Marriage and family law: court centered legal development, 1942-2012

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MARRIAGE AND FAMILY LAW: COURT CENTERED LEGAL DEVELOPMENT, 1942-2012

By

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A Dissertation
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Abstract

The goal of this dissertation was to explore the internal problem solving nature of state courts and thus produce a narrative about court-created legal development. By examining four policy areas related to marriage: divorce/annulment, alimony, adoption/custody and loss of consortium, I show the courts turn to performance as a way to adjudicate questions from individuals and couples operating at the margins of marriage, couples who do not live to the marriage ideal or more broadly the breakdown in the marriage ideal. Through an analysis of four unique policy areas I offer conclusions in this dissertation as to why performance matters and in turn present an analysis that accounts for judicial decision-making around same-sex marriage. Focusing on the internal developmental dynamics of these four policy areas I demonstrate courts use performance as a mechanism to extend marital benefits and burdens to individuals and couples that were not formally married. As such, this dissertation adds to the scholarship around same-sex marriage illustrating these decisions were not breaks with traditional narratives but instead part of the narrative preserving institutions and institutional commitments.
Dedication

I dedicate this dissertation to my family, both far and near. Without your continuing love and support I would not have completed this dissertation. First to my husband, Brian: we met while I was writing this dissertation. Your support is unending. From the countless hours I spent in the basement to the family activities we missed. Thank you. To my dad: Yogeshwar Kapur. You have been my role model and inspiration throughout my life and continue to be. Your support has been unwavering and even as we move on to the next chapter in our lives, as a family, I know you will always be there for me. To my brother Ben: Move over! There’s another Dr. in the house now (although I’m not the one who you should call in an emergency!) To my Nan, Aunty Sue and Daydee: you have all been great fans of this process and now have bragging rights to your granddaughter and favorite niece. To Uncle Vik: I would have never thought having cookies and coke with you, the president of a University, would lead me to this point. Finally, to my mother: Linda Kapur. You did not live long enough to see me complete this dissertation but you encouraged me every step of the way until the very end. I will never forget the look of complete joy when I told you I had a date for my defense and I am sure you know I am done. You showed me what it meant to fight and I know you did for so long. I ultimately dedicate this dissertation to you, your life and your fight. May you forever rest in peace.
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I would be remiss if I didn’t thank Barbara Mathews for her kind ear and string
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friends. Some of us are transitioning into the academic job market and others are nearing
the end. I am evidence that we can make it out alive!
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Bibliography
Chapter 1: Introduction

Introduction

Same-sex couples across the United States are currently engaged in a fight for extension of formal marriage. One argument made across states concerned performance. The crux of the argument is that same-sex couples perform all the functions associated with marriage: creating and sharing a home, raising children, and caring for each other i.e. married performance - so they should be granted the formal status of marriage. The movement petitioning for the legalization of formal relationships between same-sex couples began in Minnesota’s court system in the 1970s but failed to gain much traction until the late 1990s and early 2000s.¹ In 2003 the Massachusetts Supreme Judicial Court handed same-sex couples their first true victory.²

The case - Goodridge v. Department of Health (440 U.S. 309 (2003)) - began at the trial level in 2001. In 2003, lawyers for Hillary and Julie Goodridge (and 6 other similarly situated couples) appealed to Massachusetts’ highest court asking it to recognize their relationship. The Goodridges performed the functions of a married couple and for all intents and purposes were a nuclear family with two key differences. First, they were a same-sex couple and second they operated without legal recognition i.e. they were not formally married. Therefore, if Hillary and Julie Goodridge were performing as a married couple, should they not be granted the formal status of marriage?

¹ The first case of Baker v. Nelson (191 N.W.2d 1185 (1971)) was heard in 1971. In 1974 the United States refused to hear an appeal stating there was no federal question. The denial of the marriage license to Jack Baker and Mitch McConnell stood. See also Barclay and Fisher 2006.
² I label this the first true victory because even though the Hawaii Supreme Court stated in 1993 that refusing to grant same-sex couples marriage licenses denied them equal protection based on sex no actual same-sex marriages occurred as a result of that decision. The Vermont Supreme Court in 2000 declared same-sex couples should be given Civil Unions – an equivalent, but alternative form of marriage that granted these couples marital obligations and benefits, but without the name marriage.
Chief Justice Margaret Marshall and a majority of the Massachusetts agreed. The court split bitterly on the case with a slim 4-3 majority. Justices Francis Spina, Robert Cordy and Martha Sosman issued scathing dissents of the majority’s extension of marriage. In speaking about the lead plaintiffs in the case, Marshall noted their performance in acting married stating: “the plaintiffs Hillary Goodridge, forty-four years old, and Julie Goodridge, forty-three years old, had been in a committed relationship for thirteen years and lived with their five year old daughter” (Goodridge at 314). Marshall went on to state: “the plaintiff couples were families, that many were parents, and that the children they were raising, like all children, need and should have the fullest opportunity to grow up in a secure, protected family unit” (Goodridge at 335). The decision in Massachusetts granted same-sex couples the right to enter into a formal marriage based on their continuing performance as married couples and a type of performance that mirrored married performance.

For the first time, a court in the lower 48 states recognized the legal right of marriage for a same-sex couple. The decision did not come out of the blue but instead was part of a developmental narrative in state courts towards recognizing marital benefits and obligations/privileges and duties through performativity. As such, I argue that since World War II state courts looked to performance associated with marriage in order to confront questions around failed marriages or marriages that did not live up to the traditional nature of marriage. State another way, I argue in this dissertation that performance enabled the court to contend with various breakdowns in the marriage ideal. In turning to performance, the courts emphasized the actions of individuals rather than
the formal status of marriage to either grant or restrict marital benefits and obligations. In the dissertation I demonstrate this shift through an examination of judicial discourse in policy areas associated with marriage. Through my analysis I offer an alternative explanation as to how decisions around same-sex marriage came about through demonstrating the turn towards performance in issue areas related to marriage. Further, the examination of performance in marriage policy area indicated that the Goodridge decision was actually not a significant break from narratives around marriage but instead was part of a narrative emphasizing change to preserve traditional institutions. This was true even in the so-called “progressive” northeast region of the United States.

The research in this dissertation has been guided by an overarching question asking: how and why did performance come to matter for state courts? While this question guided the analysis in the dissertation, the ultimate puzzle remains: how do I explain the development away from formal marriage towards performative marriage? What was especially interesting about this puzzle was the way courts (re)define institutional marriage across both time and space through dispensing marital benefits and obligations. Empirically, I analyze judicial opinions from the highest state courts in three Northeastern states: Maine, Massachusetts and New York and around four policy areas: divorce/annulment, alimony, adoption/custody and loss of consortium plus same-sex marriage. The three states were chosen due to their close geographical proximity as well as similar political terrain. These states presented an excellent case study due to the traditional and conservative nature of marriage juxtaposed with the progressive region of

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Definitions and explanations of both legal and performative marriage were given in the following section but legal marriage focused on the legal status of marriage bestowed upon individuals who had entered into a state sanctioned marriage. Performative marriage was used to define those couples who act as married couples but had not participated in a state sponsored ceremonial marriage.
the Northeast and I offer an explanation of the developmental narrative of marriage policy in this region by arguing that the courts actually sought to preserve marriage by turning to performance. I chose these four marriage policy areas because they were closely related to marriage and implicated shifts in understandings of marriage across time. Substantively they provide a nuanced story of development across both time and space.\(^4\)

In this project, I situated marriage as more than a formal status. It was also a practice or a type of performance. By this, I mean when courts faced questions around the breakdown of the various ideals of marriage they instead turned to principles that underlay formal marriage. The courts initially turned to the prescribed gender roles of individuals in a marriage (as a wife or husband). However, over time, gender was removed from marriage (as in the case of de-gendering alimony). Consequently, the courts had to find an alternative mechanism to grant individuals marital benefits and obligations. I demonstrate the principle the courts turned to was performance of the parties in a marriage. In doing so, the courts granted marital benefits and obligations to individuals who failed to live up to the marriage ideal. The analysis of the policy areas related to marriage presented in chapters 2 – 6 suggests scholars’ construction of marriage as a tool of inclusion and exclusion insufficient to explain the way marriage operates (cf. Yamin 2009, 2012). Instead, I analyze the courts’ discourse in evaluating who gets what, when and how much specifically emphasizing the shift towards performance in marriage. I analyze a specific breakdown in the marriage ideal in each chapter and in my empirical analysis demonstrated the courts’ discourse as they turn to performance.

\(^4\) A full review of the case selection was presented later in the chapter in the methods and data section.
In looking at divorce and annulment questions, I specifically situate the breakdown as the ultimate failure in marriage where couples no longer wished to remain faithful to their marriage and sought to exit via a divorce or annulment. The questions presented here around the failure of marriage allowed the courts to illustrate the focus on performance when seeking to remove marital benefits and obligations from individuals. Fittingly, the first empirical chapter discusses divorce and annulment as the analysis of this chapter indicated the focus on performance was more about order rather than change as performance always configures in divorce and annulment questions. This was especially true for annulment where one spouse sought to annul his or her marriage based on the fraudulent performance of the other spouse.

Alimony questions, presented in chapter three, flowed directly from the divorce judgment. I present a two-pronged marriage failure here. In the first instance: granting alimony I show over time courts turned to a variety of factors as important. These factors ranged from a husband’s ability to pay to a woman to be self-supporting and the factors the courts turned to necessarily centered performance of the husband, wife or both. The other issue under the banner of alimony was at the opposite end of the spectrum: alimony’s termination. Here, courts turned away from the remarriage termination rule as, over time, fewer women remarried after a divorce. Therefore, the courts rejected this and instead focused to a woman holding out or performing as the wife of another man. In doing so, the courts successfully picked up on the definition of performance I provide below: the acting or performing of the socially understood roles of husband and wife.

Looking at adoption and custody the courts faced a similar breakdown in the marriage ideal where couples formed families outside of the traditional boundaries of
marriage. The courts turned here to performance to specifically explore the types of actions an unwed father must perform in order to not have his consent for his child’s adoption dispensed with. Another facet under the discussion around adoption and custody was second parent adoption by a person in a same-sex relationship. This broke down the marriage ideal in two ways. First, until 2004 same-sex couples were unable to marry therefore they always had children out of wedlock. Second, these couples were same-sex couples and therefore not part of the traditional opposite-sex couple paradigm. Courts explicitly used performance of the socially understood role of a wife (and mother) to legitimize the rights a non-biological parent had over the child. Specifically, with same-sex couples the courts looked to a type of performance mirroring married performance. The courts’ focus in granting formal rights to these couples was similar to decisions around granting marriage licenses to same-sex couples.

The fourth area - loss of consortium - presented somewhat of a comparison to the other policy areas. In this area, the courts faced the problem of changing roles for men and women in marital relationships. As I noted at the beginning of chapter 5, traditional loss of consortium suits were filed by a husband to remedy the loss of his wife’s services. As this concept changed during the middle of the twentieth century the old common law tradition lost much of its purpose. Instead, the courts extended the right to consortium to women and expanded the definition but still based it very much on a gender. Women, specifically wives, were granted the right to file a claim for the loss of consortium of their husband as the definition changed to encompass a loss of society and companionship rather than services to the household. In extending this right to wives as a class of persons the courts emphasized the similar performance of wives in a marriage to husbands and
the fact that when an injury occurred both parties suffered. I remarked at the beginning of
the paragraph this policy area provided a point of comparison to the other policy areas.
Whereas formal marriage was worked out of alimony as a way to terminate a woman’s
alimony obligation the ability to file a loss of consortium claim was consistently reserved
only for formally married individuals. Couples that were not formally married were never
eligible file a claim for loss of consortium in my dataset. There were couples that tried
but their suits were unsuccessful.

Taken together, these four policy areas indicated the courts turned towards
performance occurred much sooner than *Goodridge v. Department of Health* in 2003 and
performance provided a systematic way for the courts to extend marital obligations and
rights to individuals performing the functions of married individuals, couples and
families. The issue of same-sex marriage is presented in chapter 6 where I indicate that
the decision in *Goodridge* was not actually a break from the tradition of marriage but
instead provided a change to preserve the institution. Marshall’s opinion in *Goodridge*
followed from the previous case law around marriage, especially around children as
Marshall indicated the women were performing as parents and thus should be granted the
right to have the formal status of marriage.

One example of the turn to performance illustrates well how the concept worked.
In chapter 3 I show the courts’ turn to performance (of the socially understood role of
husband wife) in alimony by analyzing what factors courts took into account when
terminating a former wife’s alimony. Initially, the adjudication was fairly simplistic: a
woman received alimony based on her wifely status if her husband caused the divorce
and any alimony terminated upon her formal remarriage. One example illustrates the
problem of relying on wifely status. In *Northrup v. Northrup* (43 N.Y.2d 566 (1978)) Mrs. Northrup did not remarry but instead cohabited with another man outside the boundaries of a formal marriage. Mr. Northrup therefore could not terminate his former wife’s alimony even though she was cohabiting with another man. In order to solve this problem the courts turned to performance as a way to terminate the husband’s obligation and transfer the obligation to the cohabiting partner. The New York court indicated alimony terminated when a woman was holding out as another man’s wife. This emphasized a concrete significance of holding out, indicating “a woman holds herself out as a man's wife by these actions: (1) applying for a telephone, designating him as her spouse and asking that she be listed in the directory with his surname; and (2) changing the names on their joint checking account so that she uses his surname” (id. at 571). This example also suggested a specific type of performance driving the narrative in granting martial benefits and obligations.

As the preceding example indicated, the courts’ framing around issues had real and substantial effects on the lives of individuals especially as law making institutions did not define formal marriage abstractly but as part of the mechanism for delimiting boundaries. The analysis I present in the empirical chapters demonstrates an expansive understanding of familial relationships encompassing a wide range of relationships beyond the presence of a formal marriage. The insights from the policy areas provide one explanation for the emergence of same-sex marriage decisions. By looking at the turn towards performance in marriage related policies, I show the courts’ reliance on performance in granting formal marriage to same-sex couples was not surprising but
instead part of a long held developmental trend in state courts emphasizing change to preserve the institution of marriage.

In each policy area it was important to understand how judges created boundaries around marriage and who should be granted marital benefits and obligations. Judges focused on the categories of husband and wife in making their decisions. Judicial discourse in the policy areas I examine indicated performances were partially gendered over time. For example, in making decisions around alimony the courts focused specifically on the former wife’s performance through exploring traditional gender roles. Alternatively, in adoption and custody cases surrounding the termination of a father’s right to consent to his child’s adoption the courts focused exclusively on his performativity. When courts made determinations around either granting or restricting marital obligations and benefits the implicit, and sometimes explicit, discussion was based around the appropriate conduct of a husband and/or wife. Other scholars examine gendered legal development (see c.f. Ritter 2006), and similar to Ritter, I demonstrate how gender had a significant impact on the extension or restriction of marital benefits and obligations to individuals in conjunction with performance.

The focus on performance led the courts to grant marital benefits and obligations to individuals who had not contracted to marry. This was evident above in the alimony example and also in adoption and custody cases for same-sex couples. In extending marital benefits and burdens the courts in essence grant individuals a formal status based solely on performance. This insight was particularly important for same-sex marriage as the courts do the exact same thing. In the discussion above in Goodridge, Marshall did not grant Hillary and Julie Goodridge the right to enter into a formal marriage as a result.
of any formal status or agreement the two had. Instead the rationale was premised distinctly on their performance and the assumption of performative responsibilities they had taken on to each other and to their family.

**Key Concepts**

*Formal Marriage*

This concept as used throughout this dissertation referred specifically to the formal marriage between two persons, sanctioned by the state. As marriage has always been a state run institution, subject to the laws and policies of individual states, I leave it up to the states to define and place parameters around who may enter into a formal marriage. I offer here only a broad definition of formal marriage as a state sanctioned union of two consenting adults. A third party must always legitimize a formal marriage (i.e. the state must also assent to the marital contract).

In the early years of the study courts used formal marriage to “institutionalize familial relations of dependency” (Yamin 2012, 7). In doing so, formal marriage ensured illegitimate children and unwed mothers did not become dependent on the state. Judges’ interpretations of formal marriage enforced a responsibility of husbands and fathers as independent actors to take care of wives/mothers and children. Over time, the uses of formal marriage were expanded to encompass performative marriage. Consequently, the courts turned to performance to accomplish the attribution of the same marital benefits and obligations.
Performative Marriage

As used throughout the dissertation, this concept referred to couples “acting” as spouses and/or parents in order to be granted the legal status of marriage. While it was left up to the individual courts to determine the different types of performance warranting a finding of performative marriage, it included such things as creating and sharing a joint home, raising children and caring for each other. It was important to leave the precise factors encompassing performative marriage up to the individual courts because these elements shifted over time and the courts addressed different elements across policy areas. This formed part of the developmental narrative explored in the dissertation. Indeed, at times, the courts defined what performance was but determine it was insufficient to grant individuals these marital benefits and burdens. I specifically identify the concept of performance when individuals were performing the socially understood role of a husband and wife without the formal status of a wife of husband.

Development and Change

Development and change throughout the dissertation were measured through the shifting frames the courts use in determining whether to grant or deny marital rights and benefits to individuals. Change was identified concretely in the alteration of the courts’ discourse in the different policy areas associated with marriage and how this alteration in discourse, or the shifting judicial frames led the court to either restrict or grant marital benefits and obligations. Throughout the dissertation, I illustrate change in marriage occurred in a piecemeal fashion and the developments further sought to preserve the institution of marriage.
The shifting judicial frames offered discretely different interpretations of marriage through the varying policy areas. The changes I analyze in policy areas associated with marriage were perhaps more nuanced and seemingly minor than some scholars would advocate for (c.f. Orren and Skowronek 2004) but nevertheless change and development occurs in marriage. This type of change, then, was important to preserve institutions (marriage). Development was not only a “durable shift in governing authority” (Orren and Skowronek 2004, 123) but instead was, according to political theorist Edmund Burke “change to preserve” the basic institutions (Stanlis 1993, 213). Under Burke’s conception of change, the decision in Goodridge simply followed on from previous case law around marriage seeking to preserve the importance of marriage by extending marital benefits and obligations to those individuals who were performing as married. Another example illustrates this point too regarding divorce and annulment. When courts removed marital obligations and benefits from couples who were not performing the socially understood roles of husband and wife the courts did so in an effort to maintain the sanctity of marriage. Indeed, Judge Desmond of the New York Court of Appeals specifically referred to this factor as important in judicial decision-making.

Taken together, these changes culminated in the development of marriage through removing and attributing marital benefits and obligations. In this analysis marriage has two aspects. In the first instance it was the culmination of the benefits and obligations recognized by the courts along with the union of two consenting adults. In addition, though, marriage was an institution having distinct sets of rules and regulations that an individual was part of. Shifting judicial frames in marriage policy areas had significant consequences for the institution of marriage and the way marital benefits and obligations
were granted or restricted. For example, alterations in adoption policy were intertwined with the institution of marriage as it impacts adoption laws as parents had different rights to consent to their child’s adoption based on their marital status. Unwed fathers did not have the right to consent to their child’s adoption unless they had a tangible and performative relationship with that child.

The developmental narrative was understood as a combination of various judicial opinions and shifting judicial frames. This was an important aspect of the focus on state level processes of development with multiple cases around similar issues that garnered a more complex and perhaps complete idea of change and development. Over time, the consequence of shifting judicial frames indicated judges take into account a varying set of factors in determining whether to grant or deny marital benefits and obligations. As a result, the institution of marriage looked different in 2012 compared to 1942 and impacting people’s lives in ways not envisioned in 1942. Further, the emphasis on different policy areas indicated that focusing on performative marriage presented one argument for why same-sex couples were extended the right to enter into a state sanctioned marriage.

**Literature Review**

Political Science literature showed marriage was important for assigning privileges and duties in marriage to individuals (both as spouses and parents). However, it did not indicate what aspects of marriage were fundamental for this purpose nor did the literature analyze how this was accomplished.
Much of the current literature on marriage and development focused on a broader array of mechanisms: legislators, initiatives, amendments, activists, and the courts in determining how the development of marriage occurs. My argument in this dissertation centers on law’s effectiveness as a tool to forward a developmental trajectory in marriage and family law. Part of the importance in law stemmed from the fact some legislative policies were given concrete significance through judicial interpretation. Resulting from this, judicial opinions were especially instructive for determining developmental narratives around marriage. I present an argument throughout the dissertation of court-centered internal legal developments in marriage policy in order to in the first instance provide an alternative explanation for how same-sex marriage decisions come about and in the second instance illustrate a different definition of change and development. The literature I review in this section of the chapter provides the major backbone of the dissertation.

Two main strands of literature inform the dissertation’s theoretical contributions: federal level studies on marriage and development and single case study or cross national comparison studies. A third strand of literature around state level studies of same-sex marriage was less central to the work I do in the dissertation but nevertheless warrants inclusion here as it illustrates the majority of studies around same-sex marriage focused on this policy area alone and external developments/pressures. The focus of these studies is contrasted to my study of court-centered internal legal developments in marriage policy areas providing the basis for same-sex marriage decisions. The literature I explore in this section of the chapter lays the groundwork for the work I do in the dissertation by emphasizing the importance of marriage as an institution that was subject to regulation by
the state in ways that had meaningful and tangible consequences of the lives of
individuals.

Exploring the leading literature on federal level of government indicated the
importance of the Supreme Court in the processes of development. This, however,
exposed a gap in the political science literature that failed to take into account the
complexity of state level work and the fact that state decisions often inform federal level
processes of development. State level developmental processes were often more complex
with multiple cases being decided simultaneously along a similar doctrinal line. My
project filled the gap by bringing together the importance of state level exploration
around marriage and analysis beyond same-sex marriage to offer generative implications
for how same-sex marriage decisions could be explained. The theoretical work I do in the
dissertation offers an alternative explanation that same-sex marriage decisions result from
long held internal legal developments in policy areas associated with marriage. These
internal developments see state courts exploring performativity extensively in policy
areas related to marriage from the 1940s onwards as a way to grant individuals rights and
benefits associated with marriage. Secondly, the dissertation emphasizes the way
marriage develops along with indicating the practical impact of granting or denying
marital benefits and obligations for individuals. These concerns were particularly relevant
given the focus on shifting judicial frames in determining either granting or denying of
marital benefits and obligations. I now explore in more depth the relevant literature to the
project.

A significant amount of work in political science, history and women’s studies
has been done to trace developments in marriage and family (see c.f. Cott 2000,
Grossberg 1985, Yamin 2009). This scholarship focused principally on the
developmental trends in marriage as an institution rather than different aspects of
marriage that are the focus of this dissertation. Nevertheless, this literature established the
importance of marriage as an institution. Specifically Cott (2000), Yamin (2012), Okin
(1979) and Brandon (2013) argue marriage and marital status act very similar to formal
institutions or branches of government (Legislative, Executive and Judicial) in organizing
sets of people. In doing so, institutions such as marriage and marital status regulated the
lives of men and women (husbands and wives) in a marital relationship. I show in my
project that formal institutions of government regulate the lives of individuals who were
distinctly outside the informal institution of marriage by offering an alternative avenue
for granting benefits and obligations of marriage. Scholars studying marriage and marital
status specifically indicate the federal level of government does the regulating. This
literature grounds my project by underscoring the importance of marriage as an
institution along with the fact the government regulates it. The focus on government
regulation forms an important pillar of my analysis. Further, these scholars emphasized
that by regulating marriage and family the state creates differences between the sexes

Taking a historical approach, Nancy Cott noted: “by turning men and women into
husbands and wives, marriage has designated the way both sexes act in the world and the
reciprocal relationship between them” (Cott 2000, 3). In another vein, Susan Moller Okin
argued marriage and family illustrate the differing roles that men and women, husbands
and wives were attributed (Okin, 1979). Mark Brandon (2013) also noted marriage and
family create differences between the sexes constructing mothers and wives who were in the home versus fathers and husbands who worked in the paid labor force (Brandon 2013).

Relatedly, but in yet another variation, Yamin specifically asserted marriage was a political institution. With that in mind she concluded the state used marriage as a key organizing principle through different historical time periods by criminalizing some marriages and encouraging others. However, Yamin argued there was a level of consistency across time with marriage’s role as a political institution, stating: “it was striking that while marriage was mobilized differently in distinct historical moments, marriage itself generates consistent thematic and political dynamics, especially after moments of political dislocation and change” (Yamin 2012, 4). As such, the way marriage develops included discussions of the appropriate roles and places of men and women in the marital relationship. This was especially important given the changing circumstances of men and particularly married women in the years during, and immediately after World War II. In my analysis I build upon these works by providing a historically focused narrative of developments in marriage. The specific emphasis in these other works of gender roles being an important part of marriage underscores one aspect of my dissertation. As I explore the policy areas related to marriage I analyze the way courts focus specifically on either the husband or the wife’s performativity in recognizing or removing marital benefits and obligations.

Another avenue of scholarly work related to marriage has been to underscore the way marriage as an institution played a central role in the development of the American polity. Work in this area emphasized how both marriage and family were not natural or
pre political but instead were under the control of the state (Bardaglio 1995, Grossberg 1995, Degler 1980, Strach 2007). While marriage was politically important in a variety of ways, the most basic sense depicted marriage as a status conferred to individuals by the state. As emphasized by Chief Justice Marshall of the Massachusetts court in Goodridge v. Department of Health, and in a number of other cases in my dataset, there were always three parties to the marriage relationship: two consenting adults and the state. Marriage licenses were granted by the state and couples must meet state requirements set out in the Domestic Relations laws. As such, the analysis of marriage as an important state institution was key in my study. However, rather than focusing on institutional marriage as other scholars do, I focus the formal and performative aspects of marriage to analyze the way these different aspects were used by the courts to dispense marital obligations and benefits. Despite changes, marriage was always regulated by the state (in my project, the courts regulated marriage).

Similar to other scholars (c.f. Yamin 2012) I bill marriage as a site of political contestation where meanings over marital rights and obligations were (re)made. From Yamin in particular, I pick up on the notion of marriage as dispensing politically important benefits to individuals and focus on the importance of the state employing different aspects of marriage to regulate lives. The empirical chapters demonstrate marriage was remade through a changing emphasis towards performative marriage. What was primarily important for the overall narrative of the dissertation was the way courts focused on performance in adjudicating questions over failed marriages. The policy areas I analyze in the dissertation were important in people’s everyday lives and therefore the courts must contend with them in some way. I show that instead of looking to the formal
status of marriage, the courts expanded the recognition of rights and benefits to individuals (spouses and parents) who were traditionally outside the reach of marriage whether by choice or statutory law. The courts actively recognized marriages based on performance where formal marriages did not exist.

To explore development in marriage in more depth, I turn to Priscilla Yamin’s work and the framing of marriage as a tool of inclusion and exclusion across snapshots of time. Yamin examined five snapshots: Reconstruction, Progressive Era, the Civil Rights/Women’s Rights Era, the initial rights struggle by gay and lesbian organizations in the 1990s and the turn of the 21st century to illustrate the political importance of marriage as an enduring institution. Yamin argued political actors used marriage to accomplish multiple ends that either saw the state encouraging or discouraging certain segments of the population from marrying. She situated marriage as a tool of inclusion and exclusion, oscillating between rights and obligations (Yamin 2012).

I build on this framework by looking at court-centered legal development at the state level occurring over a continuous and prolonged temporal span. My empirical analysis shows that rather than formal marriage being used as a tool of inclusion and exclusion the courts’ discourse emphasized ways marital benefits and obligations could be extended to couples not in formal marital relationships. In doing so, the courts could extend to individuals (both as spouses and parents) marital obligations and benefits. The use of exclusion and inclusion was too restrictive when applied to the state level developmental narrative, especially the type of court-centered internal legal development I analyze in this project. I discuss the importance of state level analysis shortly.
The discussion above underscored the fact marriage was an important marker of assigning or attributing benefits and obligations to individuals (spouses and parents). While I do not disagree with this when I (re)evaluate the different aspects of marriage used by the courts I show judicial discourse pushes marriage in the direction of granting individuals marital rights and obligations based on their performance. Consequently, marriage did not appear to be a tool of inclusion and exclusion. Instead, performance was used indicate to individuals who gets what, when and how much. It was under these parameters courts extended formal marital rights to same-sex couples.

While much political science scholarship examines marriage on the national level (see c.f. Yamin 2012, Basch 1999, Celello 1999, Coontz 1992, 2005) there were some notable exceptions (see c.f. Novkov 2006, 2008, Stychin 1995, Hulme 2013) and yet others that bridge the gap (Strasser 2011). While the legislature crafted policies around marriage it was up to the courts to interpret these policies either to set statewide policy or to judge a single case coming before it. The interpretive job of the court could result in upholding, amending or wholesale reversing legislative policies that were in place. Additionally, the courts added specificity to the standards set forth by the legislature and sometimes altered legislative meanings substantially. Thus, as marriage has been mostly a creation of state law and policy it was important to analyze what judges at this level of government brought to the understanding of marriage.

At the same time, state level policies sometimes resulted from more complex decision making processes with multiple cases the federal level lacks. More cases were heard at the state level therefore it was well equipped to study development narratives. As
a result it was important to examine the level of government where the majority of the decisions around a particular issue were made.\(^5\)

Within the recent scholarship on marriage at the state level, much has focused on the development of same-sex marriage (see c.f. Barclay and Fisher 2006, 2008, Fisher 2009, Barclay 2010, Klarman 2013, Pierceson 2013). While this was important, my study expands this literature by studying marriage more broadly over a longer temporal span to indicate when and how judges shift their focus. Further, my study adds an alternative approach to how same-sex marriage decisions come about and the developmental processes at work in the decisions. By focusing on the internal legal developments at the state level, I show courts have long turned to performance as way to grant couples formal marriage and formal marital benefits and obligations. Additionally, while the decision in *Goodridge v. Department of Health* was a sharp break with traditional scholarship around law and courts I demonstrate it actually was in line with long term developmental processes that were in place since the middle of the twentieth century.

Comparative work on marriage has been largely cross–national comparisons of the development of same-sex marriage on the national level between the United States and other countries (Smith 2009) or the development of social movement organizations on gay rights (Anderson 2006, Currier 2009). A third variation evaluated the impact of the Supreme Court case of *Lawrence v. Texas* on the case for same-sex marriage (Ball 2004, Daum 2009, Pedriana 2009, Carpenter 2012). While this scholarship was important to the realm of political science and understanding the impact of same-sex marriage was significant this literature failed to adequately speak to the large scale and long standing developmental narratives of marriage that I seek to explain.

\(^5\) I examine case selection further later in the chapter.
Moreover, few studies examined developmentally marriage at the state level, again with some notable exceptions (see c.f. Novkov 2008, Pierceson 2013). These studies emphasized the rich scholarship and intricacies of development gleaned from state level judicial discourse. These state level studies highlighted the multiple cases and complex processes of development occurring on the state level. Further, the state level was particularly appropriate as a method of study for both marriage and family as these institutions were predominantly under state level control. My research builds upon these works by focusing on judicial discourse at the highest appellate level courts by examining the way marriage and family has developed through a series of rich case studies.

Furthermore, as Mark Brandon (2013) explored, the family was central to the development of American society. However, Brandon’s focus was exclusively on constitutional development at the hands of the Supreme Court and did not undertake a “systematic normative framework” of development of family in America (Brandon 2013, 7). Instead, he offered “discrete glimpses into American familial households across time” (Brandon 2013, 7). This was a similar focus as my dissertation but while important and focusing on judicial discourse, Brandon (and others examined above) miss much of the complex nature of development and the intricacies gleaned from state level work, especially in an area of law (domestic relations) that was largely under the purview of the state governments. It was not possible to understand a state-based institution (marriage) without a full analysis of state-level development of it. Additionally, some state-level developments go on to inform the discussion at the federal level so it is important to understand the developmental narrative from these cases.
With the developmental narrative, I am not focusing on the past, but rather a re-telling of the stories around policy areas associated with marriage to understand the shift in the courts’ discourse towards using performance as a mechanism to grant individuals benefits and obligations associated with marriage. As such, I am also interested in the courts’ discussion of marriage and family in structuring relationships between individuals, focusing on who belongs to whom and who was responsible for whom (Strach 2007). The courts were the central place where this discussion takes place, especially as they interpret legislative standards that were in place. To that end, similarly, but also differently from Strach (2007), examining family as a means in the policy process, I examine marriage and the way marriage was employed by the courts (rather than legislators) to distribute marital benefits and obligations to individuals, both as spouses and as parents. The label of family as a normative ideal and criterion for eligibility were relevant to this work on marriage as marriage could operate in much the same way (Strach 2007). The shift towards performative marriage helps to understand marriage as an ideal and criterion of eligibility differently. My empirical work demonstrates that in order to be granted marital benefits and obligations the courts instead look to performance instead of formal marriage and therefore the presence of a formal marriage was no longer as necessary. Instead, what I show was that courts were expanding the umbrella of what individuals must do when they were in a formal marriage and simultaneously extending formal marital benefits and obligations to individuals who were performing these functions.

Interpretations of what it meant to be a husband and/or wife have real and tangible consequences for the way marriage operates in society. The aspects of marriage policy I
examine in the dissertation were part and parcel of people’s everyday lives. Therefore, when there was a breakdown in the marriage ideal the courts had to confront these issues. In the empirical chapters I demonstrate the formal status of marriage acted as a criterion for eligibility, specifically for granting rights and benefits associated with marriage. However, with the shift in judicial frames towards performativity, a different standard emerged as formal marriage loses some of its prominence as a criterion for eligibility. Specifically in the area of loss of consortium, judicial discourse indicated legal marriage was the ideal all other relationships were measured against. In second parent adoption cases for same-sex couples, the courts indicated that performance was important but performance that mirrored married performance.

Scholars in this area (c.f. Yamin 2012, Brandon 2013, Pierceson 2013) demonstrated marriage and family were important building blocks of development. However, this literature did not adequately address the shifting nature and importance of marriage through judicial discourse. In order to explain this, I must focus on the state level development and situate marriage as the place where government actors (courts in my case) manage, protect, and define interests. This dissertation bridges the gap between the current single state case studies and same-sex marriage focused research on state level and developmental accounts on marriage and family on the federal level to demonstrate that when we look at the development of marriage on the state level beyond same-sex marriage we see that related policy areas actually significant impact and change the developmental narrative.

Further, as I have indicated above, the current literature in political science could not explain the courts’ transition from legal family relationships defined around formal
marriage to a focus on performativity within marriage. Marriage and family policies were the locations where power was exercised in ways that were both hidden and visible. The courts’ discourse exposes marital dynamics and shifts them in ways the current literature did not account for.

Methods and Data

Methodologically, the dissertation draws on scholars from political science and women’s studies in exploring development through the courts (both federal and state) with attention being paid to the contributions of Congress and state legislatures. The primary data I examined were judicial opinions but I am cognizant of legislative and executive actions around marriage to the extent they inform the debates in my narrative. I ground the dissertation in political and legal development for several reasons. First, as the courts’ discourse developed over time past decisions, hierarchical status arrangements in marriage, and judicial considerations provided the context for, and limitations on, current legal and political debates around marital benefits and obligations. The focus on history and development was especially important in a study based around marriage policies because the United States is based in a precedent based system of law where judges often referred to past arrangements in making their decisions. Second, the dissertation explored the developmental trajectory of marriage one area of the United States: the Northeast. In line with this and in order to understand the complex nature of development it was important to provide a full historical narrative. Placing my dissertation in the context of legal development provided a key contribution of the dissertation as I am exploring
shifting judicial frames used by the courts to either grant or deny marital benefits and obligations.

Development in this account was significant as it enabled me to understand the ways judicial frames shifted resulting in granting or denying marital benefits to couples and also the way in which development was used to preserve institutional commitments. Developmental processes also indicated the ways previous commitments and judicial frames informed current debates around granting and denying of marital rights and obligations. Studying marriage through related policy areas allows me to examine the different ways the courts used marriage over time to either extend or limit marital benefits and obligations and the extent to which this has promoted an extension of the institution of marriage. These commitments allow me to get to issues at the heart of the dissertation: exploring how the courts responded to marriage failures and the process of development from formal to performative marriage through policy areas at the state level. In doing this, I offer an explanation for how same-sex marriage decisions came about through internal legal developments rather than external processes and pressures.

**Methods**

In this dissertation I examined cases from the highest appellate courts in three states. Appellate opinions, while not always generalizable to the larger set of opinions were important. They were important and useful opinions to study because they illustrated significant legal questions that should be subject to statewide policy revisions. These appellate opinions also gave judges the opportunity to develop coherent narratives around a particular issue in legal terms. These legal opinions were given significant
weight by other branches of government as courts were seen as appropriate avenue for constitutional and statutory interpretation. Furthermore, these legal opinions were important because they establish the law on a given topic. As Novkov (2011) noted: “appellate cases were, by their nature, not fungible, and must be understood as discursively embedded responses to and precursors of development” (351). This indicated appellate opinions could be useful for determining how development occurs. Appellate opinions at the state level surrounding marriage policy were particularly useful as many of the policies around marriage were set at the state level.⁶

The bulk of my empirical research was judicial opinions. Consequently, each chapter comprises an analysis of the courts’ discourse in these opinions. Specifically, the analysis illustrated framing around legal aspects of marriage versus performance to grant marital benefits and obligations. Over time, policy areas presented sites of contestations between current rules and regulations and those being (re)defined in judicial opinions over the longer developmental period. This was especially true as courts were dealing with people at the margins of marriage around the breakdown in the ideal of marriage. With these judicial opinions, the courts could uphold, amend or wholesale alter the current commitments of legal marriage.

Over time courts work into the precedent based system of law in the United States a new standard or a new precedent. I identify the shift through the concrete language of the courts by analyzing the discourse of the majority opinion, along with any concurring or dissenting opinions. The discourse in these various opinions demonstrated boundaries around how much the court was able to do.

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⁶ The question over level of government was examined in more detail later in the section.
This dissertation is ultimately a study about how marriage policy evolved in the Northeast region of the United States where I situate it as a court-centered legal developmental process. In order to develop this narrative I use discursive analysis to explore the particular language of the court around legal or performative marriage. I analyzed cases over time to demonstrate the progression and influence of the legal discourse in the transition from legal status to performance in marriage being primary.

I use discourse analysis as a method in which to study the content of communication (judicial opinions in this case) to understand how actors (judges in this case) make sense of the issues that come before them. The empirical analysis looked at the ways courts extended marital benefits and obligations to individuals performing functions traditionally reserved for formally married couples. While I did not code key words or phrases, I was attentive to how the various issues were framed, and perhaps reframed over time by courts over time.

Challenges to policies around formal marriage took two major forms in my dissertation. They were either rooted in a broader quest for legal change or a narrow suit seeking an answer to an individual concrete question. It was up to the courts to either reject or embrace these challenges. While the various plaintiffs and defendants may largely be pursuing the same claim, appellate judges picked up on subtle differences between cases in order to craft new statewide policy and, through judicial discourse, alter legal development.

As I examine judicial decision-making in this dissertation or, in other words, what the law was in “narrowly legalistic terms” (Kahn 2006, 78) I analyzed discourse and framing in the majority opinion as well as concurring and dissenting opinions. As I
illustrate in the empirical chapters dissenting opinions could, in time, become majority opinions thus altering the course of development. Therefore, examining the concurring and dissenting opinions allowed for my analysis to move the discussion beyond the outcomes of the cases and instead to the discourse used by the court and how this was transformed and shifted over time. This in turn underscored how performance came to be important in granting or denying marital benefits and obligations.

Case Selection: Time Period

In this dissertation I explore marriage in three states from 1942-2012. I chose this time span for three interrelated reasons. The primary reason for starting the study in 1942 was for legal pronouncements emanating from the Supreme Court related to the integrity and importance of marriage and the family. In 1942 the Supreme Court decided the case of Skinner v. Oklahoma (316 U.S. 535 (1942)). While this case did not directly concern the issue of marriage the Court nevertheless passed judgment on the essential nature of marriage in society stating: “marriage and procreation were fundamental to the very existence and survival of the race” (id. at 541). This quote was often used in later marriage cases as reasoning for not excluding certain individuals from marriage. Also, in 1942 the Supreme Court decided the case of Williams v. North Carolina, (317 U.S. 287 (1942)) determining the definition of marriage as the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the “[p]rotection of offspring, property interests and the enforcement of marital responsibilities (id. at 287, quoted in United States v. Windsor (570 U.S. ___ (2013))). Linked to this, was the second reason for beginning the study in 1942. At this time, the baseline recognition for marital
rights and obligations was through formal marriage. Performativity in marriage was not important in 1942. Thus in order to show how this developed, I began at a time when the baseline of granting benefits and obligations was formal marital status.

A third interrelated reason for beginning the study in 1942 was the context of World War II. During this time women entered the workforce en masse to replace men as husbands and fathers were fighting the war abroad. The year 1942 was in the middle of the war when significant numbers of women (mostly married women) already entered the workforce. Consequently, these married women challenged traditional assumptions around gender and required the courts to rethink commitments that were in place regarding marriage and family law policies.

The entrance of married women into the paid labor force was billed as helping the war effort but this exposure gave women a newfound independence. In order to capture some of this especially as it concerned the changing dynamics of the marital relationship I started in the middle of World War II rather than the end. At the conclusion of the war women were ushered back into domestic life as returning soldiers reclaimed their jobs. It was impractical at this time for both men and women to be working as there simply were not enough jobs. Moreover, men and women still operated in distinctly different spheres.

Although it was deemed un-American during the war for women not to be filling these empty positions, after the war it was lauded as un-American for women to be taking employment away from able-bodied men and the presumptive head of households. The growth of employment during the war gave married women a sense of economic freedom they did not have prior to the war. What was especially important during World War II was the interjection of a greater percentage of married versus single women into the paid
labor force. Long before World War II it was more commonplace for unmarried women to find work outside their home as they did not have a husband to support them. Furthermore, many businesses prohibited employing married women and while these were standards relaxed during the war women saw a resurgence of these practices after the war.

Burgess and Locke (1945) indicated World War II was a turning point for marriage as it transitioned to institution based on love and companionship. Especially in the context of the post war period, marriage was remade indicating sharp divisions of labor existing in the single-family earner based on breadwinner/homemaker model where men should be the breadwinner and work outside the home and women were primary in the domestic sphere as a homemaker. This, however, did not stop marriage from being conceived more as a relationship of companionship compared to any previous era in the United States and this pervaded the 1950s. World War II, thus, provided great changes in the conceptions of marriage that were worthwhile of study. The cultural concept of wives during the war period changed, as discussed above, with more married women entering the workforce (Burgess and Locke 1945; Cherlin 2004). The very nature of (married) women increasingly in the traditionally male dominated public sphere gave rise to some of the various breakdowns in the marriage ideals I discuss in the empirical chapters following this introduction.

Case Selection: Issue Areas

In the United States, some people have always assumed they have the right to marry even though marriage has always been subject to limits by the state. This was
reflected in the understanding of marriage as a privilege – restricted to some and not open to all. Marriage as an entitlement or a right also revealed the capacity for government control or oversight. States regulate marriage for a number of purposes but the reasons could be broken down into three major areas. First, states (and the federal government in the Defense of Marriage Act) set conditions on persons eligible to marry. These conditions include regulations on whom, when and how. For example, states at one time or another throughout history restricted marriages between people who were too young, the insane, parties already married to someone else, or marriages procured due to fraud. A second type of state restriction was on sexual activity outside of marriage. Until well into the second half of the 20th century states criminalized sexual activity between persons not married to each other (whether persons of the same or opposite-sex). States banned adultery, fornication and same-sex sexual relations. The ban on this kind of illicit sexual activity demonstrated the importance of marriage while states also encouraged marriage, or even found marriages where they did not exist in order to legitimize the actions.

Third, and most important for this project, states granted spouses in a marriage certain sets of rights and duties. Privileges and duties for those individuals with a formal marital status include, but were not limited to: coverage in health insurance, medical decisions for spouses, death benefits and presumptions of inheritance (absent a will). The fact marriage was an enduring institution throughout history was an important factor. Although marriage has endured it does not mean it is unchanged. There were various privileges and duties attributed to married persons throughout history and these shifted, sometimes irreversibly, over time. As such, marriage provides an excellent case study to
analyze the processes of internal legal development. Marriage was the place where gender norms were acted out: mothers and wives took on specific roles and duties, as did fathers and husbands. The gender roles played out by men and women in marriages were often reinforced by the state through public policies, crafted by the legislature, but often interpreted by the courts.

As table 1.1 below indicated there were 15 different policy areas presented in my initial search. The policy areas comprising the study were chosen because they represented the key areas in which decisions were made, judged by both the frequency of cases and the content of the opinions. In terms of the content of the opinion I specifically examine the language of the opinions. While not all cases had to focus either on formal status or performativity there had to be a significant discussion of marriage and/or related policy areas forming the bulk of the opinion. In determining the frequency of the cases, I chose the four policy areas indicating the most sustained involvement of the court. This was an appropriate threshold because my narrative of a legal developmental process required the same issue being present across time. From the extensive involvement of the state courts in these policy areas I could offer a substantively interesting analysis of the shifts and evolutions in marriage over time. For example, adoption law was largely premised on the fact married couples would adopt a child together. There was a limited set of exceptions to this. However, from my analysis I demonstrate adoption law transitioned away from relying on formal marriage to a focus on performance. Thus, changes in adoption/custody arrangements by the court had a significant impact on marriage. It was important to capture this dynamic across policy areas. Marriage policies were closely and substantively intertwined with each of the policy areas chosen for the
study and when judges make decisions around these policies there were significant consequences for marriage.

The initial group of cases I reviewed included over 1500 cases from the highest appellate court in Maine, Massachusetts and New York. The cases used in this dissertation had to be decided by the highest appellate court in each state rather than the trial court or intermediate court of appeals. I focused on this court level because the highest appellate court sets statewide policy rather than the more limited jurisdiction of the lower state courts. A search was completed via Lexis Nexis for “marriage” separated out by year from 1942-2012 and restricted to the highest appellate court. The search via Lexis resulted in 672 opinions for Massachusetts, 660 opinions in New York, and 486 opinions from Maine.

Marriage policies encompass a broad range of policies, anything from survivor benefits to social security to adoption to divorce. In this dissertation I take up an examination of four policies: divorce/annulment, adoption, alimony and loss of consortium plus the discussion of same-sex marriage. I chose these particular policy areas for a set of specific reasons. I read a total of 1,598 cases, including cases from the three states gathered based on the criteria set out above. The first consideration for narrowing the case selection to policy areas was to read all of the cases to determine the issue. As I wanted to explore the developmental trend with the courts’ discourse on formal and performative marriage, I looked for issue areas present over the entire temporal span. Consequently, I excluded issue areas with only limited discussion. Additionally, I exclude cases that only tangentially focused on marriage. These cases were not pertinent to the study as I focus on shifting judicial discourse in policy areas related to marriage to

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7 Of the 660 cases in New York, 220 of these had “no opinion” and were excluded from the analysis.
understanding the impact of granting or denying marital rights and obligations to individuals. These cases perhaps mentioned marriage in the headings or in one sentence in the opinion but did not have any kind of significant or substantial discussion of marriage, nor did the courts’ discourse focus of the various factors used in granting or denying rights. An example of this kind of case focused on the distribution of an estate. A further parameter around the policy areas I chose was consistency between criminal and civil procedures. I exclude the category of sexual assault, for example, because these cases were often criminal prosecutions against an individual rather than civil procedures between two individuals. The result of this was four sets of cases around the distinct policy areas I discuss in greater detail below. This second round of analysis resulted in 994 cases for the eventual dataset plus two cases on same-sex marriage. Table 1.1 indicated the policy areas in the initial search. Following the table, I briefly summarize the four policy areas that comprise the focus of my dissertation.

Table 1.1: Breakdown of cases by policy area

<table>
<thead>
<tr>
<th>Policy Area</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Divorce/Annulment</td>
<td>321</td>
</tr>
<tr>
<td>Loss of Consortium</td>
<td>129</td>
</tr>
<tr>
<td>Adoption/Custody</td>
<td>340</td>
</tr>
<tr>
<td>Alimony</td>
<td>199</td>
</tr>
<tr>
<td>Same-sex marriage</td>
<td>6</td>
</tr>
<tr>
<td>Spousal Privilege</td>
<td>75</td>
</tr>
<tr>
<td>Murder/Criminal Trials</td>
<td>79</td>
</tr>
<tr>
<td>Survivor Benefits</td>
<td>98</td>
</tr>
<tr>
<td>Pauper Settlements</td>
<td>17</td>
</tr>
<tr>
<td>Distribution of Estate</td>
<td>109</td>
</tr>
<tr>
<td>Mental State</td>
<td>15</td>
</tr>
<tr>
<td>Distribution of Assets/Property</td>
<td>124</td>
</tr>
<tr>
<td>Sexual Assault</td>
<td>37</td>
</tr>
<tr>
<td>Administration of Wills</td>
<td>47</td>
</tr>
<tr>
<td>Deviant Sexual Conduct</td>
<td>2</td>
</tr>
</tbody>
</table>

The first issue area was divorce and annulment. These cases represented the ultimate failure of marriage where the parties sought to remove themselves from their marital commitments. The courts were intimately involved in granting individuals a divorce from the 1940s until the 1970s during the era of fault-based divorce where the courts were required to pass judgment over the sufficiency of evidence. However, this changed in 1969 when California was the first state to legalize no-fault divorce. The legalization of no-fault divorce spread quickly across the United States reaching Massachusetts in 1975, Maine in 1977, but not truly reaching New York until 2010.\(^8\)

Performance permeated the discussion around divorce from the beginning of the dissertation’s time periods because it was fundamentally a spouse’s lack of satisfactory performance that led to a divorce.

While the courts involvement in divorce was significantly reduced after the passage of no-fault divorce laws, annulments continued until the end of the dissertation’s time period. Suits for an annulment, also demonstrated the ultimate failure of marriage (because it ended the marriage) and necessarily emphasized the performance of either party acting as a wife or husband. Performance in annulment particularly represented order rather than change as it was always part of the courts’ reasoning. Significantly, this issue area demonstrated performance as a way to remove marital obligations and benefits from individuals who were not living up to the marriage ideal. The developmental narrative I emphasize in chapter 2 illustrated the area of divorce and annulment provided a model for other policy areas in how courts adjudicated questions over marriage failures by looking at performance.

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8 I say “truly” reaching New York because in 1966, the New York Legislature passed Divorce Reform Law that legalized two “no-fault” types of divorce that required a separation based on a judicial decree and required them to live apart for 2 years pursuant to this decree thus was not truly a no-fault cause.
A second key issue was alimony. Although alimony was a direct consequence of divorce, I analyze it separately to emphasize the different set of failures the courts adjudicated in this area. Traditionally alimony was granted to a woman based upon her legal status as a wife and could only be terminated when she took on the formal marital status of wife to another man. In the eyes of the law alimony represented the transition of a woman from one man to another, which was clearly separate and distinct from the marriage failures and questions adjudicated around divorces. In this policy area I show there was a significant shift towards performativity in the 1940s in New York that was not followed until the 1960s and 1970s in Maine and Massachusetts. Resulting from this, the wife’s performance was the central concern for the courts in terminating her alimony. Formally, de-gendering alimony in 1979 proved to be a significant change in the way alimony worked in the United States. However, practically this did not dramatically change the courts’ discourse with the exception that the courts referred to payor and payee spouse instead of husband and wife. Even so, after the 1950s a variety of factors and circumstances were taken into account in adjudicating alimony awards.

The third issue area I examined was adoption and custody. Specifically, adoption, since the middle of the nineteenth century was a state creation to formalize the relationship between parent and child that nature could not. Custody decisions were important in the dissertation, especially as couples divorced at increasing rates in the 1970s and beyond. The first adoption law, passed in Massachusetts in 1851 ushered in a new era of adoption where the interests and welfare of the adoptee (the child) trumped the adoptive parents’ interests. Even though this formulation remained the same, the law of adoption and custody was anything but static throughout history. Adoption and
custody issues arose not only when a marriage failed (ending in a divorce) but also when a couple failed to live up to the ideal of marriage by having a child out of wedlock. These two issues were particularly salient in my analysis.

Along with the adoption being in the best interest of the child, it was well established in adoption law that the court acted as *parens patriae* in adjudications over child custody.⁹ Parents traditionally enjoy an almost irrefutable right to make decisions regarding children. As with any fundamental rights, however, the right was not absolute and in certain circumstances the state could intervene to protect the health and welfare of the child.¹⁰ From the 1940s onwards there was a focus on parental performance in granting parents rights and obligations. Adoption and custody determinations presented the significant variation based on gender as there were different evaluations placed on unwed mothers and unwed fathers because, according to the New York court, unwed fathers were typically absent and so there was a greater degree of performativity associated with the rights these parents receive.

The fourth area of family law examined was loss of consortium. The judicial discourse in this area saw courts refusing to extend marital benefits and obligations to those who were not in a legal marriage. Through these decisions, courts distinguished between marriage and other types of relationships. In doing so, the courts singled out legally married couples for different treatment. Although formal marital status was not

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⁹ *Kropp v. Shepsky*, 305 N.Y. 465, 468, (1953) a child's welfare was the first concern of the court upon a habeas corpus proceeding, where the judge acts 'as *parens patriae* to do what was best for the interest of the child'; *Finlay v. Finlay*, 240 N.Y. 429, 433 (1925) The chancellor "acts as *parens patriae* to do what was best for the interest of the child. He was to put himself in the position of a 'wise, affectionate, and careful parent,' and make provision for the child accordingly."

¹⁰ For cases articulating the right of parents to determine the manner in which their children will be raised, see *Prince v. Massachusetts*, 321 U.S. 158 (1944) "It was cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state could neither supply nor hinder; *Meyer v. Nebraska*, 262 U.S. 390 (1923) concerning the right to teach languages other than English in school.
entirely eliminated from this category there was clearly a turn towards performance that allowed the courts to extend the definition of consortium to include women/wives as a class of persons. The traditional nature of loss of consortium only allowed a husband to file a claim based on the loss of his wife’s services. As a woman’s place in the marriage and the underpinnings behind this marriage ideal broke down and courts had to alter the parameters around loss of consortium. In order to do this courts turned to a woman’s performance as similar but also distinct from a husband’s and extended the definition of consortium. Through the analysis in this chapter, I illustrate the definition of consortium was expanded to include a further class of persons and this extension was based around performance and gendered performance at that.

The final empirical chapter (chapter 6) examines same-sex marriage. The marriage failure in this chapter was presented as the opposite of divorce/annulment where individuals were seeking to remove themselves from marital obligations and benefits based on performance. Couples in this chapter argued they were performing all the functions associated with being married (and parents) and therefore should be granted the formal status of marriage. The specific failure here, then, boiled down to the fact the women (and only women in my data set) were of the same sex and therefore defy the traditional two sex marital relationship. The courts solved this problem associated with increasing numbers of same-sex couples seeking to enter into formal marriages by turning to their performance as parents as a way to extend the couples this right.
Case Selection: Level of Government and States

Many federal policies that rely on family law allow state definitions of familial relations to establish what constitutes a family. The state courts add a layer of complexity with multiple cases that single cases decided at the federal level misses. There were notable instances when the federal government sought to intervene in the making of family policy but by and large state governments controlled the establishment and perpetuation of particular visions of marriage and family law policies. After all it was the state requirements on marriage individuals must comport to in order to marriage.

