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Straightjacket : same-sex orientation under Chinese family law - Marriage, Parenthood, Eldercare

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'To me, marriage is simply a fig leaf (*zhexiu bu*) that pleases my parents and makes my own life easier. Now that I have already put on this fig leaf, I might as well wear the whole outfit (*yifu*) and make it more presentable.'

— Interview with Jasmine, July 2014

1.1 STRAIGHTJACKET

Jasmine, a lesbian-identified woman, and her gay husband are in a cooperative marriage.¹ As an 'infertile' couple, they were able to have a child via in vitro fertilization in a public hospital. By wearing the 'outfits' of a straight-looking family, Jasmine and her girlfriend, her husband and his boyfriend have created some precious space to nourish their same-sex relationships. Meanwhile, acting as a married woman is freighted with a host of legal and social implications, and that is not always an easy task.²

Inspired by Jasmine's vivid description of donning an outfit for 'acting straight', this thesis uses 'straightjacket' as its central metaphor.³ 'Straight' in this thesis mainly refers to the heteronormative,⁴ ideal family-life trajectory: entering into a different-sex marriage, giving birth to children and living one's old age under the care of offspring, or in Chinese, *jiehun shengzi yanglao*. Like gender, such an ideal is not a given, but is repeated and standardized through our daily practices, and it is an ideal that many people hope to approximate to but no one can perfectly actualize.⁵ A 'jacket' is arguably a more appropriate metaphor for the straight familial life than a 'closet' or a 'mask',⁶ because clothing is a necessity for both gay and straight

1 Cooperative marriage in this thesis refers to a negotiated marriage, with or without formal registration, between a same-sex-oriented woman and a same-sex-oriented man.

2 Jasmine's story will be told more substantially in Chapters 3 and 4.

3 So far there is one non-academic book elaborating straightjacket in relation to gay life, namely, Mathew Todd, *Straight Jacket: How to Be Gay and Happy* (Bantam Press, London, 2016). However, Todd mainly refers 'straight jacket' to the trauma many have experienced growing up gay in the Western context, whereas my theorization of multiple functions of the straightjacket presents the nuances of heteronormative familial life in and beyond China.

4 Concurring with Berlant and Warner, this book uses heteronormativity to refer to 'more than ideology, or prejudice, or phobia against gays and lesbians; it is produced in almost every aspect of the forms and arrangements of social life'; Lauren Berlant and Michael Warner, 'Sex in Public' (1998) 24 *Critical Inquiry* 2, 547-566, 554. For a sliding scale of heteronormativity, see Saskia E Wieringa, *Heteronormativity, Passionate Aesthetics and Symbolic Subversion in Asia* (Sussex Academic Press, Brighton. Chicago, Toronto, 2014), 217-234.

5 This is a plain paraphrase of Butler's performativity theory, see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, New York, 1990).

6 Theorization of 'mask' can be found in Hans Tao-Ming Huang, *Queer Politics and Sexual Modernity in Taiwan* (Hong Kong University Press 2011); Katsuhiko Suganuma, 'Associative Identity Politics: Unmasking the Multi-layered Formation of Queer Male Selves in 1990s Japan' (2007) 8 *Inter-Asia Cultural Studies* 485-502.

people to keep warm and conform with social norms, whereas the latter two are often deemed redundant for heterosexuals. The function of a jacket to keep one warm echoes the importance of marriage and family in providing for food and shelter. The longing for a decent 'normal' family for practical reasons, not just as a facade or as social camouflage to save face, especially for people in lower socio-economic strata regardless of sexual orientation, will be taken seriously throughout this thesis.

'Everyone covers', says Yoshino, revealing that even a middle-class straight white man would feel it imperative to downplay his 'abnormal' aspects so as to be 'ordinary'.⁷ And Sacks argues convincingly that 'an ordinary person' is actually not a person, but one's job; it requires training and practice, as well as the constant efforts to know what other people are doing ordinarily.⁸ In other words, one is not born ordinary; rather one is always 'doing "being ordinary"'.⁹ The same can be said about 'doing "being straight"', or 'straight drag'.¹⁰ It is a skill straight and gay alike have to work on, except that straight people almost forget how they learned it, whereas gay people always have to 'do rigorous anthropological fieldwork of their own' so as to intentionally pick the skill up in all its particularities.¹¹

The straightjacket of an 'ordinary' familial life is therefore an important stage prop in the cause of performing straight. Nonetheless, no matter how helpful it is in shielding an 'abnormal' person from legal punishment, moral judgments and economic disadvantages, a straightjacket is still restrictive. Throughout history, and until today, it has been used to punish and discipline those who are considered deviant and harmful to others. It has been used as an instrument of torture on criminals in prison, or to pacify patients in madhouses. The utility of straitjackets is surprisingly analogous to the social control of homosexuality.¹² Homosexuality, in many countries including China, has been treated as either a crime or a mental illness, or both. Nowadays, China still criminalizes group, commercial or pornographic homosexual sex and uses blatant conversion therapy in hospitals or clinics.¹³

7 Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House 2006) 1.

8 Harvey Sacks, 'On Doing "Being Ordinary"' in Maxwell Atkinson and John Heritage (eds), *Structures of Social Action: Studies in Conversation Analysis* (Cambridge University Press, Cambridge, 1984).

9 Ibid.

10 Halperin uses the term 'straight drag' to highlight the performativity of gender and heterosexuality, see David M Halperin, *How to Be Gay* (The Belknap Press of Harvard University Press, Cambridge, London 2012) 196. Newton has also argued that drag symbolizes that the visible, social clothing is a costume, which in turn symbolizes that the entire sex-role behavior is a role—an act. See Esther Newton, *Mother Camp: Female Impersonators in America* (University of Chicago Press, Chicago, London 1972) 108.

11 Halperin, *How to Be Gay* (2012) 196.

12 See Chapter 2.

13 The nuances of China's criminalizing, pathologizing and regulating of homosexuality will be discussed in Sections 2.2.3 and 6.3.2.

If we follow Foucault's insights, we may find prisons and madhouses as instruments of state authority are used less often by modern societies to confine homosexuals; instead, power exercised through discipline and regulation has become ubiquitous, insidious and increasingly meticulous.¹⁴ In addition to tying and binding same-sex desire through criminal indictment or medical diagnosis, same-sex-oriented people are also pushed and/or lured into wearing an apparently looser straightjacket: maintaining a straight-looking family life. Compared with surgeries or electric shock therapy, this designer straightjacket has been co-opted as a more humane and economic way of taming the deviant and making them useful,¹⁵ while hiding its own cruelty.

Interestingly, however, a straitjacket is not just a tool that constrains one's freedom; for an escapist, it is also part of their stage magic and a valuable tool with which to make a living.¹⁶ Likewise, straight family life can imply multiple meanings and possibilities for same-sex-oriented people, some of whom volunteer to be tied up and then manage to wiggle out. Those in gay-and-lesbian cooperative marriages are just like the magicians who use a gimmicked straightjacket to bewilder the audience.¹⁷ They try to create a little slack in the sleeves by negotiating away some of the wholesale obligations of marriage. Of course, a magic trick is not supernatural – no matter how skillful the escape artist is, wearing an institutional and ideological straightjacket for long periods can still be suffocating.

Meanwhile, those who are in mixed-orientation marriages¹⁸ may feel the restriction and pain caused by the straightjacket even more. Once having tied the knot with an unsuspecting spouse, a same-sex-oriented person is also bound by the moral and legal requirements of monogamy, conjugal love, marital sex and emotional support. Conflicts may occur when the straight-dragging ruse is discovered, and the failed escapologists – especially men – are shamed as 'marriage frauds', a stigma that brings with it a host of legal and moral dilemmas.

14 See Michel Foucault, *Discipline and Punish* (Vintage, New York, 1979); Michel Foucault, *The History of Sexuality* (Volume 1: *An Introduction*) (Pantheon Books, New York, 1978).

15 See Foucault's elaboration of the 'docile body', in Foucault, *Discipline and Punish* (1979) 135-141.

16 For the sociology of the paradoxical binding and freeing characters of marriage in modern times, see Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Stanford University Press, Stanford, 1992); Laura Kipnis, *Against Love. A Polemic* (Pantheon Books, New York, 2003); Zygmunt Bauman, *Liquid Love: On the Frailty of Human Bonds* (Polity Press, Cambridge, 2003).

17 For a detailed discussion of cooperative marriage, see Chapters 3, 4 and 5.

18 Mixed-orientation marriage in this thesis refers to the marriage between a man and a woman of different sexual orientation, oftentimes one heterosexual and the other homosexual or bisexual. Some spouses are informed of this discrepancy while others are not.

