

# Homosexuality, Law and Resistance

Derek McGhee

Routledge Research in Gender and Society



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# Homosexuality, Law and Resistance

*Homosexuality, Law and Resistance* explores contemporary social theory and developments in the study of sexuality through the analysis of law and its practices. Each chapter explores the power of discourse in law in relation to homosexualities, while simultaneously examining how homosexuals resist and disrupt these legal discourses.

The book includes detailed case narratives of some of the most highly publicised and far-reaching contemporary struggles surrounding homosexuality in law. These include the ban on homosexuals from serving in the armed forces and the reduction of the homosexual age of consent. It also contains case studies focused on the plight of homosexual refugees in asylum and immigrations procedures.

The author also undertakes a sustained critique of what has come to be known as queer theory. This critique addresses the 'textual' and 'abstract' limitations inherent in much queer theory by combining the analysis of discourse and representations in law with a sociological investigation of the complex of practices and counter-practices found in law.

Many of the themes explored in this book will be of interest to students and academics working in the fields of sociology, cultural studies, law, politics, gender studies and sexuality. This timely work will prove a valuable addition to the literature of all these fields.

**Derek McGhee** is a lecturer in the Department of Sociology and Social Policy at the University of Southampton, United Kingdom. *Homosexuality, Law and Resistance* is his first book, based on his doctoral research on homosexualities in the legal complex. He is currently conducting research on gays and lesbians in 'the family'.

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*Derek McGhee*

To my parents John and Jeannette McGhee and  
my family Andrew and Jem Cullis.

Not all homosexual persons can be identified as such by their appearance and manner for many have no special characteristics. Homosexuals themselves are usually able to recognise each other in various ways, including gestures, smiles and mannerisms, and peculiarities of appearance and habits. In some there is a tendency to self-display in dress and hair-styles and in the use of scent and make-up. In the effeminate type of male there is often a certain softness which is difficult to describe but easy to sense. The voice may be high-pitched and facial hair scanty. On the other hand, many homosexuals are virile and masculine. Homosexuals are often charming and friendly people and many of them are well known to be of artistic temperament.

(British Medical Association, Memorandum of Evidence  
submitted to the Wolfenden Committee, November 1955)

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Some parts of this book have been previously published and are re-published here with the permission of the publishers. A version of Chapter 1 appeared under the title of 'Looking and Acting the Part: Gays in the Armed Forces – A Case of Passing Masculinity' in *Feminist Legal Studies* 6(2) (1998): 205–244. A version of Chapter 2 appeared under the title of 'Accessing Homosexuality: Truth, Evidence and the Legal Practices for Determining Refugee Status – The Case of Ioan Vraciu', in *Body & Society* 6(1) (2000): 29–50. A version of Chapter 3 has been accepted for publication under the title of 'Persecution and Social Group Identities: Homosexual Refugees in the 1990s', in the *Journal of Refugee Studies* 14(1) (forthcoming, 2001). A version of Chapter 4 appeared under the title of 'Wolfenden and the Fear of Homosexual Spread: Permeable Boundaries and Legal Defences', in *Studies in Law, Politics & Society* 21 (2000): 65–97.

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# Introduction

These discourses have really affected lives; these existences have effectively been risked and lost in these words.

(Foucault 1979b: 79)

This book consists of case studies in which men who have loving and sexual relationships with other men experience specific exclusions and restrictions before the law. In many ways this is a book about knowledge, and how knowledge is deployed and ultimately disrupted in certain legal institutional contexts. The body, identity and discourse, as well as power and resistance, are some of the central themes that will be explored here.

The four case study chapters presented in the book are composed of three legal struggles surrounding homosexuality and law. These are: the analysis of the British armed forces homosexual exclusion policy; an analysis, in the form of two case studies, of refugee determination procedures in the UK in relation to applications for refugee status based on homosexuality; and, finally, an analysis of parliamentary discourses in relation to the age of homosexual consent between 1957, when the Wolfenden Report was published,<sup>1</sup> and 2000 (see chapter synopsis at the end of this introduction for more details).

The purpose of these case studies is not to find out what homosexuality is but rather to explore how law attempts to know homosexuality and homosexuals in order to justify its particular treatment of them.

The focus of this book, on homosexual identities and legal practices, facilitates the intersection of three interrelated sites of analysis. These are: (a) the analysis of the technologies whereby homosexual identities and 'homosexual' behaviour and activities are presented and produced as knowledge within the representational practices of law; (b) the analysis of how these discursive identities and knowledges are deployed in legal practices so as to justify the juridical regulation, control or exclusion of homosexuals; and (c) the analysis of the vulnerability of these discursive justificatory mechanisms. This vulnerability is characterised in the case studies by disruption, infiltration and the de-subjugation of alternative knowledge.

