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SAME-SEX SEXUAL DESIRE AND THE RE-IMAGINING OF THE SOUTH AFRICAN FAMILY

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ABSTRACT

Many individuals who form same-sex intimate relationships argue that the social and legal protection associated with heterosexual marriage should be extended to their relationships. This is understandable because marriage in South Africa remains the focal point for the protection and regulation of the interests of individuals who engage in intimate relationships of any kind. However, merely extending marriage rights to same-sex couples whose relationships mirror the idealised heterosexual norm will be problematic. Because of homophobia and prejudice many individuals in same-sex intimate relationships will not be able to freely 'choose' to get married. Others will form intimate relationships that will not be recognised because they will be insufficiently similar to the traditional heterosexual notion of marriage. Those who do not marry will therefore once again be marginalised and the law will once again fail to protect the weaker and more vulnerable partners in such relationships. The early case law of the Constitutional Court recognised that the right to substantive equality entails a right to equal concern and respect across difference and thus hinted that not only marriage-like intimate same-sex relationships, but also non-traditional forms of such relationships should be constitutionally protected and respected. However, later judgments seem to suggest that intimate relationships that stray too far from the model of traditional heterosexual marriage, are less worthy of respect and protection. This narrow conception of what constitutes worthy intimate relationships is deeply problematic, not only for individuals in non traditional same-sex relationships but also for the millions of individuals in different-sex relationships who are not married, because it marginalises them and fails to extend legal protection to some of the most vulnerable members of society. The legal regulation of intimate relationships should therefore completely move away from the marriage model and should instead be based on a functional model which takes account of the unequal power relations in intimate relationships.

I INTRODUCTION

'Marriage' tangles questions of eros and love and economic dependency in a way that leaves us with little vocabulary for any relationship in which these are not present in heavy doses.

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¹ S Homer 'Against Marriage' (1994) 29 *Harvard Civil Rights-Civil Liberties LR* 505, 526.

I worry that the institution of marriage will cabin all of our relationships into acceptable and not-acceptable categories by creating the ultimate expectation of marriage, and therefore defining all other relationships as lesser.

Ruthann Robson²

Individuals in South Africa who experience sexual desire for members of their own sex³ and who form relationships based (at least in part) on such desire, increasingly demand societal and legal recognition of their relationships.⁴ Such individuals also increasingly beget and/or raise children, usually with the assistance of one or more other person and increasingly demand societal and legal recognition for their parental roles.⁵ These relations — just like different sex intimate relations — take many forms and there are many possible ways in which such intimate relations could be recognised by society and by the law,⁶ but the seemingly most obvious and preferred way is to extend the access to traditional heterosexual marriage to same-sex couples.

To some it might seem surprising that individuals who seek legal and societal recognition for their same-sex intimate relationships would turn to the institution of marriage. In the context of the United States, the institution of marriage has been described as being in terminal decline,⁷ while South African statistics suggest that a large number of individuals in different sex intimate relationships are not legally married.⁸ But as the recent discussion paper of the South African Law Reform Commission on domestic partnerships points out, there are several reasons why individuals in intimate relationships who are legally entitled to get married fail to do so. Apartheid, with its concomitant migrant labour system, led to the partial breakdown in 'traditional family arrangements' and has made marriage less viable for some; poverty and unemployment

2 R Robson 'Mostly Monogamous Moms?: An Essay on the Future of Lesbian Legal Theories and Reforms' (2000) 17 *New York Law School J of Human Rights* 704, 706.

3 In this article I explicitly refrain from using terms such as 'homosexual', 'gay', 'lesbian' or 'bisexual' to signal that I wish to deal not only with the situation of individuals who identify themselves as gay or lesbian or are thus identified by others, but also with other individuals who do not identify as such but who do from time to time experience sexual desire for members of their own sex and who form relationships in which such desire might be implicitly or explicitly acknowledged.

4 See generally *Fourie v Minister of Home Affairs* 2003 (10) BCLR 1092 (CC).

5 See generally *Du Toit v Minister for Welfare and Population Development* 2003 (2) SA 198 (CC); *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC).

6 See J Sloth-Nielsen & B van Heerden 'The Constitutional Family: Developments in South African Family Law Jurisprudence Under the 1996 Constitution' (2003) 17 *International J of L, Policy & the Family* 121, 134; K Weston *Families We Choose: Lesbians, Gays, Kinship* (1997) 109.

7 See M Fineman 'Masking Dependency: The Political Role of Family Rhetoric' (1995) 81 *Virginia LR* 2181, 2184.

8 See South African Law Reform Commission (SALRC) Discussion Paper 104, Project 118 *Domestic Partnerships* (2003) 17. The report points out that only 40 per cent of African and coloured women are married. In the 1996 census, the number of individuals 'living together' in intimate relationships broken down by population group was: African 1056992; Coloured: 132180; Indian/Asian: 7119; White: 84027. See also B Goldblatt 'Regulating Domestic Partnerships — a Necessary Step in the Development of South African Family Law' (2003) 120 *SALJ* 610, 612.

force women to accept decisions by men who refuse to get married in order to avoid emotional and financial commitments; many individuals are ignorant about the law and believe that their intimate relations are protected by the law; women might also choose not to get married to avoid the male domination often associated with marriage.⁹

While the number of individuals who marry may therefore have declined, I contend that the *institution* of marriage remains of pivotal importance to most South Africans. This is because marriage remains the focal point for the legal protection and regulation of the interests of individuals who are engaged in intimate relations. Marriage is the only legal institution that comprehensively safeguards the rights of individuals involved in intimate relationships.¹⁰ It is also one of the most powerful symbols of societal acceptance and belonging in many parts of the world, including in multi-ethnic, culturally diverse South Africa.¹¹

The claim to extend the protection afforded by the institution of marriage to same-sex couples, is also supported by various provisions in the Constitution which contain an explicit prohibition against unfair discrimination on the grounds of sexual orientation and marital status,¹² and guarantees for everyone the right to privacy¹³ and human dignity.¹⁴ In some of its judgments the South African Constitutional Court has furthermore signalled that these constitutional guarantees suggest that everyone has rights to equal concern and respect across difference¹⁵ and that the Constitution thus necessitates a revision of the way in which intimate relations are legally regulated and recognised in South Africa.¹⁶

9 SALRC Discussion Paper (note 8 above) 18-23.

10 See generally SALRC *Domestic Partnerships* Report (2003) ch 3; ch 5. The Report points out that many of the legal benefits associated with marriage are not (automatically) conferred to other forms of intimate relationships: the property rights of partners; the right to maintenance; the rights to be the legal parent of one's biological children; and the right to intestate succession are a few examples.

11 R Robson 'Assimilation, Marriage, and Lesbian Liberation' (2002) 75 *Temple LR* 709, 798; P de Vos 'Same-sex Marriage, the Right to Equality and the South African Constitution' (1996) 11 *SAPL* 355, 359; A Rich 'Compulsory Heterosexuality and Lesbian Existence' in *Blood, Bread and Poetry: Selected Prose 1979-1985* 23, 50; Fineman (note 7 above) 2183. See also *Robinson v Volks* 2004 (6) BCLR 671 (C) 681, where Davis J speaks of the profound significance attached to the institution of marriage. The perception that marriage provides acceptance and social belonging to many in South Africa is illustrated by a newspaper report of Norman Ntswane, a fitter and turner from Selby, Johannesburg, who paid R15000 (almost one year's salary for him) for a traditional wedding ceremony with Moira Mogotladi. When asked about this extravagance, he remarked: 'When you get married you are blessed. God likes married people. I do believe everything I ask for will be given'. *Sunday Times Magazine* (10 October 1994).

12 Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution') s 9(3).

13 Section 14 of the Constitution.

14 Section 10 of the Constitution.

15 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 22 (per Ackermann J); 132 (per Sachs J).

16 See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC); *Du Toit* (note 5 above).

For individuals who seek legal and social recognition for their same sex intimate relations, these constitutional developments thus appear to hold out the promise of a full recognition of their relations through the constitutionally mandated expansion of the definition of marriage.

However, there are serious questions about the wisdom of endorsing such an approach to the legal recognition of non-traditional intimate relations, including same-sex relations. In this article, I argue that the legal recognition of same-sex marriage might well provide legal protection and social affirmation to same-sex couples whose relationships mirror those of the idealised heterosexual marriage, but it ignores the lived reality of many individuals who are not in a position to 'choose' to legalise their relationships through marriage. A mere extension of marriage rights to some same-sex couples will also not lead to a necessary and fundamental re-imagining of the nature of the legal regulation of intimate relations in our society. Moreover, I argue that such a development will leave unaffected many other aspects of the concept of marriage that are highly problematic, not only for individuals who experience same-sex sexual desire, but also for society as a whole.

