

Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings

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Abstract

Judicial diversity debates and reform initiatives have been a feature of several common law jurisdictions over many years. To date two strands of diversity, gender and ethnicity have dominated these debates. General arguments used to rationalise judicial diversity, the need for judicial appointments procedures to conform with the demands of equality and equal opportunity laws, that a diverse judiciary has a greater capacity to be sensitive to the needs and experiences of the diverse users of the legal system, that the judiciary be reflective of the diversity of the nation that it serves, that a diverse judiciary is a more accountable judiciary in complex western legal democracies, necessitates the incorporation of sexuality as a dimension of judicial diversity. But sexuality is and remains notable by its absence.

The first objective of this article is to gather together and offer a critical analysis of existing data on the sexual composition of the judiciary. My second objective is to introduce and offer an analysis of new data that I have generated as part of an ongoing study of sexual diversity and the judiciary. The data has been generated by way of a series of interviews with lesbians and gay men who are members of the judiciary and legal professionals in various jurisdictions, in particular in Australia, England and Wales and South Africa. Within the confines of this article I limit my analysis of this data to the ways in which members of the judiciary experience and manage the boundary between invisibility and visibility.

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1. Introduction

Judicial diversity debates and reform initiatives have been a feature of several common law jurisdictions over many years. These debates seem to have had the highest profile, been most prolific and the problem most intractable in those nation states that draw upon the political/legal model of Western liberal constitutional democracy, share a legal heritage that has its origins in the English legal tradition, the common law, and draw their judiciary from those who practice the law. In jurisdictions such as Australia,¹ Canada,² England and Wales,³ Ireland,⁴ Northern Ireland,⁵ Scotland,⁶ South Africa⁷ and the USA⁸ two strands of diversity, gender and ethnicity⁹ have dominated these debates. More recently the diversity agenda has been expanding to include disability and faith. One dimension of diversity notable by its absence is sexuality. Nothing in the general arguments used to rationalise judicial diversity, that judicial appointments should follow law and policy promoting equal opportunities, that the judiciary needs to be sensitive to the needs and experiences of the diverse users of the legal system, that the judiciary should be reflective of the diversity of the nation that it serves, or that a diverse judiciary is a more accountable judiciary in Western legal democracies, precludes the incorporation of sexuality as a dimension of judicial diversity. A feature of judicial debates focusing upon gender and ethnic diversity is qualitative and quantitative data on experiences and perceptions of bias in the judiciary.¹⁰ Quantitative data has also played a key role evidencing the lack of diversity in the judiciary, showing it to be ‘overwhelmingly white, male and from a narrow social

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- 1 Sean Cooney, ‘Gender and Judicial Selection: Should There be More Women on the Courts’ (1993) 19 *MULR* 20; Regina Graycar, ‘The Gender of Judgments: An Introduction’ in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995) 262; Regina Graycar, ‘The Gender of Judgments: Some Reflections on “Bias”’ (1998) 32 *U Brit Colum L Rev* 1; Rachel Davis & George Williams, ‘A Century of Appointments but Only One Woman’ (2003) 28 *Alt LJ* 54; Rachel Davis & George Williams, ‘Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia’ (2003) 27 *MULR* 819; Rosemary Hunter, ‘Women in the Legal Profession: The Australian Profile’ in Ulrike Schultz & Gisela Shaw (eds), *Women in the World’s Legal Professions* (2003) 87; Rosemary Hunter, ‘Fear and Loathing in the Sunshine State’ (2004) 19(44) *Aust Fem Studies* 145.
 - 2 Bertha Wilson, ‘Will Women Judges Really Make a Difference?’ (1990) 28 *Osgoode Hall LJ* 507; Claire L’Heureux-Dube, ‘Outsiders on the Bench: The Continuing Struggle for Equality’ (2001) 16 *Wisconsin Women’s LJ* 15; Maryka Omatsu, ‘The Fiction of Judicial Impartiality’ (1997) 9 *Can J of Women and Law* 1; Christine Boyle, Brenna Bhandar, Constance Backhouse, Marilyn MacCrimmon & Audrey Kobayashi, ‘*R v RDS*: An Editor’s Forum’ (1998) 10 *Can J of Women and Law* 159.
 - 3 The *Constitutional Reform Act 2005* (UK) gives statutory form to a policy of judicial diversity in England and Wales, see s63–64. Scholarship on diversity has been dominated by gender issues, see Brenda Hale ‘Equality and the Judiciary: Why Should We Want More Women Judges’ (2001) *PL* 489; Brenda Hale, ‘Making a Difference? Why We Need a More Diverse Judiciary’ (2005) 56(3) *N Ireland LQ* 281; Erika Rackley, ‘Representations of the (Woman) Judge: Hercules, the Little Mermaid, and the Vain and Naked Emperor’ (2002) 22 *Legal Stud* 602; Kate Malleson, ‘Justifying Equality on the Bench: Why Difference Won’t Do’ (2003) 11 *Fem L Studies* 1; Clare McGlynn, ‘The Status of Women Lawyers in the United Kingdom’ in Ulrike Schultz & Gisela Shaw (eds), *Women in the World’s Legal Professions* (2003) 139–158.