The centrality of homosexual identity to legal practices in this book

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unsettles the Wolfenden Committee's attempt to separate homosexuality as a condition from homosexual acts. In the Wolfenden Report it was stated that 'homosexuality is a sexual propensity for persons of one's own sex. Homosexuality, then, is a state or condition, and as such does not, and cannot, come within the purview of the Criminal Law' (1957: para 18, 11). According to Moran, the Wolfenden Committee concluded that '“homosexuality” was not an object of concern of either the law in general or the Criminal Law in particular' (Moran 1996a: 93).

Moran exposes the ambiguity of the Wolfenden Committee's claim that the Criminal Law (and the law in general) should not be interested in homosexuality, as the Committee's use of the phrase 'homosexual offences' inseparably conflates homosexual identity with 'homosexual' acts (Moran 1996a). In the case studies included in this book it will be demonstrated that homosexual identities and homosexuality as a condition are indeed a concern of international refugee law, armed forces policy and the criminal law in relation to the homosexual age of consent.

In terms of identity the book is concerned with surfaces, the performative surfaces of power and the performances of the body – especially the gendered body as surface, as signifier of identity. In the case studies that follow, the dominant interpretations and representations within legal practices are shown to cover the surfaces of events and produce discursive bodies and identities. The case studies demonstrate how male homosexuals in particular, in the practices within legal institutions, become objects which must be produced, fixed and separated out from other (heterosexual, 'normal') men so that they can be subsequently eradicated (excluded, restricted, imprisoned and executed). Lesbians, in some cases, share these experiences of separation and eradication, for example, in the case of the armed forces exclusion policy on (both male and female) homosexuals. On the whole, however, female homosexuals are excluded from the particular criminal legal discursive construction of homosexuals analysed in the various case studies. For example, as is seen in Chapter 4, female homosexuals are not subjected to a higher age of consent than female heterosexuals.<sup>2</sup> Female homosexuals, as yet, also do not feature centrally in the UK's homosexual refugee case law, analysed in Chapters 2 and 3. However, this does not mean that lesbians are excluded from the atrocities which homosexuals of both genders endure in particular countries such as Iran and Romania.

As a result of the relative absence of female homosexuals from the archive of material analysed in this book, an in-depth cross-gender analysis that would include both male and female homosexuals is not fully developed. It would be illegitimate to develop such an analysis from the cases included in this book, as they predominantly focus on the legal practices that produce, exclude and restrict male homosexuals. Issues of female homosexuality, when they arise, are examined in the relevant case studies.

## The heteronormativity of law

This book can be described as being part of a wider conversation between socio-legal studies and queer studies, that investigates the production and deployment of sexualised identities in legal and political discourse. Central to this queer socio-legal approach is the concept of heteronormativity. Berlant and Warner define heteronormativity thus:

By heteronormativity we mean the institutions, structures of understanding and practical orientations that make heterosexuality seem not only coherent – that is, organised as a sexuality – but also privileged. Its coherence is always provisional, and its privilege can take several (sometimes contradictory) forms: unmarked, as the basic idiom of the personal and the social; or marked as a natural state; or projected as an ideal or moral accomplishment.

(Berlant and Warner 1998: 548)

Heteronormativity is therefore the term used to specify the tendency in the contemporary Western sex-gender system to view heterosexual relations as the norm, and all other forms of sexual behaviour as deviations from this norm (Spargo 1999: 73). This book demonstrates the complex ways in which heteronormativity pervades legal institutions and the practices therein. It will be demonstrated that the representations of 'the homosexual' in the legal institutional practices under analysis are deployed in specific relations of power that illuminate a relationship between law, heterosexualities and homosexualities. However, in the case studies included in this book Berlant and Warner's definition of heteronormativity as an unconscious, unmarked and 'invisible, tacit, society-founding rightness' (1998: 548) is shown to understate and to generalise the heteronormative organisation of law. In the case studies included here, the relationship between law and heteronormativity will be shown to be directly expressed and explicit in particular legal practices, rather than being tacitly inferred or indirectly expressed in general as in Berlant and Warner's definition.

In many ways the case studies included in this book are demonstrations, in local legal institutional contexts, of how and in what ways heteronormativity works, in and through legal practices, especially in relation to the law's claims to know homosexuals and homosexualities in relation to particular heterosexualised norms. This is nowhere more apparent than when, in legal practices, homosexual identities are deployed within a justificatory and contrasting discursive couple with normative identities. For example, in the case studies particular homosexual identities are deployed in institutional discourses alongside identities such as the military man, the 'genuine refugee' and the vulnerable adolescent, in order to justify and legitimise the particular institutional and institutionalised treatment of homosexuals. Law here is presented in terms of Ewald's (1990) description of social law, that is

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'law which is welded to the power of norms' (Rose and Valverde 1998: 544). This is unlike law as conceptualised as a juridical system of external rules. This is law that 'appears – or claims – to emerge out of the very nature of, that which is governed. Its normativity is predicated upon and justified by its normality: the normal child, the normal family, normal conduct' (Rose and Valverde 1998: 544).