Some same-sex-oriented people are not willing to put on the straight-jacket at all. However, this does not mean that they simply live naked and unconstrained. The long-sleeved jacket always haunts the lives of the single and those who are in relationships but unmarried. As Dubler points out,

'Marriage continues to regulate the terrain outside of its formal borders, preserving its legal and ideological supremacy as a normative model for all intimate relations and as an arbiter of which relationships deserve legal recognition and protection.'¹⁹

This is mostly evident in the cases of the separation of same-sex cohabiting couples, where their relationships are judged according to their proximity to or disparity from heteronormative marriage and family life.²⁰ Such differentiation also makes an appearance where adoption, pension, medical decision and many other issues are concerned.²¹

As with every metaphor, this one has its limits and is open to misunderstanding. Putting on or escaping from a straightjacket seems to assume that the jacket itself is passive and unchanging in the process. However, I will explore how the straightjacket actually responds to its wearers, or how the ideal family trajectory is transformed during people's approximating, parodying, twisting or refusing of it. It should also be stressed that the straight-jacket can have very different looks, given that people can face different sorts of pressure, have widely divergent backgrounds and aspirations, and thus playing with it in various ways.

The multiple aspects of the straightjacket offers a glimpse of the complexity of sexual orientation under Chinese Family Law. The thesis asks: How do same-sex-oriented people in mainland China deal with Family Law? More specifically, how do these persons obey, utilize or resist the law when they arrange their marriage, parenthood and eldercare with or without a heterosexual reproductive family, and why do they do so? How does Family Law shape their identities and family life? What implications do these practices have for queer theory and for LGBT (legal) activism?

Chapters 2 to 6 will also address the following questions: What is the legal environment for same-sex-oriented people living in mainland China? What are the various power tactics the law exercises over homosexuality? How do Chinese same-sex-oriented individuals deal with the marriage pressure? What are their routes to parenthood? How do they live or prepare for their old age? How do gender, sexual and socio-economic differences play out in their family life? What have Chinese lawyers and activists done to change the laws in relation to sexual orientation, under what conditions, and with what effects?

19 Ariela R Dubler, 'In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State' (2003) 112 *The Yale Law Journal* 1641-1715, 1712.

20 See Section 3.2.3.

21 See Chapters 4 and 5.

Before going into the details of these questions, this introductory chapter explains the pluralist approach to (family) law that I take (Section 1.2), the socio-legal theory of legal consciousness (1.3), the methods and ethics of my interdisciplinary research (1.4), as well as giving an overview of this thesis (1.5).

1.2 A PLURALIST FRAMEWORK OF FAMILY LAW

For many of the same-sex-oriented Chinese people I have interviewed, the law feels remote. Some told me that as long as they do not commit a crime or commit a traffic violation, they cannot imagine many instances where they would come up against the law. They rarely, if ever, need to consult lawyers. Nor do they believe that laws regarding marriage affect them unless they get married with someone of the different sex, or unless the Chinese authorities open up marriage to same-sex couples.

Socio-legal scholars have been studying this 'gap' between the abstract and lived aspects of law, or the differences between on the one hand written rules and court decisions that are often unintelligible to non-lawyers and, on the other hand, the socio-cultural norms in everyday life. 'Gap' is not an accurate metaphor, however, because law and life are not two wholly separate domains.²² Moore's concept of 'semi-autonomous social field' could help us understand their inseparability.²³ Nothing in society exists entirely autonomously and in isolation, she argues, so formal legal institutions do not have a monopoly over coercion or inducement, given the existence of various other forms of effective control.²⁴ In other words, formal legal rules lurk or make themselves felt in social contexts like family, but they do not over-determine the relationships within them.

The common sense, the habitual practices and the conventions in everyday life operate as multiple sources of 'soft law' and remind us to switch our focus from a positivist view of law and take a pluralist approach instead.²⁵ To that end, we could explore how the official law becomes part of the vernacular in a social context that it is often unrecognized and unquestioned, and reciprocally how some folk languages and beliefs are woven into state law.

22 For a general introduction to the 'gap studies', see Susan S Silbey, 'After Legal Consciousness' (2005) 1 *Annual Review of Law and Social Science* 323-368; Austin Sarat and Thomas R Kearns, 'Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life', *Law in Everyday Life* (University of Michigan Press, Ann Arbor, 1995).

23 Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law and Society Review* 719-746.

24 Ibid, 722.

25 See generally, Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review* 869; Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, New York, 2001).

While putting aside the ‘law-first’ paradigm, one should nevertheless be wary of the danger of uncritically accepting ‘life’ (in its singular form) as an unmediated, coherent and monolithic entity existing in antithesis to ‘law’.²⁶ This superficially banal point is often neglected in abstract discussions of ‘the life’ of ‘Chinese *tongzhi*’, leaving aside their heterogeneity. The stories I set out in the following chapters will rather present ‘lives’ as being as complicated as ‘laws’.

How can we understand family law in accordance with the pluralist law-in-life perspective as outlined above? And, for that matter, with what historical and political connotations is the word ‘family’ loaded? In modern times there has emerged a dichotomy between family and market, whereby family has long been constructed as a private, emotional, altruistic and status-bond domain, whereas the market is taken to be a benefit-driven, rational and indifferent arena, the two functioning separately but complementarily.²⁷ In the light of feminist criticism of the division between the public and the private, Halley and Rittich propose the term ‘economic family’, placing familial and contractual relationships on a continuum.²⁸ They highlight the indivisibility of the relational, the emotional and the economic within familial relationships, and the interlaced connections between family, market and state institutions.²⁹ ‘Family’ therefore has at once three connotation of kinship (genealogical), home (sentimental), and household (material), connotations also implicit in the multiple meanings of the Chinese word ‘*jia*’.³⁰

If we debunk the family/market dichotomy, family law should then no longer be taken as an autonomous domain. The analytical model of Family Law (FL) 1, 2, 3, and 4 proposed by Halley and Rittich could help us to place family law in close relation to other legal fields including, but not limited to, laws that regulate the market.³¹ In fact, the boundaries between these ‘fields’ in everyday life are never as hard-and-fast as law-school curricula suggest.

In this framework, FL1 refers to codes, cases and interpretations regulating commonly recognized family-law issues such as marriage, divorce, parenthood, and inheritance.³² These are the foreground rules of family law

26 Mariana Valverde, ‘“Which Side Are You On?” Uses of the Everyday in Sociolegal Scholarship’ (2003) 26 *PoLAR: Political and Legal Anthropology Review* 86-98.

27 Janet E Halley and Kerry Rittich, ‘Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism’ (2010) 58 *American Journal of Comparative Law* 753-776, 758.

28 Ibid.

29 Ibid.

30 For the triple connotation of *jia* (kinship, home and household) and its importance in discussing lesbian family, sociability and belonging, see Antonia Chao, ‘Moving House: The Relational-Materialistic Aspect of Queer Cultural Citizenship’ (2002) 57 *Taiwan: A Radical Quarterly in Social Studies* 41-85.

31 Halley and Rittich, ‘Critical Directions in Comparative Family Law’ (2010).

32 Ibid., 761.

that define and circumscribe domestic relations, which have been artificially segregated from other rules actively playing in the background, namely FL2, 3 and 4.

FL2 encompasses the legal regimes that do not aim to regulate familial relationships but still explicitly use terms describing familial relationships in certain provisions, such as the use of 'spouse' or 'next of kin' in contract law, property law, employment law, pension law, welfare law, tax law and immigration law.³³ In particular, 'married' status implies many rights and obligations other than those in marriage law. Just like Graff points out,

'Married' is shorthand taken seriously by banks, insurers, courts, employers, schools, hospitals, cemeteries, rental car companies, frequent flyer programs, and more – a word understood to mean that you two share not just your bedroom but also the rest of your life.³⁴

FL3 refers to the legal rules that 'contribute structurally but silently to the ways in which family life is lived'.³⁵ For instance, legal rules regarding gender-based retirement ages (females at age 60 and males at age 65) may be one reason why there are more mothers than fathers who become activists helping lesbian and gay youth to come out;³⁶ the criminalization of hooliganism before 1997 may push gay men into marriage in order to avoid the suspicion;³⁷ the law forbidding 'illegal assembly' may prevent same-sex-oriented people from meeting one another in bars or at social events to establish and develop intimate relationships;³⁸ the household registration and residence permit system (*hukou*) provides a basis for differential treatment of urban and rural, unmarried and married *hukou* holders;³⁹ and the fact that the Constitution, including its non-discrimination and human

33 Ibid, 762-764.

34 EJ Graff, *What Is Marriage for?* (Beacon Press, Boston, 1999) 38.

35 Halley and Rittich, 'Critical Directions in Comparative Family Law' (2010) 762-764.

36 When asked why PFLAG (parents and friends of lesbians and gays) China (*tongxinglian qinyou hui*) does not have too many male members, the organizer Ah-Qiang told me that it is probably because for lesbian and gay kids in their 20s, their fathers have not yet retired, whereas their mothers have. Therefore, the mothers can have more free time to find information about homosexuality online and to participate in activist trainings and gatherings. Interview with Ah-Qiang, 16 March 2014.