Although I deal explicitly with same-sex intimate relations, I believe my argument has relevance for all individuals in intimate relationships, especially those relationships that do not conform to the stereotypical heterosexual norm. I thus deploy the concept 'intimate relations' to refer broadly to all those intimate relations between people who have established emotional and/or sexual bonds in a traditional or non-traditional unit. I wish to include in this concept all individuals who are married or live together as a married couple and might or might not be raising children and others whose bonds are more complex and whose relations are not necessarily monogamous, hierarchically structured, or coupled, and who might or might not be raising children. I use this concept to signal a rejection of the factually and ideologically problematic conflation of the concepts of 'marriage' and 'the family' and to signal, further, that I embrace the view that there are many different kinds of valuable intimate relations – freely chosen or forced upon individuals – that go way beyond relations that mirror the traditional idealised heterosexual marriage and are worthy of recognition, respect and legal protection. While I thus mainly focus in this article on same-sex relations, I contend that there are many different kinds of intimate relations that are not sufficiently protected or regulated by the law, exactly because they do not conform sufficiently to the idealised heterosexual norm. Examples include where a male and female same-sex couple decide to beget and raise children together as a family; or where more than two individuals in an intimate relationship with the others decide to beget and raise children; or where a man has a rural wife but cohabits with a woman in an urban area in a long term relationship; or where a mother and a grandmother jointly raise the mother's children.

I thus contend that the extension of legal rights and benefits to only those couples in intimate relationships that mirror the idealised heterosexual marriage, will have the potential effect of marginalising other, often vulnerable, individuals in the kinds of non-traditional relationships mentioned above. Because of homophobia, gender inequality and patriarchy in our society, gay men, lesbians and many women in different-sex relationships often do not have the social or economic power to freely 'choose' to set the terms of their relationships.¹⁷ I furthermore suggest that there is a danger that the mere extension of marriage to non-traditional intimate relations will merely reinforce and perpetuate stereotypes about the 'dangerous' and 'threatening' sexuality of those who do not conform to the idealised heterosexual norm; it will not address the gendered nature of traditional marriage and it will perpetuate the patriarchy that subordinates women's personal, economic and social interests to those of men. I also contend that it will not sufficiently recognise and value forms of intimate relations where children do not necessarily have biological connections to those who raise them.¹⁸ In short, I contend that the assumption – underlying the present legal regulation of intimate relations – that monogamous heterosexual-like marriage should be the inevitable and natural point of departure for any legal regulation of intimate relations ought not to be sustained, given the Constitution that promises us all to live lives in which difference are valued.

It is against this background that I engage with the legal regulation of intimate relations of those who experience same-sex desire.¹⁹ I first examine the Constitutional Court's emerging jurisprudence on sexual orientation and the right to equality. I then proceed to set out the present position regarding the legal regulation of intimate relations in South Africa and note the changes taking place in this dynamic field of study. I proceed to provide a critical analysis of the relevant jurisprudence and argue that the Constitutional Court's current approach to the regulation of intimate relations falls far short of the promise of its early pronouncements on sexual orientation and the right to be different. I argue that although there has been an erosion of hostility towards the legal recognition of the intimate relations of those who experience same-

17 See Goldblatt (note 8 above) 616.

18 B Cossman 'Family Inside/out' (1994) 44 *Univ Toronto LJ* 1, 8; W Eskeridge 'A History of Same-sex Marriage' (1993) 79 *Virginia LR* 1419, 1487-79; S Boyd 'Expanding the "Family" in Family Law: Recent Ontario Proposals on Same-sex Relationships' (1994) 7 *Can J of Women & L* 545, 557.

19 Although I deal with these questions from the perspective of same-sex desire, the analysis and arguments put forward in this article potentially have much wider relevance as it poses questions about the very nature of the regulation and recognition of all intimate relations in society. Towards the end of this article I will attempt to sketch some of the more general consequences of my analysis, but for the sake of clarity and brevity I shall mostly engage with questions as they relate to same-sex intimate relations.

sex desire, the much-heralded transformation of family law is 'largely an account of the evolution from the authoritarian patriarchal version of that model toward more secularized egalitarian families whose members enjoy increased individual autonomy'.²⁰ I point out that the legal norms employed by the Constitutional Court continue to reflect values long associated with the nuclear family. Those individuals whose intimate relations do not conform to the idealised heterosexual norm thus face daunting barriers to full-fledged membership in the modern legal family.²¹ I then conclude with some suggestions of how the legal regulation of intimate relations could be re-imagined in ways that would give effect to the promise of the earlier decisions of the Court.

II THE RIGHT TO EQUALITY, SEXUAL ORIENTATION AND THE RIGHT TO BE DIFFERENT

South Africa's Constitutional Court employs a discourse of 'substantive equality' when dealing with constitutional complaints of discrimination. The Court's discourse embodies a rejection of the notion of 'formal equality', opting instead for a substantive understanding of equality,²² which takes into account the structural inequalities in our society and endorses the view that the experience of subordination lies behind the vision of equality.²³ According to the Constitutional Court, substantive equality requires courts to examine the actual economic, social and political conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld. Such an inquiry reveals a world of systemic and pervasive group-based inequality, which needs to be taken into account in the formulation of jurisprudential approaches to equality rights.²⁴ The Court has suggested that its rhetoric on substantive equality means that it is required in each case to consider the *impact* of the constitutionally relevant differentiation

20 See M Minow 'Forming Underneath Everything That Grows: Toward a History of Family Law' (1985) *Wisconsin LR* 819, 827-34; L Teitelbaum 'Family History and Family Law' (1985) *Wisconsin LR* 1135, 1144-47.

21 C Christensen 'Legal Ordering of Family Values: The Case of Gay and Lesbian Families' (1997) 18 *Cardozo LR* 1299, 1302.

22 See, for example, C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248, 250; S Jagwanth 'What is the Difference? Group Categorisation in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC)' (1999) 15 *SAJHR* 201.

23 *National Coalition for Gay and Lesbian Equality v Minister of Justice* (note 15 above) para 22.

24 In elaborating further on the Constitutional Court's substantive approach to equality – or what he called the 'remedial' or 'restitutionary' approach – Ackermann J stated as follows in *National Coalition for Gay and Lesbian Equality v Minister of Justice* (ibid) para 60: 'It is insufficient for the constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied'. See also Albertyn & Goldblatt (note 22 above) 250.

on the complainant, taking into account the context in which the complainant finds him or herself.²⁵ This contextual or remedial approach requires courts to take cognisance of the legal creation and maintenance of structural inequalities and disadvantages between groups based on perceived or 'real' differences. It acknowledges that inequality results from complex power relations in society and seems to view law as having an important role in reordering these power relations in ways which strive to ensure that all individuals are treated as if they have the same moral worth. Where the law creates or perpetuates hierarchical differences in society, such laws will potentially have a harmful impact on those who are labelled different from a stated or unstated norm because such labelling will invariably have an exclusionary effect.²⁶ In this sense, the right to equality is conceptualised as a right to be different from the stated or unstated norm without suffering adverse consequences because of such difference. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*²⁷ – the first case in which the Constitutional Court was called upon to deliberate on alleged discrimination based on sexual orientation, the so called 'sodomy judgment' – the Court endorsed this view of equality. It endorsed the idea that the 'desire for equality is not a hope for the elimination of all difference' because 'to understand "the other" one must try, as far as is humanly possible, to place oneself in the position of "the other"'. According to Ackermann J it was 'easy to say that everyone who is just like "us" is entitled to equality' but it is always more 'difficult to say that those who are "different" from us in some way should have the same equality rights that we enjoy'.²⁸

The theme of equality as including a respect for difference also reverberates through the concurring judgement of Sachs J,²⁹ with the added dividend of Justice Sachs' characteristic high flying prose. 'Equality', Sachs J said, 'means equal concern and respect across difference'. This means that equality 'does not imply a levelling or homogenisation of behaviour', but instead means that we have to acknowledge and accept difference in our society. 'At the very least', according to Sachs J, 'it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At the best, it

25 *Brink v Kitshoff* 1996 (4) SA 197 (CC) para 44. See also *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 26 where Langa DP stated that the assessment of discrimination cannot be undertaken in a vacuum, 'but should be based both on the wording of the section and in the constitutional and historical context of the developments in South Africa'.

26 See P de Vos 'Equality for All? A Critical Analysis of the Equality Jurisprudence of the Constitutional Court' (2000) 63 *THRHR* 62, 68.

27 Note 15 above, para 22 (quoting from M Waltzer *Spheres of Justice: A Defence of Pluralism and Equality* (1983) xiii).

28 *Ibid* (quoting from the judgement of Cory J of the Canadian Supreme Court in *Vriend v Alberta* (1998) 156 DLR (4th) 385 para 69).

