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A Sentimental Journey

What is the relationship between sexual equality/democracy and sentimentality?

This talk will ask whether there is a resort to "sentimentality" in the sexuality cases of the Constitutional Court, and if so, whether that poses a problem for equality and democracy.

This talk builds on the paper that follows, *Sexual Democracy,* 23 SOUTH AFRICA JOURNAL ON HUMAN RIGHTS 409- 431 (2007). In this article, I critiqued the Con Court's opinion by Albie Sachs in *Fourie*, the same-sex marriage case, as being "sentimental," but I did not really elaborate on what "sentimentality" meant.

Now I'd like to elaborate on "sentimentality" and explore a series of further questions: Is sentimentality necessarily bad? If so, in what ways? Did this supposed sentimentality have any real consequences, either in Parliament or the judiciary? Does the resort to "sentimentality" overshadow equality and democracy, so that they lose their rigor and are not deemed applicable in less "sentimental" contexts? What if there are "dueling sentimentalities"? How does sentimentality play in the rest of Africa or in the United States on these issues?

SEXUAL DEMOCRACY

RUTHANN ROBSON*

ABSTRACT

Conceptualizing the relationship between sexuality and democracy requires not only an interrogation of both terms, but also an exploration of the ways in which democracy seeks to accommodate and appropriate the sexual. Recent litigation and legislation regarding same-sex relationships in South Africa casts a spotlight on the interaction between sexuality and democracy, but the illumination is partial. It is necessary to explore sexuality in a broader context, including discomfiting sexual practices, as a matter of the democratic constitutional norms of equality and dignity. Otherwise, a sentimentalized version of sexuality, with certain lesbians and gay men installed as a model minority, threatens to become the democratic standard.

I INTRODUCTION

To assert the sexual as a vital aspect of democracy provokes at least three points of contention.

First, the penultimate term 'democracy' suffers from vagueness and overexposure. Too rarely defined or qualified, 'democracy' is relentlessly deployed in a variety of contexts, cultures, and states. At times, it seems as if it can be made to fit any argument or outcome.

Second, the term 'sexual' is similarly problematical. There exist important divergences regarding what constitutes 'the sexual' or 'sexual behaviour.' Further, even if we could agree on boundaries so that all situations could be confidently labelled either 'sexual' or 'not sexual,' doubt would remain whether every act encompassed under the umbrella term 'sexual' should be a desirable freedom deemed vital to democracy.

Third and lastly, the relationship between sexuality and democracy may seem more obscure than vital. Yet the democratic state, like other state forms, seeks to associate itself with certain forms of sexual arrangements. This association implicates specific organs of the state, including the judiciary, in struggles to assess on what terms to exercise control.

I will explore each of these three sites of contention, from the perspective of a position that assumes that the sexual, and more specifically sexual freedom, is imperative to democracy. While my particular interest has long been in

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developing a lesbian legal theory, this article situates lesbianism alongside other sexual minority practices as well as treating what might be termed non-minority sexual relationships and practices. Indeed, the question of minority recognition is a crucial one, especially in a democracy committed to the protection of minority rights. The recent litigation in South Africa regarding same-sex marriage and the new Civil Union statutory scheme cast a spotlight on the relationship between sexual freedom and democracy, but the illumination is partial. It is necessary to consider the sexual in a broader context than marriage or even 'relationships' in order fully to explore the importance of the sexual to democracy.

The next part of this article will briefly interrogate the various meanings of democracy. In Part III, I will then take up the subject of the sexual, including a consideration of the liberal definition of sexual freedom. In Part IV, I will analyze the South African jurisprudence regarding lesbians and gay men in comparison to the jurisprudence relating to other aspects of sexual freedom, concluding that lesbians and gay men are being forced into service as a model sexual minority. Finally, in Part V, I discuss the state's linkage with specific forms of sexual arrangement, as well as the state's exercise of its power through judicial review or legislative processes.

II Defining Democracy

The origins of the term, from the Greek 'demokratia', belie its current ebullient and multi-faceted connotations. In Athenian 'democracy' suffrage was far from universal, excluding women, slaves, and others, and the city-state employed direct democracy. The limited franchise was accompanied by little, if any, formal recognition of rights, such as rights to dignity, life, or social equality. The trial and judgment of death for Socrates, based on the charge of corruption of youth, may have influenced his student Plato's less than favourable views of 'demokratia' as a kind of 'mob rule.'[1] However, by the time of Alexis de Tocqueville, writing *Democracy in America* in the 1830s, 'démocratie' has become more complex. It is not simply a form of state, but is an 'état social' which is as much about the 'mores' constituting social relations as about political organizations of the government.[2] As for the polity, women and slaves were still excluded from the franchise. Moreover, the United States

1 CJ Rowe 'Killing Socrates: Plato's Later Thoughts on Democracy' (2001) 121 *The Journal of Hellenic Studies* 63.

2 A de Tocqueville *Democracy in America* (1899). For example, one chapter in De Tocqueville, entitled 'Why American writers and orators often use an inflated style,' considers poetry in relation to democracy.

> I do not fear that the poetry of democratic nations will prove insipid or that it will fly too near the ground; I rather apprehend that it will be forever losing itself in the clouds and that it will range at last to purely imaginary regions. I fear that the productions of democratic poets may often be surcharged with immense and incoherent imagery, with exaggerated descriptions and strange creations; and that the fantastic beings of their brain may sometimes make us regret the world of reality. (vol II section I)

Constitution, as the nation's founding document, does not include the term 'democracy.'

The Constitution of the Republic of South Africa, 1996, does contain numerous explicit invocations of democracy. The Preamble provides that the Constitution is adopted so as to 'establish a society based on democratic values' and build 'a united and democratic South Africa.' Section 1 defines South Africa as a 'sovereign, democratic state' founded on values including 'universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government.' Section 7 proclaims the Bill of Rights as 'a cornerstone of democracy in South Africa,' enshrining 'the democratic values of human dignity, equality and freedom.' Sections 36 and 39, concerning limitations and interpretations of rights, both contextualize rights within an 'open and democratic society based on human dignity, equality and freedom.' Section 234 allows Parliament to adopt further Charters of Rights in 'order to deepen the culture of democracy established by the Constitution.' The Constitution also highlights democracy and democratic principles in its provisions relating to the structures of government.[3]

Thus, as the text of the South African Constitution makes clear, the term 'democracy' encompasses many aspects. In their study of public opinion and democracy in Africa, researchers Bratton, Mattes, and Gyimah-Boadi found that South Africans were much more likely than other nationalities to be able to offer multiple definitions of the meaning of democracy,[4] a fact that should not be surprising given the educational and public relations efforts that accompanied the drafting and adoption of the Constitution.[5] Responding to an open-ended query, Sub-Saharan Africans listed civil liberties, participation, electoral choice and majority rule, equality, social and economic development, and even efficient government as the meaning of democracy.[6] These uses reflect those in the Constitution of the Republic of South Africa, 1996.

3 Regarding the structures of government, the National Assembly and the provincial legislatures may each 'make rules and orders' with 'due regard to representative and participatory democracy' and must provide for the participation of minority parties 'in a manner consistent with democracy' (ss 57, 116). Section 236 states that in order to 'enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.' Local governments include amongst their objectives 'to provide democratic and accountable government for local communities' and should strive to do so (s 52). Members of a Municipal Council are entitled to participate in its proceedings in a manner that 'is consistent with democracy' (s 160). Chapter 9 concerns 'state institutions supporting constitutional democracy,' with s 181 establishing specific institutions that 'strengthen constitutional democracy,' and s 195 provides that public administration 'must be governed by the democratic values and principles enshrined in the Constitution,' thereafter enumerating eight standards including 'professional ethics,' development, efficiency, and human-resource management.

