

Disturbing heteronormativity: The ‘queer’ jurisprudence of Albie Sachs

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Introduction

The title of this paper suggests there is a firm link between the jurisprudence on sexuality and gender authored by Justice Albie Sachs during his tenure on the Constitutional Court and the work conducted in the field that has become known as queer legal theory.¹ That such a link exists needs to be affirmed since there is perhaps no other South African judge whose jurisprudence has considered the question of the legal empowerment and/or emancipation of sexual minorities as seriously as that of Justice Sachs.

Yet, as we will suggest in this paper, there is good reason to insist on putting the word ‘queer’ in inverted commas when it is used to describe Justice Sachs’ jurisprudence on gender and sexuality. As we read it, this is the case because there is a tension throughout this jurisprudence that causes the jurisprudence to be ‘queer’ in at least two senses of that word. First, it is queer in the sense that the term is used to designate oppositional stances to heteronormativity. In this sense, Sachs’ jurisprudence accords broadly with the critical aims of queer legal theory – it disturbs heteronormative² legal categories and the way in which these

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¹See generally Warner (ed) *Fear of a queer planet: Queer politics and social theory* (1993); Jagose *Queer theory: An introduction* (1996); Butler ‘Critically queer’ *GLQ: A journal of lesbian and gay studies* (1993) at 17-32; Edelman ‘Queer theory: Unstating desire’ *GLQ: A journal of lesbian and gay studies* (1995) at 343-346; Fuss (ed) *Inside/out: Lesbian theories, gay theories* (1991); Sedwick *Epistemology of the closet* (1990); Valdes ‘Queers, sissies, dykes and tomboys: Deconstructing the conflation of “sex”, “gender” and “sexual orientation” in Euro-American law and society’ (1995) *California LR* 1; and De Vos ‘Gay and lesbian legal theory’ in Roederer and Moellendorf *Jurisprudence* (2004) 328-353.

²We support and follow the definition of ‘heteronormativity’ as provided in Steyn and Van Zyl ‘The prize and the price’ in *The prize and the price: Shaping sexualities in South Africa* (2009) at 3: ‘Heteronormativity is the institutionalisation of exclusive heterosexuality in society. Based on the assumption that there are only two sexes and that each has predetermined gender roles, it pervades

categories have been traditionally and historically understood. However, the second sense in which this jurisprudence is queer turns on another meaning of the titular phrase 'disturbing heteronormativity'. Sachs' queer jurisprudence is also 'queer' because it (still) allows heteronormativity to disturb it every so often. Sachs' jurisprudence on sexuality and gender is thus also 'queer' in the sense that it is often strange and foreign to the project of queer legal theory.

We suggest therefore that Sachs' jurisprudence does not have any simple or clear relationship with queer legal theory. It makes concessions to heteronormativity at the same time as it opposes it. This is perhaps inevitable given that Justice Sachs is a judge who – as he himself has admitted³ – is constrained by the law and given that 'the law' is, at least on some influential accounts, an institution of heteronormative power.⁴ Confronting this 'inevitability' leads us to the question whether any emancipatory jurisprudence that is set in the socio-cultural context of a conservative heteronormative hegemony can do no more than *both* resist *and* endorse, at least to some extent, the heteronormative assumptions underlying the legal regulation of sex and intimate relations in our society. That being as it may, we suggest that Sachs' jurisprudence – in struggling, in fact in *wrestling*⁵ with heteronormativity – is exemplary for queer legal theory in that it reveals to us how much has been achieved for sexual minority freedom while it simultaneously reminds us that much work remains to be done by queer legal theory in its opposition to the disciplinary and oppressive effects of heteronormative power.

Queer legal theory and Sachs' judgments on sexuality and gender

Introduction

What distinguishes queer legal theory from certain approaches in feminist legal theory is its sharp and definitive break with identity politics and the notion of the binary sexual identities 'heterosexual' and 'homosexual'.⁶ Queer legal theory – in

all social attitudes, but is particularly visible in "family" and "kinship" ideologies.'

³See, eg, remarks made by Sachs J in *S v Makwanyane* 1995 6 BCLR 665 (CC) para 349: 'Our function is to interpret the text of the Constitution as it stands. Accordingly, whatever our personal views on this fraught subject [of capital punishment] might be, our response must be a purely legal one.' See also *The strange alchemy of life and law* (2009) 47-58, where Sachs J problematises this notion in more detail.

⁴For a view that implicitly contests this assertion, see Golder and Fitzpatrick *Foucault's law* (2009) 2-4.

⁵The image that comes to mind here is of the biblical Jacob wrestling with the Archangel Michael as depicted in the celebrated painting by Delacroix. Available at http://en.wikipedia.org/wiki/File:Lutte_de_Jacob_avec_l%27Ange.jpg

⁶Valdes (n 1) 135; see also Seidman 'Identity and politics in a "post-modern" gay culture: Some historical and conceptual notes' in Warner *Fear of a queer planet* (n 1), 105 at 106; Halley 'Reasoning about sodomy: Act and identity in and after *Bowers v Hardwick*' (1993) *Virginia LR* 1721 at 1723; Goldstein 'Reasoning about homosexuality: A commentary on Janet Halley's "Reasoning about so-

line with queer theory – questions the notion of fixed, essentialist notions of sexuality and argues that sexuality is always culturally and socially constructed.⁷ But queer legal theory goes further, questioning the very notion of sexual identities – the notion that one is a certain kind of subject with stable and trans-historical characteristics *because* of one's sexuality. Through the questioning of sexuality and sexual identity queer legal theory consequently also subverts the hierarchy of the heterosexual over the homosexual. This subversion is based on the understanding that heteronormativity flourishes on the basis of the categories of 'heterosexual' and 'homosexual', categories through which desire is often constructed in terms of power relations in society in a way that privileges certain forms of (mainly) heterosexual desire while marginalising other forms of (mainly homosexual) desire.

In a heteronormative world, discursive practices as well as legal regulation help to construct a hierarchy of sexual desires, practices and identities and this hierarchy has a disciplining force that influences the way we understand and order the world through law but also through other social practices.⁸ The notion of heteronormativity is based on a Foucauldian understanding of how power operates to produce and maintain this hierarchy of sexual desires, practices and identities.

domy: Act and identity in and after *Bowers v Hardwick*" (1993) *Virginia LR* 1781 at 1797; Wintemute 'Sexual orientation discrimination as sex discrimination: Same-sex couples and the Charter in Mossop and Layland' (1994) *McGill LJ* 429 at 431; Halley 'The politics of the closet: Towards equal protection for gay, lesbian and bisexual identity' (1989) *UCLA LR* 915 at 916; Thomas 'Beyond the privacy principle' (1992) *Columbia LR* 1431 at 1433; Arriola 'Sexual identity and the Constitution: Homosexual persons as a discreet and insular minority' (1992) *Women's Rights Law Reporter* 263 at 264 and The Editors of the *Harvard Law Review sexual orientation and the Law* (1989) 1.

⁷Valdes 'Intersection of race, ethnicity, class, gender and sexual orientation: Queer margins, queer ethics: A call to account for race and ethnicity in the law, theory and politics of "sexual orientation"' (1997) 48 *Hastings LJ* 1293 at 1308. On the construction of sexual identity see also Foucault *The history of sexuality volume 1: An introduction* (1978) at 43. In Foucault's celebrated passage he contends that the nineteenth century homosexual became

a personage, a past, a case history and a childhood, in addition to being a type of life, a life form and a morphology, with an indiscreet anatomy and possible mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their insidious and their indefinite active principle: written immodestly on his face and body because it was a secret that always gave itself away. [...] Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphroditism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.

See also Calhoun 'Denaturalizing and desexualizing lesbian and gay identity' (1993) *Virginia LR* 1859 at 1870; Arriola (n 6) at 263-296; Eskridge 'A history of same-sex marriage' (1993) *Virginia LR* 1419-1484; Thomas (n 6) at 1476-1509; Halley 'The politics of the closet: Legal articulation of sexual orientation identity' in Danielsen and Engle (eds) *After identity: A reader in law and culture* (1995) 24-38; Cossman 'Family inside/out' (1994) *University of Toronto LJ* 1-39; Duberman, Vicinus and Chauncey Jr 'Introduction' in Duberman, Vicinus and Chauncey Jr *Hidden from history: Reclaiming the gay and lesbian past* (1989) 1-13.