29 Sachs J wrote a concurring opinion which was also endorsed by Ackermann J, who wrote the main judgment. *Ibid* para 78.

celebrates the vitality that difference brings to any society'.³⁰ Finally, and to my mind crucially, Justice Sachs affirms that this right to be different has a very special consequence in the arena of human sexuality.

The concept of sexual deviance needs to be reviewed. A heterosexual norm was established, gays were labelled deviant from the norm and difference was located in them. What the Constitution requires is that the law and the public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference. What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.³¹

This judgment was handed down in heady days back in 1998 when the Constitutional Court still produced expansively reasoned judgments in at least some of the socially important, headline-grabbing cases.³²

If the rhetoric of this early jurisprudence of the Constitutional Court is to be taken at face value, it suggests that the right to equality requires a complete re-evaluation of the normative assumptions about sex and sexuality as well as the institutions ... such as 'marriage' and 'the family' ... which have helped to regulate sex and sexuality in our society and which in the past have contributed to the production and maintenance of a heteronormative society.³³ At least in the field of sexuality, everything

30 Ibid para 132, referring to CA Lyttleton 'Reconstructing Sexual Equality' (1987) 75 *California LR* 1279, 1285.

31 Ibid para 134 (quoting from M Minow *Making all the Difference: Inclusion, Exclusion, and American Law* (1990) 68).

32 Iain Currie has argued that the Constitutional Court often shies away from producing expansively reasoned judgements, avoiding 'first-order' reasoning when decisions can be made on a deductive or analogical basis and an avoidance of large scale theorising when substantive decision-making is unavoidable. He argues that the sodomy judgement, despite its scope and detail, still demonstrates many of the characteristics of minimalism because the Court avoided the question of whether the common law criminalisation of sodomy would contravene the rationality requirement attached to s 9(1). Such an investigation would potentially have required the Court to hold that differentiation motivated exclusively by religious or moral grounds is always irrational and that would have been far from minimalist. See I Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138, 164. Although I agree that a consideration of the rationality enquiry would have potentially far-reaching consequences, I disagree with Currie's argument in as far as it implies that the decision as it stands is minimalist in intent and effect. The reasons for this disagreement become evident as I develop my argument in this article.

33 The term heteronormativity was popularised by Michael Warner. See M Warner 'Introduction' in *Fear of a Queer Planet: Queer Politics and Social Theory* (1993) vii, xxi. Warner describes heteronormativity as arising from heterosexual culture's ability to interpret itself as co-extensive with society, as 'the elemental form of human association, as the very model of inter-gender relations, as the indivisible basis of all community, and as the means of reproduction without which society wouldn't exist'. See also M Warner *The Trouble with Normal: Sex, Politics and the Ethics of Queer Life* (1999) 41-88. On heteronormativity generally see D Hutchinson 'Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics' (1999) 47 *Buffalo LR* 1; A Jagose *Queer Theory: An Introduction* (1996) 3-4.

suddenly seemed up for grabs. The Court's rhetoric in these early cases suggests that there is a need to subject traditional institutions like marriage and the family to critical scrutiny and to ask whether these legally maintained institutions do not perpetuate the marginalisation and oppression of those who do not conform to some stated or unstated norm. For if everyone has the right to be different and if we must move away from the idea that heterosexuality forms the normative basis for policy formulation, then the very institutions which valorise a certain manifestation of heterosexuality and help to maintain the system of compulsory heterosexuality³⁴ in our society must be under attack. A prime candidate for re-invention or reconstruction must surely be the institutions of 'marriage' and the 'family', the very institutions which have been deployed to regulate and police intimate relations in our society. These institutions have traditionally been associated with the validation and valorisation of certain kinds of heterosexual relationships and have thus contributed to the marginalisation of those whose sexuality do not conform to the idealised heterosexual norm.³⁵ If we were to engage with the Constitutional Court's equality rhetoric around sexual orientation in a serious manner, it would throw into doubt the constitutional tenability of the continued use of these concepts in their present form or perhaps in any form. The question is to what extent these institutions can be reformed when one works within a paradigm that embraces the right to be different as a founding value of the right to equality. If the heterosexual norm has become constitutionally problematic, then those institutions such as marriage and the family which have

34 See Rich (note 11 above) 51; 57. Rich defines compulsory heterosexuality as heterosexuality that 'has been both forcibly and subliminally imposed on women'. See also Robson (note 11 above) 778-79. Robson points out that the term 'compulsory heterosexuality' has been adopted by a wide range of legal scholars working on a wide array of sexuality issues. See, for example, M Becker 'Strength in Diversity: Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships' (1994) 23 *Stetson LR* 701, 730-31 (arguing 'biases against same-sex relationship are part of system of compulsory heterosexuality' because homosexual relations do not have traditional female subordinate roles); P Cain 'Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism' (1994) 2 *Virginia J of Society, Policy & L* 43, 71 (arguing that 'compulsory heterosexuality' is part of sexist oppression of women so long as women are constructed as sexual objects (or breeders) for men, and '[c]ompulsory heterosexuality is simply one of the tools used to construct house of patriarchy'); W Eskridge Jr 'No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review' (2000) 75 *New York Univ LR* 1327, 1380-81 (arguing that compulsory heterosexuality undermines women's sexuality); P Ettelbrick 'Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All' (2001) 64 *Alberta LR* 905, 908 (discussing resistance of lesbians in 1970s to compulsory heterosexuality); K Thomas 'Beyond the Privacy Principle' (1992) 92 *Columbia LR* 1431, 1467 (stating '[h]omophobic violence aims to regulate the erotic economy of contemporary American society, or more specifically, to enforce the institutional and ideological imperatives of what Adrienne Rich has termed 'compulsory heterosexuality'); F Valdes 'Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex", "Gender", and "Sexual Orientation" in Euro-American Law and Society' (1995) 85 *California LR* 1, 234 (comparing Native American 'pan-sexuality' with Euro-American 'compulsory heterosexuality').

35 Robson (note 11 above) 715.

helped to produce and maintain heteronormativity themselves become problematic.

III THE TRADITIONAL NOTION OF MARRIAGE AND THE FAMILY IN SOUTH AFRICA

The starting point for any legal regulation of intimate relations in South Africa has always been the concept of 'the family'. However, despite the often claimed importance of family and family life in South African law and despite the many de facto forms such family life takes among so many people in South Africa, until recently, family law in South Africa was strongly associated with the institution of Western style marriage.³⁶ As recently as 13 years ago, a South African textbook on family law still stated that 'an extra marital relationship where a man and a woman live together . . . is not regulated by family law, as it is not based on the existence of a valid marriage' and hence has no consequences in family law. The same textbook also defined a family, in the narrow sense, as 'a man, his wife and their children'.³⁷ Although the concept of 'marriage' has not been legislatively defined in South African law,³⁸ academic

36 Although African customary law has been recognised, at least partially, in South Africa since the adoption of the Black Administration Act 38 of 1927, customary law has only been intermittently applied by our courts. The High Court required African customary law to be proven by expert evidence as if it was foreign law. Moreover, s 11(1) of the Black Administration Act enjoined the court to apply customary law provided it was not 'repugnant' to public policy. See *Bhe v Magistrate, Khayelitsha* 2004 (1) BCLR 27 (C) 31. Although the Recognition of Customary Marriages Act 120 of 1998 purported to place customary marriages on the same footing as marriages recognised in terms of the Marriage Act 25 of 1961, it has not provided complete assistance to people who believe they are married in terms of customary law but have no marriage certificate. See SALRC (note 8 above) 24. Recently there have also been moves to recognise the legal consequences attached to marriages concluded in terms of Muslim rites. See *Daniels v Campbell* 2003 (9) BCLR 969 (C). For many years South African family law textbooks reflected the deeply racialised and Eurocentric view that the recognition of rights associated with the family depended on the conclusion of a valid marriage in terms of the Marriage Act.

37 See for example DSP Cronjé *The South African Law of Persons & Family Law* (1990) 157. See also D Hutchison et al (eds) *Wille's Principles of South African Law* (1991) 94-5: 'marriage may be defined as a legal relationship, established by means of a state ceremony, between two competent and consenting persons of different sexes, obliging them, inter alia, to live together for life (or more realistically, for as long as the marriage lasts) to afford each other the conjugal privileges exclusively, and to support each other'. See also HR Hahlo *The South African Law of Husband and Wife* (1985) 21, who defines marriage as 'the legally recognised voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts'.

