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

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Surely, it's a skill  
 But it can be learned  
 First you'll have to work on your handshake  
 Always look in someone's eyes  
 Do you believe in stories?  
 Or do you believe his eyes?

....

Just like a song you vaguely recognize  
 A beautiful refrain  
 It doesn't matter if you don't know the words  
 As long as you can make them up...

— Swelter, 'How to Fit in', from the album *Mountains for Everyone*, 2012

### 7.1 STRAIGHTJACKET REVISITED

Fitting in, fitting out, telling stories, or making them up. These are skills everyone had better master in order to be 'ordinary'. As this thesis has shown, an 'ordinary' family life in mainland China today is circumscribed by a series of imperatives: getting married at an 'appropriate' age and staying in a marriage, having children and grandchildren, and becoming old preferably with the care of one's offspring. Against this background, fervent debates are going on, online and offline, with regard to how same-sex-oriented people can deal with these imperatives, individually and collectively: Had we better stay low-profiled or come out to our friends, colleagues and parents? Should we stick to our true selves or bow to the reality? Is cooperative marriage a smart coping strategy against the marital and reproductive pressure, or is it a pathetic compromise? Are those who have chosen to marry an unwitting person of the different sex pitiful for having to live under pressure, or are they condemnable for ruining the efforts of gay people to gain respect and recognition from society? And, should same-sex marriage be the ultimate goal for making life easier for same-sex-oriented people, or do we have other options?

This thesis does not provide one-size-for-all answers. It instead brings into light two major lines of thinking buttressing the divergence on all the above questions. One is based on the epistemology of the closet,<sup>1</sup> which assumes the existence and importance of one's essential (homo)sexual self, the moral necessity to candidly reveal that truth in intimate relationships, the discomfort and shame of being kept closeted, as well as the liberating effect of coming out. The other relates to an epistemology of the straightjacket, which questions the essential, autonomous self and the

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

'inner strength' against external pressure.<sup>2</sup> It also takes seriously the socio-economic-legal benefits of fitting in, as well as the unaffordable costs for the have-nots to be openly queer.

To recapitulate, the metaphoric straightjacket has several traits that cannot be captured by the idea of closet: 1) It is constraining, yet not just for gay people. While heterosexuals are often considered unnecessary to hide in the closet, the long sleeves of the straitjacket that regulates family life in all its capillaries actually strap over the (sexual) majority and minority alike.<sup>3</sup> 2) Unlike the cold, dark closet, the straightjacket does keep one warm and decent, indicating the emotional and material benefits of a normative family and the reasonable desire for such a safe net, which is again not gay specific. 3) Moreover, despite its suffocating effects similar to the closet, straightjacketing as a dynamic process is also a form of art, a stage magic where gimmicks can be deployed, agency exercised and thereby some free air obtained, which can be performed in both loud and silent ways.

These aspects of a normative family life have complicated the binaries of in/out, gay/straight, secrecy/openness, and lie/truth produced by the epistemology of the closet. The latter, by linking silence with oppression and non-disclosure with inauthenticity, leads to a commonsense understanding of Chinese 'gay'<sup>4</sup> people in mixed-orientation or cooperative marriages as simply perpetrators of 'marriage fraud', performers of cunningly scripted plays, or victims of the society's homophobic silencing. These images are largely based on a 'repressive hypothesis':<sup>5</sup> the mainstream society endeavors to suppress homosexuality, whereas homosexual subjects are eager to live openly if they can. This is partly true if we look at some lesbian- or gay-identified people's hard time in the closet and, in contrast, their feeling of emancipation after finally coming out, especially to their parents.<sup>6</sup>

However, pushing same-sex-oriented people into the closet, especially into a straight-looking marriage, is but one form of oppression. Let us remember Sedgwick's caveat on the double bind that gay people are perpetually struggling with: homophobia often insists on not only refusing to know but also knowing more about gay people; the disclosure is thus 'at

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2 For the individualistic discourse on being mentally strong and coming out, see Chapter 3, footnote 84, and Chapter 5, footnote 76 and accompanying text.

3 Yoshino elaborated this point eloquently: 'angry straight white men ... are understood only as impediments, as people who prevent others from expressing themselves, rather than as individuals who are themselves struggling for self-definition. No wonder they often respond to civil rights advocates with hostility'. See Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House, New York, 2006) 25.

4 Quotation marks are used here to emphasize that not all same-sex-oriented people have a gay identity yet are often arbitrarily categorized and judged as such.

5 Michel Foucault, *The History of Sexuality* (Pantheon Books, New York, 1978) 10.

6 For coming-out-to-parent stories, see Sections 5.2.1 and 5.2.2.

once compulsory and forbidden'.<sup>7</sup> As shown in the denunciation of 'gay frauds', one can be 'faulted for not disclosing enough rather than disclosing too much about her or his sexuality'.<sup>8</sup> In other words, in addition to the oft-discussed compulsory heterosexuality,<sup>9</sup> another powerful yet less criticized imperative on same-sex-oriented people is 'compulsory confession'.<sup>10</sup> Coming out and telling more personal stories about being gay may be an anti-dote to the former form of homophobia, but it plays right into the latter one.