⁸Valdes (n 7) 1307. See also Grindstaff 'Queering marriage: An ideographic interrogation of heteronormative subjectivity' (2003) *Journal of Homosexuality* 257, 259.

Queer legal theory as part of queer theory therefore takes its cue in large part from the work of Michel Foucault,⁹ for it is Foucault, more than any other social theorist of his time, who illustrates most originally the historically contingent, constructed dimensions of sexuality and sexual 'identities'. In the *History of sexuality volume 1: The will to knowledge*, Foucault focuses on the historical construction and proliferation of sexual identities during the Victorian era. These constructions of identities along sexual lines were of course intimately connected with the emergence of a heteronormative bio-power which attempts to discipline and regulate not just sexual expression but all forms and dimensions of individual social expression.

From a Foucauldian perspective sexual identity is problematic because it will inevitably privilege heterosexuality and enforce heteronormativity¹⁰ through the valorisation or perpetuation of traditional structures and institutions aimed at disciplining wayward sexuality. As David Macey writes in his biography of Foucault: 'Sexuality is not some inchoate level of experience existing outside the discourse or *dispositif* of sexuality, but its product. In that sense the only possible liberation is the liberation of pleasures from the regime of sexuality and sexual identities'.¹¹

Foucault argues famously that '[p]ower is strong ... because, as we are beginning to realise, it produces effects at the level of desire – and also at the level of knowledge'.¹² The constitution of subjects through the classification of subjects functions as a significant mechanism of disciplinary power.¹³ For Foucault the workings of power go beyond the traditional notions of repression, discrimination and prejudice. To limit our understanding of how power relations shape our world and marginalise and oppress 'the other' would be to limit the types of resistance that we could imagine and enact and the types of freedom we could embody. What Alain Badiou writes about the person of Michel Foucault is also true about his ethico-political project and, therefore, true for any legitimate empowering project based on the convictions of queer legal theory: 'For Foucault, the danger was simply the world as it is, without grace, and in the asphyxia, which always begins anew, of anything with claims on the universal'.¹⁴

This refusal of the world, simply as it is, means that in the realm of sexuality, we should not reduce the working of power to the repression of sexually 'deviant' acts or to the exclusion of minority sexual subjects from legal recognition and/or inclusion into the mainstream (and thus heteronormative) world ordered around iconic heterosexual institutions (such as marriage). Resistance to disciplinary heteronormative power must thus be firmly located within the way sexual subjects are constructed and

⁹See generally Foucault (n 7) *The history of sexuality volume 1: An introduction* (1978).

¹⁰Berlant and Warner 'Sex in public' (1998) *Critical Inquiry* 547, 548.

¹¹Macey *The lives of Michel Foucault* (1998) 358.

¹²Foucault in Gordon (ed) *Power/knowledge: Selected interviews and other writings 1972-1977* (1980) 59.

¹³Foucault *Discipline and punish: The birth of the prison* (1977) 177-184.

¹⁴Badiou *Pocket pantheon* (2009) 120.

the way a discourse of sexual freedom is deployed, rather than merely by focusing our efforts on the legal inclusion and recognition of sexual subjects (by, for example, relying on traditional human rights discourse, to include certain conforming homosexual subjects as protected individuals in a human rights regime).¹⁵

How we deal with and talk about sexual subjects – also in the legal arena – will either enhance or deter resistance to the hierarchical and ultimately exclusionary heteronormative system of power relations in our society. What is also important in this regard is the deployment of rhetoric that would resist the construction of sexual subjects on the basis of an assumed heteronormative model and would resist the disciplining power of identity groups such as 'heterosexual' or 'homosexual'.¹⁶ This would only be possible if we challenge the hierarchical nature of the heteronormative world and the knowledge produced in and by it – a world which may extend social and legal recognition and protection for certain individuals who experience same-sex emotional and sexual desire on condition only that such individuals accept the hierarchy and fit demurely within its realm.

In a heteronormative world, it has been argued, citizens are discursively constructed as heterosexual.¹⁷ Although individuals may obtain certain rights as gay men, lesbians, bisexuals or other sexual minorities, they cannot fully claim their citizenship because they are assumed to warrant protection only in as much as they conform to the hierarchical assumptions of the heteronormative state. As Johnson argues, analysing and contesting heteronormative conceptions of citizenship is, therefore, particularly important because such conceptions can still underlie mainstream political systems and discourses which marginalise and oppress those who fail to conform.¹⁸

¹⁵Foucault (n 7) 157.

¹⁶For a critical approach to sexual identity see, generally, Collier *Masculinity, law and the family* (1995) 91. The concept 'lesbian' seems to be questioned less often than 'gay' or 'homosexual'. See Robson 'Embodiment(s): The possibilities of lesbian legal theory in bodies problematized by postmodernism and feminisms' (1992) *Law and Sexuality: A Review of Lesbian and Gay Legal Issues* at 45. In this text, although we may make use of the traditional terminology associated with these categories – terms such as 'homosexual', 'heterosexual', 'gay', 'lesbian', 'bisexual', 'man' or 'woman' – we do so in the knowledge that these terms are all highly contested and should thus not be seen as coherent and fixed. Where we use such terms, it will thus in no way imply that we subscribe to a fixed and a historical notion of any of these concepts. On terminology see, generally, Halley 'Reasoning about sodomy: Act and identity in and after *Bowers v Hardwick*' (1993) *Virginia LR* 1721 at 1723; Goldstein 'Reasoning about homosexuality: A commentary on Janet Halley's "Reasoning about sodomy: Act and identity in and after *Bowers v Hardwick*"' (1993) *Virginia LR* 1781 at 1797; Wintemute 'Sexual orientation discrimination as sex discrimination: Same-sex couples and the Charter in *Mossop and Layland*' (1994) 39 *McGill LJ* 429 at 431; Halley 'The politics of the closet: Towards equal protection for gay, lesbian and bisexual identity' (1989) *UCLA LR* 915 at 916 (n 5); Thomas (n 6) 1433; Arriola (n 6) 264 and The Editors of the *Harvard LR Sexual orientation and the law* (1989) 1 at (n 1).

¹⁷Johnson 'Heteronormative citizenship and the politics of passing' (2002) *Sexualities* 317, 139.

¹⁸*Id* 319.

A considerable body of literature exists today 'which analyses the ways in which ideas of citizenship are based upon certain assumptions about sexuality, in particular hegemonic heterosexuality'.¹⁹ Even where states extend some rights to men and women who experience emotional and sexual same-sex desire, it is argued, such individuals are often not treated as full citizens because they are not accepted for who they are, but are often only accepted if they can pass as 'normal' or 'good' citizens. Governments and courts thus often promote a 'good homosexual subject'²⁰ (as well as a good heterosexual subject) and this helps to maintain the hierarchical hetero/homo binary on which the implicit or explicit exclusion of non-conforming sexual desires, practices and identities is premised. In this world, in which a normalising discourse is often deployed, even 'acceptance' contains within it the disciplining effect. It extends protection to gay men and lesbians (and to non-conforming heterosexuals) as long as they behave in a way that would not threaten the heteronormative assumptions underlying citizenship and rewards 'good homosexuals' and 'good heterosexuals' who are monogamous, coupled consumers in a late capitalist world.

Of course, the rejection of a fixed sexuality and of stable sexual identities predicated on a fixed sexuality as a constitutive moment of queer theory has particular implications for an approach that situates itself within queer theory as queer *legal* theory. Francisco Valdes noted that the first moment of this scholarship consisted of the articulation of 'nonheterosexist viewpoints in doctrinal domains from constitutional law to family law' which exposed 'the heterocentric presumptions and prejudices that permeate' law and society. According to Valdes 'this intervention gradually but certainly has established the value and legitimacy of scholarly enquiry into an aspect of human existence and sociolegal interaction that previously had been denigrated as mere prurience or deviance'.²¹ Valdes has also proposed eight strategies for queer legal theory to achieve the ultimate goal of 'sex/gender dignity and freedom for every individual'.²² His tactics include: (1) fighting stereotypes, (2) bridging social science knowledge and legal knowledge, (3) using narratives, (4) developing constructionist sensibilities, (5) conceptualising 'sexual orientation', (6) defending desire as such, (7) transcending 'privacy' and (8) promoting positionality, relationality, and (inter) connectivity. In what follows we evaluate three judgments by Justice Sachs against some of these strategies. This we do in order to illustrate that Sachs' judgments both resonate and create dissonance with queer legal theory.