37 More nuances of the crime are discussed in Section 2.1.

38 See Chapters 2 and 6. On the right to 'come together' as an inalienable part of the right to establish and develop intimate relationships, see Waaldijk Kees, 'The Right to Relate: A Lecture on the Importance of "Orientation" in Comparative Sexual Orientation Law' (2013) *Duke Journal of Comparative and International Law* 161-199.

39 A large number of Chinese people (in particularly rural women) try to achieve upward mobility by marrying urbanites, changing their *hukou* status and thus obtaining different welfare and social status. See e.g., Davin Delia, 'Marriage Migration in China: The Enlargement of Marriage Markets in the Era of Market Reforms' (2005) 12 *Indian Journal of Gender Studies* 2-3, 173-188. For *hukou* in relation to socialism, neo-liberalism and sexual outlaws, see Travis Shiu-Ki Kong, 'Reinventing the Self under Socialism' (2012) 44 *Critical Asian Studies* 283-308. The benefits and inconvenience of *hukou* will be further discussed in Chapters 3, 4 and 5.

rights clauses, cannot be cited in courts' decisions⁴⁰ also severely impedes (sexual) minorities from seeking timely legal remedy for the injustices they endure in familial and social life.

There is a wider range of informal norms, or FL4, that can substantially give meaning to FL1, 2 and 3, influence the ways they work, and simultaneously be reshaped by them.⁴¹ The FL4 norms are not binding laws, but they do guide social life with similar significance.⁴² FL4 is theoretically limitless, but some of its norms that keep appearing in my research encounters are worth mentioning here: the pressure on both gay and straight people to have a different-sex marriage and to have children; society's concept of a happy old age that centers around a harmonious three-generation, or even four-generation, family; the gendered expectations in family and at work that constrain both men and women; the Chinese state-party's inclination to maintain stability rather than to protect the legal rights of the marginalized;⁴³ the long-lasting tension between two fundamental human needs, domesticity versus eros,⁴⁴ or the craving for belonging versus the drive for freedom,⁴⁵ to name but a few.

One of the most influential FL4 norms this thesis investigates is the 'Catch 22' situation that traps many same-sex-oriented people in the straightjacket. On the one hand, they are facing strong social demands and legal imperatives to 'pass' (i.e., to act as heterosexuals, preferably married ones), if they want to enjoy the legal rights and social respectability attached to marriage.⁴⁶ On the other hand, they are pressured to disclose themselves;⁴⁷ if they were caught passing, especially passing in a different-sex marriage, there is the possibility, even likelihood, of humiliation and punishment.⁴⁸ The pressure to pass suggests that the heteronormative

40 See Chapter 6.

41 Halley and Rittich, 'Critical Directions in Comparative Family Law' (2010) 765.

42 Tamanaha, A General Jurisprudence of Law and Society (2001) 171-205.

43 Benjamin L Liebman, 'Legal Reform: China's Law-Stability Paradox' (2014) 143 *Daedalus* 96-109.

44 Stacey has argued that 'all human societies contend with irreconcilable tensions between the domains of eros and domesticity.... Every culture develops family and kinship forms to negotiate inescapable human conflicts between unruly romantic and sexual desires, on the one hand, and timeless human (and social) needs for durable, dependable, intimate relationships and care, on the other.' See Judith Stacey, *Unhitched: Love, Marriage, and Family Values from West Hollywood to Western China* (New York University Press, New York and London, 2011) 5.

45 Bauman, *Liquid Love* (2003) 34.

46 Yoshino, *Covering* (2006).

47 Xiaofei Guo, 'Foreword: You Think What You Think Is What You Think? (你以为的你以为的就是你以为的吗?)' in Kenji Yoshino, Jingshu Zhu (tr) *Covering: The Hidden Assault on Our Civil Rights* (掩饰: 同志的双重生活及其他) (Tsinghua University Press, Beijing, 2015). For more discussion of compulsory confession, see Chapter 7.

48 So far there is no law explicitly punishing same-sex-oriented people passing in different-sex marriages, but a court's report recommended for such legal change. See Section 2.2.5 and Chapters 3 and 4.

society does not want to know too much about homosexuality,⁴⁹ while the confessional demand insists on knowing more. Sedgwick has summarized the paradoxical operation of homophobia insightfully: the disclosure of one's homosexuality is 'at once compulsory and forbidden'.⁵⁰ This double bind thus disqualifies the same-sex-oriented from being honest and integral people in the face of institutions like marriage and family that are designed for those who can proudly announce their affection and sexual preference in public – namely heterosexuals. How one should deal with the desire for family and the same-sex desire thus becomes a perpetual puzzle for many same-sex-oriented people in China, to which there is no answer that can satisfy themselves, their parents, their same-sex partners, their different-sex spouses and their children all at once. This FL4 norm, i.e., the double bind of passing and confessing, will reappear throughout this thesis, as additional straps on the major parts of the straightjacket: marriage, parenthood and eldercare.

However, the analytical tool of FL1, 2, 3 and 4 will not be used mechanically. If we see this framework only as a typology, we may lose grip of the actual operation of these multi-level rules as a constantly changing assemblage.⁵¹ These acronyms will mainly serve as a key reminder: family law has many aspects; it permeates our everyday lives, in language or in silence, by means of force or seduction, so that the law is not as remote and solemn as it seems at first glance. In the following text, when I used 'Family Law' with its first letters capitalized, it implies the multiplicity of it, whereas 'family law' in small letters will be used to refer to the positivist FL1. Note that in China there is not a formal code named Family Law as such. The next section will further probe into how people perceive and deal with the multi-facet laws.

49 See Chapter 2, and Cheshire Calhoun, *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement* (Oxford University Press, New York, 2000); Wei Wei, 'From Symbolic Annihilation to Censored Publicity: The Representation of Homosexuality in the Film *If You Are the One* (从符号性灭绝到审查性公开: 《非诚勿扰》对于同性恋的再现)' (2010) 2 *Open Times* 84-99.

50 Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, Berkeley and Los Angeles, 1990) 70.

51 For 'assemblage', see Gilles Deleuze and Felix Guattari, *A Thousand Plateaus* (University of Minnesota Press 1987) 4; Jasbir Puar, 'Rethinking Homonationalism' (2013) 45 *International Journal of Middle East Studies* 336-339, 337.

1.3 LEGAL CONSCIOUSNESS

We may know nothing about the law until we find out what it can and cannot do.⁵² One way to learn is to observe how the law makes people obey, use, manipulate, circumvent, breach or oppose itself. This means that, when studying law, in addition to the black letters of the law and the landmark decisions, we should also examine how the law plays a role in constructing and constraining our daily lives, and how ordinary people deal with and reshape the various legal norms. These are what Marshall and Barclay call the ‘pull and push’ of legal ideas.⁵³ In that respect, legal consciousness theory that originates from socio-legal studies in the United States can offer us some epistemological and methodological insights.⁵⁴

The different legal-political contexts of the term ‘legal consciousness’ need some clarification. In China’s official discourse, legal consciousness (*falv yishi*) is often understood as people’s trust and faith in law and, especially, the sense of needing to be law-abiding in everyday life. It also refers to the awareness of the process of bringing disputes to courts or arbitrators, instead of resorting to uncivil and/or unlawful means of settlement. This term has been widely used in the party-state’s campaigns of ‘dissemination of law (*pufa jiaoyu*)’⁵⁵ and ‘sending law to the countryside (*song fa xiaxiang*)’.⁵⁶ For instance, according to the definition given by Chinese National People’s Congress, legal consciousness means,

‘the totality of people’s thoughts, opinions and mentality about law and legal phenomena.... It cannot come into being automatically, but should be cultivated on purpose.’⁵⁷

It continues,

‘to cultivate legal consciousness, three aspects of work must be emphasized: 1. to propagandize the rule of law...; 2. to build the legal infrastructures, making sure “there must be laws to go by, the laws must be observed and strictly enforced, and lawbreakers must be prosecuted”, so as to build up the authority of the law; 3. to disseminate the knowledge about law. In addition, we should train lawyers, conduct legal research, and direct the construction of law with scientific legal theories.’⁵⁸

52 Without going into details, this idea is drawn from Deleuze and Guattari’s discussion of ‘what a body can do’, see Deleuze and Guattari, *A Thousand Plateaus* (1987) 150. See also, Ian Buchanan, ‘The Problem of the Body in Deleuze and Guattari, Or, What Can a Body Do?’ (1997) 3 *Body and Society* 73–91.