Therefore, this thesis argues that to tackle the two contradictory demands, i.e., compulsory heterosexuality *and* compulsory confession, same-sex-oriented people should deploy two seemingly paradoxical strategies contextually. Assertively coming out tackles the erasure of homosexuality (as evident in the eye-catching lawsuit against film censorship over homosexual scenes and that against conversion therapy);<sup>11</sup> meanwhile, pragmatically entering into a straight-looking familial life path (even without full disclosure) challenges the confessional underpinning of the call for 'being your true self' and 'living under the sunlight'. More importantly, each approach is limited without one another. If being 'out and proud' becomes the only moral choice, then we may interpret silence too narrowly as complicit with oppression, which delegitimizes the vast number of silent subjects who do not come out as LGBTs or even do not self-identify as such. However, if passing in the straightjacket becomes the only profitable option, then we fail to create alternative spaces for those who do find it suffocating and who are unreasonably disadvantaged as family outlaws.

In other words, visibility and secrecy are both worth valuing and should not be antagonized. Of course, people at different positions may weigh them differently, thus showing diverging life paths, the legality and morality of which should not be pre-judged. That means if neither full transparency nor sheer darkness is desirable for same-sex-oriented people, then a certain level of opacity, ambiguity and elasticity is needed, both in

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7 See Sedgwick, *Epistemology of the Closet* (1990) 70; see also, Nicholas de Villiers, *Opacity and the Closet: Queer Tactics in Foucault, Barthes, and Warhol* (University of Minnesota Press, Minneapolis and London, 2012) 3.

8 Ibid. See also, Jingshu Zhu, "'Unqueer" Kinship? Critical Reflections on "Marriage Fraud" in Mainland China' (2017) *Sexualities*, DOI 10.1177/1363460717719240.

9 See Adrienne Rich, 'Compulsory Heterosexuality and Lesbian Existence' (1980) 5 *Signs* 4, 631-660.

10 As Foucault rightfully pointed out: 'An imperative was established: Not only will you confess to acts contravening the law, but you will seek to transform your desire, your every desire, into discourse ... [S]ex had to be put into words', see Michel Foucault, *The History of Sexuality (Volume 1: An Introduction)* (Pantheon Books, New York, 1978),) 21, 32. Like Rich (ibid), my use of 'compulsory' does not necessarily suggest certain force or threat that push people to confess; instead, the very voluntariness of coming out can be part of the socially constructed 'compulsion'. I appreciate Xiaofei Guo who helped me think through the mechanism of 'compulsory confession' (in Chinese 强制坦白).

11 See above, Sections 6.3.2. and 6.3.4.

daily life and in law. The next questions are: to what extent is the existing Family Law serving this need? How do people interact with the law for different goals? And, what can be done to make the law friendlier for both those who are 'out-and-proud' and those 'on-the-down-low'<sup>12</sup>?

## 7.2 A PLURALIST FRAMEWORK OF FAMILY LAW

This thesis has taken a pluralistic approach to understand the law, which is informed by the analytical framework of Family Law (FL) 1, 2, 3, and 4 proposed by Halley and Rittich.<sup>13</sup> Throughout the chapters, this framework has reminded us of the various legal and social norms that work together with and beyond the 'hardcore' statutory family law. Highlighting the inherent connections between FL1, 2, 3, and 4 allows us to study family with a broadened vision. Here I give a non-exhaustive list of the prototypical Family Law 1, 2, 3, and 4 that have appeared in previous discussions.

FL1 refers to codes, cases and interpretations regulating the commonly recognized family-law issues such as marriage, divorce, parenthood, and inheritance. The titles of these laws directly tell us its focal points (Table 1). The cluster of FL1 sets the framework of how the state's legal system defines and regulates normative families: what kind of relationships are idealized (i.e., caring and nurturing families based on different-sex, monogamous and reproductive marriages), what are forbidden (e.g., abandoning dependent family members, domestic violence, or having different-sex extra-marital affairs), and what are not even legally visible (e.g. having same-sex extra-marital affairs).<sup>14</sup> FL1 also prescribes dispute-settling mechanisms concerning property, custody and succession, and throughout the disputes and the courts' judgment, the ideal family is repeatedly announced and reinforced. Due to its black-letter nature, FL1 is the most difficult to negotiate away or circumvent for same-sex partners who want to establish a family of their choice. This is partly why many same-sex-oriented people would rather choose to enter into different-sex marriage, with or without disclosure, so as to enjoy the wholesale conveniences for heterosexual couples, at least before marriage is opened up for same-sex ones.<sup>15</sup>

12 'Down-low men' is often used to refer to the African- and Latino-American married same-sex-oriented men who have casual homosexual sex outside marriage without letting their wives know, see e.g., Lincoln Pettaway and others, 'Becoming Down Low: A Review of the Literature on Black Men Who Have Sex with Men and Women' (2014) 14 *Journal of Bisexuality* 2, 209–221. There are few discussions of Asian men under this term.