and educational background' and recording the slow progress towards achieving diversity objectives.¹¹ One reason given for the absence of debate and initiatives relating to sexual diversity in discussions about judicial diversity is the lack of similar data focusing on the impact of sexuality.

Data and scholarship relating to sexuality in the context of the judiciary is very limited. No jurisdiction has official data on the sexual diversity of the judiciary and none has plans to change this state of affairs. Studies collecting and analysing experiences and perceptions of sexual orientation bias in court systems in general and the judiciary in particular are rare. Before turning to some of the key findings in these studies it is important to make reference to the wider landscape of scholarship on sexual orientation bias in the law. Scholarship¹² mapping this bias and inequality has its origins in 19th Century Europe.¹³ Attempts to challenge and remove bias have a similar point of origin. Within the confines of this article it is not possible to map either the detail of this work or these initiatives in the many different jurisdictional settings. On a positive note, common to all the jurisdictions mentioned above is the decriminalisation of same-sex relations and the recognition and development of civil and human rights giving recognition and respect to lesbians, gay men, transgender people and bisexuals. But it remains the case that scholarship past and present offers much historical and contemporary evidence of bias and inequality in many different jurisdictional contexts across a wide spectrum of laws and judicial acts of interpretation, in criminal law, civil and human rights, employment law, evidence, family law (including child law), immigration and asylum law, property law, succession, pensions and welfare

4 Ivana Bacik, Cathryn Costello & Eileen Drew, *Gender Injustice: Feminising the Legal Professions?* (2003). Paul Bartholomew, *The Irish Judiciary* (1971), was the first critical study to examine the background of judges in Ireland, focusing on the religious and social class background of the Irish judiciary.

5 Section 3 of the *Justice (Northern Ireland) Act 2004*, amending s5 of the *Justice (Northern Ireland) Act 2002* specifies a duty to secure the appointment of a range of persons reflective of community in Northern Ireland. In the Fourth Annual Report of the Commissioner for Judicial Appointments for Northern Ireland it was noted that 'Most of the debate in Northern Ireland has related to the under-representation of women in some tiers of the judiciary. There is less reference to community or religious background': Commissioner for Judicial Appointments, *4th Annual Report 1st April 2005 to 31st March 2006* (2006) at [5.15]. This is perhaps somewhat surprising having regard to the impact of religious diversity upon the politics of Northern Ireland and the origins of the recent judicial appointment reforms in that jurisdiction, the Good Friday Agreement of 1998.

6 In Scotland the issue of judicial diversity was addressed in The Scottish Executive, *Judicial Appointments: An Inclusive Approach* (2000). In that report, the Scottish Executive declared its recognition of the 'importance of judiciary reflecting the diversity of Scottish Society' at [3.6]. It went on to give its *Gender Audit 2000*, which reported that women made up 7 per cent of permanent judges, 0 per cent of temporary judges and 14.2 per cent of sheriffs, as evidence of the problems with the status quo.

