AFTER LEGAL EQUALITY

Family, Sex, Kinship

a GlassHouse book

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Edited by Robert Leckey

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Robert Leckey
Montreal, January 2014

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Introduction

After legal equality

Robert Leckey

Groups seeking equality sometimes take a legal victory as the end of the line. Once judgment is granted, or a law is passed, coalitions disband, and life goes on in a new state of equality. For their part, policymakers may assume that a troublesome file is now closed. This collection, and the larger project of which it is part, arises from the sense that law reforms made under the banner of equality invite fresh lines of enquiry. For example, such reforms may worsen the disadvantage of other groups, as where recognizing same-sex couples can indirectly intensify distinctions by race or class. Redrawing the lines of legal 'family' might also further marginalize non-normative caring and kinship networks. Moreover, legal reforms in equality's name may, in unintended ways, harm even their intended beneficiaries. Efforts to protect religious women from patriarchal practices, for example, may undermine their religious freedom and deny their agency. These matters are complex and cut across different social fields. Addressing them can be uncomfortable. However, scholars, civil-society organizations and policymakers need to know about them.

To be sure, compared with situations in which there is nothing akin to equality (see, e.g., Kondakov 2013), the state of affairs 'after legal equality' may appear to be less urgent. At least at first blush, it is not a matter of life and death, although some argue that gay-rights projects collaborate in the uneven distribution of life chances (Spade 2011; Haritaworn *et al.* 2014). Considering the questions raised in this collection is nevertheless important, in order to ensure that change in the name of legal equality does not perpetuate disadvantage or stall social change.

Although some scholarly projects arise from a grand idea, my inspiration for this collection and the preceding workshop emerged by induction from small, concrete cases. In 2007, the Court of Appeal in my home jurisdiction of Quebec ordered two former lesbian partners to share the custody of girls of whom only one was the legal mother, by adoption. Had it been possible at the time, the women would have adopted the girls together. Although, under the province's civil law, the children had only one 'mother' – the other woman being a legal stranger towards them – the judges used the everyday

language of family, referring to the children's 'two mothers'.[1] I wrote favourably about that approach and result, characterizing it as 'a judicial willingness to make space for manifold existing forms of family', an attempt to bridge the gap between social and legislative discourse (Leckey 2009: 565–6 (footnote omitted)).

Several years later, the same tribunal again ordered former lesbian partners to share custody of a child of whom only one was the legal mother. This time, the mother had given birth to the child. The child was younger than the girls in the previous case, and the duration of the couple's family life with the child was shorter. This time, law reforms had offered an avenue by which the birth mother might have established parental status for her partner, but she had declined to do so. The judges, nevertheless, spoke once more of the child having 'two mothers', whatever the law said.[2] I assessed this second case more cautiously. I posed the question whether, 'now that two women may become legal spouses and that a child may have two mothers, might judges too readily interpret facts from the diverse ecology of queer kinship through the script of two equal mothers?' (Leckey 2013b: 13). While grappling with such instances in my scholarly life, my activist life has involved reorienting a national lesbian, gay, bisexual and trans human-rights organization for which no subsequent priority has matched the broad-based support rallied by a successful campaign for equal marriage.

In conversation with colleagues and friends, these examples quickly joined with others. They helped in formulating a research agenda – the title of this volume – that is distinct from scholarship laying out the advantages or disadvantages of a legal reform or prescribing doctrinal paths for achieving it. As with any research agenda, its contours are contestable: it might have included more or less. On the side of more, the terms might have extended to regulation of the workplace and of political processes. The agenda might also have encompassed reforms justified on bases other than equality, such as liberty, privacy, health, children's welfare, individual responsibility (think of welfare reform) or security. Equality, though, is especially rich, given the ontological conceptualizing that it induces about the majority, the claimant group, and the relation between them, as well as its 'fit' with liberal and neo-liberal discourses. On the side of less, it would have been possible to focus on equality from a single vantage, such as gender or sexual orientation, or on a single issue within family regulation, such as measures to foster 'equal parenting' by fathers and mothers. The hope is that the terms framing the agenda – including the subtitle, *Family, sex, kinship* – capture a middle ground, providing sufficient focus while stimulating productive connections across sites.

Researching 'after legal equality'

This collection presents new research, gathering under its rubric authors from England and Wales, the United States and Canada. Under an overarching

theme of kinship and care, the chapters are organized into three parts: Care and justice under neo-liberalism, States' reach, and Sex and love. The recognition of same-sex relationships – primarily conjugal ones – emerges as the prevalent site of investigation, but chapters also address care more broadly, gender relations in parenting, cohabitation and organizing for racial equality. This gathering embodies an effort to transcend the barriers that often confine legal scholarship within law and, via specialized journals, within fields. For example, the collection sets scholars of family law in conversation with tax specialists. Disciplinarily, it juxtaposes socio-legal scholarship with the work of specialists in sociology, American studies and women's studies.