13 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.

14 See Section 2.2.5.

15 These conveniences are especially important when giving birth in China requires cumbersome administrative procedures. See Section 4.5.1.

Table 1: Examples of FL1

Title of Law	Provisions that Set the Framework of a Normative Family	Reference
Marriage Law	Article 2, A marriage system based on the free choice of partners, on monogamy (the Chinese term is literally 'one husband and one wife') and on equality between man and woman shall be applied.	Section 3.1.1
Adoption Law	Article 10 (2), Where a person with spouse adopts a child, the husband and wife must adopt the child in concert.	Section 4.2.4
Law on Succession	Article 10, The estate of the decedent shall be inherited in the following order: First in order: spouse, children, parents; Second in order: brothers and sisters, paternal grandparents, maternal grandparents.	Section 5.1.6

FL2 covers the legal fields that do not primarily regulate familial relationships but still use the terms describing familial relationships, such as 'spouse' or 'next of kin', in some provisions. These terms serve as a dividing line, centering 'normal' families and excluding others (Table 2). That is why the 'public' business relations and welfare system, seemingly irrelevant to the 'private' familial relationships, are nevertheless always 'in the shadow of marriage law'.<sup>16</sup> Like FL1, these laws are also difficult to avoid or challenge if the legal definitions of marriage and family remain.

Table 2: Examples of FL2<sup>17</sup>

Field of Law	Provisions that Center the Normative Family	Reference
Labor Law	Bereavement leave is granted only when one's lineal relative (spouse, parents and children) deceases	Section 3.1.1
Insurance Law	Articles 12 (3) and 95, Beneficiary of life and health insurance can only be next of kin	Section 5.1.2
Tax Law	Spouses are exempted from the burdensome deed tax	Sections 3.1.1 and 3.4.1
Criminal Procedure Law	Articles 73 and 83, The family members of a suspect shall be notified within 24 hours after he is detained	Section 3.1.1

FL3 refers to the legal rules that contribute structurally but silently to the ways in which family life is lived. These laws may not even contain any words in relation to marriage or family, but are nevertheless influencing how same-sex-oriented people are treated in their social surroundings, and subtly affecting their status vis-à-vis the notion of family. Several FL3 rules are thoroughly discussed in Chapters 2 and 6. The ambiguous terms in FL3 such as 'healthy', 'morality' and 'socialist spiritualization' (which also relate to FL4) are often disadvantageous to same-sex-oriented people (Table 3).

16 The overarching, shadowy effects of marriage law has been discussed in Section 1.2.

17 More examples of FL2 are summarized in Table 5, where the dividing line is not necessarily 'spouse' or 'next of kin'.

In judicial practices, these words are easily interpreted in a way that marks same-sex-oriented people as hypersexual, indecent, immoral and thus unsuitable for a wide range of social activities, including being shown on TV or trademarks, establishing organizations, and implicitly, forming a family.

Table 3: Examples of FL3<sup>18</sup>

Title of Law	Provision that Can be Used to Disparage Same-Sex-Oriented People	Reference
Measures Ensuring that Broadcasts, Television Programs and Films Strengthen and Correct the Moral Character of Adolescents	Paragraph 15: ...Unhealthy content related to sex, such as lines, scenes and plots that promotes sexual freedom, casual sex, sexual pleasure and homosexuality should be cut out.	Section 3.1.1
Trademark Law	Article 10.1.8: The following signs shall not be used as trademarks: ... those detrimental to socialist morals or customs, or having other unhealthy influences.xx	Section 4.2.4
Regulations for Registration and Management of Social Organizations	Article 4: social organizations shall observe the constitution, state laws, regulations and state policy, and shall not offend social morality.	Section 5.1.6

FL4 are not state-promulgated binding laws, but are a wider range of informal norms that give meaning to FL1, 2, 3 and push people towards conformity without coercion. Some FL4 norms sustaining heteronormative morality are codified into state law, as shown in the abovementioned examples of FL3, and some others repetitively appear in mainstream media and in our everyday life in the forms of beliefs, proverbs, rituals, and customs (Table 4). These norms are tacitly yet powerfully shaping people's perception of what is lawful and reasonable, the breach of which thus may bring about heavy moral condemnation, and sometimes even legal disadvantages. With its profound socio-cultural legitimacy, FL4 norms are often unmarked, inert and do not have instantly observable traces of change, but the efforts to reconfigure them can be as influential as litigation or legislative lobbying directed to FL1, 2 and 3.

