



REGULATING SEXUALITY

Legal consciousness in lesbian and gay lives

a GlassHouse book

ROUTLEDGE

Rosie Harding

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and gay lives

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Regulating Sexuality

Regulating Sexuality: Legal consciousness in lesbian and gay lives explores the impact that recent seismic shifts in the legal landscape have had for lesbians and gay men. The last decade has been a time of extensive change in the legal regulation of lesbian and gay lives in Britain, Canada and the US. Almost every area where the law impacts on sexuality has been reformed or modified. These legal developments combine to create a new, uncharted terrain for lesbians and gay men. And, through an analysis of their attitudes, views and experiences, this book explores the effects of these developments. Drawing on, and developing, the concept of 'legal consciousness', *Regulating Sexuality* focuses on four different 'texts': qualitative responses to a large-scale online survey of lesbians' and gay men's views about the legal recognition of same-sex relationships; published auto/biographical narratives about being and becoming a lesbian or gay parent; semi-structured, in-depth, interviews with lesbians and gay men about relationship recognition, parenting, discrimination and equality; and fictional utopian texts. In this study of the interaction between law and society in social justice movements, Rosie Harding interweaves insights from the new legal pluralism with legal consciousness studies to present a rich and nuanced exploration of the contemporary regulation of sexuality.

Dr Rosie Harding is a lecturer in law at Keele University.

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For my mother, Joyce Walker Harding (1950–88)

Contents

<i>Acknowledgements</i>	viii
1 Introduction: law, sexuality and everyday life	1
2 Legal consciousness in lesbian and gay lives	17
3 Reconsidering resistance	35
4 From 'outlaws' to 'in-laws'?	59
5 Stories of law	80
6 Recognising regulation	109
7 Imagining a different world	148
8 Afterword	177
<i>Bibliography</i>	188
<i>Index</i>	202

Introduction

Law, sexuality and everyday life

The last decade has borne witness to an unprecedented level of change in the legal regulation of lesbian and gay lives across the Western world. In the UK in 1999, the age of consent for sex between men was 18; Section 28 of the Local Government Act 1988 prevented local authorities from ‘promoting homosexuality’; lesbians and gay men were banned from serving in the military, and were routinely discharged from the armed forces if their sexual orientation was discovered. Alongside these legal restrictions, there was a distinct lack of legal *recognition* of lesbians and gay men and, in particular, of the everyday familial relationships between same-sex couples and their children. In 2010, lesbians and gay men in the UK are no longer subjected to many of these legal detriments. Anti-gay laws have been repealed, and replaced with legal protections from discrimination on the basis of sexual orientation, and legal recognition for lesbian and gay families. The Civil Partnership Act 2004 created a system of recognition for same-sex relationships that is almost identical to marriage, recent reforms to adoption law now allow same-sex couples to adopt children together, and the same-sex partner of a woman who gives birth can now be named on any resulting child’s birth certificate and can have the legal status of ‘parent’. Yet it would be wrong to surmise that these legislative changes necessarily remove any discrimination from the everyday lives of lesbians and gay men. Elsewhere in the world, some of the gains for lesbians and gay men have been mirrored by increased backlash against same-sex relationships and families. For example, while some US states have granted same-sex couples access to marriage, many more have legislated to remove the possibility of legal recognition for lesbian and gay relationships.

These legal developments combine to create a new, uncharted terrain for lesbians and gay men. This book seeks to explore the effects of this recent seismic shift in the legal landscape for lesbians and gay men and examines the consequences of such dramatic legal change on the everyday lives of lesbians and gay men. The primary focus of this book is to explore lesbians’ and gay men’s experiences of, attitudes to and views about the interlinked reforms to the legal context of lesbian and gay familial lives. The different approaches to the recognition and regulation of lesbian and gay families in the UK,

Canada and the US provide fertile ground for exploring and understanding how different legal and social contexts impact on the ways lesbians and gay men approach, understand and consider the place of law in their everyday lives. I have three main reasons for foregrounding familial lives in this book: first, lesbian and gay relationship recognition and parenting rights are, to greater or lesser extents, the current focus of lesbian and gay activism within the UK (and in a number of other countries worldwide). Second, parenting and relationships seem more relevant to the everyday lives of lesbians and gay men in the early twenty-first century West than, for example, sexual offences legislation. A third reason for my focus on familial relationships is that it is not necessary to construct lesbians and gay men as 'victims', as may be necessary with an exploration of, for example, discrimination or hate crimes.