Before elaborating on the collection's register and methods and setting out its themes, it may be helpful to distinguish various understandings of the object of research 'after legal equality'. Although their boundaries are porous, such research might focus on at least five phenomena.

First, the dismantlement of achievements won in the name of legal equality. One might study instances in which conservative or other forces disassemble institutions or structures set up with a view to bringing about equality for one group or another. A recent example is the US Supreme Court's invalidation of the Voting Rights Act (see Jakobsen and Ferguson, both in this volume).[3] Arguably, such dismantlement should be assessed in a larger context. Thus Ferguson (159), discussing the same court's decision a day later to strike down the Defense of Marriage Act,[4] reads the judgments as together suggesting, 'that the mainstreaming of homosexuality within the US took place via the marginalization of anti-racist protections'. The destruction or reengineering of the welfare state offers other examples.

Second, the backlash following a historically marginalized or disadvantaged group's legal and social advances. Feminist gains in family law or criminal law may trigger a backlash (see, e.g., Boyd *et al.* 2007), as may achievements in rights for gay men and lesbians. Advocates for one group may borrow or co-opt the discourse of equality used by another, opposing group. Thus, fathers' rights groups have asserted fathers' right to parent equally and children's right to have two equal parents, in response to claims for substantive equality grounded in mothers' disproportionate caring work (see, e.g., Crowley 2006).

Third, the intuition (or evidence) that lobbying or litigation relying on legal equality has reached its limit. Equality as a political or legal argument has proven more effective at addressing some kinds of issue than others. In a number of contexts, equality has helped to obtain formally identical treatment, but failed to achieve significant redistribution or substantive equality (Hunter 2008).

Fourth, the impact for those left behind or further disadvantaged. Efforts to study such impact might pursue a number of enquiries. Which inequalities have reforms driven by equality exacerbated? How does enacting formal equality play against abiding substantive inequalities? Specifically, have reforms justified by equality in terms of gender or sexual orientation intensified

inequality on other bases, such as class, race and ability? Crucially, class does not generate an 'equality' claim articulable in law, something that may intensify the effects of other markers of social position, such as race. 'Success' at changing law might further stigmatize non-normative sex (Warner 2000) or non-normative families (Barker 2012), although that may be an empirical rather than a conceptual question. It might also intensify the legal and social favours accorded to privileged, coupled forms of family (Brake 2012), although the character of such favours and the social meaning of marriage vary by jurisdiction and by era. For example, marriage's significance in the US is not necessarily universal. By advantaging those who are privileged except for their sexual orientation, equality efforts risk further legitimating legal and social structures soldered to discrimination based on race, gender, class and nationality (see, e.g., Young and Boyd 2006; Kandaswarmy 2008; Lenon 2011; Joshi 2014).

Have the reforms benefitted some members of a disadvantaged group and not others? As feminist and queer critics have noted in connection with the push for same-sex marriage, the rising tide of successful equality claims does not lift all boats. The 'options' that legal reforms make available – for gay men and lesbians, marriage and legally acknowledged parenthood – do not benefit or appeal to all groups or subgroups equally. New inclusions may produce new exclusions. Moreover, 'equality' campaigns, as for same-sex marriage, may visit unwelcome effects on those who would not decide to take up the new legal possibilities. In this respect, it is significant that expanded 'recognition' of spousal status may not be optional. For purposes of social programmes, it sometimes applies mandatorily, deeming cohabiting couples to be 'spouses', aggregating their incomes and reducing their benefits, irrespective of their wishes (see Young, in this volume).

Fifth, the effects for legal reform's intended beneficiaries. This understanding of 'after legal equality' presses against the assumption that legal 'success' represents an endpoint for legal reform and political organizing. Research might scrutinize the courts' or legislatures' selected means and anticipate and observe unintended consequences. How are reforms playing out? Are people taking advantage of the mechanisms made available, such as forms of family recognition or remedies? Where legislative drafters have copied existing legislative regimes for new contexts, how effective is that approach? Assumptions of sameness call for scrutiny, in particular concerning the regulation of same-sex couples (see Monk, in this volume; Leckey 2013a) and their status as parents (see, e.g., Diduck 2007). A newly accessible regime of family law may interact problematically with the legal arrangements made by same-sex couples – pre-equality, as it were – using the devices of the ordinary private law, such as wills (Monk 2011).

It may be possible, then, to identify the benefits of legislation recognizing families created and sustained by gay men and lesbians, as well as gaps in such regimes. Where reforms are already in place, such research may identify

unintended consequences and point to additional, corrective reforms. Meanwhile, policymakers and governments in jurisdictions where reforms have not occurred can profit from the experience elsewhere. They may also find themselves judged against the yardstick of measures adopted in comparator states.