18 See Section 2.2.4.

Table 4: Examples of FL4 that Influence Family Life

Informal Familial Norms	Reference
Hetero-romantic-sexual love has nowadays become an ideal package that justifies the morality and happiness of coupledness	Sections 3.3.2 and 3.4.2
Men and women are expected to take on different roles in family and at workplace; the financial ability is men's entrance ticket to the dating pool	Section 3.1.3
A daughter-in-law is expected to show courtesy towards the elders	Section 3.3.1
Adoptive children are deemed not as close as biological ones	Section 4.3.3
The superstition that marriage and procreation can counterbalance bad luck (chongxi) have pushed some young people to marry hastily	Section 3.4.2
The commonplace idea that housework and child-rearing labor are 'invaluable' makes these efforts oftentimes unpaid and unappreciated	Section 4.5.2
The folks' saying that 'bring up sons for help in old age, and store up grains against famine' makes many same-sex-oriented young adults and their parents worry about the non-reproductive future	Section 5.1
The bundling of care (xiao) and submission (shun) in the conventional understanding of 'filial piety' also puts pressure on both generations.	Section 5.2

While these norms often make same-sex-oriented people living in contemporary China feel suffocated, some other FL4 can serve as a powerful resource when written law is ambiguous or disadvantageous. For instance, some respondents have skillfully used 'guanxi' (social connection) to surf the legally grey or even forbidden areas,<sup>19</sup> and the Party slogan in Socialist China of 'Self-Reliance and Hard Work' have also justified and even glorified the two rural women's cohabitation.<sup>20</sup>

Closely related to the pluralistic conception of Family Law is the multiplicity of tactics the law deploys to regulate homosexuality and make them family outlaws. More specifically, as shown in Chapter 2, after the repeal of the criminal offence of hooliganism, the criminal and administrative rules still penalize certain same-sex behaviors among consenting adults, such as commercial or group sex.<sup>21</sup> The laws on public health, including HIV / AIDS and blood donation, serve to both shame and domesticate same-sex desires and behaviors.<sup>22</sup> The 'symbolic annihilation' of same-sex representations and signs, including films and trademarks, has made both the sexual and non-sexual aspects of same-sex-oriented people's life invisible in public spheres.<sup>23</sup> The obstruction of their lawful association prevents them from cultivating stronger communities.<sup>24</sup> The heteronormative marriage law turns a blind eye on same-sex relationships, punishing infidelity between

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19 See Section 4.3.1.

20 See Section 5.3.1.

21 See Section 2.1.

22 See Section 2.2.1.

23 See Sections 2.2.3 and 2.2.4.

24 See Section 2.2.2.

people of different sexes only, leaving a legal lacuna regarding one's extramarital affairs with a person of the same sex.<sup>25</sup> Overall, this chapter shows that Chinese laws often refrain from speaking loudly about homosexuality, but paradoxically have to shout its name out to erase it. This has created both opportunities and challenges for legal changes.

The chapter on activism (Chapter 6) reflects upon the various social and legal advocacy Chinese LGBT activists have carried out in recent years. Although only a few issues Chinese LGBT activists brought forward (same-sex marriage and domestic violence) are directly related to FL1, all the other ones, including conversion therapy, homophobic textbooks, film censorship and refusal of NGO registration, are FL3 and 4 that co-construct what a 'normal', legally protected family should look like. Without challenging the stigmatic images of homosexuals in these fields, the call for legal recognition of same-sex relationships would not be possible. Meanwhile, the strategies of challenging these laws are also numerous: litigating, lobbying the legislators, educating the lawyers, filing OGI requests, and making claims at the UN.<sup>26</sup> In these processes, the relations between the authorities and the activists are more dynamic than merely confrontational, as shown in the CEDAW country review.<sup>27</sup> These ongoing activities will keep changing the living conditions of same-sex-oriented people in China, and thus also influencing on their familial arrangements.

### 7.3 DEALING WITH FAMILY LAW ON DIFFERENT PATHS

Related to the pluralist framework of Family Law, the notion of legal consciousness is used in this thesis to examine two major interactive 'pull-and-push' forces in the operation of law: it looks at how the law plays a part in constructing people's daily life, their desires, identities and relationships, and how ordinary people deal with the hegemonic laws and create competing legalities in various ways.

Through the ethnographic stories, we have seen different familial paths Chinese same-sex-oriented people take, including 1) not marrying a person of the different sex, but staying single or living with one's same-sex partner(s); 2) marrying a consenting same-sex-oriented person of the different sex (cooperative marriage); and 3) perhaps most commonly, marrying a person of the different sex (mixed-orientation marriage). Each path can be further bifurcated, depending on whether their parents and/or spouses are informed of their orientation. These paths are partly paved by Family Law 1, 2, 3, and 4, especially the norms on marriage, parenthood and eldercare.

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25 See Section 2.2.5.

26 See Section 6.3.

27 See Section 6.3.5.

More specifically, marriage is the central institution from which a normative family life unfolds (Chapter 3). In contemporary mainland China, marriage has been tied up with housing, *hukou* (residence registration), social welfare, intra-China mobility, employees' rights, parental rights and old-age security in times of economic uncertainty. Such an appealing package is constantly prompting people to get married and stay in marriage, while disadvantaging the non-conformists.<sup>28</sup> As an imperfect institution, however, marriage often fails to provide its promised ideal package of romantic love, passionate sex, harmonious family life and altruistic sharing and caring.<sup>29</sup> Even so, it is still desirable for many, as an indication of normalcy and a coupon for numerous benefits.