38 Legislation mainly provides for the formalities that need to be complied with. See Marriage Act 25 of 1961. The Constitutional Court has pointed out that, apart from the above act, there are at least 44 Acts of Parliament in which terms like 'husband', 'wife' and 'spouse', associated with traditional marriage are used. See *Fourie* (note 4 above) para 12. These acts include the South African Citizenship Act 88 of 1995; Prevention of Family Violence Act 133 of 1993; Sexual Offences Act 23 of 1957; Insolvency Act 24 of 1936; Child Care Act 74 of 1983; Children's Act 33 of 1960; Children's Status Act 82 of 1987; Divorce Act 70 of 1979; Marriage Act 25 of 1961; Matrimonial Affairs Act 37 of 1953; Matrimonial Property Act 88 of 1984; Recognition of Customary Marriages Act 120 of 1998; Banks Act 94 of 1990; Mutual Banks Act 124 of 1993; Mental Health Act 18 of 1973; Income Tax Act 58 of 1962; Compensation for

writers and courts have traditionally defined it as the 'legally recognised lifelong voluntary union between one man and one woman to the exclusion of all other persons'.³⁹ State-sanctioned, monogamous, heterosexual marriage ... with legally defined gender roles ... was until recently⁴⁰ thus seen as the only way in which couples could be officially and comprehensively bound together and in which children could enjoy all the legal rights associated with the institution of the family. Not only conferring unique rights and duties, marriage, perhaps most importantly, excluded others who could not or would not bind themselves in marriage from the enjoyment of such rights and duties.

There is a good reason why intimate relations have traditionally been regulated, policed, and protected with reference to the concepts of the idealised heterosexual marriage and the family. Traditionally the apartheid state utilised the concept of the idealised nuclear family⁴¹ as a handy central organising structure of white society. Mirroring trends in modern Western states, South African law regulating intimate relations⁴² has

Occupational Injuries and Diseases Act 130 of 1993; Deeds Registries Act 47 of 1937; Mining Titles Registration Act 16 of 1967; Civil Proceedings Evidence Act 25 of 1965; Criminal Procedure Act 51 of 1977; Criminal Law and the Criminal Procedure Act Amendment Act 39 of 1989; Law of Evidence Amendment Act 45 of 1988; Merchant Shipping Act 57 of 1951; Friendly Societies Act 25 of 1956; Government Employees Pension Law 1996; Railways and Harbours Service Act 28 of 1912; Railways and Harbours Acts Amendment Act 15 of 1956; Black Administration Act 38 of 1927; *South African Passports and Travel Documents Act 4 of 1994; *Companies Act 61 of 1973; *Supreme Court Act 59 of 1959; *Administration of Estates Act 66 of 1965; *National Parks Act 57 of 1976; *Mediation in Certain Divorce Matters Act 24 of 1987; *Health Act 63 of 1977; *Value-Added Tax Act 89 of 1991; *Human Tissue Act 65 of 1983; *South African Police Service Act 68 of 1995; *National Road Traffic Act 93 of 1996; *Housing Development Scheme for Retired Persons Act 65 of 1988; *South African Reserve Bank Act 90 of 1989; *Black Communities Development Act 4 of 1984; *Mining Titles Registration Act 16 of 1967. Acts marked with an asterisk contain references to 'husband' and/or 'wife' in their regulations only.

39 Cronjé (note 37 above) 149. See *Bronn v Frits Bronn's Executors* (1860) 3 SC 313; *Nalana v R* 1907 TS 407; *Estate Canham v The Master* (1909) 26 SC 166; *R v Fatima* (1912) TPD 59-63; *Seedat's Executors v The Master (Natal)* 1917 AD 302, 309; *Ismail v Ismail* 1983 (1) SA 1006 (A) 1019-24. The locus classicus in this regard is *W v W* 1976 (2) SA 308 (W) where the court held that marriage of a post-operative transsexual was invalid on the basis that the operation did not change the plaintiff into a female, and a valid marriage could only be contracted by parties of the opposite sex.

40 The Recognition of Customary Marriages Act 120 of 1998 for the first time recognised polygamy by allowing the husband in a customary marriage to enter into a legally recognised subsequent customary marriage under certain circumstances. See s 7(7)-(9). This Act does not apply to civil marriages not concluded in terms of African customary law.

41 I use the concept of the 'idealised nuclear family' as a handy shorthand for a conception of family that takes as its starting point a heterosexual marriage within which children are to be raised. This concept of the idealised nuclear family therefore evokes an image of a middle class father and mother, who got married in a church and who live happily with their two children and a dog in one of the middle class suburbs of Cape Town, Johannesburg or Durban.

42 For many years, most black South Africans acquired some of the rights associated with Western style marriage through the partial recognition of African customary law marriages. But such marriages did not provide its participants with all the rights and duties associated with civil marriages in terms of the Marriage Act. The apartheid policy with the migrant labour system also contributed to the breakdown of traditional family relationships in African societies. See SALRC (note 8 above) 18-9.

mostly assumed that nuclear families will play a primary role in the nurturing and acculturation of children and in providing care for the sick and the old. In terms of the ideology of the nuclear family, such families are seen as mediating between the individual and the state and are required to perform essential income distribution functions, from adults in their prime earning years to the old, the young and (mostly) the women who care for them.⁴³ The nuclear family is also seen as creating the space for facilitating individual identity and development and is assumed to fulfil this role.⁴⁴ The focus on the *nuclear* family, it has been argued, has been the result of the creation – under the influence of Christian teachings – of a romanticised myth in Western culture which saw the idealised nuclear family as the natural and morally superior way of organising intimate relations.⁴⁵ In South Africa, the process of colonisation and the concomitant influence of the Christian missionaries resulted in a re-imagining of traditional kinship relations to conform to Christian-inspired ideas of normality and respectability and this, in turn, contributed to the endorsement of the nuclear family by traditional African communities.⁴⁶ Although the nuclear family has been displaced by other forms of intimate relations as the predominant form – both in South Africa and in Western societies such as the United States – the perceived positive values so strongly associated with the nuclear family has resulted in a lingering nostalgia for the nuclear family and a parallel reluctance to view other forms of intimate relations as legitimate arrangements worthy of protection and respect. As Christensen points out in the context of the American experience, while there is no reason to suppose that individuals are more companionate, or parents more nurturing, in alternative families of affinity, neither is there evidence that such attributes are less valued than they are in nuclear families.⁴⁷ But these positive values are so closely associated with the nuclear family (which is in turn closely related to a form of Christian morality) that efforts to infuse non-traditional living arrangements with family-like attributes are commonly rejected as assaults on the already fragile family. Single-parent children, unmarried partners (whether of the same or opposite sex), and polygamous relationships are thus often seen as threats to the very idea of family, no matter how deep the ties and commitments that bind them.⁴⁸ In South Africa these trends have been less pronounced, but the particular Christian National nature of the

43 S Law 'Homosexuality and the Social Meaning of Gender' (1988) *Wisconsin LR* 220-21.

44 Fineman (note 7 above) 2182.

45 S Coontz *The Way We Never Were: American Families And The Nostalgia Trap* (1992) 25. See generally Christensen (note 21 above) 1308.

46 O Phillips 'Constituting the Global Gay: Issues of Individual Subjectivity and Sexuality in Southern Africa' in C Stychin & D Herman (eds) *Sexuality in the Legal Arena* (2000) 17, 21-2.

47 Christensen (note 21 above) 1316.

48 Ibid. See also J Dizard & H Gadlin *The Minimal Family* (1990) 9, 181-87.

apartheid state nevertheless contributed to the valorisation of the mythical nuclear family because it was seen as a 'civilising' Christian institution operating as a bulwark against threats to morality.

Although there have been some change in these attitudes in South Africa since the adoption of the first democratic Constitution in 1994, I contend that traditional views about the role of the family in society and the positive association of the *nuclear* family with this role, lingers on – also among law makers. Even among those who accept the limitations of the nuclear model, the nuclear family remains the starting point for any discussion of the legal regulation of intimate relations because of the perception that this form of regulation of intimate relations creates much needed legal certainty.⁴⁹ Furthermore, the fact that the law reifies the nuclear family, in turn, contributes to the societal valorisation of the nuclear family. Because the law contributes to the production and maintenance of our reality, the continued link between the legal regulation of intimate relations and the nuclear family perpetuates myths about the natural and inevitable centrality of the nuclear family in our world.

The continued ideological dominance of the nuclear family model in South Africa means that while many kinds of human pairings are possible, state-sanctioned marriage is still – in South Africa at least – the only one which officially and comprehensively binds couples together in the eyes of the law.⁵⁰ By doing so it confers upon its participants unique rights and duties, attaching legally enforceable consequences in the process.⁵¹ But there is no consensus in South Africa as to what constitutes a family or even what should constitute a legally recognised marriage. Conflicting ideological, cultural and religious values will lead to the adoption of different definitions of marriage and the family.⁵² It will also lead to different views about the possible recognition and regulation of other non-traditional intimate relations not usually

49 The argument around legal certainty is, of course, circular. The nuclear family provides legal certainty because it forms the basis for the legal regulation of intimate relations. Because the law assigns certain functions to the nuclear family, it is seen as inevitable that this kind of legal regulation is the only kind that can effectively regulate intimate relations and can provide for a degree of legal certainty to ensure that individuals can be protected. See Homer (note 1 above) 529.