53 Anna-Maria Marshall and Scott Braclay, ‘In Their Own Words: How Ordinary People Construct the Legal World’ (2003) 28 *Law and Social Inquiry* 617–628.

54 For literature review of legal consciousness studies, see Silbey, ‘After Legal Consciousness’ (2005). Duncan Kennedy produced one of the earliest accounts of American legal consciousness in 1980, in ‘Two Globalizations of Law and Legal Thought: 1850–1968’ (1980) 26 *Suffolk Law Review*, 631–679.

55 See Mary E Gallagher, ‘Mobilizing the Law in China: “Informed Disenchantment” and the Development of Legal Consciousness’ (2006) 40 *Law and Society Review* 783–816.

56 Suli Zhu, *Sending Law to the Countryside: Research on China’s Basic-Level Judicial System* (Springer, Singapore, 2016).

57 ‘What is Legal Consciousness and How is it Developed?’, National People’s Congress of China, 17 December 2000, at www.webcitation.org/6nTvKQ8ai.

58 Ibid.

From the state's perspective, legal consciousness must be brought forth top-down, through education and propaganda.⁵⁹ Its aim is to create more docile (both tame and useful)⁶⁰ citizens through the ideologically-driven aspiration of rejuvenating a civilized, modernized, rule-of-law China. In this thesis, however, the idea of legal consciousness is not limited to the obedient mental state of Chinese citizens. It is an ongoing dynamic process of collective construction of legalities, i.e., of making sense of what is legal and what is not. For the purpose of this thesis, 'legalities', when used in the plural form, is broader than the binding effects of state law; it refers to the meanings, sources of authority, and cultural practices that are commonly recognized as legal, regardless of who employs them or for what ends.⁶¹ Although legal consciousness in the latter sense has become a classic analytical tool in Western legal anthropology, it is not yet elaborated in Chinese academic literature. This is one of the contributions this thesis attempts to make.

In their renowned book *The Common Place of Law*, Ewick and Silbey have identified three schemas of ordinary people's legal consciousness: 'before' (obeying or bowing to) the law, 'with' (using or playing with) the law, and 'against' (avoiding or resisting) the law.⁶² Before-the-law legal consciousness treats the law as a series of permissions and prohibitions with transcendental majesty, similar to Foucault's 'juridical power'.⁶³ With-the-law suggests a utilitarian view of the law as a game, a terrain for tactical engagement through which people marshal a variety of social resources to achieve strategic goals.⁶⁴ Together the two constitute law's hegemonic status: when the law is deemed both universal and particular, both sacred and malleable, it becomes more convincing and prevailing.⁶⁵ The against-the-law schema, on the other hand, generates counter-hegemonic forces. It can take various forms, including 'pilfering, violence or threats of violence, tricks, institutional disruptions, foot-dragging, humor, storytelling and gossip'.⁶⁶ These tactics are often employed by those who do not benefit from bowing to the law's authority or playing the law's game, and this applies especially to the socially marginal.⁶⁷

59 For China's aspiration to become a rule-of-law state and its half-heartedness, see Lisa Rofel, *Desiring China: Experiments in Neoliberalism, Sexuality, and Public Culture* (Duke University Press 2007); Liebman, 'Legal Reform: China's Law-Stability Paradox' (2014).

60 See Foucault, *Discipline and Punish* (1979) 135-141.

61 See Susan S Silbey and Patricia Ewick, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998) 22.

62 Silbey and Ewick, *The Common Place of Law* (1998) 57-222.

63 Michel Foucault, *Power/knowledge: Selected Interviews and Other Writings 1972-1977* (Pantheon Books 1980) 88.

64 Silbey and Ewick, *The Common Place of Law* (1998) 108-164.

65 Ibid.

66 Patricia Ewick and Susan Silbey, 'Narrating Social Structure: Stories of Resistance to Legal Authority' (2003) 108 *American Journal of Sociology* 1328-1372, 1336.

67 Silbey and Ewick, *The Common Place of Law* (1998) 165-222.

The last schema has been further developed in Harding's study of the legal consciousness of lesbians and gay men in the UK.⁶⁸ She differentiates three types of resistance: stabilizing resistance (as an inherent part of power relations), moderating resistance (partly reducing the effect of power), and fracturing resistance (breaking the flow of power).⁶⁹ Harding finds that the last type is that most commonly thought of in terms of resistance, but in reality, it is the least commonly practiced.⁷⁰

In fact, if we come to terms with the idea that 'resistance hardly ever has a straightforward public presence; it is rather duplicitous, ambiguous, even devious',⁷¹ then being before, with or against the law may not differ as starkly as they do in theory. Arguably, obeying the rules (or pretending to do so) and playing the game can well be subtle yet powerful means of resistance, much like the canny tactics of 'guerrilla warfare'⁷² or 'infrapolitics',⁷³ as illustrated by many of the stories told in later chapters. Of course, these vague forms of resistance do not come without cost. As Wieringa points out, 'at one end of the sliding scale of subversion, the line between defiance and defeat is thin'.⁷⁴ This is in particular evident in the controversial practices of same-sex-oriented people entering into cooperative and 'fraudulent' marriages. Despite the turbulence they cause to the institution of marriage, these people are often scolded as complicit with heteronormativity and thus sabotaging the gay rights movement.⁷⁵ Legal consciousness theory may help us understand the complexity of their lives and the assimilation/subversion debate.

To date literature on the legal consciousness of same-sex-oriented people per se is thin on the ground, and even less has been written about non-Western societies. Baumle and Compton have conducted comprehensive research into how LGBT individuals navigate the law as part of their family decision-making in the US where the 'legal-friendliness' varies from one jurisdiction to another.⁷⁶ A few studies have focused on same-sex marriage rituals in lesbian and gay communities and how they construct

68 Rosie Harding, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge, Oxon and New York, 2011).

69 Ibid, 13.

70 Ibid, 48.

71 María Lugones, *Pilgrimages/Peregrinajes: Theorizing Coalition Against Multiple Oppressions* (Rowman and Littlefield, Lanham, 2003) x. For an elaboration of multiple tactics of resistance, see also, Chela Sandoval, *Methodology of the Oppressed* (University of Minnesota Press, Minneapolis and London, 2000); Wieringa, *Heteronormativity, Passionate Aesthetics and Symbolic Subversion in Asia* (2015).

72 Sandoval, *Methodology of the Oppressed* (2000) 58.

73 James C Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale University Press, New Haven and London, 1990) 183-201.

74 Wieringa, *Heteronormativity, Passionate Aesthetics and Symbolic Subversion in Asia* (2015) 225.

75 See Section 3.3.

76 Amanda K Baumle and D'Lane R Compton, *Legalizing LGBT Families: How the Law Shapes Parenthood* (New York University Press, New York and London, 2015).

legalities despite the lack of formal legal recognition.⁷⁷ Some discuss people's attitudes towards marriage vis-à-vis registered partnership or informal cohabitation.⁷⁸ Other scholars approach legal consciousness in the light of queer theory, caution the paradoxical role of law in both legitimization and further marginalization, and call for a more critical engagement with law and the relevant cultural codes.⁷⁹

Scholars have also pointed out several limitations of the legal consciousness theory,⁸⁰ among which two are worth noting in the current research project. Firstly, the descriptive nature of legal-consciousness studies may sideline the very production of legal consciousness, and therefore it is not made clear where one's legal consciousness, and more profoundly, one's self-consciousness as a lawful citizen, comes from.⁸¹ The notion 'consciousness' presupposes a 'prior, volitional subject' who can freely choose to perform in certain ways, while ignoring the performative construction of this very subject.⁸² To counter this individualistic tendency, I will pay more attention to the intersecting socio-economic structures that have produced various thoughts about law, and ultimately, produced historically and geographically specific subjects like *tongzhi*, *tongqis*, and PFLAGs (Parents and Friends of Lesbians and Gays),⁸³ as well as their desires. Therefore, as with the use of FL1, 2, 3 and 4, I will not just label each case with one or more types of legal consciousness or merely show the diversity of individual psychological states when dealing with law-related events. What I would like to highlight is how Chinese Family Law has shaped these identities, how life arrangements are simultaneously stimulated and restrained, and how people may resist and reformulate these norms.