I chose to focus on the state level for my analysis as the majority of developments occur at this level. The state level was also an appropriate venue as the Supreme Court in United States v. Windsor (570 U.S. ___ (2013)) asserted the “states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce… [and] the Constitution delegated no authority to the [federal] Government of the United States on the subject of marriage and divorce” (Windsor, quoting Haddock v. Haddock (201 U.S. 562 at 567 (1906)). Kennedy’s majority opinion in Windsor also went on to note that to decide questions over whether a marriage was legal, the court necessarily “requires reference to the law of the State which created those legal relationships” because “there was no federal law of domestic relations” (Windsor, quoting De Sylva v. Ballentine, (351 U.S. 570 at 580 (1956)). As a result of this, marriage laws varied from one state to the next.

11 "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not the laws of the United States" (In Re Burrus, 136 U.S. 586, 593-94 (1890)).
12 Notable instances of federal involvement were Skinner v. Oklahoma (1942) and Loving v. Virginia (1967). In both of these cases the Supreme Court made significant pronouncements regarding marriage.
The state level also allowed for a study of the developmental processes in a number of states. The federal government in a national study did not offer this distinct benefit.\textsuperscript{13} Judges at the state level examined closely the nuances and presumptions around gender and sexual orientation throughout their opinions, for example the gendered presumptions around alimony and no-fault divorce. Therefore, the state level allowed for a more in-depth analysis of the issues and areas under consideration. In each of these issues it was the state laws individuals must overcome rather than sanctions imposed by the federal government.\textsuperscript{14} While the state level provided the bulk of the empirical analysis any developmental narrative around marriage could not ignore substantial federal interventions. Therefore, throughout I refer to national events but only where they impact the story I am telling.

The three states in my study – Maine, Massachusetts and New York – were chosen for very specific reasons. Firstly, I want to examine one region of the United States to underscore the developmental impact of the courts’ discourse that could not be accounted for due to geographical divisions. I chose the Northeast region of the United States because Massachusetts was the first state to legalize same-sex marriage by focusing on performance. While many scholars saw the \textit{Goodridge} decision as a stark break from the trajectory of marriage, my research indicated that it in fact could be explained through a long history of reliance on performance in marriage policy areas and

\textsuperscript{13} The local level also lends itself to an examination of marriage through a comparative lens. However it was the STATE requirements on marriage individuals must satisfy not those of local and municipal officials. The California Supreme Court in \textit{Lockyer v. San Francisco} (2004) specifically stated setting boundaries around marriage was the duty of the state not of local officials such as mayors.

\textsuperscript{14} Although the Federal government uses marriage to dispense a number of benefits and programs the definitions of marriage and those under the control of marriage was still determined by the individual state government. For example, even though the Federal government refused to recognize same-sex marriage for the purpose of federal benefits the (now repealed) Federal Defense of Marriage Act made clear it was up to the states to determine their own parameters around marriage.
change that sought to preserve the institution of marriage. In order to capture this new insight I wanted to include this state. In addition, as much scholarship has been written on Massachusetts I sought to develop a model that looked at the court centered legal developmental process in other states in the Northeast also. The Northeast region of the United States is made up of 9 states. Six of these states represent New England (of which Massachusetts was on) and three of them represent the MidAtlantic region. As the New England region was comprised of twice the number of states as the MidAtlantic region I choose another state from that region – Maine. From the MidAtlantic Region I chose New York because this state has had significant discussions over the issue of marriage in recent years. For example, just before I began my case selection the New York State Legislature passed no-fault divorce (over thirty years after nearly every other state in the Union). Additionally, New York had a somewhat checkered history with same-sex marriage and opined in 2006 that formal marriage was key for rights, benefits and obligations. New York had a history of wanting to remain faithful to traditional understandings of marriage (as displayed in the restrictive divorce laws) and also the courts’ refusal to grant same-sex marriage.

Much scholarship on the state courts and marriage, especially same-sex marriage, examined Massachusetts and Vermont as these were the two states to first grant same-sex couples some rights, even if it was not full scale legal marriage. Therefore, I sought to expose a different story to other scholars and look at states that were less heavily examined to glean insights from their developmental trajectories.

In order to reduce variation in decision making as a result of methods of judicial selection, I choose three states where the judges on the highest court were chosen in the
same manner. In each of my chosen states – Maine, Massachusetts and New York – the governor appoints the judges with the agreement of the state senate or the governor’s council (as in the case of Massachusetts).

Individual states were a particularly good location to study the development of institutional marriage, as marriage law was not uniform across all states. It varied from state to state and there have been important tensions between the state and federal government in the development of marriage. Key in the marital politics was the ability of each state to create its own “marital regime” predicated on state interests and state definitions of the boundaries around legal marriage (Hartog 2000, 2). Individual states could establish any legitimate legislative classifications on marriage typically based on health, welfare and the safety of individuals. Thus, by and large, prohibitions on marriage rested on consanguinity, age and mental capability. However, the three states under examination did not moved in tandem with each other. Through an examination of family law I demonstrate that although marriage in the three states took a distinct path they have nevertheless resulted in the same end point.

Overview of the Research

Five empirical chapters and a conclusion follow this introduction with each empirical chapter exploring a different policy area associated with marriage and then same-sex marriage. In each of these chapters, I analyze judicial opinions to examine the way in which courts use performance as a way to dispense (or restrict) marital benefits and obligations to individuals to couples that do not fit within the traditional parameters of marriage or around failed marriages.
Each chapter comprises a narrative across the three states in one policy area underscoring the nuanced developmental process of a unique policy area related to marriage. Each chapter analyzes the issue across both time and space to understand the different ways marriage was used to bestow marital obligations and benefits on individuals.

Chapter 2 examines divorce and annulment. I examine these two issues in one chapter as both removed marital obligations and benefits and this in itself represented the ultimate breakdown in the marriage ideal. My empirical analysis in this chapter indicated a baseline of performance as the courts in divorce and annulment statutes necessarily encompassed a discussion of performance from 1942 onwards thus this chapter was based around order rather than change. In this way, then, I show that looking toward performance in annulment and divorce statutes from the beginning of the time period and the courts’ reasoning foreshadows the courts’ reasoning that later appears in other policy areas.

The key difference I show in this chapter compared to the other lay in the fact that while performance was used by the court in order to grant particular rights associated with marriage it could also be used to remove those same rights and obligations. Importantly, and one reason why divorce and annulment was the policy area I examine in the first empirical chapter, the two chapters that follow it: alimony and adoption and custody, sometimes sprung out of the divorce decision, especially alimony.

Looking specifically at divorce, these laws were significantly relaxed in the 1970s, which required the courts to adjudicate new and interesting questions around the practical application of these laws. The courts looked to devise alternative mechanisms to
remove marital obligations and benefits from couples. Looking at annulment, performativity was also fundamental for the courts as these suits specifically centered the performance of one of the spouses in procuring a fraudulent marriage. Annulment cases ultimately focused on whether the guilty spouse had induced the innocent party into a sham marriage.

Chapter 3 examines alimony and illustrates that over time the courts focused their discussions on performance. In 1942 the courts specifically looked to formal status in determining the alimony award (only women were granted alimony and only if their husband caused the divorce) and in terminating alimony (a woman must formally remarry in order for her alimony to terminate). This became unworkable for courts as fewer women remarried after a divorce and instead cohabited with an unrelated male. As my analysis in chapter 3 indicated, as a way to shift perhaps unfair burdens from husbands who were forced to provide alimony for a wife who was in a similar economic position to her husband the courts transitioned away from formal status as the only factor in alimony awards towards various factors impacting the final alimony award. At times, this resulted in women not being granted any alimony, or alimony for only a short period of time. The second type of case brought up in this chapter: terminating alimony also transitioned towards performance. As I show in this chapter, in order to confront this problem the courts looked to a woman’s performance in acting as another man’s wife, or put alternatively in holding out as another man’s wife. Performance, then, solved the problem of this particular type of marriage failure as it allowed husbands to be removed of their alimony obligations towards former wives who were, for all intents and purposes, being supported by another source.
Chapter 4 analyzes adoption and custody. The specific breakdown in the ideal of marriage I explore in this chapter was the turn away from marriage for couples wishing to have a child. There were two sets of cases I explore in this chapter both of which see courts using performance as a way to solve the fundamental difficulty arising when couples no longer had children in formal marital relationships. The first set was around fathers (unwed fathers in particular) seeking to assert their parental rights in order to prevent their consent being dispensed with when their child was being adopted. The second type of case, which arose more frequently from the 1990s onwards, surrounded second, non-biological parents in same-sex relationships (and in one instance an opposite-sex relationship) attempting to adopt their partner’s child without the biological parent losing their rights. In these cases in particular the courts focused on performance but a type of performance that was akin to married performance. The courts looked at whether the second parent was actively caring for the child. If that was the case then the courts extended formal rights to that person. It was also within the subset of cases on same-sex couples that courts began to recognize formal relationships through performance. The rationale the courts presented in this issue area foreshadowed the arguments made in same-sex marriage cases. Performance in adoption and custody cases was used to legitimate the relationship that non-married individuals and this translates almost directly into arguments that same-sex couples in seeking formal marital rights and obligations.

While divorce, annulment and alimony were largely premised on a guilty versus innocent paradigm (especially during fault-based divorce for divorce questions) the analysis of adoption and custody decisions illustrated performativity in another vein. The
courts were specifically concerned with the man’s performance as a husband (and father) as a way to grant or remove rights, benefits and obligations to these men. Unwed fathers had to prove their relationship to a child based on performance in a way that mothers did not have to. This necessarily turned on a father’s performance and the relationship the father had with the child. As a way to solve issues around individuals not living within the traditional parameters of marriage i.e. by having out of wedlock children the courts looked to his performance as a way to grant him rights over his child.

Under the second subset of cases, around same-sex couples, the courts noted that if the women were acting as mothers and as a family then the second non-biological partner could adopt the child without the biological parent losing her parental rights.\footnote{The only cases in my dataset revolving around same-sex couples adopting children were those involving two women.}

Even so, there were some instances that centered the decision on the formal relationship between the parents, which was curious given the focus of performance in the other issue areas.

Chapter 5 examines loss of consortium. In this chapter I illustrate the unique developmental trajectory of this policy area in response to the breakdown in the traditional understandings of husbands and wives in the marriage relationship. The specific breakdown in the marital relationship occurred here around the traditional definition of loss of consortium as a husband’s exclusive right based on his wife’s loss of services. This formulation was based specifically on the separate and clearly defined roles of husbands and wives. As various marriage and family law commitments were relaxed during the 1960s and 1970s most especially surrounding a woman’s role in the marriage the courts redefined the parameters around loss of consortium. Specifically, the
courts looked to a woman’s place as a “co-equal” partner who was also adversely affected when injury occurred to one partner.

The final empirical chapter, chapter 6, discusses same-sex marriage. The dissertation was pointed towards a narrative explaining how these decisions come about. Therefore, in this chapter I take up two of those cases to indicate the decisions in Massachusetts to extend marriage to same-sex couples did not come out of the blue but instead was part of a long held narrative that privileged performance in a marriage-like relationship over the formal status of marriage in order to grant benefits and obligations to each other. The specific marriage breakdown here was a general breakdown where the couples were not the traditional opposite-sex couple. Therefore, courts must find a way to contend with same-sex couples as these cases become increasingly common in the early twenty-first century.

I present the conclusion and implications in chapter 7. By the end of the dissertation, I show that during the last seventy years when faced with questions over failed marriages or marriages that did not fit within the traditional boundaries of formal marriage the courts turned to performance as a way to grant (or remove) marital benefits and obligations to individuals. This focus on performance took into account that not all couples were legally able to marry thus rely on the courts to grant them rights based on their performance in marriage-like relationships. However, change was clearly present in these decisions transitioning from a time when formal marriage permeated both granting and denying marital benefits and obligations. This has given way, now, to a focus on performance thereby extending marital benefits and obligations (which were ever increasing) to those individuals who did not choose to become part of the traditional
nature of marriage. I do show, however, these changes were undertaken by the court as a way to maintain or preserve the institution of marriage and to prevent it from becoming irrelevant or unnecessary.
Chapter 2: A Model for the Future: Divorce and Annulment

Introduction

This chapter explores two fundamental issues the courts grappled with over the last seventy years: divorce and annulment. While divorce and annulment were significantly different from each other, they were distinctly intertwined. I combined the two issues as both concerned the exit from, or end to, a marriage. A divorce ended the marriage whereas an annulment rendered the marriage invisible as if it never occurred and related the parties back to their never married status.

As I show in this chapter the courts also looked to performance when creating boundaries and/or extending the ability of couples to exit a marriage. In this way, divorce and annulment cases offer a unique example of how the courts solved family law issues of individuals and couple who were on the margins of marriage. These couples clearly did not fit in with the traditional understandings of marriage as they were seeking to exit what, in 1942 at least, was seen as a life-long, enduring commitment. The courts’ long term judicial decision-making was particularly important in these cases for the discussions over same-sex marriage as it demonstrated another area where the courts looked to performance in shifting the terrain of marital obligations and benefits.

The baseline around divorce and annulment questions from the beginning of the time period in 1942 was performance because in order to grant or deny a divorce the courts looked to the guilty and innocent party’s actions in causing the marital breakdown. The developmental narrative here emphasized order rather than change in the use of performance over time. The shift in this issue area was around the types of performance the courts used rather than a shift from formal marriage to performative marriage. This,
nevertheless, still was a development away from a one size fits all adjudication around divorce and annulment towards a variety of factors being implicated in the divorce/annulment question. Further, this type of development implicated a different notion of change that sought to preserve institutional commitments through a focus on performance.

Divorce cases were more common from the 1940s until the late 1970s owing perhaps to the more restrictive parameters around divorce. It followed that with fewer restrictions, there was decreased need to appeal a case to the highest appellate level in the state. This was especially true because after the legalization of no-fault divorce judges no longer had to pass judgment on the appropriateness of evidence in order to grant a divorce. Divorce cases, however, did not entirely disappear from the courts’ docket. Annulment cases were prevalent from 1942 until 2012.

Divorce across the United States was, and still is, restricted and judicially sanctioned. The twentieth century witnessed dramatic changes in marriage and divorce with nearly half of all marriages ending in divorce (U.S. Census Bureau 2010). As the twentieth century progressed, not only did individuals delayed entering into a formal marriage, but also began to divorce at far higher rates with many not contracting a second formal marriage (DiFonzo 1997, Weitzmann 1985). While divorces are now (in 2014) relatively easy to obtain, this was not always the case. As such, courts (as the institution responsible for granting divorces) had to come up with novel answers to the difficulties surrounding the particularly restrictive early and mid-twentieth century divorce laws focused around the guilt of one party. The rise of divorce represented the ultimately breakdown in the ideal of marriage as couples sought to remove themselves from the
marital relationship. It was clear almost immediately in this policy area that performance was the principle underlying granting a divorce and annulment. The era of fault-based divorce saw the concept of innocent and guilt significantly affect the outcome in divorce cases. These concepts map particularly well into the narrative of performance because one spouse (the guilty spouse) must perform particular actions in order for the other spouse (the innocent spouse) to obtain a divorce.\footnote{During the era of fault-based divorce, and still today, when a spouse seeks a divorce for fault grounds there must be one innocent and one guilty spouse.} Annulment statutes were equally restrictive with annulments only being granted for fraud. I argue in this chapter that when courts were faced with individuals (and couples) not remaining faithful to the sanctity of marriage (either by traveling to another state to obtain a divorce, or entering into a void/voidable marriage) judges focused on those individuals’ performance in order to remove marital obligations and benefits by granting them a divorce or annulment. I present in this chapter the distinctive story of the courts’ internal legal developments in the area of divorce and annulment. Divorces and annulments specifically fell short of the marriage ideal because marriage was initially presented as a life-long commitment that individuals should endure. Divorces and annulments, however, were a part of people’s lives and therefore the courts had to contend with these issues. In granting divorces and annulments the courts focused specifically around performance (or lack thereof in this policy area) of socially understood marital responsibilities and obligations.

\footnote{This idea also maps well into annulment, which I explain below.}
\footnote{Even though no-fault divorces were much more common nowadays (really since they became a possibility) fault-based divorces were still an available avenue for individuals seeking a divorce.}
Marriage and divorce laws, along with restrictive annulment statutes, reflected the common belief that the state, as the third party to marriage, had an interest in preserving the sanctity of the marital union and ensuring couples remained married. Accompanying this was an understanding and expectation that marriage was a life-long commitment. Therefore, marital bonds could only be severed for the most severe reasons and for this reason divorce was sanctioned for very few reasons, most commonly adultery at the beginning of the time period.\(^{18}\) Further, a divorce had to come about due to the fault of one party in the marriage (see c.f. Hartog 2000, Grossberg 1985, Bradford 1997). Before 1966, New York had the most restrictive divorce laws with adultery as the only cause for a divorce. Maine and Massachusetts until the 1970s had between five and seven causes for divorce ranging from adultery to cruel and abusive or inhuman treatment.

The analysis of judicial decision-making around divorce and annulment reveals there were a number of parameters the courts placed around marriage and its incidents. First, the courts explored various gender dynamics related to performance in removing marital benefits and obligations. Although performance was not specifically gendered in this issue area, gender roles were important in divorce and annulment questions, especially divorce. There were significant consequences for women who were at fault in divorces.\(^{19}\) When formal rules failed around divorce and annulment (for example when couples traveled to another state in order to procure a divorce) the courts turned to performance as a way to carry out (and in this case remove) the obligations of marital status. Performance aided the courts in divorce and annulment questions by enabling individuals who were not remaining faithful to the marriage ideal to exit their marriage.

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\(^{18}\) While divorce was still restricted and judicially sanctioned, it certainly expanded beyond the notions of 1942.

\(^{19}\) One such consequence was forfeiting alimony, which I examine in detail in chapter 3.
Formal statutes relied solely on the fault-based divorce system until the middle of the 1970s. However, internal legal developments in state appellate courts saw some practical changes to the way divorces and annulments were granted. The court was the place that had the ultimate authority over granting or denying a divorce, even in the era of no-fault divorce. The court’s function in divorce was confirmed by the United States Supreme Court in the case of *Boddie v. Connecticut* (401 U.S. 371 (1971)) where the Court stated: “private citizens may [not] covenant for or dissolve marriages without state approval” (*Boddie v. Connecticut*, 401 U.S. 371 at 376 (1971)). This particular quotation emphasized the state’s power over the entry to marriage and also the exit from marriage. In case after case, the state courts emphasized the state’s control in this area, as I demonstrate below. Even so, along with being the third party to a marriage (and divorce), the state also sought to ensure fidelity to marriage and maintain the sanctity of marriage. In answering questions around divorce, courts concluded the only state having an interest in the marriage (or divorce) thus jurisdiction was based on a person’s domicile. Couples traveled to states that had more lax requirements (e.g. Nevada)\(^{20}\) and sometimes out of the country to Mexico in order to obtain a divorce and then return to their home state. The home state faced a question, then, of whether to recognize this out of state divorce through either the Full Faith and Credit Clause of the Constitution (in the case of sister state divorces) or through voluntary comity (when the couple traveled to Mexico).

Another key breakdown in the ideal of marriage was revealed by the middle of the 1960s when spouses frequently fabricated the fault of one party simply to be granted a divorce. The reason for this was judges’ particularly harsh requirements for proof of

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\(^{20}\) The reason for traveling to Nevada was that this state had a particularly lax divorce law with a greater number of causes for divorce and also a relatively short six-week residency requirement.
wrongdoing of one spouse. Judges could deny a divorce to a spouse who had not sufficiently established the cause for a divorce. The power, then, largely lay in the judges’ hands. Fault divorces were denied to spouses who were equally as guilty of violating the marriage contract because under this system only an innocent spouse could obtain a divorce or annulment (Phillips 1997, Basch 1999). I demonstrate this in the discussion below as the Massachusetts court indicated a husband who was guilty of engaging in non-marital sexual intercourse with his wife prior to the marriage was barred from obtaining an annulment claiming to have been fraudulently induced into a marriage based on his wife’s chastity. In another variation based around divorce, the Maine court noted that if both parties transgressed their marriage vows and stepped outside the marital relationship a divorce could be denied.

Although courts were still required to issue final approval of a divorce, the latter half of the twentieth century saw marriage transitioning to a partnership, which could be terminated (almost at will) by either party if they were unhappy (see c.f. Coontz 2005, Starnes 2014). The legalization of no-fault divorce shifted the power dynamics in divorce cases away from the courts to the individual(s) seeking a divorce. While the fault based system required blame to be assigned to one spouse or the other, the reforms in divorce allowed spouses in most states to obtain a divorce by simply alleging a specific no-fault ground such as irreconcilable differences or irretrievable breakdown of the marriage. In no-fault divorce cases the judge simply granted the divorce without passing judgment on any evidence. Even though the power transitioned from the courts to the individual(s) seeking the divorce the impact of the court was not entirely eliminated because judges were still required to approve or deny the divorce.

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21 See also Bradford 1997 discussing the evolution from fault to no-fault divorce and the problems of both.
Annulment provided an alternative to divorce for couples resulting in the marriage being void and returning the parties to their status before the marriage. An annulment effectively rendered the marriage as if it did not occur and resorted the parties back to their single status. Moreover, although annulment provided an alternative to a divorce, they were equally restrictive. In order for an individual to have his or her marriage annulled the party seeking the annulment must prove that he or she was induced into the marriage by fraud. This fraud must speak to the fundamentals of marriage, which ultimately turned on performance in terms of cohabitation and consummation. Similar to divorces, annulments were premised on the guilt versus innocence paradigm. A woman who was not innocent of the fraud perpetrated against her would not be granted an annulment in a similar sense to divorces only being granted to an innocent party. The discussion of annulment cases particularly illustrated the baseline of performance in 1942. Annulments always necessarily involved an element of performance as the courts were specifically determining what action(s) result in the annulment suit. The marital actions, or perhaps lack of actions allowed the court to examine closely the performance of each party to the marriage to determine if a fraud had occurred.

The remainder of the chapter illustrates the courts’ use of performance rather than formal marriage in terms of removing the benefits and obligations of marriage via annulment and divorce.

Divorce

Divorce cases were significant in discussions around performance as in order to grant a divorce the courts necessarily looked at the actions of the parties in transgressing
the bonds of marriage. The courts’ evaluation was primarily important during the era of fault-based divorce when the courts must examine the innocent party’s evidence and judge its sufficiency. The question the court asked in these cases specifically referred to whether a woman or man was acting in a manner consonant with the parameters around marriage. If the guilty spouse was not acting within the bounds of the marriage ideal, and the innocent party provided enough evidence to substantiate this claim then a divorce was granted. Even after no-fault divorce was legalized in the late 1960s and beyond the courts consistently looked to performance in determining whether a divorce could be granted, resulting in the removal of marital obligations and benefits. Although no-fault divorce was legalized and most divorces occur via this method, fault-based divorce was not eliminated and cases around fault remained. I show in this section of the chapter that a similar turn to performance allowed the removal of marital benefits and obligations in a similar manner to the performance that extended marital benefits and obligations in other policy areas.

Similar to all cases involving divorce in the era of fault-based divorce, the cases around evasive and migratory marriages and divorces centered around one party being innocent and the other being guilty. In looking to either legitimize or invalidate these divorces or marriages the courts looked to the performance of the innocent party after the “illegal” marriage or divorce. Specifically, the courts examined whether the innocent party subsequently continued to live with her husband in good faith and whether she entered the “marriage” without the knowledge her husband was unable to contract a legally binding marriage. Only in cases where the innocent party lived with her husband in the manner in which she supposed (i.e. in a formal marriage with the status of a wife)
would the courts recognize the divorce or marriage. The controlling case on this issue came from Massachusetts in *Levanosky v. Levanosky* (311 Mass. 638 (1942)).

This case arose when Katherine Levanosky filed for divorce from her husband based on cruel and abusive treatment. Rather than focusing on the proof to substantiate this claim the court centered its decision on the validity of her marriage. This led to adjudication over whether she was entitled to a divorce, which required the court to either legitimize or invalidate the marriage. Katherine Levanosky asserted her marriage was valid as she entered it in “good faith” not knowing her husband could not contract a legal marriage. In rejecting this posture, the court noted: the “good faith exception” applied “only to one who innocently intend[ed] honestly to contract a presently valid marriage” (id. at 639). According to the court, the innocent spouse must be in the “full belief that the former husband or wife was dead, that the former marriage had been annulled by a divorce, or without knowledge of such former marriage” (id. at 640). Here, then, the court illustrated a baseline for accepting the idea of good faith, articulating the innocent spouse must have been unaware of her husband’s impediment to marry (i.e. that he had another wife living (bigamy) or was in some other way prevented from contracting a new marriage). Further, the must have been fraudulently induced into entering into a marriage, which resulted in no reality of consent.22

Although the court concentrated on good faith in determining whether to legitimize a couple’s marriage, the court emphasized that one party must be truly unaware of the other party’s impediment to marriage. In *Levanosky*, Justice James Ronan’s majority opinion noted that even though Katherine Levanosky continued to live

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22 It was unclear from the case why Katherine Levanosky seeks a divorce rather than an annulment as this seems to rest clearly on the definition of annulment. This case seems to fit quite clearly within the parameters of annulment.
with her husband in the manner appropriate with the status of a wife after their marriage, she was not innocent and was complicit in the fraud that led to the marriage. Therefore Katherine Levanosky was “not acting in good faith or in ignorance of the marital status of the libellee” (id. at 639). Consequently, she was deemed guilty of fraud and her marriage could not be legitimized by the state. The guilt versus innocence framing by the court consistently mapped to divorce cases and it also cut across divorce and alimony (as I examine in the next chapter). The Levanosky case emphasized the Massachusetts court’s turn to performance in cases around failed marriages. Performance was integral in removing (and granting) marital benefits and obligations to individuals. Specifically, the court noted that while Katherine Levanosky may have been acting as a wife subsequent to her illegal marriage it was inconsequential because she violated Massachusetts law by entering into the marriage in New York.

This benchmark set in Levanosky was tested in later Massachusetts cases continuing to focus on the performance of one party in acting in good faith meaning a wife was unaware of her spouse’s impediment to marriage and subsequently cohabited in good faith with him/her. When one party was truly innocent and had cohabited in good faith, the court brought the marital relationship in line with the innocent party’s conception of it. In doing this, the court noted: the “removal of the impediment and the subsequent cohabitation in good faith, the relation becomes such as the innocent party supposed it to be” (Vital v. Vital at 191). The concept of good faith was linked directly to the performative aspects of marriage where the wife performs the socially understood role of a wife without the formal marital status of wife. In making decisions around migratory divorces the court did not seek to penalize a truly innocent spouse. At the same
time, the court sought to ensure parties to a formal marriage were remaining faithful to the institution of marriage and therefore refused to grant marital benefits to a wife who was complicit in procuring a fraudulent or illegal marriage/divorce. This case was illustrative of the main argument in the dissertation that when marriage ideals breakdown the courts turn to the principle of performance to enable them to either grant (as in the case of adoption/custody and alimony) or remove (as in the case of divorce and annulment) the benefits and obligations associated with marriage.

Another major concern in the divorce cases was around condonation. This type of case also revolved around performativity in condoning a husband’s actions by resuming marital relations and therefore continuing to occupy the position of a wife. Condonation had important consequences for marriage as it put a halt to divorce actions or could prevent the wife from receiving alimony (as I explore in the next chapter). Condonation and the continuation of the marital relationship essentially forgave the previous wrongdoing by either spouse but it also supposed the guilty party would thereafter be faithful to his or her marital obligations. While marital sexual relations were important, the marital relationship constituted more than an intimate relationship between husband and wife. Consequently, the impact of condonation by virtue of resumed marital sexual relations developed over time.

Marital sexual relations were given sanctioned status in a marriage. Linked to this many states criminalized relations between non-married individuals until into the 1960s.

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23 This type of adjudication around divorce, focusing on the innocent wife versus the guilty husband was similar to those surrounding alimony considerations. If the wife was the innocent party and had not caused the breakdown of the marriage she was awarded alimony. This alimony award would also prevent the woman and any children from becoming dependent on the state. Conversely, if the wife was guilty and had caused the breakdown of the marriage, she forfeited her alimony. These cases were examined later in the chapter.
When divorce proceedings began it was assumed the sexual component of the marital relationship between the parties ceased. This was especially presumed in cases of cruel and abusive treatment where the parties should be granted a divorce because they allegedly could not continue to live together. As such, if a couple resumed sexual relations the divorce filing could be nullified as it demonstrated forgiveness by the innocent party of the guilty party’s marital indiscretion. Second, the resumption of marital relations suggested reconciliation and resuming marital cohabitation. This also resulted in ending the divorce suit. In the case of *Cabral v. Cabral*, Aldina Cabral commenced a suit for divorce based on cruel and abusive treatment against her husband, Laurano Cabral. Two months after the filing the parties resumed sexual marital relations and marital cohabitation. Consequently, the court terminated the divorce action. The divorce suit began again two months later when Laurano deserted his wife. As such, the court was asked to determine the meaning of resumed marital sexual relations and the effect this had on any subsequent divorce filing.

Justice Raymond Wilkins of the Massachusetts Supreme Judicial Court wrote the majority opinion. In his opinion, he asserted that while the resumption of marital sexual relations suggested forgiveness by the innocent party this was not the only consideration. Implicit in this continuation of marital relations was the assumption that the guilty party would now faithfully execute his or her marital obligations. Wilkins opined the resumption of marital relations was premised: “upon the implied condition that the libellee would thereafter faithfully observe his marital obligations” (*Cabral v. Cabral* (323 Mass. 441 at 442 (1948))). The eventual adjudication of the case granted a divorce (and custody of the minor child) to Aldina Cabral on the basis of desertion by Laurano
Cabral two months after the reconciliation. By deserting his wife Laurano breached the implied condition of faithfully observing his marital obligations, stated succinctly by the Massachusetts court as: “a condition which the libellee broke by deserting the libellant” (id. at 442).

The Maine court also analyzed the various aspects of condonation in *Littlefield v. Littlefield* (292 A.2d 204 (1972)). In this case, Brita Littlefield sought a divorce from her husband Clayton based on cruel and abusive treatment. During the trial, Brita testified to various acts of cruel and abusive treatment by her husband, but also acknowledged that during their separation she engaged in sexual relations with her estranged husband. The Maine District Court Judge asserted: “her three or four acts of sexual intercourse [after adultery] with her husband constitute[d] condonation which was a bar to her action for divorce” (id. at 206-207). The Maine Supreme Court disagreed finding: “to hold that sexual intercourse alone was per se condonation would be a departure from our earlier reasoning” (id. at 211). According to the court: “condonation implied forgiveness for past offenses, not continuing ones; an overlooking in consideration of promises of better behavior in the future” (id. at 210 quoting *Lausier v. Lausier* (123 Me. 530 (1924)).

Elaborating further, the court explained condonation “occur[ed] when the injured spouse, with knowledge of the misconduct undertakes expressly or impliedly to overlook and forgive the wrongs and restores the other spouse unconditionally (or conditionally if there was no recurrence of the bad conduct) to the enjoyment of all marital rights” (id. at 211). The indication from the Maine court in this case was that there was more to a marital relationship than sexual relations. Marriage was accompanied by a whole set of rights and
responsibilities. Consequently, resumption of marital sexual relations alone did not constitute a total forgiveness of any wrong.

In facing the breakdown of the marriage ideal when individuals sought divorce and also the ideal that marital sexual relations was the most fundamental aspect of a formal marital relationship the court looked to various other acts of performance and indicated there was a full set of marital rights including financial and legal aspects that did not resume as a result of the few acts of sexual intercourse. Justice Randolph Weatherbee framed the issue in these very same terms, stating: “forgiveness and a mutual intention to renew the full marital relationship were also essential elements of condonation. While sexual intercourse was only one element of the marital relationship -- although a very important one -- it may, nevertheless, furnish the basis from which the expressed intentions of the parties may be tested and the unexpressed intentions inferred” (id. at 212). The Littlefield case was decided around the same time that courts shifted the parameters around alimony to specifically include a woman’s contribution as separate and distinct from that of her husband, as explored in chapter 3. Further, changes in sexual relations between married couples were occurring, as explored in chapter 5 around loss of consortium. The discussion in this case suggested there were also changes in the way condonation works. The focus on performance and specifically how the courts understood actions accompanying the socially understood role of a husband or wife continued to undergo revision in this chapter. At the same time, it was clear the turn to performance occurred at the beginning of the time period, allowing the framing of performance in divorce (and perhaps more so annulment) cases to map successfully onto performative aspects of marriage the courts examined in later chapters.
The Maine court in *Littlefield* emphasized a “strong public interest [existed] in the orderly and serious disposition of actions for divorce and annulment. Irrespective of the defense of condonation, a continued cohabitation of the parties while a divorce action was pending was usually completely inconsistent with a serious and thoughtful decision to seek the dissolution of the marital status” (id. at 212). As with the case from Massachusetts above, the court here leant credence to the theory that in order for a divorce to be granted it must be impossible for the two parties to live together. If they do resume cohabitation there was an implication the divorce filing was terminated as the couple could function together. Even so, resumption of marital sexual relations no longer, as a result of *Littlefield*, automatically called an end to the divorce suit. Instead the court took a much more expansive view of the formal marital relationship that encompassed a whole variety of actions and different types of performance. The focus in this case on the various aspects of performance was a significant step in the direction of marriage as based on love and companionship that became prominent in the 1960s and beyond (Bradford 1997).

Relying on the fault-based divorce provisions, the Maine Supreme Court specified divorces were only granted “upon proof of wrong doing by *one* spouse” (*Russell v. Russell* (145 Me. 113 at 116 (1950))). In fault-based divorce there had to be one guilty and one innocent party. Richard Russell filed for a divorce against his wife, Marion, on the ground of cruel and abusive treatment. In a counter suit, his wife Marion claimed Richard had “not been faithful to his marriage obligations” and “she had cause for divorce on the ground commonly known as "nonsupport"” (id. at 114). In this case both parties in some way transgressed their marriage vow and the court noted that a divorce could only be
granted if one party remained “faithful to the marriage vows” while the other was “guilty of one or more of the grievous offenses against the marital relations” (id. at 116). The court’s construction here suggested that if both parties were guilty of transgressions they were not eligible to divorce. Indeed, the Maine court noted: “a libellant who was guilty of misconduct, not condoned, which in itself would be a ground for divorce was barred from obtaining a divorce” (id. at 115). The court in this decision placed clear parameters around divorces.

Going on to specify the parameters around a judicially sanctioned divorce, Justice Robert Williamson stated: “before decreeing a divorce the Court must be reasonably satisfied that the libellant had been faithful to the marriage vows, that the libellee had been guilty of one or more of the grievous offenses against the marital relations specified in the statute, that there had been no condonation, and that there was no collusion” (id. at 116 quoting *Berman v. Bradford* (127 M.e. 201 at 203 (1928)). In making the “offenses against the marital relations” key to a divorce suit, the court emphasized performance was at the heart of the commencement of a divorce action. The court’s framework in this case suggested marriage as a life-long commitment that a spouse could only exit for the most stringent of reasons. In addition, fault-based divorce indicated only one spouse could have stepped outside the boundaries of marriage. The framework used in this case perhaps illustrated a strange result in requiring the parties to remain married when they were not faithful to their marital obligations. Further, if the couple did want to divorce they were forced to perjure themselves in court, which many couples do by attesting to false claims of guilt and innocence (Weitzmann 1985).
Gruber v. Gruber (161 Me. 289 (1965)) was another Maine case around cruel and abusive treatment as cause for divorce. Karen Gruber was awarded a divorce from her husband, Howard, based on his acts of cruel and abusive treatment. Upon Howard’s appeal the Maine Supreme Court reversed the divorce decision and concluded there was insufficient evidence to prove cruelty. In focusing on the level of proof to illustrate cruel and abusive treatment, Justice Rufus Tapley asserted: “proof of cruelty alone was not sufficient upon which to base a judgment of divorce. It must be affirmatively shown by the plaintiff in a divorce action that the acts complained of caused a consequential effect of an impairment of physical or mental health or an apprehension of danger to life” (id. at 293). Therefore, although cruelty was established by Karen Gruber she failed to meet the burden of proof set forth in the second prong of the test: to prove it impaired her physical or mental health. According to the court there was no showing “such conduct caused the plaintiff physical or mental injury or that a continuation of the marriage relationship would jeopardize physical or mental health” (id. at 293). Further, Tapley stated: “Failure to prove either or both was fatal” (id. at 293). This case was important as it illustrated boundaries around causes for divorce and maps onto the reality that divorces were only granted for the most stringent of reasons and for conduct that was extreme.

The New York court also looked to performance Diemer v. Diemer (8 N.Y.2d 206 (1960)). In this case, the New York court granted a legal separation to William Diemer based on his wife’s sexual abandonment as Gilberte Diemer refused to engage in sexual relations with her husband. The facts were as follows: three years after their marriage, and after having previously consummated the marriage resulting in the birth of a child, Mrs. Diemer refused to continue a sexual relationship with her husband unless “he
submitted to a second [marriage] ceremony in the Roman Catholic Church” (id. at 208). The analysis of Diemer rested on the 1926 case of Mirizio v. Mirizio (242 N.Y.74 (1926)) where the New York court centered its opinion on Mrs. Mirizio’s refusal to act/perform as a wife.

In Mirizio, Mrs. Mirizio refused to live with her husband or have sexual relations with him until they took part in a second religious ceremony. Both parties agree to the marriage and when Mrs. Mirizio was ready to partake in this ceremony the husband refused. The Mirizio suit began at this point with the husband arguing his wife abandoned him because after Mr. Mirizio’s refusal to take part in the religious ceremony Mrs. Mirizio refused to engage in marital sexual relations. Judge Stanley Fuld’s majority opinion in Diemer centered the decision on Fannie Mirizio’s marital performance as the court looked at the performance of the socially understood role of a wife. In doing so, the court found Mrs. Mirizio to be “unwilling to occupy in any respect the status of a wife, therefore striking at the main obligation of being a wife” (Mirizio at 77).

Both the Mirizio and Diemer suits came about due to the wife’s refusal to engage in marital sexual relations. I can assume sexual intimacy was part of the “obligation of the wife.” As such, court’s discussion highlighted the wife’s ability (or lack thereof) to perform satisfactorily within the marriage. A woman was expected to have sexual intercourse with her husband, a fact both decisions noticeably reflect. In Mirizio, the court questioned whether the refusal to submit to “marital physical relations” in and of itself amounted to “matrimonial desertion” (Mirizio at 78). In Mirizio, this formulation reflected the fundamental nature of sexual relationships within the marriage along with the specific role of the wife. After all, in Mirizio, and even still in Diemer, the marital
relationship legitimized sexual intercourse and was a sanctioned activity only for married couples to engage in. The court noted this explicitly, stating: “sexual relations between man and woman were given a socially and legally sanctioned status only when they take place in marriage and, in turn, marriage itself was distinguished from all other social relationships by the role sexual intercourse between the parties plays in it” (Diemer at 210).

The status, or conception, of wife was one where she had specific obligations in the marital relationship. This was an important understanding of a wife’s position in the marriage put forward by the court in both Mirizio and Diemer where gender still significantly structured the marital relationship. There was clear implication from the court that a sexual relationship with her husband was one of the wife’s obligations in a marriage. If she refused then “in fairness and in law her husband must likewise have the power to free himself of [his] obligations” (id. at 211).

In 1960 the husband and wife both had a clearly defined set of rights and obligations in the marital relationship that were not reciprocal or transferable (Baer and Goldstein 2006). This case also demonstrated the importance of performance in the marriage as the parameters for granting rights and benefits. It was not because of Mrs. Diemer’s formal marital status she was subject to a separation suit but rather her performance in the marital relationship. This case indicated another aspect of performance compared to the other policy areas as the courts in this chapter were using performance to remove formal marital obligations (and benefits). The argument presented in this case suggests performance of marital obligations and duties was the guiding factor in determining whether to grant a spouse the legal separation sought.
Through focusing on the “ordinary relationship of husband and wife” the court found Mrs. Diemer’s performance as a wife satisfied a finding of abandonment for Mr. Diemer (Diemer quoting Mirizio at 81). Both Mirizio and Diemer illustrated a focus on performance. The court explored the performance of the wife rather than the husband, but the opinion did not suggest the outcome would be different if the husband refused to engage in marital sexual relations.\(^{24}\) However, what this case did suggest was that the courts would focus on the actions/performance of the person who was allegedly at fault. The court still sought to ensure the wife (and husband) remained faithful to the meaning and purpose of the marriage. The court noted that unless a wife “had good legal cause to refuse to have sexual intercourse with him,” he could be granted a separation (Diemer at 211). Mr. Diemer’s initial suit for cruel and abusive treatment could not be proven because there was no showing that Mrs. Diemer “willfully and deliberately intended to inflict mental or physical suffering” and neither was the husband’s health affected (id. at 209). Even so, the wife’s “refusal to have marital sexual relations undermines the essential structure of marriage” (id. at 210).

The decision in this case was centered on performativity, and more specifically than that it focused on the wife’s performance. By assenting to the marriage, Mrs. Diemer, and similarly situated wives, agreed to perform certain roles and actions associated with being a wife. The fundamentals of the marriage – consortium and cohabitation – represented the obligations of women in marital relationships. If either of these duties were not fulfilled then a husband may obtain a divorce based on abandonment.

\(^{24}\) Annulment suits, examined in the next section, specifically refer to the husband’s capacity and willingness to engage in “normal” marital relations and whether this was grounds for an annulment.
Religious convictions did not provide a satisfactory reason for a woman to evade her marital responsibilities. According to the court: “a wife who disavows her marriage and repudiates a fundamental marriage function [sexual intercourse] out of deep-felt religious conviction had abandoned her husband just as effectively as one who had done so for base and illegitimate motives” (id. at 211). It was simply expected a wife would carry out the sexual component of her marital obligations. There was no alternative for women but to perform this obligation in a marriage.

Similar to the New York court, the Massachusetts court also highlighted the limitations on the causes for divorce and looked to the functionality of a marriage. In a set of cases revolving around cruel and abusive treatment claims, the justices placed specific importance on the level and duration of the alleged treatment and in doing so emphasized specific actions that did not lie within acceptable performance in a formal marriage.

In *Clifford v. Clifford* (354 Mass. 545 (1968)), Harper Clifford filed for divorce against his wife, Junita, on the basis of cruel and abusive treatment. The lower court granted Harper a divorce based on adultery after he amended his divorce petition. The wife appealed the decision but Justice Jacob Spiegel’s majority opinion for the Supreme Judicial Court upheld the trial court’s granting of a divorce stating: “we are unable to say that the judge was plainly wrong in granting a divorce to the husband” (id. at547). Spiegel noted the parties went into the marriage with a significant amount of knowledge of what marriage entailed stating: “the parties here could hardly be called naive. This was the third marriage for each” (id. at 548). The court did not go into great detail surrounding the actions of the parties but stated: the “wife's conduct could hardly be
called exemplary,” which resulted in the court upholding the lower court’s granting of a divorce to Harper Clifford.

In granting divorces, the court consistently opined there must be a significant and substantial cause for a divorce based on cruel and abusive treatment. In *Collis v. Collis*, (355 Mass. 25 (1968)) Edgar Collis filed suit against his wife alleging cruel and abusive treatment. The court, however found these acts were initiated by the husband and were preventable. Therefore, the husband did not meet his burden of proving cruel and abusive treatment. For example: “A typical husband and wife brawl [that] ensued in front of the garage” was insufficient for a finding of cruel and abusive treatment (*Collis v. Collis*, (355 Mass. 25 at 26 (1968)). However, when that one act rises to a significant level the court noted: “we recognize that a single act of cruelty may constitute sufficient ground for divorce” (id. at 27).

Picking up on this control by the state over the marital relationship the Maine court noted the importance of marriage for the state asserting: “courts must encourage rather than discourage the dismissal of divorce actions. Because of the involvement of public policy in divorce actions, they were distinguishable from other forms of litigation” (*DeBlois v. DeBlois*, 158 Me. 24 at 29 (1962)). In emphasizing the state’s role the Maine court echoed New York and Massachusetts stating: “the State was party to every divorce action and had a well defined interest in the continuance of the marriage relationship on the grounds of public policy” (id. 30). In addition, the person seeking a divorce, for example, based on cruel and abusive treatment, must bear the burden of proving this treatment. Even though the state had an interest in continuing the marital relationship, it was clear that when the relationship was “dead” the courts should terminate it.
Furthermore, implicit in this discussion was the fact that the state sought to uphold the sanctity of marriage and a particular vision of marriage that had some benefit for both parties in the marriage and the state. As I show below, with the advent of no-fault divorce the courts still did not allow couples to divorce for frivolous reasons. Even so, when the marriage was no longer advantageous it was in the state’s interest to remove marital benefits and obligations from these couples.

The New York legislature expanded divorce beyond adultery during this time period (1960s). This had a significant impact on the court’s framing. One of the most important developments in New York was the enactment of Divorce Reform Law in 1966. The New York State legislature amended the state’s archaic divorce law to expand the parameters beyond adultery as the sole cause for a divorce. This law ushered in four fault grounds in New York including cruel and inhuman treatment. In order for this to be acceptable as cause for a divorce, the treatment must “endanger the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant” (*Hessen v. Hessen* 33 N.Y.2d 406 at 409 (1974)). As well as expanding the fault grounds, the legislature added two no-fault grounds. These two no-fault grounds required the couple to be living apart for a period of two years pursuant to a written separation agreement. Although change in divorce law came about through the legislature it was still up to the court to determine the parameters around the no-fault causes for divorce and be the ultimate arbiter of divorce cases.

Four years after Divorce Reform Law was enacted, the Court of Appeals had to interpret the meaning of the no fault provisions of the law. These provisions provide for a divorce after a judicially sanctioned separation or agreement. A consolidated pair of cases
asked the court to retroactively apply the two-year separation period for couples living apart that began before the 1966 Divorce Reform Law. Judicial framing in this case emphasized an understanding of performativity in granting the couple their divorce as the couples were no longer performing the socially understood roles of a husband or wife. The court noted the couples had been separated for a period of two years and reconciliation still had not occurred and was unlikely to.

The Court of Appeals in *Gleason v. Gleason* (26 N.Y.2d 28 (1970)) noted the importance of marriage for society and the corresponding interest of the state in sanctioning divorce for only a limited set of causes. The two no-fault grounds added to the Domestic Relations Law specifically centered on performance and were “predicated on a couple’s living apart for a period of two years after the granting of a separation judgment or decree or the execution of a written separation agreement” (id. at 32). In this case the couple had been separated for two years but the entire time was not after the law went into effect thus the court was being asked to retroactively apply this new section. In the case of Mr. and Mrs. Gleason, the “plaintiff brought his action in October of 1968; he alleges that he and his wife was living apart for more than two years, pursuant to a separation decree obtained by Mrs. Gleason in June of 1954, and that he had complied with all of its terms” (id. at 32). The couple was acting as separated and not remaining faithful to their formal marital obligations. Therefore, the couple sought to invoke the law in order to legalize their divorce. Mr. Gleason argued that giving the act retroactive application was unconstitutional.

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25 Thirty years previously, in *Waddey v. Waddey* in 1938, the New York court was asked to apply an amendment to the alimony provision retroactively, and the judges refused citing this was not the intention of the legislature and it was not within the power of the judiciary to extend legislative intent.
The Goldstein case (consolidated with Gleason) had a similar fact pattern with a “a pre-1966 separation decree in favor of the wife and the commencement of suit by the husband based on their living apart for more than two years” (id at. 33-34). The court noted section 170 should be given retroactive application as “the public policy which underlies that concept [was that] if a reconciliation [was] effected within two years following a judicial separation, the Legislature had concluded, and reasonably so, that the parties were irreconcilable and the marriage dead” (id. at 35). Here, the judiciary interpreted the legislative intent of the law to grant retroactive application where the court had refused to do so in Waddey v. Waddey (a case around alimony, examined in the next chapter).

In making the decision the New York court did not specifically focus on the formal status accompanying their living apart but instead on the practical fact they were living apart as a reason to retroactively apply the no-fault provision. The removal of marital rights and obligations seemed to move beyond New York’s restrictive divorce laws and indicated that when questions arose over failed marriages the courts looked to performance. This decision drew parallels to the 1938 amendment to the Domestic Relations Law removing formal remarriage as a requirement for terminating alimony looking instead to the wife’s performance in occupying the socially understood role of a wife. Both sets of facts indicated the New York Legislature only want to give marital benefits and obligations to those remaining faithful to marriage. Once a person or persons acted outside the boundaries of formal marriage, or in a way not appropriate for married people, the court removed benefits and obligations. This could point to one change to preserve the institution of marriage. Those individuals that were not performing
consonant with the institution of marriage should not have the benefits and obligations accompanying marriage.

In keeping with the provisions of other no-fault divorce legislation, the court noted: it “makes no difference whether it was the “innocent” or “guilty” party seeking to convert the judicial separation into a final divorce” (id. at 35). It was evident to the court the Legislature intended to abandon the “traditional fault approach to divorce and permitting the termination of marriages even where both parties were at fault – except in cases of adultery” (id. at 35). The purpose of the no-fault provisions in the Divorce Reform Law was “to sanction divorce on grounds unrelated to misconduct. The decree [was] simply intended as evidence of the authenticity and reality of the separation” (id. at 35). The framing of the court’s involvement in divorce now suggested a clearer focus on performance. It was no longer up to the court to examine evidence of fault for its sufficiency. Instead the courts simply sought to ensure the separation was not fraudulent and the parties truly wish to end their marriage.

The court discussed the importance of marriage to the state. Implicit in this new legislation was the recognition that it was “socially and morally undesirable to compel a couple whose marriage was dead to remain subject to its bonds” (id. at 40). In other words, if the couple no longer functioned as married there was little reason to require them to maintain the relationship. The changes from the New York court reflected societal and cultural change making divorce more common across the United States in the middle of the 20th century (Brandon 2013).

Although Maine legalized no-fault divorce in 1977 there were still other avenues of adjudication for the Maine court. In making these decisions the Maine court remained
focused on performativity in granting divorces to couples. In each instance the court examined the extent to which the parties were not conforming to the traditional nature of marriage. In these cases the granting (or denying) of a divorce ultimately turned on performance of the parties in the socially understood roles of husband and wife.

In 1987 the Maine court decided *Cellucci v. Cellucci* (522 A.2d 1318 (1987)) and focused on proving the grounds of cruel and abusive treatment. In remarking on the now limited involvement of the court in these proceedings, Justice David Roberts’ majority opinion noted the court’s jurisdiction was limited to questions brought to the court rather than expanding the appeal to include divorce for irreconcilable differences. In assessing what constituted cruel and abusive treatment Justice Roberts commented on the performance of the parties and the fact the alleged acts of cruel and abusive treatment must have a “consequential effect of an impairment of physical or mental health or apprehension of danger to life” (id. at 1318 quoting *Gruber v. Gruber* 161 Me. 289 at 292 (1965)). The plaintiff in establishing this treatment must prove “(1) the cruel and abusive conduct of the plaintiff’s spouse and (2) that such conduct caused the plaintiff physical or mental injury or that a continuation of the marriage relationship would jeopardize physical or mental health” (id. at 1318). This was a similar standard to the New York court in *Diemer* decided nearly thirty years prior to *Gruber* in proving cruel and abusive treatment.

In highlighting the conduct and performance of the parties in the marital relationship, the court noted the conduct must be serious, it must demonstrate more than “incompatibility between the parties” (id. at 1318). Similar to the determination above in *Littlefield*, in order for conduct to rise to the level of cruel and abusive treatment there
must be significant consequences for the innocent party. The court asserted the
“complaint failed to allege irreconcilable marital differences as a ground for divorce” (id. at 1318). The limitation on the court to not consider other factors perhaps led to a strange result in that it required the parties to remain married until such time one party filed for a divorce based on irreconcilable differences. This fell in line with fault–based divorce filings that consistently required one innocent and one guilty party. An important facet of the decision to divorce was the ground presented for a divorce. There were significant implications for claiming one ground over another. This was especially true if one is a fault based ground for divorce where the judges still necessarily examined the sufficiency of the evidence.

The court continuously had an interest in maintaining rather than ending the marital relationship but it did become easier over time for the parties to end their marriage. The development of the boundaries around marriage and divorce parallel the shifting cultural and societal normal around the institutions of marriage and divorce (Weitzmann 1985). The courts reflected these changes in their opinions. The New York Court of Appeals specified the boundaries around divorce based on cruel and abusive treatment in Brady v. Brady, where Edward Brady sought a divorce (64 N.Y.2d. 339 (1985)). The case centered on Dorothy Brady’s alleged sexual abandonment of her husband. Judge Sol Wachtler’s majority opinion found Dorothy “constructively abandoned [the] plaintiff by refusing to engage in sexual relations with him,” thus satisfying the divorce requirements (id. at 342).

In granting a divorce, the court “termed the marriage a “dead” one and concluded that based on the marital breakdown and the separation of the parties further cohabitation
was improper” (id. at 343). In this case the court’s language demonstrated two important points and a hold over from the *Gleason* case in deeming the marriage dead. First, the fact the husband could file a cruel and abusive treatment action for sexual abandonment by the wife indicated a continuation of the obligation of the wife in giving her husband sexual access. This also suggested performance was important for the court in determining whether an individual could be granted a divorce. A second important consideration was the floor the parties must meet in order to prevail. The fact their marriage was of a long duration worked against Edward Brady because the court determined his wife’s actions were isolated. Substantiating this, the court noted there must be “substantial misconduct” in order to prove cruel and inhuman treatment, the spouse alleging the cruelty faced a higher burden of proof (id. at 345).

Finally, the court noted: “we reaffirm the holding in *Hessen* that whether a plaintiff had established a cause of action for a cruelty divorce will depend, in part, on the duration of the marriage in issue. The existence of a long-term marriage did not, of course, serve as an absolute bar to the granting of a divorce for cruel and inhuman treatment, and even in such a marriage "substantial misconduct" might consist of one violent episode such as a severe beating” (id. at 345).

Taken together the cases in this section demonstrated a continued commitment by the court to performance in order to remove marital obligations and benefits through divorce. The courts, at the beginning of the time period (in 1942), focused on performance of the socially understood role of a husband and wife in order to either affirm or deny the validity of migratory marriages and divorces. This continued in the discussion of reasons for divorce both fault-based causes for divorce and even divorce
questions after the legalization of no-fault divorce. This section on divorce was, therefore, representative of order rather than change. The baseline set for divorce in 1942 focused on performance and the very last case I examined around divorce also was founded on the court’s use of performance. The section on divorce and the following section on annulment together provide a model for other policy areas where there was a clear transition from a reliance on formal status to a reliance on performative marriage. Here, performance was primary throughout. This was perhaps not surprising as the decisions around alimony ultimately spring from the divorce judgment even though they were very separate and distinct from the divorce judgment.

The next section of the chapter discusses the other way in which individuals could remove their marital obligations: annulment even though the effect of an annulment effaces the marriage as if it never happened and reverts the couple back to their previous “single” status.