50 Although the Constitution has impacted upon the regulation of marriage and the family, the starting point for any legal protection remains legal marriage. See Sloth-Nielsen & Van Heerden (note 6 above) 123-30.

51 C Lind 'Sexual Orientation, Family Law and the Transitional Constitution' (1995) 112 *SAJL* 481, 482. Lind points out that there is a difference between marriage as a legal institution and as a moral institution as represented in the solemnisation of relationships within religious and other communities. Lind argues that it might be better for the two institutions to have taken two distinct names, marriage for the moral institution and domestic partnership for its legal counterpart (ibid 483). See also J Sinclair 'Marriage: Is it Still a Commitment for Life Entailing a Lifelong Duty of Support?' (1983) *Acta Juridica* 75.

52 T Mosikatsana 'The Definitional Exclusion of Gays & Lesbians From Family Status' (1996) 12 *SAJHR* 549.

associated with marriage and the family. South African legal academics and judges have defined marriage as a heterosexual, monogamous and consensual union on the assumption that there was consensus about family life and the role of family in society. But these unexamined assumptions represent the idealisation of the dominant, white, colonial, Christian concept of family as discussed above. There has been a growing recognition that this concept of family so closely linked to the idealised nuclear family utterly fails to take account of the cultural diversity and the value of pluralism of South Africa's new constitutional democracy. In reality there are various forms for the organisation of intimate relations, including those represented by the nuclear family, same-sex unions, African customary marriages, Hindu, Jewish and Muslim marriages, and multi-member relationships. Many individuals also choose to organise their intimate relations in ways that do not mirror in any way the traditional marriage or nuclear family.⁵³

It has therefore become untenable as a matter of law to sustain the definitional rigidity of marriage and the family. Indeed, over the past five years the Constitutional Court has been confronted with several cases in which the nature of marriage and the family came under the spotlight, and in these judgements the Court endorsed the view that there is a need to redefine the institutions of marriage and the family. The legislature has also signalled an awareness of the need for a different approach to the regulation of intimate relations.⁵⁴ Given the Constitutional Court's endorsement of equality as a right to be different, it might reasonably be assumed that its re-imagining of the way in which intimate relations should be regulated, would start by rejecting the traditional idealised heterosexual marriage and the nuclear family as the normative starting point for regulation. However, this has not happened. The picture that is emerging is a re-imagined regime regulating intimate relations that looks remarkably similar to the idealised notion of heterosexual marriage which has been the starting point for legal regulation in South Africa over the past hundred years.

53 Ibid 550-51.

54 See for example, s 1 of the Domestic Violence Act 116 of 1998, which aims to protect individuals in 'domestic relationships' from abuse and violence. The definition of 'domestic relationships' is very wide and covers persons who are or were married to each other, including marriage according to custom or religion; persons of the same or the opposite sex who live or have lived together; persons who are the parents of a child or who have or had parental responsibility for that child; family members related by consanguinity, affinity or adoption; persons who are or were in an engagement, dating or customary relationship of any duration; and persons who share or recently shared the same residence. See generally Sloth-Nielsen & Van Heerden (note 6 above) 123-25.

IV THE CONSTITUTIONAL COURT, INTIMATE RELATIONS, AND THE CHANGING NATURE OF 'THE FAMILY'

(a) Human dignity and the right to family life

South Africa's 1996 Constitution deliberately omitted the right to family life from the chapter setting out the Bill of Rights. When this omission was challenged in 1996 in the *Certification* judgment,⁵⁵ the Constitutional Court endorsed this omission by noting that families 'are constituted, function and are dissolved in such a variety of ways' that it might be better not to constitutionalise the right to family life. In a promising line of argument, the Court posited that this would avoid 'disagreements over whether the family to be protected is a nuclear family or an extended family' because 'these are seen as questions which relate to the history, culture and special circumstances of each society'.⁵⁶ But four years later the Constitutional Court's trepidation at getting involved in disagreements about what kind of intimate relations should be legally and constitutionally protected seems to have disappeared. In *Dawood v Minister of Home Affairs*⁵⁷ the Court declared invalid sections of the Aliens Control Act 96 of 1991 which hampered the ability of foreign spouses married to South African citizens from obtaining, amongst others, temporary residence permits. The Court found that the right to human dignity protected in s 10 of the Bill of Rights must be understood to protect the right of individuals to enter into a marriage relationship and to honour their obligations incurred as a result of such a relationship,⁵⁸ stating that 'marriage and family are social institutions of vital importance'.⁵⁹

The institution of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends.⁶⁰

According to the Court, in a constitutional democracy based on the values of equality, freedom and human dignity, the right to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people. To prohibit the establishment of such relationships would therefore impair the ability of the individual to achieve personal fulfilment in an aspect of life that is of

55 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa Act 1996* 1996 (4) SA 744 (CC).

56 *Ibid* para 99.

57 2000 (3) SA 936 (CC).

58 *Ibid* para 37.

59 *Ibid* para 30.

60 *Ibid* para 31. See also *Du Toit* (note 5 above) para 19.

central significance and would constitute an infringement of the right to human dignity guaranteed in s 10 of the Constitution.⁶¹ Marriage and the family have, however, more than a personal significance to the individuals concerned. Because human beings are social beings whose humanity is expressed through relationships with others, entering into marriage is to enter into a relationship that has public significance as well.⁶²

These passages from *Dawood* suggest that the Constitutional Court views intimate relations per se as valuable, but at the same time sees 'marriage' as remaining the cornerstone of the legal regime regulating intimate relations. Because marriage has both private and public significance and because it is so closely associated with the concept of the family, it remains a pivotal institution worthy of recognition and respect. At the same time, the Court has confirmed the centrality of the family – whatever way it might be defined – in our new constitutional order and has now recognised the principle that establishing and maintaining a family are goals worthy of constitutional protection. This implies, further, that the state has a positive duty to respect and protect the family through the adoption of legislative and other measures.⁶³

But the Court has left open the possibility of a limited re-imagining the legal regulation of intimate relations. Arguing that families come 'in many shapes and sizes', the Court endorsed the view that the definition of family changes as social practices change and implies that it would be constitutionally appropriate to take cognisance of such changes.⁶⁴ This view was also endorsed in the case of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* where the Court confirmed that over the past decades 'an accelerating process of transformation has taken place in family relationships as well as in societal and legal concepts regarding the family and what it comprises'.⁶⁵ Quoting from a book by Sinclair and Heaton,⁶⁶ the Court endorsed the view that South Africa is experiencing a period of rapid change regarding family which strikes at the heart of the assumptions underlying marriage and the family. Because South Africa is a heterogeneous society 'fissured by differences of language, religion, race, culture, habit, historical experience and self-

61 *Dawood* (note 57 above) para 37.

62 *Ibid* para 30.

63 See s 7(2) of the Constitution.

64 *Dawood* (note 57 above) para 31, referring, amongst others, to J Sinclair assisted by J Heaton *The Law of Marriage Vol 1* (1996) 5-15. See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 16 above) paras 47-8; *Du Toit* (note 5 above) para 19.

65 See *National Coalition v Minister of Home Affairs* (note 16 above) para 47.

66 Sinclair & Heaton (note 64 above) 6.

definition' it reflects 'widely varying expectations about marriage, family life and the position of women in society'.⁶⁷

It is unclear how far-reaching a redefinition of the family the Constitutional Court envisages. In *Dawood*, after noting that South African families 'are diverse in character' and that 'marriages can be contracted under several different legal regimes including African customary law, Islamic personal law and the civil common law' the Court nevertheless stresses that 'the personal significance of the relationship for those entering it and the public character of the institution remain profound' and many of the 'core elements of the marriage relationship are common between different legal regimes'.⁶⁸ These remarks suggest that any re-imagining of the legal regulation of intimate relations will be firmly rooted in the marriage/family model of regulation. But this is problematic. I contend that the real test for the Court's commitment to a re-imagining of the legal regulation of intimate relations will only come when it is required to consider the need to recognise intimate relations of individuals who form such relations at least partly because of their sexual desire for members of their own sex. If the Constitution guarantees everyone the right to be different, then surely this will extend to the right to form and have different kinds of intimate relations legally recognised. And surely individuals who experience same-sex desire have been one of the groups at the forefront of fashioning non-traditional arrangements to deal with intimate relations.⁶⁹

(b) Same-sex desire, the Constitutional Court and the limits of the constitutional family

The Constitutional Court's recent interventions in the field of intimate relations of individuals who experience sexual desire for members of their own sex look promising. The Court's rhetorical rejection of a traditional narrow conception of marriage and the family suggests that it is prepared to engage in a functional and pragmatic enquiry to determine whether a particular set of relations is worthy of legal recognition and respect. The Court seems to suggest that it would reject legislation and regulation that is based on a narrow conception of family and marriage where it triggers an equality concern and will embrace provisions that accommodate the de facto intimate relations that people form to provide financial support and emotional stability. But a closer analysis of the Court's reasoning

67 *National Coalition v Minister of Home Affairs* (note 16 above) para 47. See also *Satchwell* (note 16 above) paras 11-3 where the Court quotes from the Canadian Supreme Court case of *Miron v Trudel* (1995) 124 DLR (4th) 693 para 102 as follows: 'Family 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'.