7 In South Africa there is a constitutional obligation to promote judicial diversity in Chapter 8 of the Constitution, dealing with the courts and the administration of justice. Section 174(2) declares that 'The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.' See Kate Malleson, 'Assessing the Performance of the Judicial Service Commission' (1999) 116(1) *S African LJ* 36.

benefits, to name but a few.¹⁴ Returning to the empirical data on courtroom experiences and perceptions of bias, Todd Brower has identified four studies that focus on sexual orientation bias in the courts.¹⁵ What does the limited empirical data tell us? Brower noted that all the studies reported that:

Once sexual orientation becomes visible, it significantly affects the experiences of both lesbian and gay court users and court employees ... the judicial system is sometimes hostile...¹⁶

For example in the Californian study 56 per cent of respondents reported bias occurring where their contact with the courts involved a sexual orientation issue.¹⁷ The same study also suggested that the more extended and the more active the contact with the courts, the more negative the experience and the greater the perceived threat of discrimination.¹⁸ Another common denominator in these studies is the finding that bias mainly takes the form of the use of derogatory terms, ridicule, snickering and jokes. Brower's own research in England found that nearly two thirds of all respondents had heard negative comments, ridicule and snickering or jokes directed at gay men and lesbians in the court service (though not in open court). In open court over one in four respondents heard negative comments and over one in five reported ridicule, snickering and jokes about gay men and lesbians.¹⁹ In their combination, existing scholarship on bias in the law and the court service research, limited and problematic though it may be²⁰ offers some support for the hypothesis that sexual orientation bias in the courts in general, and the judiciary in particular, may fail to serve the needs of a sexually diverse community and thereby fail to establish and maintain legitimacy in the service of a sexually diverse democracy.

8 On gender and the judiciary see for example Judith Resnick, 'On the Bias: Feminist Reconsiderations of the Aspirations of Our Judges' (1987-1988) *S Cal L Rev* 1877; Judith Resnik, 'Asking about Gender in Courts' (1996) 21 *Signs* 952; Patricia Martin, John Reynolds & Shelly Keith, 'Gender Bias and Feminist Consciousness among Judges and Attorneys: A Standpoint Theory Analysis' (2002) 27 *Signs* 665. On race see Thomas Uhlman, 'Black Elite Decision Making: The Case of Trial Judges' (1978) 22 *Am J of Pol Science* 884; Susan Welch, Michael Combs & John Gruhl, 'Do Black Judges Make a Difference?' (1988) 32 *Am J of Pol Sci* 126; Julian Cook, 'Review: Dream Makers: Black Judges on Justice' (1996) 94 *Mich LR* 1479.

9 Prior to that social class and political affiliation were the dominant themes within scholarship on judicial background. See for example John Griffith, *The Politics of the Judiciary* (1st ed, 1977).

10 The website of the National Centre for State Courts which lists state and federal studies of gender and racial bias in the courts. Over 30 studies focus on gender, see <<http://www.ncsconline.org/WC/Publications/StateLinks/GenFaiTaskForceStateLinks.htm>> (4 Oct 2006). Over 40 focus on race, see <<http://www.ncsconline.org/WC/Publications/StateLinks/RacFaiStateLinks.htm>> (4 October 2006). In 1994 the Australian Parliament undertook a similar initiative leading to the report: Australia, Parliament, Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary* (1994). In the UK the Department of Constitutional Affairs has commissioned various studies on racial bias. For example see Roger Hood, Steven Shute & Florence Seemungal, *Ethnic Minorities in the Criminal Courts: Perceptions of Fairness and Equality of Treatment*, Research Series 2/03 (2003); Hazel Genn, Ben Lever, Lauren Gray & Nigel Balmer, *Tribunals for Diverse Users*, Research Report 1/2006 (2006).

Data is also lacking on the impact of sexuality or sexual orientation bias upon the experiences and perceptions of those who hold judicial office, despite the fact that openly gay and lesbian individuals have been appointed to judicial office since the 1970s.²¹ Three short autobiographical notes by gay men and lesbians, all holding judicial office in the USA, were published in Robin Buhrke's edited volume *A Matter of Justice: Lesbians and Gay Men in Law Enforcement*. One is by Albert J Mrozik Jr a magistrate in Asbury Park New Jersey.²² A second is by Marcy Kahn a judge who was elected to office as one of the first two openly lesbian Supreme Court Justices in the State of New York.²³ The third is by Jerry R Birdwell, an ex-judge of the Criminal District Court Dallas Texas who was appointed to the state court by the then Governor Ann Richards and seven months later, after a homophobic campaign against him, lost his bid for re-election.²⁴ Another more recent autobiographical account is to be found in the published memoirs of Edwin Cameron, a judge in the South African Supreme Court of Appeal. In *Witness to Aids*²⁵ Cameron gives an account of his coming out as an HIV positive gay man, his involvement with HIV/AIDS policy and activism and details the impact of these developments upon some of his experiences as a judge. Such a small and idiosyncratic sample of reflections makes it difficult to draw general conclusions about the experiences of sexuality and sexual orientation bias in the judiciary. I offer three tentative conclusions. One, that there is evident sexual diversity within the judiciary. The judiciary is overwhelmingly heterosexual and is always perceived to be heterosexual: non-heterosexuals will be out of place.²⁶