Legal practices are presented here from a critical legal studies conceptualisation that challenges and exposes the myth of the unbiased neutrality and unemotional and detached objectivity of legal practice. The formative statement of the British Critical Legal Studies Conference was as follows: 'the central focus of the critical legal approach is to explore the manner in which legal doctrine, legal education and the practices of legal institutions work to buttress and support a pervasive system of oppressive non-egalitarian relations' (Grigg-Spall and Ireland 1992: ix). Law, according to Ireland and Grigg-Spall, 'generally acts to consolidate and maintain an extensive system of class, gender and racial oppression' (1992: ix); to this must be added the oppression of non-normative sexualities.

The struggles or challenges to the legal restriction and/or exclusion of homosexuals documented in the case studies included in this book throws this assumed neutrality at the heart of liberal legal reasoning into sharp relief. The institutionalisation of the particular and contextualised heteronormative relations of power within the legal practices under analysis in the case studies puts paid to the myth of law as the site of 'objective, unmediated voices by which transcendent, universal truths find their expression' (Williams 1993: 9).

Law is approached here in a particular way. It is not 'law' in general that is under analysis, rather it is local institutions and the practices within what Rose and Valverde describe as the 'legal complex' (1998: 542) that will be analysed in the case studies. Rose and Valverde insist that 'law' should not be viewed as a unitary institution. Rather, 'law' should be viewed as multi-institutional and impure. According to Rose and Valverde

The intellectual premises and analytic methods of legal studies tend to presuppose that objects and problems form within the workings of law itself. But in order to analyse the ways in which problems form at the intersection of legal and extra-legal discourses, practices and institutions, it is necessary to de-centre law from the outset.

(Rose and Valverde 1998: 545)

The 'law' of *Homosexuality, Law and Resistance* is therefore a de-centred law. Law is presented and approached in this book as the intersection of the legal and the extra-legal in a complex of institutional settings.

## Power, discourse and the body in the legal complex

By using the concept 'heteronormativity', the relationship between heterosexuality and homosexuality immanent in legal practices is brought to the fore. Within this relationship the constructions and representations of the homosexual, particularly the homosexual body, are implicated in specific regimes of truth and power relations. The concept of performativity is central to this analysis. According to Butler, a performative is that discursive practice that enacts or produces that which it names (Butler 1993a: 13). Therefore, in terms of the naming of homosexuality within heteronormatively organised institutional practices, performativity is construed as the power of discourse to produce effects through repetition or reiteration (Butler 1993a: 20). What Butler means here is that power is not power that acts but a reiterative acting that is power (1993a: 9), that is 'power acts as discourse' (Butler 1993b: 17).

Discourse describes how social knowledge is organised in particular ways. Discourse is the concept used to describe how knowledge is institutionalised in social policies and the organisations through which they are carried out. Discourses are thus about relations of power, about organised positions and places in the field of power (Hughes 1998: 159). In Foucauldian theory, discourse is not just another word for speaking, but a historically situated material practice that produces power relations. Discourses are bound up with specific knowledges (Spargo 1999: 73). Discourses exist within, and support, institutions and social groups. In legal institutions the discourses which produce homosexual identities are interdependent with specific juridical effects which restrict or exclude homosexuals. The critical discourse analysis presented in each of the case studies can be described as performing deconstructive readings of reiterated, institutionalised discourses in order to reveal underlying paradoxes and absent presences within them. In this context, critical discourse analysis is akin to Foucault's definition of critique. According to Foucault:

A critique is not a matter of saying that things are not right as they are. It is a matter of pointing out on what kinds of assumptions, what kinds of familiar, unchallenged, unconsidered modes of thought the practices we accept rest.

(Foucault 1988: 154)

Thus, the case studies included in this book can be described as critiques of the self-evidence of discourses that have become accepted in social and institutional practices. However, this is only one side of the project presented here as these critiques are as much to do with making space for alternative, competing or subjugated knowledges within the legal complex as they are with the analysis of discourse.