¹⁹Richardson 'Claiming citizenship? Sexuality, citizenship and lesbian/feminist theory' (2000) *Sexualities* 255 at 257.

²⁰Smith *New right discourse on race and sexuality: Britain 1968-1990* (1994) 207 and Johnson (n 18) 320.

²¹Valdes 'Intersection of race, ethnicity, class, gender and sexual orientation: Queer margins, queer ethics: A call to account for race and ethnicity in the law, theory and politics of "sexual orientation"' (1997) *Hastings LJ* 1293 at 1416.

²²Valdes (n 7) 362. The same views are expressed in 'Beyond sexual orientation in queer legal theory: Majoritarianism, multidimensionality, and responsibility in social justice scholarship or legal scholars as cultural warriors' (1998) *Denver University LR* 1409.

The resistance of stereotypes of sex, gender and desire

Valdes argues that it is crucial for the emancipatory project of QLT to resist the stereotypes implicit in the conflation of sex with gender and with sexual desire.²³ For example, we must resist the notion that if a person is born with male sexual organs, he automatically should behave in a masculine way and is automatically attracted to a member of the opposite biological sex. In fact, we should challenge, and challenge forcefully, the notion that there is such a thing as an obvious masculine way of acting, or the assumption that sexual desire should be viewed in terms of the sex/gender of the person one desires. Valdes argues that if the assumptions inherent in this conflation of sex with gender and with sexual desire are not challenged – not 'queered' if you will – efforts toward both social and sexual equality will be necessarily limited to a system that subordinates some and privileges others. Furthermore, queer legal theory needs to go even further in questioning the binary assumptions about sex itself. As recent debates in South Africa concerning the Caster Semenya debacle have revealed, even the President of the ANC Youth League seems to think that we live in a world where there are only boys and girls.²⁴

Justice Sachs' judgments on sexuality and gender go a long way to questioning the stereotypes of essentialist heteronormative discourse. In the first *National Coalition* case Sachs declared his resistance to legal stereotypes writing that 'prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure ... as in many important legal distinctions, "a page of history is worth a volume of logic"'.²⁵

It is this resistance to sexual and gender stereotypes that ultimately led the Constitutional Court in *Fourie* – Justice Sachs writing for the majority – to declare, first, that the common law definition of marriage is invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits and the associated responsibilities it accords to heterosexual couples;²⁶ and, second, that the Marriage Act – in terms of which marriages are concluded in South Africa – is invalid because it refers only to marriage between a 'husband' and 'wife', and not between 'spouses'.²⁷ In doing so Sachs, following his decision in *National*

²³See Valdes (n 7) 249.

²⁴'What is hermaphrodite in pedi?' http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20091002154409123C338320#more 'You are either a woman or a man. When a child is born you are announcing it's a baby girl or a baby boy. We have never heard in the village a child being projected: "we are given a hermaphrodite". There's never been such a thing in the village we come from'. On a queer analysis of the concept of intersex see Spade 'Resisting medicine, re/modeling gender' (2003) *Berkeley Women's LJ* 15.

²⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) para 127.

²⁶*Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 3 BCLR 355 (CC) para 162.

²⁷*Id* para 80.

Coalition, endorsed the notion that at the heart of the prohibition on discrimination based on sexual orientation, is an acceptance of the right to be different.²⁸ The judgment also confirmed and re-emphasised the previously expressed view that individuals in same-sex relationships should not be defined exclusively in terms of the sexuality of its participants.²⁹ Sachs sought to expose the hurtful and harmful stereotypes, which, as he puts it, resulted 'in classifying lesbians and gays as exclusively sexual beings, reduced to one-dimensional creatures defined by their sex and sexuality'.³⁰

Developing the idea of 'sexual orientation' into a coherent concept

Valdes suggests that the concept of 'sexual orientation' should be developed into a coherent idea, in spite of the general stance against identity and essentialism.³¹ Although making such a move risks essentialism, if approached self-consciously and inclusively, it is an important first step to use 'sexual orientation' in constitutional anti-discrimination cases which, in turn, will assist with the emancipation of gay men, lesbians and other sexual minorities. Furthermore, Foucault's contention about the historically contingent and constructed nature of homosexual identity,³² and an understanding of the fact that 'homosexuality' is the product of medical and legal discourses in Europe and that it is thus indeed a social construction deeply rooted in European culture,³³ suggests that *in South Africa* the Constitution would not deal with sexual orientation discrimination as a matter of discrimination against a fixed, essentialised group named 'homosexuals'. Rather, it would focus on the social and sexual practices which might mark individuals as 'other' because of their practices and because of their shared experience of oppression and exclusion.

Indeed, the South African Constitutional Court has been successful in formulating 'sexual orientation' in a non-essentialist, non-identitarian way when, in the first *National Coalition* case, it adopted the definition originally put forward by now Justice Edwin Cameron.³⁴ Justice Ackermann wrote on behalf of the Court:

²⁸*Id* para 59-62.

²⁹*Id* para 52.

³⁰*Ibid*.

³¹Valdes (n 7) 367.

³²Foucault (n 7) 43.

³³Pantazis 'The problematic nature of gay identity' (1996) *SAJHR* 291 299: 'there may be some truth in the assertion that homosexuality in South Africa is a white European imposition. While same-sex desire is a transcultural phenomenon ... it would be missing the point of constructivism not to be careful about universalising conditions which go to the making of a gay identity.'

³⁴Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *SALJ* 450.

Sexual orientation, 'is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex ... It applies equally to the orientation of persons who are bi-sexual, or transsexual and it also applies to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex.'³⁵

This definition seems careful, then, not to frame sexual orientation protection in terms of a kind of homosexuality that is viewed as a universal category, without recognising its historical and cultural specificity. It seems to be based on an understanding that when we talk about sexuality we thus cannot accept that all of us share an understanding of sexual identity or even of which acts can be termed sexual and which ones not.³⁶ This move destabilises the hetero/homo dichotomy and embraces a notion of sexual orientation that is not based on a heteronormative understanding of the world or on the heteronormative assumptions that underlie so much of traditional equality jurisprudence in which stable and essential categories of heterosexual and homosexual are set up in a hierarchical opposition to each other. This, at least, is allowed by a generous reading of the text.

Justice Sachs' quotation in his separate concurring judgment in the first *National Coalition* case from Foucault's *The history of sexuality 1*³⁷ could be read as reinforcing or justifying the above definition of sexual orientation. The refusal to deal with sexual orientation as a matter of fixity was particularly apt in the South African context because it seemed to acknowledge the fact that homosexual identity is historically contingent, and that the emergence of a discourse on homosexuality in South(ern) Africa would not follow the same historical trajectory as its European colonial antecedents.³⁸ It seems to acknowledge that it would make it theoretically and practically difficult, probably impossible, to talk of homosexual identity in

³⁵This seemed to suggest that the constitutional protection would safeguard the rights not only of those individuals who have embraced a 'safe' homosexual identity, but everyone who finds themselves on the wrong end of discrimination because of their emotional and erotic attraction to a member of the same sex. We would argue that this could be read as the first 'queer', possibly anti-heteronormative, moment in the jurisprudence of the Constitutional Court as it suggests that the protection against discrimination on the basis of sexual orientation would not be essentialised, and would not be based solely on the (presumably fixed and hierarchical) traditional sexual identity categories of 'heterosexual' and 'homosexual'.

³⁶Stychin *A nation by rights: National cultures, sexual identity politics and the discourse of rights* (1998) 68.

³⁷*National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 26) 108.