Closely related to the marital imperative is the pressure to become parents (Chapter 4), especially for women at their 'best reproductive age'. The pressure is even heavier for the generation born under the one-child policy that only ended nationwide in 2016. Moreover, dual-parenthood based on formal, different-sex marriage still occupies a legally and culturally superior position, although children of single parents, adopted and out-of-wedlock children are legally recognized. Only legally married couples can get a 'birth permit', and only with this certificate can a child be legally delivered and registered as a lawful resident.<sup>30</sup> Similarly, only different-sex married couples are allowed to adopt a child jointly.<sup>31</sup> Step-parent adoption is only valid within different-sex marriages, and foreign homosexual individuals or couples are explicitly forbidden to adopt Chinese children because homosexuality is deemed 'unhealthy' and 'immoral'.<sup>32</sup> Restriction also shows in fostering.<sup>33</sup> Surrogacy is completely banned in mainland China, and the access to assisted reproductive technologies is closely tied up with marriage, too (with an unproved exception of a bylaw in Jilin).<sup>34</sup>

The marriage and reproductive imperatives are both highly gendered, posing different expectations and pressure on men and women.<sup>35</sup> For instance, men are expected to have their biological children, even without marriage, as many parents of gay men have expressed;<sup>36</sup> on the other hand, women are pressured into both marriage and motherhood, and it seems that with the rising of their economic independency and feminist awareness, more and more same-sex-oriented women are now dare to refuse or negotiate with the reproductive imperative, which is vividly demonstrated by the tensions between some cooperatively married couples.

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28 See Section 3.1.1.

29 See Section 3.1.2.

30 See Section 4.2.1.

31 See Section 4.2.4.

32 Ibid.

33 See Section 4.2.5.

34 See Section 4.2.6.

35 See Sections 3.1.3 and 4.1.

36 See Sections 4.3.2 and 5.2.2.

The laws in relation to old age also influence people's familial arrangements. The beneficiaries of social security and commercial life insurance in China are both restricted within spouses or next of kin. The same goes for statutory succession.<sup>37</sup> However, the actual legal inconvenience in old age outside of normative family is less worrisome than people tend to assume, as shown in the laws on surrogate medical decision, living organ donation and continued tenancy, which all give openings to non-familial interdependent relationships.<sup>38</sup> It can thus be said that the ageing anxiety is more related to FL4, where the imagination of a happy old age is primarily linked with filial piety (*xiao shun*), a moral-legal obligation that expects obedience, adjacency, economic and emotional support all at once.

Interacting with the laws on the marriage-parenthood-eldercare straight-jacket are three prototypical schemas of legal consciousness – 'before' (obeying or bowing to) the law, 'with' (utilizing or playing with) the law and 'against' (avoiding or rejecting) the law.<sup>39</sup> All of them can be found in my respondents' lived experiences, and oftentimes in the same person in a single life event. Next, I would briefly review the legal consciousness shown in each of the three main relationships: same-sex partnership, cooperative marriage and mixed-orientation marriage.

Same-sex couples living outside of the marriage institution in China have to deal with the law's blindness on their relationships. For instance, the property dispute of a cohabiting same-sex couple is regulated by laws on business partners instead of the rules on common property in Marriage Law.<sup>40</sup> Inconveniences also show in obtaining birth permit, adoption, succession, insurance, medical care, etc.<sup>41</sup> Despite the legal exclusion, same-sex couples are creating informal legalities in their own ways. Some use weddings without marriage to gain public legitimacy for their relationship, and a lesbian couple have given new meanings to their real-estate certificate as if it were a marriage certificate.<sup>42</sup> They have made full use of the de facto adoption (*guoji*) to form their families, or use social connection (*guanxi*) to carry out in vitro fertilization in a public hospital that is otherwise impossible.<sup>43</sup> They have come up with all sorts of eldercare plans, such as preparing for rainbow nursing homes or developing intergenerational same-sex love/friendship/kinship.<sup>44</sup> Some cultural-political discourses are also appropriated for them to legitimize their relationships, as evident in the two elderly ladies who call their life-long cohabiting relationship as 'self-reliance', a popular communist party line in 1950s till the late 70s.<sup>45</sup>

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37 See Section 5.1.2 and 5.1.6.