68 *Dawood* (note 57 above) para 32.

69 See generally P Califia *Public Sex: the Culture of Radical Sex* (1994).

shows that the Court's protection will not necessarily extend to relationships that do not sufficiently mirror that of a heterosexual marriage.

The Constitutional Court has endorsed the view that in the absence of same-sex marriage, the state has a duty to protect same-sex couples who live in same-sex life partnerships.⁷⁰ But not all relationships of same-sex couples are constitutionally worthy of protection. According to the Court, to determine which relationships should be protected, one should first determine the exact nature of 'family life' that is usually protected through the common law recognition and valorisation of marriage. Such an enquiry reveals that under South African common law a marriage 'creates a physical, moral and spiritual community of life, a consortium omnis vitae'.⁷¹ A consortium omnis vitae embraces intangibles such as loyalty and affection as well as more material needs of life such as physical care, financial support and the running of a common household.⁷² The duties of cohabitation and fidelity flow from such a relationship. Lastly, this reciprocal duty of support also means that partners have a joint responsibility for supporting and raising children born of the marriage.⁷³ The formation of such a relationship is a matter of profound importance to everyone concerned 'and is of great social value and significance'. Relationships which create similar obligations and have similar social value as that of the heterosexual marriage described above should therefore also be legally protected.⁷⁴

The question remains, of course, how one will know when such relationships create similar obligations and have similar social value as that of the heterosexual marriage and the nuclear family? The answer, according to the Constitutional Court, is by looking at the totality of all relevant facts and by determining whether the intimate relations of the individuals involved is sufficiently similar to that of the idealised heterosexual marriage. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Court provided an open ended list of factors that might be relevant to make such a determination. These factors focus on the permanence of the relationship and the public nature of the commitment and include the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners;

70 *National Coalition v Minister of Home Affairs* (note 16 above) para 57.

71 Ibid para 46 (quoting from Sinclair & Heaton (note 64 above) 422). See also *Satchwell* (note 16 above) para 22.

72 Ibid. See *Peter v Minister of Law and Order* 1990 (4) SA 6 (E) 9G.

73 *Dawood* (note 57 above) para 31; *Satchwell* (note 16 above) para 22.

74 *Satchwell* (note 16 above) para 22. And given the association of marriage with family – nuclear family – legal protection for family life will similarly depend on whether the 'family' is sufficiently similar to that of the idealised nuclear family traditionally protected by the law.

whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another.⁷⁵

The Court stressed that none of these considerations would be indispensable to decide whether the intimate relation is worthy of legal recognition. It is therefore theoretically possible that certain kinds of intimate relations that do not conform to all or even a majority of these factors could still be viewed as worthy of recognition and respect. However, the long set of factors listed above has the appearance of a checklist for all the requirements of a traditional, idealised heterosexual marriage. The cumulative effect of this list of factors is to send a strong signal that only those intimate relations that are sufficiently similar to that of an idealised heterosexual marriage will qualify for recognition and protection. This is in line with the Court's reasoning about the importance of marriage and other similar intimate relations discussed above. Relationships which have the same structure as that of the idealised heterosexual marriage or which have the same basic functions as such a relationship are therefore singled out as worthy of protection. Intimate relations which do not closely map that of an idealised heterosexual marriage, will therefore apparently not be worthy of equal concern and respect.

In the final analysis the Court therefore seems to support a rather narrow conception of which intimate relations should qualify as worthy of recognition, even while it professes to endorse a more open ended view and claims that it is broadening access to 'marriage' and 'the family'. The judgments of the Constitutional Court suggest that intimate relations that stray too far from the model, one man, one woman and two and a half children, married monogamously until death do them part, will not be worthy of recognition. It is therefore unclear whether the Court would extend the full legal protection afforded by marriage to more unconven-

75 *National Coalition v Minister of Home Affairs* (note 16 above) para 88. See also *Du Toit* (note 5 above) para 4, where the Court, in determining that their relationship was worthy of protection, approvingly described the applicants' relationship in terms that meet most of the factors set out here: 'The applicants have lived together as life partners since 1989. They formalized their relationship with a commitment ceremony, performed by a lay preacher in September 1990. To all intents and purposes they live as a couple married in community of property; immovable property is registered jointly in both their names; they pool their financial resources; they have a joint will in terms of which the surviving partner of the relationship will inherit the other's share in the joint community; they are beneficiaries of each other's insurance policies; and they take all major life decisions jointly and on a consensual basis'.

tional relationships such as those listed in the introduction above.⁷⁶ The possible exclusion of such unconventional intimate relations from constitutional protection is important exactly because the legal regulation of intimate relations in South Africa still take as its starting point the idealised heterosexual marriage and the accompanying nuclear family. In such an environment those whose intimate relations do not conform in some way to the traditional model runs the risk of again being marginalised and excluded from the legal protection and the social approval that comes with such protection.

V HETERONORMATIVITY RIDES AGAIN: THE ASSIMILATION OF NON-TRADITIONAL INTIMATE RELATIONS

(a) The marginalisation of non-traditional intimate relations

Progressive opponents of same-sex marriage have long argued that the extension of marriage to same-sex couples will not solve the problems of marginalisation and exclusion suffered by many who base their intimate relations (at least partly) on their same-sex desire. Extending marriage to same-sex couples, they have argued, will not transform the institution of marriage into something that is responsive to the lived realities of individuals. Nor will it prevent the production and/or maintenance of an idealised norm that reflects the values of the idealised monogamous heterosexual marriage and the resultant nuclear family. And this norm, it is argued, will continue to operate as a powerful legal and symbolic social tool to reward compliance with the norm and punish and marginalise those who fail to mould their relations and their identities to conform to this norm. Opening up the institution of marriage will merely force individuals to 'choose' between moulding their intimate relations to conform to the idealised notion of heterosexual marriage on the one hand and 'choosing' to continue to live their lives as before on the other. The latter group -- by its very nature a vulnerable group -- will thus continue to suffer marginalisation and exclusion.⁷⁷ Of course, for many the

76 Examples are: Where a male and female same-sex couple decide to beget and raise children together as a family; or where more than two individuals in an intimate relationship with the others decide to beget and raise children; or where a man has a rural wife but cohabits with a woman in an urban area in a long term relationship; or where a mother and a grandmother jointly raise the mother's children.

77 See Homer (note 1 above) 52; W Eskridge 'A History of Same-sex Marriage' (1993) 79 *Virginia LR* 1419, 1488-89; Cossman (note 18 above) 9; Robson (note 2 above) 711; A Hequembourg & J Arditi 'Fractured Resistances: The Debate Over Assimilationism among Gays and Lesbians in the United States' (1999) 40 *Sociological Quarterly* 663. P Ettelbrick 'Since When is Marriage A Path to Liberation?' in R Baird & S Rosenbaum (eds) *Same Sex Marriage: the Moral and Legal Debate* (1997) 164-68 argues that marriage is '[s]teeped in a patriarchal system that looks to ownership, property, and dominance of men over women as its basis ...' and '[m]arriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture and the validation of many forms of relationships'.

purported 'choice' would be no choice at all.⁷⁸ In a sexist, patriarchal and homophobic society, a society in which many individuals depend on others for their social and economic survival, it will often be difficult or even impossible for individuals to 'choose' to marry their same sex sweethearts. Such a 'choice' would require an individual in some form of same-sex intimate relationship to come out of the closet and to openly live the life of a 'homosexual', thus inviting rejection, hatred and violence.⁷⁹ What this means is that once marriage becomes an option for all couples regardless of their sex, there will be a selective assimilation, in which a new group of cultural insiders will reap the benefits, leaving the remainder – usually poor and vulnerable – as permanent outsiders. Such a move would thus merely result in reinforcing views about 'good' and 'bad' lesbians and gay men, with 'good' ones living as much like the stereotype of the traditional married couple as possible, 'and preferably quietly'.⁸⁰

The recent jurisprudence of the Constitutional Court seems to bear out this argument. The Court's acceptance of the idealised heterosexual 'marriage' as the normative starting point for any enquiry into the constitutionally required recognition of intimate relations seems to foreclose the possibility for a more fundamental re-imagining of the legal regulation of intimate relations. The jurisprudence reinforces notions of an idealised dominant group – a heterosexual, Christian, happily married, able-bodied and healthy couple with two children – and this idealised group seems to serve as a normative reference point for decisions on which intimate relations are worthy of legal recognition and protection and which ones are not.⁸¹ The Court seems to suggest that in the absence of evidence showing one's relationship approximates that of the idealised norm, one's intimate relations will not be fully recognised by the law – at least not in the highly symbolic way associated with marriage. This move is highly problematic because it is essentially coercive in nature and fails to live up to the rhetoric of difference.