³⁸Not only is the periodisation different, but the social process also transforms the discursive character of sexual relations in a different way. The central role of missionaries in the process of colonial conquest, the rise of the colonial state as the new sovereign power on the subcontinent and the interest of the mining houses sometimes contested but mostly colluded in the formation of institutions to regulate and discipline the sexualities of all its subjects. See Achmat 'Apostles of civilised vice: "Immoral practices" and "unnatural vice" in South African prisons and compounds, 1890-1920' (1993) *Social Dynamics* 92 at 107.

South(ern) Africa as a monolithic, describable, stable concept.³⁹ It has been argued that in South Africa, different homosexual identities were and still are produced by a unique set of power relations and apparatus in the context of colonialism, capitalist development and racial domination.⁴⁰ So, while many men and women in South Africa may engage in same-sex sexual activities, not all of them would identify themselves as 'lesbian', 'gay' or 'bisexual' and, in fact, to see sexuality only in terms of these identities would 'misrepresent Africa as statically monocultural, [...] ignore the richness of differing cultural constructions of desire, and in suggesting such a totalised notion of African culture, one simply replicates much of the colonial discourse on African sexuality'.⁴¹

Unfortunately this non-essentialist orientation towards sexual orientation did not hold up when the Court was faced with the question of legal protection for same-sex relationships. In the second *National Coalition* judgment – a judgment in which Justice Sachs concurred – the court instead imposed what Johnson calls a politics of passing on same-sex relationships.⁴² The Court declined to expand the concept of a 'spouse' in this case and instead opted to protect same-sex relationships under a separate legal category it called a 'permanent same-sex life partnership'.⁴³ The Court proceeded to provide a list of factors which would assist in the determination of whether the same-sex life partnership was 'permanent' and thus worthy of protection.⁴⁴ These factors mirrored the characteristics of an (obviously idealised) heterosexual marriage. The use of these factors implied that the type of same-sex life partnership that the law would protect had to approximate as closely as possible the idealised, ordinary – and one is tempted to add mythical – heterosexual marriage. The judgment 'emphasised that what was needed was to determine whether the same-sex partnership was sufficiently similar to that of the idealised heterosexual marriage'.⁴⁵

It is thus as if the Court assumed here a stable sexual orientation (and consequently denied its own non-essentialist definition) from which it proceeded to impose on intimate relationships that come about as a result of the orientation, the characteristics of relationships that come about as a result of heterosexual

³⁹Achmat (n 38) 97. See also Gevisser 'A different fight for freedom: A history of South African lesbian and gay organisations' in Cameron and Gevisser *Defiant desire: Gay and lesbian lives in South Africa* (1994) 14 at 16-17, where he speculates about the elusive and indefinable nature of gay and lesbian identity or identities in South Africa.

⁴⁰Achmat (n 38) 96.

⁴¹Phillips 'Zimbabwean law and the production of a white man's disease' (1997) *Social and Legal Studies* 471 at 474.

⁴²Johnson (n 18).

⁴³*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC) para 86/9.

⁴⁴*Id* para 88.

⁴⁵De Vos 'Same-sex sexual desire and the re-imagining of the South African family' *SAJHR* 20 (2004) 179, 196.

sexual orientation. In this way the Court revealed how far it was prepared to go in respect of legally recognising and protecting queer intimate relationships. It is when one takes this into account that a sense of tension with and a discord between queer legal theory and the jurisprudence in which Justice Sachs played an important role, begins to emerge.

Invoking the narrative method

When it comes to a consideration of Sachs' judgments against queer legal strategy's invocation of the narrative method we should take account of Valdes' argument that in order to ensure the rejection of stereotypes one should invoke the narrative method (and simultaneously acknowledge the limits of legal scholarship).⁴⁶ The narrative method allows for the telling (and listening to) of stories within the law. Narrative method is learning and illustrating what it means to be queer through experiential examples. The narrative method focuses on the particular, not the general, thus allowing us to zoom in on the individual's unique life experience, context and attributes which, in turn, opens up a space in which an individual can – at the very least – be seen and treated as more than a member of a particular essentialised identity category.

Valdes, goes further though, and argues for the development of a narrative literature from which legal actors can draw insight, whether or not they have personal relationships with queers. The narrative work of queer legal theorists such as Ruthann Robson comes to mind here.⁴⁷ As a result, while the evolution of a queer narrative may be slow, convincing courts to listen will eventually become a self-sustaining task because the judicial narrative will both reflect and construct social reality. Simultaneously, narratives will serve as real world reminders to queer theorists of the concrete and compelling effects of heterosexism and encourage them to continue developing queer legal theory in politically meaningful ways.⁴⁸

In this respect, Justice Sachs' judgments as a whole almost always, in some or other way, is particularly concerned with the real life stories of the real people who are before the court. In the first *National Coalition* case Sachs, J stated that 'the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times.'⁴⁹ Sachs J also wrote that a situation-sensitive human rights approach has the particular benefit that it focuses the analysis 'not on abstract categories, but on the lives

⁴⁶Valdes (n 7) 366.

⁴⁷Robson *Sappho goes to law school* (1998); *Lesbian (out)law: Survival under the rule of law* 1992; *Gay men, lesbians and the law* (1996).

⁴⁸Valdes n (7) 366.

⁴⁹*Coalition for Gay and Lesbian Equality v Minister of Justice* (n 26) para 117.

as lived and the injuries as experienced by different groups in our society⁵⁰ and he even went as far as stating that '[i]t is no exaggeration to say that the success of the whole constitutional endeavour in South Africa will depend in large measure on how successfully sameness and difference are reconciled'.⁵¹

In addition, a narrative, literary account of the facts and the legal question has become a distinguishing feature of many of Sachs' judgments. For instance, consider the opening of the *Fourie* judgment – an opening rather like a novel than a legal judgment:

Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up home together. After being acknowledged by their friends as a couple for more than a decade, they decided that the time had come to get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities they felt should flow from and attach to it. Like many persons in their situation, they wanted to get married. There was one impediment. They are both women.⁵²

Adopting a constructionist sensibility

Although Sachs' jurisprudence reveals a clear alliance with the methodology of queer legal theory in the context of the narrative method, we contend that its strongest, most articulated alliance with queer legal theory lies in its adoption of a constructionist sensibility. And yet, the adoption of this constructionist sensibility comes at a price – a price that has significant consequences for the relationship between queer legal theory and Sachs' judgments on sexuality and gender.

Valdes argues for an adoption of a 'constructionist sensibility' as a way of guarding against exclusionary practices.⁵³ Categories are often used to exclude and marginalise (and thus to oppress), amongst others, sexual minorities. This is often done, first, by presenting such categories as self-evident, normal and/or as merely describing the existing reality in a neutral manner, and, second, by essentialising such categories – that is by presenting such categories as fixed and true, describing accurately the essence of those who are said to belong to a particular category.⁵⁴ By testing essentialist categories (which pervade statutory definitions) against the complex, nuanced and shifting patterns that make up our reality, queer legal theory can argue for more fairness by 'debunk[ing] the claimed naturalness, normality, morality, and essentiality of sex/gender subordination under hetero-patriarchy'.⁵⁵

Justice Sach's judgment in *Fourie* certainly represents a constructionist sensibility in relation to the common law and statutory concept of marriage.

⁵⁰*Id* para 126.

⁵¹*Id* para 131.

⁵²*Minister of Home Affairs v Fourie* (n 27) para 1.

⁵³Valdes (n 1) 366-367.

⁵⁴Valdes (n 1) 367.