**Annulment**

As noted above, annulments were only granted for fraud. The purpose of an annulment was to recreate the parties as unmarried individuals as an annulment rendered the marriage invisible as if it never happened. The analysis I present in this section of the chapter demonstrated the reasoning behind annulment shifted over time. Nevertheless, this section of the chapter, similar to the divorce section above, presents a developmental narrative around order rather than change. In the cases I analyze in this section the courts always value some aspect of performance in granting an annulment as the courts were ultimately focusing on whether the actions or performance of one spouse fell outside the
boundaries of marriage. The very purpose of an annulment was to cast doubt on one party’s performance in creating a sham marriage. Annulment, along with divorce, represented the decisive marriage failure as one spouse sought to remove themselves from their marital obligations (and benefits). There was a shift in the nature of the performance the courts use in order to grant an annulment.

The baseline, set in 1942, was a transgression of the fundamentals of marriage. These fundamentals were defined as consortium and cohabitation and placed very real and strict limits around the parameters of annulment. The courts in their effort to continue the tradition of formal marriage as a life-long commitment were reluctant to expand the parameters for annulment beyond these specific and enduring aspects of the marital relationship. Statutory construction required the fraud at the heart of annulment suits to be due to nonage, consanguinity or the fundamentals of marriage and each of these constructions result in the innocent party not proceeding with the marriage. This third category was especially prevalent in the three states in my data set.

The fundamentals of marriage (consortium and cohabitation) were those striking at the heart of the marital relationship. The court easily defined cohabitation but consortium was less well defined. It encompassed not only sexual relations but also companionship a spouse expected to enjoy during a marriage. For the courts, cohabitation ultimately led to marital sexual relations thus consortium. Conversely, without cohabitation the court did not see the possibility of consortium at least until the 1960s when sexual relations between unmarried individuals were distinctly outside the boundaries of legal conduct. Non-performance of particular marital obligations and duties here formed an important aspect of the narrative. Annulment cases, especially in the
1940s and 1950s focused around one person in the marriage not performing duties and obligations that were understood to be those of a husband and wife i.e. by not cohabiting or not consummating the marriage.

Over time, and especially by the 1960s, when relations between husband and wife changed and various aspects of family law were being altered the courts looked to a more expansive view of important aspects to a marital relationship. The expanded definition of when an annulment could be granted was when there was a fraud resulting in the innocent party not contracting the marriage. This definition goes far beyond the fundamentals of marriage and allowed an individual to remove him or herself from a marriage via annulment for a greater set of causes. It was this focus on various aspects of performance the courts ended up with in 2012. Again, the developmental narrative emphasized order but there was certainly development and shift in the nature or types of performance the courts valued in determining the validity of an annulment case.

In creating boundaries around a husband’s suit for annulment based on fraud, the Massachusetts court differentiated between a woman who had sexual relations with her husband before a marriage and a woman who had sexual relations with another man prior to the marriage. The societal and cultural expectation was linked to the expectation for individuals, especially women, to not engage in sexual relations prior to formal marriage (Cott 2000, Hartog 2000).

In the case of Bosclair v. Bosclair (313 Mass. 442 (1943)) the Massachusetts court indicated a husband was not entitled to an annulment based on his wife’s alleged fraud in inducing him into a sham marriage based on her representation that she was pregnant with his child. The husband charged his wife had sexual relations with another
man resulting in a pregnancy. However, the court dismissed the annulment because the husband also had sexual relations with her prior to the marriage. Thus, he could not claim to be induced into a marriage with a woman he thought virtuous. In dismissing this annulment suit, the court focused on the fact a husband could not be granted an annulment if he also had premarital sexual intercourse with his wife and then proceeded to marry her. The court made clear that when a husband was “responsible” for her “condition” because he “had criminal intercourse with the libellee before his marriage to her” he could not obtain an annulment (Bosclair v. Bosclair, 313 Mass. 442 (1943)). Justice Henry Lummus, citing the court’s decision in Crehore v. Crehore (97 Mass. 330 (1867)), stated: “one who had intercourse before the marriage could not allege that he was induced to contract the marriage by such fraud and deceit as will permit him to avoid the marriage” (Bosclair at 444).

In 1943, an annulment was no recourse for a husband who also engaged in sexual relations with the wife prior to the marriage, especially as the court did not sanction premarital sexual relations in 1943. Moreover, this decision suggested a woman’s chastity only seemed to matter if she engaged in sexual relations with a man other than her future husband, which was supported by the reference to the “criminal” conduct of the wife (c.f. Hartog, 2000 Coontz 2005). This case demarcated a clear line around permissible annulment suits but nevertheless made a decision based on performance of the socially understood roles of husband and wife. As the husband and wife were not acting in a manner consistent with the role of a husband and wife in the context of 1943 the court denied the annulment. The context mattered in each of these cases for what the court was able to do. The courts were unable to legitimize conduct that was inherently
“criminal” and this case suggests having “criminal” intercourse with your wife prior to formally having that status was tantamount to condonation, which I examined above. Stated here briefly, when an individual (man or woman) condoned the wrong or illegal actions of his or her spouse the courts were unwilling to find in favor of the claimant.

Seven years after this case, the Massachusetts court again noted limits on annulment. In looking to New York State’s annulment provisions, the court in *Damaskinos v. Damaskinos* (325 Mass. 217 (1950)) found an annulment could only be granted if “consent to such marriage [occurred] by reason of force, duress or fraud” (id. at 219 quoting the Consolidated Laws of New York 1930 c. 14, section 7). Additionally, the Massachusetts court focused specifically on the actions taken by the individuals in a marriage and the fundamental nature of these, stating an annulment in “an unconsummated marriage may be secured more readily than in a case where the parties had cohabited” (id. at 219). This quotation implied cohabitation presumably led to consummation but the converse was not true. It also suggested non-performance of marital duties or obligations (i.e. consummation) could be grounds to remove those benefits and obligations.

The issue of non-performance was important as these early cases ultimately rested on one spouse not performing the actions associated with being a husband or wife. If a couple consummated a marriage an annulment could not be sought and the wronged spouse would have to file for a divorce. At the same time, there were different sets of duties and obligations (along with the corresponding rights and benefits) that husbands and wives enjoyed in the marital relationship. These were neither transferable between spouses nor reciprocal (Baer and Goldstein 2006). This difference in treatment between
husbands and wives in a marriage was unsurprising at the time this case was decided (1950) as there was a clear gendering of roles within marriage and the performance of those separate roles was important for the court (Coontz 2005).

In the New York annulment cases, I demonstrated the court drew tight boundaries around the causes for annulment and the fundamental aspects of marriage. Moreover, the court focused on the performance of each person during the marriage to eventually grant or deny the annulment. Annulment suits specifically rested on performance because the purpose of an annulment was to render the marriage as if it never happened. Therefore granting (or denying) and annulment could not center on the formal status of marriage because there was none.

In 1950 the New York Court of Appeals explored the fundamentals of marriage standard to determine whether an annulment could be granted in *DeBaillet –Latour v. DeBaillet –Latour* (301 N.Y. 428 (1950)). In this case the husband, Alexandre De Baillet – Latour filed an appeal to the lower court granting his wife an annulment based upon his fraudulent representation that he would perform the “customary duties of marriage (id. at 428). In this case, the husband maintained that once married he would partake in a normal marriage including sexual relations, performing “husbandly duties” which he did not do. This suit by Evelyn DeBaillet –Latour for annulment alleged “[the] defendant [Alexandre] refused to have, and never did have, sexual intercourse with her” (id. at 430). Evelyn, then, asserted the marriage was consummated which struck at the fundamentals of the formal marital relationship.

The premarital falsehoods expressed by Alexandre De Baille-Latour ran afoul of the basic obligations in the marital contract that included the “refusal of the husband or
wife without adequate excuse to had ordinary marital relations” (De-Baillet –Latour v. DeBaillet –Latour, 301 N.Y. 428 at 434 (1950)). This particular quotation implicated the fundamentals of marriage here – consortium – as a reason for granting a spouse an annulment on the basis of fraud. What was particularly interesting in this case was the nature of the performance in that it was apparent the refusal of the husband or wife to engage in sexual relations amount to fraud based on consortium. It did seem surprising at this time that the court focused on the sexual activity of the husband as it was commonly assumed it was the wife’s obligation in a marriage to engage in sexual relations as part of her duty in the marriage while the husband had different duties based on support (Baer and Goldstein 2006).

The court failed to expand the discussion of what else constituted ordinary marital relations but this particular understanding of the fundamentals of marriage necessarily focused on the performance of the parties, or lack of performance in removing marital obligations and benefits from individuals. This was an important opinion because it removed the gendered nature of performance of marital obligations. The court allowed a woman to file an annulment case based on her husband’s refusal to engage in sexual relations in a “normal marriage” with her. The discussion here was line with the marital obligations discussed in Diemer, a case around divorce I examined in the previous section, as the court there focused specifically on the actions of the guilty party. There was no indication in either Diemer or the instant case that gender played a role. Instead there was the suggestion that a willingness of either party to have marital sexual relations was a fundamental component of a formal marriage.
Dissenting in De-Baillet–Latour Judge Charles Froessel’s concern was that by expanding the parameters around annulment the courts made a “mockery of the institution of marriage” (id. at 435, Froessel dissenting). Froessel noted the strict guidelines around marriage and the importance of marriage for the stability of the nation with marriage being one of the founding institutions governing relations between adults (id. at 435). Along this same line, the dissent noted this marriage was the plaintiff’s third “marital venture” and therefore she was not unused to the “trappings of marriage” (id. at 435). This line of argument by Froessel suggested if the plaintiff was not previously married, the dissenting judge may have looked more favorably on her suit.

In a discussion of the evidence necessary, Froessel stated: “the plaintiff must prove [her] case beyond a preponderance of the evidence and in some cases: “to make a preponderance, the evidence should be clear and convincing” (id at 443, Froessel dissenting quoting McKeon v. Van Slyck, 223 N.Y. 392 at 397). His dissent alluded to the fact the marriage broke down because of incompatibility rather than the fault or fraudulent representation by the husband. Of course, in New York in 1950 there was no statutory cause for divorce based on incompatibility and the spouses must therefore turn to annulment. According to Froessel, by validating the annulment the court “tend[ed] to open even wider a door that was already ajar for the indiscriminate granting of countless annulments where an absolute divorce could not be obtained on the statutory ground” (id. at 444, Froessel dissenting).

26 As I noted above in the section on divorce, the parameters around divorce were drawn as tight, if not tighter as the only statutory cause for divorce in 1950 when this case was decided was adultery. Couples may turn to annulment to end their marriage but were unsuccessful if there was no breakdown in the fundamentals of marriage. These remarkably strict laws around divorce and annulment become problematic in the 1960s and beyond resulting in shifting judicial understandings of the parameters around both.
The dissent took a different view of women. Whereas Judge Desmond concluded the wife was essentially duped, the dissent judged the wife to be able to advocate for herself as an independent person who enters the marriage knowingly. This was especially true for the dissent given the fact she married here for the third time. The miscalculation on her part should not fall within the parameters of judicially sanctioned annulments.

A second case two years later enabled the New York court to again delimited the boundaries around annulment suits. Focusing on performance in discussing the fundamentals of marriage, the court explained the husband’s “pre-marital falsehoods” expressing love and affection for his wife did not strike at the core of marriage. As the fundamentals of marriage were not implicated the annulment was denied. In *Woronoff-Daschkoff v. Woronzoff-Daschkoff* (303 N.Y. 506 (1952)) Roman Woronzoff-Daschkoff appealed a lower court’s decision upholding an annulment (for the wife, Bachoobai) because of alleged fraud by the husband inducing the wife into a sham marriage. Bachoobai asserted although Roman, prior to the marriage, stated he would fulfill the role of the husband and add to her happiness, support her, and perform his duties faithfully, he had not. Instead, she claims he did not work and did not take care of her as a husband should. Ultimately, she claimed he was not fulfilling the performance of the socially understood role of a husband. As such, Bachoobai asserted she should be granted an annulment.

Judge Charles Desmond’s majority opinion issued a particularly biting observation of the husband’s character, asserting the defendant was “no model of chivalry or propriety. That proof, believed by the trier of the facts, was enough, we will assume, to expose him as a fortune hunter, a slaggard, a hypochondriac, and a man who
took his promises lightly. But this was a suit to annul a marriage for fraud” (id. at 511). Even though the husband was perhaps not the model husband, this did not give rise to sufficient evidence for an annulment as it did not speak to the fundamentals of marriage (id. at 511). Casting doubt on the entire claim of fraud, Desmond noted: “If this defendant deceived his wife, it was not as to any vital element of their union” (id. at 512).

Desmond found that even though the husband’s performance in the marital relationship was perhaps less than perfect these aspects of performance alone were insufficient to result in an annulment. Desmond did indicate, however, what was sufficient and this confirmed the notion of the fundamentals of marriage. Desmond stated: “marriages could be voided only for frauds going to the essentials of marriage, that was, consortium and cohabitation” (id. at 511). As Desmond also wrote the majority opinion in *De Baillet-Latour* I assume one fundamental aspect of the marriage was sexual relations (consummation of the formal marriage) and there was no indication from the court in *Woronzoff-Daschkoff* that either of these fundamental aspects were missing.

In commenting on the marital obligations, specifically of the husband, the court noted: “of course, the husband was under a legal duty to support even a well-to-do wife” (id. at 512). The use of the words “of course” here suggested an expectation that a husband support his wife no matter the wife’s personal wealth. The court specifically looked to the lived relationship between the two, but determined mere incompatibility was insufficient. In order for the court to grant an annulment there had to be a transgression of the fundamental aspects of marriage. The wife was not granted an annulment in this instance because the court did not find a claim of non-support to be a vital aspect of the formal marriage, at least where annulments were concerned. Indeed,
the court noted: “there was here nothing to disprove the defendant’s assertions that he intended to, and did, perform the fundamental duties of the marital relationship” (id. at 512). This language illustrated a commitment to the traditional nature of marriage as an enduring union between two persons that could only be disrupted for the most egregious reasons, which were those that struck at the heart of the formal marital relationship: cohabitation and consortium. For all other “lesser” causes a couple must endure their marital union. These causes defined the essentials of marriage and the particular duties of the husband and wife in the marriage. The different types of non-performance occurring in Woronzoff-Daschkoff and De Baillet –Latour allowed the court to distinguish between the two cases and enables the court to grant an annulment in one case (DeBaillet-Latour) and deny it in the other (Woronzoff –Daschkoff).

In the case of Brillis v. Brillis (4 N.Y.2d 125 (1958)), decided by the New York court six years later, an annulment was granted to Aspasia Brillis based on her husband, “an alien seaman,” fraudulently inducing her into marrying him in order to gain non-quota entry into the United States (id. at 126). The posture in this particular case surrounds Petros Brillis’ appeal from the lower court’s decision granting his wife an annulment. The facts were explained as follows: Petros asserted he would partake in a religious marriage ceremony with Aspasia when he returned to the United States provided his wife took part in a civil ceremony immediately so the two could be formally married. Petros was absent from the United States for six months and when he returned he refused to “consent to any religious ceremony” (id. at 127). Judge Stanley Fuld’s majority opinion noted the innocence of the Aspasia as “she knew nothing of his purpose, but was induced by his promises and representations, which he never intended to carry
out, that upon his return he would participate with her in a religious ceremony in the Greek Orthodox Church, of which they were communicants, and that he would establish a home for her and support her” (id. at 126). Part of the husband’s fraud also rested on his assertion that he would fulfill his duty of support towards her. Interestingly, though, the New York court in the previous case did not find non-support to be a fundamental aspect of the formal marital relationship (although this was not the basis of the annulment suit). The court granted Mrs. Brillis the annulment based on her husband’s non-performance of his marital duties and obligations. This had the effect, then, of declaring the legal marriage null and void rendering the parties back to their pre-marital status.

The court noted the parties had not lived together because they were to not “live together as man and wife until the religious ceremony had been held and, since there had been no such ceremony, the marriage had never been consummated” (id. at 126). This particular quotation implied the religious ceremony was a prerequisite for consummation as the parties. In this case, the wife asserted, and the court agreed, a fraud had been perpetrated and it was a fraud speaking to the fundamentals of marriage (in this case both cohabitation and consortium). As such, she was entitled to an annulment nullifying her formal marriage. Missing from this marriage was the religious marriage ceremony that indicated the intent to create a real marriage. For the court there was a causal link between the missing religious ceremony and subsequent cohabitation and consummation. It seems likely that if the parties had lived together and consummated the marriage without the religious ceremony Aspasia Brillis could not be granted an annulment and instead must seek the alternative – a divorce.
In making the decision, the court looked to well-established precedent surrounding annulments, stating: “where one prospective spouse, in order to induce the other to enter a civil marriage, makes a promise of a subsequent religious ceremony, without intending to keep it, an annulment will be granted, at least where, as in the present case, there had been no consummation by cohabitation” (id. at 126). This particular choice of language surrounding “consummation by cohabitation” once again presumed cohabitation would lead to consummation almost indicating that if the parties cohabited then consummation was assumed and an annulment denied. It was an interesting posture for the court to take but, at the same time, not altogether unsurprising as during this time (1958) sexual relations receive legitimacy only when engaged in by married couples.

Overall, these cases demonstrated a commitment to the marital relationship and one again underscored the place of the court (and the state more broadly) in the marital relationship as one of power. The couple in each case was unable to contract together in annulment cases to recreate themselves as never married people and required the intervention of the courts. There was also a discussion of certain aspects of performance, or lack of performance that was important for the courts. Specifically here, it was the action of non-performance that resulted in annulments. That was, the husband or wife fraudulent induced his or her spouse into a sham marriage and then refused to engage in the socially understood role of a husband or wife by either not consummating the marriage or refusing to form a joint home.

Consortium and cohabitation as measures of performance were the backbone of these early annulment cases. In order to remove marital obligations and benefits from
individuals the courts looked at whether the “guilty” party was performing or not performing consistent with their obligations and duties in a formal marital relationship.

The courts granted annulments to husband and wives whose spouse was not performing a particular role provided that role spoke to the fundamentals of marriage. In other words, in looking to remove marital obligations and benefits from individuals whose relationships were on the margins, the courts looked at whether the parties were performing consistent with their supposed formal marital status. Further, and perhaps more importantly for my purposes, the courts focused on performance when they faced questions over failed marriages or marriages that did not live up to the traditional ideal of marriages. After all, annulments were just that – they were failed marriages one party perpetrated against the other. This, along with divorce then, represented the ultimate failure in marriage – the removal of marital obligations.

By the middle of the 1960s, the courts used performance and/or performativity to expand the causes for annulment beyond the restrictive fundamentals of marriage: consortium and cohabitation. The New York court in Kober v. Kober (16 N.Y.2d 191 (1965)) extended the cause for annulment from issues pertaining to the fundamentals of marriage to a more relaxed standard of “material misrepresentation” that had the result of preventing the innocent party from contracting the marriage (id. at 195). Jacqueline Kober filed for an annulment stating her husband concealed his fanatic anti-Semitism prior to the marriage. She claimed if she knew of his proclivities she would not have consented to the formal marriage ceremony.

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27 I use the term “supposed formal marital status” here because the purpose of an annulment brought into question the presence of a formal marital relationship. However, in each of the cases examined in this annulment section there was one innocent party -- one party who believed he or she was in a state sanctioned marital relationship and one guilty party -- one person who perpetrated the fraud.
In granting Mrs. Kober an annulment, the judicial framing around annulment changed from previous cases. The court stated: “fraud need no longer “necessarily concern what was commonly called the essentials of the marriage relation – the rights and duties connected with cohabitation and consortium attached by law to the marital status” (id. at 194 quoting *di Lorenzo v. di Lorenzo*, 174 N.Y. 467 at 469). Instead the court noted: “any fraud which was material to the degree that, had it not been practiced, the party deceived would not have consented to the marriage” (*Kober* at 195). By making this judgment, the court carved an exception into the previously established rule around annulment thus changing the parameters around future suits.

This case had the effect of extending the boundaries around causes for annulments and changing the way marriage and annulment laws work. As a result, the causes a person could receive an annulment for were expanded beyond the notion of the fundamentals of marriage. In carving this exception into the established precedent for filing for an annulment, the court created a new interpretation of how husbands and wives should behave within a marriage and in doing so evaluated the type of performance they should be engaging in. In this decision, the court gave husbands and wives a broader set of rights and obligations pertaining to fraud within the marriage that did not simply strike at the consortium and cohabitation, the fundamentals of marriage.

The expanded use of fundamentals of marriage was an important change and development in the court’s language as it indicated a different set of boundaries around annulment. Further, this case demonstrated the court’s focus on the husband’s performance rather than the wife’s because it was the husband who misrepresented his views to her resulting in Mrs. Kober’s annulment suit. This was consistent with previous
case law, and represented order rather than change as the courts consistently focused on
the performance or non-performance of the guilty rather than innocent party in a divorce.
The court’s ultimate determination was to discover whether the guilty party truly induced
the innocent party into a sham marriage through fraudulent misrepresentation.

The Court of Appeals remarked that marriage was a civil contract requiring
consent, thus if “either party consent[ed] by reason of fraud there [was] no reality of
consent. Hence, the marriage [was] voidable” (Kober at 196). The Court of Appeals
determined Mrs. Kober would have refused to marry her husband if she knew his true
sentiments, therefore “there [wa]s no reality to the consent of the plaintiff to this
marriage” (id. at 196). Indeed, these facts “which ha[ve] been concealed and inferentially
misrepresented during courtship, would so plainly make the marital relationship
unworkable” that there was no other choice than an annulment” (id. at 197). The court
went on to note: “these were more than distasteful beliefs; they were absolutely
repugnant and insufferable… A fraud with respect to such beliefs [i]s one affecting a vital
aspect of the marital relationship” (id. at 197). Even though these beliefs perhaps did not
speak to the fundamentals of marriage they nevertheless affected material enjoyment of
the marriage thus providing ample grounds for an annulment. According to the court this
was sufficient.

The majority opinion indicated the parameters around annulment and what
constituted “material conditions” of the marital relationship. In creating and delimiting
the boundaries around annulment, the court noted that the fraud must be “of such a nature
as to deceive an ordinarily prudent person” (id. at 194 quoting di Lorenzo at 474). It was
not enough, however, to demonstrate one partner married for money and was
disappointed when the money did not materialize (Woronzoff-Daschkoff v. Woronzoff-Daschkoff, at 512). The Kober court looked to the New York lower courts’ previous rulings in delimiting the conditions warranting an annulment. These issues include: concealment of prior marital status was held to be sufficient in Costello v. Costello (155 Misc. 28); treatment of a mental disorder (schizophrenia, catatonic type) was held to be enough in Schaeffer v. Schaeffer (20 Misc. 2d 662); material misrepresentation of age in Tacchi v. Tacchi (47 Misc. 2d 996); fraudulent promise to become a United States citizen in Siecht v. Siecht (41 N. Y. S. 2d 393), where after years of married life the husband learned that his wife was a member of the Deutsche Bund and that her failure to become a citizen was deliberate due to disloyalty to the United States.

In Laage v. Laage (176 Misc. 190), an annulment was granted to a wife by reason of the husband's false representation that he was a naturalized American citizen, after she had stated to him that she would not marry a German-born alien (Kober at 195-196). The cases demonstrate it was actions – performativity – that were primary the courts’ decisions. There was a clear understanding that fraudulent actions going to the fundamentals or the material conditions of the marriage resulted in a marriage being annulled. The New York court expanded the parameters around annulment, but at the same time the court clearly indicated trivial misconduct or trivial actions would not result in an annulment. This was a similar standard to that of fault - based divorce cases examined above where divorces were only granted for the more egregious circumstances.

During a similar time frame the Maine court also altered its annulment statute around the fundamental aspects of marriage. In doing so the court focused on the wife’s performance as the husband filed suit citing he was fraudulently induced into the
marriage. In *Dolan v. Dolan* (259 A.2d 32 (1969)) Ronald Dolan claimed his wife, Lucille Dolan, fraudulently misrepresented that her willingness or intention to consummate the marriage. The suit for fraud alleged Lucille perpetrated a fraud upon Ronald Dolan at the time of marriage “by reason of [the] defendant’s pre-marital fraudulent representation that she intended to consummate the marriage by normal marital sexual relations while in truth and in fact she had no such intentions” (id. at 34). The husband asserted, and it was undisputed, that during the four and a half months of the marital relationship “the plaintiff's advances at sexual intercourse were met by physical resistance on the part of the wife [and] accompanied by outbursts of uncontrollable emotional behavior” (id. at 37). In denying the annulment, the court accepted as fact the refusal to consummate the marriage but asserted there must be “adequate proof of permanency of the wife’s condition” (id. at 39). Additionally, the “wife's incapacity for sexual intercourse in the instant case may have originated from psychological rather than physical causes” (id. at 39).

In order for an annulment to be granted the spouse alleging fraud must prove “by a fair preponderance of the evidence” the wife was impotent” (id. at 37). Impotency was defined as “the want of power for copulation.” Further, the “incapacity must have existed at the time of the marriage” (id. at 37). If it did not exist at the time of the marriage but afterwards the spouse filing the suit could not claim to have been induced into the marriage by fraud because he/she was aware of the condition. This paralleled this issue of condonation discussed above in divorce cases and loss of consortium cases, discussed in chapter 5. A potential husband who knew of his future wife’s incapacity could not be
fraudulently induced into a marriage. He took her to be his wife with the full knowledge of her condition.

As with other cases, the Maine court discussed the importance of marriage for the state. Noting that marriage was an important civil contract it was also accompanied by great significance for “immediately upon its consummation public policy endows the marital relationship with enduring rights and responsibilities” (id. at 38). The court noted the effects of an annulment on the State, stating: “an annulment suit had virtually the same impact upon the public good as the liquidation of the marital status through divorce” both of which the state would like to avoid (id. at 38).

The particular case here implied the “clock” on the marriage began with consummation, not with the formal marriage ceremony. This spoke to the performative aspects of the marriage. If the wife (or husband) did not act married by consummating the marriage or cohabiting with his or her spouse then the marriage could be annulled. It appeared in Dolan the controlling factor was engaging in marital sexual relations. This was also an important illustration of the role of the husband and wife in the marriage as it was clear that by not engaging in sexual relations with her husband she was presenting an affront to her marital duties. The annulment, then, questioned her non-performance of the socially understood role of a wife. In the annulment cases, this was as important, if not more important, as the issue of performance of these same roles. Even so, as I noted above, the baseline in annulment cases was performance or non-performance of socially understood roles of husband or wife.

The end of this section on annulment saw the three states largely in line with each other in terms of granting annulments. In each instance above I showed the performance
of the parties was the controlling factor for the courts. The courts focused on both the husband and wife’s performance, or non-performance, specifically the party who was accused of inducing the innocent party into the sham marriage. The suits around annulment suggest clearly that performance was at the heart of these cases. The discussion around annulment also indicated the same set of circumstances and mechanisms could be used by the courts in removing marital obligations as in granting marital obligations to couples.

**Conclusion**

In this chapter I forwarded the central argument of the dissertation that when faced with problems associated with marriage and the declining fidelity to the central tenets of traditional marriage the courts instead turned to performance as a way to grant or deny marital rights and benefits to individuals. The ultimate breakdown in the marriage ideal was presented here as couples sought to remove themselves from their marital obligations. The other chapters in the dissertation focus on granting rights to couples based on performance but in this chapter the courts centered performance or non-performance as a way to remove marital benefits and obligations to couples.

The use of performance in divorce and annulment cases was evident from the beginning of the dissertation’s time period in 1942. Taken together the two types of cases focused on the nature of performance or the type of performance in removing the obligations (and benefits) of marriage from individuals.

Looking together at divorce and annulment the courts did not specifically focus on a gendered type of performance as they do in alimony statutes (centering women’s
performance) or in adoption claims (centering a father/husband’s performance) but here the discussion was based explicitly around the performance of the guilty party. This was especially true in the area of divorce during the era of fault-based divorce up until the 1970s and through the entire narrative of annulment cases. The focus on the guilty party specifically mapped to the guilt and innocence paradigm that courts centered divorce around until no-fault divorce was legalized.

Looking specifically at divorce, in era of fault-based divorce especially, the court looked at the actions of each to determine whether to grant a divorce. Even when the couple sought to retroactively apply the no-fault based provisions of the New York Divorce Reform Law, the court centered its decision on whether the couple were living apart for two years. While it was undeniable a formal marriage was necessary in order to grant a couple a divorce it was equally clear performance was the most important factor. Again, non-performance of marital duties and obligations allows the court to more readily remove the obligations and benefits of marriage.

In the analysis of divorce, I show various types of performance were evaluated by the court ranging from a woman condoning her husband’s actions by resuming her marital duties and obligations to a couple living apart for two years to illustrate to the court their marriage was “dead” and not performing any of the functions society intends. It was possible to discern from these cases that divorces were only granted to couples based on severe and permanent performance that provides an affront to the traditional ideas and purposes of marriage. In other words for a divorce to be granted based on cruel and abusive treatment there had to be a sustained period or single severe incident making it intolerable for the couple to continue cohabitation and therefore legal marriage. In these
cases there was a range of performativity meeting the burden of proof to end the marital relationship. There were no hard and fast rules about who was included or excluded as judges focused more on the ways individuals could illustrate their marriage should be ended.

In annulment cases explicitly, the courts looked specifically to the performance of the husband and/or wife in perpetrating a fraud against the innocent party. Annulment questions necessarily turned on the performance of the parties to a marriage. Specific actions were the focus of annulment suits as annulments were granted for fraud based on the fundamentals of marriage: consortium and cohabitation.

Developmentally the annulment cases were important as the courts granted (or denied) annulments to women (and men) based on the fundamentals of marriage in the 1940s. By the 1960s onwards the court took into account any factors that materially affected the marriage that had the result of the innocent party not consenting to the marriage. Different types of performance were important for the court in these cases over time as the courts specifically evaluated the nature of the guilty party’s performance. Nevertheless order rather than change formed the backbone of this chapter as the courts consistently looked to performance.

A final point to make regarding this chapter was that the courts look to performance in the area of annulment and divorce first and this provided a model or a blueprint for the value of performance in the other areas. I show in this chapter that performance, or non-performance, was used to remove marital obligations and benefits around the most fundamental of the breakdowns in the marriage ideal: the wish of one party to remove themselves entirely from the marital relationship. As various laws around
marriage and family law were relaxed in the late 1960s and early 1970s courts had to find alternative ways to deal with this fundamental breakdown in the marriage ideal. While the courts continued to use performance they focused on different aspects of performance. This was similar to alimony statutes, examined in the next chapter, where at the beginning of the time period in the 1940s and 1950s the courts had a narrow understanding of when alimony could be terminated. This expanded over time to enable a husband to terminate his former wife’s alimony under a wider set of circumstances.

The next chapter explores a marriage policy flowing directly from the decision to divorce or annul the marriage: alimony.
Chapter 3 – Nuanced Development: The Trajectory of Alimony

Introduction

The purpose of alimony was to ensure a sense of economic equality between two spouses in the event of a divorce. In this way, it was fundamentally tied to divorce but distinct from it in the sense that alimony presented a separate failure in not living up to the traditional ideal of alimony. Resulting from this breakdown in the ideal of alimony the courts turned to performance but not before focusing exclusively on formal status in creating boundaries around alimony.

In 1942 alimony was the right of a woman, and a woman alone, based on her wifely status stemming from a husband’s obligation to support her, even after a divorce (Grossberg 1985, Hartog 2000). Further it was granted to her only when her husband’s fault caused the divorce. A woman who caused the divorce forfeited her alimony. The laws of alimony, though, have not remained static since 1942 with there being various purposes for it. The purpose of alimony shifted over time from support for a dependent partner (traditionally a wife), compensation for a partner reducing career ambitions in order to serve the marriage (also traditionally the wife), and compensation for the caregiving role one spouse took on during the marital relationship (Hartog 2000, Cott 2000, Starnes 2014). While many marriages and families required both parties work in the paid labor force, a single wage earner head some families (Starnes 2014). In the majority of marriages when it was necessary for one spouse to relinquish their career and corresponding economic prosperity in order to take on the major caregiving role in the family it was a woman who made this sacrifice (Starnes 2014).
Resulting from the difference purposes of alimony it was perhaps unsurprising women were, and continue to be, the primary recipients of alimony even at a time when more married (and divorced) women were working in the paid labor force and could be economically independent. The courts were tasked with determining when alimony was warranted and further the appropriate level of alimony to be awarded.

The courts faced various clashing commitments regarding alimony and its distribution including weighing several factors in making the initial alimony award and conversely when alimony should be terminated. In adjudicating both types of claims courts moved away from a one size fits all adjudication where women were granted alimony based on their status as a wife (if their husband’s fault caused the divorce) and only formal remarriage terminated a woman’s alimony towards an approach examining the performance of the wife, husband or both parties in determining when (and even if) alimony should be granted and conversely the parameters around terminating alimony.

The above paragraph indicated the baseline for alimony in 1942: it was for wives alone and terminated upon their formal remarriage to another man. At the beginning of this chapter’s developmental narrative formal status controlled the granting and terminating of alimony. This became problematic when fewer couples remarried after a divorce and instead cohabited outside the traditional parameters of marriage. As a way to ensure the continued importance of marriage, the courts turned to performance in granting and terminating alimony. By the end of the chapter, performance was used exclusively by the courts to determine when alimony should (or should not) be granted and also when alimony terminated. The formal status of a wife was entirely removed from the equation along with the gendered distribution of alimony, at least formally.
The adjudications in this chapter followed on from questions over divorce and annulment as the alimony award was a direct consequence of couples divorcing. Additionally, the courts did not all see performance from the beginning of the time period. Instead it developed as societal and cultural shifts in the United States occur. Unlike divorce and annulment, there were significant gendered questions in this issue area that play out across time and space.

This chapter presents the unique story of the courts’ internal legal developments in the area of alimony. As a way to deal with what seemed like the decline of marriage (shown by couples divorcing and not remarrying after a divorce or by unmarried cohabitation) the courts turned to performance as a way to fundamentally alter what it means to be married and in doing so sought to create change that preserved the institution of marriage. This turn to performance allowed courts to focus on performance of socially understood marital roles rather than formal marital status. The courts looked instead to a woman’s actions as a wife rather than her formally being a wife in order to terminate rights and benefits (for women) and obligations (for men) associated with marriage. The focus on performance enabled the courts to bring individuals and couples that were traditionally outside of marriage into the fold and solve the problem of a husband paying alimony to a former wife who was supported by another man. Consequently, the legal developmental process in this chapter resulted in formal marriage and (re)marriage as not the only way to terminate a person’s marital benefits (and obligations).

Under the umbrella of alimony, there were two major, yet distinct, concerns the courts focused on: granting alimony and terminating alimony.
First: granting alimony. As mentioned above, the baseline in 1942 was formal marriage, which resulted in an innocent woman being granted alimony. This obligation of the husband stemmed in part from women’s low earning potential and power. There were fewer women than men in the workforce in the early years of the twentieth century and only a small percentage of those were married women. Although married women in the workforce increased during World War II, many of these women were forced back into the domestic sphere upon the conclusion of the war. Alimony, then, was based on the presumption that a divorce woman had no other avenue for support other than her former husband.

By the middle of the twentieth century, changes occurred in marriage and family law. Divorce laws were relaxed through provisions like no-fault divorce in the 1970s, Moreover, as more middle class women entered the paid labor force (Coontz 2005, Cott 2000) judges too altered rules around alimony to fit in with these new marriage failures. The increase of women in the paid labor force had irreversible consequences for the domestic relations of husbands and wives and family relations more generally. As women gained respect in the work force they demand similar levels of respect in the home (Coontz 2005). Temporally in line with these developments the courts in the Northeast took a variety of factors into account when determining a woman’s alimony award. This was a distinct shift from granting alimony based on wifely status and fault. The legalization of no-fault divorce had profound consequences for the distribution of

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28 To be clear, fault still played a role in alimony determinations until the middle of the 1970s but marital fault was not the sole determinant of alimony.
alimony with traditional fault-based claims, along with innocence and guilt, no longer primarily in play.\textsuperscript{29}

As the courts could no longer rely on traditional fault-based claims around this particular type of failed marriages judges had to come up with an alternative mechanism for granting women alimony. To solve the problem of husbands being left destitute because of alimony awards the courts turned to performance of both parties and weighed the relative commitments and earning potential of the husband and wife. The transition towards performance in adjudicating alimony awards began when the courts explicitly rejected the automatic granting (or denying) of alimony to women based on their marital status. The movement towards no-fault divorce did not necessarily cause this shift but, as I show below, was part of a similar movement away from considering fault in divorce cases and their progeny. Even though the legalization of no-fault divorce in the states occurred at different rates, there was a clear move towards no-fault adjudication in alimony cases during the 1970s across Maine, Massachusetts and New York.\textsuperscript{30} Across the Northeast I show there was a developmental trajectory steadily towards performance focusing on a woman holding out to be another man’s wife.

Terminating alimony was an as important if not a more important issue for the courts in my dataset between 1942 and 2012. In 1942 the baseline of terminating alimony relied solely on formal status with husbands being able to end their obligation for two reasons: upon his wife’s death or her formal remarriage. While both perhaps seemed

\textsuperscript{29} As I note below, the legalization of no-fault divorce did not entirely eliminate fault-based divorce. However, alimony was no longer automatically granted (or denied) to a woman based on her fault in the divorce not least because increasing numbers of divorce occurred for no-fault reasons. Even when divorces did occur for fault, the courts did not automatically grant or deny alimony.

\textsuperscript{30} As I discuss in chapter 2, Massachusetts legalizes no–fault divorce in 1975, followed by Maine in 1977. New York did not legalize true no-fault divorce until 2010 even though a type of no-fault divorce was legalized in New York in 1966 by the Legislature in Divorce Reform Law.
fairly obvious the latter was controversial for the courts in the second half of the twentieth century.

In order to terminate alimony there had to be proof of a significant change in the wife’s circumstances, which was most evident in her formal remarriage. From the 1940s until the 1960s remarriage for women was common. However, the advent of the woman’s rights movement along with societal and cultural changes during the late 1960s and beyond meant that women remarried at lower rates and non-marital cohabitation was more common (c.f. Polikoff 2009, Yamin 2012). This presented a failure to the court because a husband may be required to support a woman that was supported by another man. To solve this marriage failure the courts turned to factors outside the formal marriage. That was, the courts looked to the performance of a woman acting as another man’s wife without the presence of a formal marriage. A husband’s duty of support only went so far and when a woman engaged in various types of performance associated with joining another man’s household (taking their partner’s surname, obtaining joint bank accounts etc.), the courts found a woman was in committed sexually intimate relationship and was supported by her partners. Consequently, the ex-husband’s support obligation was terminated.

Within this second major issue under the umbrella of alimony there were two sets of cases both related to terminating a woman’s alimony. The first focused on a husband seeking to remove his alimony obligations while the second centered on a woman seeking to have her alimony reinstated. The two types of cases highlight two interrelated factors important to the overall developmental trajectory of alimony. First, the cases emphasized the gendered nature of alimony. Although alimony was de-gendered in the
late 1970s for all practical purposes women remain the primary recipients thus alimony continued very much to be a gendered enterprise. Second, the two sets of cases emphasized the courts turned away from formal rules in terminating alimony towards performance in adjudicating these divergent, but similar, claims.

The trajectory of terminating alimony looked remarkably similar to that of granting alimony: a gradual shift towards informal or performative factors with one notable exception. While in 1942 Maine and Massachusetts looked specifically to a woman’s formal remarriage in termination alimony the New York court looked to whether a woman was holding out as another man’s wife or the performance associated with being married rather than the presence of formal remarriage. Even so, the states focused specifically on terminating alimony when another man actively supported a woman. While there were subtle differences between the states I explore below regarding terminating alimony, the overall trajectory of the three states was that by the 1970s alimony terminated upon a woman’s holding out as another man’s wife or upon her being self-supported.

Another facet of the analysis was the gendered nature of alimony. Until the 1970s alimony was quite clearly gendered. Statutorily it was specifically designed for a woman from her husband. It was not expected a woman would provide her husband with alimony and to this end there was no statutory provision stating such. As my analysis below demonstrates, in case after case the courts across both time and space pointed to the traditional notion of alimony, even after it was de-gendered by the Supreme Court in 1979 in *Orr v. Orr* (440 U.S. 268 (1979)). The continued gendered aspect of alimony was implicitly and sometimes explicitly demonstrated in the cases. This was particularly
important as de-gendering alimony formally altered it while in practice it remained the
right of a woman from her husband. This was significant because it illustrated that while
a statute could formally be altered this did not always translate into practical shifts.

In the remainder of the chapter, I present a narrative of the courts’ discussions
around alimony in both granting alimony and terminating alimony. In doing so, I
illustrate the courts focused on performative marriage rather than formal remarriage in
removing (and granting) marital benefits and obligations.

Granting Alimony

In granting alimony, as the introduction to this chapter indicated, courts looked
initially at the fault of the husband or wife. The courts used a very specific frame and
focused their discourse either on the fault of one party or the other.\textsuperscript{31} During the era of
fault-based divorce this was an appropriate mechanism to determine alimony awards.
However, with the rise of no-fault divorces the courts had to use a different principle to
determine alimony because fault was inherently absent.\textsuperscript{32} Moreover, even in the years
prior to the legalization of no fault divorce (in the late 1960s and early 1970s) the courts
indicated they took into account a variety of factors and thus altered the way alimony
worked.

There were a number of temporal developments in alimony with the legalization
of no-fault divorce. The most important, for women at least, was that alimony was no
longer automatically denied but neither was it automatically granted. As a result, the

\textsuperscript{31} Chapter 2 on divorce and annulment specifically discusses the different causes for divorce and how the
courts adjudicated cases over this issue.

\textsuperscript{32} Fault based divorce still existed but it was used infrequently as it was easier for couples to divorce under
no-fault guidelines.
courts took a balancing approach to determine the level of alimony a woman should be
given. This balancing approach focused on a case-by-case basis as no two divorce or
alimony cases were alike. Even so, there were some basic parameters the courts followed
as I illustrate below.

Two of the most important factors in the balancing approach were the husband’s
ability to pay (which had not been taking into account in earlier alimony rulings) and the
contribution of the wife to the success (or lack thereof) of the marital relationship. The
previous rule around alimony focused almost exclusively on a woman’s need with little
to no discussion based around a husband’s ability to pay or a woman’s contribution to the
success of the marital relationship. While the courts did not specifically refer to the rise
of no-fault divorce they do reference the fact these divorces were granted for no-fault
reasons and therefore fault should not be taken into account when adjudicating the
alimony award.

Despite these changes in alimony, it largely remained a gendered enterprise. The
courts’ framing around alimony granted to a woman based on various factors may have
changed but women still received the lion’s share of alimony awards. There was no case
of a husband receiving alimony from his wife in my dataset. This was true even though
alimony was statutorily de-gendered in 1979 by the Supreme Court, and even before in
Maine and Massachusetts.

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33 This did not mean these types of awards do not occur but the appellate courts in Maine, Massachusetts
and New York do not hear a controversy around this issue.
Granting Alimony: A Woman’s Right

The Massachusetts court made a clear determination alimony was the “legal right of a wife to the supported by her husband” (Coe v. Coe, 313 Mass. 232 at 235 (1943)). Further picking up on the traditional nature of alimony, the court noted alimony was not narrowly conceived but was for the necessities of the wife. The court framed these necessities broadly stating they include, but were not limited to: “articles of food or clothing required to sustain life.” Implicating the gendered framing of alimony, the court remarked alimony was an innocent woman’s right extending to “articles for use by the wife as were suitable to maintain her and the family according to property and condition in life of her husband” (id. at 236 quoting Jordan Marsh Co. v. Cohen (242 Mass. 245 at 249 (1922)). This indicated a broad view of alimony and where it stood in the 1940s. The particular language also illustrated a woman was disadvantaged in a divorce and alimony was a device to ensure, at least in theory, a sense of economic equality between the divorced spouses.

In practice, alimony awards were often not sufficient to ensure the diminished economic fortune of the wife, especially as women and men had little to divide between them (Starnes 2014). As alternative frames around alimony, examined below suggest, by the 1960s courts were acutely aware a husband and wife shared the economic burdens of divorce, although not necessarily in equal parts. The development in the understanding of how alimony awards worked fundamentally altered the meaning of alimony away from being an almost automatic right of a woman.34

34 In framing alimony as an automatic right of a woman I am not forgetting that a woman that caused the breakdown of her marriage forfeited alimony. I am specifically referring here to an “innocent” woman.
The progression of the twentieth century saw courts (and legislatures) taking measures to remove formal inequality from the law. This included questions over granting alimony and its gendered nature.\(^3\) Resulting from the “factual emancipation” of women the court faced the problem of relying solely on wifely status in granting alimony (\textit{Pendexter v. Pendexter} 363 A.2d 743 (1976)). Like many other state statutes pertaining to alimony, Maine’s alimony statute §721 of Title 19 illustrated the gendered nature of alimony. This statute provided alimony for divorced women only and did not provide in alimony for men at all. Therefore, the courts had to devise an alternative mechanism to ensure equality between the sexes in distributing alimony. In doing so, the Maine court amended the alimony statute construing it in a gender-neutral fashion. In challenging the alimony statute as written in Maine, Mr. Ossie Beal in \textit{Beal v. Beal} (388 A.2d 72 (1978)) asserted the gendered construction denied him equal protection of the laws under the Maine and Federal Constitutions.

Justice Edward Godfrey summarized Mr. Beal’s claim stating: “[the] Appellant asserted that the Maine alimony statute then in effect discriminate[d] against the class of divorced men by subjecting them to claims of alimony while not subjecting divorced women to similar claims” (id. at 72). The backbone of Mr. Beal’s claim was that men were subject to alimony claims from women whereas women as a class of individuals were not. This resulted in discrimination based on sex. Here, the court concluded discrimination between men and women could not stand because it “ha[d] no rational relationship to any legitimate state objective… the classification did not pass the rational basis test” (id. at 74). Although this case was decided two years after the United States

\(^3\) For a discussion of the federal cases and commentary on sex discrimination see generally Baer and Goldstein 2006.
Supreme Court case of *Craig v. Boren* (429 U.S. 190 (1976)) that elevated sex-based discrimination to heightened scrutiny, the Maine court found the alimony statute did not even pass the rational basis test, the most deferential standard of judicial scrutiny.

Although the removal of the gendered alimony statute suggested the court recognized the co-equal status of men and women in society, the judges nevertheless reinforced the traditional purpose of alimony as “protect[ing] the right of the innocent wife to support by her former husband.” Moreover, the court emphasized alimony was still mainly right for a wife rather than for a husband (id. at 74 quoting *Bubar v. Plant* (141 Me. 407 (1945))). Further, the court noted a number of cases demonstrate the changed purpose of alimony towards a more balanced approach, transitioning away from a woman’s right to alimony based on need (see e.g. *Strater, Pendexter*). Additionally, while although not eliminating gender roles in their entirety the court took one step in that direction. Resulting from *Beal v. Beal* both men and women were able to receive (and be required to pay) alimony even though on a practical level women most often sacrificed careers hence received alimony.

Situating the elimination of formal gender roles in alimony as a solution to sex-based discrimination claims, the Maine court significantly and irreversibly altered alimony away from the long-term solution for a woman by virtue of her formal wifely status. Instead, the court’s discourse specifically picked up on alimony as a “provision of financial support to the former wife when necessary” (*Beal* at 74, emphasis added). The language of “when necessary” suggested alimony was no longer a right for a wife but instead for a specific purpose based on her need, presumably an economic one. The court also stressed “great changes [had occurred] in economic relations among men and
women” and women were no longer in the same position they were in the past (id. at 74).

Focusing on economic relations between the husband and wife also identified one way wifely performance perhaps changed over time, not least measured by the fact women were working in greater numbers outside the home and were becoming independent actors, distinct from their lives as caretakers (Coontz 2005). Furthermore, the conception I present here significantly altered the nature of alimony from a right to support based on a woman’s status as a wife to a contingent need based on various factors. The adjudication over various factors also indicated that a woman might not necessarily always be granted alimony. The changing nature of alimony influenced marriage in two ways. First, this decision emphasized the courts sought to remove to one gendered aspect of the marital relationship. The gendering of roles in the marriage, at least in terms of both the husband and wife being subject to alimony payments, was removed as a result of this decision. Second, and perhaps more important for how courts adjudicate failed marriages, was the court’s language around the duty of support for a wife from her former husband. This case clearly indicated a change regarding his support duty as the court recognizes there should be a balance of various factors to determine the appropriate level of the award. This change, however, was directed to preserving the institution of marriage.

Resulting from this decision the right of alimony was extended to men. In practice as fewer women than men work outside the home and of those women even fewer had the ability to pay their former husband’s alimony it remained primarily for women. According to the court “broadening the scope of the former alimony statute would result in a burden on some members of the class of divorced women who might be required to
pay alimony” but this was not outside the realm of legislative intent for the statute and brought the statute in line with equal protection of the law (id. at 75). The court focused concretely on equality here emphasizing the changing place and performance of wives in society to reach the conclusion that statutes should be drawn without regard to sex wherever possible.

The court’s decision in Beal also recognized a broader societal movement away from sex-based classifications and gender roles in the 1970s (see e.g. Coontz 2005, Baer and Goldstein 2006). Relying on federal pronouncements of Craig v. Boren (429 U.S. 190 (1976)), Reed v. Reed (404 U.S. 71 (1971)) and Frontiero v. Richardson (411 U.S. 677 (1973)), the Maine court noted: “administrative convenience” was insufficient to “justify the perpetuation of sex discrimination” (id. at 75). In adjudicating alimony decisions, the courts should look at each case and the circumstances surrounding that individual case.

The cases in this section illustrated a number of important points. First, in the 1940s and 1950s, alimony was clearly linked to a woman’s formal status as wife. It was granted to women based on her innocence in a fault-based divorce. Equally clear was the fact a woman lost her right to alimony if she caused the divorce (the guilty party). Linked to this was the fact alimony was solely a right for women. As the Maine court noted in Beal, prior to 1977 there simply was no provision for men, as a class of persons, to be granted alimony (Beal at 76). This reflected a clear gendering of roles in marriage (c.f. Yamin 2012, Grossberg 1985). However, this was unworkable into the 1970s when women fought for equality in other areas and men challenge the gendered nature of alimony as unconstitutional. The court faced the problem of using formal marital rules to
grant alimony to women and as such had to fashion different principles by which to allocate alimony awards. As I have shown in this section, the courts looked away from the gendering of roles in alimony determinations towards a finding that both men and women could be subject to alimony. Beal picked upon much of what I explore in the following section: the balancing between the husband’s ability to pay the alimony and the wife’s need in having alimony.

*The Balancing Act: The husband’s ability to pay versus the wife’s need*

This section focuses specifically on the transition towards the balancing approach in adjudicating alimony. As the Maine court demonstrated below, as early as the 1960s the state courts took into account various circumstances and relative needs in awarding alimony to one of the partners. While the previous section indicated alimony was gendered, this section does the same but by focusing on a woman’s performance and needs to granting her alimony.

The Maine court, in 1963, indicated for the first time it used a balancing approach to determine an alimony award. While alimony traditionally was to remedy fault caused by a husband against his innocent wife, the Maine court focused instead on a wife’s ability to maintain her station in life. In *Strater v. Strater* (196 A.2d 94 (1963)) the court stated: “The granting of alimony was within the sound discretion of the court determined by many factors, including the husband's ability to pay, the wife's station in life and her financial worth and income” (id. at 99). In this case the court noted *with emphasis* that the wife “stands without blame for the dissolution of the marriage” (id. at 98). Furthermore,

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36 This case was discussed in more detail in chapter 2 on divorce as the primary issue in the case was surrounding the couple’s divorce.
the court indicated: “in fixing the amount of alimony the court should consider the size of
the husband's estate and his earning capacity; the wife's estate and her necessities
measured by the social position in which her marriage had placed her” (id. at 99). Taken
together, these factors all indicated alimony was no longer simply granted to women by
virtue of their wifely status. Instead it was up to the court to weigh a various factors in a
two pronged determination, initially to determine if alimony should be awarded to a
woman and second the appropriate level. Despite the changes in alimony it remained a
gendered enterprise due to the specific focus on alimony as a wife’s compensation for her
contribution to the marriage.

Similar to the Maine court, the New York Court of Appeals focused on the new
balancing approach succinctly, noting the alimony award must be “commensurate with
the manner in which the parties had lived and a consideration of the ability of the
husband to furnish means of support” (Kover v. Kover 29 N.Y.2d 408 at 414 (1972)).
While this framing missed the contributions of the wife, it took into account more than
formal wifely status instead looking at the husband’s ability to pay and thus not being
economically destitute as a result of the alimony award.

Linked to this new balancing approach of the court was the change in gender roles
in marriage along with the woman’s rights movement calling for increasing equality not
just in marriage but in society more generally (see c.f. Cott 2000, Coontz 2005). As
Coontz argued, women working outside the home gave them a greater degree of
independence and respect they sought to emulate in the private sphere. In keeping with
social and cultural changes, the courts recognized the parameters around alimony needed
reform. Judge Stanley Fuld specifically indicated this in Kover asserting: “times had
changed, owing not only to the coequal status which a married woman today shares with her husband but also to the increase in the number of married women working in gainful occupations” (Kover at 414).

Although Fuld did not explicitly reference alimony it was clear he was talking about alimony when analyzing the remainder of the case. Even so, this passage made clear the underlying principle of alimony as a woman’s right based on her formal status was undercut by the “coequal” status of women. This changed position of women required the courts to reevaluate the commitments of alimony. In doing so, as I demonstrate below, the court fundamentally changed how alimony worked. I should also comment that the focus on performance in both Strater and Kover occurred a few years before no-fault divorce was legalized in the Northeast thus this change was not in response to the amended status of divorce laws but instead moved alongside these central changes in divorce law in the United States. The evolution of the role and conception of performance by a wife clearly changed as evidenced by this quotation with the majority opinion framing married women as more independent. Judge Fuld also noted the legislative intent was to take into account as “financial resources of each [were] considered separately” (id. at 416). This was far removed from the 1943 conception of alimony presented above focusing on solely formal status. Instead, alimony was reconfigured to provide a woman with the necessities of life on a similar level to what she enjoyed as the former husband’s wife.

In making clear how this balancing approach works, the court noted: “there must be a nice but realistic balancing of [Carol Kover’s] needs and her independent means for meeting them with the husband’s ability to pay” (id. at 416, emphasis added). Another
facet of this particular approach not emphasized in prior cases was a woman’s ability to
be self-supporting, or her “independent means” for meeting her needs. In explicating the
balancing approach further, Fuld stated: “the ultimate determination in each case must
depend upon a balancing of several factors -- the financial status of the respective parties,
their age, health, necessities and obligations, their station in life, the duration and nature
of the marriage, and the conduct of the parties” (id. at 415-416). This particular
understanding of the changing notion of husbands and wives in the marital relationship
was an important factor.