4 M Bratton, R Mattes & E Gyimah-Boadi *Public Opinion, Democracy, and Market Reform in Africa* (2005) 66.

5 S Skjelten *A People's Constitution: Public Participation in the South African Constitution-Making Process* (2006).

6 Bratton, Mattes & Gyimah-Boadi (note 4 above) 68.

A multiplicity of meanings is also embodied in international assessment standards.[7] The Institute for Democracy and Electoral Assistance (IDEA) names the key democratic principles as 'popular control' and 'political equality.'[8] Regarding freedom and liberty, the institutional authors explain that these are inherent: 'liberty is entailed by the idea of democracy, and does not have to be added on as something extra to it.'[9] Yet one could have easily argued that 'popular control' or 'equality' are inherent in the very idea of democracy. These basic notions, however, are further contexualized with 'mediating values' such as participation, authorisation, representation, accountability, transparency, responsiveness, and solidarity. The value of solidarity requires 'tolerance of diversity' and lists international human rights laws as one means of realisation, and elsewhere they explicitly include economic and social rights. The authors acknowledge that a more limited view of democracy than the one that they hold restricts democracy to 'processes of public decision making, rather than its outcomes.'[10] Yet the authors defend their interpretation thusly:

> The inclusion of an economic and social rights audit is justifiable both in terms of process and outcome. As regards process, it is a necessary condition for the exercise of civil and political rights that people should be alive to exercise them, and should have the capacities and resources to do so effectively. At the same time, people rightly judge the quality of a democracy in terms of its ability to secure them the basic economic and social rights on which a minimally decent human life depends.[11]

The mechanism for securing economic and social rights usually includes the judiciary. Judicial review is generally considered a cornerstone of constitutional democracy, with 164 of 193 independent nations employing some form of judicial review.[12] However, in the 'process view' or 'majority rule' version of democracy (sometimes named 'illiberal democracy' in contrast to 'liberal democracy'), the prospect of judicial review is problematized. Judicial review — the power of an often unelected judiciary to declare acts of a usually elected legislative body, or even a product of direct democracy, void as unconstitutional — remains a divisive subject despite its reputation as a cornerstone of democratic constitutionalism. Stated in very basic terms, one perspective is that judicial review is necessary to curb the excesses of democracy, a type of 'mob rule' leading to the oppression of minorities or even statistical majorities who are less powerful. Phrased equally reductively, the opposing view is that judicial review is an elitist and aristocratic practice that thwarts 'direct' democracy, imposing the unchecked views of an appointed oligarchy on the

7 D Beetham, S Bracking, I Kearton & S Weir (eds) *International IDEA Handbook on Democracy Assessment* (2002).
8 Ibid 13.
9 Ibid 14.
10 Ibid 15.
11 Ibid.
12 FR Romeu 'The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions' (2006) 2 *Review of Law & Economics* 103, 125n2.

people.[13] The debate regarding judicial review is especially pronounced when the substantive controversies are sexual ones, as will be discussed in the last section.

Unlike judicial review, no matter the precise definitions, democracy is a positive concept. As the researchers Bratton, Mattes, and Gyimah-Boadi note in several nations, including South Africa, 'positive views of democracy are so widespread that almost no politically unaware person came up with a negative definition.'[14] They argue that the 'danger with overwhelmingly favourable associations is that democracy has become ideologically unassailable, a symbol that nobody wishes to oppose,' and which may be paid 'lip service' as a 'fashionable idea' without 'at the same time knowing precisely what it means.'[15]

Others similarly remark on the ubiquity of a positive valence attributed to the elastic term 'democracy.' For example, the French philosopher Alain Badiou argues that 'democracy' has become an 'authoritarian opinion': 'It is forbidden, as it were, not to be democrat.'[16] British political theorist John Dunn opines that democracy now dominates the world's political imagination.[17] American journalist Fareed Zakaria names this a 'democratic age' and states that even the 'enemies of democracy mouth its rhetoric and ape its rituals.'[18] Professor Ellen Meiskins Wood, by extension, explains how democracy has successfully been deployed as an 'ideology of empire' by the United States.[19]

While an amorphously positive term can be a 'danger,' it may be that South Africans' adoption of 'unusually holistic views of democracy,' is an important advance.[20] A constitution that seeks to provide the mechanisms to implement democratic participation as well as to name rights as not only 'human rights' but as 'democratic values,' might also be judged 'unusually holistic.' Yet this is preferable to the diluted view of democracy as simply majority rule, or even seeking to capture it in a single term such as Badiou's penultimate definition of democracy as 'justice,'[21] or the more often proffered terms of 'liberty' or 'equality.' Indeed, a holistic approach to democracy seems most appropriate.

Nevertheless even a holistic view of democracy can seem inadequate to grapple with the thorny questions that surround sexuality and sexual practices. In the next section, I turn to a consideration of the concept of 'sexual freedom.'

13 R Robson 'Judicial Review and Sexual Freedom' (2007) 29 *University of Hawai'i LR* (forthcoming).

14 Bratton, Mattes & Gyimah-Boadi (note 4 above) 69.

15 Ibid.

16 A Badiou *Metapolitics* (1998) (trans J Barker, 2005) 78.

17 J Dunn *Democracy* (2005) 13.

18 F Zakaria *The Future of Freedom: Illiberal Democracy at Home and Abroad* (2003) 13.

19 E M Wood 'Democracy as an Ideology of Empire' in C Mooers (ed) *The New Imperialists* (2006) 9.

20 The researchers attribute these unusual holistic views to a reaction to the 'totalizing ambitions of the former regime' during which 'apartheid forced its way into every cranny of people's lives.' Bratton, Mattes & Gyimah-Boadi (note 4 above) 86.

21 Bratton, Mattes & Gyimah-Boadi (note 4 above) 94.

III Sexual Freedom

The attempt to define 'sexual freedom' is as vexing as characterizing 'democracy.' The starting point for most efforts to delimit 'sexual freedom' is generally the classic liberal — or perhaps neo-liberal — formulation that any viable notion of sexual freedom must protect sex between two persons who are consenting adults committed in the privacy of the home and thus causing no harm to others. The Wolfenden Report in Great Britain and revisions to the Model Penal Code in the United States in the 1950s adopted such definitions, although issues concerning the relationship between morality and harm to society persist.[22] Yet under most analysis, such a demarcation would preclude the prohibition of crimes such as adultery, miscegenation, and sodomy. This is not to say, however, that there is global agreement. For example, sodomy continues to be criminalized in many nations,[23] including the world's most populous democracy, India.[24]

However, even if one accepts the neo-liberal formulation, it provokes a host of further definitional problems. For example, what is 'sex'? One thinks here of some of the treatments of lesbian sexual practices which troubled (male) lawmakers if there were no penis or penis-substitute involved.[25] The requirement of 'two' raises several important concerns, based as it is on the dyad-model of 'coupling' that extends into marriage and anxieties around polygamy, discussed below. Perhaps even less understandable is distress regarding solitary sexual activities, as exhibited by recent cases in the United States upholding criminal prohibitions of the distribution of 'sex toys,' except by medical prescription.[26] Similarly, the prerequisite of 'person' seems obvious at first, although prohibitions of so-called inter-species sex can certainly be critiqued,[27] as might practices such as necrophilia and activities with inflatable dolls.

The neo-liberal extension of protection for sexual acts only to adults is also disquieting, although we have long been accustomed to laws based on a capacity to contract. These laws impose a bright-line rule based upon a person's age; the ability to vote is a good example. Yet if we compare the voting age of 18 in South Africa[28] and the United States[29] to the age of sexual consent in those nations, there is dissonance. It is not simply that the age to

22 For example, J Finnis 'Law, Morality, and "Sexual Orientation" ' (1994) 69 *Notre Dame LR* 1049.

23 <http://www.sodomylaws.org/index.htm>.

24 <http://www.sodomylaws.org/world/india/india.htm>. For a discussion, see S Katyal 'Sexuality and Sovereignty: The Global Limits and Possibilities of *Lawrence*' (2006) 14 *William & Mary Bill of Rights J* 1429, 1451-1461.

25 R Robson 'Lesbianism in Anglo-American Legal History' (1990) 5 *Wisconsin Women's LJ* 1 — 42.

26 J Borgmann 'Hunting Expeditions: Perverting Substantive Due Process and Undermining Sexual Privacy in the Pursuit of Moral Trophy Game' (2006) 15 *UCLA Women's LJ* 171.