Another closely related critique is that the volitional idea of legal consciousness obscures the power of the subconscious or unconscious mind.⁸⁴ To explore the legal sub- or unconsciousness from a psychoanalyti-

77 Kathleen E Hull, 'The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-Sex Marriage' (2003) 28 *Law and Social Inquiry* 629-657; Nancy Nicol and Miriam Smith, 'Legal Struggles and Political Resistance: Same-Sex Marriage in Canada and the USA' (2008) 11 *Sexualities* 6, 667-687, 667.

78 Alison Rolfe and Elizabeth Peel, "'It's a Double-Edged Thing': The Paradox of Civil Partnership and Why Some Couples Are Choosing Not to Have One' (2011) 21 *Feminism and Psychology* 317-335; Rosie Harding, "'Dogs Are 'Registered', People Shouldn't Be": Legal Consciousness and Lesbian and Gay Rights' (2006) 15 *Social and Legal Studies* 511-533.

79 Lisa C Bower, 'Queer Acts and the Politics of "Direct Address": Rethinking Law, Culture, and Community' (1994) 28 *Law and Society Review* 1009-1034; Arvind Narrain and Alok Gupta, 'Introduction' in Arvind Narrain and Alok Gupta (eds), *Law Like Love: Queer Perspectives on Law* (Yoda Press, New Delhi, 2011) xxii.

80 For a summary of the critiques, see Harding, "'Dogs Are 'Registered', People Shouldn't Be'" (2006) 515-517.

81 Ibid, 516.

82 Judith Butler, 'Imitation and Gender Insubordination' in Diana Fuss (ed), *Inside/Out: Lesbian Theories, Gay Theories* (Routledge, New York and London, 1991) 13-32, 24.

83 For more discussion of *tongqi* and PFLAG parents, see chapters 3, 4 and 5.

84 Harding, "'Dogs Are 'Registered', People Shouldn't Be'" (2006) 516.

cal perspective is beyond the scope of this research, but we could at least pay more attention to the productive role of feelings and emotions, as suggested by many recent critical works.⁸⁵ Ideology works best via the proliferation and circulation of emotions rather than ideas;⁸⁶ it is often emotions that bring some people into alignment and exclude others;⁸⁷ they mediate the psychic and the social, the individual and the collective.⁸⁸ Therefore, another theoretical contribution this thesis tries to make is to connect the dots between legal consciousness and one's less articulable feelings. Some of the most intense emotions circulating among Chinese same-sex-oriented people include stress, shame, guilt, anxiety, as well as a certain carefreeness, which will make themselves felt by the readers in subtle ways in the chapters that follow. The concluding chapter develops further this link between legal consciousness and feelings.

1.4 QUILTING LAW AND STORIES: SOURCES AND METHODS

Being privileged to be affiliated to both a law school and an anthropological department, I am constantly fascinated by legal reasoning, story-telling and the way they overlap. Law and Anthropology, when juxtaposed, seem to suggest two separate fields that only occasionally receive an interdisciplinary examination. This thesis nevertheless tries to resist the binaries of reason/sense, doctrinal/empirical, and rigid/freeform that at first sight encapsulate the disciplinary divisions between law and anthropology. What I believe is that 'the life of law is both logic *and* experience',⁸⁹ so neither law nor life stories would be fully comprehensible without the other.

Therefore, I adopt a 'quilting' approach towards researching and writing, stitching different discourses together, not privileging either the 'legal'

85 For the readability of this thesis, I will not differentiate emotions and feelings, and will not elaborate the affect theory here. The most relevant implication of affect studies to this thesis is the non-individualistic understanding of emotions, i.e., emotions are not what one has; emotions do things. See Lauren Berlant, *Cruel Optimism* (Duke University Press, Durham and London, 2011); Gilles Deleuze, *Spinoza: Practical Philosophy* (City Lights Books, San Francisco, 1988).

86 Yin-Bin Ning and Josephine Chuen-Juei Ho, *People in Trouble: Depression, Emotion Management and the Dark Side of Modernity* (民困愁城: 忧郁症、情绪管理、现代性的黑暗面) (Taiwan: A Radical Quarterly in Social Studies, Taipei, 2012).

87 Sara Ahmed, 'Affective Economies' (2004) 22 *Social Text* 117-139.

88 Ibid.

89 Holmes has argued eloquently that 'the life of the law has not been logic: it has been experience', and that 'life of the law is always already animated by prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with the fellow-men'. Oliver Wendell Jr Holmes, *The Common Law* (Project Gutenberg 1881) 1. Developed from Holmes' famous quote, Silbey and Ewick emphasize the importance of both logic and experience. Susan S Silbey and Patricia Ewick, 'The Double Life of Reason and Law' (2003) 57 *University of Miami Law Review* 497-512, 501.

or the 'social'.⁹⁰ Unlike delicate embroidery, this socio-legal patchwork may not have a neat appearance; yet as all the patches are pieced together and sewn into an ensemble, so that they are not isolated. In this section, for the purpose of structural clarity, I explain the 'legal' and 'anthropological' methods separately, but we should pay more attention to their interplay in real-life cases.

1.4.1 The Legal Research

The primary sources of the doctrinal legal research include the Chinese Constitution, national and provincial legislation, binding legislative and juridical interpretations of law, central and local administrative regulations, court cases, and specific administrative decisions. When an international and/or comparative perspective is needed, I refer to international treaties, principles, resolutions of the United Nations, decisions of international or regional courts and human rights mechanisms concerning sexual orientation, as well as statutes and cases in other jurisdictions. I rely on the authorized digital versions of these texts. The unofficial English translation of some Chinese laws can be found online, but for the purpose of accuracy, I may use it with minor adjustments. The primary legal resources also consist of some materials I collected in the field, such as the prenuptial contracts between cooperative spouses, the financial agreements among cohabiting same-sex couples, and the written submissions and evidence of the parties in lawsuits. The secondary legal sources used in this thesis are mainly treatises and periodical articles.

In order to have an overview of Chinese statutory law on homosexuality, I searched for all national and regional legislations and administrative regulations with the key words 'homosexuality (*tongxinglian*)', 'same sex (*tongxing*)' and 'sexual orientation (*xing quxiang* or *xing qingxiang*)' on the database Chinalawinfo. It turns out a small number of the laws explicitly include these words. As shown in the following chapters, the legal restrictions on same-sex-oriented people are mostly imposed in a more ambiguous fashion.

The same key-word searches have been done on the published court cases in the official database China Judgement Online, as well as in unofficial ones such as ItsLaw and OpenLaw. As there have been thousands of court cases including these words, I selected 39 typical cases on different subject matters, such as divorce (property and custody), separation of same-sex couples, same-sex assault, group sex, blackmail, same-sex prostitution, trademarks, civil organization registration, etc. Most of these collected cases are decided after 2010, since the judgments before are less detailed. The

90 The quilting approach is inspired by Paula Saukko, 'Between Voice and Discourse: Quilting Interviews on Anorexia' (2000) 6 *Qualitative Inquiry* 299-317, which cites Deleuze and Guattari, *A Thousand Plateaus* (1987) 474.

wide variety of legal issues in relation to homosexuality give us a broader picture in which the family life of Chinese same-sex-oriented persons is situated.

Some of the FL 2 and 3 cases are analyzed in Chapters 2 and 6, and more FL 1 cases in Chapters 3, 4 and 5. In addition, I sampled randomly 40 'ordinary' cases since 2010 in which there is no explicitly same-sex-oriented party. Some of these cases are briefly referred to, so as to show the commonplace legal practices concerning marriage, parenthood and eldercare. Such comparison between the 'gay' cases and presumably 'straight' ones can help us see more clearly to what extent Chinese laws and courts take sexual orientation into account, and when they do, whether this is done with bias.