This book is concerned, predominantly, with the legal situation of lesbians and gay men. While it has become common to include bisexual and trans people within academic commentary relating to sexual minority rights, I have chosen not to do so in this book for two key reasons. First, the empirical foci of my study (relationship recognition and parenting) give rise to different issues for bisexual people (see e.g. Aviram, 2008; Klesse, 2006) and for transsexual and transgender individuals (see e.g. Coombs, 2001; Whittle, 2002) than they do for lesbians and gay men. While it would have been interesting to be able to compare these perspectives within this research, it is beyond the scope of this book to do justice to the different perspectives that bisexuality and trans issues bring to these areas. Second, as well as being concerned with sexuality, throughout this book I examine places where there are (and are not) gendered differences in attitudes to and perceptions of law and legal process. As such, a focus on the similarities and differences between lesbians' and gay men's views allows these gendered differences to come to the fore.

Regulating lesbian and gay families

The prominence of relationship recognition and same-sex marriage in lesbian and gay struggles for legal equality has led to a wealth of academic commentary and debate, and the place, utility and aims of same-sex marriage remain hotly contested. The details of this debate have been laid out many times, from several different perspectives (see e.g. Cooper, 2004; Goldberg-Hiller, 2002; Peel & Harding, 2004; Sullivan, 1997; Wardle et al., 2003). It has been claimed that same-sex marriage is the ultimate equal rights goal of many lesbians and gay men (Eskridge, 2002), and that it is essential to place same-sex marriage at the heart of lesbian and gay politics because the heterosexism of the 'traditional' family serves to displace lesbians and gay men from both the public and private spheres (Calhoun, 2000). Other commentators argue that same-sex marriage is a 'human right' and therefore should be recognised as such in law (Kitzinger & Wilkinson, 2004a); that same-sex marriage will help to reduce gay male promiscuity and integrate gays into society

(Rauch, 2004; Sullivan, 1996); that civil partnership (or other forms of relationship recognition short of marriage) are simply stepping stones in the direction of same-sex marriage (Eskridge, 2002; Waaldijk, 2001); and that same-sex marriage marks the transition for lesbians and gay men from outsiders to full citizens (Josephson, 2005).¹

On the other 'side' of the debate, commentators argue against the privileging of marriage in lesbian and gay struggles because, for example: marriage is a site of the continued oppression of women (Jeffreys, 2004); the introduction of same-sex marriage may reduce the possibilities for wider reaching reform of marriage and increase the possibilities of assimilation of same-sex relationships into the heterosexual norm (Auchmuty, 2004); that same-sex marriage (and the legal recognition of same-sex relationships more generally) brings with it increased regulation of and reductions in the welfare and social security benefits of lesbians and gay men in the lowest income brackets (Young & Boyd, 2006); that same-sex marriage continues the privileging of conjugal relationships over other forms of relationship (Barker, 2006; Polikoff, 2003); and that the inclusion of same-sex couples in the institution of marriage serves to strengthen the power of that institution, further marginalising those on the outside (Butler, 2002). This debate is ongoing,² even as the legal backdrop to the question of whether the legal recognition of same-sex relationships is an inherently good or bad thing has changed considerably in recent years, as more and more jurisdictions either open up civil marriage to same-sex couples or create other forms of opt-in relationship recognition.