27 M Dekkers *Dearest Pet: On Bestiality* (1992) (trans P Vincent, 1994).

28 Section 46, Constitution (minimum voting age of 18 for National Assembly); s 105, Constitution (minimum voting age of 18 for provincial legislatures).

29 Amendment XXVI, United States Constitution (1971) (minimum voting age of 18, changed from previous age of 21).

vote and to have sexual relations should be the same, although I am not persuaded there are rationales sufficient to support any discrepancies. Instead, it is that the age of sexual consent itself varies. At times, this variance is predictable, based on a confluence of discriminatory factors. For example, as Professor Angelo Pantazis has compellingly articulated, 'lesbian and gay youth test the law's commitment to the equal dignity of lesbians and gays, and of children.'[30] Thus, in South Africa, despite the identification of the disparity in age of consent laws for heterosexual and homosexual acts as inconsistent with the then-interim Constitution of 1994,[31] the criminal law continues to prohibit same-gender acts with persons under the age of 19, while prohibiting opposite-gender acts only with persons under the age of 16.[32]

In the United States, there are similar disparities. The Supreme Court has upheld a state statute that prohibited males from having sex with females under the age of 18, but not the reverse.[33] The situation in the United States is further complicated by the fact that age-of-consent laws are matters for individual states rather than the federal government, so that a 13-year-old may consent to sex in one state, such as New Jersey or New Mexico, while she or he might need to be four or five years older if travelling to a nearby state such as New York or California.[34] Additionally, many states further refine their laws by varying the age of consent with the age of the partner. For example, in Alabama the age of consent is generally 16, but is only twelve if the partner is less than 16 and less than two years older.[35] Additionally, the Kansas legislature saw fit to limit any mitigation for proximity in age to opposite-sex partners, a requirement that the state's highest court found unconstitutional in 2005.[36]

Importantly, the law's imposition of age restrictions for sexual relations is not only dissonant with political rights such as voting, but also with other sexual rights. In South Africa at the moment, the anomalous situation exists that one could be criminally punished for having sexual relations with a same-

30 A Pantazis 'Lesbian and Gay Youth in Law' (2000) 117 *SALJ* 51, 51.

31 E Cameron ' "Unapprehended Felons": Gays and Lesbians and the Law in South Africa' in M Gevisser & E Cameron (eds) *Defiant Desire: Gay and Lesbian Lives in South Africa* (1995) 89, 97.

32 Sexual Offences Act 23 of 1957:

s 14(1)(b): it is an offence for any male person to commit or attempt to commit an immoral or indecent act with a boy under the age of 19 years.

s 14(3)(b): it is an offence for any female person to commit or attempt to commit an immoral or indecent act with a girl under the age of 19 years.

s 14(1)(a): it is an offence for any male to have or attempt to have unlawful carnal intercourse with a girl under the age of 16 years.

s 14(3)(a): it is an offence for any female to have or attempt to have unlawful carnal intercourse with a boy under the age of 16 years.

33 *Michael M v Superior Court of Sonoma County* 450 US 464 (1981).

34 New Jersey Statute s 2cC:14-2; New Mexico Statute s 30-9-11; New York Penal Law s 130.05; California Penal Code s 261.5.

35 Alabama Code s 13A-6-62.

36 *State v Limon* 122 P3d 22, 80 Kansas 275 (2005). For a discussion of the problem, see N Bourke 'Heeding the Equal Protection Clause in the Case of *State v Limon* and in Other Instances of Discriminatory Romeo and Juliet Statutes' (2006) 12 *Widener LR* 613.

sex partner aged 18, although one could enter into a lawful marriage with her or him.[37] Similarly, in the United States, the age to consent to marriage is often lower than the age to consent to sex, and often a parent or custodian may provide permission to substitute for the minor's consent. More contentious is the access to sexual information, to sexual health services and other treatment for minors. Provoking much controversy are the recent provisions of the Children's Act 38 of 2005, effective 1 July 2007, mandating condom distribution to persons over the age of 12 years and provision of contraceptives other than condoms on request by the child and without parental consent with proper medical advice.[38]

In addition to chronological age, the 'adult' requirement in the conventional neo-liberal formulation of protectable sexual activity is often extended. One situation encompasses persons deemed not sufficiently mature because of a developmental disability. Another analogous circumstance involves an otherwise competent and mature person whose ability to consent freely may be impaired by a power differential. The law's interest in power differentials is exhibited in some of the age-of-consent statutes in the United States that incorporate age differentials, and a few of these also raise the age of consent if the older partner is in a 'supervisory or disciplinary position.'[39] In the non-criminal context, a person subject to another's supervisory or disciplinary position may be held not to be capable of consent, as is the case in some university policies forbidding student-faculty sexual relations. Additionally, the ethical rules of some professions prohibit sexual engagement with clients, or with some specific type of client.[40] In New York, for example, the Rules of Professional Responsibility provide that a lawyer shall not 'require or demand sexual relations with a client or third party incident to or as a condition of

37 Civil Union Act 17 of 2006 s 1 definition of 'civil union'.

38 Section 134. The Department of Social Services issued a statement relating to the Act, explaining that:

> The Act provides that children should be provided with access to contraceptives. This is in realisation of the fact that children are sexually active at a very young age, even though the legal age of consent is 16. Furthermore, given HIV and AIDS, especially amongst teenagers, it would be unwise to deny children access to condoms.
>
> Provision of the reproductive health services to minors will most importantly help us to detect children who are in need of care. We are mindful of the fact that a sexually active child may be a child in need of care. Therefore the health practitioners would be required to report suspicious cases to a child protection organisation, social workers, police officers or children's court. The child would then receive proper attention and assistance. This would assist children who are abused, neglected and exploited.
>
> In addition, access to contraceptives should go hand in hand with appropriate sexuality education.

Statement *Clarity on Clauses in the Children's Act, Act No 38 of 2005* (6 July 2007) available at <http://www.info.gov.za/speeches/2007/07070615151001.htm>. The government was responding to reactions such as those reported from the 'National Democratic Convention (Nadeco), which said it was appalled at the "morally flawed" Act.' <http://www.mg.co.za/articlepage.aspx?area=/breaking_news/breaking_news__national/&articleid=312969>.

39 New Jersey Statute s 2cC:14-2.

40 M Seymour 'Attorney-Client Sex: A Feminist Critique of the Absence of Regulation' (2003) 15 *Yale J Law & Feminism* 175 (arguing for ban on attorney-client sex and discussing bans in other professions).

any professional representation,' or 'employ coercion, intimidation, or undue influence in entering into sexual relations with a client,' both of which would constitute classic sexual harassment. However, in addition, '*in domestic relations matters*,' a lawyer shall not 'enter into sexual relations with a client during the course of the lawyer's representation of the client."[41]

The perception that the client in domestic relations matters needs more protection than other clients, including clients in criminal cases facing incarceration, is linked to the larger theoretical perspective that permeates the neo-liberal formulation of protectable sex: valorisation of the home as a realm of privacy meriting special safeguard. The notion of a 'man's home is his castle' has been devastatingly critiqued by feminists, amongst others. The bourgeois bedroom as a locus for privacy not only impedes the achievement of sexual freedom for those who are actually or metaphorically confined to it (as for example victims in domestic violence situations), but also for those who would, or who must, pursue sexual freedom outside of it. South Africa's notorious 'party law' aimed at homosexual sex is a stunning example, for it conjoined the notion of the 'private' with the requirement of the dyad, defining a 'party' as more than two people.[42] In the landmark case of *Government of the Republic of South Africa v Grootboom*,[43] the Constitutional Court addresses the issue of homelessness as it relates to the founding values expressed in the Constitution's Preamble: 'human dignity, the achievement of equality and the advancement of human rights and freedoms.' The Constitutional Court does not specifically mention sexuality, but certainly it might have, and certainly the Court would not conclude that Irene Grootboom's lack of housing deprived her of sexual freedom.[44]

Any review of the failings of the neo-liberal formulation of sexual freedom, however brief, exposes the difficulties of demarcating sexual freedom in a democracy. Furthermore, the neo-liberal arrangement presupposes a passive state that is not charged with actively promoting sexual freedom, except when bounded by the concept of harm. Yet despite these faults, as previously suggested, the neo-liberal conception has been a positive force for lesbians

41 New York Code Of Professional Responsibility DR 5-111(B)(3), New York Comp Codes & Regs title 22, s 1200.29-a(b)(3). For a discussion of the special rules in matrimonial and family-law cases, see LM Mischler 'Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex Between Domestic Relations Attorneys and their Clients' (2000) 23 *Harvard Women's LJ* 1.