The decision in Kover indicated specifically factors pertaining to both the
husband and wife were important in construing the ultimate alimony award. Put another
way, the wife’s performance in the marital relationship was important for the court in the
same way the husband’s ability to actually pay the alimony award. This case also
represented the first time a husband’s ability to pay was taken into account by New York.
Speaking to the changing times, the court specified that even when the husband was at
fault, it “did not necessarily entitle the wife to be forever supported by a former husband
who had little, if any more economic advantages than she had” (id. at 417). This also
illustrated another important factor taken into account: the “station in life” of each of the
parties. In further explicating this aspect, the court indicated it specifically referred to the
“the standard of living the parties enjoyed jointly during marriage” (id. at 418). This
development fundamentally changed the meaning of alimony as the courts explicitly
stated a variety of factors were taken into account and further that a husband was not
required to support a wife forever. Life-long support by a husband was a central tenet of
alimony law in in the 1940s but now (in the 1970s) alimony could be restricted to a
particular length of time. Again, this was in tandem with developments in divorce (explored in chapter 2) but problems around alimony and the particular breakdown of alimony in living up to the marriage ideal was a separate and distinct concern for the courts.

The framing used in this case – exploring the parties’ standard of living - picked upon the economic situation of both the former husband and wife, and illustrated a frequently faced problem in alimony. In the event of a divorce, there was often little, or nothing, to divide between the parties. Moreover, in the event of a divorce, both parties were often left in a worse situation than in the marriage, even if the husband’s was better than his former wife’s (Starnes 2014). In discussing the state interest in the marital relationship the court noted: even “when the familial entity had been destroyed” the state had a “continuing interest in allocating the economic burdens fairly, so that member of the former family group, including the husband, were not individually destroyed by the crushing economic and psychological pressures. Alimony must therefore be measured largely by the need for support rather than the desire for vengeance” (id. at 418). Again, this framing focused on the balancing of the relative needs of each party and the ability to each party to support not only themselves but also each other. This indicated a different understanding of the purpose of alimony along with the expectation of both the husband and wife – the husband’s duty of support for a wife only went so far both in terms of him only being expected to pay what he could afford and also that alimony would not necessarily continue for the duration of a woman’s life (or until she remarried). Important as alimony cases were, the courts clearly refashioned the way alimony worked on a
practical level to combat the breakdown in the marriage ideal resulting from women working increasingly outside the home and also fewer women remarrying after a divorce.

The court’s discourse here clearly emphasized the move away from long term, alimony for women and instead towards shorter term, limited alimony. Additionally, alimony seemed to be for a specific purpose: to allow a woman to remedy the economic disadvantage she faced after a divorce. To be clear though, the court did not see the economic burden falling solely on the wife and illustrated the husband’s economic situation was perhaps only slightly better. Developmentally this was important and a clear and distinct shift from the 1940s and 1950s regarding alimony distribution indicating one way in which the purpose of alimony transitioned over time. This shift again, reconceptualized alimony away from the traditional purpose based on a husband’s long-term commitment to support his wife and placed a greater emphasis on the ability of a woman to support herself after a divorce with some level of assistance from her former husband.

The *Kover* case did not give significant guidance to how the balancing approach worked in a practical sense. However, two years later, the New York court more concretely defined the parameters around granting alimony. In this judgment the court specified it looked more directly at each party’s performance of their various marital obligations and duties. This adjudication showed the concept of performance at its clearest focusing on how the parties in a marital relationship (or supposed marital relationship) acted out their socially prescribed marital roles. This was very definition of performance driving the category under consideration. Focusing on the performance of
marital roles allowed the courts to attend to the problem faced in alimony cases of individuals not remaining faithful to their formal marital obligations.

In *Hessen v. Hessen* (33 N.Y.2d 406 (1974)) the court noted in fixing the level of the award, it “balanced significant aspects of the marital relations: the financial status of the respect[ive] parties, their age, health, necessities and obligations, their station in life, the duration and nature of the marriage, and the conduct of the parties” (id. at 411). When a divorce was sought for fault-based reasons the conduct of each in causing the divorce was important. Nevertheless, the court still used fault as only one aspect producing the eventual alimony determination. It was important to note that at the time this case was decided fault-based divorce remained commonplace in New York and no-fault divorce was not legalized. Given this context, convention required the court to judge the appropriateness of evidence in granting or denying a divorce and also take marital fault into account in the alimony award.\(^{37}\)

After no-fault divorce was legalized in Massachusetts (1975) and Maine (1977) the courts no longer took fault into consideration in alimony determinations. The formal rule of fault had broken down and thus the courts centered the discussion on other types of performance in line with the socially understood roles of husband and wife. An example of this type of decision from the Maine court discussed a variety of factors taken into account when determining the level of an alimony award. The wife’s ability to be self-supporting and her employment along with the “relative financial circumstances” were taken into account when determining the appropriate level of alimony (*Wood v. Wood*, 407 A.2d 282 at 284 (1979)).

\(^{37}\) Divorce and annulment cases were examined in detail in chapter 2.
The Massachusetts court in *Bianco v. Bianco* (371 Mass. 420 (1976)) gave greater guidance to what factors were used to determine appropriate alimony levels. The court stated it followed the Massachusetts General Laws §34 c. 208 that specifically laid out the factors taken into account when determining alimony awards. “The judge must consider fourteen mandatory factors set out in the third sentence of §34, namely "the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, and the opportunity of each for future acquisition of capital assets and income." In addition, the judge may, in his or her discretion, consider "the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit" (*Bianco* at 421). This particular quotation took into account the wife’s contributions to the success (or lack thereof) of the marital relationship.

Alimony was significantly and irreversibly reconfigured by this case as it was no longer granted to women based solely on their formal marital status and formal understandings of fault. The future earning capacity of the wife was important especially during the time when women did not occupy high paying jobs. The court discussed the monetized value of a woman’s contribution in *Bell v. Bell* (393 Mass. 20 at 26 (1984)). Justice Ruth Abram’s dissent recognized the “typical alimony recipient was a woman who had sacrificed her earning capacity to her marriage and who…must look to her former husband for financial support following a separation or divorce” (id at 26, Abrams dissenting).
An important shift in the way New York adjudicated claims around alimony was the use of the balancing approach to compensate a wife for stalling her career in order to assume the primary caretaking role. The latter half of the twentieth century saw women working extensively in the home and in the work force, engaging in the so-called second shift. This second shift resulted in women not only working full time in the public sphere but also doing the lion’s share of work in the home (Hochschild 1989). Confronting the question of how to compensate a woman for stalling her career the court looked to her role in the home (her performance in the marriage) as contributing on the same level as the husband’s monetary contributions. One example of this was in *Price v. Price* (69 N.Y.2d 8 (1986)) where Judge Stewart Hancock Jr. asserted property that increased in value “due in part to the indirect contributions or efforts of the other spouse as homemaker and parent, should be considered marital property” (id. at 11). Resulting from the court’s emphasis on various factors producing the alimony determination, the court “consider[ed] all the circumstances of the case and the respective parties to the marriage. Equitable distribution was based on the premise that a marriage was, among other things, an economic partnership *which both parties contribute as spouse, parent, wage earner or homemaker*” (id. at 14, emphasis added).

The specific and deliberate notation of a wife’s contribution as homemaker by the court was significantly important to underscore the shifting terrain around alimony. It marked a transition from precedents (examined in the previous section) framing alimony in very narrow terms based on a formal status. The importance of this development should not be understated both for how alimony developed across time but also the recognition that a woman was the spouse who more often relinquished her career to take
care of the family, saw her contributions to the marriage valued similarly to men’s financial contribution to the success of the marital relationship. As such, a wife deserved compensation not only for the domestic service she performed in the household but also for the choices she made in not reaching her career and thus economic potential. Turning to performance and the relative contributions of women allowed the court to confront the issue of failed marriages by centering granting alimony around a woman’s performance of her socially understood role in a marital relationship or contribution to the success or failure of the marriage relationship rather than simply the presence (or absence) of a formal marriage. Moreover, the court observed there was a “wide range of nonrenumerated services to the joint enterprise [of marriage]” (id. at 14). This opinion underscored women’s role to the marital relationship as separate and distinct from the husband’s and worthy of compensation through alimony.

Taken together these cases indicated the courts’ commitment to reviewing a variety of factors in determining the appropriate alimony award. Not only was a husband’s monetary contribution important but the homemaker role of the wife was monetized. Wives were no longer property of men and could no longer expect formal marital status to result in automatic alimony awards. On the flip side of this, however, women should also be compensated for their years in the marriage as caregivers. The courts’ discourse and framing emphasized women need support for the future due to their low earning potential in addition to compensation for being the primary caregiver and stalling career aspirations they perhaps had. The alimony cases I discussed here illustrated the courts’ emphasized on the husband and wife’s performance in confronting questions around alimony. Although performance was importance, during the continued
era of fault-based divorce, guilt and innocence was weighed as one factor but neither was a controlling.

The distribution of alimony was both forward and backward looking with the courts noting, as quoted above, multiple reasons comprising the alimony award that included looking back on each spouse’s contributions to the marital relationship. Simultaneously, the courts were also forward looking in shaping alimony focusing on when and how women could obtain employment and be self-supporting or at least in need of lower alimony. In making this formulation the court did not specify whether it looked to previous, current or future sources of income, but rather that this was one of the aspects of making the alimony decision.

Along with the changing place of women and short-term alimony, the court also looked at the resources of the husband in making the alimony determination on a number of occasions (see e.g. Brown v. Harble 940 A.2d 1091 (2008); Coppola v. Coppola, 938 A.2d 786 (2007)). Previous courts took into account a husband’s ability to pay as one of the factors in adjudicating the initial alimony award. However, with the shift toward short-term alimony not necessarily based on a woman’s remarriage or holding out as another man’s wife there was a shift in the husband’s obligation to support his wife. Put another way, the husband’s duty of support only went so far. There were instances when he could see his support end, or not have to pay alimony to his former wife at all. The developmental narrative followed here reflected a different understanding explored above that women were able to be self-supporting thus not in need alimony to the same degree as earlier time periods. This was a new consideration for the Maine court in conjunction
with an alimony award and represented yet another shift away from the state of alimony in 1942.

Judge Paul Rudman for the Maine court observed in *Arey v. Arey* (651 A.2d 351 (1994)) under Maine law the court took into account “all factors relevant to a particular divorce” and that although “Judy [wa]s entitled to a higher alimony award [the court] limited the award on the basis of Owen’s finite resources” (id. at 353-355). In a second case, *Spencer v. Spencer* (720 A.2d 1159 (1998)) the court noted: “although there was no magic to the device used, the court must order at least a nominal amount of spousal support in order for the court to had the authority to alter or amend that order at a later date. Accordingly, we have awarded spousal support of $1.00 per year to “permit the trial court to modify the award on an appropriate showing of a change in circumstances” (id. at 1162-1163). In this case Mr. Donald Spencer voluntarily retired because he “didn't enjoy working any longer” (id. at 1163). Consequently, if Mr. Spencer resumed working the “balance of the factors considered by the court might shift significantly” thus requiring a change in the alimony award (id. at 1163). A nominal amount of alimony was granted to the spouse because “the court could not alter or amend that which did not exist” thus if no award was given there would be no option to amend it (id. at 1164). This was an important side point by the court. A number of cases saw the courts grant women alimony in the amount of $1 per year. The court explicated the reasoning here, stating that if no alimony was given in the initial judgment then it could not later be amended. The purpose of granting women this nominal amount of alimony was that so if the subsequent fortunes of either spouse change (and either spouse petitioned the court) the court was able to amend the award. If no award was given the court could not simply
award alimony at a later date. Alimony (and child maintenance) must be set in conjunction with the final divorce decree.

The framing of these judicial opinions cemented a number of the themes highlighted in this chapter. First: the gendered roles within the marriage. As much scholarship in political science indicated there was a distinct way in which men and women operate in a marital relationship with clearly defined gender roles. Centering the judicial opinion on the contribution of each party to the marriage brought into clear focus the distinct and separate roles of the husband and wife. Commenting on the wife’s contributions to the marriage in terms of home maker and caregiver gave the wife a more independent role in the marriage than early alimony laws simply granting or denying women alimony based on a somewhat arbitrary category – fault – did.

The baseline of alimony laws set in 1942 was the formal status of a wife. Alimony not only was granted to women based on their formal wifely status but it was granted to women alone. Gender was obviously important in alimony determinations even after the de-gendering of alimony in the 1970s. Second, and related to this, was the duty of support. From the foregoing analysis it was certainly clear in the 1940s and 1950s that men should support a wife (indeed the parameters around alimony of it being for life or until a wife formally remarried cemented this obligation). What was equally clear was that developments in alimony fundamentally alter this baseline principle. As courts looked towards performance in the 1960s and beyond judges took into account performance, which was the acting of socially understood roles of husband and wife, rather than the formal status of husband and wife. While this was perhaps more pronounced after the rise of no-fault divorce, it certainly began before the 1970s and
worked alongside this irreversible change in family law and the way marriage worked in society.

**Terminating Alimony**

While determining the alimony award granted to women was an important judicial function, at the other end of the spectrum courts were also responsible for terminating a woman’s alimony upon a showing of a “substantial change in circumstances.” I previously noted the baseline for husbands to terminate their alimony obligations, which in 1942 revolved around the formal status of marriage. A wife’s alimony terminated upon her formal remarriage. Formal status, then, resulted in the termination of a husband’s marital obligation. However, over time courts were faced with the breakdown of this ideal of marriage as fewer women remarried after a divorce. Consequently, courts had to look behind the formal rules. In doing so the courts, in cases concerning terminating alimony, looked to the wife’s performance of socially understood marital obligations and duties. Controversies surrounding terminating alimony in my data set revolved around the wife’s formal remarriage. No cases reached the highest state appellate level in my data set concerning the husband seeking to terminate his alimony payment based on his former wife’s death.\(^{38}\) In this section of the chapter I argue that over time the courts rejected the formal remarriage termination rule and instead looked at performance of marital obligations and duties to terminate the husband’s alimony award. In doing so the courts specifically attributed marital obligations to individuals

\(^{38}\) This was not a surprising result as the highest appellate court generally only hears cases based around important legal issues that garner significant controversy at the courts below. Part of the purpose of the state supreme courts issuing rulings was to set statewide policy. There was little controversy over alimony terminating upon a person’s death.
(specifically men regarding support) who had not actually contracted a formal marriage. This change came about in order to preserve the commitments to the institution of marriage.

The specific problem, laid out above and stated again here, was that women remarried at much lower rates and therefore terminating a woman’s alimony upon her formal remarriage was unworkable. Consequently, and as a way to solve this problem, the courts looked towards a woman’s performance in holding out as another man’s wife and performing the socially understood role of a wife without a formal marriage. Some cases arose in the 1940s and 1950s around formal remarriage terminating alimony. However, by and large the courts’ focus was on a woman being in a marriage-like relationship or holding out to be the wife of another man.

The particular conception of marriage forwarded here indicated two key themes of this chapter. First, the duty of support only goes so far. When a woman engaged in a marriage-like relationship with another man support from her former husband was terminated. Second, it indicated the nature of cohabiting couples. There were no statutory obligations and benefits couples received based on unmarried cohabitation thus these cases were treated on an individual basis and support was determined by various markers that mirrored married performance. These markers included performing tasks akin to being in a formal marriage i.e. creating a joint bank account. As such, when a woman holds out as another man’s wife she must look to him for support and there was an assumption that he would furnish this support. Moreover, the first husband’s duty of support was limited to women who did not receive support from another source. These cases also indicated the impact of remarriage and the commitment to a new partner. In
line with the framing around these cases the courts looked at whether the former wife’s new partner did have an obligation of support for her and how this in turn impacted the support obligation of the former partner. The courts fashioned this alternative rule to terminate alimony based on the differing nature of informal marital commitments.

In Maine, Massachusetts and New York the framing around terminating alimony shifted from formal remarriage to performative marriage at different rates but the overall trajectory remained shifting from a time where formal remarriage was central to the end of the time period where formal remarriage was absent from the formulation and the court instead turned to performance in terminating a husband’s alimony obligation. As a result of these shifts the importance of formal marriage for the termination of alimony was significantly and irreversibly reduced. There was no need for a woman to be in a formal marriage to have her alimony terminated. There were substantial consequences for the obligations (of husbands) and the rights (of wives) in the event of a breakdown in the ideal of marriage (a divorce, with resulting alimony adjudication).

In 1938 the New York State legislature amended the alimony statute removing the requirement of formal remarriage to terminate a husband’s alimony obligation. However, both Maine and Massachusetts continued the commitment to formal status until the 1960s when it became clearer women remarried at lower rates. Formal marriage and remarriage rates declined in the 1970s with couples forming alternative family structures outside the traditional parameters of government regulation. Therefore, framing alimony judgments in the 1970s in the same way as the 1940s placed a burden on a former husband to continue supporting his former wife when she may be performing the functions of another man’s wife (Polikoff 2009). This was fundamentally problematic for the court
and resulted in courts turning to alternative mechanisms in order to terminate alimony.

The shift opened up possibilities for individuals who were not in a formal marriage to remove obligations (for husbands) and remove benefits (for wives) as judges incorporated an alternative strategy for termination: if a woman was cohabiting with a non-blood related man and holding out to be his wife. In other words, this performative aspect relied explicitly on a woman performing the functions understood as wifely even in the absence of a formal status. In doing so, the courts illustrated that focusing on performance enabled them to bring judgments in line with the way individuals were operating in society. This also demonstrated individuals who were not operating within the traditional boundaries of marriage (un-related individuals cohabiting) and living in marriage-like relationships could be brought into the fold of benefits and obligations by the courts through shifting the focus to performative marriage. For the courts there were no statutory requirements to attribute benefits and burdens to unmarried cohabitants. Instead the courts considered on a case-by-case basis as to whether the woman was acting as the wife of her partner through taking on his surname, opening a joint bank account etc. If she was then her alimony from her former husband was terminated.

_Terminating Alimony: Formal Remarriage_

The traditional parameters around alimony indicated it terminated upon a wife’s formal remarriage thus her occupying the formal status of a wife to another man. It seemed as though the problem for the courts was how to shift the obligations from one man to another and formal remarriage accomplished this goal. As discussed above, alimony was primarily to aid a woman from being economically destitute after a divorce.
and therefore the courts sought to ensure at least a modicum of support from a former husband. A finite set of circumstances existed resulting in the husband’s continued support obligation even after his wife’s remarriage. This was primarily limited to instances where the second husband was unable to support the woman and she would be a ward of the state. In confirming this, Judge Sidney Thaxter of the Maine Supreme Judicial Court in *Bubar v. Plant* found: “remarriage of a divorced wife did not itself terminate her right to alimony, but that it did make out a *prima facie* case which required the court to end it in the absence of proof of some extraordinary circumstance justifying its continuance” (*Bubar v. Plant*, 141 Me. 407 at 410 (1945) emphasis in original). While this language suggested theoretically remarriage did not necessarily or automatically terminate alimony the eventual ruling in this case did terminate alimony.

The court concluded the wife offered no proof of continued need other than wishing to “live with her second husband in the way in which she lived prior to her marriage to him” (id. at 411). Judge Thaxter noted: “that was hardly a valid reason for its continuance. The first husband was under no obligation to support her as another man’s wife in the same status as she lived as a single woman” (id. at 411). Reasoning it was “against public policy in the ordinary case for one man to be supporting the wife of another who had himself assumed the legal obligation for her support” the court found it “so illogical and unreasonable… [and was] characterized as legally and socially unseemly. Two husbands should not be liable for the obligation of support for a woman” by virtue of the new marriage (id. at 410). For the Maine court, this issue was settled in 1945 as the court indicated it was possible for remarriage to not terminate a woman’s alimony. However, the burden was placed squarely on the woman (or the person seeking
the continued alimony) to prove she had insufficient support from her new husband. This discussion also picked up on the notion that legally the court perhaps saw alimony as a woman being transferred from one husband to another. This notion was underscored by the idea that a former husband must support his ex-wife until she found another husband to support her. In 1942 this was not at all problematic for the courts as women frequently remarried thus terminating the husband’s obligation when she did but it was problematic as women remarried at lower rates.

Moving forward with this issue nearly fifty years, a case from Massachusetts, Keller v. O’Brien (420 Mass. 820 (1995)) found the Massachusetts General Laws, c. 208, §37 “provide[d] for modification of alimony awards but did not specifically address whether remarriage require[d] termination of alimony payments” (id. at 823). However, the solemnization of a new marriage did present “prima facie evidence of a material change in circumstances which would warrant termination” (id. at 823). In other words both cases (Bubar and Keller) indicated remarriage presented the first evidence that a change in circumstances occurred but it was up to the court to determine whether this was sufficient to warrant the termination of the first husband’s alimony obligation. The posture in Keller fell largely in line with Bubar finding there could be circumstances when a husband was required to continue supporting his former wife after her subsequent remarriage. The court in Keller noted a preference for alimony to be terminated unless there was “proof of some extraordinary circumstances, established by the recipient spouse, warranting its continuation” (id. at 826).

In construing alimony in this fashion the court affirmed the general presumption of alimony ending upon a woman’s formal remarriage but certain circumstances required
“courts to override this principle on evidence produced showing certain rare and
exceptional circumstances (id. at 826). Only “rare situations” involving “on-going and
legitimate need for continuation of alimony payments” warrant the court continuing
alimony (id. at 827). The sole reason for this continuing alimony was if the “remarried
recipient spouse becomes a public charge” (id. at 827).

The court stated the rationale behind continuing the former husband’s alimony
obligations was to prevent “burden[ing] the taxpayers of this Commonwealth” (id. at
827). Under this conception it was likely for alimony to terminate upon a woman’s
remarriage. Indicated in both Keller and Bubar was an understanding of continued
alimony only if either the second husband was unable to support his wife. The courts did,
however, transition to a focus on performance when the remarriage termination rule was
unworkable. The shift towards performance irreversibly altered the way alimony worked
as alimony was terminated if a man was supporting a former wife, whether in a formal
marriage or a marriage-like relationship. Under either circumstance the former husband’s
alimony obligation terminates.

The framing of alimony in the two cases here pointed to the importance of two
related factors. First, the husband’s support obligations terminated at some point and
second the assumption of support (without legal obligation) between unmarried
cohabitants was based on various performative factors. At the heart of the issue, it was
perhaps inconsequential for the court whether this support was through a formal marriage
or a marriage-like relationship. Instead, the realities of the support and performance of
the woman were important. This was seen even more clearly in the next section.
Terminating alimony: The holding out question

Requiring alimony to terminate upon a wife’s remarriage satisfied the policy of not having two men supporting the same woman as Bubar v. Plant above indicated. However, this (re)marriage ideal broke down in the 1960s as couples formed alternative family structures outside of formal marriage. Therefore, under the traditional alimony termination rules it was unclear how courts could ensure a woman was only support by one man. Formal marriage was one way in which the government ordered society. If couples were not in formal marriages then they were not bound by various obligations and benefits of marriage. This breakdown in the ideal of marriage resulted in the courts fashioning alternative mechanisms to remove the divorced husband’s alimony obligation.

In 1938 the following provision was added to the New York Domestic Relations Law focusing on alimony: “the court in its discretion upon application of the husband on notice, upon proof that the wife was habitually living with another man and holding herself out as his wife, although not married to such man, may modify such final judgment and any orders made with respect thereto by annulling the provisions of such final judgment or orders or of both, directing payment of money for the support of such wife” (L 1938, Ch. 161). This amendment altered the 1909 alimony statute that stated: “public policy dictate[d] that a woman who ha[d] received a final decree of divorce in her favor from her husband should no longer be permitted to hold her husband liable for alimony after she had again remarried” (Waddey v. Waddey 291 N.Y. 251 at 255-256 (1943)).

In recognizing a woman did not always remarry after a divorce, the 1938 amendment turned to a woman’s performance of the socially understood role of a wife as
sufficient to terminate her alimony and correspondingly her former husband’s obligation. The developmental shift towards performance here was clear. Instead of looking at formal marital status the court looked at whether a woman was holding out to be the wife of another man and the various factors that proved this standard. The court’s opinion Waddey did not specifically define the factors comprising holding out but placed a clear emphasis on performance and holding out rather than formal marriage. The standard of holding out ultimately turned on whether a woman was performing the functions associated with being a wife and the developmental narrative of this section illustrated the courts’ discourse in explicating the factors that comprised holding out absent the formal status of marriage.

The turn to performance and holding out enabled the court to solve the fundamental problems associated with the specific breakdown in the marriage idea I examine in this chapter: women’s lower remarriage rates after a divorce. Performance allowed the court to solve the problem of a husband supporting a wife who was practically being supported by another source. This shift from formal marriage to performative marriage was particularly important as it suggested formal marriage was not the only avenue for obtaining or removing marital benefits and obligations. Additionally, it expanded the circumstances under which a husband’s alimony obligation could be terminated.

While it was not unsurprising at this time (1943) that a divorced woman would remarry, the New York Legislature’s amendment envisioned an alternative avenue for a husband seeking to terminate his alimony obligation. The amendment implicitly recognized the fact a woman could circumvent the remarriage requirement by living with
another man without formally marrying him. As a result of the amendment, couples were treated differently depending on the date of their divorce. As such, husbands who divorced prior to the amendment filed suit seeking to amend their alimony obligation towards a former wife who was acting as the wife of another man. Finding a solution to terminating a husband’s alimony obligation not premised on formal marriage was important as alimony had a real and substantial effect on individual’s lives.

The suits arising after the 1938 amendment required the court to determine the scope and applicability of the amendment to individuals whose divorces were finalized prior to the amendment. One key case in this area from the New York court was *Waddey v. Waddey* (290 N.Y.251 (1943)). In this case Mr. Everett Waddey petitioned the court to terminate his alimony payments as his wife was living openly with another man. In construing their decision, as limited by the legislative intent, the judges on the majority indicated they could not retroactively apply the law to Mr. Waddey’s claim even though his wife “fail[ed] to otherwise live, subsequent to the divorce, in her character of former wife” (id. at 256). While the majority opinion simply stated the court was unable to terminate Mr. Waddey’s alimony payment because the terms were already set. The dissent by Judge Charles Desmond, found “if all this be binding law, strange results follow” (id. at 257, Desmond dissenting).

Judge Desmond framed this conundrum in a very different way to the majority. Instead of couching behind legislative intent, Desmond examined at the practical result of the court’s decision, stating: “A wife who file[d] her divorce judgment in April of 1938 would find herself deprived of support from her former spouse if he could prove her guilty of unlawful cohabitation while, her erring sister, whose decree ha[d] been handed
down in February of that year, w[ould] be safely beyond the reach of the statute” (id. at 257, Desmond dissenting). For Desmond this was the most important factor: the practical result of the court’s decision and the difference in treatment based on dates. This was an interesting posture by Desmond bringing into question the court’s problem solving ability.

It was perhaps not particularly noteworthy or controversial that when an amendment was added to a piece of legislation it had a disparate effect on individuals subject to the new amendment and those that were not. The majority opinion’s rationale was based purely on statutory grounds of when this amendment was ratified. By all accounts, the majority opinion allowed a woman to still collect alimony from her husband while living with another man, which crafted a husband’s support obligation as extensive. Under the majority’s conception of marriage only a formal marriage removed the husband’s obligation even if a woman was performing marital obligations and duties towards another man.

The majority’s understanding of the case appeared to center very specifically on the statutory construction. For Desmond, performance was important, but for the majority it was not. It did not matter whether a former wife was performing the duties and obligations of marriage with another man. What mattered was her formal marriage (or lack thereof). The issue for Desmond was of transgressing marriage and preserving marital obligations when the wife deserved them. Moreover, under Desmond’s assertion it was clear the wife no longer deserved alimony as a marital benefit if she was performing wifely duties for another man outside the boundaries of a formal marriage through holding out. Resulting from this case, the court’s majority indicated alimony was
still terminated when a woman was holding out as another man’s wife but the amendment had no retroactive applicability. The baseline of alimony in New York was set in this case as fundamentally turning on performance. Even so, the question of when alimony could terminated if a woman was holding herself out to be the wife of another man was far from settled in Waddey v. Waddey. In this case the New York court did not indicate what exactly was meant by holding out.

Another aspect that remained unclear from this case was the extent of cohabiting couple’s obligations towards each other. Judging from the discussions around loss of consortium (examined in chapter 5) the courts collectively found there were very few, if any, formal obligations flowing from this non-legal, but perhaps marriage-like relationship. However, as the developmental narrative progressed into the 1960s and 1970s the courts assumed marital obligations and duties of individuals not bound by the formal status. This assumption of obligations (especially on the part of men) was akin to the discussion in chapter 4 around second parent adoption where individuals had not contracted to marry but there was an assumption they took on marital responsibilities including parenting a child.

Turning back to alimony, the question of what obligations flowed from a performative marriage-like relationship received explicit discussion in cases in the second half of the twentieth century. The narrative in this chapter demonstrated the courts turning to the underlying factors behind a woman’s performance of the socially understood role of a wife in order to grant her alimony (as illustrated in the preceding section) and terminating her alimony as I examine here. While marriage presented a *prima facie* case alimony should be altered, “unmarried cohabitation [was] not prima
facie evidence that alimony should be terminated because cohabitants had no legal obligation to support each other” (Haag v. Haag, 609 A.2d. 1164 at 1165 (1992)). The specific language here indicated the importance of formal marital status to grant benefits and corresponding obligations. The formulation presented in the quotation above indicated cohabitation did not automatically lead to support where as marriage did. However, if a couple cohabited and acted married there was an assumption of support even if absent a legal obligation. This case from Maine presented a different angle to the termination of alimony question than the New York case of Waddey decided almost fifty years prior. The two cases indicated cohabiting and holding out as another man’s wife were not the same thing.

In 1978 the New York court gave greater clarity to the holding out provision the legislature ushered in forty years prior. As I show here, the New York court added further specificity to what the holding out provision meant on a practical level. In doing so the court continued to frame the discussion around a wife’s performance in being in a marriage-like relationship. This explicitly allowed the court to solve the problem of the breakdown in the ideal of marriage as women remarried at lower rates, in addition to various other marriage and family law changes in the 1960s and 1970s.

In Northrup v. Northrup (43 N.Y.2d 566 (1978)) Mr. Ray Northrup ceased alimony payments after discovering his former wife began “living openly and notoriously with another man,” which was the classic common law marriage framework (id. at 569). For Mr. Northrup, this falls squarely within the parameters laid out in the 1938 amendment to the alimony statute. There was no question over the applicability of the amendment to this case. Therefore, the entire question rested on the wife’s performance
in giving the outward appearance of being another man’s wife, or satisfying the holding out provision of the amendment. As alimony questions fundamentally affect the lives of individuals, the court must judge the meaning of the Domestic Relations Law stating a woman was "holding herself out as his wife, although not married to such man" (id. at 570).

The Court of Appeals found although Mrs. Anna Northup lived with another man this was not the same as holding herself out as another man’s wife (id. at 571). In order to prove a woman was holding out as another man’s wife the court had a two-part test. The first part of the test: the “habitually living with another man” provision was more readily established than the stringent holding out aspect. In order to prove the holding out provision the court focused on the woman’s performance stating it looked to “conduct which would lead a person to believe that the parties were living and associating as husband and wife” (id. at 570, emphasis in original). The performative aspects under consideration by the court focused exclusively on the woman’s performing the socially understood role of a wife.

It was clear to the court Mrs. Northrup was living with another non-blood related male thus satisfying the first prong of the alimony termination requirement. However, in delimiting the boundaries of this provision, the court specified the type of conduct necessary to establish this second prong: “to be sure, conduct may constitute a holding out. For example, one court had held that a woman holds herself out as a man's wife by these actions: (1) applying for a telephone, designating him as her spouse and asking that she be listed in the directory with his surname; and (2) changing the names on their joint checking account so that she uses his surname” (id. at 571). This formulation indicated in
order to take on the role of another man’s wife a woman must in all senses join his household. As such, performativity was key in determining whether the woman was acting as another man’s wife.

These requirements were not inconsequential and perhaps a hard burden to meet. They also suggested a woman must take numerous performative measures save contracting the actual marriage ceremony to illustrate the holding out aspect. As such, the court denied Mr. Northrup’s petition to terminate his alimony because his wife was not, under the meaning of the statute, holding out to be another man’s wife. Resulting from this framing, there was no assumption Mrs. Northrup was supported by another man.

Judge Lawrence Cooke’s majority opinion specifically referred to the fact there must be certain kinds of actions or performance to warrant a finding of holding out. Simply stated: “there was no evidence here other than the plaintiff for six months habitually lived with another man. This was not enough” (id. at 571). Although the final judgment in this case did not terminate Mr. Northrup’s alimony obligation the case was important in the developmental trajectory of alimony as it indicated the underlying principles behind how alimony could be terminated. The court here centered performance in the decision over when alimony could be terminated. Further, formal marital status was entirely removed from the decision even though the types of performance analyzed by the courts focused on actions that formal wives engage in.

Judge Sol Wachtler dissenting noted the holding out provision, could be easily circumvented as the requirements were so specific and detailed. This was emphasized by the language of the opinion, stating: “I could not agree with the majority that the Legislature intended § 248 of the Domestic Relations Law to be interpreted in such a
narrow, technical and unrealistic manner” (id. at 573, Wachtler dissenting). Further Wachtler asserted: “a court of course could not rewrite a statute but the statute must be given a reasonable interpretation -- one which will maintain its effectiveness and carry out the legislative intent” (id. at 573). This seemed to imply the court could, and should, go beyond the words of the statute and look at the meaning of it as applied to the various controversies arising before the court. Wachtler asserted judicial decision-making must be in line with what the legislature intends, but through an interpretation by the judiciary. The dissenting opinion spoke specifically to the type of court-centered legal development I analyze in the dissertation. This opinion specifically saw the court creating development towards performance underlying the granting of marital benefits and obligations. At the same time, this development and change was designed to preserve the integrity of the institution of marriage. Looking at the practical result of the cases was an important aspect of this developmental trajectory in alimony.

The Northup case was not the first time the judges of the New York Court of Appeals disagreed over the applicability of the alimony statute. As explored above the majority and dissenting opinions in Waddey also disagreed on the practical result of the courts’ decision to not retroactively applying the holding out amendment. Referring to the court’s previous case of Waddey v. Waddey Judge Wachtler in Northrup noted the amended alimony “provision [wa]s literally interpreted to require a ceremonial remarriage. As interpreted the statute contain[ed] a loophole which permit[ed] a former wife to continue to collect support from her former husband although she was living with another man holding herself out to be his wife, so long as she simply avoided formalizing the relationship by a marriage ceremony” (id. at 572-573, Wachtler dissenting).
Judge Wachtler believed *Waddey* was wrongly decided and the court’s decision in *Northrup* “compounded the error by giving a technical interpretation to the liberalizing amendment. And, once again, they had read the statute in such a way as to virtually render it a dead letter by requiring a degree of formality, which the majority must recognize, was unrealistic in terms of current social standards and practices. Indeed the majority concede[d] that their interpretation of the amendment create[d] a new method for avoiding the statute” (id. at 573, Wachtler dissenting). Wachtler believed although the court should follow legislative intent it must also interpret statutes and give effect to positions that “maintain its effectiveness” (id. at 573, Wachtler dissenting).

Referring to societal trends Wachtler clearly meant the trend towards cohabitation instead of marriage (and the breakdown in the marriage ideal requiring a reconfiguration of how alimony worked) as he indicated the court should consider “the extent of the wife's new relationship without respect to formalities” (id. at 573). Wachtler also noted: “today's decision leaves the courts powerless to relieve the former husband of the obligation of subsidizing his former wife's affairs no matter how unfair this may be under the circumstances. It was hard to imagine that the Legislature ever intended such a grotesque result” (id. at 573, Wachtler dissenting). This unfairness clearly pointed to the economic hardship that may befall the husband because he was required to continue support of a woman who perhaps was supported by another man. Even so, the majority opinion focused wholly on the performance of the wife in meeting the various criteria set out for satisfying the holding out provision of the alimony termination statute.

Importantly here, the opinion indicated the gendered nature of holding out. The focus in both the majority and dissenting opinions in this case was around the woman’s
performance. The performance of Prentice (the unrelated male Mrs. Northrup cohabited with) or Mr. Northrup did not figure prominently in the opinion. The rationale in the opinion was based almost entirely on Mrs. Northrup’s performance of the socially understood role of a wife. The parameters put forward by the court for proving the holding out focused on a woman taking various steps to essentially join the household of her new partner, therefore result in an assumption of support.

The opinions centering performance fundamentally altered the importance of formal marriage in alimony determinations. According to Wachtler a ceremonial marriage was no longer necessary to terminate the alimony obligation of a former spouse and he drew the boundaries around the holding out provision more loosely. This was contrasted to the strict interpretation of the statute by the majority illustrating the importance of some semblance of marriage in order for support to terminate even though it did not require an actual marriage ceremony.

The framing of the majority and dissenting opinions emphasized performative factors to determine whether a woman was holding out as another man’s wife. Performance was clearly more important than a formal marital status. Both opinions referred to the fact statutory law stated a woman did not have to formally remarry in order for her alimony to terminate. The duty of support by the ex-husband for the majority opinion carried much further than the duty of support for the dissenting opinion. This, then, corresponded to the assumption or presumption of support by another man. Of course, there were no statutory provisions relating to non-married couples supporting each other, but there was clearly an assumption in the dissenting opinion.
The presumption of support by the unrelated male had the effect of terminating the ex-husband’s alimony obligation. In order to confront this specific problem of women not remarrying after a divorce the courts turned to performance and specific performative aspects of the relationship that result in only one man supporting a woman, which was in line with the purpose of alimony statutes. The majority opinion stated: “the fact that a woman may avoid the loss of alimony by tailoring her conduct should not be surprising” (id. at 571). The language here was indicative of the fact women were not always innocent and could use the statutory construction of alimony to their advantage to circumvent the alimony termination requirement.

The New York court defined the parameters around the holding out aspect more clearly seven years later. In \textit{Bliss v. Bliss} (66 N.Y.2d 382 (1985)) Mr. Richard Bliss sought to terminate alimony payments alleging his former wife was living with another man and had been on and off for 14 years. The lower court found Mr. Bliss did not meet the burden to show “Virginia Bliss, through her conduct, had held herself out to be another man's wife” (id. at 386).

The majority opinion, written by Judge Fritz Alexander, concluded Mrs. Virginia Bliss was not presenting herself as “married to Flemming” (id. at 385). Upholding the standard set in \textit{Northrup} the Court of Appeals noted the two-pronged test to determine whether alimony should terminate. The court also noted it was the husband (or the person seeking the termination) who bore the burden of proof to illustrate the wife was holding out as another man’s wife. The court noted that some “objective evidence of a holding out by the former wife” must be present (id. at 387).
In order for a woman to have her alimony terminated there must be some outward showing the woman and her new partner were portraying themselves as married. The standard fundamentally centered on the woman’s performance rather than Flemming’s actions. The woman must show she was joining her new partner’s family rather than the other way around. If this occurred there was almost an assumption of support by the male partner. There was no discussion in any of these cases surrounding the actions of the male partner or any attempt made to discern whether the new male partner was actually supporting her. In this particular case, the court dismissed attending “family activities” as insufficient to prove holding out as the court set a floor beneath which the level of proof required could not fall (id. at 388).

The rationale in this case provided an important clarification even though it did not set a blue print for future cases on the same issue. For the court, it appeared the proof for holding out was only sufficient when a woman took nearly all steps short of the legal marriage ceremony to join the man’s family. The examples the court provided as proof of holding out all focused on the wife’s behavior in forming a family unit with the new partner. Even so, these decisions indicated formal remarriage was no longer necessary in order to terminate a woman’s alimony. Instead, the court continued to look to the underlying principles of marriage – a woman’s performance of the socially accepted role of a wife.

The court also acknowledged the statute could be easily circumvented by the “dependent” but urged a legislative remedy rather than court action. Indeed, the Court of Appeals remarked the Legislature made “numerous unsuccessful attempts following the Northrup decision to amend the language of Domestic Relations Law § 248 (id. at 389).
Both the *Bliss* and *Northrup* cases indicated the types of actions showing a woman was holding out to be another man’s wife. The unanimous court in *Bliss* relied heavily on the previous discussion in *Northrup* to indicate a similar posture. In both cases, part of the rationale focused on the fact both women were referred to by their married names of Mrs. Northrup and Mrs. Bliss, respectively, during their relationships with a second man. Additionally, in *Bliss*, Flemming left Mrs. Bliss’ home establish his own home in another state, which Mrs. Bliss did not visit.

Although attending family functions was an outward display of a relationship it was insufficient, along with sharing a bedroom to satisfy the prong that Mrs. Bliss was holding out to be Flemming’s wife. Indeed, the court noted: “the record did not reveal any conduct by Mrs. Bliss, either through direct action or by implication, indicating that she ever wished anyone to believe that she was married to Fleming” even though the two shared a bedroom (id. at 388).

Taken together these cases indicated a fairly expansive understanding of the first husband’s duty of support. Indeed, there were substantial steps a woman must take to illustrate she was in fact holding out as the wife of another man. In any event, performance was still used to solve the problem in the breakdown of the ideal of marriage that saw women not remarrying at the same rates in the 1960s and 1970s as they did in the 1940s and 1950s.

In line with the New York court, the Massachusetts court in 1984 gave meaning to the two provisions to terminate alimony: holding out and habitually cohabiting with an unrelated male. The court asserted alimony would terminate upon the “wife’s living together with a member of the opposite sex, so as to give the outward appearance of
marriage” (Bell v. Bell 393 Mass. 20 at 21 (1984)). This departed in significant and meaningful ways from the previously adhered to standard in Massachusetts. As such, the court focused not on the formal remarriage of a woman in terminating her alimony, but instead whether she performed the functions (duties and obligations) and received the benefits (primarily support) of being a wife. The Bells alimony agreement specifically stated that if Anne Bell cohabited with another man her alimony terminated but was silent on “any significant actual support or a new right to support from a man” (id. at 22). This case, then, presented a limited notion of the husband’s support obligation after a divorce and did not necessarily correspond with her actually being supported by another man. The case instead relied on an assumption of support underlying cohabitation.

This new standard of holding out and habitually living with another man was not without controversy on the court as it was subject to abuse by a woman who wished to continue receiving alimony. This was not lost on Justice Francis O’Connor, dissenting in Bell. He stated: “the provision permitting a termination of alimony in the event of the plaintiff’s remarriage might give her reason to decide against remarriage” (id. at 23).

For another dissenting justice, Herbert Wilkins, the private nature of “sharing a bedroom” was “inconclusive on the question of an outward appearance of marriage” (id. at 25, Wilkins dissenting). This notion perhaps reflected a changing societal understanding that sex occurred more frequently outside of marriage and it did not automatically lead to a formal and committed relationship (Coontz, 2005).

A second dissent focused on a different aspect: the job of the court in protecting a wife in a divorce. Justice Ruth Abrams asserted women were disadvantaged in divorce proceedings and separation agreements finding they had “little bargaining power and to a
large extent must rely on judicial supervision to ensure their entitlement support was not made contingent on unjust and unreasonable conditions” (id at 26, Abrams dissenting). Even so, Justice Abrams opined a man did not need to continue his support of his former wife when “the recipient’s need was eliminated or met by another source.” Until such a time it was his obligation to support her (id. at 26, Abrams dissenting). Abrams did not elaborate on what this other source may be but nevertheless centered the opinion on the husband’s duty of support.

The Bell case was particularly important for illustrating the transition in the place of women in society and how the court decided cases in light of these changed circumstances. On the one hand the majority opinion noted Mrs. Bell lived with another man, which was sufficient to terminate alimony. However, this also illustrated her supposed economic reliance on a male figure. In terminating a woman’s alimony when she was holding out to be the wife of a second man the court seemed to imply a woman was being passed from one man to another. In these cases the court did not ascertain whether a woman could support herself; instead, the justices were primarily concerned with the male source of support. Indeed, Abrams’ dissent emphasized the continued reliance of women on men and in some sense the innocent nature of women. One of the court’s purposes was to protect an innocent wife from being taken advantage of by her husband.

The potential for the holding out aspect of alimony termination agreements to be evaded by a wife was a common theme in the dissenting opinions in New York. Judge Victoria Graffeo, dissenting in Graev v. Graev (11 N.Y.3d 262 (2008)) found Mrs. Linda Graev could avoid her alimony being terminated by staying with her partner “24 hours a
day and sleep[ing] together every night for years – but so long as they maintain separate bank accounts and not sharing expenses” the clause was violated (id. at 279). According to Graffeo this was an unfair disposition towards the husband as he was forced to continue supporting a woman who was part of another household and was presumably supported by that man.

The understanding of wives put forth by Graffeo indicated women were independent actors capable of defying the spirit of the alimony agreement. This picked up on much of what the New York court analyzed above in Northrup where the court expected or at least was unsurprised if a woman specifically engaged conduct resulting in her alimony continuing. This particular piece of the opinion demonstrated performance as primary for Graffeo. The woman in could actively occupy the place of a wife of another man while still retaining her alimony from her husband if she did not fully immerse herself into the new partner’s family through creating joint bank accounts and other mechanisms defined by the court in Northrup and Bliss. Here, Graffeo focused more on the disadvantage men faced in alimony termination questions, which was certainly a development from earlier cases. This was also similar to the judicial framing of the Maine and Massachusetts courts around the husband’s ability to pay.

The discussion in this particular case centered on the meaning of cohabitation, which was especially important here as the parties’ separation judgment stated alimony terminated if the wife lived with another man for a continuous period of 60 days. Again, the rationale concentrated on performance rather than formal marriage in dispensing or in this case removing the wife’s benefits of her former marriage.
Performance allowed the court to solve the problem associated with the breakdown in the ideal of marriage, which specifically in this chapter was the fact fewer women remarried after a divorce. By relying on formal marriage the courts faced a practical problem of two men supporting the same woman, which the courts sought to avoid. Discussing the meaning of cohabitation (and providing a definition of when alimony should be terminated) Graffeo asserted there was a “commonly accepted core meaning [of cohabitation]: habitually living with an unrelated adult in the same residence while engaged in an intimate relationship without being legally married to that person” (id. at 276).

Graffeo went on to conclude the term cohabitation was “synonymous with the phrase habitually living with another person for the purpose of the maintenance termination provisions of Domestic Relations Law § 248” (id. at 277 quoting Bliss v. Bliss 66 N.Y.2d 382 at 389 (1985)). This definition of cohabitation was particularly interesting because it supposed an intimate relationship between the two leading a presumption of support and care. This presumption assumed the two were performing duties and obligations associated with marriage.

Including part of the definition as an intimate relationship indicated a difference between platonic friends and cohabiting (and supporting) partners in a marriage-like relationship. In this case particularly, Mrs. Graev asserted her relationship with M.P. was solely platonic and therefore the inward private actions did not constitute holding out. While outward public performance was one aspect to show holding out, the court here also noted the inward private performance of non-married couples in satisfying the
holding out provision. The dissenting opinion here assumes support by the unrelated male towards Mrs. Graev due to their cohabitation.

Conversely, Judge Susan Read’s majority opinion found Mrs. Graev was not holding herself out to be the wife of another man even though she was habitually living with him. The alimony agreement in this case specifically terminated Mrs. Graev’s alimony if she cohabited with another man for a 60-day period or longer alimony. Similar to the dissenting opinion, the majority also focused on the meaning of cohabitation.

Mrs. Graev argued the relationship between her and M.P. was simply platonic, “as proven by evidence of M.P.’s sexual incapacity and her diminished sexual desire” (id. at 266). This, she argued and a majority of the court agreed, did not amount to holding out as another man’s wife as it shows the two were not working as “one economic unit” (id. at 266). This formulation of an economic unit underscored previous case law stating there must be some financial demonstration the two were acting as husband and wife (See Waddey, Northrup, Bliss). Additionally, Mrs. Graev used the fact the two were not in a sexual relationship to prove she was not holding herself out as his wife because a marriage like relationship would necessarily include a sexual component. Upon non-marital cohabitation it seemed, at least in this case, there was no automatic assumption of mutual support or obligations between the cohabitants when there was no evidence of the sexual aspect to the relationship. Instead a marriage-like relationship occurred when certain aspects of performance of the socially understood functions of a wife ensued.

As Judge Read pointed out, the court viewed “cohabitation as more than a sexual relationship, requiring a sharing of finances or an economic relationship akin to a shared possessory interest in one home” (id. at 270 quoting Salas v. Salas (128 A.D.2d 849
(1987)). In this case Mrs. Graev focused on the inward and private aspects of marriage – the sexual relationship as reasoning that the two were not in a marriage like relationship.

Conversely, the court noted that cohabitation meant “more than a romantic relationship or series of nights spent together” (id. at 270). Instead it required the “sharing of finances or an economic unit akin to a shared possessory interest in one home” (id at 270). This type of cohabitation was more analogous to the provision of holding out as another man’s husband emphasized by the New York court in the discussion above.

Contrasted to the dissent, Judge Read did not believe “cohabitation had a plain meaning which contemplates changed economic circumstances.” Instead the term was “ambiguous as used in this settlement agreement” (id. at 272). For the court, it was both the outward showings of marriage, the public and performative aspects, along with the inward intimate relationship between the couple that were important in establishing the couple was cohabiting and she was holding out to be M.P.’s wife. Under the majority’s definition of cohabitation the two were not operating as one economic unit thus the performative aspects of marriage were not present. Two people cohabiting could simply be roommates with no financial obligations to support each other. Consequently, Mrs. Graev still relied on her former husband for economic support because M.P. did not provide her with this. The performative aspects of marriage included acting as a conjoined economic unit for the court. The court “define[d] cohabitation as living together[,] with the central element being the maintaining [of] one residence, sharing household expenses and functioning as an economic unit” (id. at 269). These elements were absent here as M.P. maintained his own residence in Connecticut and did not contribute to the costs of Mrs. Graev’s summer home (id. at 269).
Had Mr. Graev proven his former wife and M.P. operated as a one economic unit then he probably would have been successful in terminating his alimony obligation. As it stood, however, Mrs. Graev relied on her former husband’s alimony payments to sustain her lifestyle. In other words, the support obligation was not transferred from Mr. Graev to M.P. simply based on their cohabitation. The opinions in this case were interesting for their divergent stances on the meaning of cohabitation specifically discussing the different factors courts take into account when determining whether the performative aspects of marriage were sufficient to assign or remove marital burdens and benefits.

In alimony cases the courts often placed a heavy weight on the specific language of the particular alimony award with curious results that had important practical consequences. The practical effect of the court’s judgment in *Graev* was perhaps for Mrs. Graev supported by two men: her former husband and M.P., the man she was living with. Furthermore, in this decision the court’s narrative emphasized performance rather than formal marriage in determining whether to terminate Mr. Graev’s alimony payments.

By the end of this set of cases the developmental narrative the courts forwarded was very interesting. The breakdown in the ideal of marriage where a woman remarried at lower rates caused the court to pause in terminating a husband’s alimony obligation only based on formal remarriage as it perhaps required the husband to support his former wife when another man supported her. As a way to remedy this the courts looked to alternative mechanisms or principles: performance. That was, the courts looked to whether a woman occupied the socially understood role of a wife. Interestingly the courts in these cases focused almost entirely on the woman’s performance as a wife and assumed if she was performing as such then the male partner was fulfilling a husband’s
support obligation. Resulting from this, the ex-husband (the man with the formal marital status) saw his obligation terminate. Even though the developmental narrative moved steadily in this direction and by the end of the time period, the courts relied exclusively on performance I show in these cases the courts placed substantial and weighty requirements on the wife (and her performance) to demonstrate or satisfy the holding out prong of the two pronged alimony termination rule.

_Reinstating Alimony: The case of an annulled second marriage_

With alimony traditionally terminated upon a woman’s formal remarriage, what happened if that second marriage was subsequently annulled? The New York court faced this question once and determined a second marriage (whether annulled or not) ends a first husband’s alimony obligation. The Massachusetts court hands down three opinions on this issue, reaching a different conclusion each time. The eventual determination brought the Massachusetts rule in line with New York.

A particularly important case in New York, _Gaines v. Gaines_ (308 N.Y. 218 (1954)), arose when an ex-wife claimed that the annulment of her second marriage reinstated her first husband’s alimony obligation. The context of this case was particularly important as the second husband died and therefore was unable to provide alimony for his former wife. The court found the second husband’s death unconvincing as a reason for resuming the first husband’s support and stated: “that the second husband had died was unfortunate, but plaintiff’s plight was no different from that of any woman whose source of support had come to an end through death. Having remarried, she chose to abandon her right to support from defendant” (id. at 226). Essentially, the wife was
unable to remedy her situation and any future support must come from the most recent husband, or his estate in the event of his death.

The framing of the opinion by the New York court suggested that by entering into a new marriage the former wife relinquished any potential support, stating: “the subsequent fortunes of the remarriage, and whether or no[t] it was later terminated, were in no way material to the agreement; the husband’s obligations were by its terms to continue only until she remarries, and there was nothing in the agreement which could serve as a basis for subsequently reviving those obligations” (id. at 223). Judge Stanley Fuld’s majority opinion centered on the fact the former Mrs. Gaines contracted a new marital relationship. The question before the court was really whether that second marriage “permanently extinguishe[d]” the first husband’s alimony obligation.

The court confirmed the second husband’s obligation did not resume but nevertheless noted the differences between marriage and annulment stating that even though an annulment “put an end to the marriage from the beginning” and the marriage was “effaced as if it had never been,” a woman still had no recourse to look to her first husband for support (id. at 222). The court went on to state this more forcefully noting: “the wife, too, must have understood that by remarrying she abandoned her rights to support under the agreement” (id. at 224). Emphasizing the woman’s conduct in entering into a second marriage, the court noted “[the] Plaintiff could not retain both husbands as sources of support; having made her choice, she was bound by it, although subsequent events prove it to have been an improvident one” (id. at 226). Further, while the court acknowledged an annulment effectively nullified the marriage contract with a woman reverting to her previously unmarried status, the court found there was attached to
“annulled marriages sufficient validity and significance to support an award of alimony, in other words, to serve, the same as any valid marriage would, as the foundation of a continuing duty to support the wife after the marriage was terminated” (id. at 225).

The language of abandonment illustrated it was the wife’s actions causing the termination of her alimony award and if she had acted differently her alimony would have continued. Following the second marriage the wife must to look to her second husband for “whatever support would be furnished her by her second mate” (id. at 224). Discussing the “rights” a wife had to support, the court emphasized support as one of the responsibilities of the husband in an era when the courts focused repeatedly on the responsibilities of the wife. Again, the two types of obligations for the spouses in a marriage were evident here but focused more concretely on the rights of women to be supported by their (current) husband and the obligation of that husband to support his wife. In keeping with the Maine court’s notion of public policy around supporting a wife, the New York court noted the state’s interest in not having two men responsible for supporting one woman. The court stated: “the interests of justice require...the wife look to the last [husband] for support, and, certainly that she be given neither two sources of support nor the ability to choose between her first and second husbands for the more profitable” (id. at 225).

Questions over the extent of the husband’s duty of support were evident in this case. While focusing on the fact there was a duty of support it was nevertheless limited by a woman’s formal remarriage, whether that marriage was later annulled or ended via divorce. There were clearly distinctions between divorce and annulment but the court’s framing in this opinion indicated this did not have the effect of reinstating an ex-
husband’s alimony obligation. The new marriage had the result of “permanently extinguishing” the first husband’s alimony obligation.