78 See Goldblatt (note 8 above) 616.

79 Women in different-sex relationships often have a similar problem. As Goldblatt (note 8 above) points out: 'Gender inequality and patriarchy results in women lacking the choice freely and equally to set the terms of their relationships. It is precisely because weaker parties (usually women) are unable to compel the other partner to enter into a contract or register their relationship that they need protection'.

80 Boyd (note 18 above) 557; De Vos (note 11 above) 359. Robson has described this process as one of 'domestication', hinting at the potentially disciplining role of the traditional idealised marriage on intimate relations of individuals who previously did not qualify for acceptance into the marriage fold. See R Robson *Lesbian (out) Law: Survival Under the Rule of Law* (1992) 119-27. At the same time, such a development will ignore the lived reality of many individuals who are engaged in less traditional different sex intimate relationships. Such relationships – for example, of a husband with a rural wife and a city wife – are often based on unequal power relations and often leave the women and some of the children involved in a vulnerable position unprotected by traditional legislation on marriage. The failure to accommodate such relationships is thus equally problematic. See Goldblatt (note 8 above) 616.

81 Robson (note 2 above) 715. See also Goldblatt (note 8 above) 611.

Defenders of the Court's position will of course argue that it is impossible and, indeed, untenable to provide legal protection and social recognition for *all* the possible variants of intimate relations. Society, for example, must surely have an interest in preventing intergenerational intimate relations and cannot respect 'difference' in such cases. The answer to such criticism is to agree that any society places limits on the acceptance of difference and that the South African Constitution explicitly allows for the limitation of rights – including the right to non-discrimination guaranteed in s 9. But these limits must be determined with reference to rational and logical principles and values and not with reference to an outdated, ideologically problematic construct such as marriage. It would therefore be possible to reach consensus on the kinds of intimate relationships that are worthy of protection by relying on predetermined rational principles informed in the values of the Constitution. For example, the need to protect children who are inherently vulnerable and can be viewed as being incapable of truly consenting to intergenerational intimate relations with its inherent power differentials can surely justify non-recognition of such relationships. Such a move would then not be aimed at 'punishing' individuals who 'choose' not to conform to an ideologically loaded notion of what should constitute 'correct' intimate relations, but will be aimed at protecting the most vulnerable individuals from exploitation.

Conversely, I contend that the focus on marriage as the mechanism for legally regulating intimate relations in effect places pressure on members of the – already vulnerable and marginalised – outside group to strive to meet the normative standard set by the dominant group if they wish to access the tangible and intangible benefits associated with assimilation. If one recalls that legally sanctioned benefits and social approval for certain kind of marriage-like relationships entails corresponding legal disadvantages and social disapproval for those whose intimate relations do not conform to the norm, the coercive effect becomes even more apparent.⁸² This means that the arrangement of one's intimate relations to conform to the idealised heterosexual marriage might not be a 'preference at all but something that has had to be imposed, managed, organised, propagandized, and maintained by force'.⁸³

The coercion, here, stems not only from the actual legal regulations that confer benefits on some relationships and impose penalties on others, but also from the symbolic role played in our society by the discourse of matrimony and its association with family. The legal discourse that valorises certain kinds of intimate relations go hand in

82 Robson (note 2 above) 778.

83 Ibid 779. Robson here is alluding to Adriane Rich's work on 'compulsory heterosexuality'. See Rich (note 11 above) 50. Rich argues that for women, heterosexuality must be 'imposed, managed, organized, propagandized and maintained by force'.

hand with what may be broadly termed 'the social' attitudes towards marriage and marriage like relations and which operates to 'organise and propagandize'⁸⁴ in favour of traditionally structured relationships. Arguments for same-sex marriage recognition adopt these social themes. For example, David Cruz⁸⁵ notes in the context of the United States that a married woman has an acceptability and legitimacy that a single woman lacks.⁸⁶ He points out that in the general social milieu it is accepted that to 'make an honest woman' of someone means to lawfully marry her; that marriage is a sign of maturity;⁸⁷ that to be married is to be an adult, to accept commitment, to pledge one's self to fidelity, loyalty, and devotion;⁸⁸ that marriage means that one's sexuality is not one's predominant interest;⁸⁹ that the desire to marry to constitute one's identity is a human desire.⁹⁰ These statements, of course, do not express any 'truth' about the nature of marriage, but do seem to encapsulate the prevailing social attitude towards marriage – not only in the USA but also in South Africa. It reminds us that our society universalises matrimony as a human desire and does not allow for any serious questioning of the ideal of marriage and family as assumed by law (and by the Constitutional Court). The danger here, as Robson has pointed out, is that any dissenters are 'implicitly anthologised as immature, uncommitted, unfaithful, disloyal, undevoted, and overly sexual. For women, this pathology is expressed as more pronounced, given the implicit view that unmarried women are unacceptable and illegitimate, and if sexually active, somehow dishonest and disreputable'.⁹¹

Given these insights, it becomes more surprising that the Constitutional Court has engaged in this assimilationist discourse in relation to marriage and the family. It is particularly surprising, given the Court's rhetoric regarding the value of difference and its questioning of the validity of maintaining a heterosexual norm. I believe the Court's equality jurisprudence in the field of intimate relations becomes 'the handmaiden of formal equality' because it obscures the existence of a dominant group that functions as the standard.⁹² In this sense alone, the constitutional jurisprudence is problematic. The Constitutional Court's first decision on the constitutional protection of individuals who experience same-sex desire, held out the promise of the development of a radically different kind of law relating to intimate relations, a body of

84 Robson (note 2 above) 798, see also Rich (note 11 above) 349.

85 D Cruz 'Just Don't Call it Marriage: Marriage as an Expressive Resource' (2001) 74 *South Cal LR* 925.

86 Ibid 937.

87 Ibid 942.

88 Ibid.

89 Ibid 942-43.

90 Ibid 940.

91 Robson (note 2 above) 798.

92 R Robson 'Assimilation, Marriage, and Lesbian Liberation' (2002) 75 *Temple LR* 709, 719.

law that would move away from the ideologically loaded and deeply problematic normative focus on the idealised heterosexual marriage. This early jurisprudence seems to suggest that those proponents of same-sex marriage who have argued that the extension of marriage to same-sex couples would begin a process that would expand legal recognition to various new forms of relationships⁹³ were correct. But this has not happened.

(b) Marriage, the family and the legal regulation of intimate relations

The exclusion of some forms of intimate relations from legal recognition can, of course, be defended. It is often argued that the legal protection of marriage and relationships that are sufficiently similar to marriage is a social good because it promotes community stability and legal certainty.⁹⁴ The state, so this argument goes, has an interest in promoting marriage and the kinds of relationships that are sufficiently similar to marriage because it creates the space within which individuals can make those intimate connections needed for human development and happiness. Humans have a need to be part of such an institution because we experience it as a 'psychological conglomerate of nurture and support and/or an emotional proving ground for individual self-development'.⁹⁵ This legally protected and recognised form of intimate relations also fulfils an economic function because it creates a system of mutual support and creates a safe and supporting environment for the raising of children.⁹⁶ The state therefore has a legitimate and important interest in the recognition and protection of marriage and the aligned concept of family. While it is therefore regrettable, so the argument goes, that not all variations of intimate relations can be treated with equal concern and respect by the law, the legal protection of the idealised marriage is necessary to safeguard the socially important goal of fostering a healthy family life.

But this view is based on an essentialist notion of intimate relations.⁹⁷ It assumes that marriage and/or the marriage-like arrangements of

93 See M Dunlap 'The Lesbian and Gay Marriage Debate: A Microcosm of our Hopes and Troubles in the Nineties' (1991) 1 *L & Sexuality* 63, 91.

94 See C Lewis 'From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage' (1988) 97 *Yale LJ* 1783, 1800; B Cox 'Same-sex Marriage and Choice-of-law: If We Marry in Hawaii, Are We Still Married When We Return Home?' (1994) *Wisconsin LR* 1033; also C Ball 'Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism' (1997) 85 *Georgia LJ* 1871, 1930; S Foster 'The Symbolism of Rights and the Costs of Symbolism: Some Thoughts on the Campaign for Same-Sex Marriage' (1998) 7 *Temple Political and Civil Rights LR* 319, 320.

95 Fineman (note 7 above) 2182.

96 Ibid 2183. The Constitutional Court has endorsed this view of marriage and the family. See *Dawood* (note 57 above) paras 30-1.