A third dimension to the burgeoning same-sex marriage literature is a growing number of studies exploring the attitudes and experiences of lesbians and gay men to the introduction of legally recognised same-sex relationships. Prior to the widespread availability of forms of legal recognition, studies of lesbian and gay relationships tended to focus on the social meanings of (non-legal) same-sex relationships and commitment ceremonies (e.g. Hull, 2003, 2006; Lewin, 1999; Liddle & Liddle, 2004; Shipman & Smart, 2007; Weeks et al., 2001). More recent studies have, however, begun to focus on the attitudes of lesbians and gay men to legal recognition (e.g. Clarke et al., 2006, 2007; Harding & Peel, 2006; Lannutti, 2005).

Full, legal same-sex marriage is currently available in just a handful of jurisdictions around the world: Belgium (2003), Canada (2005),³ the Netherlands (2001), Norway (2009), South Africa (2006), Spain (2005), Sweden (2009) and the US states of Connecticut (2008), Iowa (2009)⁴ and Massachusetts (2004). Several other jurisdictions are also in the process of introducing same-sex marriage legislation or considering doing so.⁵ A large (and exponentially increasing) number of other jurisdictions have introduced some sort of opt-in framework for the legal recognition of same-sex relationships – variously called registered partnership, domestic partnership, civil union or civil partnership (among others).⁶ In a minority of jurisdictions, these legal frameworks are open to different-sex as well as same-sex couples (e.g. France,

the Netherlands, New Zealand). One of the most interesting aspects to the creation of these 'new' forms of relationship recognition for same-sex couples, aside from myriad names given to them, is the differences between the rights and responsibilities included within them. Whereas some (such as the UK civil partnership provisions) closely mirror marriage law, others are radically different. An example of a very distinct legal framework for recognising same-sex relationships is that available in Tasmania, which also allows for the recognition of other, non-conjugal, caring and dependent relationships (Wong, 2004). A third form of legal recognition of same-sex relationships comes through *de facto* status or cohabitation rules.

In many jurisdictions, including the UK, while there are often very few legal differences there are some important points of contrast between civil partnership and civil marriage. In the UK, the differences between civil marriage and civil partnership were consistently played down by the Government during the passage of the Civil Partnership Act 2004 (CPA). Instead of noting that there are differences between the two, the Government repeatedly claimed that civil partnership was an 'equality' measure, seeking to ensure that same-sex couples entering into a civil partnership were treated in the same way as different-sex couples entering into a civil marriage:

It is the Government's intention that those people who enter into a civil partnership will receive the same rights and take on the same responsibilities as those that we expect of those who enter into civil marriage.

(Jacqui Smith MP, House of Commons *Hansard*,
12 October 2004: Col. 177)

There are, however, a small number of substantive legal differences between civil partnership and civil marriage, and it is important to be aware of these. First, there are a number of technical differences in the way a civil partnership is constituted from the way that a marriage is formed. Perhaps the most important of these technical differences is that a civil partnership cannot be created in religious premises⁷ neither can any religious service be used while the registrar is officiating at a civil partnership.⁸ While these provisions were designed (in part) to circumvent claims that the CPA was creating same-sex marriage, they were objected to by the Lord Bishop of Oxford during the course of the CPA through the House of Lords for both infringing the freedom of religious authorities to control the use of their premises and for denying same-sex couples who see civil partnership as a commitment with a religious dimension the opportunity to have a blessing at the same time (or near to) their civil partnership registration.⁹

Second, there is no sex in the CPA. There is no requirement for consummation of the civil partnership and there is no equivalent to adultery as a ground of dissolution. This difference between marriage and civil partnership can be read as both a retrenchment of the 'continuing centrality of penetrative

intercourse in the way in which the law *constitutes* heterosexual relationships' (Stychin, 2006: 83) and as a 'negative gap in the CPA, a place where lesbian and gay sexuality is left unspoken' (Barker, 2006: 251). Contrariwise, the absence of a legal requirement for consummation and the absence of 'adultery' as a ground for dissolution could be read as an exercise in creating a legal framework more suited to the realities of same-sex relationships, giving legal 'support' to the differences between same- and difference-sex relationships and recognising that monogamy can be less salient in same-sex relationships.