The set of cases from Massachusetts around a second marriage’s annulment was particularly important for the internal legal development of marriage and performance as the court decided three cases in a relatively short 10 year time span arriving at three different answers. As noted above, by remarrying a woman generally forfeited her right to continued alimony from her husband. But when that second marriage ended in an annulment, which rendered the woman never married, what of the first husband’s alimony obligation? The driving factor for the Massachusetts court in each decision was the woman’s actions.

The court framed its decisions specifically around whether she was at fault in procuring the fraud or whether the fraud was perpetrated against her. In other words, the decision turned on whether the former wife was the guilty or innocent party. This conception of guilt and innocence was similar to other alimony cases where a wife whose fault caused the divorce was not granted alimony. The frame also ran directly through the divorce and annulment cases I examine in chapter 2. The rationale from the Massachusetts court looked at the issue of alimony from a similar vantage point to the divorce cases: if a wife was innocent, she received alimony but if she was guilty, she did not.

Adjudicating cases in this way – looking at the relative guilt of the wife - allowed the courts to focus on two interrelated and shifting themes emerging in this chapter. On the one hand the court examines the gendered roles of each party in the marriage to the extent that it looked specifically at the wife’s role in engaging in fraudulent conduct.
Related to this, the court emphasized the gendered enterprise of alimony as compensation for a woman, and only a woman. The other theme emerging from this set of cases was the duty of support. I show above in the *Gaines* case from New York that there was a limited duration of a husband’s support even if the wife’s second marriage ends in an annulment. The cases I examine below offer a different assessment on this same question and indicate, at least in the first instance, that a husband’s duty could be reinstated upon his former wife’s annulled marriage.

In the first instance of *Robbins v. Robbins* (343 Mass. 247 (1961)) a wife filed suit to have her alimony reinstated when her second marriage was annulled. Mr. Saul Robbins stopped paying alimony under the assumption that remarriage of his ex-wife constituted “such a substantial change in the circumstances as would warrant a modification of the decree” (id. at 248). However, this was not the case. The Massachusetts court reinstated Mr. Robbins’ alimony obligation. The court’s justification was that “no modification could be made unless the petitioner shows a change of circumstances since the entry of the earlier decree” (id. at 249). The rationale centered on the nature of the annulment as “the respondent’s marriage to Goodman, if not annulled, [was] such a material change in circumstances as to justify a revision of the former decree” (id. at 250).

The wife’s second marriage was “fraudulently procured, [it] was voidable but not void” (id. at 251). In such a case, “an annulment decree relate[d] back and makes such a marriage void from its inception… [therefore] nothing of legal significance remains after the annulled marriage to justify a finding of changed circumstances” (id. at 251). As the

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39 A void marriage was invalid on its face whereas avoidable marriage was valid but could be cancelled by one party to the marriage, therefore effectively annulling the marriage. The most common reasons for annulling a marriage were nonage- when one party was underage, when the marriage was induced by fraud and incapacity to enter into a marriage. Voidable marriages could only be annulled when one party commences an action in court.
marriage was void from inception, the annulment had the effect of rendering the second marriage as if it had never happened. Accordingly, the court ruled the original divorce and alimony provisions should resume because the annulled marriage “did not show a significant change of circumstance” (id. 253).

While the remarriage termination rule was the general regulation, the court did carve an exception stating “there should be no hard and fast rule one way or the other…cases could readily be imagined where it would be unrealistic as well as unjust to hold that the annulled remarriage did not constitute a significant change in circumstances” (id at 252). This particular case turned on the fact Mrs. Robbins was not complicit in creating the fraud leading to the annulment as she was the innocent party having a fraud perpetrated on her. The result of the annulment reverted her formal marital status back to prior to her marriage and rendered her a single woman. Differentiated from the New York court’s determination in Gaines that an annulment guaranteed some valid aspects to the marriage e.g. alimony, the court focused on the fact the annulment effaced the marriage as if it never happened. Concluding the decision, Justice John Spalding found “[the] petitioner had not established that the annulled remarriage had resulted in a change of circumstances that would justify a modification of the decree” (id. at 253).

The question of annulment was complicated further by a second case in Massachusetts where the court concluded the woman was at fault. The notion of fault was linked to the traditional understanding of alimony premised on a woman being automatically denied alimony if she was at fault in causing the divorce. Explicit in the court’s framing of the decision was her fault in procuring an illegal thus voidable

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40 This question was answered in the next case, Glazer v. Silverman.
marriage. Confronting this particular problem, the court ascertained alimony could not be reinstated.

In *Glazer v. Silverman* (354 Mass 177 (1968)) the husband terminated his alimony upon his wife’s formal remarriage deeming it a significant change in circumstances, as laid out in *Robbins*. Departing from the difference the court found between divorce and annulment in *Robbins*, the court here asserted: “there was no more reason [in view of § 1140 –a] 41 to revive the obligation of the first husband - a stranger to the annulment - than there would be if the remarriage were terminated by divorce” (id. at 180). The court treated this woman as if she was the guilty party stating: “the wife had actively participated in the illegality that made the second marriage void” (id. at 179). Thus, “there should not be an intermittent obligation reinstated upon disclosure of circumstances to which the [ex] husband was not privy and which he had no reasonable means of discovering” (id. at 179). Simply stated, upon his wife’s remarriage the husband’s obligation to support his wife financially ends. The language in this case was starkly different from *Robbins*, decided seven years earlier. The *Glazer* case ultimately turned on the issue of guilt versus innocence.

A third instance of a second annulled marriage arose in *Surabian v. Surabian* (362 Mass 342 (1972)). Once again the wife sued her former husband for nonpayment after her marriage was annulled. The court found the intention of the divorce decree was that “all matrimonial ties between the parties would be totally dissolved upon the libellant's going through the ceremony of marriage with another man” (id. at 347). Justice Joseph Tauro, writing the majority opinion, dispelled any connection between *Surabian*

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41 This section of the Civil Practice Act stated “when an action was brought to annul a marriage or to declare the nullity of a void marriage, the court may give such direction for support of the wife by the husband as justice requires.”
and Robbins finding the previous case was silent on the effect of remarriage and did not overruled Robbins. Nor had the parties in the Robbins case provided in a separation agreement for the termination of alimony (id. at 347-348).

The court’s opinion stated: “support payments to the wife terminate upon her remarriage” (id. at 348). Significantly for the court the marital relationship required the new husband to support his wife, which relieved the first husband. The court noted: “it [was] clear that, by remarrying, the libellant relinquished her right of support under the separation agreement” (id. at 346). This was a significant shift in policy regarding annulments and had a substantial effect on the husband’s alimony obligation. The court’s rationale in this case indicated there were clear limits on a husband’s duty of support. A wife must look to her most recent husband for support and this formal remarriage permanently removes the support obligation of the first party.

The decision in Surabian brought the Massachusetts court in line with the decision from New York in Gaines indicating that support for a woman only extended so far. In adjudicating questions over failed marriages, the courts indicated they would only allow a woman to look to support from the most recent husband. The rationale behind this posture was rooted in the baseline case from Maine, Bubar v. Plant examined in the previous section. Bubar found it was important for the court to only allow one man to support a woman as this was what public policy demanded. The New York court used the framing of abandonment and similarly, the Massachusetts court here focused on the fact the wife relinquished her support privileges from her first husband.
Conclusion

This chapter focused on the unique policy area of alimony and demonstrated that when courts were faced with the breakdown of the marriage ideal, which in this instance was the lower numbers of women remarrying after a divorce the judges turned to the underlying principles: performance of the socially understood roles of husband and wife. I have shown in this chapter that the developmental narrative transitioned from a time when the courts focused on a woman’s formal marital status to grant her alimony and conversely, the woman’s formal remarriage as the reason to terminate alimony. The different sections around alimony indicated there was a nuanced process of development regarding marriage as the courts looked to different types of performance and the ways in which individuals act as a way to either terminate a husband’s alimony obligation or grant women alimony.

This chapter demonstrated the broader argument of the dissertation seeking to explain the way same-sex marriage decisions came about through an exploration of judicial discourse in policy areas related to marriage. The larger story of the dissertation was that when courts were presented with a problem associated with couples (or individuals) moving away from traditional marriage judges focused on performance in order to grant these same couples and individuals rights and duties associated with marriage.

In this chapter the discussion played out in part when a woman did not remarry after a divorce, but instead was in a marriage-like relationship. Constant throughout the narrative was the courts’ goal of not having a woman supported by two men at the same time. While this was a stated public policy, the courts sometimes saw fit to continue a
former husband’s support of a woman even though she had formally remarried, or was living in a marriage like relationship. In order to ensure a woman was only supported by one man the courts turned to her performance in acting as a wife to another man through various measures associated specifically with her performance of the socially understood role of a wife.

The turn to performance in this chapter demonstrated two aspects of the transformation in alimony. First, performance was gendered in this account. There was no discussion of a man’s performance in this aspect of alimony, which was perhaps not surprising as the court looked to specifically determine when a wife was holding out to be another man’s wife. Second: the obligations of non-married cohabiting individuals. Focusing on the performance of the wife as sufficient in terminating alimony indicated a presumption by the court that a man would be supporting a woman even if the couple was not married. Correspondingly, if a woman was holding out to be another man’s wife her former husband’s duty of support was terminated.

The dissertation is pointed towards an understanding that if I look at the internal legal dynamics and development of the courts I can illustrate that the focus on performance in same-sex marriage decisions stemmed not only from the outside, external political pressures but also from the internal developments in the court over the last seventy years. These developments saw the courts center performance of the husband, wife, or both parties in order to grant or remove marital benefits and obligations but in a nuanced and complex way as developed throughout the chapter.

The nuanced story explored in this chapter saw a shift in the frames used by the court to determine two major facets in alimony – the factors taken into account when
determining an alimony award and also, on the flip side, when an alimony award could be terminated or reduced. The frames used by the court either focused on the formal remarriage of the wife or her performance as a wife without the formal marriage.

The narrative of the chapter has indicated that while alimony traditionally terminated upon a wife’s remarriage this framework was rejected by the courts as increasing numbers of couples eschewed marriage in favor of alternative family forms. With this in mind, the courts adopted a focus on performativity in order to dispense marital benefits and obligations to individuals. On the flip side, the courts also used the same type of performance to remove the marital benefit of alimony from wives and the marital obligation of alimony from husbands.

Interestingly, the courts focused to a large degree on the performance of the wife, only taking the husband’s performance into account in determining what factors should go into the initial alimony award. This demonstrated the one of the key shifts I explore in the dissertation: the gendered roles in the marriage. Focusing on the wife’s performance on the one hand appeared uncontroversial as it was a husband seeking to amend his alimony obligation based on the wife’s “substantial change in circumstances.” Centering a wife’s performance allowed the courts to develop a narrative on how the alimony laws were specifically impacting the daily lives of women. That was not to say men’s performance did not matter, it certainly did but only to the extent that the courts sought to ensure a husband could pay the alimony award. This was less about performance, however, and more about financial ability.
The next chapter explores the nuanced development of adoption and custody and the transition towards the courts’ use of performance in adjudicating questions over a breakdown in the marriage ideal.
Chapter 4 – Recognizing Performance: Adoption and Custody Questions

Introduction

Parenting was a concept that has changed over time due to economic shifts and social policies (Degler 1980, Grossberg 1985, Coontz 1992). The family was not treated as pre-political and beyond government intervention (Strach 2007) and was therefore subject to intervention and regulation by the state. As the cases and developmental trajectory in this chapter indicated there were multiple concerns the courts explored in adoption and custody since 1942.

From the very beginning of the dissertation’s time period in 1942 the courts indicated the importance of performativity as they frequently confronted questions over the “best interests of the child.”\(^\text{42}\) The New York court first articulated the best interest concept in *Finlay v. Finlay* (240 N.Y. 429, (1925)).\(^\text{43}\) Focusing on the best interests of the child necessarily turned on performance asking the court to articulate the custody arrangements that were in the best interests of the child. At the beginning of the time period (in 1942) the baseline in adoption and custody cases saw marriage as the paradigmatic institution to raise children and the courts focused almost exclusively on formal marital status in granting parental rights over children. By the end of the dissertation’s time period in 2012 this narrative around adoption and custody had moved significantly away from formal status granting parental rights towards performance

\(^{42}\) Kropp v. Shepsey, 305 N.Y. 465, 468, (1953) a child's welfare was the first concern of the court upon a habeas corpus proceeding, where the judge acts 'as *parens patriae* to do what was best for the interest of the child''; Finlay v. Finlay, 240 N.Y. 429, 433 (1925)

\(^{43}\) The chancellor in exercising his jurisdiction upon petition ... acts as *parens patriae* to do what was best for the interest of the child. He was to put himself in the position of a 'wise, affectionate and careful parent,' and make provision for the child accordingly ... he was not determining rights 'as between a parent and a child' or between one parent and another. He 'interferes for the protection of infants’’ (at 433-434).
associated with marital status granting individuals rights over, and obligations towards, children. Formal marriage was largely removed as a foundation from granting custody and adoption rights to individuals.

The marriage ideal of two parents caring for children broke down during the 1960s and beyond with couples divorcing at increasing rates. Accompanying divorce adjudications (if the couple had children) were questions over custody. As such, there were significant questions surrounding custody at this time. In line with this, another breakdown in the marriage ideal of having two formally married parents responsible for the child was the onset of increasing numbers of children being born out of wedlock. This was problematic in adoption cases as married parents must both consent to had their child adopted. For a child born out of wedlock only a biological mother’s consent was required unless the biological father performed various actions associated with fatherhood. Therefore, with the rise of nontraditional families the courts must adjudicate claims between mothers and fathers who were not married to each other.

A second issue area arising under adoption and custody was based around same-sex couples bearing children. Until 2004 these couples were unable to marry thus they faced a similar problem to unmarried couples in custody and adoption determinations. With increasing numbers of same-sex couples wishing to co-parent children how do these families fit into the broad notion of adoption and custody that relies on the “best interests of the child”? In order to adjudicate questions over these families and relationships that did not fit in with the traditional nature of marriage the courts turned to performance. The courts recognized the parent/child relationship separate and distinct from the presence of a formal marital status between the parents. This presented the central tension between
formal and performative marriage in this chapter. The courts faced the breakdown in the ideal of marriage from couples that had children out of wedlock and thus must resolve the issue of determining custody for children who were not the product of a formal marriage. The second tension arose out of a similar concern as second parents in same-sex relationships sought to adopt the biological child of their non-marital partner without the first parent relinquishing parental rights (which was commonplace in adoption proceedings). The courts, then, turned to whether each parent was acting as such in assuming marital responsibilities and obligations over children even when they had not contracted to marry. If this was the case then the court largely extended second parent adoption rights to the non-married, non-biologically related parent.

As a result of the different focus by the courts, the overall developmental trajectory shifted from a focus on formal marital status to a focus on performance, with some notable exceptions I explain below. In this policy area specifically, I demonstrate through my analysis that performance was a means for the court to attribute or legally recognize formal relationships. Here the courts recognized formal relationships between a parent and child through performance. The same rationale the courts used in adoption cases carries over to questions around same-sex marriage. I show (in chapter 6) that courts used performance of the socially understood roles of husband and wife to extend legal recognition to same-sex couples in a similar way to the courts using performance to legally recognize the relationship between a parent and child.

In this chapter, I provide a developmental narrative focusing on performance as a way to answer the questions of differing rights between mothers and fathers and then controversies over second-parent rights for same-sex couples. Marriage and
adoption/custody were inextricably linked but this relationship had been malleable throughout history occurring due to court-created legal developments. By 2012, individuals were not granted rights based on their formal marriages but instead on the tangible relationship between the parent and child. The courts solved the problem caused by the breakdown of the specific marriage ideal in this area by turning to performance to determine custody and adoption disputes between parents not married to each other and as a way to legally recognize formal relationships between a parent and child.

There were two main variations of cases in the area of adoption and custody where the courts evaluated the formal versus performative nature of parenting in relation to marriage. The first area was the issue of who must consent to their child’s adoption and the second revolved around a person in a same-sex relationship adopting their partner’s child. The discussion of both types of cases implicated important themes central to the dissertation as the courts looked to performance of marital obligations and duties as a way to presume parental rights in a similar way to the courts’ adjudication over alimony cases presume support obligations of unmarried cohabitants, examined in chapter 3. This was especially true for couples in same-sex relationships that could not legally contract a marriage. Despite this, the courts assumed a set of marital obligations and duties on these individuals.

Looking at the first type of case, parental rights were never considered absolute. Under certain conditions the courts could step in to ensure the welfare of the child.44 Importantly, these cases specifically centered the marital status of the parents looking at

44 For cases articulating the right of parents to determine the manner in which their children will be raised, see Prince v. Massachusetts, 321 U.S. 158 (1944) “It was cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state could neither supply nor hinder; Meyer v. Nebraska, 262 U.S. 390 (1923) concerning the right to teach languages other than English in school.
whether they were married to each other and the effect formal marital status had on their right to consent to their child’s adoption. Adoption statutes in Maine, Massachusetts and New York all indicated parents must both consent to their child’s adoption if they were married to each other.

Conversely, if the child was not born to married parents only the biological mother’s consent was necessary for the child to be adopted. An unwed father must demonstrate to the court he had a tangible (or performative) relationship with the child. A father demonstrated this performative relationship by meeting various statutory requirements including supporting the child financially, being in regular communication and having regular visitation with the child. Cases frequently occurred where a father petitioned the court trying to prevent his consent from being dispensed with i.e. seeking to withhold his consent to his biological child’s adoption. Cases reaching at the highest appellate court had in common that the lower court ruling against a biological father. Consequently, these cases focused on the father’s appeal with him asserting he took the necessary steps to illustrate his performance as a father thus his consent for his child to be adopted should be required.

One exception to the almost exclusive focus on a father’s performance in this set of cases was when a putative father asserted his paternity of a child born during an intact marriage. As one of the court’s primary purposes was to bestow legitimacy on a child a putative father was unable to question a child’s paternity. The courts maintained a potential father could not intrude on an intact family. Here, then, the marriage and marital family created by the natural mother and her husband (who was not the biological father) was beyond intrusion by a “stranger” to the marriage and family.
Developmentally two Supreme Court cases were important for the overall discussion of adoption and custody as they showed how on the one hand gender was removed from determinations around custody and adoption but the on the other hand indicated formal marriage was privileged above the parent/child relationship.

The first was *Stanley v. Illinois* (405 U.S. 645 (1972)). In this case the petitioner (Stanley) was an unwed father whose children, upon their mother’s death, were declared wards of the state. An Illinois statute stated children of unmarried parents were declared wards of the state upon their mother’s death without any determination of their father’s fitness to parent them. Custody was removed for one reason: if the parents were not married to each other, because if the children were born to parents married to each other the father would be granted custody. In *Stanley v. Illinois*, the Court struck this law down as unconstitutionally discriminatory on the basis of gender as it treated unmarried fathers as a class of persons differently from unmarried mothers. Justice Byron White’s majority opinion recognized the profound “interest of a parent in the companionship, care, custody, and management of his or her children” (id. at 650). Further, Justice White asserted: Stanley's interest in retaining custody of his children was “cognizable and substantial” (id. at 650). This case found a strong presumption for a father who was acting as though he was married to the child’s mother. The result of this case was to recognize a formal relationship between the parent and child based on the performative relationship that existed between the two. This exact issue foreshadowed the rationale behind extending legal recognition to individuals in same-sex relationships.

This case indicated the court favored formal marital relationships over biological ones. The case arose when a child (Victoria) was born to a mother (Carole) who was married to a man (Gerald) but had an affair with another man (Michael). The mother and child live with Michael on and off for Victoria’s first three years. DNA tests indicate Michael was the father of Victoria and when Carole reunited with her husband Gerald, Michael petitioned the court for visitation with Victoria, but did not seek custody. The law in California granted a presumption of legitimacy to children born during a marriage. Michael sued arguing this violated his parental rights under the Constitution. Justice Antonin Scalia in *Michael M. v. Gerald D.* concluded a child born during a marriage was presumed legitimate and a potential father did not have the right to interfere with the marital relationship. Scalia asserted the Court had “an aversion to declaring children illegitimate” and supported “the interest in promoting the ‘peace and tranquility of States and families’” (id. at 125). The Supreme Court privileged the marital relationship and the accompanying rights and benefits over children born in that marital relationship compared to the rights of a potential father.45

A second set of cases arose under the banner of adoption and custody focusing on granting adoption and custody rights to same-sex parents. By 2014, most states extended adoption and custody rights to non-biological same-sex second parents with little to no fanfare compared to the struggle over same-sex marriage (Gash 2010). Since the first couple seeking to grant a second parent visitation rights over a child in a same-sex relationship in 1991, this type of case became more prevalent as women (and men) in

45 Adoption and custody disputes were not the only area in which the United States Supreme Court privileged marriage over other types of relationships. In the realm of contraceptives and sexual intimacy the Supreme Court also found acts engaged in during a marriage receive greater privileges than those engaged in outside of a marriage.
same-sex relationships sought to bring a child into their family and become parents. In these cases, the court ushered a new definition of parenting along with legitimizing alternative family structures. There was a great deal of significance to these cases as the courts presumed marital obligations of persons who had not contracted to marry. The courts instead looked at their performance to assume they would take on marital obligations of parenting and thus be granted rights. In cases under this area in particular the courts used performance to allocate legally recognized rights (of parenting) to individuals. Arguments similar to the ones in this chapter formed the backbone of questions around same-sex marriage that arose in the early 2000s. These arguments centered on couples acting married: raising children, sharing homes and joint economic fortunes. The focus on performance of these principles enabled the court to extend formal marriage to same-sex couples.

There was a significant discussion in Massachusetts and New York around the adoption and custody of children born to same-sex couples with a less sustained narrative in Maine. In these cases I demonstrated the courts largely focused on the practical, performative relationship between children and the non-biological parent in granting the second parent custodial rights over the child. In this way, the courts found performance as a parent sufficient to create a formal relationship between the child and parent in a similar way to courts in same-sex marriages cases found performance as a couple sufficient to grant the formal status of marriage. The notion of performance here forwarded the

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46 Although I refer to men and women adopting children in same-sex relationships, there was no controversy in my data set that involved two men attempting to adopt either together or extend custody to the non-biologically related parent.

47 I examine this issue in detail in chapter 6.
overall developmental narrative of the dissertation and questions over how courts dealt with the breakdown of the marriage ideal.

I show courts turned to the performance paralleling married performance by non-married individuals in order to extend these couple’s rights associated with formal marriage. It was the tangible relationship between the parent and child (and non-married adult partners) that was important for the court rather than the formal marital or legal parental status. There was one exception to this overall developmental narrative. This came from New York where the court focused (in one case) on the importance of the civil union the two women were in. The presence of the civil union formed the backbone of the granting of parental rights associated with marriage to the non-biological parent.

Despite this one exception, the narrative of this chapter fits in with the broader story of the dissertation not only in the turn towards performance but also in the gendering of performance. Whereas the chapter on alimony indicated a wife or mother’s performance was primarily at work, the cases in this chapter focused on the father/husband’s performance as unmarried mothers did not have to prove their relationship with the child in a way unmarried fathers did. The courts’ reasoning was based on a mother’s ability to prove their relationship with the child (based on biology) compared to a father’s (see e.g. *Adoption of Heather Malpica Orsini*). Fathers who abandoned their responsibilities for the child were not rewarded with parental rights or the right to withhold consent to their child’s adoption.

The story I present in this chapter is one of nuanced development away from formal relationships towards performance evaluated as the primary factor in determining benefits and obligations associated with marriage. This chapter illustrates that when the
courts adjudicated questions over failed marriages they turned to performance to ensure the significance and stability to marriage. The chapter demonstrates the story of the courts’ focus on performative factors when couples transgressed the socially accepted notion of the nuclear family and marital relationship.

Parental Rights and Responsibilities

Questions around parental rights and responsibilities arose in an era, since the 1960s, where couples were increasingly having children out of wedlock. As with all cases focusing on adoption and custody rights the courts looked to their role as *parens patriae* and examined the cases with an eye to the best interests of the child. Questions arising under the umbrella of adoption and custody in this section were specifically framed around a right to withhold consent to a child’s adoption and in making these decisions. The courts’ rationale focused on performance as a parent, particularly performance as a father.

The focus on performance enabled the court to confront the particular breakdown in the ideal of marriage in this area. When couples had children out of wedlock there were fundamental concerns around adoption and custody. One key problem was that statutory requirements mandated only an unmarried mother to consent to their child’s adoption. Unmarried fathers must prove their relationship to the child along a number of dimensions that focused exclusively on the father’s performance as a father rather than his biological relationship to the child. The way consent requirements were framed by the courts indicated an almost voluntary nature of parenting for an unwed father (and later a same-sex partner who was not biologically related to the child).
A married father (whether biologically related or not) and a biological mother (whether married or not) were two categories of persons who always had to consent to their child’s adoption. This implicated Fineman’s (1999) understanding of the core unit of a mother and child with all other individuals granted rights based on their relationship with the mother rather than the child. The context of the 1960s and beyond was particularly important as after this time increasing numbers of marriages ended in divorce thus questions over custody became more common (Brandon 2013). This also tied in with the breakdown in the marriage ideal discussed in chapter 2 on divorce and annulment because courts had to find different ways to deal with the repercussions of a divorce and/or couples who had children out of wedlock. As the discussion below makes clear, a married father was responsible for children his wife bore during the marriage especially if that man accepted paternity and was named on the birth certificate.

The mother’s marriage legitimized the child, a badge the courts were very wary to remove. The following cases indicate the courts’ focus on the performance of a father whose child was born out of wedlock was a mechanism for ensuring two things. First, that the courts (and children) were not disadvantaged in attempting to locate an absent father and second, on the flip side, that fathers who were actively a part of their child’s life (taking on parenting obligations) received rights and benefits associated with that status. This focus on performance provided an alternative device for the courts to solve the problem of fathers seeking to withhold their consent to their child’s adoption.

The distinction between mothers and biological (but unwed) fathers regarding consent to adopt served a legitimate government interest in not allowing absent fathers potential veto power over an adoption or custody proceeding. As a result, the courts did
not frame this distinction as an arbitrary classification based on gender. The rights of unwed fathers rested on their performance as parents versus the rights of married fathers resting on the presence of a formal marriage. Unless a father financially and emotionally supported his child for a period of time prior to the adoption filing, his consent was not required. In *Adoption of Heather Malpica Orsini* (36 N.Y.2d 568 (1975)) Hector Orsini, the biological father of Heather, appealed a judgment dispensing with his consent for his child to be adopted by her stepfather. Judge Lawrence Cooke of the New York Court of Appeals observed this differential treatment between mothers and fathers served to “promote the welfare of an otherwise homeless child” (id. at 572).

Due to the fact many unwed fathers were absent the court perceived “great difficulty and expense would be encountered, in many instances, in locating the putative father to ascertain his willingness to consent. Frequently, he [was] unlocatable or even unknown. Paternity [was] denied more often than admitted” (id. at 572). Consequently, the standard of performance promoted the best interest of the child by not allowing his or her adoption to be stalled by an unwilling (or under performing father). By requiring an absent unwed father to consent to his illegitimate child’s adoption the “chances that such a child will have the equal rights and benefits of a home will be immeasurably diminished and the likelihood that he or she will be a pawn for the avaricious and embittered will be greatly enhanced” (id. at 575).

The New York court distinguished this case from the United States Supreme Court case of *Stanley v. Illinois* I examined in the introduction by asserting: “due process was not lacking here [in *Adoption of Heather Malpica Orsini*]” as the father was given

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48 See for example. *Consent to Adopt a Minor*, (345 Mass 706 (1963)), *Adoption of a Minor* (367 Mass 907 (1975))
notice of the adoption along with the right to object (id. at 577). While the Illinois law did not rest on any measurable notion of parenting, willingness or performance, the New York law specifically looked to whether the father was acting as such prior to removing his right to consent. This necessarily focused on performance rather than any kind of arbitrary classification between unwed mothers and unwed fathers.

While the majority opinion used the rational basis test to uphold the consent requirement, Judge Theodore Jones dissented finding the rational basis test the entirely wrong standard to judge this case.49 He remarked: “§ 111 of our Domestic Relations Law must be subjected to a stricter standard of scrutiny” (id. at 582, Jones dissenting).

In finding a father had “basic civil rights” concerning his child Judge Jones commented: a “natural father’s rights and interest in his own child were implicitly recognized and protected by the Constitution… rights “so rooted in the traditions and conscience of our people as to be ranked as fundamental” (id. at 584 quoting Snyder v. Massachusetts, 291 U.S. 97 at 105). In construing the relationship between child and natural parent Judge Jones’ dissent urged the court to remove gender distinctions between an unmarried mother and unmarried father, asserting the relationship between a parent and his or her biological child was “jealously guarded” (id. at 585). This picked up on the almost absolute right of parent regarding their child where the court only stepped in to remedy to most grievous situations. The assumptions around the relationship of the mother and father to the child illustrated gender was a fundamental factor in determining what role the parent played in the child’s life (along with obligations the parent had to the child), which corresponded to the rights they receive regarding the child.

49 This case was decided one year prior to the United States Supreme Court case of Craig v. Boren where the Court elevated sex-based discrimination to heightened scrutiny.
One problem associated with determining rights based on performance revolved around the appropriate level of contact, support and ultimately performance on the part of the unmarried father. In 1980 the New York Legislature enacted guidelines for determining the appropriate level of contact between a child and the unwed (biological) father. The requirements encompassed both physical proximity to the child and financial aid to the mother in the care of the child. The legislature determined the father must show substantial and continuous or repeated contact with the child manifested by reasonable child support payments, visitation with the child at least monthly, regular communication with the child when unable to visit the child (Domestic Relations Law §111(1)(d)). If a father failed to meet these obligations it could be shown he willfully neglected his child and may be denied the right to consent.

The Court of Appeals passed judgment on the legislative boundaries one year later in 1981. In the case of *Nesiba v. Taylor* (433 A.2d 720 (1981)) Ella Nesiba’s second husband sought to adopt her two children from her previous marriage and change their surname. Taking much the same view as in *Adoption of Heather Malpica – Orsini*, Judge Edward Godfrey’s majority opinion noted Toby Taylor (the biological father) showed no substantial interest in his children. Even so, the burden rested on the person(s) seeking the adoption to prove the father’s consent should be dispensed with. This person must show the biological parent “willfully abandoned his child or [was] unwilling or unable to undertake parental responsibility” (id. at 723). The person seeking the adoption must show by “clear and convincing evidence” the natural parent was unfit to assume or resume their parental responsibilities (id. at 724). Even though the court laid out the
standard it did not devote significant attention to what constituted “clear and convincing evidence.”

Although parameters were set, other questions arose over the father’s consent. One additional requirement stated the father must live with the mother six months immediately before the child’s placement for adoption and that he openly acknowledges his paternity during this period (Domestic Relations Law, §111 (1)(e)). In the Matter of Raquel Marie X and Matter of Baby Girl S (76 N.Y.2d 387 (1990)), a pair of consolidated cases decided by the New York Court of Appeals, the living together requirement was challenged as unconstitutional. Both of these cases revolved around a child born to an unwed mother who gave consent for her child to be adopted and where the biological parents did not live together prior to the child’s adoption. Consequently, the unwed father’s consent was not necessary. The biological fathers in both cases appeal their child’s adoption.

In her majority opinion Judge Judith Kaye (who later became chief justice) asserted the “living together” condition required a father “openly lived with the child or the mother for six continuous months immediately preceding the child's placement for adoption, openly acknowledged his paternity during such period, and paid reasonable pregnancy and birth expenses in accordance with his mean” was unconstitutional (id. at 394). Kaye maintained this section of the statute: “neither legitimate[ly] further[ed] the State’s interest nor sufficiently protect[ed] the father’s” (id. at 394).

Kaye noted the “changing family patterns and social attitudes toward unwed fathers” significantly altered the landscape regarding unwed fathers. Even so, after Stanley v. Illinois, unwed fathers only had limited rights and more specifically, “an
unwed father in New York had no right to veto an adoption to which the mother had consented” (Matter of Raquel Marie X. at 397). While granting rights to unwed fathers the court wished to ensure the father actually shouldered some of the caretaking responsibilities for the child and consequently satisfied the requirements laid out in § 111 (1)(d).

The ruling in Matter of Raquel Marie X relied on another United States Supreme Court case, Caban v. Mohammed (441 U.S. 380 (1979)). In Caban the Court found: “an unwed father may have a relationship with his children fully comparable to that of the mother” and focused on the practical lived relationship between the parties (Matter of Raquel Marie X at 399 quoting Caban v. Mohammed at 389). Both Caban and Raquel Marie X. sought to remove the focus on men and women as a class and instead looked to evaluate the relationship between the parent (specifically father) and child on a more case-by-case basis in order to discover the relative merits of each person’s actual relationship with the child. This, the court opined, was truly in the best interest of the child. Caban rendered unconstitutional §111 of the Domestic Relations Law requiring an unmarried mother’s consent to have her child adopted but not an unmarried father’s consent. The Court struck this section of the Domestic Relations Law down based on the fact there was no legitimate state interest in the classification between fathers and

50 This case originated in New York as Matter of Adoption of C. (43 N.Y.2d 708 (1977)) where the New York Court of Appeals dismissed the father’s appeal of the lower court decision removing his consent to adopt his child under Domestic Relations Law section 110 and 111. The case eventually made its way up to the United States Supreme Court where the Court found that Domestic Relations Law § 111 was unconstitutional because it treated mothers and fathers differently in terms of consenting to their child’s adoption. The New York Court of Appeals disposition was not discussed in this chapter as the New York Court dismissed the appeal without an opinion.

51 The outcome in this case should be contrasted with the outcome in Alison D v. Virginia M. where the court did not look to the best interest of the child, or a case-by-case evaluation of the relationship between the parent and child. One major difference in these two cases was that the father in Raquel Marie X. was a biological parent, whereas the second parent in Alison D. was not biologically or legally related to the child. This provided the backbone of the court’s analysis and was examined later in the adoption section.
mothers in finding homes for illegitimate children (Caban v. Mohammed, 441 U.S. 380 (1979)). Consequently, Raquel Marie X. focused explicitly on the constitutionality of the “living together” requirement that remains in the adoption statute.

As described in Matter of Heather Malpica Orsini it may be impossible to locate fathers and this justified the differential treatment. The New York Court departed from this established precedent and instead asserted: “the State’s problem [could] be solved by a more finely drawn distinction” (Raquel Marie X. at 399). This was an important pronouncement developmentally for the issue of adoption. The decision in Raquel Marie X. came just over ten years after the United States Supreme Court’s decision in Craig v. Boren where Justice William Brennan Jr. argued for a heightened level of judicial scrutiny for sex based discrimination cases. Therefore, the New York court operated using a different set of assumptions than in Adoption of Heather Malpica Orsini. The decision in Raquel Marie X utilized the more exacting heightened or intermediate level of judicial scrutiny whereas the Adoption of Heather Malpica Orsini used the more lax rational basis test.

In line with the focus on performativity, the court drew a distinction between “a mere biological connection and an actual relationship of parental responsibility… if he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development” (id at 400). This quotation illustrated a commitment on the part of the court to only grant rights to individuals who took on the corresponding responsibilities of parenting. This language focused on performance rather than a biological relationship between the parent and child. Only individuals accepting
the duties and responsibilities of a parent were granted those rights. This billed parenting very much as an obligation based relationship rather than a rights based relationship. The individual seeking parental rights had to prove they carried out various obligations before they were granted rights.

The presence of a significant and substantial parent child relationship was profoundly important to the court. It was not the relationship the parent had with the mother of the child but rather it was the bond and relationship the parent had with the child. Put another way, the court noted: “he must both be a father and behave like one” (id. at 401). This quotation demonstrated the very nature of the court’s inquiry: not only did the father had to have a biological connection with the child but he must have an actual relationship with the child along the lines the court noted above in terms of financially contribution to the child’s wellbeing and be physically present with the child. The father had to perform all the functions associated with parenting before he was granted parental rights.

The State had an important and legitimate interest in adoption and providing for the welfare of children. Similar to the posture in Matter of Heather Malpica Orsini, Judge Kaye in Raquel Marie X noted the difference in the statutory provisions reflected the “inherently different position…of an unwed mother alone faced with the enormous responsibility of making crucial decisions about the future of her newborn child” (id. at 404). As a result “the State could deny a right of consent to all unwed fathers who do not come forward to immediately assume their parental responsibilities, and it could prescribe conditions for determining whether the unwed father’s manifestations of interest in his child was sufficiently prompt and substantial to require full constitutional
protection” (id. at 404). This language indicated an unwed father had to be actively asserting his role as a parent in order to be granted rights. Fathers must not only be fathers in name – having a biological connection with the child - they must also perform the functions associated with fatherhood.

The context of this decision was placed squarely in the context of the developmental processes at work regarding family and marriage law in the 1960s (Brandon 2013, Self 2013). Developmentally this was important as it brought the adoption decision in line with societal and cultural shifts over the importance of marriage in having a child. The paradigmatic family of married parents having children was still present but other family formations should not be disadvantaged by the courts’ decisions. Performance as a father was the fundamentally important aspect of the adoption decision as biological fathers were granted the right to withhold consent to their child’s adoption based on their performance rather than any other factor.

Looking at Baby Girl S., the court determined the father should be granted parental rights as he had taken “full custodial responsibility virtually from the time he learned of Regina’s pregnancy [and] did everything possible to manifest and establish his parental responsibility” (id. at 409). Conversely, Miguel, the father in Matter of Raquel Marie X did not avail himself substantially to the performative requirements immediately after the child’s birth. Although Miguel subsequently married the child’s mother this marriage “must be timely in order to be considered substantial” (id. at 409). This decision emphasized formal marriage was not as important for custody compared to the practical relationship between the child and parent. The absence of a formal marriage could not be used to deny a parent rights over a child where a performative relationship existed. This
had important implications for the discussions over same-sex marriage and same-sex couples where one person sought to adopt his or her partner’s child. The posture in this case indicated judges looked to the performative relationship between the parent and child rather than the formal relationship between the parents. How this worked in practice is part of the narrative of the second section of this chapter.

The presence of a tangible relationship between the parent and child was of course more difficult to establish when the mother granted the adoption at birth. At this time, a father could only have a biological connection with the child. In such a situation “an unwed father who had been physically unable to have a full custodial relationship with his newborn child was also entitled to the maximum protection of his relationship, so long as promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child” (id at 402). A question arose around this concern, especially when the unwed father alleged the mother prevented the formation of a tangible relationship between the father and child by concealing the pregnancy and birth of the child from the biological father. This question was answered two years later in Matter of Robert O. v. Russell K (80 N.Y.2d 254 (1992).

In Robert O. the biological father (Robert O.) alleged the child’s mother (Carol) concealed from him the birth of the child and therefore was prevented from forming a substantial bond with the child within the parameters of the six-month requirement. He filed suit seeking to vacate the final adoption of his child by Russell K. and his wife, Joanne K. During the adoption process, the biological mother (Carol) indicated no other person should be informed of the petition to adopt the child. Robert O. claimed he was unaware of the child’s birth until 10 months after the adoption was final and asserted the
State had a duty to ensure he was aware of his child’s birth. Consequently, Robert O. claimed the adoption by Russell K. was procured by fraud through deception and concealment and should be invalidated. The New York court disagreed finding the Domestic Relations Law did not require his consent for his child to be adopted. However, the court maintained: “the father of a child born outside wedlock could qualify for notice of an adoption proceeding in any one of several ways: by having been adjudicated to be the father, by filing a timely notice of intent to claim paternity, by living openly with the mother and child and holding himself out as the father, by having been named the father in a sworn statement by the mother, by having married the mother subsequent to the birth, or by filing with the Putative Father Registry” (id. at 261). Of course all of these requirements were premised on the father actually knowing he was a father, which was absent in this case.

Focusing on the rights of an unwed father, the court turned distinctly on performativity stating: “the unwed father of an infant placed for adoption immediately at birth faces a unique dilemma should he desire to establish his parental rights. Any opportunity he had to shoulder the responsibility of parenthood may disappear before he had a chance to grasp it, no matter how willing he was to do so. Accordingly, we have acknowledged that in some instances the Constitution protected an unwed father's opportunity to develop a relationship with his infant son or daughter. This constitutional right to the opportunity to develop a qualifying relationship did not extend to all unwed fathers or arose from the mere fact of biology. The right existed only for the unwed father who manifests his willingness to assume full custody of the child and did so promptly” (id. at 262). Given the actions of the biological mother, the father here asked
the court to extend the ruling in *Raquel Marie X* to include fathers who did not have the opportunity to perform as a father prior to the adoption. This, the court was unwilling to do.

Judge Richard Simons’ opinion concluded that even though the “petitioner acted promptly once he became aware of the child [this focus] fundamentally misconstrue[d] whose timetable was relevant” (id. at 264). According to the court “promptness was measured in terms of the baby’s life not by the onset of the father’s awareness” (id. at 264). This requirement was set up due to the “local and necessary outgrowth of the State’s legitimate interest in the child’s need for early permanence and stability” (id. at 264).

The biological connection between the child and father was insufficient. In this case there was only a biological connection between the father and child as it was impossible for the father to form a tangible relationship with the child. Even so, it made no difference for the court that the father was unaware of the child’s adoption and the court refused to extend the ruling in *Raquel Marie X* to encompass the situation presented here. The court was not persuaded by the biological father’s argument that if he had been aware of his child’s birth he would have taken an active role in her life. The court noted: “there must be manifestation through action on the part of the unwed father. Absent that, the biological link of the father was insufficient to create a constitutionally protected interest” (id. at 265). This standard remained the same throughout all of the cases on parental consent requirements. For the court, the particular facts of the case seemed to suggest the courts took broad strokes in parental consent cases rather than a more careful case-by-case adjudication. Even so, the court maintained the decisions were
consistent with the notion of *parens patriae* as the court was ultimately acting in the best interest of the child by not passing the child from one party to another; once the adoption was finalized there was little opportunity for the biological father to had his rights recognized.

Judge Vito Titone concurred in the result. He asserted it was not the petitioner’s fault he was unaware of the child’s birth because it was the biological mother, rather than an unwed father, who had the “exclusive power to decide whether or not the other progenitor was to be informed of the pregnancy’s existence. The man who had not been told of the pregnancy had few, if any, avenues of recourse” (id. at 268, Titone dissenting). At the same time, the concurrence agreed with the majority: “there also must come a point where the matter was deemed irrevocably closed, so that the parties could go forward with their lives, secure in the certainty that their legal and familial status could no longer be disturbed” (id. at 269).

Stability and the welfare of the child still reigned as the most profound concerns for the concurring opinion as the family could not be in a “state of legal limbo” (id. at 269). Titone’s disagreement with the court stemmed from the fact “that in all circumstances "biology alone was not enough to warrant constitutional protection” and “I could not agree with the majority's reliance on the purported fault of this biological father in "fail[ing] to take any steps to discover the pregnancy or the birth of the child" until after the child was adopted” (id. at 267, Titone concurring).

Titone concluded the opinion with a discussion of the ultimate problem of the case: “in sum, petitioner's situation was an unfortunate one, since, through no real fault of his own, he had been deprived of "the blessings of the parent-child relationship" and even
the opportunity of developing such a relationship (id. at 267, Titone concurring, quoting Lehr v. Robertson (463 U.S. 248 at 262 (1983)). However, as Titone pointed out the dilemma the unwed father faced was not created by “any institutionalized mechanism or unrealistic legal barrier imposed by the State, but rather by Carol A.'s personal—and perfectly understandable--decisions to keep her pregnancy secret from him and to surrender their child without disclosing his identity. In these circumstances, the interests [the] petitioner may had had in his role as a biological father were more than outweighed by society's overriding interest in ensuring the finality of his child's adoption. For that reason, and that reason alone, I conclude that petitioner's interests were not entitled to due-process protection, and, accordingly, I concur in the Court's decision to affirm (Robert O. at 271-272, Titone concurring).

The New York cases illustrated a commitment to parental rights and demonstrated the court’s active role in delimiting boundaries around the evolving state institutions of marriage, adoption and custody. Developmentally the trajectory of the issue of adoption/custody in New York placed greater importance on the relationship the biological father had with his child compared to his relationship with the mother or marital status. This conception of marriage and family emphasized performance as a parent was increasingly important compared to the formal status of marriage. From these cases, I show that while marriage may be the exemplary way to raise a child it was not the only family formation the court recognized. Following Supreme Court precedent, illegitimate children should not be disadvantaged due to the choices of their parents. The interpretation of adoption and custody law struck at the heart of marriage’s fundamental importance in these decisions. While it was presumed married couples would adopt
together and share joint custody there was less emphasis on the parents being married to each other and instead in granting custody and adoption rights to those individuals who performed the functions associated with parenting. Parental rights were not absolute. These rights could be removed from individuals who were not acting appropriately and could be granted to individuals who were taking care of children in line with the best interest of the child standard. The turn to performance in these cases presented the court with a way to confront the breakdown in the ideal of marriage when parents were no longer having children in marital relationships.

The Maine court continued the developmental narrative of recognizing the importance of marital actions through performance in the case of Stitham v. Henderson (768 A.2d 598 (2001)). Here, a man (John Henderson) believed he was the father of children and acted as de facto parent for ten years. The case arose when he sought rights over these children. The court remarked that due to his “prior legal relationship to the child and his current role as a de facto parent” parental rights were granted (id. at 603). Justice Leigh Saufley’s concurring opinion asserted fathers were granted rights due to their relationship with the child based on various aspects of performance. The fact Henderson acted as a parent legitimized his rights to the child even absent a biological relationship. When a second man (David Stitham) was determined to be the father, the courts must ensure “the child did not, without cause, lose the relationship with the person who had previously been acknowledged to be the father but in the law, those marriage, and in fact, through the development of the parental relationship over time” (id. at 605). The specific language used here emphasized the court’s turn to performance to assess who should be granted rights over the child. In making the decision, the court had to
determine whether it was in the best interest of the child to continue the relationship with the man presumed to be the father. The court determined it was. Biology was not the only factor taken into account in determining the rights of individuals regarding children. The turn towards performance in this case allows the court to grant legal parental rights to an individual who did not bear a biological connection to the child. Attributing parental rights in this case was based on Henderson’s performative relationship over years. This picked up on the language of the New York court’s refusal in previous cases to extend parental rights to individuals not acting as parents. Instead, the court asserted fathers must not only be a biological parent but they must act as such. In the Stitham case, the father took on the role of parent and thus was granted parental rights.

In 2012 the Massachusetts court faced the question of paternity in the case of D.H. v. R.R. (461 Mass. 756 (2012)). The issue before the court was whether the probate judge correctly vacated the voluntary acknowledgment of parentage by R.R. In this case a mother (D.H.) lived with a putative father, who believed he was the child’s (Karen) biological father (R.R.). The mother, however, was married to another man (husband). A day after the child was born the mother and putative father executed a voluntary parentage agreement asserting he was the child’s father. However, the mother died three years later in 2010 and genetic testing revealed R.R. was not the child’s biological father. Karen (the child) petitioned the Probate and Family Court to vacate the voluntary acknowledgment of parenting, which the court granted. The potential father (R.R.) appealed. The court determined the voluntary parentage agreement was not law because the mother was married to another man at the time. Therefore the child was presumed to be his, which R.R. could not challenge. During the mother’s life the husband had not
denied paternity of the child, “husband had not executed an affidavit denying his paternity during the mother's lifetime” (id. at 762). Consequently, he was presumed the father and R.R. had no claim to the child.

Justice Donald Gant’s majority opinion focused on the importance of legitimacy being granted to the child finding: “the presumption [of legitimacy] had endured, but the strength of the presumption had diminished” (id. at 760). The legislature in 1981 changed the statute regarding children born out of wedlock to remove the stigma that may be faced by an illegitimate child. The court remarked: “the statute maintains the common-law presumption of legitimacy to the extent that it provides that, where a child was born during the marriage or within 300 days after the termination of the marriage, the husband was presumed to be the father of the child and must be joined as a party in any paternity action. G. L. c. 209C, § 6 (a). But the statute made it easier to rebut the presumption by reducing the standard of proof to establish paternity to ”clear and convincing evidence” (id. at 760). It noted the presumption of legitimacy, while still important, was not as forceful as it once was due to the fact prejudices against illegitimate children were reduced. This was still an important pronouncement from the court as R.R. was listed on the child’s birth certificate as the father. Identifying R.R. as the father was unpersuasive for the court due to the heavy presumption of legitimacy in light of the mother’s marriage.

The rationale behind this opinion suggested no matter who was listed on the birth certificate the husband was presumed to be the father. Formal marriage and legitimacy controlled the outcome of this case entirely. This outcome mirrored the federal pronouncement in *Michael M.* examined in the introduction to this chapter. Presumption
of fatherhood was extensive when a child was born during an intact marriage and the courts were unable to affect the legitimizing of a child. Legitimacy was a fundamental principle the courts sought to attribute to children whenever possible. Once attributed the courts were wary to remove it.

Taken together these cases illustrated a somewhat different commitment of the Massachusetts court compared to the New York court. In Massachusetts marriage and legitimacy trumped the rights of a biological father. The permanency of marriage outweighed the potential rights of an unrecognized biological father and along with that there were significant implications for the benefits a father could receive regarding his child in the two stated. This was an interesting conundrum developmentally as it implied the New York courts reflected societal and cultural reality that children were not always born to married parents and it was the relationship of each biological parent with the child that was paramount compared to the Massachusetts court that relied on the old concept and importance of legitimacy. In this way, the court in New York confronted the issue over the breakdown of the marriage ideal by exploring performative factors associated with performing the socially understood role of husband/father or wife/mother. Over time, the concept of legitimacy carried less weight regarding children and even the United States Supreme Court noted this in removing disadvantages once faced by illegitimate children in *Levy v. Louisiana* (391 U.S. 68 (1968)).

The general trajectory in these cases allowed individuals (fathers in particular) who had formed a tangible relationship with the child based on performance rights over the child. In particular the New York courts focused on this performative relationship but at the same time placed restrictions on the ability of an unwed father to assert his rights.
after the child was adopted. Under the standard of the “best interests of the child” the court found it necessary to place real limits on a father’s ability to interrupt the newly formed family created by the child and the adopted parents. This was true whether the adoption was a stranger adoption or whether it was a biological mother and her second husband adopting the child.

The trajectories in the three states were similar in that they continuously emphasized the importance of legitimacy but differed with the New York court’s extensive discussions around adoption and the rights of fathers compared to the more limited discussions in Maine and Massachusetts. What was important to note in these cases, which was different from the alimony questions discussed in chapter 3, was that these fathers were not engaged in a marriage-like relationship with the biological mother. Instead they were asking the court for rights to their children based solely on their own performance as a parent, not in conjunction with another person. Performance as a parent was given increasing weight as the twentieth century progressed. This is shown in the next section of this chapter where the courts granted rights to individuals specifically based on their performance as a parent. Moreover, this mapped almost directly onto Marshall’s opinion in Goodridge v. Department of Health in Massachusetts where the court extended marriage licenses to same-sex couples through an emphasis on performance as a parent.

Even though marriage continued to be a mechanism to legitimize children the courts looked beyond formal marriage and instead to performance that paralleled the socially understood roles of a husband or wife, but specifically a husband/father in this instance. The focus on performance was used as a way to extend formal rights to
individuals despite their non-marital status. Judicial interpretation of adoption statutes and adjudications on adoption cases focused more on the concrete relationship created between the parent and child by virtue of them acting as a parent rather than the formal legal status of parent created through adoption or marriage.

Marriage at one time served to exclude certain individuals from the enjoyment rights but judicial interpretation around custody and adoption worked to extend parental rights to non-married individuals and in doing so added specificity to the vague legislative standards set in place. This was largely in response to the breakdown in the ideal of couples having children in a formal marital relationship. This chapter’s focus on performance laid the groundwork for disputes over same-sex marriage by centering the performance parents. The foundation in this section also laid the groundwork for the next section of the dissertation focusing on same-sex couples adopting. This was especially true because prior to 2000 same-sex couples had no way to formalize their relationship with each other. Therefore, any extension of parental rights to a non-biological parent must come about through the use of performance.

**Same-Sex Couples Adopting**

From the 1990s onwards, state courts faced increasing numbers of questions from same-sex couples wishing to raise a child together. The very nature of conception only allowed one woman to be biologically related to the child. Indeed, in the early 1990s there were no formal options for same-sex couples wishing to legalize their relationship. The extension of adoption and custody rights to a second same-sex parent tied in directly with same-sex marriage as couples seeking to enter into a marriage attempted to formalize their performative status. Similarly, couples that were unmarried (or could not
marry) sought to formalize their relationship with a child they together brought into the family. The courts’ decisions in this particular area largely centered performance as a parent with some notable exceptions I discuss below.

Until 2000 when Vermont created and legalized civil unions, there was no way for same-sex couples to formalize their relationship to each other. Resulting from their unmarried status the partner of a biological parent was unable to adopt that child or have any custodial rights over him or her. The primary purpose of a second parent seeking to adopt the child was to give the child a second parent along with the love and stability accompanying dual parentage (see e.g. Adoption of Tammy, In Re Dana).

Adoption statutes required the natural parents to sever all ties between him or her and the child upon an adoption to ensure the stability of the newly created family. This requirement placed same-sex parents and their children in a catch 22. If the second parent adopted the child then the biological parent lost their rights over the child. This still left the child with only one parent and in the same situation as before the adoption.

During the 1970s as a response to women (and men) remarrying after a divorce, stepparent adoption laws were created. These allow the biological parents to retain their parental rights while giving the stepparent (the mother or father’s new spouse) rights and responsibilities over the child (Gash 2010). Questions over second parent adoption were premised on much the same set of founding facts but were inherently more difficult as the parents were not married to each other. If married, the spouse fell under the stepparent adoption statute. Thus, the breakdown in the marriage ideal followed that if the parents

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52 This was also true for unmarried opposite-sex couples. It happens that all the cases revolving around this particular controversy in my dataset bar one arose around same-sex couples. Non-biologically related parents who were married to the child’s biological parent i.e. stepparents could adopt the child through stepparent adoption, which allowed the natural parents (mother and father) to retain their parental rights.
were not married to each other, could the courts extend this right to encompass two parents who actively cared for the child? In confronting the questions by same-sex couples, courts had to determine whether the state domestic relations laws sanctioned this type of adoption. If not, judges must then evaluate whether the court possessed the power to extend the law to encompass second parent adoption. Under the best interest of the child standard courts had broad powers in acting in adoption and custody cases and in many cases use these powers to extend parental rights to a second parent.

The argument in this section was that the courts looked to the performance by same-sex partners that paralleled married performance in order to grant couples marital benefits and burdens absent the formal marital status. By looking at the performance of the women in these cases the courts determined whether the non-biological parent was acting as a de facto parent, defined by taking responsibility for the child and being active in his or her everyday life.

Performance, then, was more important than formal marital status in adoption cases. Although these cases predominantly surrounded same-sex parents, the same logic applied to non-married opposite sex parents as I illustrate in the New York case of In Re Dana. Performance of marital obligations allowed the court to assume marital obligations of individuals even though they did not legally contracted to marry.