42 The statute provided: 'A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence.' Section 20A(1) of Sexual Offences Act 23 of 1957. The statute further explained that 'a "party" means any occasion where more than two persons are present' (s 20A(2)). The political battles and comprises that gave rise to this bizarre wording are discussed at length in M Gevisser 'A Different Fight for Freedom: A History of South African Lesbian and Gay Organization — The 1950s to 1990s' in Gevisser & Cameron (note 31 above) 30-35.

43 2001 (1) SA 46 (CC).

44 Although he does not specifically address sexual freedom and privacy in the context of homelessness, Pierre de Vos has specifically linked *Grootboom* to the Constitutional Court's sodomy case, *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), arguing that the Court's judgment in the sodomy case makes it clear that 'a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights.' P de Vos 'Substantive Equality after *Grootboom*: The Emergence of Social and Economic Context as Guiding Value in Equality Jurisprudence' 2001 *Acta Juridica* 52, 64.

and gay men seeking to challenge the criminalizations of some of our sexual practices, specifically sodomy statutes. However, this success is not sufficient. Indeed, it risks transforming lesbians and gay men into a model sexual minority rather than as agents of sexual freedom. In the next section, I explore the South African jurisprudence regarding lesbians and gay men in comparison to the jurisprudence relating to other aspects of sexual freedom.

IV Lesbians and Gay Men as the Model Sexual Minority

The Constitution of the Republic of South Africa remains a unique beacon for sexual minorities throughout the world because its prohibits the government and private actors to 'unfairly discriminate directly or indirectly against anyone' on a numerous grounds, including 'sexual orientation.' [45] This accomplishment should never be minimized and for queer legal scholars in other nations, including the United States, it is a cause for envy.[46] This constitutional provision provides the clear basis for the Constitutional Court to declare the criminalization of sodomy unconstitutional,[47] a feat that the United States Supreme Court achieved only after years of pain for sexual minorities, an initial decision upholding a sodomy statute in 1986,[48] and then considerable division amongst the justices on the Court when it declared a sodomy statute unconstitutional in 2003.[49] The constitutional text also provided firm grounding for the South African Constitutional Court to recognize rights for sexual minorities in same-sex partner relationships including immigration,[50] government pensions,[51] joint legal parent status through adoption,[52] joint parent status

45 Section 9.

46 For discussions of the process of constitutionalisation, see E Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 *SALJ* 450; E Christiansen 'Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process' (1999-2000) 32 *New York Univ J of Int Law & Policy* 997; P de Vos 'The "Inevitability" of Same-Sex Marriage in South Africa's Post-Apartheid State' *SAJHR* (in this issue).

47 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

48 *Bowers v Hardwick* 478 US 186 (1986).

49 *Lawrence v Texas* 539 US 558 (2003). Three of the nine Justices of the United States Supreme Court dissented, and one other Justice concurred on the basis that the statute violated equal protection because it only criminalized same-sex, and not opposite-sex sodomy.

50 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) (construed s 25(5) of the Aliens Control Act 96 of 1991, which facilitated the immigration into South Africa of the spouses of permanent South African residents but did not afford the same benefits to gays and lesbians in permanent same-sex life partnerships with permanent South African residents, to include same-sex partners in order to preserve constitutionality).

51 *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) (held that benefits under the Judges Remuneration and Conditions of Services Act 88 of 1989, which gave benefits to the spouses of judges, should be afforded to same-sex partners of judges where reciprocal duties entailed in a marriage can be shown in the same-sex relationship); *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC) (ordered that the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' be read into the new regulations regarding judges' renumeration).

52 *Du Toit v Minister of Population and Welfare Development* 2003 (2) SA 198 (CC) (holding that the Child Care Act 74 of 1983 and Guardianship Act 192 of 1993 discriminated on the grounds of sexual orientation and marital status by infringing on the right of same-sex life partners to adopt children jointly).

for children born through alternative insemination,[53] intestate succession,[54] and marriage.[55] Again, this jurisprudence is the envy of sexual minorities living under other legal regimes.

Yet this jurisprudence exhibits the well-known tension between the recognition of lesbians and gay men as an identity and the recognition of our sexual practices. Writing in 1999 after the Constitutional Court's sodomy decision, Angelo Pantazis observes 'how easily gays fit into the Constitutional Court's equality jurisprudence,' as a 'model of minority, like blacks, women, ethnic groups, and religious minorities' so that 'sexual orientation becomes another prohibited ground of discrimination.' Thus, although the sodomy law criminalized an act rather than a person, Pantazis analyzes the reasoning of Sachs J in the concurring opinion as explicitly shifting the focus to the 'sodomite' rather than the sexual act. Despite — or because of — this repositioning, Professor Pantazis concludes that the Constitutional Court in an 'exemplary fashion' 'maintains the unstable relationship between the two shifting poles' of act and identity.[56] Comparing the South African sodomy case to the then-precedential United States case upholding the sodomy statute, Pantazis states that 'it is harder to be hostile to gays, as the majority of the American court was, when gay experience is used to show the importance of sexual autonomy.' [57]

However it seems to me that there may be a tilt away from sexual autonomy and toward gay identity, for precisely the reason that Pantazis articulated: the ease of gay men and lesbians settling into the model of a minority seeking recognition of an equality claim. As Pierre de Vos has argued, the successful inclusion of sexual orientation in the Constitution can be attributed to the way in which gay men and lesbians could be articulated within the master narrative of discrimination suffered under apartheid.[58] In *Fourie*, Sachs J lists several 'unambiguous features of the context in which the prohibition against unfair discrimination on the grounds of sexual orientation' in the Constitution must be analysed, including 'the existence of an imperative constitutional need to acknowledge the long history in our country and abroad of marginalization and persecution of gays and lesbians,' and that the 'Constitution represents a radical rupture with a past based on intolerance and exclusion.'[59]

It can be troubling to conceptualize lesbians and gay men as 'models of minority.' However, I am more concerned by our construction as 'model

53 *J and Another v Director-General, Department of Home Affairs and Others* 2003 (5) SA 621 (CC) (holding that the Children's Status Act 82 of 1987 was unconstitutional to the extent that it allowed for married couples to become joint parents of a child born to them as a result of artificial insemination, but did not allow same-sex partners to become joint parents to a similarly born child).

54 *Gory v Kolver NO* 2007 (4) SA 97 (CC) (declared section of the Intestate Succession Act 81 of 1987 unconstitutional in so far as it did not provide for a permanent same-sex life partner to inherit automatically, as a spouse would, when the other partner dies without a will).