Finally, when initially introduced, there were a number of important differences in the ways that the parent/child relationship was treated in civil partnership as opposed to marriage. In essence, parenting was all but left out of the civil partnership legislation. The CPA placed civil partners in an analogous position to step-parents in heterosexual marriage, providing that children of civil partners would be considered 'a child of the family', and allowing civil partners access to Parental Responsibility Agreements and the step-parent adoption process. More recently, the Human Fertilisation and Embryology Act 2008 (HFEA 2008) amended the situation so that the civil partner of a woman who conceives through donor insemination (anywhere in the world) will automatically be considered that child's other legal parent. Accessing legal status as a parent is also now possible for same-sex couples not in a civil partnership, provided that the child was conceived through treatment at a licensed clinic, and the relevant consents have been given.¹⁰ In terms of the legal recognition of lesbian and gay families, these reforms can be thought of as providing the final piece in the puzzle of legal recognition of lesbian and gay families. But in certain respects, lesbian and gay parenting remains on the periphery of legal protections for lesbians and gay men, and understandings of the realities of family life for lesbian and gay parents are much less entrenched than considerations of same-sex relationships. While this may be the case, it is important to note that lesbian and gay parenting is very much a reality in the UK, in spite of the seeming unintelligibility of lesbian and gay parenting to the courts.¹¹ There are, of course, many lesbian and gay parents in the UK, although (as with all statistics relating to lesbians and gay men) it is nearly impossible to say how many, as these data do not exist in any reliable form.¹²

The regulation of lesbian and gay parenting is, in many ways, more complex than the regulation of same-sex relationships. In contrast to the wealth of academic commentary and debate that exists on same-sex marriage, the position of lesbian and gay parents is one which seems to have been relatively neglected by law, gender and sexuality scholarship in the UK. Nancy Polikoff (2000a) argued that lesbian and gay family law has developed in two separate ways on either side of the Atlantic: in the US, lesbian and gay parents have been legally recognised to the detriment of recognition of same-sex partnerships, and in Europe, same-sex relationships have been granted legal recognition while lesbian and gay parents have been denied such recognition. This binary approach to lesbian and gay family law may account for the

relative dearth of UK legal scholarship focusing on the regulation of lesbian and gay families. This is not to say, of course, that there is a dearth of scholarship on lesbian and gay parenting, rather that much of the academic literature on lesbian and gay families hails from outside law, from the social sciences, particularly psychology and sociology.

In psychological literature concerning lesbian and gay parenting, much research into lesbian mothers¹³ has cohered around two specific areas. First, whether lesbians who choose to become mothers are as happy and well adjusted as heterosexual mothers, whether non-biological lesbian mothers are more or less active in childcare than heterosexual fathers and whether childcare was shared equally between the parents (e.g. Chan et al., 1998; Flaks et al., 1995; Patterson, 1995). Second, researchers have been concerned with the social and psychological development of children from lesbian (and gay) families (e.g. Patterson, 1992, 1994; Tasker & Golombok, 1997). In the UK, Susan Golombok and Fiona Tasker's research on the development of children of lesbian mothers has perhaps been the most influential (Golombok & Tasker, 1994; Tasker & Golombok, 1991, 1997, 1998). Their research findings suggest that growing up in a lesbian family does not have any major impact on the psycho-social development of children, and that children of lesbian families grow up to be just as well adjusted as children from heterosexual families (Tasker & Golombok, 1997).

The general consensus within lesbian and gay psychological research into the effects on children of being raised in a lesbian family is that 'there is no empirical support for the proposition that the children of lesbian and gay parents are different from other children' (Flaks et al., 1995: 106) and therefore that lesbian and gay families and parents are much the same as heterosexual families (Allen & Burrell, 1996). This type of psychological research evidence has certainly been influential in family law cases regarding custody and residence for children with lesbian mothers (Clarke, 2005), but the aims of this type of 'sameness' research in lesbian and gay parenting have also been subject to critique on the grounds that this research is structured on the basis of (hetero)normative assumptions about the nature of 'the family' (Clarke, 2002; Riggs, 2004).