The remainder of this section fleshes out how the courts looked to performance in cases involving same-sex couples adopting or being granted custodial rights over children. It forwards the overall argument of the dissertation by indicating that courts increasingly turned to performance in order to bestow (and remove) obligations that were traditionally reserved for only married couples. Even though the courts did not take
formal marital status into account, they still looked to performance of socially understood roles of husband and wife (in this instance caring for children and taking responsibility for them) in order to legalize the relationship between the non-biological parent. In turning to performance the courts ensured the stability of marriage and brought individuals into the fold of government regulation who were not in a formal marriage. Legitimacy was no longer as fundamental concern as it lost much of its importance during the 1960s and beyond when the United States Supreme Court, in 1968 struck down disadvantages for children born out of wedlock in *Levy v. Louisiana* (391 U.S. 68 (1968)).

The discussion around same-sex couples adopting or an individual in a same-sex relationship being granting custodial rights over children began in New York with the case of *Alison D v. Virginia M.* (77 N.Y.2d 651) in 1991. Alison D, the non-biological second parent of A.D.M., challenged the lower court’s conclusion she lacked standing to request visitation rights. The women entered into a relationship and together decided to become parents. The respondent and biological mother (Virginia) was artificially inseminated. The women planned the conception, birth and to raise the child together and intend to share jointly all the rights and responsibilities of parenting. The parties ended their relationship. Initially Alison D.’s visitation continued but Virginia M. (the biological mother) stopped A.D.M. from seeing Alison three years later. This suit arose when Alison D. challenged the lower court’s decision that she did not had standing to sue based on her lack of parental status.

Agreeing with the Appellate Division, the Court of Appeals determined the meaning of the word parent only encompassed persons either biologically related to the
child or legally related through adoption (Alison D. v. Virginia M.). The court unceremoniously stated Alison D. was a “biological stranger to a child” and therefore unable to challenge the custody decisions of the natural parent (id. at 655). In reaching this conclusion, the Court concluded biologically related and legally adoptive parents possessed an almost unquestionable, constitutionally protected right to determine whom their child associated with. This was especially true if they were a fit parent as Virginia M. in the instance case was. Indeed, the court noted: “petitioner [Alison D.] concede[d] that respondent [Virginia M.] was a fit parent. Therefore she had no right to petition the court to displace the choice made by this fit parent in deciding what was in the child's best interests” (id. Alison D. at 657). This quotation indicated the state place requirements on parents to provide food and shelter for their child but simultaneously reflected the notion that “parents had substantial discretion about how to satisfy this duty, and ordinarily the state did not intervene…unless the child was subject to sufficient harm as to be regarded as abused or neglected (Grossberg 2005, 496).

In determining Alison D. did not have standing the court failed to reach the substance of the issue: the visitation rights. Rebutting this determination of her not being a parent, Alison D. asserted she was not simply a third party, but had formed a substantial relationship with the child over the previous six years from birth to the present (meaning 1991). While no legal steps were taken by her to formalize the relationship with the child, her claim focused on her role as a de facto parent to A.D.M. Alison D. was a primary caregiver to the child since his birth and acted in a manner consistent with the child’s biological mother. Alison D.’s problem was compounded by the fact there were no legal mechanisms (in 1991) available to her to formalize her relationship with the child.
(without his biological mother relinquishing parental rights) and also with her same-sex partner.

In this case, the majority interpreted the Domestic Relations Law narrowly and allowed biology to define the term parent. In doing so the court elevated the wishes of the biological mother over the wishes, and potential repercussions, to the child. The court ignored the most fundamental aspect of child custody and adoption cases: the best interest of the child and judged it was better to remove all contact with a person who had been a constant presence in the child’s life since birth rather than impede slightly upon the biological mother’s wishes. This decision seemed somewhat at odds with other jurisdictions giving parental rights to individuals actively parenting children with the full consent of the child’s biological parent.\(^53\) Perhaps the key difference here was that the biological mother did not give consent to the non-biological parent to actively participate in the child’s life. In any event, the court did not reach a best interest of the child inquiry that traditionally determined the outcome in child custody and adoption cases.

Chief Judge Judith Kaye dissented with a forceful rebuke of the majority’s conclusions. She remarked the court should recognize the relationship even absent any biological or legal ties between Alison D. and the child. Kaye noted the Legislature actually “did not define the term "parent" at all. That remain[ed] for the courts to do, as often happens when statutory terms were undefined” (id. at 659, Kaye dissenting). The women voluntarily chose to have a child dependent on them but remained independent from each other.\(^54\)


\(^54\) It was unclear from the opinion whether the women chose to remain in any legally recognized relationship or whether they did so because there was no legally recognized relationship available to them.
Kaye determined the repercussions of this statutory construction fell hardest on children of such parents through “limiting their opportunity to maintain bonds that may be crucial to their development” (id. at 658, Kaye dissenting). Indeed, severing these bonds could not truly be in the best interest of the child. While of course there should be limitations on who was able to petition for visitation of a child, persons actively parenting the child should fall within the acceptable category. Kaye also commented that Alison D. was not asking for custody of the child but was simply asking for continued visitation. The two were distinct: “the fitness concern present in custody disputes was irrelevant in visitation petitions, where continuing contact with the child rather than severing of a parental tie was in issue” (id. at 661, Kaye dissenting). Kaye asserted that to characterize Alison D. as a stranger to A.D.M was to “utterly misconstrue” the reality of the circumstances here and the best interest of the child (id. at 661, Kaye dissenting).

Highlighting the fact Alison D. was a legal stranger to the child illustrated the framing of the problem by the court. Casting Alison D. as a stranger to the child deemed the majority’s argument logical as she was neither the biological nor adoptive parent of A.D.M. For the court it did not appear as unreasonable or outside the realm of judicial interpretation to deny standing to a “biological stranger,” as she was referred to. Denying Alison D. rights if she was judged with a full understanding of the complex and loving relationship that existed between her and the child had a much different connotation.

I should note again the best interest of the child standard was utterly disregarded. The court did not discuss the potential consequences to the child when his relationship with one of his primary caretakers was entirely severed. The majority opinion was framed entirely in the importance of the formal biological relationship between the child and
mother resulting in her right to have total control and custody over her child. In situations where the biological mother was deemed fit, the court asserted it had no ability to question her parental decisions or custody, stating: “it had long been recognized that… parental custody of a child may not be displaced absent grievous cause or necessity” (id. at 656). This recognized a parent had a great deal of discretion in decisions over their child’s care and wellbeing.

Enabling the courts to award visitation—a limited form of custody—to a third person necessarily impaired the parents’ right to custody and control. “Petitioner (Alison D.) conceded that respondent (Virginia M.) was a fit parent. Therefore, she had no right to petition the court to displace the choice made by this parent” (id. at 656-657). This line of reasoning missed the entire point of Alison D.’s suit. She did not want to interfere with the parenting choices of Virginia M. she simply wanted visitation with the child she helped raise. Had Alison and Virginia’s relationship not fallen apart it is unlikely this case would have even reached the Court of Appeals because the couple would still be raising the child together, as their parenting agreement stated. The case hinged on the meaning of the word parent, a meaning the majority of the court was unwilling to extend to include individuals who had been acting as de-facto parents.

In line with this analysis the court declined to revisit the meaning of the word parent to include “categories of non-parents who had developed a relationship with the child or who had had prior relationships with the child’s parents and who wish to continue visitation with the child” (id. at 657). The court asserted that while this person may be involved in the child’s life, the legislature in §70 of the Domestic Relations law did not compel the natural parent to relinquish any custody or visitation rights to a third
party not related to the child. This conflict did not go as far as asking the court to legitimize a second parent adoption; Alison D. simply wanted to visit her son.

The court stated the concern was over Alison D. not being biologically related to the child and the refusal of the court to extend parental rights to individuals who were not legally or biologically related tied in with this. The difficulty in this case stemmed from the fact Alison D. had, for all practical purposes, been acting as the child’s parent and whether it was truly in the best interests of the child to curtail all contact with this individual. There was certainly an implication of Martha Fineman’s construction of the core unit of the (biological) mother and child in this case. This was not without consequence especially in an era of changing familial make-ups and increasing numbers of same-sex parents choosing together to raise children. This was an especially difficult conundrum for same-sex parents both of them could not be biologically related to the child. Additionally, in 1991 there was no way for the non-biological parent to formalize their relationship with the child through adoption because adoption statutes mandated the biological mother or parent lost all parental rights upon the adoption of her child.

The court looked entirely at formal status in this instance and disregarded the performance of the non-biological parent in the years the women were in a relationship. The outcome of this case provides an interesting point of comparison to the case of *Stitham v. Henderson* (768 A.2d 598 (2001)) from the Maine court where Mr. Henderson was granted parental rights even though he was also a “legal stranger” to the child. The rationale in the case centered on his de facto relationship with the child’s biological mother.
In 1993, Massachusetts was the second state to allow same-sex couples to adopt. Six years later in 1999, Massachusetts also was the second state to allow a same-sex parent visitation rights without biological, adoptive, or other legal ties (see E.N.O. v. L.L.M. (429 Mass. 824 (1999)). Even before the decision in Adoption of Tammy, the Massachusetts court recognized sexual orientation alone was not sufficient to prevent a natural parent from having custody of his or her child (Davies 1995, 1072-74).

New York’s lower courts, in 1992, determined a second parent should be allowed to adopt her partner’s biological child without the biological mother losing parental rights concluding an “absurd result” occurred if the adoption was not legalized (In Re Evan 583 N.Y.S.2d 997 (1992) and In Re Adoption of Caitlin 622 N.Y.S.2d 835 (1994)). This case did not make its way up to the Court of Appeals so the precedent of Alison D v. Virginia M remained.

In 1995, the New York Court of Appeals amended the posture from Alison D. without expressly overruling it and concluded the non-marital same sex or opposite-sex partner of a biological mother was entitled to the same parental rights married partners. This decision was based entirely on performance of the socially understood role of a husband or wife. Even though the legislative intent did not allow this type of adoption the court determined it was in the best interest of the child to have two parents due to the numerous benefits for the child.

The Maine court extended parental rights to a woman based on her performance of the socially understood role of a wife even absent a legal relationship between the women and a biological connection between the parent and child. The rationale given by

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55 Adoption of Tammy (416 Mass 205 (1993)); Vermont was the first state earlier in 1993, In Re. BLVB (160 Vt. 368 (1993))
the courts in these cases mapped directly to the focus on performance to attribute formal relationships to individuals in the same-sex marriage cases I examine in chapter 6. A focus on performance here allowed the courts to extend rights to individuals based on their performance that paralleled married individuals even though they were not formally married.

In the Adoption of Tammy, the Massachusetts court was asked to grant Tammy the right to be legally related to both her female parents. By focusing solely on the best interest of the child and not the biological relationship the court approved this second-parent adoption. Justice John Greaney concluded the women functioned as a familial unit with Tammy thus it was in the best interests of the child to continue this (Adoption of Tammy 415 Mass 205 at 209 (1993)). Greaney stated: “the petitioners and their home were suitable for the proper rearing of this child” (id. at 209).

In 1993 there was no avenue for the women to formalize their relationship through the law even though they were in a committed relationship. As such, Tammy’s non-biological parent fell outside the parameters of the stepparent adoption law. Therefore, the court was faced with a conundrum. Should it expand the law to recognize the performative relationship between the non-biological parent and Tammy even when her parents were unmarried?

As a way to solve the breakdown in the marriage ideal (non married couples bringing children into their families and, perhaps even more of a breakdown, the fact same-sex couples were forming families with children) the courts turned to performance and the fact these women performed marital obligations akin to married individuals. As such, the lack of a formal marital status was inconsequential for the court and it
concluded there was “overwhelming support for the join adoption and the judge’s conclusion that join adoption was clearly in Tammy’s best interests” (id. at 209-210).

The decision in favor of the adoption focused heavily on the practical and loving relationship between the non-biological parent and Tammy but also the fact these women performed functions closely associated with the traditional role of a wife (and mother). Performance was the controlling factor here. Through this interpretation, the court acknowledged the integral role the second parent played in Tammy’s life despite the fact she was not formally or legally related to the child. This type of adoption expanded the category of parent to individuals in alternative family units. Further, key for the court was whether a person performed duties and obligations associated with parenting. In using this standard of adoption and looking at the best interest of the child, the court demonstrated a move away from the notion that only married couples were acceptable parents and towards a focus on alternative families.

While married couples were certainly one acceptable category of parents, parental status no longer was defined by formal marital status. The finding of the court here also removed some of the privilege associated with biological parents having an almost absolute right to determine the welfare of their child, which was a development from the New York court’s rationale in *Alison D. v. Virginia M.*

The best interest of the child was reconfigured because of this case and was the controlling factor for the court. As the majority opinion explicitly stated the fact Tammy had two loving parents was the most fundamental aspect of the adoption. As a result the court was willing to extend the rights and duties of parenting to individuals despite the absence of formal marriage. This particular case extended the vision of parenting and in
doing so brought individuals previously excluded under the scope to statutory rules and boundaries. Simultaneously, it removed distinctions between married and non-married parents and also distinctions based on the gender make-up of the couple.

Although the legislature may not had envisioned this type of adoption falling under the standard, the court examined its broad discretionary powers over custody and adoption proceedings asserting: “the legislative intent to promote the best interests of the child was evidenced throughout the governing statute, and the adoption of a child by two unmarried individuals accomplished that goal” (id. at 211). Contrasted to the New York court and its understanding of the word parent in Alison D., the Massachusetts court here interpreted the legislative intent and meaning of the word parent broadly to include persons not directly related to the child but who functioned as a de-facto parent to the child. In doing so, the court focused on the performative aspect of the relationship between the parent and child.

While the court did comment on the relationship between the two women, the main thrust of the court’s discussion rested on the relationship between the child and non-biological parent. Focusing solely on the best interests of the child, the court noted: “rather than being detrimental to the child’s life” this type of adoption would allow “Tammy to preserve her unique filial ties to Helen in the event that Helen and Susan separate[d], or Susan predeceases Helen” (id. at 214). The decision here recognized an alternative family structure not predicated on a nuclear family of a husband, wife and child or a legal marriage between the parents. It was possible for non-married individuals to sufficiently parent a child in the same way a husband and wife could.

Moreover, the recognition of the relationship between the child and non-
biological parent was based on the performance of the adult as a parent. This was similar to the discussion of parental consent requirements above where the New York court concluded that in order to have parental rights a man must not only be a father in name but also must act/perform as such. Performance as part of a couple and assumption of marital obligations of parenting provided a way for the court to extend rights in this case; future cases continued this developmental trajectory. Even though perhaps the formal status of marriage was not as important as it once was the Massachusetts court nevertheless legitimated performances that mirror married performance. In other words, as Tammy’s second parent performed functions traditionally associated with being a wife and mother the court extended marital rights and obligations to her.

Two years later New York passed judgment on the same issue and reached a similar conclusion to the Massachusetts court. In extending second parent adoption to non-marital same-sex couples the New York court allowed the biological parent to retain her parental rights. In two consolidated cases, *In Re Jacob* and *In Re Dana*, the court asserted it interpreted the Domestic Relations Law to grant a second parent rights over child without terminating the biological parents’ rights even though the parents were not married to each other. The decision specifically amended the Domestic Relations law as written (86 N.Y.2d 651 (1995)).

*In Re Dana* involved a lesbian couple that planned together to have a child through artificial insemination. *In Re Jacob* involved an unmarried heterosexual couple where the male partner wished to adopt the child from his female partner’s previous
relationship.\footnote{Had the couple been married, the mother’s husband could adopt the child having full parental rights over the child.} In both instances the couples wished to co-parent the child giving him or her the numerous advantages of a two-parent family. Both cases challenged New York State’s Domestic Relations Law, section 117 (1)(a) stating the natural parent must relinquish parental rights when their child was adopted. As an unmarried couple the partner did not have standing to petition for an adoption because he or she was not a parent under the current statutory understanding.

In asserting the overriding purpose of adoption to create a legitimate filial relationship, Chief Judge Judith Kaye determined requiring the natural parent’s right to be severed achieved an absurd result. In centering the argument on performative aspects of parenting Kaye remarked it did not serve the best interest of the child to remove parental ties from a person who was already practically functioning as a parent to the child.

Kaye went on to discuss the numerous advantages for the child resulting from having two parents including social security and life insurance benefits, health insurance coverage under parents' policies and not least, the guarantee the second parent could make medical decisions for the child in the event of an emergency. The type of palliative care a second parent could offer a child was not lost on the majority when Kaye stated: “even more important, however, was the emotional security of knowing that in the event of the biological parent's death or disability, the other parent will had presumptive custody, and the children's relationship with their parents, siblings and other relatives will continue should the co-parents separate” (\textit{In Re Jacob}, 86 N.Y.2d 651 at 658 -659 (1995)). Although the court recognized the “disruptive visitation battle we faced
in *Matter of Alison D. v Virginia M.*” it did not specifically overrule the case (id. at 659).

The rationale in this case followed directly from the Massachusetts court in *Adoption of Tammy* and similarly centered the benefits gained by a child from having two parents. These cases moved towards a new understanding of best interests premised on the tangible relationship between the parent and child – the performativity of the parent - rather than the formal status of parent. In other words, the court asked whether the mother was *acting* as a mother rather than whether she had the *status* of a mother. In both cases – *Adoption of Tammy* and *In Re Jacob and In Re Dana* - it did not matter to the court the parents were not in a formal marriage. Instead importance was placed on the relationship between the child and parent; the fact the parent had been *acting* as a child’s parent was key. Even so, the opinion centered on the fact the women were performing duties traditionally associated with formal marriage.

Performance of marital obligations enabled these individuals to receive benefits (and obligations) traditionally only granted to married couples. Interestingly the couples in both of these cases were still functioning family units while in *Alison D.* the relationship broke down. This did not appear to be a controlling factor because Kaye’s opinions in both *Alison D.* and *In Re Jacob* focus on the practical and performative relationship between the non-biological parent and child. It seemed to be of no consequence to her that the parents were either still in a relationship or not, the focus was squarely on the best interest of the child, which was having two parents rather than one.

Moving beyond even the best interest of the child standard and requiring the biological parent to give up his or her rights to the child contravened the purpose of adoption. It placed the couple in a "Catch-22" when one person still only legally parented
the child, which was not supported by section 117. Kaye asserted: “broadly speaking the stated rationale for the severing of parental ties was a rational piece of legislation as the majority of adoptions were between strangers: the statute prevented any "unwanted intrusion by the child's former biological relatives to promote stability of the newly adoptive family" (id. at 666). However, this was not the situation here. Speaking to the difference between traditional adoptions by strangers and the current question before the court, Judge Kaye noted: "the complete severance of the natural family relationship was not necessary when the adopted person remains within the natural family unit" (id. at 666).

Interpreting the statute in this manner the judges recognized the changing make up of families and altered the legal framework to embrace the change. Again, this case required the court to look at the real and lived relationship between the child and parent to judge based not on the formal marital status of the non-biological parent but instead on performance as a parent. Although the focus was on performance there was still an assumption the non-biological parent was taking on marital responsibilities without the formal status of marriage.

The court’s commitment to only granting rights (and obligations) to individuals who were actively caring for the child was enhanced by this case. The consequences were two fold. First, it recognized the performative relationship between the non-biological parent and child as legally recognizable as they perform similar functions to married individuals and in doing so were able to solve the breakdown in the ideal of marriage faced when non-married couples had children.
Second, by centering the rights of de facto parents, the courts ensured only individuals who were actively involved in the child’s life could enjoy rights and corresponding obligations over the child. Inherently, though, it was a parent’s performance that allowed them to enjoy these rights. Expanding stepparent adoption to include persons not married to each other acknowledged the gradual expansion of categories of persons able to adopt since World War II. Further, the majority asserted that while the New York statute did not explicitly allow homosexual persons to adopt it did allow “a single person to adopt [and]… equally clear was the right of a single homosexual person to adopt” (id. at 651).

The “difficult task of statutory interpretation” (id. at 660) was undertaken with the full knowledge of the different make up of capable families. Formal marriage was not central to the court’s rationale as Kaye noted: “any proffered justification for rejecting these petitions based on a governmental policy disapproving of homosexuality or encouraging marriage would not apply.” As noted above, New York did not have a policy disfavoring adoption by either single persons or homosexuals. In fact, “the most recent legislative document relating to the subject urges courts to construe section 117 in precisely the manner we have as it cautions against discrimination against "non-marital children" (id. at 668). As a way to confront this problem, then, the court turned to performativity and extended the scope of the Domestic Relations Law.

In examining the Matter of Jacob, Kaye noted the male petitioner in Jacob could marry his partner and thus the entire situation was solved. This did not satisfy Chief Judge Kaye, however, because Dana continued to suffer simply "as a consequence of her mother's sexual orientation" (id. at 666). This phrasing emphasized the adoption statutes
must be equal with regards to sexual orientation; they could not have a disparate impact on a child because of their parent’s sexual orientation.57

The inability of Dana’s parents to marry was important for Kaye as it still prevented the adoption and Dana from having two parents. For Kaye solving the problem by asserting Jacob’s parents could marry was not satisfactory because the ability for individuals to adopt their partner’s child should not rest on formal marital status.

In her concluding remarks and emphasizing the developmental trajectory of adoption and custody law, Kaye commented: “the Legislature that last codified section 117 in 1938 may never had envisioned families that "include[ed] two adult lifetime partners whose relationship was … characterized by an emotional and financial commitment and interdependence" (Braschi v Stahl Assocs. Co. (74 NY2d 201) at 211). Nonetheless, it was clear that section 117, designed as a shield to protect new adoptive families, was never intended as a sword to prohibit otherwise beneficial intrafamily adoptions by second parents (id. at 668-669). With this in mind, Chief Judge Kaye specifically looked to the applicability of the statute in the modern day.

The formal law had the practical effect of imposing a significant hardship on a great number of children and perpetuating an inequality between children raised by married parents and those raised by cohabiting parents (whether opposite-sex or same-sex). This language specifically picked up on the language of Adoption of Tammy in Massachusetts (discussed above) in speaking to the difference between legislative intent when the statute was written versus necessary judicial interpretation. Consequently, both the Massachusetts and New York courts elevated the performative aspects of marital

57 In 1992, in the case of In Re Evan the New York Surrogate Court determined that an open lesbian relationship was not a reason to deny adoption” because “a child’s best interest was not predicated on or controlled by parental sexual orientation” (583 N.Y.S.2d 997 (Sur. Ct. 1992))
obligations (in this case parenthood) over the obligations accompanying the formal marital status. Although the court eliminated a distinction based on marital status, the opinion nevertheless focused on performance akin to married performance in attributing rights.

Judge Joseph Bellacosa’s dissent in In Re Jacob focused on the lack of permanency of non-marital relationships to deny the adoption, as "unlike married and single parent households, each couple here cohabited only day-to day... their relationships lack legal permanency and the State had not endowed them with the benefits and enforceable protections that flow from relationships recognized under the color of law" (id. at 670, Bellacosa dissenting). This factor precluded stepparent adoption by an unmarried partner from being in the best interest of the child according to Bellacosa. In this way, Bellacosa centered the decision on the presence of a formal marriage, which attributed specific rights and obligations. The right of adoption flowed from marriage for Bellacosa as his opinion suggested the two were indistinguishable. Formal marriage was key for Bellacosa in a way it was not for the majority. Even though marriage perhaps was the paradigmatic way to raise a family the majority opinion noted there were other legitimate ways to achieve the same result. The dissenting opinion did not agree.

Focusing on legislative intent and reaching a different conclusion, Bellacosa asserted the legislature showed no intent to permit cohabiting unmarried adults the right to adopt their partner’s child. Further, Bellacosa asserted the state consistently rejected the recognition of "at-will common-law relationships as marriages" (id. at 673, Bellacosa dissenting). For the dissent there were no shades of grey regarding different family makeups being extended benefits associated with adoption. Formal marriage, along with the
protections and benefits flowing from this legally recognized relationship provided a clear line for the dissent.

Bellacosa’s rationale was similar to the filing of loss of consortium claims: only those persons in legally recognized marital relationships were eligible. No marriage-like relationship was included. Defining boundaries between marriage and other relationships ensured formal marriage and formal marital status functioned as an ideal all other relationships were measured against. If nothing else, marriage was a more permanent relationship that was more difficult to sever. The difficulty in ending a formal marriage served the best interest of the child in a way that no other relationship could match. Bellacosa’s analysis led directly to the overarching argument of the dissertation. If marriage was a more permanent relationship with accompanying benefits and obligations then why not extend it to couples that were performing these functions? The stability of the family and the impact marriage had on children underpinned Chief Justice Margaret Marshall’s opinion in extending formal marital status to same-sex couples in Goodridge v. Department of Health.

Although the presence of marriage did not seem fundamental for the majority it emerged as essential for Bellacosa. This reflected an understanding of certain practices being treated differently and given sanctioned status when enjoyed by a married couple. Formal marital status was fundamentally important in the dissenting opinion’s rationale. The dissent noted the case was centrally about formal marital status and the stability of family rather than sexual orientation as: “she [Dana’s non-biological mother] petitioned individually and qualifies under section 110, irrespective of her sexual orientation. The Dana case, therefore, was not a case involving the right of homosexuals to adopt,
nor, self-evidently, was the *Jacob* case [as the parents were of the opposite sex]” (id. at 671-672, Bellacosa dissenting). What Bellacosa failed to understand in characterizing Dana’s mother as being able to adopt as a single woman was that this would require Dana’s biological mother to relinquish parental rights and therefore not solve the problem satisfactorily. For Bellacosa the parties being married to each other fixed the entire problem but this was an unworkable solution according to Chief Judge Kaye that did not actually fix the problem because Dana would not be able to be formally related to both of her female parents as same-sex marriage was not sanctioned in New York at that time.

The rationale behind the majority and dissenting opinions differed substantially in *In Re Jacob*. Bellacosa’s dissenting seemed to miss the entire point of the suit in emphasizing formal marital status. While the dissent focused on the lack of permanency in these relationships the majority opinion looked to the practical benefits of having two parents. The majority opinion framed the extension of parental rights as a natural step for the court similar to the Massachusetts opinion in *Adoption of Tammy*. The majority opinion from both courts (New York and Massachusetts) reinforced the fact performance as a parent was key. This was seen more clearly with the Massachusetts court’s reliance on the lived and practical relationship between the second non-biological parent and Tammy and the fact she enjoyed the comforts provided to her by both of these women.

The two decisions framed family relationships as those between individuals who wished to become families rather than a preconceived notion premised on formal marital status. This also implicated a broader understanding of parenting than two biologically related individuals who were married to each other. However, at least for the non-biological parent there was an implication of voluntary assumption of parenting rather
than forced attribution characterizing some decisions in the earlier time periods around questions of legitimacy. The two cases also illustrated an assumption of marital responsibilities for cohabiting couples that did not contract to marry. This was an important innovation for the court. The assumption of parental responsibilities made it a small leap to then extend marital rights to same-sex couples based on their performance as couples and the assumption they had already taken on, or were at least willing to take on, marital obligations. Even though the courts used performance as a way to grant marital benefits to individuals, there was still an assumption by the court that these couples were acting in ways that imitate married performance.

The rationale behind the majority opinion in *Tammy* found the court ascribing itself the role of interpreter of legislative intent. The consequence of the decision was to expand the notion of family and adoption beyond what the legislature initially envisioned. The parameters of *Tammy* also reflected dramatic changes in adoption since the statute was put into place and even more so since the initial Massachusetts adoption statute in 1851. Further implicated in this opinion was the court’s role in bringing the law into line with how adoption had shifted and transitioned in society. The majority opinion in *Tammy* made it clear it was the court’s job to interpret the legislative intent and remove fissures between the law on the books and how the law operated.

The opinion in *Tammy* contrasted to Kaye’s majority opinion in *In Re Jacob* where the rationale was based more squarely on the ramifications for children who did not have two parents. For Kaye it was particularly important for the child to have the benefits of dual parenting. Kaye also focused more directly on the purpose of adoption and not wishing to disadvantage children whose parents either chose not to marry or were
statutorily barred. Both the Massachusetts and New York courts expanded what they suggested were “absurd results” of leaving the legislation in its current form. The framing of the court’s decision here implicated an important aspect of judicial decision-making looking to add specificity to the legislative standards and also change them. Both of these decisions had significant ramifications for non-married same sex and opposite-sex parents as these couples were now included in the boundaries around adoption.

Judicial framing in both of these cases indicated formal marriage was not as important as it once was in granting benefits and obligations to individuals. Instead, when the courts faced an affront to the established law they turned to performance. While marriage was undoubtedly still important the courts were unable to maintain a status hierarchy between couples based on marital status. Performativity was primarily important for the courts in these cases but again was a type of performance that paralleled married performance. If the couples were not already acting married, both as couples and parent it was unclear whether the Massachusetts and New York courts would have extended second parent adoption to them. The rationale from both courts indicated quite clearly the rationale was to give the child in question a formal relationship to a person who was already occupying the place of a parent and assuming parental responsibilities.

Another case the Massachusetts court decided was *E.N.O v. L.L.M.* in 1999. In this case the Massachusetts court granted parental rights to women who intentionally brought a child into their family and were raising that child together (*E.N.O. v. L.L.M.*, 429 Mass 824 (1999)). In 1999 there were no legal options for the women to formalize their same-sex relationship in the eyes of the state. Despite this, the women took part in a commitment ceremony to signify their relationship and promise to each other.
An important factor in the overall determination was their public commitment and their choice together to become parents. In the event of a separation, the parent agreement stipulates the women remain as co-parents to the child. Deferring to this parental arrangement, the court to found “the family that must be accorded respect in this case was the family formed by the plaintiff, the defendant and the child” (id. at 833).

In extending rights to the second, non-biological parent, the court focused on the tangible relationship between the parent and child, and centered the performative aspects of parenting through indicating that as a de-facto parent, the non-biological parent made key parental decisions for the wellbeing of the child and was intimately involved in the child’s upbringing. Despite the fact she was a “legal stranger” (to borrow to the term from Alison D.) she took on the responsibilities and obligations of parenting i.e. she assumed obligations associated with marriage without actually contracting to marry. Resulting from this, the Massachusetts court to defined a de-facto parents as an individual “with no legal relationship [with the child] but had participated in the child’s life as a parent” (id. at 829). As such, the court assumed parental (and married) responsibilities (and rights) to individuals who had not contracted to marry.

The performance of the non-biological parent in this case and the performance of the couple paralleled married performance of parenting in the sense that both women here cared for the child and seek to ensure the child’s wellbeing. Additionally, as both were responsible for the child and the Massachusetts court determined the women should have rights over the child. Importantly here, though, the couple was separated. The court’s decision indicated that just because the women were not longer in a relationship with
each other, their responsibilities towards children did not end. Similarly to when a couple divorced they were still responsibility for the children of the relationship.

Performance of the parental and family relationship—acting as a de facto parent and family in taking care of the child - controlled for the Massachusetts court. Even so, the assumption of marital responsibilities (towards a child) was not inconsequential for the court. The decision in E.N.O. was certainly in line with the developmental narrative of the Massachusetts court and followed almost directly from the decision in Adoption of Tammy. In both cases the court looked to performance as parents but it was performance that necessarily mirrored performance towards children of formally married couples as both parents were taking on responsibilities and obligations towards the child they were raising together. The breakdown of the marriage ideal here (specifically as a homosexual woman sought to adopt the biological child of their partner) the court turned to the aspects of their performance to solve this problem. It is important to note, though, that the court looked to the performance as similar to married performance, occupying the socially understood role of a wife and mother. If a woman did not taken on this role it was clear she would not have a role to play in the child’s life.

With the ruling in E.N.O. v. L.L.M. the court recognized the rights of same-sex parents that were given to opposite-sex parents twenty-seven years before in Stanley v. Illinois (id. at 829). The practical result of this decision was to grant any same-sex person who could demonstrate a de-facto parental relationship temporary visitation rights. Missing from this decision was any provision for joint custody or adoption of the child and the decision was limited in scope.58 It certainly was not a broad scope decision in

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58 While stating that the non-biological parent originally filed for adoption, joint custody, and visitation, the court in E.N.O. only dealt with the visitation issue (at 825). As settled in Adoption of Tammy a couple that
granting same-sex parents extensive rights over the care and custody of their children. At the same time, the court did find a way to maneuver around the legislative barrier preventing the adoption by focusing on the performative aspect of parenting in a manner that they performed functions associated with the role of a mother.

In 2000 Vermont legalized civil unions. This statutory provision granted same-sex couples all the state rights and benefits associated with marriage.\(^5\) As Vermont did not have a residency requirement for civil unions couples could travel to Vermont and formalize their relationships. During the first decade of the twenty-first century other states begin to extend marriage benefits same sex couples either by recognizing out of state civil unions, legalizing civil unions through either legislation or judicial decision or legalizing same-sex marriage through legislation or judicial decision.\(^6\)

When same-sex couples entered into marriages or civil unions it was just as likely their relationship would end as with opposite-sex marriages. When children were involved sometimes bitter custody battles ensued. This was the case in *Debra H. v. Janice R.* (14 N.Y.3d 576 (2010)). Debra H., the non-biological mother filed suit seeking joint custody of a child she raised with her former partner, Janice R. Here, Debra H.

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\(^5\) Other states, however, were not required to recognize these civil unions. Unlike marriages performed in different states where sister states were bound by the Full Faith and Credit Clause of the United States Constitution to recognize these marriages, Civil Unions were entirely a creation of the state. Of course, one caveat to the exercise of Full Faith was the Federal Defense of Marriage Act (DOMA, passed in 1996) allowing states to not recognize out of state same-sex marriages.

\(^6\) In 2003, the Massachusetts Supreme Judicial Court legalized same-sex marriage in *Goodridge v. Department of Health* (440 Mass 309 (2003)). In 2008, then Governor David Patterson issued an Executive Directive compelling state agencies to recognize same-sex unions performed elsewhere. This directive followed hot on the heels and directly cited as reasoning the case of *Martinez v. County of Monroe*, a decision of the State Appellate Court in Rochester determining Ms. Martinez, who married her partner in Canada (and who works at Monroe Community College) could not be denied health benefits by the College because of NY’s long standing policy of recognizing only marriages between persons of the opposite sex.
prevailed in her suit on the narrowest possible grounds in a case that flew in the face of In re Jacob and In Re Dana I discuss above.

In Debra H. the majority opinion rested its decision solely on the fact Debra and Janice were in a legal civil union not the fact Debra acted as a de facto parent to the child since the child’s birth. The couple entered into a civil union in Vermont. Children born during a legal civil union were considered children of both parents and were consequently legitimized, similar to children born to formally married parents. The majority stated any children born during a legal civil union “shall enjoy the same rights with respect to a child of whom either becomes the natural parent during the term of the civil union” (id. at 598). Before their relationship ended Debra H. participated fully in the upbringing of the child, which established her role as a de-facto parent. The marriage-like relationship (i.e. the civil union) was significant for the court as couples had all the rights incident to a marriage including “the assumption that the birth of a child during the couple’s legal union was extremely persuasive evidence of joint parentage” (id. at 599, quoting Miller-Jenkins v. Miller Jenkins (912 A. 2d 951 (2006))).

The recognition of the parental rights (granting Debra H. custody) rested almost entirely on the presence of the civil union. Thus, the court legitimated her performance because it paralleled married performance. If the couple was heterosexual, a child born during that marriage was considered the child of both parties. The same rationale extended to parties to a civil union. This particular conclusion picked upon the Judge Richard Simon’s dissent in Braschi where he argued only those in formally recognized legal relationships, limited to “those related to the tenant by blood, marriage or adoption”

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61 This was an important aspect as the express purpose of civil unions was to grant couples all of the same benefits and obligations as couples who were formally married, which includes rights and obligations over children.
should be granted rights (Braschi v. Stahl Associates, (74 N.Y.2d 201 at 208 (1989)). For Simon, the court should only extend rights to individuals in legally recognized relationships and not those performing the outer functions of either being married or being a parent. The performative aspects of marriage were unpersuasive for Judge Simon in Braschi as well as the majority in Debra H. v. Janice R. The decision here was a point of comparison to the New York court’s earlier decision in In Re Jacob and also the discussion in chapter 3 on alimony where the courts readily terminated alimony when a woman was holding out to be the wife of another man. The decision in Debra H. was consistent with the court’s limited notion of the parties able to file a loss of consortium claim in the case of injury or death, which I examine in chapter 5.

The presence of the civil union was not at issue or disputed by Janice R. (the biological mother). Rather, the objection stemmed from the New York courts recognition of the out of state civil union as Janice R. argued New York should not recognize their civil union. This was unpersuasive to the Court of Appeals and it recognized the civil union. Thus, under the law of comity, New York must recognize Debra H.’s parental rights.

Although I cannot know with certainty the outcome of the court if Debra and Janice were not in a civil union, Debra’s success was unlikely given the narrow grounds of the majority and the unwillingness of the court to overrule Alison D. as bad law. The analysis in the case highlighted that absent the civil union, the court did not recognize Debra H.’s rights. The focus here was entirely on the formal civil union creating a legal status of parent and therefore performance that parallels married performance. Marriage, or the presence of a civil union, was clearly not eliminated from the discussion over
adoption and custody as in each of the cases in this developmental narrative the courts look to whether the non-biological parent was assuming rights, or performing rights associated with being a wife and mother.

Two of the unanimous seven ruling for Debra wrote concurrences based on grounds other than the civil union. Judge Carmen Ciparick would overrule *Alison D. v. Virginia M.* as “outmoded and unworkable” (id. at 607). Picking up on Kaye’s dissent in *Alison D.* on the untold consequences the court’s decision had, Ciparick argued: “in countless cases across the state, the lower courts, constrained by the harsh rule of *Alison D.*, had been forced to either permanently sever strongly formed bonds between children and adults with whom they had parental relationships” (id. at 607). This could not be in the child’s best interests. Furthermore, while the court did not overrule good law Ciparick asserted: “*Alison D.*, however, has never been good legal precedent. Rather, the majority in that case took an unwarranted hard line stance, fixing biology above all else as the key to determining parentage and thereby foreclosing any examination of a child’s best interests” (id. at 608). Ciparick noted other jurisdictions had a much less rigid mechanism for determining who should be granted parental rights. These states focus not only on biology or a legal family relationship but instead made a “functional examination of the relationship between the parties and the child,” which was akin to performance (id. at 608). For Ciparick, the relationship between Debra H. and the child should not rest upon the relationship she had with the child’s mother but rather her relationship with the child.

62 Ciparick argued a functional test would more often result in an outcome that serves the best interests of the child. Smith, argued for the application of the common law presumption of parentage for same-sex couples living together. Graffeo would uphold *Alison D.* but decide the case based on the civil union and the redefinition of the family.

He argued marital status had nothing to do with the ability and willingness of a person to parent a child. This concurring opinion examines the actual relationship between the child and parent to determine the outcome and advocates for basing the decision on the performative aspects of parenting rather than the civil union as the majority did.

Judge Robert Smith, also concurring, argued the women intended to bring the child into a two-parent family and for the court to step in and remove one of the parents was beyond the scope of its authority. He advocated for the application of the common law presumption of parentage for same-sex couples living together asserting that “where a child was conceived through ADI [artificial donor insemination] by one member of a same sex couple living together, with the knowledge and consent of the other, the child was as a matter of law -- at least in the absence of extraordinary circumstances -- the child of both” (id. at 612).

In contrast to the majority, Smith’s opinion did not rest on the marital status of the parties but on the commitment of the two women to each other and to the child. Smith used the women’s performance that was similar to married performance in order to conclude Debra H. should be granted parental rights. The opinion here directly laid the groundwork for cases over same-sex marriage, as courts in same-sex marriage cases (particularly in Massachusetts) used this very argument about performativity. The concurring opinions centered the performative relationship between the non-biological parent and child rather than the formal relationship between the parents. Simply put,

64 Interestingly, Judge Robert Smith writes the majority opinion in *Hernandez v. Robles* in 2006, which was the Court of Appeals’ decision over same-sex marriage. In his opinion, which I examine in chapter 6, one central aspect of his argument was that all things being equal the legislature may determine it was in the best interests of the child to be raised by opposite --sex parents. The rationale behind his opinion in *Hernandez* did not appear consistent with his concurring opinion here in *Debra H.* where he found the non-biological parent should be granted joint custody of the child based on her performance as the child’s parent.
Debra H. and Janice R. may end their relationship with each other but, similar to heterosexual separated partners, they did not intend to sever their relationship with their child. Smith’s opinion indicated performance as a parent was key even after the end of the relationship between the adults obligations towards a child never end.

When formally married partners end their relationship there was often a question over support and maintenance for children (and wives) in those relationships. As opposite-sex couples and same-sex couples function on very similar terms when they end their relationships there were also questions over child support and maintenance, separate from alimony. The Massachusetts court faced support questions from partners in same-sex relationships. In making decisions around support obligations the courts focused almost entirely on the formal status of marriage. When a formal relationship ended, parents, most often fathers, had to pay child support for their children.

Biological parents were always required to support their children. However, this was more complicated in same-sex relationships where both parents were not biologically related to the child. To what extent should a non-biological caretaker have to financially support a child? The court essentially determined a non-biologically related caretaker did not have to support the child if the relationship broke down. This followed from understanding that cohabiting couples had no obligations towards each other. 65 Marriage assumed a set of responsibilities and obligations (both financial and emotional) that were simply absent for unmarried couples.

In T.F. v. B.L. (442 Mass. 522 (2004)) the Massachusetts court looked to whether a woman in a non-marital relationship was responsible to pay child support to care for her children.

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65 This was a rationale used by the court to determine whether a woman was holding out to be the wife of another man. Cohabiting couples, roommates in a sense, had no obligation of support and neither could one party look to the other for support.
non-biologically related child. The facts were as follows: a woman, B.L., consented to her partner's insemination but left the relationship before the child was born and refused to support the child (id. at 523-524). The non-biological parent, having left the relationship prior to the child’s birth had not formed a relationship with the child and thus was not acting as parent to the child under the parameters of what the Massachusetts court determined to be de facto parenting (as discussed above in *E.N.O.*). Consequently, the court determined the non-biological parent was not required to pay child support.

What was even more interesting about this case was that when the case began same-sex marriage was not legal but by the time it reached the Supreme Judicial Court same-sex marriage was legal. Therefore, if the child was born after the parents were married he or she was considered the child of both parents as in *Debra H.* from New York.

Justice Judith Cowin, writing the majority opinion, asserted the non-biological mother was not the legal parent of the child and therefore could not reasonably be expected to pay child support. Similar to the New York court, the requirement rests on a determination of parenthood. This also established parenthood as a contract between the two individuals at least in situations when they were not married to each other. Marriage assumed husband was a parent to any children born to his wife during the marriage. Conversely, the absence of marriage suggested an almost voluntary nature to parenting, at least for the non-biological parent. In the context of same-sex couples, these cases suggested an emerging theme over the debate around the idea of families by choice, at least for the non-biological parent.

The judicial framing in the cases above indicated non-biologically related parents do not had to assume the status of parent unless they wish to. This type of voluntary
parenting was important in two ways. First, it allowed non-biologically related parents to perhaps eschew the parental rights if they “change their minds” after committing to have a child with their partner. It also had the opposite effect though: when non-biological parents sought to assert their rights it was more difficult as they had to prove a relationship with the child based solely on performance. Further, the type of performance the courts valued was performance that mirrored married performance.

The effect of this was perhaps no more keenly felt than on same-sex couples. These couples were not able to marry (until 2004) and therefore did not have the same rights over children as married heterosexual couples. Civil unions allowed a non-biological parent to remedy this situation and formalize the relationship with the child through a marriage-like relationship with that child’s mother. This was the crux of the issue in Debra H. where the women entered into a civil union, which conferred legitimacy on the child born during the union thus cementing the formal parental relationship between the non-biological woman and the child beyond the performative aspects of marriage. What the civil union did, that was missing in T.F., was bestow the badge of parenting on the non-biologically related woman.

The presence of the civil union allowed the court to make an argument that the non-biologically related woman was acting as a parent to the child and thus should be granted parental rights and obligations. This entire situation, though, was premised on the women performing akin to married individuals and married performance. Marriage was not removed from the equation in these cases. Instead the courts evaluated the level of performance based on the similarity or difference to married performance.
In 2004, the Maine court system was asked to extend parental rights to a woman’s same-sex partner in *C.E.W. v. D.E.W.* (845 A.2d 1146 (2004)). The couple in question took all legal steps to ensure both women were parents to the biological child of D.E.W. The women also took each other’s last names and made various other indications they were in a committed monogamous relationship. Upon their separation, the couple signed an agreement that ensured both women would continue to parent the minor child. However, this suit arose when the biological mother (D.E.W.) contended that due to her non-biological relationship with the child, C.E.W. could not be grant parental rights. The court disagreed. In his opinion, Judge Jon Levy asserted C.E.W. was a parent to the minor child due to her status as a de facto parent. Since the child’s birth, C.E.W. had actively parented the child and her performance, which was akin to married performance, legitimizes her rights.

As a way to confront the breakdown in the marriage ideal of unmarried and same-sex couples having children, the courts increasingly looked to performance as a de facto parent and performance of the socially understood roles of husband and wife as a way to grant individuals formal marital rights. The courts noted in a number of cases the rise in prominence and importance of alternative family structures and along with that the rights of de facto parents. This category of parent was not legally or biologically related to the child but instead acted as a parent in performing duties and being bound by obligations associated with both formal marriage particularly regarding children. As a result, these individuals who were actively part of the child’s life should be granted rights over that child through either adoption and/or custody.
In C.E.W. in particular, the Maine court noted: “we have recognized de facto parental rights or similar concepts in addressing the rights of third persons who had played an unusual and significant parent-lie role in the child’s life” (id. at 1149).

Alternative family structures were not limited to same-sex or unmarried couples, but encompassed a wide range of different familial makeups including those with grandparents caring for children, aunts and uncles caring for children and single-family homes. Additionally, de facto parents were not only those with blood relationships to the child, but instead could be formed with a broader network of kin relationships.

In maintaining their role as *parens patriae* in adjudications over adoption and custody, the Maine court noted that in deciding these cases the courts must distinguish between warring parents and focus concretely on the best interest of the child. In this case, it was clearly in the child’s best interest to maintain contact with both parents. The court also observed that only “adults who had fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child’s life” should be granted rights” (id. at 1152). Parents then, whether they were same sex or opposite-sex parents who had cared for the child were granted rights. Or, put another way, those individuals who actively perform as parents were granted rights. The determination here followed from previous case law (in this section and in the previous section) in only recognizing rights and corresponding obligations for those who actively participated in the child’s upbringing. At no time were parental rights absolute, which was underscored by Justice Clifford’s concurring opinion stating: “I write separately to emphasize that courts should be aware of, and give consideration to, existing legal and statutory remedies in the area of parental rights and responsibilities, and should exercise
equity powers with caution” (id. at 1152, Clifford concurring). Further he asserted: “an award of parental rights and responsibilities to a third person was a substantial intrusion on the fundamental rights of a parent and should be authorized only in very limited circumstances” (id. at 1153, Clifford concurring). The decision here signaled a clear appreciation for different familial. The court also followed and preceded a number of other stated similarly recognizing de facto parents in same sex relationships and those that had also recognized a second parent who was not related biologically to the child.

A similar concern was highlighted in the Massachusetts court in 2012 in Hunter v. Rose (463 Mass 488 (2012)). In this case the court was asked to recognize a California Registered Domestic Partnership (RDP) entered into in 2003 and also the fact that both women were parents to the children they each bore while in the Domestic Partnership. The couples’ domestic partnership was registered in California in October 2003. This particular filing was important for the Massachusetts court as “in September, 2003, the California Legislature amended its domestic partnership laws to grant same-sex domestic partners rights that were identical to those of marriage. 2003 Cal. Stat. 421, codified at Cal. Fam. Code § 297.5(a)” (id. at 490). Hunter and Rose both cared for the child as co-parents once they moved to the East coast.

After the end of their relationship in 2008, Rose moved to Oregon with the child and cut off all contact between Hunter and the child, Jill. In determining the recognition of the California Domestic Partnership law in Massachusetts, the court noted: “California's domestic partnership law provides virtually identical rights as marriage” (id. at 492). Further, according to the California Family Code, “Registered domestic partners shall had the same rights, protections, and benefits, and shall be subject to the same
responsibilities, obligations, and duties under law . . . as were granted to and imposed upon spouses” (id. at 492 quoting Cal. Fam. Code § 297.5(a))

Both women were legal parents of the child as, according to the Massachusetts General Laws: “under Massachusetts law, children born into a legal spousal relationship were presumed to be the children of both spouses (G. L. c. 209C, § 6). It was particularly important in this case that the domestic partnership functioned as the legal equivalent to marriage, just as the civil union was functionally equal to marriage in the case of Debra H. in Massachusetts.

Moreover, any child born as a result of artificial insemination with spousal consent was considered to be the child of the consenting spouse.” (id. at 493 quoting G. L. c. 46, § 4B). As both women were presumed parents, the court noted: “parents had an equal right to custody of their children” (id. at 494). In this case the decision to award both women parenting rights stemmed from the fact they were in a legally recognized relationship akin to marriage. The case further argued that custody disputes should be resolved in a manner that spoke to the best interest of the child and no one parent shall had their relationship with the child terminated without a showing of cause.

The case also demonstrated, then, it was the (marriage-like) relationship between the parents that allowed for parental rights rather than the relationship with the child. While custody determinations turned on the best interest of the child, the legal relationship turned on the fact the child was born during a “marriage.” If the parties were not in a registered domestic partnership in California that was due comity in Massachusetts the outcome may be much different. In a way the presence of a legal marriage was not important for the Massachusetts court in earlier cases, it now was.
Performance was important, but it was a type of performance akin to those in a formal marriage.

Taken together, the cases I presented in this section of the chapter illustrated inherent differences but also similarities between same sex and opposite-sex couples. The overall developmental narrative in this section indicated individuals whose performance mirrored married performance were granted custody and adoption rights over children. Marriage was not removed from the questions in this section, but the courts focused on the real and tangible relationships occurring in the family both between the adults and the non-biological parent and child. The three states: Maine, Massachusetts and New York all indicated non-biological, same-sex parents should be granted adoption/custody rights over a child if they were acting as a parent to that child. It did not matter whether the parents were married to each other (at least prior to the legalization of civil unions in Vermont in 2000). However after Vermont legalized civil unions for same-sex couples, the focus reverted back to the parents being in a legal relationship. How was this explained?

One possible explanation was the fact the New York and Massachusetts courts granted those rights simply because there was no way for same-sex couples to formalize their relationship with each other prior to 2000. It perhaps was not surprising that New York reversed course here as New York courts had continuously sought to remain faithful to traditional understandings of marriage. Therefore, requiring couples be married in order to be given parental rights achieved this goal. While the reversal of course did not had a particular impact on the cases the court decided after (see e.g. Debra H. v. Janice R.) it did indicate formal marriage remained an important factor for the court now
that same-sex couples could enter into one. Further, the decision indicated formal status was one component to adoption and custody determinations.

Conclusion

Two main concerns were central to the courts’ discourse around adoption and custody. The first was around parental consent requirements and the second around second parent adoption for same-sex couples. In this chapter, I have shown the courts in the Northeast looked specifically and almost exclusively at performance in decisions whether to grant or deny individuals (mothers and fathers, sometimes biologically and sometimes non-biological related) rights over a child.

As explored in the sections above there were two narrow exceptions to the focus on performance; one in each section. The first occurs in Massachusetts in the 1980s when an unmarried putative father was denied standing by the Supreme Judicial Court to question the paternity of a child legitimized by the natural mother’s marriage. The second exception explored above surrounded granting adoption rights to a second parent in a same-sex partnership. The court in New York specifically referred to the fact the second parent was granted rights (and corresponding obligations) over the child based on the presence of the civil union between the two women in Debra H.

Apart from the two narrow exceptions the courts discourse was developmentally important in terms of asserting performance was more important than a formal relationship between the parents. The most important factor for the courts in adjudicating these cases was the performance as a parent in forming a tangible relationship with the
child. This remained the status quo during these cases and was especially interesting in
gendered terms.

The courts unrelentingly focus on the performance of the father indicating only a
father must prove his relationship to the child based on performance. A mother did not
have the same requirements imposed upon her. The gendered concerns were particularly
relevant when looking at the decisions over whose consent was necessary in order for a
child to be adopted. In cases where the parties were not married to each other, the state
required only a father to prove he had a tangible relationship to the child he was seeking
to withhold his consent to adopt. This was premised on the context of the 1960s and
1970s when fewer couples married and had children out of wedlock. Further, as the New
York court recognized in Adoption of Heather Malapcia Orsini unwed fathers and men
were more often than not unlocatable. The difficulty in locating a father may had an
adverse effect on the child and contravenes the policy of deciding adoption and custody
cases using the standard of the best interest of the child.

Developmentally judicial framing in these cases illustrated the three states
allowed those individuals who had a de facto relationship with the child to be part of that
child’s life and be legally responsible for the child. Although there were some temporal
differences between the states the performance as a parent was intrinsically important.

Importantly, the courts in the Northeast recognized the rights of non-biological
parents in cases of adoption where it was not possible for the couple to enter into a
legally sanctioned relationship. These cases emphasized the performance of the parties
engaging in marriage-like responsibilities without having contracted a legal marriage.
The cases again, emphasized the best interest of the child. For marriage, though the
impact significant as these cases illustrated the fact, once more than institutional marriage and adoption were two separate and distinct institutions. It was no longer necessary for a couple to be married in order to adopt a child and the fact that same-sex partners were able to adopt the children of their partner demonstrated a new vision of what it means to be a family; a vision that was not surrounded by the traditional, patriarchal institution of marriage.

I show in this chapter the question was more nuanced than a simple conception of a mother and child core unit. Instead, there were certain instances when a father was given rights over his child based on his significant and concrete relationship with the child. The granting of these rights was absent any formal relationship with the child’s mother.

This was particularly important for the developmental narrative the dissertation tells. The data and analysis presented in this chapter demonstrates that when confronted with issues over failed marriages, or marriages that do not meet the traditional ideal of marriage the courts turned to performance. The courts’ internal legal development in adoption and custody cases indicated that performance was important for the courts over the longer temporal span of the dissertation.

The next chapter focused on the fourth marriage policy: loss of consortium.
Chapter 5 – Performance and Formal Status: Loss of Consortium

Introduction

The issue of loss of consortium was tied in with marriage from the 1940s until 2012. Traditional loss of consortium statutes allowed a husband to file a claim against a third party for injury to his spouse. As I show in this chapter there were specific parameters around the filing of a suit related to both the formal status of marriage and the performance of the parties in a marriage. While each of the other chapters in the dissertation represented a largely linear developmental narrative, loss of consortium cases illustrated the status quo in court-created internal legal developments and also significant shifts.