55 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

56 A Pantazis 'How to Decriminalize Gay Sex' (1999) 15 *SAJHR* 188, 191-192.

57 Ibid 191.

58 De Vos (note 46 above).

59 *Fourie* (note 55 above) para 59.

minorities.'[60] Fashioning gays and lesbians as model sexual minorities means that we are 'just like' the sexual majority (presumably heterosexuals), but also that we are 'more like' them. In other words, we become the way they would like to be (or imagine they should be), embodying a romanticized and ideal version of sexuality and relationships. In the Constitutional Court cases considering lesbians and gay men subsequent to the sodomy case, we appear as coupled, committed, and domesticated into (alternative but happy) families. In *Fourie*, the opinion is introduced with this sentence: 'Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up a home together.'[61] In *Satchwell*, the applicant is a member of an 'intimate, committed, exclusive, and permanent relationship.'[62] In *Du Toit,* the applicants are 'partners in a longstanding lesbian relationship,' with intertwined finances who 'take all major life decisions jointly and on a consensual basis.'[63] More conclusively, the applicants in *J* are simply described as 'partners in a same-sex partnership'[64] and the applicant in *Gory* as the surviving member of 'a permanent same-sex life partnership in which they had undertaken reciprocal duties of support.'[65]

This is not to place the entirety of blame on the Constitutional Court for this development. Indeed, at times there is an admirable exercise of restraint. For example, in *J,* Goldstone J remarks that 'it is not appropriate for the courts to determine the details of the relationship between partners to same-sex (or for that matter heterosexual) relationships.'[66] Further, litigation strategies contribute to the portrait of gay men and lesbians. As I have noted in the US context, the character of reform litigation means that the best lesbian plaintiffs are those who 'but for' their lesbianism are 'perfect.'[67] These 'but for' images are intended to contradict the pathological descriptions of lesbians and gay men advanced by conservatives, including the portrayal of us as hyper-sexualized, promiscuous, and immature. Furthermore, when the basis of the claim is an unfair distinction between married heterosexual couples and unmarried same-sex couples, the extent to which the couples are deemed the same enhances the argument for equal treatment. Yet the 'sameness' approach requires the same-sex couple to argue that they are functionally if not legally like the most traditional married couple.[68] Unlike the US context, in South Africa the constitutional doctrine has obviated the need for much of the litigation prevalent in the United States such as that involving discrimination against a person excluded from membership in a private organization or in the military based

60 M O McGowan & J Lindgren 'Testing the "Model Minority Myth" ' (2006) 100 *Northwestern LR* 331 (discussing Asians as the 'model' ethnic minority in US law and culture).
61 *Fourie* (note 55 above) para 1.
62 *Satchwell* (note 51 above) para 4.
63 *Du Toit* (note 52 above) paras 1, 4.
64 *J* (note 53 above) para 2.
65 *Gory* (note 54 above) para 2.
66 J (note 53 above) para 26.
67 R Robson *Sappho Goes To Law School* (1998) 30.
68 Ibid 165.

on sexual orientation.[69] Thus, it is not surprising that the jurisprudence almost exclusively centres on couples. Nevertheless, the idealized and romanticized descriptions of gays and lesbians contained in the Constitutional Court cases has the potential to separate sexual minorities into those who are acceptable and assimilated from those who are deemed not acceptable.

This phenomenon occurs in *S v Jordan*,[70] decided by the Constitutional Court in 2002 and which has been compellingly critiqued by others.[71] Here, however, I want to focus on the Constitutional Court's contrasting of sex work and sex workers with sodomy and 'sodomites,' that is gay men and lesbians. In *Jordan*, the Constitutional Court upheld the Sexual Offences Act that criminalises the sex worker (but not the client) for prostitution and criminalises the keeping or managing of a brothel. The majority judgment is especially harsh, blaming the sex worker for any discrimination that befalls her: 'by engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community, thus undermining their status and becoming vulnerable.'[72]

Yet the minority judgment of O'Regan and Sachs JJ, which would have found that crimiminalising the sex worker but not the client constituted indirect but unfair gender discrimination, is similarly unforgiving. The opinion rejects the usefulness of positing any 'independent right to autonomy'[73] and thus proceeds with separate analyses of the right to engage in economic activity, discrimination, the right to human dignity, and the right to privacy. In its discussion of the right to privacy, it takes pains to distinguish the sodomy case. The sodomy judgment

> emphasises the interaction between equality, dignity and privacy in relation to a community that had been discriminated against on the basis of closely-held personal characteristics. Furthermore, it stresses that the protected sphere of private intimacy and autonomy relates to establishing and nurturing human relationships.[74]

On the contrary, according to the judgment of O'Regan and Sachs JJ, 'central to the character of prostitution is that it is indiscriminate and loveless.'[75] The prostitute 'is not nurturing relationships or taking life-affirming decisions about birth, marriage or family.'[76] With reference to the right to dignity, the

69 *Boy Scouts v Dale* 530 US 640 (2000) (upholding the right of the Boy Scouts to refuse membership to a scoutmaster based upon his 'homosexuality' despite a state law prohibiting discrimination on the basis of sexual orientation); *Rumsfeld v Forum for Academic and Institutional Rights* 547 US 47 (2006) (upholding The Solomon Amendment which withheld federal funds from institutions of higher education that denied military recruiters access to campuses and students because the military discriminates on the basis of sexual orientation).

70 2002 (6) SA 642 (CC).

71 D Meyerson 'Does the Constitutional Court of South Africa Take Rights Seriously? The case of *S v Jordan*' 2004 *Acta Juridica* 138; N Fritz 'Crossing *Jordan*: Constitutional Space for (Un)Civil Sex?' (2004) 20 *SAJHR* 230.

72 *Jordan* (note 70 above) para 16.

73 Ibid para 53 (O'Regan and Sachs JJ).

74 Ibid para 82.

75 Ibid para 83.

76 Ibid.

minority opinion, like the majority judgment, faults the sex worker for her unconstitutional status:

> To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself … . the dignity of prostitutes is diminished not by the [legislative provision] but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.[77]

The impoverished view of dignity here is unsettling, especially given its robust application by the Constitutional Court in other contexts. Finding the death penalty unconstitutional, the Constitutional Court relied on the African concept of ubuntu which 'recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community.'[78] In *Jordan*, there is no mention of ubuntu, or acknowledgment that a sex worker might be part of a community. Instead, the rhetoric of choice is deployed in order to construct sex workers as exiles from constitutional dignity. The argument is that sex workers have a choice — even though it may be a choice with 'few alternatives' — to engage in 'exploitation' of their own bodies for financial 'reward' and that it is this choice, rather than any legal proscriptions on that choice, that accounts for any negative consequences.

Without s 9 of the Constitution of the Republic of South Africa, 1996 (and s 8 of the interim Constitution, Constitution of the Republic of South Africa, Act 200 of 1993) listing 'sexual orientation' as a prohibited ground of unfair discrimination, it is not difficult to imagine the sodomy judgment containing similar language. The Constitutional Court might have stated that by 'engaging in sodomy, gay men knowingly accept the risk of lowering their standing in the eyes of the community, thus undermining their status and becoming vulnerable,' and that 'the dignity of gay men is diminished not by the [legislative provision] but by their engaging in acts of sodomy,' the 'very character' of which 'devalues the respect that the Constitution regards as inherent in the human body.' Persons have a choice whether or not to engage in 'deviant sex acts' and it is that choice, rather than any criminal statutes, that causes any negative consequences.[79]

Certainly there may be those within lesbian and gay identities who would applaud, or at least not disagree with, the distinction the Constitutional Court's minority judgment explicitly draws, and which the Court's majority judgment implicitly establishes. Indeed, it can be comforting to be no longer amongst the 'deviant' and to be capable of being assimilated into the mainstream.[80] Yet I believe there are at least three serious causes for concern. First, to the extent the distinction rests upon gay men and lesbians as a 'community' with

77 Ibid para 74 (O'Regan and Sachs JJ).

78 *S v Makwanyane* 1995 (3) SA 391 (CC).

79 A reminder of the possibilities of judgments upholding the criminalization of same-sex sodomy can be found in the United States cases of *Bowers v Hardwick* (note 48 above), decided in 1986, and the dissenting opinions in *Lawrence v Texas* (note 49 above), decided in 2003.

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

a certain identity based upon 'closely-held personal characteristics,' we need to examine the veracity of such claims. For example, the existence of the category 'MSM' (men who have sex with men) in HIV/AIDS prevention work belies the limitation of 'sexual orientation' to persons who identify themselves as members of a specific sexual community.[81] For yet another example, the viewpoint of one lesbian, a white South African, a judge and a litigant in a sexual orientation Constitutional Court case stresses her differences from another lesbian, also a white South African, a judge and a litigant in a sexual orientation Constitutional Court case.[82] Most likely many of us could point to numerous other situations and there is a vigorous literature disputing a community of identity. Nevertheless, I do not believe we should, or usually do, seek to deny persons legal protection based upon our ideas of community.