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- 11 Commission for Judicial Appointments, *Annual Report 2002* (2002) at [6.10]: <http://www.cja.gov.uk/files/AnnualReport_final_copy.pdf> (4 Oct 2006). The Commission was established in 2001 as a result of the recommendations from a review inaugurated in 1999, undertaken by Sir Leonard Peach, to investigate the operation of the appointments procedures in relation to all judicial appointments and Queen's Counsel in England the Wales. The Peach report was published in 2001: <<http://www.dca.gov.uk/judicial/peach/oeachrec.htm>>. Its primary function was to exercise an independent oversight of the appointments process relating to judicial appointments and the appointment of Silks. For a short introduction to the background and function of the Commission see the *Annual Report 2002*. The Commission ceased to operate in April 2006 as a result of reforms introduced under the *Constitutional Reform Act 2005*. While this particular example is from England and Wales, it is a common point of departure in other jurisdictions.
- 12 Media reports, particularly in the lesbian and gay press are another source of data. For example on 1 September 2005, the *Pink Paper*, a weekly lesbian and gay newspaper circulated throughout venues and organisations in England and Wales, carried a front-page story of 'institutional homophobia' in the judiciary. See Tris Reid-Smith, 'Judge Says Sorry for "Buggery" Comments' *Pink Paper* (1 September 2005). Stonewall, a London based gay and lesbian parliamentary lobby and law reform group, complained to the then Home Secretary, Charles Clarke, head of the government department with responsibility for immigration and asylum matters, about comments made by Judge John Freeman in the course of rejecting an application for asylum by a 29-year-old gay man from Iran. While the government condemned the incident it did not initiate a wider investigation into sexual orientation bias in the judiciary in that jurisdiction.
- 13 For a useful historical introduction see Harry Cocks, *Nameless Offences: Homosexual Desire in the 19th Century* (2003); Jeffrey Weeks, *Sex, Politics and Society: The Regulation of Sexuality Since 1800* (1981); Louis Crompton, 'The Myth of Lesbian Impunity' (1980) 6 *J of Homosexuality* 11; Lisa Duggan, *Sapphic Slashers* (2000).

Members of the judiciary who are openly lesbian or gay will be exceptional. Second, they may experience discrimination and homophobia, which may throw up particular challenges for those who wish to pursue judicial office and also for those appointed. In the most extreme case homophobia may make it difficult if not impossible to perform the role of judge and may be used to challenge a person's fitness to hold office. Third, that lesbians and gay men on the bench have the potential to make a difference, bringing different perspectives to the bench and bringing individuals into office to more effectively challenge prejudice and that these talents may be thwarted by homophobia.

With the findings from existing research in mind I want to turn to the research objectives I wish to pursue in this article. I begin my substantive study of the sexual diversity of the judiciary by way of a reading and analysis of Maxwell Barrett's study of the judges of the UK's supreme court, the House of Lords. Barrett's study covers the judiciary in post between 1876, when the current court was established, and 2000 when his study ended. I have extended Barrett's research adding information about the judges appointed between 2000 and 2006. My intention is to use Barrett's study to examine how the sexual diversity (the sexual homogeneity) of the judiciary been produced and sustained. His study also provides an opportunity for me to consider the impact that reforms that recognise same-sex marriage (or other intimate relations such as civil partnership) may have upon the sexual diversity of the judiciary. How might they both facilitate and limit the production of a more sexually diverse judicial body? My second objective is to introduce and offer an analysis of new data that I have generated as part of an