1.4.2 The Fields

The stories in this thesis are mainly collected during the fieldwork I conducted in China from March to October 2014, followed by a number of updates and follow-up visits over the next two years. After a pilot study in November 2013, I first decided to do fieldwork in Guangzhou, the capital city of a southern coastal province Guangdong. This metropolis accommodates numerous same-sex-oriented people from all over China, with a great diversity of identities and lifestyles. Moreover, since the 2000s, this city has also witnessed the emergence of China's LGBT and young⁹¹ feminist activism. Many LGBT organizations are thriving there, including PFLAG China (*Tongxinglian Qinyou Hui*, an NGO founded in 2008 providing peer support for the parents of gay or lesbian children), Zhitong Guangzhou LGBT Centre (the first local NGO providing an LGBT hotline service, which it has done since the early 2000s and is now also offering HIV-AIDS-prevention outreach and LGBT cultural events), GirlFriend (a lesbian-feminist group), Gay-Straight Alliance (a group aiming to ensure more heterosexuals have a more complete picture of the real life of LGBTs), and Tong Cheng LGBT Youth Education Center (an organization working with high-school or college teachers to give LGBT-friendly sex education lessons), to name but a few.

During my first month in Guangzhou, I liaised with these NGOs and their activists, who introduced me to a number of same-sex-oriented people and their parents living in or near the city, whom I talked with at some length and interviewed. Meanwhile, I worked as a volunteer at some of their weekend events as reciprocity, which also gave me the opportunity to find more respondents by means of snowball sampling. This was helpful in the early stages, but was also limited because the respondents I found via the activist 'gatekeepers' were more likely to be homogeneous.

91 About the 'youthness' of feminist activism since the 2010s, and the continuity and rupture with previous state-sponsored feminism, see Wen Liu, Ana Huang and Jingchao Ma, 'Young Activists, New Movements: Contemporary Chinese Queer Feminism and Transnational Genealogies.' (2015) 25 *Feminism and Psychology* 1, 11-17.

After two months, I decided not to limit my field to the city of Guangzhou, considering that many of the respondents I contacted online expressed the wish to talk with me face-to-face, and that many LGB-relevant (legal) events in other places were worth participating in. My aim was not simply to widen the variance in gender, age, class or region in my sample – after all, difference cannot be enumerated by simply enlarging the pool. I travelled because I preferred to ‘follow’ my research in a leisurely manner rather than to ‘lead’ it, in light of the actor-network theory (ANT):

‘Craft research is shaped by the patterns of interaction and practice that it’s immersed in. You don’t assume too much. You let the research unfold. ... It would unfold uncertainly. It would be sensitive to ethnographic surprises. It wouldn’t be highly programmed.’⁹²

Therefore, leaving room for surprise, I became a participant observer in story-telling meetings (*ken tan hui*) organized by PFLAG in Kunming (capital city of Yunnan Province in southwestern China) and Guangzhou, in the LGBT camp in the Sex Expo in Xi’an (capital city of Shanxi Province in central China), in an *elderly lesbian oral history* working group meeting in Chengdu (Sichuan Province in southwestern China), in some informal gatherings of people in cooperative marriages in Shenyang (Liaoning Province in northeastern China), and in a caucus meeting in Beijing aiming to discuss litigation strategies for an LGBT NGO registration case (some activists were arrested the day before and released 24 hours later). I also went to a village in southern China to assist a *tongqi* with her divorce litigation, and another village to interview two elderly unmarried women living together for more than half a century. These widely differing stories will be added to the quilt in later chapters, and the connections between them will be reconsidered in the conclusion.

Meanwhile, I have also spent plenty of time on the virtual ‘field’. I joined three *tongzhi* QQ⁹³ groups, two *tongqi* groups and one PFLAG group for the purpose of observing participants online, so as to get a sense of the issues that were important to a wider range of people than those who show up and speak up in offline events. I found a number of respondents for interviews via these groups. I also surfed frequently and got inspiration from some discussions on other online forums such as *tianya*⁹⁴, or the *tongqi*,

92 John Law and Vicky Singleton, ‘ANT and Politics: Working in and on the World’ (2013) 36 *Qualitative Sociology* 4, 485–502, 488. For more about the ANT, see Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford University Press, New York, 2005).

93 QQ is an instant-message software that is most widely used in China, which can be accessed on both personal computers and smart phones.

94 *Tianya* is one of the largest online forums that have various sections, including one called ‘on the same road’ (*yilu tongxing*). The word ‘same’ (*tong*) serves as a cue for homosexuals (*tongxinglian* or *tongzhi*), at www.webcitation.org/6qlpP4wCS. For the use of the word ‘tong’ in many other LGBT organizations, see Yu Qi, ‘Identity Terms and Organizing for Women in Same-Sex Relations in Mainland China’ (Degree Thesis of Master of Arts in Gender Studies of Central European University, 2013).

cooperative marriage and feminist 'web bars' on Baidu⁹⁵. While acknowledging that online and offline stories are differently situated and produced, we should nevertheless try to move beyond the dualistic thinking which holds that offline provides the context while online is the phenomenon'.⁹⁶ Instead, Internet material encompasses both texts and interactive sites.⁹⁷ I will not give more credits to stories told face-to-face than down-the-line or the other way around, but will read these narratives with and against one another, while paying attention to the socio-legal-emotional contexts that give meanings to them.

1.4.3 Sampling Respondents

When designing this project in early 2013, and with a narrow definition of family law in mind, I planned to find out how Chinese lesbian and gay couples in relatively stable relationships make legal arrangements about family issues such as communal property, inheritance, insurance and parental responsibility, and how lawyers would advise them. Soon after I started my fieldwork, I realized these particular aspects of same-sex partnership, including the very awareness and ability to consult a lawyer about property and parenthood, might have narrowed my focus onto people who are already relatively resourceful. This is not to say that lower-class people do not directly engage with the law and lawyers, but only looking at stable cohabitation and its legal arrangements would miss a wider variety of lived experiences, legalities and legal consciousness.

Therefore, while I was still looking for long-term same-sex couples as my respondents, I did not discount other stories, stories about coming out, being single, hooking up, breaking up, finding cooperative-marriage partners, conducting 'marriage fraud', making friends inside and outside the LGBT communities, making a living on the farm, surviving in the metropolises, and so on. It turns out that many insights have come from stories that superficially seemed 'irrelevant' to family and to law.

If the legalities, the legal subjects and their legal consciousness are all plural, then sampling respondents based on identities like lesbian, gay, bisexual, and *tongqi* is insufficient, if not futile. How could I find those who do not identify with, or do not even know these labels? Is it not simply impossible? Undeniably, there was a bit of luck. For example, I first met a rural-to-urban migrant worker Hua, who self-identifies as a *lala* (similar to

95 Anyone can establish a virtual bar on Baidu concerning a wide range of topics (except for anti-state, anti-social, violent, or explicitly pornographic ones), and like other BBS, people of the same or opposing interest can post and make comments. Many same-sex-oriented people and *tongqis* 'discovered' their identities and found their communities there. See www.webcitation.org/6qlpQbLvN.

96 Shani Orgad, 'From Online to Offline and Back: Moving from Online to Offline Relationships with Research Respondents' in Hine Christine (ed), *Virtual Methods: Issues in Social Research on the Internet* (Berg, Oxford, 2005) 51-65, 64.

97 Christine Hine, *Virtual Ethnography* (Sage, London, Thousand Oaks, New Delhi, 2000).

lesbian).⁹⁸ If Hua had not told me that she believed there were two elderly ‘lalas’ in her hometown, I would not have met these two life-long cohabitantes in a remote village, whose relationship does not have any name in the glossary of contemporary lesbian and gay studies.⁹⁹ However, it was more than a lucky coincidence, because Hua, the QQ software we both used, a certain degree of rural-urban mobility in China and the rising lesbian/lala discourses are all inevitable elements that prompted our encounter.

Sampling the silent majority is even more difficult and ethically thorny. If, as estimated, there are 14 million mixed-orientation marriages in China,¹⁰⁰ how could I even approach the unwitting wives without risking a fundamental breach of research ethics of ‘doing no harm’? If most same-sex-oriented men, especially the older generations, had entered into different-sex marriages without a clear gay identity, thus without an intention of ‘straight-passing’, how can we ask their wives to tell us their experiences and feelings about a ‘fraudulent’ marriage? In such cases, are these women ‘tongqis’ and their husbands ‘gay’ or ‘bisexual’ at all? These tricky questions will be further discussed in Section 1.4.5 about research ethics, and in more detailed stories in the next chapters.¹⁰¹

1.4.4 Interviewing

During the fieldwork, I conducted semi-structured interviews instead of asking a list of prepared questions. When talking to my respondents, I had key words like ‘marriage’, ‘parenthood’, ‘eldercare’ and ‘law’ in mind. The questions I raised were often improvised in response to their respective words and stories. I did not fully adopt the grounded-theory approach,¹⁰² since I had already had a preliminary research plan in mind. However, the idea of it helped to alleviate my concerns about the ‘usefulness’ of the stories and allowed the conversations to flow more naturally.