Second, the distinction between sex workers and lesbians might be historically murkier than it appears. As the sodomy case makes clear, under apartheid the sodomy statute criminalized acts between men and men but not between women and women.[83] From this, one might assume that women were free to indulge in lesbian acts under apartheid, or even that there was a thriving lesbian existence that escaped criminal sanction. While I confess to finding such assumptions attractive, there is little record to support them. There is also little reason to suppose that lesbian acts simply did not occur under apartheid,

81 For one discussion, see <http://www.unaids.org/en/Issues/ Affected_communities/ men_who_ have_sex_with_men.asp>.

82 L Moran 'Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings' (2006) 28 *Sydney LR* 565, 574-575. Moran's observations and his quotation from his interview bear repeating:

> Comments made by Justice Satchwell explore sexual identity as a marker of things in common, of community. She reflects upon the significance of the term 'lesbian' and its capacity to provide an identity in common with other lesbians, in this instance with fellow lesbian, Justice de Vos. Like Justice Satchwell, Justice de Vos has had a high profile as a lesbian as the result of bringing a case under the sexual orientation equality provisions of the South African Constitution, in this instance with regard to discrimination in relation to same-sex adoption. Reflecting upon the way the terms 'lesbian' might suggest things in common with Justice de Vos, Justice Satchwell explained:
>
> > … what I am saying is that I have nothing in common with Anna Marie de Vos. She is a white Afrikaner from Pretoria. She was never engaged in the struggle. And I'm not interested in her politics. Do you see? That diversity is not enough to bridge certain things. That is not to say that when she had her court case, in fact our cases happened to be heard at the same time, we didn't know each other. My partner and I invited her and her partner to dinner. We thought, 'Well let's meet. Our names are always joined in the papers all the time: lesbians and judges.' So we met. When they won their case they invited us to a celebration lunch. That has been the extent of our socialising.
>
> Being lesbians, Satchwell explains, is 'not enough' to cement the experience of being in common. She is separated from Justice de Vos by ethnic background: de Vos is Afrikaner in contrast to Justice Satchwell's background, which is English South African. Politics also separates them. During the course of the interview Justice Satchwell identified her privileged left liberal background and engagement in the anti-apartheid 'struggle' as central to her politics, her position on the bench and her sense of community, which she defined as a community made up of 'struggle people'. This she suggested is very different from the social cultural and political background of Justice de Vos. The being in common that 'lesbian' provides is described here as in part serendipitous, being something that arises out of coincidence (the litigation), in part it is imposed externally, by the media, and in part it is a conscious choice of individuals deciding to act in common. Sexual commonality is not so much something that is merely brought into being by a name, uniformly applicable, taken for granted or enduring, but may be an alien and alienating, qualified, partial and fleeting experience.

83 Note 47 above, para 11.

a possibility I find less tempting and even less plausible. What does seem credible, however, is the possibility that sex crimes such as lesbianism were prosecuted under the umbrella sex crime for women, namely prostitution. As lesbian theorist Joan Nestle explains, in the United States police raids on lesbian bars resulted in arrests and imprisonment for the crime of prostitution.[84] Further, there is the historical reality that sex work as a livelihood has been one of the few occupations available for women unattached to men, especially if the women are not from the privileged classes. On a theoretical level, Nicole Fritz argues that prostitution marks 'out a domain of female sexuality above and beyond mere procreation — a sphere which, absent legal and societal penalties, ought to be preserved and in which all women might choose to participate.' [85] Many lesbians would articulate lesbianism in a similar manner.

Third and last, the Constitutional Court's distinction between constitutionally unprotected sex work and constitutionally protected gay and lesbian sexuality provokes serious concern because of the contrasting descriptions. Given the rhetoric of choice in *Jordan*, it is difficult not to read 'closely-held personal characteristics' as connoting an absence of choice. Indeed, the model of the minority is that there are characteristics that are not the fault of the person and thus not a fair basis of judgment or discrimination. On this view, as a lesbian I deserve constitutional protection because I was 'born that way.' While the debates between essentialism and social constructionism continue, it remains as true as it ever was that basing constitutional protection on one theory of sexuality over the other seems deeply flawed. [86] Furthermore, and perhaps more seriously, it is not merely the origin of my sexual orientation but its particular manifestations that entitle it to protection. The message from the Constitutional Court in *Jordan* to sexual minorities is that in order to be constitutionally protected not only must our sexual relations be caused by a 'closely-held personal characteristic,' but they must be life-affirming and nurturing, and must not be with strangers, indiscriminate or loveless.

Perhaps it is a personal failing on my part, but I do not believe that all of us desire our sexual activities to be consistently packaged in such sentimental wrappings. Moreover, even if it is our desire, I do not believe all of us unerringly achieve these goals. Certainly there are counsellors who would advise that sexual relations never be devoid of true love. But this is different from the legal standard to which any of us should be held in a democracy.

V The Role of the Democratic State in Sex

It may seem churlish to argue that loving life-affirming sexual relationships have a negative connotation just as it is difficult to dispute the favourable associations with 'democracy.' Further, there is a tendency to associate good

84 J Nestle *A Restricted Country* (1987) 169.
85 Fritz (note 71 above) 237.
86 A Pantazis 'The Problematic Nature of Gay Identity' (1996) 12 *SAJHR* 291.

things with other good things.[87] Thus, it is tempting to link these 'loving life-affirming' sexual arrangements with democracy, or even to suggest that these specific sexualities promote democracy. This, however, is a temptation that must be resisted.

An historical example illustrates the danger of associating a specific sexual organization with democracy. In 1879 the issue of polygamous marriages reached the United States Supreme Court in *Reynolds v United States*,[88] a test case set up by the Mormon Church.[89] The Court rejected the freedom of religion claim, establishing a distinction between belief (which the government could not infringe) and practice (which the government could infringe). The Court characterized polygamy as 'odious' among the 'northern and western nations of Europe,' and until the Mormons, 'almost exclusively a feature of the life of Asiatic and African people,'[90] thus arguing that polygamy was not an indigenous practice but was being imported and imposed from abroad.[91] The Court also specifically connected marital and government forms, concluding that polygamy was anti-democratic. According to the Court, 'as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or lesser extent, rests,' and 'polygamy leads to the patriarchal principle, and which when applied to large communities, fetters people in stationary despotism, while that principle cannot long exist in connection with monogamy.'[92] The Court's interest in preventing patriarchy seems rather disingenuous given its refusal in those years to recognize the right of women to practise law or to vote.[93] The Court also upheld the denial of democratic suffrage to polygamists and — vitiating the act/belief dichotomy — even to believers in polygamy.[94] Thus, the Court found that polygamy's threat to democracy could constitutionally be addressed through anti-democratic means.

Such developments in nineteenth-century American jurisprudence are not merely a peculiar and irrelevant episode. The doctrine points to the histori-

87 'And since what is natural is pleasant, and things akin to each other seem natural to each other, therefore all kindred and similar things are usually pleasant to each other.' Aristotle *Rhetoric* Book 1, chap XI, 1371b.

88 98 US 145 (1879).

89 S Gordon *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (2002) 113-115.

90 *Reynolds* (note 88 above) 164.

91 The parallel to arguments that 'homosexuality' is 'unAfrican' should be apparent.

92 *Reynolds* (note 88 above) 166.

93 *Bradwell v Illinois* 83 US 130, 139 (1873) (upholding the exclusion of women from the practice of law); *Ex parte Lockwood* 154 US 116 (1894) (rejecting constitutional challenge to Virginia's policy of excluding women from practice of law, holding that state courts could construe word 'person' in state statute as confined to males); *Minor v Happersett* 88 US 162 (1875) (upholding the exclusion of women from the right to vote).