⁵⁵*Ibid.*

Holding that the common law definition of marriage and the formula for solemnising a marriage in terms of the Marriage Act of 1961 constitute unfair exclusionary practices in relation to same-sex relationships⁵⁶ Sachs J found the definition and the Act to be unconstitutional.⁵⁷ Sachs J's judgment deals carefully and eloquently with the traditional conservative objections against gay marriage, debunking the hetero-patriarchal essentialism inherent in each of these objections. Although it could be argued that the inclusive redefinition of marriage occurs against the background of a valorisation of marriage one needs to bear in mind that Sachs J's judgment is predicated upon an evaluation of the social importance of marriage in South African society. To quote Sachs J: 'given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way'.⁵⁸

The Court argues that marriage is an important and unique institution and constitutes 'much more than a piece of paper'.⁵⁹ On the one hand, it pointed out that marriage until recently was the only source of socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims and the like.⁶⁰ On the other hand, the Court noted that marriage also bestows a myriad of *intangible* benefits on those who choose to enter into it.⁶¹ As such, marriage entitles a couple to celebrate their commitment to each other at a public event so celebrated in our culture. Couples who marry are showered with presents and throughout their lives they will be able to commemorate this event at anniversaries while pictures of the day can be displayed in their house and in the houses of their families.⁶²

Given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this regard 'would be to negate their right to self-definition in a most profound way'.⁶³ Thus, the Court argued that where the law fails to recognise the relationship of same-sex couples 'the message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected'.⁶⁴ It serves in addition to perpetuate and reinforce existing prejudice and stereotypes. 'The impact constitutes a crass, blunt, cruel and serious invasion of their dignity'.⁶⁵

⁵⁶*Minister of Home Affairs v Fourie* (n 27) para 117.

⁵⁷*Id* para 162.

⁵⁸*Id* para 72.

⁵⁹*Id* para.

⁶⁰*Id* para 70.

⁶¹*Id* para 51 although the quote is originally taken from Ackermann in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (n 44) para 46.

⁶²*Id* para 72.

⁶³*Id* para 72.

⁶⁴*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (n 44) para 54.

⁶⁵*Id* para 65.

The exclusion of same-sex couples from the benefits and responsibilities of marriage, according to the reasoning in *Fourie*, is not 'a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew.'⁶⁶ It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that the Constitution seeks to secure for everyone.⁶⁷ It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.⁶⁸ The judgment clearly contains ringing language affirming the right of gay men and lesbians to form intimate life partnerships and to 'be different'.

But there seems to be a contradiction at the heart of the rhetoric employed by the Court. It is striking to what degree this judgment valorises the institution of marriage and endorses the view that legal marriage remains the only comprehensive and valid way in which two people can (and perhaps should) bestow full legal and societal recognition on their relationship. At the heart of the decision is an acceptance of the fundamental importance of marriage for our society. In order to show that the exclusion of same-sex couples from marriage fundamentally affects their human dignity, the Court emphasises both the legal and symbolic nature of marriage and approvingly notes that marriage provides those who enter into it, with a specific, somewhat exalted, status in our society. Although this valorisation of the institution of marriage by the Constitutional Court is not new,⁶⁹ it is particularly striking and somewhat jarring in this case, given the rhetoric of the Constitutional Court in both the *Minister of Justice* judgment and the *Fourie* judgment about 'the right to be different'.

If the test for the full recognition of equality is about the recognition of and respect for difference, then why, one might wonder, is it appropriate for the law to bestow special rights and a special status on those hetero- or homosexual couples who choose to enter into the traditional marriage? The judgment thus hints at the limits of the role law can play in queering family law. It seems to suggest that acceptance, true acceptance, only comes to those who wish to make or have the power to make a choice in favour of 'normality' – even though, given the economic, social or cultural position of individuals, this 'choice' might not be open to all. The 'right to be different' then runs the risk of becoming an empty

⁶⁶*Minister of Home Affairs v Fourie* (n 27) para 71.

⁶⁷*Id* para 71

⁶⁸*Ibid.*

⁶⁹See eg, *Dawood v Minister of Home Affairs* 2000 8 BCLR 837 (CC) and *Volks v Robinson* 2005 5 BCLR 446 (CC).

slogan. One might even argue that it becomes merely the right not to be a heterosexual – as long as one conforms to the image of the idealised imaginary heterosexual.

In a certain sense the *Fourie* judgment resonates *and* stands in stark contrast with the judgment of the court in *Volks v Robinson*.⁷⁰ Justice Sachs' minority judgment in this case reveals marked disagreements with the judgment of the majority and arguably stands in stark contrast with the judgment of the court that he authored in *Fourie*. In *Volks*, the majority of the Constitutional Court declined to endorse the claim of unfair discrimination on the basis of marital status made by one Mrs Robinson against the estate of one Mr Shandling. Skweyiya J for the majority found that section 2(1) of the Maintenance of Surviving Spouses Act⁷¹ which provides for a claim for reasonable maintenance for a surviving spouse from the estate of the deceased spouse did not unfairly discriminate against individuals who might be living in heterosexual life partnerships but are not married to one another.⁷²

Skweyiya J's judgment in *Volks v Robinson* displays a textbook example of heteronormative reasoning by placing emphasis on the importance of marriage in our society and in the constitutional scheme, by valorising marriage to the exclusion of other types of intimate relationships and by failing to question the deeply held (but often unstated) assumptions about the legal pre-eminence of traditional arrangements regarding intimate relationships. The judgment also fails to take seriously the marginalising effect of the legal valorisation of marriage on often marginalised and less powerful partners in intimate relationships. Noting that marriage and the family are important legal and social institutions, Skweyiya, J argues that the law may therefore distinguish between married people and unmarried people, and states that 'the law may in appropriate circumstances accord benefits to married people which it does not accord to unmarried people'.⁷³

Skweyiya, J argues that individuals are free to decide to marry or not to marry.⁷⁴ They are also free to decide how their assets should be divided upon their death.⁷⁵ Marriage entails a set of legal obligations and duties and those who decide to get married, do so fully cognisant of these obligations. Because there is such a free choice it is therefore admissible to distinguish between married and unmarried people in the way that the impugned provision does.⁷⁶ Those who choose to marry take on legal duties while those who choose not to get married, escape legal duties. This assertion is based on a libertarian notion of autonomy

⁷⁰*Volks NO v Robinson* (n 70).

⁷¹Act 27 of 1990.

⁷²*Volks NO v Robinson* (n 70) para 70.

⁷³*Id* para 54.

⁷⁴*Id* para 55.

⁷⁵*Id* para 57.

⁷⁶*Id* para 54-56.

and is underpinned by the same assumptions underlying the common law notion of *pacta sunt servanda* in the law of contract.⁷⁷ In short, the reasoning of the majority in the *Volks v Robinson* judgment seems to take for granted and uncritically endorses the way in which the law has come to regulate intimate relations in our society – a decidedly un-queer judgment.

In contrast, the dissenting judgment of Sachs J grapples honestly with the complex and difficult issues presented by the case and genuinely attempts to shift the focus away from the legal recognition of one kind of intimate relationship – marriage – to a broader, context sensitive, understanding of the way in which intimate relationships on the one hand can provide a nurturing and supportive environment for the full realisation of an individual's sexual citizenship and human dignity, while, on the other hand, it can also subjugate and disempower individuals emotionally and financially. We contend that the judgment of Sachs J persuasively challenges the majority decision and the often unspoken assumptions about sex and gender equality on which it relies, thus assisting to disturb the hetero-normative matrix around which traditional family law is structured.

At the same time the judgment cannot completely escape the heteronormative foundations of family law as it is forced to make concessions to the traditional institution of marriage. Sachs points out – correctly, in our view – that the complex issues in this case cannot be fully explored and addressed without attending to the 'largely unstated subtext',⁷⁸ pointing out that this subtext exercises 'a subterranean influence' on the determination of the case, which is 'all the more powerful for being submerged in deep and largely unarticulated philosophical positions'.⁷⁹ What is required is to 'locate the issue in a completely different legal landscape'⁸⁰ from the one embraced by the majority. And what might this legal landscape embraced by Sachs look like and how would it differ from the legal landscape endorsed by the majority?

Sachs's judgment seems to be animated by a desire to square the circle by accepting that the law should recognise – as far as possible – the autonomy of individuals to arrange their intimate relationships and the legal consequences that might flow from such relationships as they wish, while also acknowledging the oppressive and potentially subjugating effects of doing so by exclusively relying on traditional legal categories and institutions. Setting out the issues Sachs states:

⁷⁷Goldblatt 'Regulating domestic partnerships – a necessary step in the development of South African Family Law' 120 (2003) *SALJ* 610 at 616. See also De Vos 'Still out in the Cold? The Domestic Partnership Bill and the non-protection of marginalised woman' in Sloth-Nielsen and Du Toit (eds) *Trials and tribulations, trends and triumphs: Developments in international, African and South African child and family law* (2008) 131-132.