97 De Vos (note 11 above) 371-72.

intimate relations are not only statistically and symbolically normal⁹⁸ but also forms (and should form) the basis for what is legally normative.⁹⁹ It assumes that marriage is the 'natural' way for humans to arrange their intimate relations and therefore assumes that the law needs to be aligned with this 'natural' state of affairs. Although this view allows for marriage to be opened up to new categories of individuals, such as same-sex couples, all the other assumptions about intimate relations and the role of the state in regulating such relations are left unexamined.

Another argument is influenced by the liberal notion that in essence the state should respect the distinction between the public and private sphere and should only intrude into the private sphere of intimate relations in limited and clearly defined circumstances. Although the state may interfere in the private sphere to create obligations between spouses, this only happens where two people 'choose' to get married, and then only to safeguard the institution of marriage that is for the good of society as a whole. Individuals who 'choose' not to marry must therefore be protected from undue state interference in their private intimate relations.¹⁰⁰ The problem with this argument is that it does not take cognisance of the unequal power relations between various individuals who form intimate relationships. The more powerful member(s) in an intimate relationship – more powerful because of gender, or race or economic status – take the opportunity to remain outside the protection provided by the institution of marriage, thus exposing the less powerful member(s) to exploitation and harm.

Given these problems, I contend that there is no reason why only this one kind of arrangement should form the basis for the legal regulation of intimate relations in our society. In as much as marriage and marriage-like relations fulfil the social functions set out above, they do so because the law assigns these functions to marriage alone.¹⁰¹ The law could just as well utilise other mechanisms for achieving the same goals. This becomes even more apparent if one takes cognisance of the fact that the lived reality of many individuals – whether they experience sexual desire for members of their own or the opposite sex – does not conform to an idealised norm. Individuals find themselves in so many different permutations of intimate relations, yet the law continues to assume that one permutation – the nuclear family – must be the starting point for the regulation of intimate relations in our society.

It falls beyond the scope of this article to pursue fully the potential alternative ways in which the law could regulate intimate relations.

98 Even this statement is not uncontroversial as the intimate relations of many South Africans do not conform in any way to that of the idealised heterosexual norm.

99 I am here using the terminology used by Sachs J in *National Coalition v Minister of Justice* (note 15 above) para 134, when he affirmed that equality includes a right to be different.

100 See generally Goldblatt (note 8 above) 616.

101 Homer (note 1 above) 529.

However, I will discuss one proposal put forward by Martha Fineman to demonstrate how problematic the present focus on the institution of marriage is and how that intimate relations can be legally organised in ways that will move away from the idealised heterosexual norm and that will accord more respect and concern for the variety of intimate relations prevalent in our society.

(c) Martha Fineman's new family

In her book *The Neutered Mother: The Sexual Family and other Twentieth Century Tragedies* and in other writing¹⁰² Martha Fineman argues that the ideal family as constructed in Western legal discourse is essential to maintain the myth that autonomy and independence can be attained by all individuals. Because our society mythologises concepts such as 'independence' and 'autonomy' – despite all the evidence that these ideals are unrealistic and unrealisable – dependents and caretakers are rendered deviants. The nuclear family is constructed to protect dependents and caretakers from such branding. The central role of the nuclear family in our society is based on the assumption that we all naturally belong to or aspire to belong to nuclear families and as long as we conform to this expectation and fulfil the roles assigned to us within such families, we are not branded deviants. Thus, a husband performs as head of the household, providing economic support and discipline for the dependent wife and children, who correspondingly owe him duties of obedience and respect. In turn mothers care for their dependent children without remuneration.¹⁰³ This vision of the family, Fineman argues, is perceived as facilitating individual identity and development. The family is seen as the site for intimate connection, a place for humans to retreat to when seeking to satisfy their human needs. The family 'also has an historic monopoly on "legitimate" reproduction'.¹⁰⁴

But as our society changes and more women reject the hierarchical family or are forced to live outside the boundaries of the nuclear family¹⁰⁵ and as more women participate in the paid workforce, the notion of the traditional family has come under attack. However, the basic assumptions for the legal regulation of intimate relations remain rooted in the idea of the naturalness of the nuclear family. This is at least partly true

102 See also Fineman (note 7 above); M Fineman 'Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency' (2000) 8 *American Univ J of Gender, Society, Policy & L* 13; and generally N Pollikoff 'Why Lesbians and Gay Men Should Read Martha Fineman' (2000) 8 *American Univ J of Gender, Society, Policy & L* 167.

103 Fineman (note 11 above) 2182. Many of these attitudes persist to this day in South Africa. See Goldblatt (note 8 above) 614.

104 Fineman (note 11 above) 2183.

105 In South Africa, apartheid had a profound influence on the way in which families operate. While many men from rural areas went off to the cities to find work, women often stayed behind and fashioned new ways of organising their intimate relations, often out of necessity and not of choice.

because it allows for dependency – which is ‘naturally’ assigned to the nuclear family – to be privatised. The ideological underpinnings of this system is that the market or the state will not directly contribute or assist in the necessary caretaking of children and elders because it is ‘naturally’ assumed to be the task of the private family. ‘The ideology of the family mandates that the unit nurture its members and provide for them economically’.¹⁰⁶ As Fineman points out, the catch is that the burdens of economic support and caretaking are allocated within the family based on the often gendered roles that its members play, and that this assignment of burdens operates in an inherently unequal manner. The ‘uncompensated tasks of caretaking are placed with women while men pursue careers that provide economically for the family but also enhance their individual career or work prospects’ and this division of labour which perpetuates gendered family roles has been understood as ‘natural’ rather than manufactured.¹⁰⁷

But in a changing world it is difficult to maintain the fiction of the natural nuclear family and, as the Constitutional Court has pointed out, the notion of family is in flux. Fineman points out, though, that the alternative conceptions of family – the kinds of conceptions put forward by the Constitutional Court – all assume ‘certain things about what is appropriate and desirable’ regarding the structure of the family and the roles of those in it. These ‘alternative’ family forms carry within their confines the possibility of exclusion and stigma that attaches to nonconforming relationships. Each model defines itself with reference to the parameters of what is ‘natural’ and ‘appropriate’ and the converse of the created ideal then become defined as deviant or pathological.¹⁰⁸

Fineman thus proposes to move away from the idea that individuals have a particular role in a family and argues that we must rather consider the structural position of the family. What is required is to look at the role of the family as a social institution vis-à-vis the state.¹⁰⁹ We must move away from the idea of the family as a private and benign institution, exactly because this privatisation of the family ‘masks the universal and inevitable nature of dependency and allows for the public and government officials to frame rhetoric in terms idealising capitalistic individualism, independence, self-sufficiency and autonomy’.¹¹⁰ In this interplay of dependency women are the ones who perform most of the unremunerated caretaking tasks and the law should take cognisance of this. If we privatise these caretaking tasks inside the ‘family’, it will merely perpetuate the oppression of women. Fineman thus proposes that we move away from legal regulations which reify the nuclear family

106 Fineman (note 11 above) 2187.

107 Ibid 2188.

108 Ibid 2191.

109 Ibid 2203.

110 Ibid 2205.

directly or indirectly, arguing that this would merely entrench the structural inequalities in our society. What is required she argues is that:

those women who are caretakers must be given a right to resources to enable them to perform the task we demand of them. The concept of justice must be reformulated so that punitive and mean-spirited laws designed to discipline women and children into patriarchy are seen as inappropriate. Transforming justice requires an attack on the underlying ideology that valorises the nuclear family. A reformulated vision of justice would relate to the empirical needs of society, accepting and accommodating the inevitability of dependency and recognising the claim of caretakers for resources necessary to accomplish their nurturing tasks.¹¹¹

Fineman's proposal seeks to bypass the ideological problems associated with the legal regulation of intimate relations through marriage or marriage-like institutions. She suggests that such institutions should have no legal relevance or effect and that the law should rather concern itself with the practical questions of who fulfils which tasks in taking care of dependents and address inequalities and injustices associated with such tasks. Such an arrangement will allow individuals to arrange their intimate relations in ways that suit their social, emotional, sexual and ideological needs without the threat of deviance and marginalisation that inevitably follows if one legally regulates intimate relations with reference to institutions such as marriage.

VI CONCLUSION

It might well be that Fineman's proposal, which requires us to focus on care giving and dependency, will in the end not be the only or even the best way of dealing with this problem. I offer her proposal here as an indication that there *are* ways of legally regulating intimate relations without recourse to institutions such as a heterosexual-like monogamous marriage. If we wish to take seriously the equality rhetoric of the Constitutional Court, and if we believe that equality entails also the right to be different and to arrange one's intimate life differently from what is generally accepted as the 'natural' and 'normal' way, then it is imperative that we should begin a conversation about the ways in which we want to regulate intimate relations without recourse to exclusionary institutions such as marriage -- even when that institution is opened up for same-sex couples.

111 Ibid 2214.