Other enquiries ripple outwards from legal regimes, reaching further into social practice and generating additional research questions. How have reforms altered conduct in their field of operation and beyond, such as the way people organize politically or where they congregate and live? Have legal rules that are ostensibly more equal reshaped kin configurations and practices or ways of talking about them? To what extent has a chosen legislative model 'channelled' social practice into it (Wallbank 2010), and how, methodologically, might we answer those questions? Looking back at the tools of law reform, how distortive is the image constructed for argumentative use before judges or elected lawmakers that the claimant group is the same as another group or sufficiently similar to it? (On campaigns for marriage, see Zylan 2011.) What subtleties and distinctive traits are stripped away when legal processes turn their gaze on a group heretofore 'outside' legal regulation? (Might the image on this volume's cover, by Montreal photographer Valerie Simmons, be read as an allegory of the strangely deadening effects of aiming to make one thing the same as another?) The diversity of social practices ensures that a process of legal recognition, through which one or more models will be picked out and given the state's imprimatur, will exclude some forms of practice and misrepresent others (Leckey 2011).

One finding from research 'after legal equality' may be that efforts to bring about formal equality – identical treatment of different individuals or groups – have not necessarily resulted in substantive equality. That observation has been made repeatedly, and this collection does not develop it. Instead, without pretence to exhaustiveness, this collection bears primarily on the fourth and fifth understandings of researching 'after legal equality'. I hope that it provides methodological, conceptual and theoretical resources for gathering and reframing existing research from different jurisdictions, and that it will inspire further work in other sites and concerning other groups. It may be worth identifying a few instances that exemplify the larger research agenda. On the gender and sexuality front, trans individuals' circumstances come to mind. A fine example of relevant research is Sharpe's (2012) painstaking analysis of the UK's Gender Recognition Act 2004 and its discriminatory premises and effects. Further, on family matters, the legal approach to surrogacy may register a concern for some intending parents' equality relative to others and a contingent conception of women's equality or capacity to choose (e.g., Campbell 2013: Ch. 3 Tremblay forthcoming). Turning to public policy, attention to areas such as welfare (see, e.g., Smith 2007) would align with this volume's chapters by specialists in taxation (Brooks and Young). Finally, religion warrants further analysis, whether in relation to legal efforts to

advance women's equality by protecting them from religion (e.g., Korteweg and Selby 2012), perceived conflicts between freedom of religion and equality relating to sexual orientation (e.g., Cooper and Herman 2013) or other matters.

It is now appropriate to develop further the present collection's approach. In agreement with Hines and Taylor (2012: 2), that attending to advances around sexuality – and analogous matters – is 'both a methodological question and a theoretical challenge', this Introduction addresses the collection's register and methods, as well as its theoretical and thematic foundations.

Register and methods

Research 'after legal equality' may operate in a different register from work seeking to bring about law reform. It might bracket the binary logic of being for or against a given goal, such as access to marriage, and the doctrinal imperative of shoehorning social practice into existing categories. Such a juncture might make it more possible to 'complicate progressive narratives' and challenge the basis of claims for identical treatment (Monk 2011: 247). More than work prepared with an eye to judicial or parliamentary decision-making in the short or medium term, research 'after legal equality' may develop a critique that previously was politically unpalatable or simply not perceived (Harding 2011: 182; on the luxury of critique, see Brown and Halley 2002). Such research may be meditative, reflective or speculative. In this way, Monk aims 'to create a space for a "quiet empiricism", raising questions more than offering answers' (in this volume: 201 (reference omitted)). Of course, any opposition between advocacy or activism and research is contentious, and all research advances some perspective. Still, work 'after legal equality' may seek to deepen understanding, without issuing an immediately applicable policy recommendation. By contrast, moments of law reform, such as parliamentary hearings, pitting one group against another, offer less room for such enquiry.

Nonetheless, it would be wrong to imply that this collection of studies 'after legal equality' eschews policy prescription or offers no normative implications. Young favours an approach to taxation that focuses on the individual, not the conjugal couple. Although that is a view that she advocated two decades ago (Young 1994), it is now enriched by the experience of what 'equality' has brought and the heteronormative patterns it has failed to disturb. Other studies in this volume will inspire differing normative reflections in their readers. Reece's conclusion (129) that 'cohabitants' recalcitrance' – their failure to take responsibility for themselves by negotiating and concluding cohabitation agreements – 'may be something to celebrate' stands as a challenge to a prescriptive strand of legal policy literature. For some readers, though, her chapter's interdisciplinary discussion of the costs of concluding contracts on an individual basis, including the foreseeable hit

to couples' optimism bias, will evoke the law-and-economics literature on default rules and strengthen the case for presumptively subjecting cohabitants to more robust protections. It is similarly possible to read Brooks's chapter on two levels. It is foremost a sociological endeavour, with the goal of better seeing conjugality at the margins. It may, however, lead some readers to worry about the intrusion that 'recognizing' family on an informal or functional basis occasions, and the apparently regressive way in which individuals with fewer resources appear least well placed to control their relationships' legal characterization. (The degree to which class privilege and social conventions inform metrics of intrusiveness would rightly temper such a reading.)