First, the status quo was represented by the fact that throughout the dissertation’s entire time period, in order to file a loss of consortium claim the adult must be in a formal marital relationship with the injured party. The requirement of formal status was present throughout the dissertation’s time period and the courts drew real and significant boundaries in this way around who could file a loss of consortium case. Performance of socially understood marital roles i.e. being in a marriage like relationship was insufficient for the courts in this policy area. Loss of consortium traditionally was a husband’s right to recover for the loss of his wife’s services. But, as relations between husbands and wives changed during the middle of the twentieth century, judges had to reconfigure the definition and understanding of loss of consortium to encompass this breakdown in the ideal of marriage. This led, then, to the important shift in loss of consortium claims: the extension of the statute to cover wives wishing to file a claim based on their husband’s
loss of consortium. This is extended to a wife based upon her performance of wifely
duties in the marital relationship along with the fact she was also negatively affected
when injury or death befell her husband.

The baseline, set at the beginning of the dissertation’s time period in 1942 and
confirmed by the New York court in 1958, was that loss of consortium statutes were
specifically a right of a husband based on his status as a husband to recover, and not a
right of a woman as a wife. A traditional loss of consortium claim, as I show below, was
based on a husband’s loss of his wife’s services during the marital relationship. This was
clearly rejected by the courts during the era beginning in the late 1960s when women
became more independent actors in the marital relationship. The loss of consortium
development, then, followed on from other areas examined in the dissertation e.g. divorce
and alimony, where courts carved out a place for women as wives separate from their
husbands and value their contribution to the marriage. The loss of consortium cases over
time (similar to alimony determinations analyzed in chapter 3) saw women as
independent actors who also suffered when the marriage relationship was impaired by
injury or divorce.

What was especially interesting for the overall developmental narrative in these
cases was a shift in the courts’ boundaries around loss of consortium claims. This shift
ultimately altered the definition of consortium based the performance of socially
understood marital roles that transitioned over time. Even so, as noted above and
explored in more detail below, the courts continued to differentiate between formally
married and non-married individuals in loss of consortium. In doing so, the courts
indicated only spouses in a formal marriage had responsibilities towards each other thus
they were the only persons eligible to file a claim. This was an interesting departure from the analysis of the courts’ discourse in the other chapters as, for example with alimony, courts readily recognized the assumed obligations of partners (specifically men) in non-marital relationships in terms of support obligations towards his non-married cohabiting partner.

The overall developmental narrative of this chapter followed that at the beginning of the time period the courts focused solely and exclusively on formal marital status in and at the end the same was also true. However, the parameters around who was eligible to file a loss of consortium claim changed over time transitioning from only husbands (based on their obligation of support) to women based on a more expansive definition of consortium beyond a wife’s services to her husband. By the end of the developmental trajectory, the definition of consortium encompassed love, society and companionship of two persons in a marital relationship. Although formal status remained relevant in these cases performance came to the forefront in court decisions extending the right of consortium to women as the courts focused on the women’s performance of their socially understood marital roles. The shifting focus on performance, and gendered performance at that, fundamentally altered the way formal marriage worked as the courts saw women as distinct contributors to the marital relationship (success or failure of the marriage). This was a clear development from the beginning of the dissertation’s time period when women’s contribution was not specifically and separately valued, judged by the baseline of loss of consortium claims.
Loss of Consortium: A Marital Right

The New York Court of Appeals indicated the baseline of loss of consortium statutes in *Kronenbitter v. Washburn Wire Company*, (4 N.Y.2d 524 (1958)). This baseline demonstrated a woman’s position in the marriage was significantly different to her husbands. In this case Josephine Kronenbitter filed a suit against her husband’s employer due to his workplace accident. Her claim asserted she was entitled to file the claim based on her status as the formal wife of the injured party. In dismissing Josephine Kronenbitter’s claim to her husband’s consortium, the majority opinion, written by Judge John Van Voorhis asserted: “an action for loss of consortium was not maintainable” by a woman (id. at 526). Further, he opined: “to decide otherwise would be contrary to principle as well as contrary to precedent” (id. at 527).

Going on to explicate the reasons why this was contrary to precedent, the majority noted the woman’s performance in the marriage was not equal to her husbands with the traditional right of consortium being granted to him based on the common law understanding of a man’s wife as “her husband’s chattel” (id. at 527). The opinion in *Kronenbitter* was based in a strict notion of loss of consortium as a loss of services rather than a broader understanding of love and companionship. This case indicated in 1958 there were significant differences between the rights a husband and wife enjoyed in a legal marriage. These rights were more akin to the traditional understandings of separate spheres and roles of husbands and wives that were forwarded by William Blackstone in his *Commentaries* but still configured prominently in the 1950s laws on consortium.66

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66 The differing rights of husbands and wives in a formal marital relationship discussed in this case was in line with the other policy areas around the same time. For example, in divorce cases fault was still primarily considered. Alimony judgments present another similarity as women were granted alimony based on their formal wifely status and it was a provision solely for women.
In terms of formal marriage versus performance, the New York court’s understanding of consortium at this point was based on the legal concept of husband and wife but also the husband’s performance as the head of household ensuring the success of the family. While a husband’s performance was taken into account, I show below this shifted significantly over time towards a focus on the performance of the husband and wife and their gendered performance specifically with women being granted the right to file a loss of consortium claim grounded in their particular contribution to the marital relationship.

Ten years after *Kronenbitter*, the New York court explicitly overruled the case focusing almost exclusively on the wife’s performance of socially accepted role of a wife during a formal marriage. In *Millington v. Southeastern Elevator Co.* (22 N.Y.2d 498 (1968)) the plaintiff wife, Pauline Millington, brought a suit against her husband’s employer for loss of consortium. Millington asserted she had the same right to her husband’s consortium as he had to hers. The suit claimed an elevator accident had left her husband paralyzed from the waist down, which caused “a radical change in their marriage and this circumstance was due to the defendants' negligence” (id. at 500).

Judge Kenneth Keating’s majority opinion noted the changing societal conceptions of wives as “discrimination on the basis of sex was [recently] proscribed” and statutes now “impose[d] equal obligations and responsibilities upon women including the requirement of supporting a husband” which “resulted in the legal emancipation of married women” (id. at 501). In viewing an expansive vision of consortium based extensively on the spouses’ performance in the marriage, the majority opinion noted: “The concept of consortium include[d] not only loss of support or services, it also
embrace[d] such elements as love, companionship, affection, society, sexual relations, solace and more” (id. at 503). As a result, the court no longer regarded loss of consortium as a husband’s right derived from “the time when the wife was regarded in law in some respects as her husband’s chattel. He was allowed damages for injury to her in much the same manner that he would have been allowed damages for the loss or injury of one of his domestic animals” (id. at 502 quoting Kronenbitter at 527).

From the majority opinion in Millington, there was a distinctive shift in the place of wives in the marital relationship. They had a much more expansive set of rights and obligations and were now able to and abilities to file a loss of consortium. Consequently, the “interest sought to be protected was personal to the wife” (id. at 503). Noting the inherent rights of the wife as an equal partner in the marital relationship, Judge Keating stated: “the gist of the matter was that in today's society the wife's position was analogous to that of a partner, neither kitchen slattern nor upstairs maid. Her duties and responsibilities in respect of the family unit complement those of the husband, extending only to another sphere. In the good times she lights the hearth with her own inimitable glow. But when tragedy strikes it was a part of her unique glory that, forsaking the shelter, the comfort, the warmth of the home, she puts her arm and shoulder to the plow. We were now at the heart of the issue. In such circumstances, when her husband's love was denied her, his strength sapped, and his protection destroyed, in short, when she had been forced by the defendant to exchange a heart for a husk, we were urged to rule that she suffered no loss compensable at the law” (id. at 503-504).

The New York court emphasized the ability of a woman to file a loss of consortium claim due to her specific status in the marital relationship. It was the wife’s
performance of her wifely role that afforded her the right to file a loss of consortium claim. While formally the loss of consortium statute was de-gendered, in reality the extension of the statute to wives was premised clearly on her role and place as a wife rather than as a co-equal partner. This was akin to the discussion of alimony in chapter 3 where the courts significantly altered the purpose of alimony and granted it to a woman based on her specific role and contributions to the success or failure of the marital relationship. The particular problem faced by the courts in loss of consortium claims revolved around women’s changing position in society. Consequently, the courts used a woman’s specified role and her performance of the socially understood role of a wife to expand the definition of consortium to include a wife’s right to claim. Specifically in this case, the performative aspects of the wife’s role were emphasized as she was neither “kitchen slattern” nor “upstairs maid.” Instead, women now occupied a similar place as men but even so their contribution was valued as separate and distinct from a husband.

In line with this shift towards performance and away from a rigid focus on formal status, the majority opinion emphasized the changed nature of the relationship between husbands and wives, and with it a development in the way society viewed wives. The courts centered the shared burdens of the marriage stating: “that both spouses suffer when the marriage relationship was adversely affected by physical injury to either was a fact evidenced, if not by logic, by human experience since the institution of marriage became a basic part of our mores. Today, at least, it was unquestioned that the desire to have children and the pleasures of sexual intercourse were mutually shared. If the husband’s potency was lost or impaired, it was both the man and woman who were affected. If the physical injury was to the wife, she sustains the same kind of loss in the marital relation
as he did in the converse situation” (id. at 504). This specific posture underscored the “co-equal” status of husbands and wives in a marriage, in a new way compared to past precedent. Packed into this particular quotation was the contribution of both the husband and wife and mutual enjoyment of the marital relationship by both parties. No longer, according to this opinion, was the husband’s pleasure valued above the wife’s. Here, I see a shift in how the frame of performance works resulting in an extended definition of consortium by incorporating the wife’s distinct and separate performance. While the formal marital status was important the ultimate driving force behind recognizing a woman’s right to file a loss of consortium claim was her performance as one half of the partnership.

Millington specifically overruled the decision in Kronenbitter asserting: “in the 10 years following that [Kronenbitter] decision, however, there has been a radical change of opinion” (id. at 505). The court also rejected the argument change should originate in the legislature as “this court has not been backward in overturning unsound precedent in the area of tort law” (id. at 509). Indeed, the court ended forcefully with a statement on judicial power and the impact of the court stating: “the common law of this State was not an anachronism, but was a living law which responds to the surging reality of changed conditions” (id. at 509). This certainly demonstrated the court’s ability to interpret laws in light of the current societal climate, rather than waiting for the legislature to act. This decision embodied court-centered internal legal development I focus on in this dissertation as the courts fundamentally altered policy around loss of consortium without legislative guidance. This facet of judicial policy-making was particularly important for the Massachusetts court in the cases I examine below.
Millington represented a departure from the court’s previous case law regarding the issue of loss of consortium and delved deeply and significantly into the rights of women within a marriage. The rights of wives were no different under the court’s definition from the rights of husbands. This was an important pronouncement from the New York court, especially at a time where in other areas (e.g. divorce) the court presented a rather limited nature of wives’ rights. On the surface gender appeared to be written out of this particular conception of loss of consortium but looking at the courts’ language they focused principally on the role of women and wives in society and in the marriage and how this changes. The Massachusetts court (as I demonstrate below) and New York court focused specifically on shifting understandings of wives to demonstrate how her performance in the marriage was important in terms dispensing politically significant rights and corresponding obligations.

Even after the New York court allowed women to recover, the Massachusetts court still concentrated on the traditional conception of loss of consortium along with the place of the wife in the marital relationship stating: “right of a wife to recover for the loss of consortium for a personal injury negligently inflicted on her husband by another had never been recognized in this Commonwealth” (Lombardo v. Frangioso & Co., Inc, 359 Mass. 529 (1971)). Justice Ammi Cutter’s majority opinion further explained limitations on the right to recover for a spouse’s injury asserting: “there may be no recovery, based on negligence, for loss of a spouse's services or for loss of consortium, apart from a husband's right (based upon his duty to support) to reimbursement of medical and closely related expenses incurred for the care of an injured wife” (id. at 530). This quotation placed the right of consortium very much as only the husband’s right. In this particular
case the husband was injured in an automobile accident and the wife filed a claim asserting her husband could not perform his occupation and the accident prevented him from “from continuing a normal marriage relationship with the [p]laintiff” (id. at 529). The majority opinion provides very little detail of how a change in the rights of wives to recover for loss of consortium could come about aside from asserting “modification should be accomplished by the Legislature and not by judicial decision” with the court also noting this law should not be applied retrospectively as it may be “unfair to defendants or to their indemnitors” (id. at 531).

Justice Joseph Tauro’s dissenting opinion put forth a different posture regarding the relations of husbands and wives asserting there should be no difference between a husband and wife’s right to recover for loss of consortium. Tauro opined there was “no valid reason why that concept [recovery for loss of consortium] should not be extended to permit recover for wrongs negligently caused of the legal unity through physical injuries of either spouse… That both spouses suffer when the marriage relationship was adversely affected by physical injury to either was a fact” (id. at 540, Tauro dissenting). This aspect of suffering indicated a focus on performativity as the inability of either party to fulfill their marital obligations could lead to a loss of consortium claim. The definition of consortium presented here extended beyond the restrictive definition that presented the baseline in New York, examined above. The dissent also took issue with the majority’s assertion that a change should come about via the legislature, noting: “when dealing with a rule of law originally established by judicial decision I believe that its change, when required, should come by means of a judicial decision. In these circumstances, I do not

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67 The court did not allude to what a normal marital relationship consisted of but it was possible to assume it involved some aspect of sexual relations.
believe that we should look to the Legislature for change” (id. at 536, Tauro dissenting). Further, the dissent asserted the construction of loss of consortium and wives’ ability to recover in these instances was at the hands of the judiciary. Finally, the dissent concluded the court “in other circumstances, has reversed prior decisions supporting archaic rules of law in the absence of legislative action when it determined the rule to be incompatible with modern legal thinking” (id. at 538). For Tauro, this was a clear place for the court to step in because the loss of consortium statute was originally crafted by the judiciary. Therefore, it was not the place of the legislature to change the statute; it was the place of the courts.

In illustrating the American Law Institute’s changing understanding of a wife’s role in the marital relationship, Justice Tauro stressed: “The American Law Institute had tentatively approved a rule permitting a wife to recover, after bodily harm tortiously inflicted on her husband, “for resulting loss of his society, including any impairment of his capacity for sexual intercourse, and for any reasonable expense incurred by her in providing medical treatment” (id. at 540, Tauro dissenting). Further picking up on the case of Kronenbitter v. Washburn Wire Co., Tauro noted the basis for the gendered nature of the statute stemmed from common law when “the wife was regarded in law in some respects as her husband’s chattel. He was allowed to recover damages for injuries to her in much the same way that he would have been allowed damages for the loss of injury of one of his domestic animals” (id. at 540, Tauro dissenting, quoting Kronenbitter v. Washburn Wire Co. 4 N.Y. 2d 524 at 527 (1958)).

68 Picking up on a somewhat progressive notion of gender, the court asserted distinguishing between a husband and wife in loss of

68 This case was discussed in the previous chapter.
consortium claims was based on “outworn theory” that did recognize “equality of the sexes” (id. at 540, Tauro dissenting).

Tauro asserted there was no reason to separate out the benefits (and obligations) granted to husbands and wives. Tauro used performance here to confront one of the main problems associated with the breakdown of the ideal in loss of consortium (that only husbands could recover based on their status) as he focused on the changed position of women and wives in society. They were no longer seen as chattel and instead were independent actors in the formal marriage. Formal marriage could not solve the problem pertaining to the changed place of wives, but turning to performance and judging how women’s position had changed in the marriage and provides the backbone of Tauro’s opinion. Finally, Tauro surmised his argument stating: “It was argued that the right to loss of consortium should be accorded to the husband before it was given to the wife. I see no basis for such discrimination. The short answer was that the court could provide husband and wife this "equal protection" at the same time” (id. at 541, Tauro dissenting).

The opinions in this case asserted a very clear idea of wives. While the majority rooted their opinion in a lack of jurisdiction to alter the statute and focused on the different place of husbands and wives, the dissenting opinion forcefully asserted the roles of wives. This opinion provided an understanding of a wives’ position in society as having changed over time. As a result of this “outworn theory,” the court should amend the statute to allow a woman to recover. She was not in a different position to her husband and thus should not be bound by different rules. This fundamentally altered the understanding of formal marriage. Husbands and wives were no longer granted rights based solely on their formal marriage. Instead, this particular policy area indicated there
were important performative considerations accompanying the formal status of marriage that was ultimately the driving force behind the recognition of rights (and obligations). Perhaps prior to these decisions wives had no financial or support obligations towards their husbands. These decisions, however, recognize the “co-equal” status of men and women in marital relationships.

A number of important points should be unpacked from the Lombardo case. The first was an understanding of the different roles of husbands and wives in the marital relationship as indicated by the majority opinion. The majority opinion was clear that a husband, and a husband alone had the right to file a loss of consortium claim. As noted above in the chapter’s introduction, this right was based on traditional understanding and separate spheres for husbands and wives. Another part of this same conception was that when a wife was deemed property she also owed her husband sexual access.

Frequently, judicial discussions of women’s social and political status were based around a woman’s sexual capacity and her reproductive abilities (Ackerman 2007). If she was injured an unable to satisfy her marital obligations the husband should be given restitution. These particular understandings arose from differing performances of the husband and wives in the marital relationship. It was not understood at any time prior to this time (1971) that a husband and the same obligations as a wife. Further she was not responsible for supporting him thus she had no rights to his consortium.

A second important point was the dissenting opinion’s focus on performance. The dissenting opinion indicated because a wife essentially performed the same functions in a modern marital relationship she should be given the same rights to file a claim based on his loss of consortium. The dissent goes further, though, not only should a wife be
granted the right based on her “co-equal” status but also because of her similar performance in the marital relationship. The dissent framed the spouses in a marital relationship as in remarkably similar positions but at the same time extended the meaning of loss of consortium to encompass a wife based distinctly on her performance and separate role in the marriage. In other words it was her wifely role, the performance of the socially understood functions of a wife that afford her the ability to file a loss of consortium claim.

Although both the majority and dissenting opinions indicated a formal marital relationship was necessary this case ultimately turned on what performance was important in order to extend the right to file a loss of consortium claim to wives of injured husbands. The dissenting opinion in Lombardo formed the basis of the majority opinion over turning it in Diaz (examined next). Concluding the opinion, the Lombardo majority noted any change to the loss of consortium statute should come about via the legislature.

The dissent in this case represented a shift in analysis from the formal status of marriage to performative factors in determining whether a woman should be granted the right to file a loss of consortium claim. The majority opinion did not recognize the same shift, but two years later did, explicitly overturning the decision in Diaz v. Eli Lilly & Co. (364 Mass. 153 (1973)).

Two years after Lombardo the Massachusetts court noted while “historically, a claim for a loss of consortium [wa]s a man's right to recover for the loss of consortium of his wife” this posture should be amended (Diaz v. Eli Lilly & Co. (364 Mass 153 at 167 - 168 (1973)). In expanding the understanding of consortium as it related to the
relationship between husband and wife the Diaz court noted it was not only sexual
ged duties corresponding to their inferior social status, any action for personal or other injuries to the wife is
brought in the names of the husband and wife, and the husband is ordinarily entitled to the avails
of the action as of his own property. The husband had, in addition, his own recourse by action
without even nominal joinder of the wife against those who invaded the conjugal relationship, for
example, by criminal conversation with or abduction of his wife. At one time the gravamen of the
latter claims for loss of consortium was the deprivation of the wife's services conceived to be
owing by the wife to the husband; the action was similar to that of a master for enticement of his
servant. Later the grounds of the consortium action included loss of the society of the wife and
impairment of relations with her as a sexual partner, and emphasis shifted away from loss of her
services or earning capacity. The defendant, moreover, need not have infringed upon the marital
relation by an act of adultery or the like, for he could inflict similar injuries upon the husband in
the way of loss of consortium by an assault upon the wife or even a negligent injury. Meanwhile,
what of the wife's rights? She had none analogous to the husband's. The husband was of course
perfectly competent to sue without joinder of the wife for injuries to himself, and there was no
thought that the wife had any legal claim to the husband's services or his sexual or other
companionship -- any claim, at any rate, in the form of a cause of action for third-party damage to
the relationship” (id. at 154-155).

The lengthy quotation from the majority opinion suggested a fundamental change
in the way the court viewed the husband and wife in the marital relationship and focused
on the performance of wives to underscore why women should be granted the right to file
loss of consortium claims. It was especially important for demonstrating how the wife’s
responsibilities and rights have been amended throughout history and was largely in line
with the dissenting opinion in Lombardo.

The court noted a change in the rights of wives since the middle half of the
twentieth century, as recognized in a number of jurisdictions. Thus, the court found the
decision to extend the right of loss of consortium to a wife as well as a husband was
“strengthened in this view by the movement of opinion in this country since 1950 toward
recognizing a right of action in either spouse for loss of consortium due to negligent
injury of the other” (id. at 163). Emphasizing the importance of the institution of
marriage, Justice Benjamin Kaplan stated: “The marital interest was quite recognizable
and its impairment may be definite, serious, and enduring, more so than the pain and
suffering or mental or psychic distress for which recovery was now almost routinely
allowed in various tort actions” (id. at 164). The court ultimately overruled the Lombardo
decision and held “either spouse had a claim for loss of consortium shown to arose from
personal injury of the other spouse caused by negligence of a third person” (id. at 167-168).

Developmentally, these two cases were important for an understanding of the
roles of husbands and wives. From this case, I can see it was possible for formulations of
categories could change within the same court in a relatively short period of time (2 years
in this case). The majority opinion from Diaz emphasized many of the same points as the
dissenting opinion in Lombardo respecting the rights and place of women in the martial
relationship. Although there were clearly still gendered aspects and gender played a great
role in both of these decisions, the Diaz decision illustrated a move away from an inferior
role of wives or understanding that wives were not due the same rights in a marriage as
husbands. Institutionally, this was also important for the way marriage was viewed.
Wives were not separated out for disparate treatment as a result of the Diaz opinion. This
in itself was a significant development in marital relations from the Lombardo case. It
also fundamentally altered the way formal marriage works as there was a new view of
women and their role in the marriage. Again, as the courts were faced with the breakdown of the marriage ideal (here the separate and distinct places of husbands and wives) the courts turned to performance solve the problem as here the court center her wifely performance in order to extend the definition of consortium to her.

Taken together, these cases illustrated a dual understanding of loss of consortium that was both static and progressive or both order and change. In the first instance it was a right limited to those couples occupying the formal status of marriage. Second and in the progressive sense, the definition of loss of consortium was greatly expanded due to the failure of the original rule around consortium. In order to combat the breakdown in this marriage ideal, the courts extended consortium’s definition to encompass the right of a wife to file a claim based on the loss of her husband’s consortium. The recognition of this type of performance by the court substantially altered formal marriage as it underscored the breakdown of the traditional relations between husband and wife where a husband could be rewarded for loss of his wife’s services. This was unworkable and the courts rejected this in an era (in the middle of the 1960s and 1970s) when the roles of women and wives become much more expansive.

Temporally in line with the Massachusetts and New York courts, the Maine court noted the traditional understanding of loss of consortium as a solely a husband’s right in *Potter v. Shafter* in 1965. In this case, distinct from the Massachusetts court, the Maine court opined that courts could “judicially legislate a new cause f[or] action” thus allow the wife to recover but the court chooses not to (id. at 341). The Maine court noted: “the proposed creation of a new cause of action in the wide field of torts merits consideration
by the legislature” (id. at 342). This case did not provide an extensive rationale over loss of consortium beyond the determination a change should come via the legislature.

In 1973 the Maine Legislature “replace[d the loss of consortium statute] with the gender-neutral § 302 of Title 14, which provides that "[a] married person may bring a civil action in that person's own name for loss of consortium of that person's spouse” (14 M.R.S.A. § 302). This statute removed the gendered nature of loss of consortium and allowed a wife to sue for her husband’s loss of consortium.

The Maine court noted a limited right to recover for loss of consortium in *Hardy v. St. Clair* (739 A.2d 368 (1999)). In this case, though, a wife sues due to injuries sustained to her husband. Here Justice Paul Rudman’s opinion observed “for centuries court has recognized a husband’s right to recover damages for the loss of consortium when a tortious injury to his wife detrimentally affects the spousal relationship (id. at 371 quoting *Macomber v. Dillman*, 505 A.2d 810 at 813 (1986)). Allowing both a wife and husband to recover for this claim did not lead to a multiplicity of suits. Indeed, the court noted “consortium claims were separate, independent causes of action” and “that a wife's statutory right to bring a consortium claim "belongs to the wife and was separate and apart from the husband's right to bring his own action against the party responsible for his injuries” (id. at 372).

While there was some variation in timing between the three courts the overall trajectory of loss of consortium was the same. By the end of the time period all three states (and in fairly similar timing) allowed a wife to file a loss of consortium claim against her husband’s employer. Performance was an important factor for the court in

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69 The Maine legislature, then, amended the loss of consortium temporally in line with the Massachusetts court (1973) and New York court (1968) but the shift came from the legislature rather than the courts.
these cases, but the emphasis on formal marital status should not be forgotten. Loss of consortium statutes emphasized marriage as the paradigmatic institution for the state with all other relationships being measured against formal marriage. While the cases presented above did not concern non-married individuals there was a set of cases, examined next, where couples asked the courts to extend the definition of consortium to them even though they were not in a formal marital relationship. However, in the cases I examine in this performance was important as it allowed the courts to transition from a time when loss of consortium was narrowly defined as a husband’s right to one where both wives and husbands could both file these types of claims.

**Questioning the Extension of Consortium**

As marriage rates were declining in the 1970s due in part to the divorce revolution sweeping the United States (Weiztman 1985) fewer couples chose to marry. This, then, results in a breakdown of the marriage ideal. As I show in chapter 3 analyzing alimony the courts came up with new ways to ensure only one man supported a woman by turning to her performance of wifely duties and obligations. A similar breakdown in the ideal of marriage was presented here. As couples remarried at lower rates and instead cohabited, those couples could be injured in the same way as married couples. Therefore, would judges confront this breakdown in the ideal of marriage by extending the right to file a loss of consortium claim to couples that were not formally married? The short answer, which I go into in more detail below, was no. In case after case, the courts remained steadfast in their commitment that only formally married individuals should be granted these rights and benefits.
Throughout this section, I show formal marriage was differentiated from all other kinds of relationships, even couples who were engaged. In the case of *Swayer v. Bailey* (413 A.2d 165 (1980)) the Maine court noted the injury to Daniel Sawyer’s fiancée Lynn Jackson occurred before their marriage and thus before each were bound by obligations and duties towards each other. Consequently, the court dismissed the loss of consortium claim, as “there was no cause for action for loss of consortium on behalf of an engaged party, even though there was a later marriage, and even though there was an engagement at the time of injury” (id. at 166).

In providing a rationale for the decision the court stated there was a clear limit to the “right of consortium to the marital relationship. The right of consortium has been said to grow out of the marriage relationship... Absent a lawful relationship between husband and wife, there could be no recovery for loss of consortium” (id. at 166). Any benefits sought under the loss of consortium statute began with the legal marriage and “tracks the existence of the marital relationship and terminates at its dissolution by death or divorce” (id. at 167). This construction implied the marital relationship started the clock on any type of rights and a divorce (or death) ended them. Despite the fact the couple was acting as a married couple while they were engaged the court found the two relationships dissimilar. As Daniel Sawyer had not “assumed any marital obligations” he did not have a right to recover under the loss of consortium statute. Further, “when Daniel Sawyer took Lynn Jackson as his lawful wedded wife, he took her for better or for worse in then her existing state of health, voluntarily taking until himself any marital deprivation that might result fro his wife’s premarital injury” (id. at 167). This case was consistent with general loss of consortium statutes specifying a couple must be in a legal
marital relationship to recover for loss of consortium. It indicated the joint fortunes of married couples on each other but also clarified no corresponding rights or obligations for an engaged couple.

The court’s framing in Sawyer v. Bailey illustrated the marital relationship was accompanied by a set of rights and benefits but also obligations and responsibilities toward the other partner in the relationship. There was no way for a couple to be granted the benefit of loss of consortium without being in a formal marriage relationship. There was no extension to a couple living in marriage-like relationships. The outcome and rationale for this case was intriguing when compared with the discussion of alimony in chapter 3. In alimony cases the courts were willing to assume obligations of marriage for even those couples that only acted married as was the case with Daniel Sawyer and his fiancée. A similar comparison could be made to second parent adoption cases I examine in chapter 4 where the courts again assumed marital obligations of individuals who had not contracted to marry. In the case of Daniel Sawyer and Lynn Jackson although they had yet to officially contract to marry they were engaged thus showing an intention to contract to marry, which is more than the alimony cases examined in chapter 3 where the court presumed marital obligations without any indication of such an intent.

In a similar way, the Massachusetts court also distinguished between couples occupying the legal status of marriage and couples that did not. In Feliciano v. Rosemar Silver Company (401 Mass. 141 (1987)) the court noted: “Marcial and the plaintiff had lived together as husband and wife for approximately twenty years…as a de facto married couple, although they were not legally married until 1983” (id. at 141). The
absence of a formal marriage results in the denial of the claim based on loss of consortium as the injury occurred prior to the legal marriage.

Focusing on the meaning behind marriage and the state’s interest in fostering it as the “foundation of the family” the court asserted the “Commonwealth has a deep interest that [marriage’s] integrity was not jeopardized” (id. at 142). Furthermore, the court had to draw a clear line between marriage and the “myriad of relationships that may exist between mere cohabitants.” Moreover, the court opined the “value [of marriage] would be subverted by our recognition of a right to recover for loss of consortium by a person who had not accepted the correlative responsibilities of marriage” (id. at 142). Here, marriage was a distinct relationship, separate from all others, but also accompanied by responsibilities both to the other person in the marriage and to the state and once again a relationship that all others were measured against. The performative aspect of marriage (the fact the pair lived together for twenty years and acted as a married couple) was not sufficient for the court.

A clear line was drawn between those that chose to marry (and abided by the rules and regulations) and those that did not. For those that did not they also could not reap the associated benefits. For the court it was paramount the injury occurred before the actual marriage thus there were no obligations on the part of either person. This was similar to Maine where an engaged couple could not benefit under the law. Both the Maine and Massachusetts courts noted accompanying benefits and obligations that were associated with marriage. The fiancé in Maine knew the injuries sustained by his partner and married her anyway. In the Massachusetts case the parties lived outside the traditional marital relationship and therefore chose not to be bound by marital obligations and duties.
Therefore, the couple could not reap the benefits. Here the courts clearly emphasized the importance of formal marriage. It was inconsequential to the court that the couple lived together and acted married for two decades. They were still not bound by the obligations of marriage and thus the couple could not receive the benefits associated with marriage.

While in the previous section the courts extended loss of consortium beyond the legislative intent (to expand the definition to include women) the court did not do the same here.

The development in these cases illustrated a different type of nuanced development compared to the issue area of alimony analyzed in chapter 3. In alimony there was an assumption that a non-married couple supported each other, or at least the man supported his partner. As such, the obligation of support was removed from the first husband and was transferred to the second man. In a sense, the woman was being passed from one man to the other even though there may not be any actual support. However, in this chapter there was no presumption of support (and corresponding rights) associated with non-married cohabitants even if they were engaged to be married. In the alimony cases if a couple was engaged then I can presume there was a corresponding obligation to support his future wife, especially as the courts extended this obligation without any intent to marry.

In another case, *Norman v. Massachusetts Bay Transportation Authority* (403 Mass. 303 (1988)) the Massachusetts court delimited the boundaries around filing loss of consortium claims. Focusing on the importance of the relationship between adults but also the parameters around actionable relationships, the court noted “we must draw a principled, defensible line between those relationships to which a right of recovery
should attach and those relationships with respect to which no such right should be recognized” (*Norman* at 305 (1988)). In keeping with this, the court opined the importance of consortium for marriage stating: “by the very nature of marriage, spouses depend on one another’s society, companionship, love and support” (id. at 305). Clearly in each of the loss of consortium cases presented to the court there had to be a legally recognized relationship between the person seeking to file the claim and the third party. Again, the court specified: “as a matter of sound public policy, the law could not and should not attempt to right all wrongs…. It must be recognized that tort liability could not be extended without limit” (id. at 304 quoting *Feliciano v. Rosemar Silver Co* (401 Mass. 141 at 142 (1987)). Consortium was defined by the court in both of these cases as general companionship and society, rather than a predominantly sexual relationship. While there was a clear line demarcating for the court the parameters around loss of consortium, these cases saw judges affecting the daily lives of individuals in a very real and tangible manner.

In *Fitzimmons v. Mini Coach of Boston* (440 Mass. 1028 (2003)) the court specifically recognized changing family make ups, opining that while “social mores regarding cohabitation between unmarried parties had changed dramatically in recent years and living arrangements…our cases clearly distinguish between the legal rights of married and unmarried cohabitants” (id. at 1028). Traditionally loss of consortium cases requires parties to be married in order for a claim to be filed and this remains unchanged even though fewer couples married. Marriage bestows upon individuals specific rights and responsibilities including “a legal right to consortium of the injured party” (id. at 1028). Without this right a person could not file a claim. Even though the couple may act
married and perform marital duties and obligations there was no expectation or obligation on either party. Therefore, no rights flow from the relationship and the couple fell outside the boundaries of the loss of consortium statute.

In Consorti v. Owens Corning (86 N.Y.2d 449 (1995)) the New York court also noted the limited nature of the loss of consortium statute stating “consortium represent[ed] each marital partner’s interest in the continuance of the marital relationship as it existed at the inception of the marriage” thus “a loss of consortium cause of action by the spouse of an injured person did not lie if the alleged tortious conduct and resultant injuries occurred prior to the marriage” (id. at 450). In limiting Mrs. Frances Consorti’s loss of consortium claim, the court noted: “as a matter of law, Mr. Consorti’s tortious injury occurred when he was exposed to and inhaled asbestos during the 1960s, before his marriage, and that Mrs. Consorti had no viable loss of consortium claim” (id. at 451). This case indicated there was a set of marital obligations and benefits accompanying marriage and these were limited to those who in a formal marriage. Again, the clock on a spouse’s ability to claim began with the inception of the formal marital status, not before. Without an intact formal marriage neither person had a responsibility to the other nor could they claim any rights under the law to injuries sustained by the other partner. The court did not find in favor of couples even if the parties were living in a marriage-like relationship; those who were acting marriage whether there was an intention to later solemnize their marriage relationship or not.

The status quo represented by the loss of consortium claims illustrated the difference for the court between relationships that were sanctioned by the state and ones that were not. The law protected only the first type. The status quo in loss of consortium
claims was particularly interesting in light of the courts’ willingness to find quasi-marriages satisfied the holding out requirement to terminate alimony payments. The loss of consortium cases I discuss were especially noteworthy because on the one hand they represent a dramatic change over time (in allowing wives to file a loss of consortium claim) but were simultaneously maintaining the status quo as only couples in a legal marriage could file these claims. As I demonstrate above, individuals “acting married” for years were unable to file a claim if they did not possess the formal status. Furthermore, couples that were now married but were not at the time of the incident were also unable to file a claim. Whether the couple performed all the duties and obligations associated with marriage was inconsequential for the court.

The traditional limitations on loss of consortium were problematic for same-sex couples. Prior to the Massachusetts decision in Goodridge v. Department of Health (440 Mass. 309 (2003)) same-sex couples could not legally marry even though they may be performing the functions of married couples. For opposite-sex couples there was a clear line in loss of consortium claims where the courts would not extend the right to non-married couples. Same-sex couples, however, did not necessarily choose to remain unmarried but instead were statutorily prohibited prior to Goodridge. Consequently, a question arose over the statute’s applicability to same-sex couples marrying as soon as legally able. Could they be retroactively included in the loss of consortium statute? In the opinion of Charron v. Amaral (451 Mass. 767 (2008)) the Massachusetts court concluded they could not because the legislature did not intend to apply this statute retroactively. If the legislature intended this, it would have been included in the law.70 The standard

70 This was similar to the New York court’s contention about retroactively applying a portion of the alimony law in Waddey v. Waddey examined in chapter 3.
espoused in this case was in line with the loss of consortium cases so the ruling was not surprising, even though perhaps disappointing for gay rights advocates. Writing for the court, Justice Roderick Ireland observed, “this court consistently has rejected the idea that cohabiting adults, even those who could demonstrate a commitment to each other, could recover” (id. at 770). Ireland confirmed the status of formal marriage as an important social institution, and declined to revisit the loss of consortium law in light of Goodridge, stating: the court “rejected the plaintiff’s invitation to reconsider the Feliciano holding in light of greatly changed social mores concerning cohabitation” (id. at 770). The court rejected the plaintiff’s argument that it “should allow her to recover for the loss of consortium because she meets all other criteria for recovery and would have been married but for the legal prohibition” (id. at 773).

This was a particularly significant decision. Although same-sex couples could marry immediately after Goodridge it was inconsequential for the court as the injury occurred before the marriage. The legislative intent was clear to only allow spouses to recover if they were married at the time of the injury. As I show above if the injury occurred prior to the marriage then a loss of consortium claim was not the appropriate avenue for relief. This followed that the non-injured party entered into the formal marriage with the full knowledge of the impediment. It appeared as though the clock on obligations and rights began with the legal marriage ceremony and ends with a divorce (or death of one party). No issue area was clearer on the rights flowing from the marital relationship and that individuals seeking the rights were required to possess the legal status. Performance of marital obligations was insufficient for the court to extend obligations and benefits to individuals who were not in a legal marriage.
The focus here on the parties knowing injuries and impediments mirrored the discussion in chapter 2 on condonation. In chapter 2, a man could not obtain a divorce from a woman he thought virtuous when he also engaged in pre-marital sexual intercourse. He knew her “condition”. Similarly here, the couple married after the injury so the non-injured party married his or her spouse with full knowledge of the “condition.

Conclusion

The developmental trajectory in the area of loss of consortium was perhaps less clear-cut than any of the other policy areas I consider in the dissertation. Even so, the narrative illustrated that the baseline in 1942 was that only a husband could file loss of consortium claims to recover for the loss of their wife’s services. By the end of the 1960s in New York and then the middle of the 1970s for Maine and Massachusetts this baseline was altered to allow women (wives) to recover for the loss of their husband’s consortium. The result of this change came from the breakdown in the ideal of marriage where wives and husbands had distinct and separate spheres or roles in the marital relationship. In the 1960s and 1970s various marriage and family laws were broken down as I have shown in the other chapters. Consequently, judges turned to the underlying principles behind formal marriage (the official rules, obligations and duties of formal marital status) to solve the problems associated with failed marriages. However, as roles and relationships between spouses continued to evolve well into the 1970s the judges turn instead to performance associated with formal marital status. With the other areas of family law I examine in chapters 2 to 4 the courts removed formal status almost entirely from the equation.
I note above the trajectory in loss of consortium was a little less clear. The reason for this was because the developmental narrative did not see formal status eliminated in its entirety. The courts continued until the end of the time period the presence of a formal marital status. There were clear limitations on the filing of loss of consortium even though the definition of consortium was expanded to include wives as a category of persons able to file a loss of consortium claim.

The cases above indicated a willingness on the part of the courts (at least the New York and Massachusetts courts) to truly forward the developmental narrative without legislative input. The overall developmental trajectory still moved in a direction favoring performance. It was also gendered performance as the focus was on the wife’s similar performance to her husband and her similar role to her husband that enables her to file loss of consortium claims.

The second set of cases decided under the banner of loss of consortium did not, however, see formal status eliminated nor do the courts focus on performance of the socially understood roles of husband and wife. Instead, the line was drawn purposefully around formal status. Non-married individuals were unable to file loss of consortium claims even though they may have been acting married or about to marry in the case of engaged couples. Failed marriages, or a breakdown in the ideal of marriage did not see the courts wholeheartedly turning to performance as they do in other policy areas.

The development towards performance was more muted than in some of the other policy areas examined in the dissertation. Moreover, despite the extensive changes in marriage and family law since 1942 the cases I analyzed in this chapter provide a picture nuanced development of the relationship between formal and performative marriage. This
was even clearer in the examination of *Charron v. Amaral* in 2006 when the Massachusetts court refused to extend the right of loss of consortium to a same-sex couple that has been statutorily barred from formal marriage. Throughout, the courts did not extend the right to file loss of consortium claims to any couple not in a formal marriage. However, there was still a focus on performance when determining how to extend the right to file a claim to those persons in a legal marriage.

The next empirical chapter examines the issue of same-sex marriage to illustrate that the turn to performance provides a way to extend formal marriage to individuals in a same-sex marriage.
Chapter 6: Focus on Performance: Same-Sex Marriage

Introduction

The dissertation has been pointed towards an explanation for how same-sex marriage decisions came about in the early 2000s. The introduction of the dissertation began with a puzzle around same-sex marriage asking why the courts were slow to extend and recognize legal relationships between same-sex couples even though they performed the socially understood roles of husband and wife. One of the most important cases around same-sex marriage was the case I opened the dissertation with – *Goodridge v. Department of Health* coming from Massachusetts in late 2003.

In this chapter I turn back to the issue I began with: same-sex marriage to show the courts here looked to performance as a frame for the court in terms of performing the socially understood functions of a husband or wife. Same-sex marriage provided another breakdown of the marriage ideal but a different breakdown to the policy areas I analyzed in the previous chapters. In same-sex marriage decisions the specific breakdown was the removal of two genders from the formal marital relationship as clearly the traditional understanding of marriage was a union between one man and one woman. Same-sex couples, then, could be presented as a failure of that marriage ideal.

In this modern era when same-sex relationships occurred the courts must contend with whether, and then how, to grant these couples formal, legal recognition. In this section I explore two cases around same-sex marriage. The first case was *Goodridge v. Department of Health* from Massachusetts decided in 2003 was the first case to grant same-sex couples the legal recognition of marriage. Importantly, Chief Justice Margeret
Marshall in her majority opinion recognized not only the benefits same-sex couples could now receive but also the fact that accompanying marriage was a set of obligations. These responsibilities were not only to the person’s spouse but also to the state.

In framing the opinion, Marshall indicated marriage was very much a set of obligations – obligations to each other, to children and not inconsequentially, to the state. The rationale behind Marshall’s decision to extend marriage licenses to same-sex couples rested concretely on their performance as parents based on their obligations to children. While same-sex marriage traditionally was subject to rights-based arguments (that marriage is a right and excluding same-sex couples is a violation of that right), I argue that marriage was, and still is, actually obligation based (there are various obligations and requirements for individuals in marriage therefore when they perform these obligations and requirements they are extending marital benefits and burdens). This was clearly seen throughout the other empirical chapters. For example, in the alimony chapter courts extended marital benefits and burdens to individuals performing obligations associated with marriage (i.e. a male supporting his unmarried partner or a woman taking her male partner’s name). The turn to performance associated with marriage solved the problem of women not remarrying and as I illustrate below solved the problem of same-sex couples seeking marriage licenses.

The second case was *Hernandez v. Robles* decided by the New York Court of Appeals in 2006. This case did not grant same-sex couples the right to enter into a formal marriage based on their performance and Judge Smith’s majority opinion hewed much closer to a limited conception of formal marriage assigning rights and benefits without a corresponding focus on performance. Similar to Marshall, Smith also focused on children
and ramifications of same-sex marriage. Judge Smith went on to argue same-sex marriage was a policy issue that should be decided by the legislature and the legislature could decide, all things being equal, it was better for children to grow up in an opposite-sex household rather than a same-sex household.

A Watershed Moment: Goodridge v. Department of Health

During the early 2000s much of the country was trying (and successfully) limiting marriage to opposite-sex couples. The Commonwealth of Massachusetts, on the other hand, moved in the opposite direction and granted same-sex couples formal marriage rights in their fullest sense. The Massachusetts decision was monumental not least because it perhaps brought into clearer focus Justice Scalia’s dissent in Lawrence v. Texas (539 U.S. 558 (2003)) where he asserted the decision to strike down Texas’ sodomy statute left on “pretty shaky ground” laws limiting marriage to opposite-sex couples (Lawrence at 602, Scalia dissenting).

Just before the court decided Goodridge, public opinion against same-sex marriage in Massachusetts was somewhat lower than the rest of the country with about 50% of people polled supporting same-sex marriage compared to 35-39% nationwide. The difference in public opinion perhaps made it more inviting for the Massachusetts

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There was no case decided by the Maine Supreme Court during this time around same-sex marriage.

By commenting that the Massachusetts court did this in the “fullest sense” what I am getting was that the court extends marriage to same-sex couples on the same level as was available to opposite–sex couples. The court did not allow a separate statutory construction for same-sex couples in the way Vermont had done in 2000. However, I should note here, that the original Goodridge decision did not forcefully set down a remedy but instead leaves it up to the legislature to craft a remedy. The Justices, in early 2004, however, reject the legislature’s remedy of civil unions and determine marriage in name, function and substance must be extended to same-sex couples.
The court’s decision in *Goodridge v. Department of Health* (440 Mass. 309 (2003)) confirmed same-sex couples could not be denied the right to enter into a formal marriage under the equal protection and due process provisions of the Massachusetts Constitution. More importantly the court centered on these couples’ performativity both as couples and parents in performing the socially understood functions of husband and wife as the rationale to grant marriage licenses. Beyond the constitutional issues it was important for Marshall these families were functioning successfully as a family. Key in her opinion was the notion that children would be disadvantaged if their parents could not marry. This was cause alone for formal marriage to be extended to same-sex couples based on the court’s role as *parens patriae* in cases involving children.

This case reached the Supreme Judicial Court in 2003 after the plaintiffs (Hillary Goodridge and 13 others) sued in state court in 2001 claiming under the Massachusetts Constitution by denying same-sex couples the right to enter into a same-sex marriage denies them protections and arguing the state Constitution forbid “the creation of second class citizenship” (id. at 312). The lead plaintiff, Hillary Goodridge, was not chosen by accident. In 2001, Hillary and Julie Goodridge were an attractive middle class family with a young child. The family configuration of the Goodridges was as close to a nuclear family as possible except they were two women rather than an opposite-sex couple. For

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73 Frank Philips. Support for Gay Marriage: Massachusetts Poll Found Hal in Favor. *Boston Globe*, April 8, 2003. A Boston Globe Poll showing 50% supporting same-sex marriage and 44% in opposition. This was compared to a national poll showing 35-39% supporting same-sex marriage versus 55% in opposition. It should be noted, however, cross polling comparisons were not always accurate due to question wording, question framing and the different questions asked.
all practical purposes this couple already functioned as a family without the legal backing from the state. The couple attested to their co-parenting, they were each other’s beneficiaries, they owned joint property and a whole range of other performative factors associated with traditional formal marital status. Due to the absence of legal recognition of their performance by the Massachusetts state government the couple was denied the multiple rights and benefits accompanying formal marriage.

In her majority opinion Marshall emphasized the importance of marriage for Massachusetts. She noted it was not just an individual commitment but also a “vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return, it imposes weighty legal, financial and social obligations” (id. at 312). In addition marriage fostered stable and healthy relationships. Even more than this: marriage “anchor[ed] and order[ed] society” (id. at 322).

The meanings and purposes of marriage were numerous. According to Marshall, marriage was not only a social and cultural institution (fostering stable relationships) but also an economic (anchoring society) and political (imposing weighty legal obligations) institution. The multiple facets of marriage Marshall articulated provided one line of reasoning for why it was impermissible for the state to deny marriage to a class of persons based on the fact the relationship was between two persons of the same sex. Although the state could regulate marriage in a variety of ways to protect the health and welfare of the people (e.g. age limits) the restriction on formal marriage to only opposite-sex couples was not legitimate government interest. Indeed, as Marshall noted: “benefits
accessible only by way of a marriage license were enormous, touching nearly every aspect of life and death. The department stated ‘hundreds of statutes’ were related to marriage and marriage benefits” (id. at 323-325).

The definition of marriage, which was set by the legislature, was a “legal union of a man and a woman as husband and wife” (id. at 319). This definition was intended to ensure the traditional concept of marriage. However, this traditional definition of marriage was broken down with the increasing numbers of same-sex couples in the United States. If marriage was to be extended to same-sex couples then it could no longer be defined as a legal union of a man and woman; instead it must be redefined as a legal union of two persons as spouses or at least a definition that removes the gendered construction of marriage.

Underscoring marriage as a status (but not a necessarily a legal right) allowed the state to exclude individuals who it deemed incompatible with marriage. However, Marshall did not agree it was a status or unchanged throughout history. Describing some of the legal changes in marriage Marshall emphasized the extension of marriage to individuals and the evolving nature of marriage, defining it “as a public institution and a right of fundamental importance, civil marriage was an evolving paradigm” (id. at 339). Further, Marshall noted: “marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution” (id. at 340). This particular line of reasoning illustrated marriage developed over time and same-sex marriage was only one of those developments. Indeed, according to Marshall, there was no reason to believe extending marriage to same-sex couples would bring about the end of this time honored institution.
The marriage statute, chapter 207 of the Massachusetts General Laws, had a dual function as a gatekeeping and recording keeping statute: “It sets minimum qualifications for obtaining a marriage license and directs city and town clerks, the registrar, and the department to keep and maintain certain "vital records" of civil marriages” (id. at 317). The public nature of marriage gave the state its regulatory authority. Further emphasizing the role of the state, Marshall asserted: “there are three partners to every civil marriage two willing spouses and an approving State… While only the parties could assent to marriage, the terms of the marriage – who may marry and what obligations and benefits and liabilities attach to civil marriage were set by the Commonwealth. Conversely, the Commonwealth defines exit terms” (id. at 321). This was not unusual – many other cases throughout the study emphasized the state’s role.

To determine whether the Massachusetts statute was constitutional the majority could elevate sexual orientation to a suspect classification or conclude the right to enter into a same sex marriage was a fundamental right, being deeply rooted in the Nation’s history and traditions. Marshall did neither, which in itself was telling. Instead, she asserted the marriage statute did not even meet the rational basis test. To find a violation under this level of review the statute or policy in question must bear no rational relationship to a legitimate government interest. The Massachusetts court followed the

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74 This statement on the extent of the state’s involvement in marriage was important. The control of the exit from marriage i.e. divorce was the other side of the coin to marriage. To divorce a couple must meet the state’s requirements on divorce. Similarly, to marry a couple must meet the state’s requirements. Of course, anyone could choose to marry (or divorce) but unless it was within the parameters set forth by the state it will not be recognized.

75 In 1938 in U.S. v. Carolene Products (304 U.S. 144 (1938)) Justice Harlan Fiske Stone’s Footnote 4 gave rise to the tiered levels of scrutiny. Justice Stone said that in nearly all cases the plaintiff would bear the burden of proving the state was acting in an unconstitutional manner; the statute had the presumption of constitutionality. This was known as the rational basis test. However, in certain cases the burden shifts. He asserted that in cases where fundamental rights and basic liberties were involved the court would take a particularly careful look to discover whether the statute in question burdens the enjoyment of these rights.
United States Supreme Court finding statutes singling out homosexuals for disparate treatment failed the rational basis test.\textsuperscript{76} The significance of this should not be understated as Marshall went on to find each state interest an illegitimate regulation on the right to marry under the state’s police powers.

The Department of Health offered a number of rationales for limiting marriage to opposite sex couples. The first was to provide a favorable setting for procreation. Marshall struck this interest as irrational because “our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family…[there was] no requirement that the applicants for a marriage license attest to their ability or intention to conceive children… fertility was not a condition of marriage, nor was it grounds for divorce” (id. at 331). This rationale illustrated the ban on same-sex marriage could not possible legitimately forward this particular stated governmental interest.

Procreation was frequently cited by opponents to same-sex marriage as a legitimate reason why these couples could be excluded.\textsuperscript{77} In explicating why the procreation rationale did not hold sway with the court Marshall asserted: “if procreation [was] a necessary component of civil marriage, our statutes would draw a tighter circle

\textsuperscript{76}In 1996, the United States Supreme Court struck down Amendment 2 to the Colorado Constitution using the rational basis test. Justice Kennedy declared Amendment 2 was born out of animus and did not bear any rational relationship to a legitimate government interest (using the rational basis test) (\textit{Romer v. Evans} (517 U.S. 620 (1996))). In 2003, the Supreme Court had also struck down Texas statute banning same-sex sodomy under equal protection. Again, the Court found this statute violated the rational basis test and there was no need to elevate sexual orientation to suspect classification (\textit{Lawrence v. Texas} (539 U.S. 558 (2003))).

\textsuperscript{77}Removing procreation as a fundamental component of marriage did not render it unrecognizable. It was simply one change in a long line of developments in the institution of marriage.
around the permissible bonds of non-marital child bearing and the creation of families” (id. at 333). This classification was essentially struck down for being overbroad.

Many same-sex couples in Massachusetts already functioned as families therefore, legislative rationale was not satisfactory. Marshall indicated performance as a family allowed these couples to be granted the rights associated with marriage and indeed, the right of marriage itself. This picked up on much of what the courts concluded around a non-biological partner in a same-sex relationship adoption his or her partner’s biological child. The argument presented in the adoption cases (chapter 4) underscored the fact that these couples were performing the functions associated with being a husband and wife (including care for children) and therefore should be granted legal rights.

Important for Marshall was this performance as a parent. The plaintiff couples were taking on the roles of husband, wife and parent without the accompanying legal recognition. Implicit in Marhall’s opinion was the idea that performance as a parent was the benchmark for granting the formal status of marriage. In making the decision in Goodridge, the court essentially used performance to attribute formal recognition and legal rights to the actions the couples were already taking.

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78 The United States Supreme Court struck down the procreation argument as a rationale for limiting marriage. In Turner v. Safley (482 U.S. 78 (1987)) the Court distinguished between procreation and marriage. Writing for a unanimous court in Turner, Justice O’Connor asserted prisoners could not be denied their fundamental right to marry solely because there was no procreative ability. She noted “a prison inmate “retains those [constitutional] rights that were not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system” (id. at 94). Although marriage was limited for prisoners “many important attributes of marriage remain” (id. at 94). This illustrates marriage was a fundamental right not only for heterosexual procreation but also as a way to solemnize social relationships individuals find intrinsically important. Marshall’s majority underscores the fact Turner rules the fundamental right of marriage could not be restricted on account of the choice in partner. Further, Turner represents one alteration in the institution of marriage that did not render the institution unrecognizable. The Turner decision moves marriage away from procreation and privacy as prison inmates do not enjoy a constitutional right to privacy on the same level as free individuals (if at all) and there was no reasonable expectation prison inmates will be able to engage in sexual intimacy while imprisoned (Ball 2004).
The second argument forwarded by the Department also failed. Opposite-sex couples provided a stable environment to raise children but not a more secure environment than same-sex couples. The policy of denying same-sex couples marriage could not possibly forward the goal offered by the Department because “excluding same-sex couples from marriage will not make children of opposite sex marriages more secure, but it did prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated and socialized” (Goodridge at 335). Once again this indicated the court privileged the functioning family and performativity in making the decision about whether to grant the right of marriage. Furthermore, Marshall noted: “the task of child rearing for same-sex couples was made infinitely harder by their status as outliers to the marriage laws” (id. at 335). This formulation indicated the special place of marriage in conferring legitimacy on a child and attributing real and cognizable benefits to the both the parents and child(ren). This argument also demonstrated the court placed importance on the best interest of the child standard to ensure a fully functioning family cared for the child.