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- 14 There is an extensive literature dedicated to documenting and recording the operation of bias in the production of inequality in the law made up of monographs, edited collections, articles in scholarly journals and specialist journals. The list of works is too long and diverse to record here. For an introduction to the literature see Leslie Moran, 'Lesbian and Gay Bodies of Law' in Diane Richardson & Steven Seidman (eds), *Handbook of Lesbian and Gay Studies* (2002); and Leslie Moran, *Sexuality, Identity and Law* (2006).
 - 15 The four studies are: Judicial Council of California, Access and Fairness Committee, Sexual Orientation Fairness Sub Committee, *Sexual Orientation Fairness in Californian Courts* (2001); New Jersey Supreme Court, Task Force on Sexual Orientation Issues, *Final Report* (2001); Todd Brower, *Sexual Orientation Fairness in the Courts of England and Wales, Report on the 2003 Survey of the Department of Constitutional Affairs, Rainbow Network* (unpublished 2003); Todd Brower, *Sexual Orientation Fairness in the Courts of England and Wales, Report on the 2005 Survey of the Department of Constitutional Affairs, Rainbow Network* (unpublished 2005). A useful analysis of the themes that emerge from these studies is to be found in Todd Brower, *Multistable Figures: Sexual Orientation Visibility and its Effects on Experiences of Sexual Minorities in the Courts* (2006): <<http://law.bepress.com/expresso/eps/1519>> (4 Oct 2006). Information about Brower's English studies are to be found in Todd Brower, 'Pride and Prejudice: Results of an Empirical Study of Sexual Orientation Fairness in the Courts of England and Wales' (2006) 13 *Buffalo Women's LJ* 18.
 - 16 Brower, *Multistable Figures*, above n15 at 2.
 - 17 Brower, *Multistable Figures*, above n15 at 8–9. Brower's own studies of experiences and perceptions of court service employees attached to England's Department of Constitutional Affairs reported a similar situation in that jurisdiction. See Brower, Report on the 2003 Survey, above n15 at 6.
 - 18 Brower, *Multistable Figures*, above n15 at 28 & 31.

ongoing study of sexual diversity and the judiciary. The data has been generated by way of a series of interviews with lesbians and gay men who are members of the judiciary and legal profession in various jurisdictions, in particular Australia, England and Wales and South Africa. Within the confines of this article I have confined my analysis of this data to the ways in which members of the judiciary experience and manage the boundary between invisibility and visibility. In part my focus upon this matter reflects its importance in the interview data. In part it draws upon one of the key findings of Todd Brower's analysis of existing data on sexual orientation discrimination, that invisibility is a central issue in understanding experiences of bias in courtroom settings.

But before proceeding further I want to reflect upon some of the general and theoretical challenges raised by an engagement with diversity politics in general and sexual diversity in particular. Queer theory has been an important influence challenging the identity politics associated with sexual diversity, problematising assumptions and exposing omissions that shape sexual identities. Seidman explains that queer theory demands that we question 'what has been the dominant foundational concept of both homophobic and affirmative homosexual theory: the assumption of a homosexual subject or identity.'²⁷ I want to highlight three connected aspects of this challenge. First, I want to examine assumptions of the singularity and cohesion of sexual identity categories such as 'lesbian' and 'gay'. Second, I want to develop a critique of the use of identity in relation to ideas of community. More specifically I want to consider the use of a 'minority' and a

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- 19 See Brower, *Report on the 2005 Survey*, above n15. While Brower suggests in this later report that there has been some improvement in experiences and perceptions of fairness in the courts, again he qualifies the general findings with a note of caution: 'Other survey data and the factor of invisibility suggest that some LGBT individuals' experiences are much less favourable when one asks about specific treatment and concrete observations': at 6.
- 20 With the exception of the California study the overwhelming source of the data in the other surveys comes from court staff. It is difficult to determine if the workplace experiences and employment relation have a positive or negative effect on their experiences and perceptions.
- 21 Rand Schrader was appointed to judicial office, as a municipal judge, in Los Angeles in 1979. He was one of the first openly gay men to be appointed to judicial office. See Betty Berzon, 'Lesbian and Gay Professionals in the Closet: Do They Serve or Only Hide?' in Teresa Decrescenzo (ed), *Gay and Lesbian Professionals in the Closet: Who's In, Who's Out and Why* (1997); and Tracey Wilkinson, 'Municipal Court Judges Faces Challenge of AIDS — Disease: Rand Schrader Says He's Going Public to Show that Stricken People Can Live Productive Lives' *Los Angeles Times* (25 November 1991): <<http://www.aegis.com/news/Lt/1991/LT911129.html>> (14 April 2006).
- 22 Albert Mrozik Jr 'Albert J Mrozik Jr' in Robin Buhrke, (ed) *A Matter of Justice: Lesbians and Gay Men in Law Enforcement*, (1997) 182.
- 23 Marcy Kahn, 'Marcy Kahn' in Robin Buhrke, (ed) *A Matter of Justice: Lesbians and Gay Men in Law Enforcement*, (1997) 187.
- 24 Jerry Birdwell, 'Jerry R Birdwell' in Robin Buhrke (ed), *A Matter of Justice: Lesbians and Gay Men in Law Enforcement* (1996) 193.
- 25 Edwin Cameron, *Witness to AIDS* (2005); for further information about the book see <<http://www.witnesstoaid.com>> (4 Oct 2006).
- 26 Id at 19.
- 27 Steven Seidman, 'Queer-ing Sociology, Sociologizing Queer Theory: An Introduction' (1994) 12 *Sociological Theory* 166 at 173.