98 For the inaccuracy and the interpretive openness of translation, especially in relation to gender, sexuality and post-colonial theories, see A Ka Tat Tsang and P Sik Ying Ho, ‘Lost in Translation: Sex and Sexuality in Elite Discourse and Everyday Language’ (2007) 10 *Sexualities* 5, 623-644; Liu, Karl and Ko, *The Birth of Chinese Feminism* (2013) 11.

99 More of their stories can be found in Sections 4.3.3 and 5.3.1.

100 Minghua Liu and others, ‘Estimation on the Numbers of Chinese Homosexuality and People with Same-Sex Sexual Behaviors and Related Female Group’ (中国同性恋者、同性性行为者和相关女性群体人口数值估测) (2013) 53 *Journal of Chemical Information and Modeling* 117-121.

101 The method of ‘inconvenience sampling’ is discussed in a paper in Chinese, see Jingshu Zhu, ‘Inconvenience Sampling: Methodological Implications of the Research on “Gay Frauds” in Mainland China (不方便抽样:中国大陆“男同骗婚”研究的方法论启示)’ (2016) 10 *China Youth Study* 30-35.

102 See e.g., Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory* (Aldine 1967); Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (SAGE Publications, London, Thousand Oaks, New Delhi, 2006).

Conducting interviews on legal consciousness requires certain techniques. For many people, law is understood as simply a series of prohibitions, punishment, formalities, all rather removed from everyday life.¹⁰³ Therefore, it would be less fruitful to ask straightforwardly about their perception and use of 'law' than to encourage them to talk about life events, thus letting their legal consciousness emerge organically. For instance, I often started my interview with a lesbian-identified person by asking how she came to be aware of her same-sex orientation, how she met her partner(s), what she did on a typical weekday, whether she had come out to her parents, whether she faced the pressure to marry or to have children, and how she envisaged her life in five or ten years. Most respondents could weave rich stories around these questions, and even if they did not directly use or talk about the word 'law', it is still possible to find out how Family Law is affecting their lifestyles and important decisions, and how they may subtly change the law's meaning in the course of arranging their (non) normative (non)familial lives.

The interviews usually lasted for one to two hours. I interviewed some people more than once and spent up to a week living with a number of others. Some of my respondents and I later became good friends and they have been updating me about their life changes and thoughts constantly. With some, I have developed a strong sense of kinship.¹⁰⁴ At times the interviews were not clearly different from informal chatting, especially when I decided not to use a voice recorder so as to make the respondents less cautious about their words. In other occasions, even a notebook and a pen can be intrusive and distractive (in a gay cruising park for instance), so I relied only on my memory, which made the conversations easier, at the expense of some degree of accuracy when I quote them. In such cases, I immediately wrote down the important words and observations after we spoke. I use *Atlas.ti*, a qualitative software package, to manage my interview transcripts and field notes, but I try not to use it to categorize and code the before-, with- or against-the-law legal consciousness mechanically.¹⁰⁵

Altogether, I have formally or informally interviewed 51 same-sex-oriented people, not all of whom self-label as gay, lesbian, *tongzhi*, *lala*, queer/*kuer*, etc. Among them, 23 are men, 26 women and two self-identify

103 See above, Section 1.2.

104 For an elaboration of 'research kinship', see Mathias Detamore, 'Queer (y)ing the Ethics of Research Methods: Toward a Politics of Intimacy in Researcher/Researched Relations' in Kath Brown and Catherine Nash (eds), *Queer Methods and Methodologies: Intersecting Queer Theories and Social Science Research* (Ashgate Publishing Company, Surrey and Burlington, 2010).

105 Silbey opposes simply coding legal consciousness, arguing instead for using these schemas to 'collect and organize the materials out of which people construct their accounts of law... Legal consciousness, in this account, consists of mobilizing, inventing, and amending pieces of these schemas.' See Silbey, 'After Legal Consciousness' (2005) 358.

as transgender.¹⁰⁶ I also talked to eight PFLAG parents (who are presumably straight¹⁰⁷) and seven lawyers (some are openly gay or *lala*). Numerous informal chats with activists and short conversations with same-sex-oriented people in bars and cruising parks at night were of great inspiration, too. All the encounters have shaped the ideas set out in this thesis, although I can only elaborate a few of them. My concern is less about being unable to present the panorama of sexual orientation law and legal consciousness in China. Instead, I am more afraid of reducing these vibrant and vital life stories into separate 'case studies', 'examples' or 'counterexamples' that prove or falsify a certain universal progression of 'gay rights', yet not challenging the legitimacy of its very universality. My socio-legal analysis of the fragmented snapshots of the respondents' lives can hopefully allow their experiences and views to dialogue with each other, so as to give us a glimpse of the incongruities of a world much messier than we might wish it to be.

1.4.5 Research Ethics

My research has been guided by the general ethical principle 'first do no harm'¹⁰⁸. The difficulty is, however, future harm is never wholly predictable at the time of the interview, and the boundaries between harm, conflict and discomfort may vary from person to person.¹⁰⁹ Therefore, even if a researcher has followed the methodological guidelines on 'mutual rapport' and 'informed consent'¹¹⁰, she has no grounds for complacency about her ethicality.¹¹¹ A lot more should be thought and done during and after the

106 Transsexual or transgender subjects may self-identify as man or woman, but these two respondents do not.

107 This assumption itself is interesting to notice, as if when one is seen as primarily a parent in China, this person is by default heterosexual, and his or her sexuality becomes much less meaningful than their familial and social status. In fact, one PFLAG parent has informed me of some anecdotes that several parents in their group are also *tongxinglian*. These rumors are often neglected or denied in the official accounts of the PFLAG, partly due to such a heterosexual assumption of a parent. More importantly and more subtly, the denial might be because these 'exceptional' parents will complicate PFLAG's principled argument – they argue that homosexuality is genetic (thus natural and immutable) but not hereditary (thus not the fault of the parents, and no worries for the future kids of gay people). This thesis cannot dig further into the (sexual) life of these 'straight' parents, but the longing for normalcy of many Chinese parents and their same-sex-oriented children will be presented in more arguments and thoughts like this.

108 Peter Allmark and others, 'Ethical Issues in the Use of In-Depth Interviews: Literature Review and Discussion' (2009) 5 *Sheffield Hallam University Research Archive* 48-54.

109 The unpredictability of harm in research encounters is discussed in J O'Connell Davidson, 'If No Means No, Does Yes Mean Yes? Consenting to Research Intimacies' (2008) 21 *History of the Human Sciences* 49-67. For the discussion of harm in personal relationships in general, see Sarah Schulman, *Conflict Is Not Abuse: Overstating Harm, Community Responsibility, and the Duty of Repair* (Arsenal Pulp Press 2016).

110 Ron Iphofen, *Research Ethics in Ethnography/Anthropology* (European Commission, DG Research and Innovation, 2013) 26-34.

111 Davidson, 'If No Means No' (2008) 65.

fieldwork to make sure that the respondents' privacy and security remains the priority. In many cases, therefore, I have to tell a much less vivid story here than what was told to me.

In the field, I adjusted the manner (written or oral) and timing (from the very beginning or retroactively) of information-giving and consent-requesting depending on the topics and the particular circumstances. I also bore in mind that consent should be an ongoing and dynamic process, and that it could be withdrawn before a paper is published.¹¹² Such ethics are consistent with the ontology and epistemology that this thesis follows: if we believe one's subjectivity is constantly re-negotiated in the process of knowing others and being known, then one's willingness to be written down may reasonably change in time. There are a few cases where the respondents ceased to consent to my using their stories during the writing process, which I have fully respected.