38 See Sections 5.1.4, 5.1.5 and 5.1.7.

39 See Section 1.3.

40 See *Gao v. Han* in Section 3.2.3.

41 See Sections 4.2 and 5.1.

42 See Section 3.2.2.

43 See Sections 4.2.4 and 4.2.6.

44 See Section 5.3.2.

45 See Section 5.3.1.

Cooperative marriage is also a relationship where comfort, constraints and resistance coexist. Once married, the cooperative lesbians and gay men have to lead their life according to the formal and substantial rules on marriage. This gives them much expediency in purchasing real properties in some cities and giving birth to children through lawful procedures. Meanwhile, they are also bound by the social norms that circumscribe a culturally intelligible marriage, such as the obliged show-up in the other's family gatherings, and the expectation of a wife to serve tea for a mother-in-law.<sup>46</sup> They have exercised agency to customize their marriages and gain some free air: they may sign prenuptial agreements, or at least verbally negotiate the rights, obligations and exonerations of each party; they tend to worry less about divorce; they often show a greater level of egalitarianism, although some gendered cultural expectations can hardly be negotiated away; they are also more likely to challenge the normativity of monogamy, since the existence of their extra-marital same-sex relationships have already made them to some extent non-monogamists.

Mixed-orientation marriage is the most controversial way in which same-sex-oriented people deal with the straightjacketing imperatives. The 'gay' men are often condemned as having committed 'marriage fraud' and 'womb fraud', if they form a family with a straight spouse without informing her of his sexual orientation. Like any different-sex marriage, the same legal rules on property, infidelity, parenthood, succession and medical care almost invariably apply to mixed-orientation marriages, except for cases where judges would take the stigmatic image of homosexuality into consideration in custody.<sup>47</sup> Moreover, the existing law does not have any punitive rules on same-sex extra-marital affairs, which is partly why the *tongqis* (wives of 'gay' men) feel ignored resort to mass media, hoping the public shaming of their 'fraudulent gay husbands' can do them justice. In contrast with the over-simplified media representation of *tongqis'* stories, however, I have encountered in my fieldwork various ways of dealing with such marriages: to maintain friendship instead of romantic love in marriage, to create some physical space from each other, to trivialize sex life, to communicate candidly, to experiment with non-monogamy, and to critically reflect upon the socio-legal straightjacket that gives few livable alternatives for both spouses.<sup>48</sup>

The before-, with- and against-the-law practices in all the above forms of relationships and occasions have shown us that the law can be 'both sacred and profane, God and gimmick, interested and disinterested, here and not here'.<sup>49</sup> Moreover, as these co-existing, overlapping schemas of legal consciousness sediment in more and more people's lived experiences,

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46 See Section 3.3.1.

47 See Section 4.4.1.

48 See Section 3.3.2.

49 Silbey and Ewick, *The Common Place of Law* (1998) 223.

they are prone to create informal legalities that can then compete with the official one that defines and regulates family life. Such competition and transformation is happening not simply at the textual or behavior level, but in a more embodied way.

#### 7.4 THE EMOTIONS OF LAW

The legal consciousness theory is not *just* about describing and categorizing people's thoughts and behaviors. More importantly, it is a critical tool to challenge the formal law's hegemony, through constructing diverse legalities in everyday life. However, previous literature has not told us how exactly different meanings of law are made and unmade, by what discursive, material and affective forces. One of the limits of the notion of legal 'consciousness' is that it seems to assume a rational subject, who acts 'consciously' before, with or against the law for his best interest. But are these behaviors generated from rational decision-making only?

Without antagonizing reason and feeling, which are both somatic and semantic, I found a recurring theme in many stories told in this thesis: the indispensable role emotions play in people's push-and-pull interaction with the law. In other words, law participates in molding our feelings and vice versa. Personal and intimate as they are, feelings are simultaneously informed by social conventions, institutions and laws, as Williams points out in his elaboration of the structure of feelings.<sup>50</sup>

For instance, the pressure to marry, the stress to procreate and the fear of aging tragically is strongly felt in same-sex-oriented people. The anxiety of 'no future' is closely related to the feeling of being 'abnormal', being left out, and being undervalued, which are all written explicitly or implicitly in laws that pamper the hetero-familial good-life fantasy and prejudice the non-normative existence. Although most of my respondents do not know the specific legal provisions, they can easily find out their unprotected status when they encounter the inconvenience in almost every aspect of family life. These unpleasant experiences may make many same-sex-oriented people feel unconfident and pessimistic, thus having a stronger impulse to act 'before the law' and live a straightjacketed life.

Another example of the law's emotion-producing effect can be found in the widespread anger and hatred of *tongqis* against 'gay frauds'. Such strong feelings are not merely a matter of personal traumas, but are also socially produced, replicated and circulated, like a form of capital,<sup>51</sup> especially through *tongqis'* online discussion and media coverage. *Tongqis'* discontent and homophobic aversion is partly instigated by the manifestation of law

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50 Raymond Williams, *The Long Revolution* (Pelican Books, Middlesex and Victoria, 1965) 64-65.