'minority community' model of individual and group identity in relation to sexuality, a model more commonly associated with racial and ethnic minority identities. The third issue I want to address is the impact that assumptions about the sexual identity categories of 'lesbian' and 'gay' (and a critique of those assumptions) might have upon the way 'heterosexuality' is understood and addressed in judicial diversity settings. I want to use the data generated by way of interviews with lesbians and gay men who are members of the judiciary in various jurisdictions to explore these issues.

2. *The Challenge of Sexual Identity*

Let me begin with assumptions about the singularity and cohesion of categories of sexual identity. Judge Katherine Satchwell sits as a judge in South Africa. She is a member of the bench of the High Court sitting in Johannesburg. While in post she brought a successful case under the sexual orientation equality provisions of the South African Constitution before the Constitutional Court demanding the extension of judicial pension provisions to incorporate same-sex partners, including her own partner.²⁸ Commenting that she had never experienced a problem being 'out' as a lesbian on the bench, Justice Satchwell offered the following explanation:

Let me just tell you my experience. I am a white middle class South African, which immediately catapults me from birth, even though I was born in Birmingham [England], into a life of great privilege and confidence. I come from an educated background. I come from an extremely liberal background. One might almost say politically radical those things immediately presented me in life with confidence and arrogance and the ability to be myself When I went to university I went to a white but English speaking, very liberal, university that prided itself on being against the government, even though it wasn't really. And when the time came for a professional career I sought out a very radical one.²⁹

Here Justice Satchwell draws attention to many factors that have influenced her experiences and perceptions of her sexual identity: ethnicity and race, social class, education and political beliefs. While this example arises in the experience of one person in a very specific context, a judge in post-apartheid South Africa, these issues are pertinent to other individuals and those in different jurisdictional settings. So for example a fellow member of the South African judiciary, Justice Anna Marie de Vos, who at the time I interviewed her was a lesbian sitting on the Pretoria Bench of the High Court, drew attention to the particular impact of gender upon her judicial experiences. She described a key dimension of her judicial experience of diversity on the Pretoria Bench in the following terms:

28 *Satchwell v The President of the Republic of South Africa* 2002 (6) SA 1 (CC). Copies of the papers submitted in this case are available at: <http://concourt.law.wits.ac.za/courtrecords.php?case_id=12081> (3 Oct 2006).

29 All quotations from lesbian and gay men on the bench are taken from transcripts of interviews on file with the author. All interviews were conducted between November 2005 and March 2006.

I'm the only woman judge amongst 30 judges and it's been like this for five years. They've had 12 years since the new dispensation to do something about it and they haven't. They have appointed women in other divisions but not in my division because my judge president is very conservative. Obviously, because why else? It's not because Pretoria can't produce women judges. That is complete nonsense.

When I asked if the reason for this gender imbalance was a gender imbalance in the wider legal profession Justice de Vos replied:

No! They have managed to scrape some women together for the Cape Bench and the Transkei Bench and even Bloemfontein, for Pete's sake. In Johannesburg there must be eight or nine or ten women on the bench. Maybe that's too optimistic, maybe six or seven. But not in Pretoria.

In April 2006 Justice de Vos tendered her resignation from the bench. In her letter to the President of South Africa, Thabo Mbeki, she expressed the frustrations she experienced generated by the failure to improve gender equality during the six years she sat on the Pretoria Bench.³⁰ The press reported that this was an important factor informing her decision to resign. Religious belief may be another factor impacting on identity. For example Justice Michael Kirby of the Australian High Court, commenting upon the potential impact that hostility focusing upon his sexual orientation might have upon him, explained:

Because I was brought up in a Christian tradition I really can cut away horrible things that are done to me or that I hear said of me and unkindness that is displayed to me by judges and others, because that is how I was brought up ... That is how I am.