It is not feasible to double check with every respondent (some of whom I have lost contact with) that I did not misunderstand them in my thesis, but I did do so with people I refer to substantially. Some would ask me to emphasize or trivialize certain words, which I followed when I found it reasonable. On the other hand, however, a researcher should not refrain from expressing different opinions than what the respondents expected her to say, because being ethical is not equal to being a pleaser to all parties, especially when discussing controversial topics.¹¹³

As much as informed consent helps to avoid future disputes, we should not assume its ethical supremacy. Obtaining consent from those who are referred to in other people's narratives is oftentimes impractical, undesirable, if not unethical. A typical scenario in my thesis is the accusations leveled at their 'gay' husbands by my *tongqi* respondents. We can reasonably assume that their anger and bitterness may have become emotional ingredients in their story-telling that lead them to exaggerate, distort or possibly fabricate their 'gay' husbands' apathy or violence.¹¹⁴ I could not confirm with these men if they really beat or ignored their wives, because it is almost impossible to approach a husband via an (ex)wife who is strongly antagonistic towards him. Hence, I can only remind the readers not to

112 However, the respondents' right to change their mind and to withdraw the consent should not be infinitely extended after the publication. For a discussion of the time limit on researchers' responsibility and commitment towards research subjects. See Davidson, 'If No Means No' (2008) 61.

113 The ethical dilemmas are shrewdly discussed in David Mosse, 'Anti-Social Anthropology? Objectivity, Objection, and the Ethnography of Public Policy and Professional Communities' (2006) 12 *Journal of the Royal Anthropological Institute* (N.S.) 935-956; Xing Ying, *From 'Asking for Justice' to 'Balancing Relations': A Story of Petitioning in A Hydroelectric Station Area In Southwestern China* (大河移民上访的故事：从“讨个说法”到“摆平理顺”) (Joint Publishing, Beijing, 2001); Yuan-Horng Chu, 'Betrayal: On the Ethnographic Underworld' (背叛/泄密/出卖：论民族志的冥界) (1997) June, *Taiwan: A Radical Quarterly in Social Studies* 26, 29-65.

114 See e.g., the stories in Section 3.4.2.

uncritically take certain one-sided narratives in absence of further evidence, but instead to focus more on the social contexts that produce these words and emotions. Likewise, the single narrative of a 'gay' man about his 'happy' marriage is also likely to be partial if we do not know his wife's views and feelings.¹¹⁵ However, it would be even more unethical to probe into the 'real' feelings of the unwitting wife of a same-sex-oriented man by first revealing her husband's 'real' sexual orientation. Paradoxically, therefore, a researcher is pressured to be ethical (obtaining informed consent) by being unethical (exposing other's privacy),¹¹⁶ which is a double-bind closely interwoven with the double-bind of passing and confessing imposed on the same-sex-oriented respondents.¹¹⁷ The epistemological and methodological implications of these questions will be revisited in the concluding chapter.

Qualitative data is full of clues and scraps of respondents' personal information, so scrutiny and care is required to ensure their anonymity. I use pseudonyms unless a respondent wished otherwise.¹¹⁸ I also omit certain identifiable traits, shuffle locations and professions, and sometimes give more than one pseudonym to the same person, although such 'manipulation' inevitably compromises the approximation of my accounts to the 'facts' my respondents shared with me. Some of them have also shared their stories and feelings on their own social media accounts (such as blogs or Weibo), and this requires that I take additional care to deal with interview materials in a way that ensures they could not be recognized contrary to their stated preference. In such cases, I further anonymize them by changing their demographic information and withholding references to online resources.

All the links to web pages have been saved to WebCite,¹¹⁹ an online archiving system for web-references, to ensure that cited web material will remain available to readers in the future, considering that some links may be changed or that some contents may be censored by the authorities. The field notes and transcripts will be stored at the International Information Center and Archives for the Women's Movement in Amsterdam.¹²⁰

115 See e.g., the story in Section 5.3.2.

116 I encountered such pressure when an anonymous reviewer of one of my journal articles on the same topic required me to present the voice of the wife of a same-sex-oriented man. For more discussion, see Jingshu Zhu, "'Unqueer' Kinship? Critical Reflections on 'Marriage Fraud' in Mainland China' (2017) *Sexualities*, DOI 10.1177/1363460717719240.

117 See above footnotes 46-50 and accompanying text. For my own ethical dilemma in obtaining 'informed consent' in the field, see (forthcoming), Jingshu Zhu, "'We're Not Cheaters': Polyamory, Mixed-Orientation Marriage and the Construction of Radical Honesty' (2018) *Graduate Journal of Social Science*.

118 I will indicate in the footnotes if the names are real ones, or are one's nicknames that are well-known in the local LGBT communities and even in mainstream media. Otherwise, all the names are pseudonyms.

119 webcitation.org/index.

120 www.webcitation.org/6qkngowja.

1.5 THESIS OVERVIEW

Chapter 2 shows the broader legal context in which the familial decisions of same-sex-oriented people are made. It gives a detailed account of the criminality of homosexuality in China. It also analyzes other contemporary Chinese laws that deal with sexual behaviors, organizations, media representation, trademarks and intimate relationships, which are subtly linked to the stigmatization of homosexuals as sexual deviants who are unfit for family life and bad for children, or as 'family outlaws'. It considers the various forms in which power is used to make homosexuality invisible-and-visible, illegal-and-legal in different circumstances, where the law works as both a juridical and a disciplinary institution to restrain the 'abnormal'.

Chapter 3 focuses on the imperative applied to most people in China, whether straight or gay, to enter into different-sex marriage. It approaches marital norms from the legal reasoning used in cases of divorce. By studying how Chinese courts construe the provision on 'complete breakdown of spousal affection' in divorce cases, we can see how marriage is gendered, and is understood as both utopian and pragmatic in everyday life in contemporary China. This chapter also examines several court cases and life stories to illustrate the marital choices same-sex-oriented people make and their respective socio-legal consequences. The arrangements include staying single, living with one's same-sex partner, entering into a mixed-orientation marriage,¹²¹ and having a cooperative marriage.¹²²

Chapter 4 examines the societal expectation that people have children, and how Family Law in China treats people in different-sex marriages as the most legitimate parents. It also examines how the law disadvantages the unmarried, including same-sex couples. This chapter focuses on the pressure same-sex-oriented people face to have children, and how some of my respondents become parents outside different-sex marriage, in mixed-orientation marriages, or in cooperative marriages. The experiences of using assisted reproductive technology and the legal encounters people have in that context in and outside China are also touched upon.

Chapter 5 discusses the anxiety about getting old common to both younger and older same-sex-oriented people, which is also shared by their parents and, for some, by their straight spouses. It investigates how Family Law grants privileges to people who follow the 'straight path' of the heteronormative trajectory of ageing, namely, growing old after taking a spouse and having offspring. In particular, it illustrates how the laws on intestacy, tenancy, social security, tax and medical decision contribute to the creation of a sense of precariousness for the unmarried. It also shows how same-sex-oriented people imagine and actually live their old age, which are constrained by, yet also reconfiguring, the framework of heteronormative family and its laws.

121 Mixed-orientation marriage is defined in footnote 18.

122 Cooperative marriage is defined in footnote 1.

Chapter 6 has a slightly different focus. While the previous three chapters mainly look at ordinary same-sex-oriented people who do not want to find themselves in close proximity with lawmakers, law enforcers or adjudicators, this chapter looks at the attempts by LGBT NGOs and individual activists to change China's laws on sexual orientation. It documents the major milestones of LGBT legal activism in the 2010s, ranging from strategic litigation, requesting open government information, legislative lobbying, to using international human rights mechanisms. Most issues they have brought up (such as homophobic textbook, conversion therapy, and LGBT-related films) do not strictly belong to Family Law (FL) 1 and 2, but are significant challenges against the FL3 and 4 that produce the deep stigma of family outlaws.

Chapter 7 concludes the thesis by making into a narrative quilt the previous patches of pluralist legalities, marriage, parenthood, eldercare and activism of same-sex-oriented people in China. It further theorizes the epistemology of the straightjacket, the framework of FL1, 2, 3 and 4, and the emotional dimensions of legal consciousness. It also problematizes the mainstream global gay rights politics that is too closely wedded to identity politics, coming out and same-sex marriage. It summarizes the beyond-marriage openings in Chinese law, and discuss the possible routes of activism that values both visibility and ambiguity. In the end, this thesis reflects upon its academic and political contribution, which is not merely to add some 'Chinese cases' to the global gay rights paradigm, but to question its very universality.

Having a 'polyamorous' relationship with law, anthropology, gender/sexuality studies, post-colonial scholarship and activist engagement all at once is challenging but rewarding. I try not to use too many jargons from any of these disciplines. The ethnographic stories in Chapters 3, 4 and 5 come after the black-letter legal analysis, so the readers from a non-lawyer background may skip the first halves of these chapters. The 'Index for Readers of Different Interests' in the end of this thesis can be a helpful navigator. I hope you will be pleased to note, as I do, that the connections between different disciplines, lifestyles and standpoints are as fascinating as their discrepancies.