⁷⁸*Volks NO v Robinson* (n 70) para 149.

⁷⁹*Id* para 149.

⁸⁰*Id* para 151.

Respecting autonomy means giving legal credence not only to a decision to marry but to choices that people *make about alternative lifestyles*. Such choices may be freely undertaken, either expressly or tacitly. Alternatively, they might be imposed by the unwillingness of one of the parties to marry the other. Yet if the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not be astute to penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them.⁸¹

This passage demonstrates the difficulties inherent in the task of queering the legal regulation of intimate relationships. A queering of the law dealing with intimate relationships must begin with the problematisation of (an often unstated) norm on which the legal regulation of intimate relationships is based. This norm is one of a (in the past heterosexual, but now perhaps also homosexual) monogamous couple who marry, produce and raise children and take on a mutual duty of support towards each other and towards their children within the confines of the capitalist system, thus privatising social assistance and shielding the state from the financial burden of taking care of vulnerable and marginalised individuals in such relationships during or after the dissolution of such relationships. This norm is buttressed by the legal recognition and valorisation of the institution of marriage, an institution, so we are told, that individuals in intimate relationships are free to enter into in order to take on the legal duties and the responsibilities that would safeguard a relationship and would protect individuals from the vagaries of the capitalist system.

The judgment of Sachs J in the *Robinson* case presents a fundamental challenge to this norm. First, Sachs J points out that many partners in intimate relationships do not have a choice in this matter.⁸² Often this 'choice', would be no more than the choice of one partner which would then condemn the other partner to a world outside the protection of the law. Second, the judgment challenges the notion that the law should present only one 'choice' to individuals in intimate relationships in order to protect both the relationship and those who enter into such relationships, namely the choice to enter (or not to enter) into a particular institution – marriage. According to Sachs,

[f]amily means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons — all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law.⁸³

⁸¹*Id* para 156 (italics added).

⁸²*Id* para 157.

⁸³*Id* para 159.

What matters is the functional value of the legislation based on acknowledgment of a similar social role to that served by marriage.⁸⁴ Sachs wishes to move away from a definitional approach to the legal regulation of intimate relationships towards a functional approach.⁸⁵

Such an approach looks beyond biology and the legal requirement of marriage by considering the way in which a group of people function. As a result it has been said that:

[w]hen supporters of the definitional argument assume that couples who have made a public commitment by way of marriage are the only ones who have a legal responsibility to each other, and would be more likely to provide a child with stability and security, they are under a wrong impression. ... [E]ven married relationships are not guaranteed for life and do end with inevitable accompanying negative consequences.⁸⁶

The judgment thus prominently deploys the constructionist sensibility inherent in the questioning of the traditional definitional approach to family law. By acknowledging that one should look beyond biology and the institution of marriage when deciding whose intimate relationships are worthy of legal protection Sachs displays an admirable understanding that social and legal institutions – of which the family is a prime example – are not static. Instead family forms change and the way in which the law should regulate such family relationships also need to change.

Second, the judgment makes use of social science research and analytical tools to address the issues at hand, thus Sachs speaks about sexism and patriarchy, 'which are so ancient, all-pervasive and incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible' and also takes note of the gendered nature of poverty which is being exacerbated by the choice/definitional model of the legal regulation of intimate relationships.⁸⁷

However, the judgment cannot escape the disciplining influence of heteronormativity.⁸⁸ In order to determine which kinds of relationships are worthy of legal protection Sachs, J proposes a court focuses on the qualitative and quantitative nature of the cohabitation and the particular legal purpose for which it is being claimed, or denied. Sachs points out that a distinction will usually be drawn between short-term and long-term cohabitation, 'between the casual affair and the stable relationship, between relationships which have resulted in the birth of children and those which have not, and between couples who live together and

⁸⁴*Id* para 161. Sachs is recalling here Pantazis' earlier call for a functionalist approach to marriage. See Pantazis 'An argument for the legal recognition of gay and lesbian marriage' (1997) 114 *SALJ* 556.

⁸⁵*Id* para 172.

⁸⁶*Id* para 173.

⁸⁷*Id* para 164-166.

⁸⁸Foucault n 13) 177-184. See also Phelan *Sexual strangers: Gays, lesbians and dilemmas of citizenship* (2001) 82-114; Viad *Virtual equality: The mainstreaming of gay and lesbian liberation* (1995) 46. See also Johnson (n 18) 330.

couples who do not'.⁸⁹ While the emphasis thus shifts from locating conjugal rights and responsibilities exclusively within the tight framework of formalised marriages, marriage remains the normative template to which other relationships ought to conform in order – according to Sachs, J at least – for such relationships to be constitutionally brought into the ambit of legal regulation. In the end family law should embrace a wider canvas, argues Sachs J, to extend legal recognition of the 'rights and responsibilities so as to include all marriage-like, intimate and permanent family relationships'.⁹⁰

Non-marriage, like intimate relationships, is *not* envisaged to be worthy of constitutional (or legal?) protection. The ambivalence that Sachs J displays towards the institution of marriage is revealing. While, on the one hand, he questions the pre-eminent position that traditional, monogamous, heterosexual marriage should play in the legal regulation of intimate relationships, Sachs J feels compelled to gesture towards marriage – at least rhetorically – to confirm its pre-eminent legal and social space, thus undermining the queer aspects of his judgment. Thus, while pointing out that marriage has been used in the past to marginalise and discriminate against a range of individuals⁹¹ and while pointing out that a 'certain degree of conventional disdain coupled with moral disapproval is still directed at unmarried couples' – especially women in such couples⁹² – he nevertheless proceeded to state that:

There can accordingly be no doubt that the institution of marriage is entitled to very special recognition and protection by the law. The issue, however, is not whether marriage should in many respects be privileged. Clearly it has to be. The question is whether it must be exclusive.⁹³

⁸⁹*Volks v Robinson* (n 70) para 179.

⁹⁰*Id* para 179.

⁹¹*Id* para 198, here he states:

These would include the directly discriminatory practices of the past, such as penalising women for being married (eg women teachers and civil servants who automatically lost their employment on marriage on the basis that they could not hold down a job and look after their husbands and children at the same time); or penalising women for not being married (eg for bringing disgrace on an institution, neighbourhood, building or workplace by having a child 'out of wedlock'); or treating married women as losing the autonomy they formerly had as single women, because from marriage onwards they required their husband's consent for various legal transactions. Alternatively, certain posts, such as ambassadorships, were as a matter of practice reserved for married people only. In addition, there were indirect forms of disadvantage affecting people not living as a married couple. Thus single parents, widows and widowers could be denied housing, or suffer from tax or social security disadvantages or be refused mortgages because they did not fit the format of the married and male-headed-couple household.

⁹²*Id* para 203 where he states:

South African society has indeed become far more tolerant than it once was towards different ways of creating families, including cohabitation not formalised in marriage. Yet there can be no doubt that many prejudices of the past linger on, particularly against women who are seen as not conducting their lives in a manner befitting their culture or religion. A certain degree of conventional disdain coupled with moral disapproval is still directed at unmarried couples. By the very nature of their unconventional relationship they are regarded as either immoral, irresponsible or defiant. This will be irrespective of the actual degree of commitment, seriousness and stability of their family relationships.

⁹³*Id* para 105.

But the question is why should marriage be accorded such a special place? Sachs J attempts here to do two very different things. On the one hand, he acknowledges the fact that marriage bestows a certain status that goes beyond legal rights and that those excluded from marriage suffer – at least to some degree – because of this exclusive and exalted status of marriage. On the other he tries to accommodate both marriage and other marriage-like relationships within the protection of the law. The question is of course what happens to those relationships which do not mirror traditional marriage? How will individuals who form part of such intimate relationships be treated by the law and how does this help us to destabilise the very categories which have oppressed us in the past and continues to oppress those who choose not to or find it impossible to enter into, such valorised relationships?⁹⁴ Maybe this problem is not easily resolved by the law, or maybe it is not resolvable at all. Maybe it is impossible to be a real queer judge then – at least in a society as presently constituted within the power/knowledge matrix presently in existence?