Bodies, or, more specifically, representations of the homosexual body, are

central to the interdependent relationship of power/knowledge in the legal complex. According to Hyde, 'bodies are, among other things, the ways we represent other people to ourselves' (Hyde 1997: 3). That is, bodies are at least in part 'the linguistic, discursive device for representing that aspect of other people, which is not opaque and inaccessible to us' (Hyde 1997: 3–4). In this book the sensuality (especially 'the visibility') and corporeality of legal institutional practices is a central concern. It is not only the sensuality of legal practice that is emphasised here, but also the emotionality of these institutional practices. For example, in Chapter 1 the irrationality of 'paranoia' is as evident in the justifications for the homosexual exclusion policy in the armed services as this policy's alleged 'rationality' and 'practical' basis. Similarly, in Chapter 4 the justifications for a higher homosexual age of consent are explicitly linked with fear in parliamentary debates, especially the fear of the degenerative forces of homosexuality spreading into the nation's young people, especially the nation's sons.

As described above, in each case study the representation of the homosexual body in legal discourse can be contextualised within a heteronormative power relation characterised by performativity. However, as the case studies will demonstrate, it is also through the body that homosexuals develop tactics for coexisting alongside such discursive productions and the power effects that justify their particular juridical treatment. In this book I demonstrate that it is through the body and the sensory, social scrutiny of bodies by other bodies<sup>3</sup> that homosexuals become, in certain social settings, privatised, self-governing, circumspect subjects of power (Rose 1990; Moran 1996a). What I mean by this is that, through the internalisation of hostility and official sanctions, homosexual men learn how to become unrecognisable socially as homosexuals. They become men who can pass as assumed heterosexuals in some of the most anti-homosexual institutional contexts in contemporary societies.

In the case studies that follow, passing occurs within what Chaney describes as the reciprocity of 'visual power' relations, that is, where ways of seeing are also necessarily ways of being seen' (1996: 103). However, Chaney's descriptions of the reciprocity of sight must be modified here. The term 'reciprocity' connotes a degree of mutual exchange, a degree of equality between participants. As a result, it is unsuitable for the conceptualisation of the asymmetrical power relations between homosexual bodies and the heteronormative gaze – that sentient, diacritical scrutiny of bodies for the signs of homosexuality. The term 'intercorporeality' (Williams and Bendelow 1998: 51) better conceptualises this social sensorial relationship (albeit an ocularcentric one) between homosexuals and the surveillant embodiments of heteronormativity that they encounter in institutional contexts. In these settings, homosexual bodies must attempt to coexist by tactically accommodating to this embodied visual power relation.<sup>4</sup>

These intercorporeal encounters are situated within the heteronormative



relations of power which Butler describes as the heterosexual matrix. Butler defines the heterosexual matrix as 'that grid of cultural intelligibility through which bodies, genders, and desires are naturalised' (Butler 1990: 151). The heterosexual matrix is characterised by:

A hegemonic discursive/epistemic model of gender intelligibility that assumes that for bodies to cohere and make sense there must be a stable sex expressed through a stable gender (masculine expresses male, feminine expresses female) that is oppositionally and hierarchically defined through the compulsory practice of heterosexuality.

(Butler 1990: 151)

The gendered body is crucial to understanding the specific episodes of resistance/survival presented in the case studies. Gender, according to Butler (1989, 1990, 1993a), is the signifier of an underlying sexual orientation; gender is thus a manipulable signifier of sexualities that may or may not correspond to particular gender performances. In the case studies, it is the performance of appropriate varieties of 'heterosexual masculinities' that becomes the tactical means whereby homosexual males can act their bodies, when a situation necessitates it, so as to signify heterosexuality (or deflect attention away from their homosexuality). In the context of social hostility towards homosexuality, homosexuals become aware of the significance of their appearance and behaviour, and thus 'attach overwhelming importance to monitoring their own and other appearances that they can control' (Chaney 1996: 103–4). As a result of this particular focus on the tactical and resistant possibilities of gender, in the case studies that follow, Foucault's reputed over-theorisation of power and under-theorisation of resistance, and also the alleged 'absence of gender in his [Foucault's] work' (Ramazanoglu 1993: 4) are addressed. Foucault has been criticised by feminists for treated the bodily experience of men and women as being the same in relation to the characteristic institutions of modern life (Bartky 1990: 65). These case studies will demonstrate that the bodily experiences between men and within gender (masculinities) differ in relation to the characteristic institutions of modern life too.

The threat of becoming known or recognised as a homosexual, as a 'sexual suspect' is a recurring theme throughout the book, as is the role law plays, in its multi-institutional practices, in promoting self-governing, private homosexualities. Self-protection and privacy are central tensions throughout the book, and are played out in this specific discursive intercorporeal realm.

According to Plummer, the social process of recognising homosexuals is largely dependent on the mediation of certain patterns of socially constructed meanings (Plummer 1975: 179). As a result, what is observed socially is of crucial importance because this is the primary source of intelligibility, especially if the heteronormative sensorial relation is conceived in