94 In *Murphy v Ramsey* 114 US 15 (1885) the Court found the denial of the right to vote to polygamists an efficacious and 'suitable' effort to 'withdraw all political influence from those who are practically hostile to its attainment.' In *Davis v Beacon* 133 US 333 (1889), the Court upheld Idaho Territory's 'test oath' requiring potential voters to swear they were not members of an organization which advocated plural marriages, reasoning that the law was necessary to 'prevent persons from being enabled by their votes to defeat the criminal laws of the country.'

cally contingent, as well as racist and sexist, nature of assessments of sexual arrangements in terms of their connection, if any, with democracy. Today, life-affirming, nurturing, and loving sexual relationships may *seem* preferable, just as marriage may *seem* to be their penultimate expression. As the Constitutional Court has stated, 'marriage is a constitutionally recognized institution in our constitutional democracy,' and therefore the 'law may legitimately afford protection to marriage,' even if it means affording 'protection to married people which it does not afford to unmarried people.' [95] Thus, in *Volks NO v Robinson*, the Court did not afford spousal rights to Ms Robinson despite the fact that she was in a permanent life partnership with the deceased, Mr Shandling. This contrasts with the spousal rights the Court afforded to Mr Gory who was in a permanent life partnership with Mr Brooks, also deceased.[96] The difference is that Ms Robinson was in an opposite-sex relationship while Mr Gory was in a same-sex relationship at the time that marriage was not available to same-sex couples. Now that civil partnership/marriage is available to same-sex couples in South Africa, a future unmarried cohabitant will presumably be governed by the precedent of *Robinson* rather than that of *Gory*, whether a member of a same-sex relationship or not.

In one sense, this is an expression of the equality so important to democracy. As Sachs J in *Fourie* noted, the constitutional imperative is that same-sex couples and opposite-sex couples have the same choice of marriage available.[97] Sachs J also stated that the manner in which the choice is exercised is not important,[98] but this is more questionable. It may be that certain choices are less respected and more damaging to dignity. Like Ms Jordan's choice to pursue sex-work, the choice not to marry can be viewed as 'not nurturing relationships or taking life-affirming decisions about birth, marriage or family,'[99] and thus diminishing a person's (otherwise) inherent dignity. Such a result belies the Court's rhetoric stressing the importance and acceptance of difference and the distaste for a 'homogenisation of behaviour.'[100] Instead, the law channels the exercise of our 'choice' toward a specific outcome.[101] However, just as there were polygamist Mormons with their undemocratic and alien beliefs and practices during the nineteenth century in the United States, there are dissenters amongst lesbians, gay men, and other sexual minorities to the regime of marriage and 'life-affirming' sexual practices.

95 *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) para 87.

96 *Gory* (note 54 above).

97 *Fourie* (note 55 above) para 72.

98 Ibid. As the Court stated:

> It may be, as the literature suggests, many same-sex couples would abjure mimicking or subordinating themselves to heterosexual norms. Others might wish to avoid what they consider the routinisation and commercialisation of their most intimate and personal relationships, and accordingly not seek marriage or its equivalence. Yet what is in issue is not the decision to be taken, but the choice that is available. (footnotes omitted)

99 Ibid.

100 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 50 above) para 131.

101 Robson (note 80 above).

The concept of sexual citizenship promises some explanatory power. As Carl Stychin has noted, it may be surprising that 'citizenship' has been adopted as a theoretical tool by sexual minorities given citizenship's 'exclusionary history,'[102] and I would add, present exclusionary and contested legal and social realities of 'citizenship', especially in the United States. Stychin theorises that this 'appropriation speaks to the power of citizenship and to the lack of alternative languages which express both a desire for rights and participation.'[103] Like the terms 'democracy' and 'sex,' the term 'citizenship' (or even 'sexual citizenship') admits no precise definition. As Brenda Cossman observes, there is 'no consensus within citizenship debates on the nature of citizenship.'[104] For her part, Canadian legal scholar Cossman — like Alexis de Tocqueville more than a century before her[105] — turns to contemporary social mores: her recent study of sexual citizenship analyzes United States television productions such as *Queer Eye for the Straight Guy, The L Word, Desperate Housewives*, and features many instructions from television host 'Dr Phil.'[106] On one view, sexual citizenship is highly disciplinary, and sex is 'privatised, de-radicalised, de-eroticised, and confined in all senses of the word.'[107] For Stychin, this disciplinarity is 'synonymous with normalisation.'[108] Moreover, as one scholar writing about sexual citizenship in the context of sadomasochistic sexual practices notes, 'the overwhelming desire to produce a sexual subject deserving of citizenship' then leads to a 'conservatism within SM communities and a consequent failure to transform citizenship itself.'[109] Nevertheless, Stychin argues that while the notion of the disciplined sexual citizen is 'intuitively persuasive,' there remains an 'unruly and unpredictable edge' to rights, citizenship, and 'people living their lives.'[110] That there is resistance to what I have called the forces of domestication is not surprising.[111] Indeed, I would argue that fostering that resistance is the purpose of our theorising and analysis.

Here, my focus is on legal — rather than social, cultural, or even political — relationships between democracy and sexuality. Given the present jurisprudence, it can be challenging for those who would dissent from legal constructions of sexuality even to begin to articulate a claim. Indeed, there may be 'limited thinkability.'[112] The argument of a sexual minority youth to

102 C Stychin *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (2003) 12.
103 Ibid.
104 B Cossman *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (2007) 5.
105 See note 2 above.
106 Cossman (note 104 above).
107 D Bell & J Binnie *The Sexual Citizen: Queer Politics and Beyond* (2000) 3.
108 Stychin (note 102 above) 13.
109 D Langdridge 'Voices from the Margin: Sadomasochism and Sexual Citizenship' (2006) 10 *Citizenship Studies* 373, 381.
110 Stychin (note 102 above) 13.
111 Robson (note 67 above) 168. 'Yet domestication has within it the idea of its opposite. To have been domesticated, one must have once existed wild, and there is the possibility of a feral future'.
112 D Cooper 'Speaking Beyond Thinking: Citizenship, Governance, and Lesbian and Gay Politics' in V Munro & C Stychin (eds) *Sexuality and the Law: Feminist Engagements* (2007) 171, 191. Cooper is specifically referring to strategies of interacting with local governments.

exercise sexual agency is fraught.[113] It is difficult to imagine an uncoupled judicial colleague of Ms Satchwell arguing that the pension should be awarded to some other person of her choice. It would be equally complicated for Ms Du Toit to conceptualise a legal argument with one — or more than one — of her friends to become joint parents, although some of these assertions are beginning to be made. Yet honouring the sexual in a democracy means more than being inclusive regarding marital forms, such as recognising same-sex, customary, and Muslim marriages.[114]

It also means interrogating the very form of marriage itself and the state's role in the marital relationship. Writing for the Massachusetts Supreme Judicial Court in its opinion extending marriage on the same terms to same-sex couples, South African native Margaret Marshall asserted that there are three parties to any marriage: two willing spouses and the state.[115] One might question whether there is meaningful consent to having the 'state' as a member of our marriages, civil partnerships, civil unions, or any of our sexual liaisons. Furthermore, the state is the most powerful member in these sexual arrangements. Often unobtrusive, it nevertheless retains its control. In marriage, for example, the state has the authority to alter the terms of the marriage 'contract' after the parties have entered into it and without their consent; it could, for example, pass a law rescinding the grounds of 'irretrievable breakdown' for a divorce or declare all antenuptial contracts void.

The democratic state surely plays a different role than an apartheid, fascist, or religious state. In a democratic state, the public officials through whom the state operates have what Margaret Marshall has named 'a kind of "capital" with the public, to spend or squander as they choose.'[116] Marshall, like many others, is particularly concerned with the 'capital' the judiciary possesses, which

> is not political but 'intellectual and reputational, limited to what it can acquire through effective job performance'. Often, for American judges, this means knowing when and how to limit judicial involvement in a matter of public controversy. That calculation is never easy. No mathematical equation, no neat formula, unerringly guides the American judge to an inevitable conclusion when cases concerning the separation of powers arise. Reasonable minds can and do differ. Loudly. The most our courts can do is see the right balance between accountability and independence in every case, knowing that we may not always get it right, but confident that if we get that balance woefully wrong, the people and their elected representatives will let us know, and that we shall listen carefully.[117]

For Marshall J, writing for the Supreme Judicial Court of Massachusetts in *Goodridge v Department of Health*, the balance was struck in favour of the judiciary's power to declare same-sex marriage as a right of due process and

113 Pantazis (note 30 above).

114 The parallels and distinctions between same-sex marriage and unique constructions of Muslim and customary marriages are beyond the scope of this article.