51 Sara Ahmed, 'Affective Economies' (2004) 22 *Social Text* 2, 117-139.

in daily life: women's unpaid labor in marriage and reproduction is often unappreciated in marriage law and divorce cases; the courts' legalistic judgments concerning 'fraudulent marriages' do not favor the wives even if they have robust evidence of their husbands' cheating with men; and the pejorative language used in the media coverage of criminal cases concerning promiscuity, AIDS and drugs of gay men<sup>52</sup> further justifies the panic against homosexuality. Conversely, these feelings have also motivated some *tongqis* to come out in public, hoping to convince the judges and legislators to see and punish the 'frauds'.<sup>53</sup> As we recalled in the previous section, there are other feelings in mixed-orientation marriages, yet they are much less attended in media and academia. In return, *tongqis'* victimized feelings, as an important part of the dominant discourse of 'marriage fraud', can influence the legal authorities' attitude, as evident in the Beijing First Intermediate Courts' non-binding legal report that sides with *tongqi* and stigmatizes married 'gay' men.<sup>54</sup>

Importantly, in addition to stress, anxiety, grudges and hatred, other feelings are also emerging in the life of same-sex-oriented people. One is a certain degree of easiness, as exemplified by laughter of the two old ladies despite the bitterness in life.<sup>55</sup> We also see the comrade sentiments emerging from the shared stress and anxiety, as evident in the relatively egalitarian cooperative parenting experience between some lesbians and gay men,<sup>56</sup> and in the idea of collective eldercare among PFLAG parents or same-sex-oriented elders.<sup>57</sup> There is a feeling of kinship, too, as shown in my deep attachment with some respondents,<sup>58</sup> and in several mixed-orientation and cooperative marriages.<sup>59</sup> And we have seen the confidence in the 'friendship as a way of life', borrowing Foucault's term,<sup>60</sup> in the joyful, living-in-the-moment relationship between the old man and his multiple 'friends/lovers/sons'.<sup>61</sup> All these feelings of can arguably be forms of 'queer optimism'<sup>62</sup>, which may lighten some heavier moods that are often deemed as the key tone of queer life in China and elsewhere.

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52 For instance, A popular legal education program on the Chinese party-state's central television, Legal Report, has demonized homosexuality in 'Dangerous Relationships', 13 February 2015, at [www.webcitation.org/6r2SLSG7](http://www.webcitation.org/6r2SLSG7).

53 See the report on mixed-orientation marriage of the Beijing Intermediate Court, in Section 2.2.5.

54 See Section 2.2.5.

55 See Section 5.3.1.

56 See Section 4.5.2.

57 See Sections 5.2.2 and 5.2.3.

58 See Sections 5.3.1.

59 See e.g., *tongqi* Rou's story in Sections 3.2.2 and Fish's gratitude to her cooperative gay husband in 5.2.1.

60 Michel Foucault, 'Friendship as a Way of Life' in Paul Rabinow (ed), *The Essential Works of Foucault, Volume I, Ethics: Subjectivity and Truth* (The New Press, New York 1997)

61 See Section 5.3.2.

62 Michael D Snediker, *Queer Optimism: Lyric Personhood and Other Felicitous Persuasions* (University of Minnesota Press, Minneapolis and London, 2009).

Understandably, social movements tend to prefer using tragic stories to arouse the empathy of the public. In order to change the written laws, activists need to explain why the current rules are shortsighted, discriminatory and even painfully oppressive. To that end, tears and outcry do work.<sup>63</sup> However, these strategies are not enough. For LGBTs, the sense of community should not only be built on the collective memories of being marginalized, but also feelings of care, warmth, pleasure and indeed hope. The representation of a full range of feelings can do justice to the rich lived experience of same-sex-oriented people. Only when the rigorous arguments about gay rights circulate together with various embodied feelings, can Family Law (especially FL4) be changed in a more profound way, a way that addresses these widely shared feelings regardless of sexual orientation or marital status.

## 7.5 BEYOND-MARRIAGE APPROACH OF LGBT LEGAL ACTIVISM

With the increasing LGBT visibility in media and in daily life, Chinese legislatures and courts can no longer avoid answering some tricky moral-legal questions: If the law were to illegalize those extra-marital same-sex affairs that bother the straight monogamous spouses, what about the same-sex relationships that do not intrude into others' marriage? If the law were to punish illegal child-bearing and -rearing by same-sex-oriented people outside of marriage, then should they be given lawful routes towards parenthood? If the law encourages people to 'go home often' and privatizes eldercare responsibilities, what kind of 'home' is ready to accommodate same-sex-oriented 'family outlaws'?

One solution to these questions is to open up marriage for same-sex monogamous couples, so that they can form their own legally valid families, with a whole package of rights and obligations as previously granted to their different-sex counterparts. As marriage equality has become a hot topic in LGBT movements worldwide, China has seen same-sex marriage campaigns in recent years as well.<sup>64</sup> While it is important for same-sex-oriented people to equally enjoy the rights attached to marriage, fitting into this institution may not be the only way out. The idea of straightjacket being a constraint for both straight and gay can further help us to think LGBT (legal) activism in a more inclusive way.

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63 One of the most frequently told prototypical sad stories worldwide is that of an old same-sex couple unable to make medical decision for each other. For more analysis of this story and its legal inaccuracy in Chinese context, see Section 5.1.4.