Beyond the question of its normative intensity, research 'after legal equality' raises methodological questions. The research agenda prefigured by this collection may call for different methods from debates for and against reforms. As the impact of legal reform on formerly excluded groups is a key question, empirical research is in order. The reforms in question are recent enough that fuller-scale empirical work must await the future; indeed, the complexity of legislation's impact necessitates a long-term view (Maclean and Kurczewski 2011: 106–10). Nevertheless, mid-term assessments may be fruitful. Researchers have already begun to trace how the availability of access to formal recognition of same-sex relationships may affect attitudes and ways of living (e.g., Balsam *et al.* 2008). Scholars have also examined the impact of legislated norms of equal or shared parenting (Fehlberg *et al.* 2011).

A shift in the scale and location of legal action post-equality may dictate a corresponding methodological shift. Where 'big' matters have been addressed in terms of equality, activism and pressures may be redirected towards more technical and interstitial legal matters. The implications of civil partnership and same-sex marriage in private international law or conflict of laws present an example (Cossman 2008). Regulations ostensibly based on health or risk concerns – in access to assisted reproduction or blood donation – that disproportionately affect a group are another.

To expand on this shift in scale, once equality has been 'achieved' via a human-rights judgment of general application or by legislation, the level and scale of relevant decision-making may change too. Equality's on-the-ground meaning will arise, for example, from discrete applications of law, as in individualized decisions respecting custody, residence orders or contact, made in a child's 'best interests' (Richman 2009). From an equality standpoint, the historical record of the latter concept's application is uneven, at best. Regimes that have been ostensibly purged of discrimination on their face may nevertheless prove problematic in their administration. A plain example is the adoption or fostering process (see Monk, in this volume). As an indication that it may be necessary to slice regimes finely, social workers' approval of same-sex couples as adopters may not be matched, downstream, by the placement of children with them (Sullivan and Harrington 2009). The lesser degree of transparency as the action shifts to policy, soft law and administrative

decision-making – by contrast with publicly available judgments – mounts a thorny methodological challenge.

Concretely, then, with adjudication before apex courts and primary legislation in the national, state or provincial parliament behind it, scholarly attention 'after legal equality' may reconnect to research devoted to other sets of sources, such as soft law, and to less instrumental modes of reading. Indeed, research on regulation 'after legal equality' may have much in common with the pre-equality attention to soft law and policy, including at local levels, undertaken when groups such as gay men and lesbians were absent from higher-order laws (on 'sexing the city', see Cooper 1994; on 'post-equality', see Richardson and Monro 2012: Ch. 5). Same-sex marriage having been legislated in England and Wales, Harding (in this volume) brings critical discourse analysis to bear on the parliamentary debates that led to it. Research 'after legal equality' may privilege attention to the intimate, the archival and the micro. Think of work exploring queer parenting and kinship by examining stories, films and photographs (Hicks 2011; for a study of small-scale spaces, see Cooper 2013). Within this volume (100), Brooks reads legal tax cases for their portraits of individuals 'at the margins of conjugality', aiming to 'deriv[e] evidence about the texture' of their lives. Monk draws on interviews with solicitors who had experience of writing wills for gay men and lesbians, a revealing site of socio-legal enquiry, but not an obvious one. Nor are legal sources the only ones relevant. Consider Reece's assessment of Advicenow, a government-sponsored information website. The provision of information may merit analysis as a form of intervention and, indeed, of governance (see also, e.g., Reece 2003: Chaps 4, 5).

Critically, the micro character of suitable sources need not imply a small scope of relevance for the resulting findings. Even if focused on a minority group or formation in a circumscribed context, research 'after legal equality' stands to yield broader insights. For example, studying the friction between marriage law and gay and lesbian family life may provide insights applicable to other kinds of family, including the 'mainstream' different-sex couples for which such law was devised (Heaphy *et al.* 2013: 32; Leckey 2014).

Theory and themes

The complexities of post-reform politics may make it constructive to 'take a break' from prevailing theoretical constructs and commitments (Halley 2006). At minimum, it is worth studying their epistemic limits. Pre-equality, it sometimes appeared straightforward to characterize a minority group as oppressed or excluded by the majority. In contrast, a 'new era of legal recognition' around sexual orientation may create 'winners and losers within the lesbian and gay community', in the process 'test[ing] the very political notion of a community' (Monk 2010: 98). Queer theory has played an important role in this move, but Monk suggests that his chapter 'draws on, but at the