115 *Goodridge v Department of Health* 798 NE 2d 941, 954 (Massachusetts 2003).

116 M Marshall 'The Separation of Powers: An American Perspective' (2006) 22 *SAJHR* 10, 19.

117 Ibid.

equal protection under the state constitution.[118] For Sachs J, writing for the South Africa Constitutional Court in *Fourie*, the scales tipped in the opposite direction, although not fully toward the legislature. Sachs J noted that '[o]rdinarily a successful litigant should receive at least some practical relief,' but that this 'is not an absolute rule.'[119] In supporting the Constitutional Court's conclusion to allow Parliament 'to cure the defect within twelve months,' [120] the Court interestingly relied upon the need for security for a 'section of society that has known protracted and bitter oppression.'[121] Sachs J reasoned that Parliament might later choose a remedy other than a simple 'reading-in of the words "or spouse"' in legislation which was sex-specific, as the Court would do,[122] and the Court's 'temporary remedial measure would be far less likely to achieve the enjoyment of equality as promised by the Constitution than would lasting legislative action compliant with the Constitution.'[123] Interestingly, however, the South Africa Constitutional Court maintained judicial supremacy, holding that should the South Africa Parliament fail to remedy the situation within 12 months, the Court's remedy would be instated.[124] The sole dissenting opinion of O'Regan J disagreed with the choice to 'leave it to Parliament' to craft a remedy within the limited 'range of options.'[125] O'Regan J stressed that the definition of marriage as a 'rule of common law developed by the courts,' 'lies, in the first place, with the courts.'[126] Further, she emphasized the constitutional duties of the Court to provide appropriate relief that is just and equitable.[127] Addressing the argument that an Act of Parliament might 'carry greater democratic legitimacy' than an order by the Court, O'Regan J opined that the legitimacy of a Court order 'does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.'[128]

The process of Parliamentary approval, including what some have a called a 'road show' that provided a vehicle for 'homophobic hate speech,'[129] resulted in the Civil Union Act of 2006, signed by the President. The Act provides for civil unions 'of two persons who are both 18 years of age or older' to be 'solemnized and registered by way of either a marriage or a civil partnership.'[130]

118 *Goodridge* (note 115 above).
119 *Fourie* (note 55 above) para 133.
120 Ibid para 161.
121 Ibid para 136.
122 Ibid para 135.
123 Ibid para 136. This somewhat cooperative model is similar to the process that occurred in the United States jurisdiction of Vermont. In *Baker v Vermont* 744 A2d 864 (Vermont 1999), the state's highest court found that the state marriage laws excluding same-sex couples violated the Vermont state constitution, yet held that the remedy should be wrought by the state legislature. The legislature passed a civil union statute available only for same-sex couples, which some have criticised as imposing a 'separate and unequal' system of marriage.
124 *Fourie* (note 55 above) THE ORDER para 2(e).
125 Ibid paras 163-168 (O'Regan J).
126 Ibid para 167.
127 Ibid para 170.
128 Ibid para 171.
129 Conversation with Jonathan Berger.
130 Section 1.

Its preamble quotes the SA Constitution's prohibition against discrimination on the grounds of sexual orientation as well as the inherent right to dignity. The Act includes an 'opt-out' clause for marriage officers who 'object on the ground of conscience, religion, and belief to solemnizing a civil union between persons of the same sex,'[131] a provision which is constitutionally suspect.

Despite any concerns, however, the entrustment of the same-sex marriage issue to Parliament in *Fourie* merits comparison with the entrustment of the sex-worker issue to Parliament in *Jordan*. In *Jordan*, the judgment of Ngcobo J for a majority of the Constitutional Court eschews all responsibility for the matter, stating that in a democracy such a decision is entirely outside of the judicial ambit.[132] The separate judgment of O'Regan and Sachs JJ also states that the regulation of commercialized sex is a matter 'appropriately left to deliberation by the democratically elected bodies.' Unlike *Fourie,* O'Regan and Sachs JJ provide no time frame and no parameters to Parliament.[133] One might well imagine the directive to Parliament in *Fourie* being as lax as the deferral in *Jordan*. One might also imagine the Constitutional Court in the sodomy case relegating the matter to Parliament.[134]

The issue of which organ of the state should have ultimate authority over particular sexual controversies is a vital concern in constitutional democracies, but it is only a part of the larger picture. It is also important that a democratic state not conceptualize itself as a participant in sexual arrangements or as the third party in every marriage or partnership. Additionally, the democratic state should not associate specific sexual arrangements as more consistent with itself, lest it exile those with less pleasing sexual practices and beliefs from democracy itself.

VI Conclusion

The sexual as a vital aspect of democracy. In this article, I have maintained that defining democracy is a difficult project, as is defining sexual freedom. Democracy is freighted with an overwhelmingly positive value, even as the

131 Section 6.

132 He stated:

> Much of the argument in this case, and of the evidence placed before this Court, was directed to the question whether the interests of society would be better served by legalizing prostitution than by prohibiting it. In a democracy those are decisions that must be taken by the legislature and the government of the day, and not by the courts. Courts are concerned with legality, and in dealing with this matter I have had regard only to the constitutionality of the legislation and not its desirability. Nothing in this judgment should be understood as expressing any opinion on that issue.

Jordan (note 70 above) para 30.

133 Ibid para 91 (O'Regan and Sachs JJ). They also note that 'voices' of various named organizations will 'help direct public and parliamentary attention.' It seems that the ability of sex workers to bring their concerns before legislative bodies is assumed.

134 Such imaginings are assisted by the cautionary example of United States Supreme Court Justice Scalia who dissented in *Lawrence v Texas* (note 49 above), the 2003 Supreme Court decision declaring a state statute criminalizing homosexual sodomy unconstitutional. He stated that 'social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best,' but that the judiciary should not be a vehicle for imposing views on sexuality and morality 'in absence of democratic majority will.'

concept bears a multiplicity of meanings. Sexual freedom has a less consistently positive character, and attempts to define and delimit it are mired in contradictory applications and examples. Nevertheless, the sexual should be as inherent in democracy, as equality, liberty, dignity and ubuntu are inherent. As a matter of equality, there should be a regard for sexual practices that avoids a 'leveling or homogenization of behaviour.'[135] As a matter of dignity, there should be a rejection of the assumption that a person's sexual practices can diminish her own intrinsic dignity.

One danger is that the democratic state can be as particular in its sexual expressions as any individual. It prefers its sexual minorities to be understood in the same framework as it understands other minorities. It also prefers its sexual minorities to be comparable to its romanticized version of heterosexuals. Yet turning gay men and lesbians into a 'model minority' is deeply problematic. It imposes a false unitary community on gay men and lesbians, it denies the links between gay men and lesbians and other sexual minorities, and it separates gay men and lesbians who appear in accordance with the idealized version of heterosexuals from those who do not.

When the state asserts a specific form of sexuality as being linked to democracy, it runs the risk of betraying its own values. Such an assertion is always historically contingent, even when our contemporary sense may find nothing objectionable about the linkage. While marital forms may seem democratic, they are not necessarily so, especially when the state seeks to channel its subjects into the marital 'choice.' Further, the state's insertion of itself into our intimate relationships, as the third party in a marital partnership, is deeply problematic.

The state operates through its officials, of course, and one of the most contested processes is judicial review, which appears more troublesome when the subject matter is as controversial as sexual matters. The judiciary has the option of exercising its deference to Parliament, which it refused to do in the case of sodomy, finessed as a compromise in the case of same-sex marriage, and enthusiastically adopted in the case of sex-work. These disparate approaches are explicable, yet ultimately unjustifiable.

In terms of its constitutional recognition of 'sexual orientation' and 'gay men and lesbians,' South Africa sets an enviable standard. Yet sexual democracy cannot be limited to only some lesbians and gay men, or indeed, to only lesbians and gay men as a model sexual minority. Both democracy and sexuality can be uncomfortable, but the project is 'not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.'[136] It means not only letting democracy be sexy, but also allowing sexuality be democratic.

135 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 50 above) para 132 (Sachs J).

136 *Fourie* (note 55 above) para 60.