A second theme within academic literature around lesbian and gay families is a focus on the radical potential of lesbian and gay families to challenge existing gender orders, through a celebration of the differences inherent in lesbian and gay families. A minority of this literature is academic research, predominantly social scientific (e.g. Dunne, 2000; Sullivan, 2004; Weeks et al., 2001; Weston, 1991). This type of (sociological or anthropological) research seeks to show that lesbian (and gay) families 'provide a model of intimate connection that rigorously opposes the violence that is done both within and in the name of the patriarchal family' (Sullivan, 2004: 230). A larger proportion of the literature in this area is, however, drawn from experiential and personal narratives from lesbian and gay parents themselves (e.g. Abbot &

Farmer, 1995; Hicks & McDermott, 1999; Pollack & Vaughn, 1987; Strah & Margolis, 2003). A function of these personal and experiential accounts has been to highlight the invisibility of lesbian and gay parenting within wider struggles for lesbian and gay legal equality (Clarke, 2005).

Legal and socio-legal scholarship on lesbian and gay parenting has taken a slightly different approach to these issues than the social science research outlined above. Much of the literature on lesbian (and gay) parenting in law, gender and sexuality scholarship has cohered around two issues: custody battles (e.g. Arnup & Boyd, 1995; Kelly, 2004; Reece, 1996) and access to assisted conception services (e.g. Douglas, 1993; Jackson, 2002; Langdridge & Blyth, 2001; Millns, 2002; Murphy, 2001; Robinson, 1997). It is probable that legal and socio-legal literature has focused on these two areas because they have, historically, marked the extent of regulation of lesbian and gay parenting. Academic analysis of custody battles has been important because, for many years, a mother's lesbianism would be a reason for denying her custody of her children on the breakdown of a heterosexual marriage. Equally, access to assisted conception services has historically been one of the main methods of restricting lesbians and gay men from creating their families of choice, through donor insemination, IVF or surrogacy.

Key themes and arguments

Regulating sexuality

The key themes and arguments in this book cohere around questions of the work that law does in the everyday lives of lesbians and gay men, understandings of law and legal process and the possibilities and limitations of 'equality' in lesbian and gay struggles. My focus on 'the work that law does' in the lives of lesbians and gay men has two components: first, I am interested in the impacts and effects of new legal developments on the everyday lives of lesbians and gay men; second, the ways in which lesbians and gay men respond to these effects. The impact and effects of law and legal regulation are an essential part of (critical) socio-legal research. Rather than taking the content of law or measuring the 'effectiveness' of law through 'objective' analysis of how people use law (e.g. Genn, 1999), my concern is with the specificities of individual lesbians and gay men's experiences of law. In particular, I am interested in how lesbians and gay men describe their perspectives on recent tectonic shifts in the legal regulation of sexuality from criminalisation, persecution and legal discrimination to the legal protection of lesbian and gay relationships, families and working and social lives.

Where I focus on lesbians and gay men's understandings of law and legal process, I explore how these understandings can be explained. My aim is not to isolate sexuality from the other aspects of people's self-identity, but rather to examine where and how sexuality intersects with other aspects of lesbian

and gay lives and identities to impact on the ways that people experience, understand and contextualise the place of law in their everyday lives. My primary focus in this regard is the place of gender in lesbians' and gay men's accounts of law. I focus on gender for two key reasons: first, because political activism and legal reform in relation to sexuality often seem to assume that the issues facing lesbians are the same as the issues facing gay men; and second, that it is often assumed that sexuality and gender are divisible facets of identity. In previous research, I found that, in contrast to some lesbian feminist assumptions that it was only gay men who wanted to get married (e.g. Auchmuty, 2004), there were few differences between lesbians and gay men's views about the legal recognition of same-sex relationships (Harding & Peel, 2006). Taking gender as a primary problematic in this book allows a more detailed analysis of the way(s) that lesbians and gay men's views differ in relation to the place of law in same-sex relationships and lesbian and gay parenting.