These questions should perhaps not be aimed at Justice Sachs. Rather a broader question may be formulated relating to the ways in which one can challenge the status quo and the extent to which law – including the Constitution – can be used to facilitate a queer struggle for sexual freedom. It would after all, have been impossible for Sachs J to challenge the *status quo* to the extent of declaring the very legal recognition of marriage unconstitutional because it discriminated against unmarried individuals in contravention of section 9(3) of the Constitution.

Incremental change is the touchstone of legal reform. In his *Volks* judgment⁹⁵ Sachs recognises the changing nature of these institutions – marriage, the family, etc – but is still bound by the legal conventions and the expectations of the legal community not to move too far ahead of the pack. Quoting from the *Dawood case* Sachs J perhaps went as far as one could have expected or hoped for: '[F]amilies come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.'⁹⁶

Transcending the concept of privacy

The constructionist sensibilities of Sachs' judgments are closely related to his

⁹⁴In this regard woman and children are particularly vulnerable and, as Beth Goldblatt and others point out, they often become poorer when families break up. At present the vulnerable members of such families are only fully protected (if that) by the law if they have entered into a valid marriage or civil union. Same-sex couples in intimate relations who have not entered into a civil union marriage are also afforded extensive protection through the jurisprudence of the Constitutional Court. Yet many South Africans live together in heterosexual intimate life partnerships but never marry because they have very little choice in the matter. More than a million South Africans are said to live in such relationships but the likelihood is that this number is much higher. See Goldblatt 9 (n 77) 610.

⁹⁵*Volks v Robinson* (n 70) para 210.

⁹⁶*Dawood v Minister of Home Affairs* (n 70) para 210.

view on privacy as set out in his judgment in the first *National Coalition* case. Valdes suggests that a transcendence of the concept of privacy in sexual matters, which would promote the idea that sexuality functions in public, as well as in private life is also crucial to the project of queer legal theory. Justice Sachs' understanding of the right to privacy in this context is deeply informed by queer legal theory's attempt to understand the concept of privacy differently. In this view, the right to privacy is reimagined to protect the privacy of heterosexuals and non-heterosexuals, while at the same time ensuring that it does not function as an oppressive tool to force gay men and lesbians back into the closet.

In his *National Coalition* judgment Sachs's reimagination of the right to privacy occurred through an examination of the relationship between equality and privacy.⁹⁷ Sachs famously criticised the applicants for treating the right to privacy as 'a poor second prize to be offered and received only in the event of the court declining to invalidate the laws because of a breach of equality.'⁹⁸ He denied the sequential ordering of equality and privacy rights implicit in the applicant's argument and argued that the right to equality and privacy are interrelated.⁹⁹ Sachs J then proceeded to point out that the anti-sodomy laws 'deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy'.¹⁰⁰ In this way 'the violation of equality by the anti-sodomy laws is all the more egregious because it touches the deep, invisible and intimate side of people's lives'.¹⁰¹ Privacy understood in this way places obligations on the State to promote the conditions of personal self-realisation. In addition, it is human dignity that links equality to privacy in this context in that inequality is established 'through differentiation which perpetuates disadvantage and leads to the scarring of the sense of dignity and self-worth'.¹⁰²

In addition, Justice Sachs' judgment portrays a marked sensitivity to the relationship between sexuality and public participation because it emphatically notes that the scarring of the sense of dignity arises from invisibility: '[g]ays constitute a distinct though invisible section of the community that has been treated not only with disrespect or condescension but with disapproval and revulsion'.¹⁰³ The judgment repeatedly acknowledges that the discrimination against the LGBTI community exists as an attempt to erase their space of appearance. By portraying this case as being about full moral citizenship, appearance and plurality (rather than just about privacy), Sachs J affirmed that the decriminalisation of homosexual conduct and the granting of equal rights to

⁹⁷ *Coalition for Gay and Lesbian Equality v Minister of Justice* (n 26) para 108.

⁹⁸ *Id* para 110.

⁹⁹ *Id* para 111.

¹⁰⁰ *Id* para 112.

¹⁰¹ *Id* para 114.

¹⁰² *Id* para 125.

¹⁰³ *Id* para 128.

the LGBTI community are fundamental ingredients for nurturing the profundity of full common citizenship for South African democracy and politics as a whole.

The legitimization of bodily pleasure

The reimagining of privacy is, in turn, closely related to queer legal theory's attempt to legitimise bodily pleasure. As Valdes argues, the legitimization of bodily pleasure as an important feature of human experience is crucial for queer legal theory and he suggests that QLT 'defends desire as such'.¹⁰⁴ Defending desire means facing the widespread sense of sexual proscription that emanates from many organised religions and, even more broadly, the prudish mythology that surrounds them. Queer sex must be deshamed and the danger associated with it must be defanged so that in the law, and elsewhere, queerness is not just tolerated but celebrated.¹⁰⁵ Celebrating the right to privacy as part and parcel of equal moral citizenship in a way that resonates with feminism's 'the personal is the political' slogan contributes significantly to the legitimisation of bodily pleasure as a strategy of queer legal theory.

Unfortunately though, the Constitutional Court's decriminalisation of consensual male sodomy in private as well as the decriminalisation of the infamous 'men at a party' laws,¹⁰⁶ has not yet translated into large scale societal or religious acceptance and celebration of queer sex, sexuality or desire in South Africa. As recently as January 2010, socio-political movements in South Africa were still calling for a change of the Constitution to remove the protection it affords to non-heterosexual sexual orientation.¹⁰⁷ Gays and lesbians are still being murdered in parts of South Africa, because they display their sexual orientation publicly.¹⁰⁸

In his judgment in the first *National Coalition* case Sachs J acknowledged that 'although the Constitution itself cannot destroy homophobic prejudice it can require

¹⁰⁴Valdes (n 7) 368.

¹⁰⁵See for example Rubin 'Thinking sex: Notes for a radical theory of the politics of sexuality' in Abelove, Barale, Halperin *The lesbian and gay studies reader* (1993) 3 11-12. Rubin argues that modern Western societies judge sex acts:

according to a hierarchical system of sexual value. Marital, reproductive heterosexuals are alone at the top of the erotic pyramid. Clamoring below are unmarried, monogamous heterosexuals in couples, followed by most other heterosexuals. Solitary sex floats ambiguously... Stable, long-term lesbian and gay male couples are verging on respectability, but bar dykes and promiscuous gay men are hovering just above the groups at the very bottom of the pyramid. The most despised sexual castes include transsexuals, transvestites, fetishists, sadomasochists, sex workers such as prostitutes and porn models, and the lowliest of all, those whose eroticism transgress generational boundaries.

¹⁰⁶See s 20A of the Sexual Offences Act 23 of 1957, which prohibited acts 'calculated to stimulate sexual passion or to give sexual gratification' between two men at a party.

¹⁰⁷'Zuma's new God squad wants liberal laws to go' <http://www.mg.co.za/article/2009-09-11-zumas-new-god-squad-wants-liberal-laws-to-go>

¹⁰⁸'Soweto's female gays live in constant fear' http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20080630060202249C682854

the elimination of public institutions which are based on and perpetuate such prejudice'.¹⁰⁹ The decriminalisation of gay sex meant that a section of the community could henceforth feel the 'equal concern and regard of the Constitution and could enjoy lives less threatened, less lonely and more dignified'.¹¹⁰ In *Fourie*, Sachs J again suggested that '[t]he law may not automatically and of itself eliminate stereotyping and prejudice. Yet it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse. It needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights'.¹¹¹

Unfortunately, the law has, by and large, not fulfilled the educative role Sachs J envisaged here. During the public participation hearings on what eventually became the Civil Union Act, it was clear that the majority of South Africans still believe that queer sex is deviant and morally reprehensible.¹¹² It was also clear that this is a view not just held by uninformed or uneducated members of society but also by members of Parliament and community leaders. Some of the statements made during these hearings bordered on hate speech and members of the LGBTI community who participated in these hearings found these statements deeply hurtful and demeaning. At the time, now President Jacob Zuma also publicly declared his distaste for homosexuality.¹¹³ Furthermore, in the light of continuing reports of corrective rape and of the brutal murders of gays and lesbians referred to above, it is clear that QLT still has an enormous task ahead of it in playing the educative role Sachs J envisages.