Rather than simply striking down this state interest as illegitimate Marshall went further and argued it was counterproductive to any possible state interests because specifically limited marriage to opposite-sex couples inflicted direct harm on the welfare of children of same-sex couples. Likening the statute to Amendment 2 in Colorado, Marshall stated: “the "marriage was procreation" argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like "Amendment 2" to the Constitution of
Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly "identifies persons by a single trait and then denies them protection across the board" (Romer v. Evans, 517 U.S. 620 at 633 (1996)). In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships were inherently unstable and inferior to opposite-sex relationships and were not worthy of respect” (id. at 333).

Similar to the adoption and custody cases I examined in chapter 4, the court put the best interests of the children at the forefront of the analysis to bring about a system of equality. It seemed from Marshall’s rationale the very reason the court extended marriage to these couples was based concretely in their performance as parents. The welfare of the child seemed to be front and center of the majority opinion’s discussion. This also makes the opinion less surprising given the trajectory of the states in the Northeast to grant concrete and formal rights to individuals based on performance.

The court focused on the negative impact the non-recognition of formal marital rights had on a child. This was similar to the courts’ rationale in adoption and custody cases looking at the untold negative consequences of denying a second same-sex parent rights over a child the woman cares for. The language Marshall offered around the second rationale regarding children mirrored much of the majority opinion in Adoption of Tammy decided by the Massachusetts court in 1993.

Marshall acknowledged adoption by couples of the same-sex was not what the legislature envisioned when the adoption statute was crafted and passed. However, the Goodridge court asserted that times changed and when traditional rationales for limiting
rights to certain categories of persons were no longer compatible with society these rules must also change. This provided the underlying reason why the courts turn to performance. Similar to the majority in Adoption to Tammy, the Goodridge court focused on the practical relationship the child enjoyed with the adults preferring to extend parental rights to a second parent rather than removing the parental rights from the natural, biological parent.

Dispelling the myth that same-sex marriage fundamentally altered institutional marriage Marshall suggested that if marriage was extended to same-sex couples then these couples were bound by the same obligations as opposite sex couples. There were no special rules or procedures for same-sex couples. Instead these couples must abide by the state rules around formal marriage. Further, Marshall concluded: “if anything, extending civil marriage to same-sex couples reinforce[d] the importance of marriage to individuals and communities. That same-sex couples were willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another was a testament to the enduring place of marriage in our laws and in the human spirit” (Goodridge at 337). Same-sex couples, she argued, were not seeking to alter any aspect of marriage; they simply sought entrance into the institution of marriage, to be protected by it and to receive the benefits it bestowed upon opposite sex couples. In fact, the plaintiff couples in this case specifically did not want to be part of any other institution of marriage. They wanted entrance in to the state sanctioned institution of marriage on the same level as opposite –sex couples and to be bound by the rules and obligations of marriage. The rationale provided here was an example of changing the institution of
marriage to preserve the institutional commitments of a state sanctioned relationship between two adults with various obligations towards each other and the state.

Although Marshall conceded “certainly our decision today marks a significant change in the definition of marriage as it had been inherited from the common law, and understood by many societies for centuries” she went on to note “it did not disturb the fundamental value of marriage in our society” (id. at 337). Importantly, this type of development in marriage preserved the institution of marriage. As Marshall asserted earlier in her opinion, marriage was not an unchanging institution. There have been (and probably will continue to be) many changes to institutional marriage but it nevertheless was an enduring institution in American society and culture. Marriage, even after this decision, remained a commitment between two individuals, which the state was able to regulate. But, the result of the decision extended it to include same-sex couples as well as opposite-sex couples.

The decision did not actually fundamentally alter the commitments and understandings of marriage; it simply extended it to include two people of the same sex, which is the very definition of change to preserve institutional commitments. While to some, this in itself amounted to a fundamental change it did not alter the commitments and regulatory power of marriage. What it did was bring an additional set of persons under the banner of marriage and extended to them the rights and benefits, along with obligations and burdens, of marriage. Marriage was still being used in the same way by the state to dispense politically important benefits to individuals but the scope of individuals was broader. As the chapter on adoption and custody indicated, the arguments for same-sex couples being extended the formal recognition of their relationship status
rested on the assumption that these couples were performing all of these functions anyway just without the formal status. Extending marriage to same-sex couples had a dual purpose. On the one hand it allowed the state to regulate these couples’ actions and on the other side of the coin it enabled these couples to have the protections afforded to them by a formal marital status.

After Marshall dispensed with each state interest she turned to the question of the remedy. Putting to rest any fears the decision called for the end of secular, civil marriage Marshall stated: “no one argues that striking down the marriage laws was an appropriate form of relief. Eliminating civil marriage would be wholly inconsistent with the Legislature's deep commitment to fostering stable families and would dismantle a vital organizing principle of our society” (id. at 342 -343). In her final definition of marriage Marshall noted: “civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs' constitutional injury and furthers the aim of marriage to promote stable, exclusive relationships” (id. at 343). Although Marshall found a constitutional violation the majority of the court stayed the decision for 180 days to allow the Legislature to “take such action as it may deem appropriate in light of this opinion” (id. at 343). In taking this action Marshall avoided criticism that the court was usurping the Legislature’s broad power to regulate the institution of marriage but made clear the legislature had to do something to recognize the marriage-like relationships of same-sex couples.

By February 2004 the Senate crafted Senate No. 2175 “An Act Relative to Civil Unions” and asked the Supreme Judicial Court to pass judgment on whether this Act was in keeping with Goodridge v. Department of Health. The court determined it was not and
required same-sex couples to be granted full formal marital status mirroring the status opposite-sex couples receive. The first same-sex marriages took place in Massachusetts in May 2004.

Justice John Greaney’s concurrence in Goodridge focused on the equal protection aspect but still found “the right to marry was not a privilege conferred by the State, but a fundamental right that was protected against unwarranted State interference” (id. at 345, Greaney concurring). He articulated a vision of marriage very similar to the majority and noted: “we share a common humanity and participate together in the social contract that was the foundation of our Commonwealth… Simple principles of decency dictate that we extend . . . full acceptance, tolerance and respect. We should do so because it was the right thing to do” (id. at 350, Greaney concurring). This particular quotation indicated Greaney believed the court should look beyond simple mechanics of marriage and instead to the benefits and obligations flowing from the institution. According to Greaney, marriage was much more than the combination of these factors; it was a fundamental aspect of society that was deeply rooted in the culture and tradition of not only the Commonwealth of Massachusetts but also in the United States.

The state could not deny one class of persons the benefit while allowing it to others. Greaney specified: “neither the mantra of tradition, nor individual conviction, could justify the perpetuation of a hierarchy in which couples of the same-sex and their families were deemed less worthy of social and legal recognition than couples of the opposite-sex and their families” (id. at 349, Greaney concurring). Greaney argued the distinction between the two types of relationships and the families created by those relationships resulted in a “caste-like system [that was] irreconcilable with, indeed,
totally repugnant to, the State's strong interest in the welfare of all children” (id. at 348, Greaney concurring). Similar to the majority opinion, Greaney saw one reason to extend marriage to same-sex couples was to ensure the welfare of children under the court’s role as *parens patriae*.

Greaney also articulated a version of the statute discriminating on the basis of sex, rather than sexual orientation. The legislature “create[ed] a statutory classification based on the sex of the two people who wish to marry” (id. at 345, Greaney concurring). This was an important difference from the majority opinion. He found these individuals (and others similarly situated) were denied the right to marry on account of sex: a man was preventing from marrying another man because he was a man, not because he was homosexual man. “Thus, when an individual desires to marry, but could not marry his or her chosen partner because of the traditional opposite-sex restriction, a violation of art. 1 has occurred” (id. at 346, Greaney concurring).

The gendered framework forwarded by Greaney here provided an alternative mechanism for allowing same-sex couples to marry through the construction of heterosexual and homosexual couples as identical in all regards except the genders of their chosen partner. He stated: “Only their gender prevents Hillary and Gary from marrying their chosen partners under the present law” (id. at 346, Greaney concurring). Similar to the majority opinion, this framing extended formal marriage thus benefits and obligations to same-sex couples and discussed at the practical results of the courts’ framing. There was a clear understanding in this concurring opinion that the formal rules underlying the definition and limitations of marriage in Massachusetts no longer worked. In order to resolve this breakdown of the marriage ideal (when same-sex couples
petitioned to marry) Greaney also advocated for looking at the couple’s performance as mirroring married performance thereby extending formal marital status. While both Marshall and Greaney’s opinions resulted in the extension of formal marriage to same-sex couples the institution of marriage remained an exclusive commitment of two individuals sanctioned by the state.

Three justices: Francis Spina, Martha Sosman and Robert Cordy dissented from the decision. Francis Spina found the statute did not impermissibly violate the equal protection clause as men and women were treated the same as both were denied the right to marry a person of the same sex. Spina used discrimination based on gender to reach the opposite conclusion to Greaney. Further, Spina asserted crafting the statute in a gendered nature “creat[ed] no distinction between the sexes, but applie[ed] to men and women in precisely the same way” (id. at 351, Spina dissenting). Further, he rejected the plaintiff’s contention that the statute created a hierarchy based on sexual orientation and noted: “marriage statutes do not disqualify individuals on the basis of sexual orientation from entering into a marriage [because anyone could marry but they must marry a person of the opposite sex]” (id. at 351, Spina dissenting). This was the exact opposite conclusion to Greaney. In his concurrence, examined above, Greaney noted the entire point was that the statute discriminated on the basis of sex because John could not marry James but could marry Jane. For Greaney this very distinction meant John and James

79 Of course, Spina was correct in the contention homosexuality did not bar an individual from marrying. The practical effect of the statute however was to limit the enjoyment of this right based on sexual orientation because individuals could only marry a person of the opposite sex and therefore homosexual individuals were prevented from marrying the person of their choice. This was the same type of impermissible restriction (not being able to marry the person of your choice). Chief Justice Earl Warren found unconstitutional in Loving v. Virginia (388 U.S. 1 (1967)
could not marry solely because of their gender. The concurring opinion and Spina’s dissent construed the very same problem in very different ways.

Removing the gendered language of the marriage statutes was a demonstration of judicial usurpation of legislative powers according to Spina because the judicial framing specifically altered the legislature’s intention. This legislative intent was “unambiguously intended to preserve the marital rights of single men and women. Such a dramatic change in social institutions must remain at the behest of the people through the democratic process” (id. at 355, Spina dissenting). Spina noted that because the court was not a policy making body it should refrain from altering public policies. This rationale was similar to the Judge Smith’s majority opinion in *Hernandez* decided by the New York Court of Appeals three years later. For Spina, then, performance of socially understood roles of husband and wife seemingly made no difference. Spina’s type of judicial restraint simply required legislative intervention.

Justice Martha Sosman also dissented. Sosman’s major point of departure from the majority opinion surrounded the second rationale Marshall dispensed with in the majority opinion: the ramifications for children of same-sex couples. She did not believe the legislature was acting irrationally in granting benefits to proven successful family structures while denying benefits to an “essentially untested alternative family structure” (id. at 361, Sosman dissenting). This entire line of reasoning missed the fact that for ten years by the time this decision was made Massachusetts allowed same-sex couples to raise children with the full support of the law (see *Adoption of Tammy* examined in chapter 4).
Sosman also considered the negative ramifications of raising children in a same-sex parent household, stating: “notwithstanding our belief that gender and sexual orientation of parents should not matter to the success of the child rearing venture, studies to date reveal that there were still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples” (id. at 358, Sosman dissenting). This inquiry amounted to a concern over the implications of the decision for children and families rather than concern over the fate of marriage as a set of policies or institution. Sosman’s dissent similar to Spina’s dissent articulated a branch of judicial restraint where the court should refrain from making bold statements and extending privileges and rights to “those alternate family structures [that] have not yet been conclusively shown to be the equivalent of the marital family structure that has established itself as a successful one over a period of centuries” (id. at 358, Sosman dissenting). The nuclear family promoted by opposite sex marriage was clearly fundamental for Sosman. To her, the gendered nature of the family arrangement was a key part of the institution’s integrity. Without this component, the institution simply was not the same. The focus on family structures was interesting given the fact the lead plaintiffs (Hillary and Julie Goodridge) functioned as an intact and tested nuclear family.

Justice Sosman’s evaluation of family jarred with the previous rulings of the court (see for example Adoption of Tammy (416 Mass. 205 (1993))). To assume same sex households with children were an untested family structure was somewhat far-fetched especially given the court’s previous decisions regarding adoption and custody rights for same-sex couples. Indeed, the Massachusetts court championed granting legal parental rights to women in same-sex relationships who were not biologically related to the child
and was the second state to extend this right in 1993. Even though Sosman dissented in the case her opinion focused on performance especially concerning untested family structures. Seeking to ensure there were no negative ramifications for children suggested she was interested in seeing how these couples performed as parents. If they were successful, she may well reverse course and grant same-sex couples marriage. This indicates, similar to the majority performance as a parent was fundamental in granting rights to same-sex couples with children being the reason to grant formal marriage to these couples.

The dissenting justices focused on different aspects of the issue at hand. Although the dissents provided different rationales the three amounted to an understanding of the limited role of the court in altering social policy and extending rights and benefits to a new class of persons and family structures. While there were fundamental differences between the opinions in Goodridge, there was a common theme among them in that they all focus on performance. Marshall’s majority opinion was replete with examples pertaining to these couples’ performance as married couples as reasoning to grant them the full set of marital benefits, rights and obligations. Even the concurring and dissenting opinions centered performance although somewhat more muted than Marshall. Greaney’s focus on the ramifications for same-sex families if they were not granted the full set of marital rights and benefits underscored the fact these couples were performing the functions of married couples and limiting marriage to only some (opposite-sex) couples was constitutionally unsound. Similarly, Martha Sosman’s dissenting opinion focused on ramifications for children and the concern these families were untested. This, then, also ultimately focused on performance.
The New York Court of Appeals Speaks: *Hernandez v. Robles*

In 2006 the New York Court of Appeals decided *Hernandez v. Robles* (7 N.Y.3d 338 (2006)) directly addressing same-sex marriage. The outcome of the decision could have significant implications for marriage in New York. In his majority opinion, Judge Robert Smith engaged in a full-scale analysis of the constitutional issues at stake and made a full determination of the state interests in a manner similar to the Massachusetts court in *Goodridge*. Ultimately, constrained to the Massachusetts court, the New York court concluded: the “New York Constitution d[oes] not compel recognition of marriages between members of the same sex. Whether such marriages should be recognized is a question to be addressed by the Legislature ” (id. at 358). The rationale from the majority opinion reinforced the legitimacy of retaining marriage as an opposite-sex union and hewed to a much narrower definition and purpose of marriage than the majority opinion in *Goodridge*.

Judge Robert Smith’s majority opinion reaffirmed the traditional notion of formal marriage as a union between a man and a woman creating the marital status of husband and wife. Even so, he conceded: “the Domestic Relations Law governing marriage “nowhere say in so many words that only people of different sexes could marry each other...[but] that was the universal understanding when articles 2 and 3 were adopted in 1909, an understanding reflected in several statutes” (id. at 357). For example, §12 of the Domestic Relations Law (DRL) provided that the “parties must solemnly declare... they take each other as husband and wife” (DRL §12). Therefore, Judge Smith created a much narrower definition of marriage that focused on how the statute was written and applied
in a traditional sense. Although Smith acknowledged the breakdown in the traditional marriage ideal of two persons of the opposite sex, he nevertheless did not believe judicial intervention should solve this question believing instead it should be left up to the elected political branches of government.

Smith found no fundamental right to same-sex marriage and concluded rational reasons existed why the legislature could limit marriage to persons of the opposite sex. In linking marriage and child rearing the majority reinforced the traditional notion of marriage. The court opined, because same-sex couples were unable to accidentally procreate they did not need marriage to promote family stability (id. at 359). The rationale followed these couples were already more stable family units because of the process of becoming a family. Even so, this reasoning was at odds with the whole purpose behind extending marriage. Partially, the purpose of formal marital rights was to provide the child with greater stability and this would not be achieved outside of the recognition of a formal status between the parents and/or the (non-biological) parent and child.

It seemed for the New York Court of Appeals the purpose of marriage amounted to a way to ensure opposite-sex couples remain a family to “promote stability, and avoid instability” (id. at 359). This was an interesting posture from Smith around the ramifications for children as he wrote opinions for the court surrounding the extension of second parent adoption rights to the same-sex partner of a biological mother. The conclusions here, then, were at odds with what he wrote in adoption/custody cases I examined in chapter 4. For Smith it appeared rational to find a legal relationship between a child and a woman who had been caring for that child (thus based on performance) but
not to extend a legal relationship to the child’s parents. The two rationales seemed fundamentally at odds with each other.

Smith’s contention that a rational legislature could limit marriage to opposite sex couples suggested the court viewed gender difference as a fundamental aspect of marriage but not of parenting. Looking at the rational basis test, the most deferential standard of review, the court noted: “rational basis scrutiny was highly indulgent towards the State's classifications” (id. at 365). The court went on to conclude the line drawn between opposite sex and same-sex couples in marriage “did not create an irrationally over narrow or overbroad classification. The distinction between opposite sex and same-sex couples enacted by the Legislature did not violate the Equal Protection Clause” (id. at 365).

Even though the breakdown in the ideal of marriage occurred as a result of same-sex couples seeking to obtain formal recognition of their performative relationships the court asserted extending marriage to same-sex couples did not solve that marriage breakdown. The commitment of Judge Smith and the majority to marriage being an opposite-sex union was clear throughout the opinion as the courts provided a close analysis of formal marriage granting individuals rights and benefits. The majority was unwilling to solve the breakdown in the ideal of marriage by looking at the couples’ performance of the socially understood roles of husband and wife, which was surprising given the court’s interest in extending marital benefits and obligations to individuals based on their performance in other areas (see e.g. divorce and annulment in chapter 2 where the New York Court of Appeals was quick to remove marital obligations and benefits from individuals and couples that were not functioning appropriately as married).
Instead, the court simply asserted formal marriage was how individuals gained rights and as a policy issue the question of extending marriage to other classes of persons was a legislative prerogative.

This opinion did not focus on performance but rather the presence or absence of formal marital status as a tool for excluding certain couples from benefits. Framed in this opinion, formal marriage was an ideal that all other family forms and relationships were stacked up against. Same-sex couples were not brought under the parameters of the formal marriage as Smith contended all things being equal a legislative rationale existed to limit marriage based on the protection of children. Smith’s contention around families differed significantly from Chief Justice Margaret Marshall in Goodridge. It was also somewhat at odds with the decisions around adoption and custody of the New York courts, examined in chapter 4. Smith’s focus on children was more akin to Justice Sosman’s concern of potential ramifications for “untested” family structures.

Dissenting, Chief Judge Judith Kaye asserted a different liberty interest at stake stating that if a fundamental right existed for one group of persons then it did for all. For Kaye, the decision was less about marriage and more about the exercise of the fundamental right to marry. Mapped another way, Kaye argued the question was not so much about the formal status of marriage but rather the performance of marital status thus reframing the concern along the lines of the question the dissertation answers.

Indeed, for Kaye, the right of marriage and to enter into a formal marriage was one of the many rights people enjoyed by virtue of them being citizens and therefore was a fundamental right for all individuals. As such, the enjoyment of this right could not be prevented because the couple was of the same sex. Additionally, she chastised the
majority for construing the interest at stake much too narrowly and remarked: “an asserted liberty interest was not to be characterized so narrowly as to make inevitable the conclusion that the claimed right could not be fundamental because historically it had been denied to those who now seek to exercise it,” “fundamental rights were fundamental rights. They were not defined in terms of who was entitled to exercise them” (Hernandez v. Robles at 381-382, Kaye dissenting). To explicate her point Kaye turned to interracial marriage.

Chief Judge Kaye found little in statutory provisions restricting marriage to opposite sex couples, and an argument that “marriage was heterosexual because it ‘just was’ amounts to circular reasoning” according to Kaye (id. at 385, Kaye dissenting). Characterizing marriage as an unchanging institution simply distorted the past. Instead marriage has been altered throughout history and marriage in the modern era is significantly different from what it was in the 1700s. Kaye stated: “in truth, the common understanding of "marriage" has changed dramatically over the centuries” (id. at 385, Kaye dissenting). Part of this change included extending marriage to couples based on their performance. Expanding formal marriage to include same-sex couples was simply one further extension of marriage especially as these couples sought to be bound by the same obligations as opposite-sex couples. They did not want special treatment; they simply wanted the formal benefits and obligations associated with the performative relationship they were in. As a result, Kaye asserted the extension formal marital status and recognizing same-sex couples’ relationships under marriage statutes did not change marriage tremendously. Rather, and similar to Marshall’s opinion from Goodridge, Kaye noted that by extending formal marital status to same-sex couples simply extended the
rights, benefits, obligations and burdens of institutional marriage to these couples. For Kaye, these couples’ performance mirrored were performing married performance anyway so extending marriage did not fundamentally alter marriage. Instead, this development actually preserved the institution.

An important second line of reasoning in Kaye’s dissent was the elevation of sexual orientation to a suspect classification thus reviewing the marriage statute under strict scrutiny. She noted: “homosexuals meet the constitutional definition of a suspect class, that is, a group whose defining characteristic is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations were deemed to reflect prejudice and antipathy” (id. at 385, Kaye dissenting).

The majority failed to see sexual orientation as a suspect classification, but Kaye asserted it met the three criteria set down by the Supreme Court: subject to purposeful discrimination, a trait that was unrelated to the ability to perform and participate in society and finally a history of political powerlessness (id. 389, Kaye dissenting). Reviewing a policy or statute under strict scrutiny shifted the burden of proof of constitutionality from those challenging the statute to the government in ensuring the statute was not discriminatory. This case also presented discrimination based on sex, evident when a man was prevented from marrying another man on account of sex. Kaye noted: “under the Domestic Relations Law, a woman who seeks to marry another woman was prevented from doing so on account of her sex--that was, because she was not a man. If she were, she would be given a marriage license to marry that woman. That the statutory scheme applies equally to both sexes did not alter the conclusion that the classification here was based on sex (id. at 389 -390, Kaye dissenting). This discussion
echoed Justice Greaney’s concurrence in *Goodridge*, I examined above. But, while Greaney used this discrimination based on sex to extend marriage to same-sex couples, Kaye would use discrimination based on sexual orientation to extend marriage. Even so, both achieved the same result.

Kaye concluded marriage should be extended to same-sex couples using another rationale: ramifications for children, similar to Chief Justice Marshall of the Massachusetts Supreme Judicial Court. Kaye stated: “while encouraging opposite-sex couples to marry before they had children was certainly a legitimate interest of the State, the *exclusion* of gay men and lesbians from marriage in no way furthers this interest. There are enough marriage licenses to go around for everyone” (id. at 391, Kaye dissenting, emphasis in original). Kaye’s opinion also indicated the children of opposite-sex couples would not be negatively affected by extending marriage rights, but it would have a profound impact on the children of same-sex parents. This amounted to an understanding of the best interest of the child. As Kaye indicated before, in the case of *In Re Dana* there were significant advantages for a child of two parents, whether these parents were of the same or opposite sex. For Kaye there were no disadvantages to extending formal marital status to same-sex couples, only immeasurable benefits to both couples and children.

Chief Judge Kaye also noted the institution of marriage was “about much more than producing children yet same-sex couples were excluded from the entire spectrum of protections that come with civil marriage--purportedly to encourage other people to procreate” (id. at 393, Kaye dissenting). This, she asserted did not amount to sound reasoning and was no reason to exclude same-sex couples as the “protections that the
State gives to couples who do marry--such as the right to own property as a unit or to make medical decisions for each other--were focused largely on the adult relationship, rather than on the couple's possible role as parents” (id.at 393, Kaye dissenting). This picked up on the notion of performance as the state, in distributing marriage licenses to adults, focused on the lived or performative relationship of the couples. While the couples must meet certain criteria set forth by the state, which same-sex couples did, the state looked to the actual tangible relationship between the parties.

The majority, concurring and dissenting opinions clearly forwarded a view of homosexuality, albeit a very different one. The majority saw homosexuality incompatible with marriage.\(^80\) To back this up, Judge Smith’s majority opinion offered a number of rationales as to why the legislature may limit marriage to a union between a man and woman. The majority did not offer any reasons as to why a rational legislature could extend marriage to include same-sex couples. While the majority construed the right to same-sex marriage very narrowly and in some sense negatively; Kaye saw it much more broadly and positively. Overall, however, Kaye deemphasized the right to marry and understood the interest at stake as a broader liberty interest. Kaye emphasized the benefits couples (and their offspring) received by virtue of marriage, stating: Civil marriage provided tangible legal protections and economic benefits to married couples and their children” (id. at 393, Kaye dissenting). Finding a rational legislature could deem it “better” for a child to grow up with a mother and father illustrated the negative aspect of homosexuality in as much as two mothers or two fathers who were in a loving relationship may not provide as well for a child. The argument that opposite-sex marriage

\(^80\) Of course, homosexuals could marry provided they marry a person of the opposite sex. This would run afoul of Chief Justice Warren’s conclusion that restricting whom a person could marry restricts their fundamental right of marriage.
perpetuated stability, also forwarded negative views about homosexuality in indicating same-sex couples could not provide stable family environments for children. This was a fact Kaye’s dissenting opinion disagreed with forcefully. These pronouncements assumed homosexuality was inferior to heterosexuality as only heterosexual marriages could naturally produce children and provide for them. For Kaye, procreation was a distant second argument as marriage was about much more than procreation and was instead about the performed relationship between the adults and the creation of a family from that relationship. The majority saw marriage as creating a “supportive environment for procreation to occur and the resulting offspring to be nurtured” (at 370, Smith).

While the majority opinion did not actively confront the distinctly gendered notion of marriage the dissent by Kaye did. While Kaye’s opinion extended marriage to all persons due to its status as a fundamental right – not limited by gender or sexual orientation – this rested on a different understanding of marriage compared to the majority. Throughout Kaye’s opinion a different result did not ensue whether this was a case of discrimination based on gender or sexual orientation. Under either condition the Domestic Relations Law as currently construed was discriminatory. This was especially violative in the modern era (2006) when states had taken great measures to eliminate distinctions based on gender and sexual orientation in other facets of life. Gender still structured formal marital status in a way it did not for Kaye’s dissent. The purpose of civil marriage was more about the benefits, rights and obligations individuals were bound by, which Kaye determined were too numerous to mention. Having two persons of the opposite sex in a marriage was not a fundamental component of marriage, especially if marriage was a fundamental right.
After the decision in *Hernandez* a number of bills were introduced into the New York State Legislature to extend marriage to same-sex couples. Successive New York State Governors – Spitzer, Paterson and Cuomo were supportive of same-sex marriage and pushed for legalization. Two sets of bills passed the New York State Assembly but failed to garner sufficient votes in the State Senate (Melloy 2009). Finally, a third bill, The Marriage Equality Act, passes the New York State Assembly in June 2011 by a margin of 80 to 63. The Senate passed the bill a week later on June 24, 2011 with 29 Democrats and 4 Republicans voting in favor of the bill. Governor Andrew Cuomo signed the bill into law a month later and same-sex marriage began in New York in July 2011.

**Conclusion**

*Hernandez* and *Goodridge* indicated the different factors judges took into account when determining whether same-sex couples should be granted the formal status of marriage along with the rights and obligations associated with marriage. The majority opinion in *Goodridge* focused very much on the performativity of the couples and the impact on children if the court did not extend marriage to these couples. Indeed, Marshall’s majority opinion likened the fight for same-sex marriage to interracial marriage and the argument could be taken further. The second-class status children of same-sex couples may feel could be analogized to the second-class status African American children felt during the era of segregation and when Chief Justice Warren in *Brown v. Board of Education* referred to the “feeling of inferiority” (*Brown v. Board of Education* (347 U.S. 483 at 494)).
Performativity formed the backbone of Marshall’s opinion, and in looking at the trajectory of performance since the middle of the twentieth century the decision was not largely out of step with marriage decisions and policy areas I have examined leading up to the 2000s. Instead, this decision was very much in line with divorce and annulment cases (where courts removed marital obligations from individuals not performing within the boundaries of marriage), alimony cases (where judges terminated a husband’s alimony upon proof his wife was holding out as the wife of another man), adoption cases (where courts extended formal relationships between non-biologically related individuals), and finally loss of consortium cases (where judges expanded the definition of consortium to include wives that were performing similarly to husbands).

Marshall’s opinion in Goodridge and the decision to extend marriage licenses contrasts starkly with Judge Smith’s opinion in Hernandez v. Robles, which judging by my developmental trajectory is actually the surprising decision.

In Hernandez, Judge Smith did not center the discussion on performativity but rather gave guidance to what the legislature could choose to do and limited formal marriage to opposite-sex couples. Focusing, similar to Marshall, on the ramifications for children Smith asserted a rational legislature could determine all things being equal it was better for children to grow up with opposite-sex parents. While this perhaps misconstrued the “best interest of the child standard,” Smith ultimately found this was a policy decision that should be left up to the states. The fact Judge Smith did not look at all to the performance of these individuals as couples and parents is surprising given the lines of reasoning offered by the New York Court of Appeals since the middle of the twentieth century based around performance. While on the one hand it is surprising, it also is in line
with some jurisprudence from this court that has sought to remain faithful to traditional interpretations of marriage.

In highlighting these two important decisions, I demonstrated that when judges were faced with the breakdown in the ideals of marriage (defined here as same-sex couples seeking to enter into a formal marriage) they weighed performativity differently. Performativity was an evolving concept and its use by the courts has evolved even more so in the era of same-sex marriage. But what this dissertation illustrated is that couples that were acting as married were likely to be granted the benefits and obligations associated with the formal status of marriage. Married performance was still important and when couples acted in this manner judges often assumed rights associated with marriage, which I demonstrate clearly in alimony (chapter 3) and adoption/custody (chapter 4). Whether this was an extension of the institution of marriage, or simply an extension of the benefits and obligations of marriage was unclear. Marshall indicated she was not transforming the institution of marriage by legalizing same-sex marriage. I tend to agree; she was simply opening the current type of marriage to another class of persons. Marriage as an institution was preserved by this developmental trajectory, which I would argue is what the courts set out to accomplish. There were not large scale cleavages with the established order as scholars Orren and Skowronek would point to in looking at development. Instead, this was a much more nuanced picture complete with a purposeful movement towards same-sex marriage by using performance, which began decades before same-sex marriage was on the judicial radar. As a mechanism, performance is likely to be used by other courts as a means of attributing or legally recognizing formal relationships.
Chapter 7: Conclusion

Introduction

Through this dissertation I have demonstrated marriage plays a central role in dispensing politically important rights and benefits to individuals and in doing so bounds them by particular obligations and burdens. However, as the twentieth century progressed the courts were faced with various breakdowns in the ideal of marriage, or so-called marriage failures. In other words, formal marriage and the rules formal marriage asserted was unable to provide accurate or appropriate answers to questions the courts faced. As a result of formal marriage not providing sufficient answers the courts looked to other principles underlying marriage – performance. In the empirical chapters (2-6) have explored unique policy areas associated with marriage (divorce and annulment, alimony, adoption and custody, loss of consortium and same-sex marriage) to indicate how judges turned to performance as a mechanism to carry out marital obligations. For example, in the area of alimony (highlighted in chapter 3) the specific breakdown of the marriage ideal was based on women not remarrying after a divorce. As such, the traditional remarriage termination rule for alimony (when a husband’s alimony obligations to his former wife ended upon her formal remarriage) was no longer an appropriate rule. As a result, the courts turned to performance and determine whether the woman was performing the socially understood role of a wife to another man or in other words the woman holding out to be another man’s wife. Chapter 6 on the issue of same-sex marriage illustrated perhaps the most recent marriage failure where couples that sought marriage licenses were same-sex couples rather than traditional opposite-sex couples. As I showed in that chapter, the Massachusetts Supreme Judicial Court turned to
performance of marital obligations, specifically around parenting, to extend marriage licenses to same-sex couples.

The dissertation explored shifts in judicial discourse in four unique policy areas plus same-sex marriage in granting or denying marital benefits and obligations to individuals (both as parents and spouses). Broadly the developmental narrative of the dissertation emphasized a shift in focus from formal marriage to performance within marriage as central to the courts’ granting marital benefits to individuals in alimony, adoption/custody and loss of consortium cases. A similar focus was evident in chapter 2 analyzing divorce and annulment when the courts used the same parameters to remove obligations and duties of formal marriage from individuals seeking to divorce or annul the marriage.

My central argument in the dissertation is that this turn to performance in various policy areas associated with marriage has generative implications for same-sex marriage decisions. I have shown in each of the unique policy areas I examine – divorce and annulment, alimony, adoption and custody, and loss of consortium – the courts emphasized performance of the parties in distributing (or removing) marital benefits and burdens. The dissertation has answered the overarching question of how do I understand performance in marriage? The answer I arrived at, illustrated in each of the empirical chapters is that the courts emphasize the obligations associated with marriage that individuals in a marriage –like relationship were performing. If these obligations were being carried out satisfactorily then the courts extending rights and burdens associated with formal marital status to these couples. In adoption and custody this played out particularly well regarding unwed fathers. Adoption statutes traditionally only required a
father to consent to his child’s adoption when the parents were married to each other. A mother, whether married or not always had to consent to her child being adopted. Unwed fathers, however, could petition to require their consent but had to prove various performative factors before the courts would issue a favorable result. In other words, a father must not only have a biological connection with the child but perform or act as that child’s father. There were a range of factors to prove this tangible relationship that included emotional and financial requirements. If a father could demonstrate he was actively involved in the child’s life then the courts would overturn the order dispensing with his consent.

By looking at court-centered internal legal developments the exploration of this shift towards performance as a way to contend with breakdowns in the ideal of marriage added greatly to the discussion around marriage policy development in the Northeast. This turn towards performance in various policy areas associated with marriage presented an alternative explanation for how same-sex marriage decisions came about. I have shown in policy areas associated with marriage that courts looked specifically to how individuals were (or were not) performing functions traditionally associated with formal marriage. Each of the developments the courts created was pointed to preserving institutional commitments. For example, in alimony cases when a woman no longer remained faithful to the traditional parameters of marriage the courts saw fit to remove her former husband’s alimony obligation.

Looking beyond the binary notion of marriage and marital status demarcating ideas of inclusion and exclusion my dissertation offered a much more nuanced understanding of marriage policy development and court-centered internal legal
development at that. I show in my empirical work that courts were attempting to parse out nuanced ways of extending the benefits associated with marriage to those not in a formally recognized marriage. By exploring marriage in this way my project indicated marriage did not actually operate at the center of a battle over inclusion and exclusion but rather as the center of politics in a way that it defined who gets what, when and how much. In keeping with this the courts took into account a variety of performative factors when making decisions whether to assign marital benefits and obligations to particular couples and family make ups. The courts’ role in this process was especially important as legislative measures were interpreted via the courts when plaintiffs brought cases.

Looking at policy areas related to marriage I showed the courts turned to performance as a way to adjudicate questions over marriages that did not fit in with traditional understandings of marriage or failed marriages. Further, in terms of same-sex marriage and the use of performance in granting couples formal marital rights and benefits, I showed that long before decisions around same-sex marriage came about performance was a tool the courts used extensively to grant benefits.

Decades before same-sex marriage decisions came to the courts, judges offered new and interesting conclusions of how to combat the breakdown in the ideals of marriage but at the same time continued to preserve the institution of marriage. The turn to performance arose because the courts must deal with these policy areas and issues as they were part of people’s everyday lives and therefore could not be ignored. Another facet connected to the empirical work I have done in the dissertation is an illustration of the courts’ inherent problem solving nature. Whether the particular decision affected only the plaintiff or issued a broader statewide ruling, the state appellate courts must explore
these questions to solve problems for the lived lives of spouses, non-marital cohabitants and parents.

One example from the area of adoption and custody demonstrates this innovation. In the case of a same-sex partner seeking to adopt the biological child of her partner or a cohabiting male seeking to adopt the biological child of his partner, the courts looked to assumed marital obligations through the performance of these partners without having entered into a contract to marry. In the example of adoption and custody the courts were granting rights to non-married partners based on them mirroring married performance. What I mean by this is that courts were not removing marriage from the equation but instead were looking at how a woman (or man) performed the functions of a wife or husband in a similar way to how a formally married individual did. In another example from the issue of alimony the courts assumed a responsibility of support by a cohabiting male without a contract to marry, where there was a formal obligation to support a wife. Both of these examples implicated same-sex marriage directly as the same-sex marriage cases were asking the courts to recognize formally the couples’ informal or performance as a couple and as parents.

Divorce and annulment, examined in chapter 2, emphasized order rather than change. Performance always was part of the divorce or annulment decision as the courts necessarily looked to how a spouse was not performing functions associated with marriage in order to remove his or her marital obligations. There were two particularly interesting points take away and conclude about divorce and annulment. First, the idea of non-performance and the removal of marital rights and obligations. While the other empirical chapters (3-6) explored how individuals could attain marital rights and
obligations through specific actions of performance, the opposite was true for divorce and annulment. These cases consistently turned on acts consistent with non-performance of marital obligations and duties (i.e. consortium and cohabitation) as a way to remove marital obligations and benefits. A second important factor in these cases was the lack of gendered performance. In divorce and annulment cases the courts specifically referred guilty versus innocent spouse rather than a woman always being innocent and a man always being guilty. While there were implications flowing from whether the guilty or innocent spouse was the husband or wife, the court nevertheless focused on the non-performance of marital duties and obligations by the guilty spouse in determining whether the actions were consistent or inconsistent with formal marriage.

The other policy areas: alimony, adoption/custody and loss of consortium focused on performance as a way for couples to be granted rights traditionally associated with marriage and some aspect of gendered performance. Alimony and loss of consortium specifically centered on a woman’s performance either in holding out to be another man’s wife (alimony) or in being similarly situated to her husband when one spouse was injured (loss of consortium). Adoption and custody was more focused on an unwed father’s performance, especially in the cases around whether he must consent to his child’s adoption. In these cases the courts required him to perform certain functions of parenting before they will extend him rights associated as such as I indicate above.

Implications of the Research

This research had been focused around how marriage policy develops in the progressive Northeast through an examination of three progressive states: Maine,
Massachusetts and New York. I have forwarded an argument of court-centered legal developments in policy areas associated with marriage offering generative conclusions for how same-sex marriage decisions came about in the early 2000s. At the heart of the dissertation was an analysis of the shift from formal marriage granting (and denying) marital benefits and rights toward performance of the socially understood roles of husband and wife granting or denying those same marital benefits and obligations.

I have shown in four unique policy areas: divorce/annulment, alimony, adoption/custody and loss of consortium the courts turned to performance or non-performance of marital obligations by individuals (as spouses and parents) to legally recognize the relationships these individuals were in. This turn to performance of marital obligations allowed me to offer an alternative explanation for how same-sex marriage decisions came about. Looking at the courts’ discourse around other policy areas associated with marriage I demonstrated the same arguments showed up in the rationale over same-sex marriage as explored in chapter 6. Along with this, the empirical research indicated this development was court-centered; the courts spearhead the shift towards performance or the shifting nature of performance that was important for the court in each policy areas. This research also demonstrated through the varying rationales, the courts carved out exceptions for previously established rules and when these exceptions become widely accepted then the courts had engineered a shift away from the established order and developed marriage in a particular way. Importantly, however, I have shown this shift was a shift to preserve institutional commitments rather than a shift in governing authority as other scholars of American political development have posited. The decision in Goodridge v. Department of Health appeared in line with the long term developmental
trajectories in marriage policy and was not as much of a shock to the system as other scholars indicated.

One may ask why this was important to scholars of law and courts and political scientists more broadly? The story of how marriage develops was more than just a story of a series of court cases around marriage and the research presented has implications beyond the dissertation’s scope. It was also a story about how the courts used marriage in different ways to define the varying boundaries around what marriage could do and what marriage was. The narrative of development in each chapter displayed these competing arguments and illustrates one of the primary contributions of my study. As such, my findings are important for their ability to aid scholars in understanding the importance of judicial decision-making and how change comes about at the hands of courts (court – centered development).

Similar to scholars of American political development I situated the courts as independent actors making decisions separate from other branches of government. However, I depart from scholars of American political development, Karen Orren and Stephen Skowronek to argue that the strategy of the northeast in expanding marriage is one that while fundamentally breaks with the past (legalizing same-sex marriage) was fundamentally based on the conservative notion that change maintains institutions forwarded by Political theorist Edmund Burke. As I noted at the end of the previous chapter with *Goodridge v. Department of Health*, that decision may have been a sharp break with the past but it was concretely based in the notion of preserving the institution of marriage and was not actually revolutionary but instead made sense as the next step in the developmental trajectory I provided in this dissertation. In this story of development,
Massachusetts was not an outlier in extending marital benefits to same-sex couples. Instead, looking along the broader line of development and away from just the issue of same-sex marriage, the blue northeastern states adopted a similar strategy for change, which was based on preserving the institution of marriage. The broader contribution of my work, then, is a challenge to the notion that change is always a “durable shift in governing authority” (Orren and Skowronek 2004, 123) because what seemed like a break from the norm was actually really part of a broader narrative at work in the state courts around preserving institutions.

At the outset of the first chapter I briefly highlight the Goodridge decision and noted Chief Justice Margaret Marshall’s focus on performance in granting the same-sex marriage. This research indicated the turn towards performance actually occurred long before the issue of same-sex marriage came to the courts in the late 1990s and early 2000s. Instead, the courts’ use of performance in questions concerning the breakdown of the marriage ideal was widespread in various marriage policies. The courts were innovative in looking at different ways marital benefits and burdens could be extended to couples not in formal marriages and therein lay the importance of performativity. Thus, this research indicated that in order to explain how same-sex marriage decisions come about scholars could also look to internal legal developments at the state courts along rather than looking solely at external political pressures on the court to make these decisions. The research I undertook in this dissertation seeks to shed light on this issue and offer an alternative explanation for scholars of same-sex marriage. I am not particularly refuting scholars who favor models of external political pressure. Instead I offer an avenue of potentially fruitful research and collaboration.
The developments in marriage and how we understand marriage were implicated in the use of the courts’ language in this dissertation as the courts shifted what it means to be married and how performance of the socially understood roles of husband and wife impacted the enjoyment of rights, benefits and obligations. Using the approaches in this dissertation, specifically American political development, I show there was a different understanding of marriage compared to uses of marriage that scholars had previously identified. As Kahn (2006) and Ritter (2006) explore the Supreme Court could close one path, while alternatively opening another. I demonstrate courts at the state appellate level could also do this, albeit perhaps in a more muted fashion. The new path taken by the courts in the Northeast over time entrenches these developments. But, at times, the courts could, and will, branch off from this preordained path. The development advanced here was more in line with the “messy” process of development advanced by Kahn and Kersch (2006). Nevertheless, there appears to be somewhat of a linear movement towards performance. Once the courts develop the use of performance I do not observe a shift back towards formal marriage. Nevertheless, the courts do alter the types of performance or actions that were important in granting and denying marital benefits and burdens.

In (re)interpreting the developmental trajectory of marriage I contribute to a set of “revisionist” literature (Gillman 2004, 10) that has been forwarded by scholars of law and American political development. These scholars seek to reinterpret accounts of particular moments and developmental trajectories throughout American politics (cf. Gillman 2004, Kersch 2004, Graber 2006, Novkov 2001). This school of thought emphasizes current discussions around issues have their roots in the past and (re)examining a doctrinal line or the (re)telling of a particular narrative illustrates that current commitments that may be
surprising were actually in line with the developmental trajectory around a particular issue. What I have shown in the dissertation is that courts deciding cases around same-sex marriage are taking old ideas (i.e. the turn to performance in marriage-like relationships as a mechanism for granting rights and obligations of marriage) championed through other marriage policy areas (i.e. divorce/annulment, alimony, adoption/custody and loss of consortium) and applying them to new policy areas (i.e. same-sex marriage).

Another contribution I make to the law and courts literature was in an understanding of how marriage works in society. Previous scholarship explores the way marriage was employed by the court to dispense politically important benefits and obligations upon individuals. My dissertation specifically questions this assumption and found when examining the way marriage was used by the courts in adjudicating questions over related policy areas this was actually not the case. Thus, my work implied scholars should rethink the way marriage operates in society and the uses of marriage in forwarding particular policies.

A third implication of this work requires a separation of marriage into formal and performative aspects. I have demonstrated that, over time, performativity was largely favored over formal marital status by the courts in determining when individuals were bound by obligations and duties and conversely when they were granted benefits. In this way performativity rather than formal status was the marker of how individuals were granted marital rights and benefits. My work demonstrates the courts instead look at marriage from a sense of who gets what, when and how much. This in turn allowed the courts to extend benefits and obligations to those who were traditionally “excluded.” The courts were able to add specificity to the vague legislative policies around alimony,
adoption, custody etc. and carve out the parameters around when individuals were
extended these benefits and when they were denied.

A final implication of my work was the study of the subnational level and issue
area focus. While other scholarship had engaged in research on the subnational level, my
work brings into greater focus the trajectory of state level development, which was where
much of the marriage policies were set. The differences between the unique policy areas
may allow scholars to potentially think about divergent development narratives in the
states. Although all end up focusing on performance, there were differences in the way
performance was employed in each policy area thus each chapter presents a unique
narrative of that area. This could lead to fruitful research about how other policy areas
employ performance. The policy areas I analyze here focus around civil penalties,
another area of fruitful research could be to explore how criminal cases map to explaining
how same-sex marriage decisions come about.

This particular piece of work was also important in attending to the ways in which
courts, judicial discourse in particular, weighs a variety of factors in making
determinations around whom to assign benefits and obligations to. This was intrinsically
important when studying an institution such as marriage that had traditionally been an
institution that individuals seek to become a part of. There had, of course, been
exceptions to this, but largely throughout history there had been a push towards marriage.
BIBLIOGRAPHY


Basch, N. 1999, Framing American Divorce, From the Revolutionary Generation to the Victorians, Berkeley, California, University of California Press


Brandon, M. 2013, States of Unions: Family and Change in the American Constitutional Order, Kansas, University Press of Kansas


Burgess, E. and Locke, H. 1945 The Family: from Institution to Companionship. New York, American Book


Case, M. 1999 ”The Very Stereotype the Law Condemns: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies,” 85 Cornell L. Rev. 1447 pp.1447 - 1491


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Gash, A 2010 Below the Radar: How Silence Saved Civil Rights Ph.D. Dissertation, University of California, Berkley


Grossberg, M. 1985, Governing the Hearth: Law and Family in Nineteenth Century America, Chapel Hill, University of North Carolina Press


Hume, R. 2013, Courthouse Democracy and Minority Rights: Same-Sex Marriage in the States, New York, Oxford University Press


Kahn, K and Gozemba, P. 2009, Courting Equality: A Documentary History of America's First Legal Same-Sex Marriages, New York, Beacon


Klarman, M. 2013. From the Closet to the Altar: Courts, Backlash and the Struggle for Same-Sex Marriage, New York: Oxford University Press


Pascoe, P. 2000, “Sex, Gender and Same-Sex Marriage” in *Was Academic Feminism Dead?* University of Minnesota Center for Advanced Feminist Studies, NYU, pp. 86-129


Polikoff, N, 2009 *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law*, New York, Beacon Press

Ragin, C. 2000 “The Place of Case-Study Research,” *Comparative and Historical Sociology*, vol. 13, no. 1


**Cases**


*Adoption of Alex*, 408 Mass 522 (1990),

*Adoption of Carlos*, 413 Mass 339 (1992)

*Adoption of Heather Malpicia Orsini*, 36 N.Y.2d 568 at 571 (1975)

*Adoption of Larry*, 434 Mass 456 (2001)

Adoption of a Minor, 357 Mass 490 (1970)

*Adoption of Peggy*, 436 Mass 690 (2002)

*Adoption of Tammy*, 416 Mass. 205 (1993)


Bliss v. Bliss, 66 N.Y. 2d 382 (1985)
Bosclair v. Bosclair, 313 Mass 442 (1943)
Boutilier v. INS, 387 U.S. 118 (1967)
Brillis v. Brillis, 4 N.Y.2d 125 (1958)
Byrn v. New York City Health and Hospitals Corporation, 31 N.Y.2d 194 (1972)
Bubar v. Plant, 141 Me. 407 (1945)
Cabral v. Cabral, 323 Mass. 441 (1948)
Caldwell v. Caldwell, 298 N.Y. 146 (1948)
Care and Protection of Three Minors, 392 Mass 704 (1984)
Cary v. Cary, 112 Conn. 256 (1930)
Clifford v. Clifford, 354 Mass 545 (1968)
Coe v. Coe, 313 Mass 232 (1943)
Cohen v. Cohen, 103 N.Y.S.2d 426 (1951)
Collis v. Collis, 355 Mass. 25 (1968)
Commonwealth v. Gallant, 373 Mass 577 (1977)
Commonwealth v. Gardner, 300 Mass 372 (1938)
Commonwealth v. Kitchen, 299 Mass. 7 (1937)
Craig v. Boren, 429 U.S. 190 (1967)
Crehore v. Crehore, 97 Mass 330 (1867)
Damaskinos v. Damaskinos, 325 Mass. 217 (1950)
DeBlois v. DeBlois, 158 Me. 24 (1962)
De Sylva v. Ballentine, 351 U.S. 570 (1956)
di Lorenzo v. di Lorenzo, 174 N.Y. 467 (1903)
Diemer v. Diemer, 8 N.Y.2d 206 (1960)
Donohue v. Donohue, 116 N.Y.2d 241 (1909)
Domschke v. Domschke, 138 A.D. 454 (1910)
Dresser v. Dresser, 225 A.2d 395 (1967)
Estate of Fannie May, 305 N.Y. 486 (1953)
Fernandes v. Fernandes, 87 N.Y.S.2d 707 (1949)
Finlay v. Finlay, 240 N.Y. 429, 433 (1925)
Fisher v. Fisher, 250 N.Y. 313 at 318 (1929)
Gaines v. Gaines, 308 N.Y. 218 (1954)
Garfi v. Garfi, 327 Mass 122 (1951)
Glazer v. Silverman, 354 Mass. 177 (1968)
Gribble v. Gribble, 583 P.2d 64 (Utah 1978)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Grover v. Grover, 143 Me. 34 (1947)
Gruber v. Gruber, 161 Me. 289 (1965)
Haddock v. Haddock, 201 U.S. 562 (1906)
Haas v. Haas, 298 N.Y. 68 (1948)
Hoops v. Hoops, 292 N.Y. 428 (1944)
Holyoke v. Holyoke, 78 Me. 404 (1886)
Hudson View Properties v. Weiss, 59 N.Y.2d 733)
In Re Adoption of Caitlin, 622 N.Y.S.2d 835 (1994)
In Re. BLVB, 160 Vt. 368 (1993)
In Re Cooper, 187 A.D.2d 128 (1993)
In Re Evan 583 N.Y.S.2d 997)
In Re Jacob, 86 N.Y.2d 651 (2004)
In Re Marriage Cases, 43 Cal.4th 757 (2008)
Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct.App.1973)
Kober v. Kober, 16 N.Y.2d 191 (1965)
Kover v. Kover, 29 N.Y.2d 408 (1972)
Kronenbitter v. Wasburn Wire Co. 4 N.Y. 2d 524 (1958)
Kropp v. Shepsky, 305 N.Y. 465 (1953)
Laage v. Laage, 176 Misc. 190 (1941)
Labine v. Vincent, 401 U.S. 532 (1971)
Lausier v. Lausier, 3123 Me. 530 (1924)
Levanosky v. Levanosky, 311 Mass 638 (1942)
Levy v. Louisiana, 391 U.S. 68 (1968)
Levin v. Yeshiva University, 96 N.Y.2d 484 (2001)
Lewis v. New York State Department of Civil Service, 60 A.D.3d 216 (2009)
Littlefield v. Littlefield, 292 A.2d 204 (1972)
Livingston v. Livingston 173 N.Y. 377 (1903)
Loving v. Commonwealth of Virginia, 388 U.S. 1 (1967)
Maine v. Lafferty, 309 A.2d 647 (1973)
Marquardt v. Marquardt, 396 N.W.2d 753 (S.D. 1986)
Marriage of Shima, 360 N.W.2d 827 (Iowa 1985)
Jordan Marsh Co. v. Cohen, 242 Mass 245 (1922)
Matter of Spence- Chaplin Adoption Service v. Polk, 29 N.Y.2d 196 (1971)
Maynard v. Hill, 125 U.S. 190 (1888)
McKeon v. Van Slyck, 223 N.Y. 392 (1918)
Merchant v. Bussel, 139 Me. 118 (1942)
Meyer v. Nebraska, 262 U.S. 390 (1923)
Millington v. Southeastern Elevator Co., 22 N.Y.2d 498 (1968)
Mirizio v. Mirizio, 242 N.Y.74 (1926)
Monahan v. Monahan, 142 Me. 72 (1946)
Moore v. East Cleveland, 431 U.S. 494 (1977)
Murphy v. Murphy, 296 N.Y.168 (1947)
Orr v. Orr, 440 U.S. 268 (1979)
Patakaskas v. Judeilis, 327 Mass 258 (1951)
People v. Kern, 75 N.Y.2d 638 (1990)
People v. Mario Liberta, 64 N.Y.2d 152 (1984)
People v. Shepard, 50 N.Y.2d 640 (1980)
Petition of the Department of Public Welfare to Dispense with Consent to Adoption 383 Mass. 573 (1981)
Petition of the Department of Social Services to Dispense with Consent for Adoption, 391 Mass 113 (1984)
Petition of the Department of Public Welfare to Dispense with Consent to Adopt, 383 Mass. 573 (1981)
Petition to Dispense with Consent to Adopt, 371 Mass 651 (1976)
People v. Onofre, 51 N.Y.2d 476 (1980)
Perez v. Sharp, 32 Cal.2d 711 (1948)
Plessy v. Ferguson, 163 U.S. 537 (1896)
Potter v. Schafter, 161 Me. 340 (1965)
Prince v. Massachusetts, 321 U.S. 158 (1944)
Re Mattews Estate, 153 N.Y.443 (1897)
Roe v. Wade, 410 U.S. 113 (1973)
Royal v. Royal, 324 Mass. 613 (1949)
Rubenstein v. Rubenstein, 319 Mass 568 (1946)
Russell v. Russell, 145 Me. 113 (1950)
Saeli v. Mangino, 353 Mass 591 (1968)
Schaeffer v. Schaeffer, 20 Misc. 2d 662 (1959)
Shea v. Shea, 294 N.Y. 909 (1945)
Siecht v. Siecht, 41 N.Y.S. 2d 393 (1943)
Skinner v. Oklahoma, 316 U.S. 535 (1942)
Stanley v. Illinois, 405 U.S. 645 (1972)
Strater v. Strater, 159 Me. 508 (1963)
Surabian v. Surabian, 362 Mass 342 at 347 (1972)
Tacchi v. Tacchi, 47 Misc. 2d 996 (1959)
Tuck v. Tuck, 14 N.Y.2d 341 (1964)
U.S. v. Carolene Products, 304 U.S. 144 (1938)
Van Voohrs v. Brinnaall, 86 N.Y. 18 (1881)
Ventresco v. Bushey, 159 Me. 241 (1963)
Waddey v. Waddey, 290 N.Y.251 (1943)
Whittet v. Hilton, 335 Mass 164 (1956)
Woronzooff-Daschkoff v. Woronzoff-Daschkoff, 303 N.Y. 506 (1952)