A final key problematic in this book is an exploration of how individual lesbians and gay men's everyday experiences can throw light on the ways power and resistance work in everyday life, and on the possibilities and limitations of 'equality' in lesbian and gay struggles. I examine the ways that lesbians and gay men draw on the concept of 'equality' in arguing for legal protection, and the strategies that are deployed to argue for legal equality in lesbian and gay struggles. Another facet of this is the ways in which discrimination and inequality impact on the lives of lesbians and gay men. In considering this, I highlight the ways that lesbians and gay men respond to and deal with encountering discrimination and inequality in their everyday lives, and their reasons for responding in the ways that they do.

Everyday life, legal consciousness and resistance

Charting the presence of 'law in everyday life' has been a part of the (North American) law and society movement for the last two decades (Macaulay, 1987; Sarat & Kearns, 1993a). Broadly speaking, law and society research that examines the place of law in everyday life can be divided into two 'camps': instrumental perspectives and constitutive perspectives (Sarat & Kearns, 1993b). Instrumental perspectives on the place of law in everyday life are predominantly concerned with law as a tool for sustaining or changing aspects of social life, and take the 'effectiveness' of law as the primary subject of inquiry. Instrumentalist accounts of the effect of law in society are perhaps most notable for the conception that law is somehow separate from and distinct from 'society' and that it is possible to measure the impact that law has on society.

Constitutive perspectives, by way of contrast, envisage law as a part of society, such that society (and that part of society which is known as everyday life) creates effects on law as much as law creates effects on society.

A constitutive approach to the study of law in society focuses more on the wider (not necessarily legal) effects and impacts of law and legal change. At the same time, it attempts to map the impact of the ways that individuals approach, use and think about law in their everyday lives on law and legality (Ewick & Silbey, 1998). A major branch of this 'constitutive' approach to law and society research has been the development of the field of 'legal consciousness studies'. 'Legal consciousness' has been examined in socio-legal scholarship since the 1970s, but whereas earlier legal consciousness studies focused on people's awareness of and experience of using law, courts and alternative dispute resolution processes (e.g. Bumiller, 1988; Engel, 1984; Merry, 1990; Sarat 1977), gradually the focus of legal consciousness studies shifted to an expressly constitutive approach to socio-legal scholarship through de-centring law (Ewick & Silbey, 1998; Nielsen, 2004). These more recent legal consciousness studies take 'ordinary' people's accounts of their everyday experiences as the starting point for thinking about law in everyday life, and the way that law works in society. One of the main foundations for these constitutive studies of law and everyday life is that 'everyday life constitutes law and is constituted by it' (Engel, 1993: 126) – a statement that highlights the ways in which 'law' and 'everyday life' are not separate spheres that act independently, rather they are interlinked in such a way so as to suggest that to understand one it is necessary to also examine and understand the other.

As well as using and applying this framework of 'legal consciousness studies', my aim is to develop and extend the theoretical and methodological reach of legal consciousness as a way of exploring the place of law in everyday life. In so doing, I demonstrate that the interlinked concepts of power and resistance are crucial to understanding the place of law in the everyday lives of lesbians and gay men. In discourse around rights struggles, the 'power' of the state, sovereign, government or other seemingly 'powerful' institutions or groups are rarely questioned, and the lesbian and gay social movement itself is easily conceptualised as 'resistant'. Throughout this book I seek to expose the contingency and instability of approaching power and resistance in this way, and to show that resistance is complex, varied and worthy of deeper analysis. Through the theoretical approaches to power and resistance that I draw on, I complicate this picture of a powerful/powerless dyadic relationship between 'the state' and 'lesbians and gay men'. To gain a deeper insight into how relations of power and resistance operate in lesbian and gay legal consciousness, I draw on Foucault's (1979, 1980, 1998, 2002) analytics of power as a creative, technical and productive force, and feminist engagements (e.g. Bell, 1993; Cooper, 1995a; Smart, 1989) with this approach to power. In my consideration of power and resistance I also draw on governmentality theory (e.g. Cowan & McDermont, 2006; Dean, 1999; Foucault, 1991a; Rose, 1999) as a way of interrogating the ways that 'micro' experiences of relations of power and resistance in the everyday lives of lesbians and gay men are informed by and inform broader structural forces.