Building intersectional bodies

Finally, Valdes's eighth strategy for QLT addresses identity politics and coalition-building by bridging the perceived divides of sex, race, class, age and disability to build intersectional bodies with an expansive and self-educating critique.¹¹⁴ From this perspective it is important to come to grips with the complex and interrelated nature of discrimination, marginalisation and oppression by recognising the different ways in which different individuals positioned differently in terms of race, class, sexuality, age and disability experience marginalisation and oppression to a different degree depending on the particular interplay of forces. At the same time the

¹⁰⁹ *Coalition for Gay and Lesbian Equality v Minister of Justice* (n 26) para 130.

¹¹⁰ *Id* para 130.

¹¹¹ *Minister of Home Affairs v Fourie* (n 27) para 138.

¹¹² De Vos and Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' *SALJ* (2007) 795 at 814 and Barnard 'Totalitarianism, (same-sex) marriage and democratic politics in post-apartheid South Africa' *SAJHR* (2007) 523 at 524.

¹¹³ 'Gay groups doubt sincerity of Zuma's apology' http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20060929101000167C385686&page_number=1

¹¹⁴ Valdes (n 7) 371-372. On intersectionality, see generally Crenshaw 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' *University of Chicago Legal Forum* (1989) 139-167.

recognition of this fact should not lead us to accept that there will inevitably be a fracturing of interests which make a kind of coalition politics impossible. The shared experience of oppression by marginalised groups – whether such groups are marginalised because of their race, class, sex, age or disability or a combination of the above – creates opportunities for the forging of links across perceived identity boundaries. A queer politics and ethics must be aimed at building solidarity between groups with the goal of taking joint action to resist marginalisation and oppression. In the *Fourie* judgment Sachs J situated its analysis within the broader perspective of South Africa's oppressive and discriminatory past, explicitly rejecting arguments for a 'separate but equal' legal regime to regulate intimate same-sex relationships on the basis that this mirrored arguments made about racial discrimination during the apartheid era.¹¹⁵ This was not a new development as South Africa's Constitutional Court has often emphasised that one can only grasp the far-reaching, progressive, effect of the constitutional protections if one remains aware of the dark apartheid past and understands that the Constitution was drafted in great part to prevent a recurrence of the dehumanising oppression and marginalisation that so characterised the apartheid state.¹¹⁶ The apartheid legislation that contributed to this oppression included the Immorality Act,¹¹⁷ which criminalised sexual intercourse between white and black people and the Prohibition of Mixed Marriages¹¹⁸ Act which prohibited marriage between white and black people in South Africa. There has therefore been a long history in South Africa of interference with the all-important life enhancing choices people make about their intimate actions and relationships, interference that was based on a disregard for the human dignity of black citizens. Sachs J further noted that during the apartheid era gay men and lesbians had suffered a particularly harsh fate, having been branded as criminals and rejected by society as outcasts and perverts.

It also pointed out that this exclusion and marginalisation, and the concomitant hatred and violence that it invariably produced, was experienced more intensely by those South Africans already suffering under the yoke of apartheid because of their race and/or sex and/or economic status. In this sense, too, Sachs' judgments can be seen as acknowledging as he says that 'people live

¹¹⁵See *Minister of Home Affairs v Fourie* (n 27) para 150 where Sachs J states:

'Historically the concept of "separate but equal" served as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to segregation. The very notion that integration would lead to miscegenation, mongrelisation or contamination, was offensive in concept and wounding in practice. Yet, just as is frequently the case when proposals are made for recognising same-sex unions in desiccated and marginalised forms, proponents of segregation would vehemently deny any intention to cause insult. On the contrary, they would justify the apartness as being a reflection of a natural or divinely ordained state of affairs.'

¹¹⁶*Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) para 19.

¹¹⁷Act 21 of 1950.

¹¹⁸Act 55 of 1949.

in their bodies, their communities, their cultures, their places and their times¹¹⁹ and that a person's identity consists not principally out of her sexuality but rather principally consists out of what Valdes would call her intersectional body.

Conclusion: 'Every way you look at it, you lose'¹²⁰

It is quite possible that our argument in this piece will be read as too critical and too thankless of the extraordinary achievements of the Constitutional Court in bringing sexual minorities in from the juridical cold. After all, the jurisprudence locates itself within a powerful heteronormative hegemony hungry for disciplinary force. In this sense the jurisprudence risks democratic legitimacy and has already come under fire for having gone too far.¹²¹

Yet we contend that the jurisprudence has not gone far enough and this contention is rooted in a concern for those queer bodies and practices that the law continues to brand as vile and deviant. It is not the case that a critical stance towards the Court's jurisprudence on sexuality and gender simply allows a conclusion that our argument leads to a morally relativist position that would endorse sexual practices such as sex with minors, necrophilia, rape or bestiality. Being critically queer is not about excusing such unacceptable behaviour on the basis that they are examples of incidences where heteronormative disciplinary power exerts itself at the cost of individual sexual expression. There are, after all, marked differences between a sexual orientation towards a fellow human being and a sexual orientation toward an incapacitated or non-human being.

¹¹⁹*National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 26) para 117.

¹²⁰From Simon and Garfunkel 'Ms Robinson':

Coo, coo, ca-choo, Mrs Robinson
Jesus loves you more than you will know (Wo, wo, wo)
God bless you please, Mrs Robinson
Heaven holds a place for those who pray
(Hey, hey, hey...hey, hey, hey)
Sitting on a sofa on a Sunday afternoon
Going to the candidates debate
Laugh about it, shout about it
When you've got to choose
Ev'ry way you look at it, you lose
Where have you gone, Joe DiMaggio
A nation turns its lonely eyes to you (Woo, woo, woo)
What's that you say, Mrs Robinson
Joltin' Joe has left and gone away
(Hey, hey, hey ... hey, hey, hey)

Available at <http://www.lyricsondemand.com/s/simonandgarfunkellyrics/mrsrobinsonlyrics.html>.

¹²¹'Civil Union Bill a slap in the face' http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20061114102125576C695511

In her book, *Bodies that matter*, Judith Butler considers the question of what it means, practically, to be critically queer. She states: 'If the term "queer" is to be a site of collective contestations, the point of departure for a set of historical considerations and future imaginings, it will have to remain that which is, in the present, never fully owned, but always and only redeployed, twisted, queered from a prior usage and in the direction of urgent and expanding political purposes'.¹²²

When one considers Albie Sachs' judgments on sexuality and gender during his tenure on the Constitutional Court one can see that Sachs' judgments were both critically queer and not critically queer. These judgments often disturbed heteronormativity but they also yielded to its disciplinary power/knowledge. It is as if Albie Sachs in these judgments did precisely that which he could not do and wrote these judgments with both hands, as if together these judgments represent what Derrida calls a double writing or a double affirmation – a writing simultaneously both a monument and memorial of the other.¹²³

Perhaps there can never be such a thing as a queer judge, because perhaps, after all, the law is constitutively the order of heteronormative power. But we can never finally know this. We are therefore left to think beyond the exclusionary, violent law and to imagine the possibility of a non-heteronormative world. Albie Sachs' queer judgments ultimately serve as an invitation to imagine just that – the 'beyond' of the given heteronormative order – and to act in the name of that future.

¹²²Butler *Bodies that matter* (1993) 228.

¹²³Derrida *Limited Inc* (1988) at 21: 'an opposition of metaphysical concepts ... is never the confrontation of two terms, but a hierarchy and the order of a subordination. Deconstruction cannot be restricted or immediately pass to a neutralization: it must, through a double gesture, a double science, a double writing – put into practice a reversal of the classical opposition *and a displacement* of the system. It is on that condition alone that deconstruction will provide the means of *intervening* in the field of oppositions it criticizes and that is also a field of nondiscursive forces.'