64 See Sections 6.1 and 6.3.2.

In the previous chapters, we have seen some laws with open-ended wording than ‘spouses’ or ‘next of kin’, which may be used in a way that benefits same-sex-oriented people. Of course, these vague terms do not directly guarantee gay rights unless interpreted more unambiguously by the legislative or judicial bodies. However, the potential for gay-friendly interpretation of existing laws at least has points to us a sporadic route of rights advocacy, namely, the ‘beyond-marriage approach’. This approach was first proposed by some scholars, lawyers and activists in North America as an alternative to or complement of marriage equality.<sup>65</sup> It is argued that different-sex marriage, or even same-sex marriage, should not be used as a dividing line for the eligibility for most legal rights; the contemporary values embodied in each particular law should.<sup>66</sup> In fact, as shown in the table below, there are many profound values that transcend people’s sexual orientation and marital status, including best interests of the child, women’s reproductive rights and autonomy, non-violence, as well as the attachment between interdependent adults in important health- and money-related decisions (Table 5).<sup>67</sup>

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65 The beyond-gay-marriage approach has been discussed in Polikoff, *Beyond (Straight and Gay) Marriage* (2008); Michael Warner, ‘Beyond Gay Marriage’ in Wendy Brown and Janet E Halley (eds) *Left Legalism/ Left Critique* (Duke University Press, Durham and London, 2002) 259-289. See also, a jointly signed document by a group of lesbian, gay, bisexual, and transgender and allied activists, scholars, educators, writers, artists, lawyers, journalists and community organizers: *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships*, 26 July 2006.

66 Polikoff, *Beyond (Straight and Gay) Marriage* (2008).

67 *Ibid*, 137-143.

Table 5: Laws with Beyond-Marriage Values and Wording

Value	Legal Issue	Legal Source	Beyond-Marriage Wording	Reference
<b>Best Interests of the Child</b>	De facto Adoption ( <i>Guoji</i> )	Supreme People's Courts Opinions on Several Problems in Implementing Civil Policies and Laws (1984)	'having established a <i>caretaking relationship</i> '	Section 4.2.4
	Fostering	Policy of a Child Welfare agency in Zhongshan city (2010)	' <i>appropriate for foster caring, not limited to "complete families"</i> '	Section 4.2.5
	Guardianship	General Principles of Civil Law (1986), Article 16(2)	'any other closely connected relative or friend willing to bear the responsibility of guardianship...'	Section 4.2.3
<b>Reproductive Rights and Autonomy</b>	Medically Assisted Reproduction	Regulations of Jilin Province on Population and Family Planning (2002), Article 30(2)	'women who decide not to marry...'	Section 4.2.6
<b>Anti-Violence</b>	Domestic Violence	Law Against Domestic Violence (2016), Article 37	'those living together who are <i>not</i> family members'	Section 6.3.3
<b>Adult Interdependency (Health)</b>	Medical Decision in Emergency	Administrative Regulation on Medical Institutions (1994), Article 33	'the agreement and signature of his or her family member or a <i>related person</i> '	Section 5.1.4
	Living Organ Transplantation	Regulation on Human Organ Transplantation (2007), Article 10	'having developed a familial relationship ... for reasons like assistance and support'	Section 5.1.5
<b>Adult Interdependency (Economy)</b>	Statutory Succession	Law of Succession, Article 14	people other than a successor who were <i>largely responsible for supporting</i> the deceased, or who had <i>depended on the support of</i> the deceased	Section 5.1.6
	Legacy-Support Agreement	Law of Succession, Article 31	'a person who... assumes the duty to support the deceased in his or her lifetime and attends to his or her interment after death'	Section 5.1.6
	Continued Tenancy	Contract Law (1999), Article 234	' <i>jointly living</i> in the unit with the lessee'	Section 5.1.7

In other words, many legal dilemmas this thesis has brought to light are not gay-specific, but are influencing all unmarried people as well, so the answers do not have to be based on same-sex couples' right to marry only. In addition to coming out and fighting for marriage equality, LGBT activists can invest more on establishing alliance with other disadvantaged groups (such as cohabiting heterosexual couples, unmarried heterosexual women who want to access the sperm bank, or elders who have no family members to reply on), so as to make legal changes for a wider range of beneficiaries. So far, few attempts have been made in China to push the authorities to interpret these words more explicitly friendly to same-sex couples and other subjects and relationships outside marriage and biological kinship. Such a piecemeal approach of law reform may not be an exciting quick fix for all the difficulties same-sex-oriented people are going through. However, it can benefit a wider scope of individuals and relationships. Hopefully, more scholarly work and activism will be carried out to this end.

Overall, this thesis has discussed the constraining, covering and malleable nature of the marriage-parenthood-eldercare straightjacket, the pluralist framework of family law, and the divergent life paths, feelings and legal consciousness of same-sex-oriented people and those closely related to them. It contributes detailed legal analysis and vivid ethnographic stories to the (queer) kinship studies in China and beyond. It pays tribute to all the activists, scholars and ordinary people who take a part in loosing and reshaping the straightjacket.