Location is another important influence. Justice Satchwell explained:

... the one comment I would make is that in a way the South African experience, and this may sound incredibly arrogant, but the South African experience is so particular, so unusual, so complex, so unresolved, that in a way issues pertaining to diversity teach us so little when one might learn more from a homogeneous society...

Here Satchwell highlights the impact of the specific social, political and cultural conditions upon sexual identity in relation to national and jurisdictional differences. South Africa, she suggests, offers a very particular and complex setting that impacts upon the formation, deployment and effect of lesbian and, one might add, gay identities in a judicial setting. The sexual politics of identity will be different in different national settings.³¹ Institutional settings, in this instance the institutions of judgment and justice, are also an important context, which needs

30 Zelda Venter, 'Top Female Judge hangs up Robe for Good' *Pretoria News* (29 March 2006): <http://www.int.iol.co.za/general/news.php?art_id=200603290340945C> (3 Oct 2006). Shortly after Justice de Vos resigned two women were appointed to the Pretoria bench, see Zelda Venter & Wendy Jasson da Costa, 'Pretoria Bench Gets Two New Women Judges' *Pretoria News* (15 May 2006).

to be taken into account in understanding the operation of sexual identity. The national particularity and complexity of sexual identity will be further mediated in its relationship through this particular national institutional setting. Kay Goodall's analysis of the challenges of comparative judicial studies is useful here. Comparative studies, she argues, draw attention to the need to be sensitive to the impact of 'different structural influences in each legal system'.³² These may at least include sensitivity to the different constitutional arrangements (such as the impact of judicial election in contrast to the appointment by government or a commission of various stakeholders), the size and composition of the legal profession, different judicial work practices, the size and degree of autonomy or inter-dependence of a legal system, and the impact of different degrees of juridification of everyday relations. Sexual diversity in the context of the courts and the judiciary will not only be subject to the complexities of sexual identity but will also be affected by the idiosyncrasies and peculiarities of each jurisdictional and institutional setting.

I now want to turn to sexual identity categories as a collective identity and as a marker of community. As a symbol of community, identity categories suggest that people who identify with a particular sexuality have things in common. Seidman suggests that the model of community imagined by reference to 'lesbian' and 'gay' identity tends to adopt a 'minority' and 'minority community' model that is most commonly associated with racial and ethnic minority identities.³³ The 'minority community' model assumes that the identity category gives a coherence, a homogeneity, a shared singularity to all those who resort to that identity category. In turn these different communities, when conjoined, make up the diversity that the nation now represents. This logic of communities (multiple minority communities) making up the larger community informs the wider characterisation of contemporary democracy as a multicultural, cosmopolitan polity.³⁴ Applied to lesbians and gay men the logic of the minority model suggests that 'lesbians-and-gay-men' may be identified collectively as a single community. This assumes that the lesbian-and-gay community can be singled out and differentiated; that it is a relatively coherent, homogenous, socially, culturally and spatially distinct and separable entity. Furthermore, in that form it becomes one of the pieces of the community jigsaw, of a multicultural or cosmopolitan whole.

My research data illustrates some of the problems with the idea of sexual communities and the minority model. Comments made by Justice Satchwell explore sexual identity as a marker of things in common, of community. She

31 Carl Stychin has done some excellent work in this area, see Carl Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (1998) and Carl Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (2003).

32 Kay Goodall 'What Defines the Roles of a Judge? First Steps towards the Construction of a Comparative Method' (2000) 51 *N Ireland LQ* 535.

33 Seidman, above n27 at 171.

34 I have explored some of the problems, challenges and uses of the minority idea of sexual identities in the context of homophobic violence and hate crime reform: see Leslie Moran, Beverley Skeggs, Paul Tyrer & Karen Corteen, *Sexuality and the Politics of Violence and Safety* (2004).

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.³⁵ 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.

The insights offered by queer theory and the observations made by interviewees suggest that merely adding lesbian and gay sexualities to the agenda of judicial diversity is problematic. Furthermore, queer theory also suggests that to expose, problematise and critique assumptions about lesbian and gay identity is also insufficient. In short, one effect of such a critique may be to reinforce already commonplace associations and assumptions about 'lesbian' and 'gay' as identities, such as that they are social fabrications, unstable and incoherent, while leaving the positive attributes and qualities already commonly associated with heterosexuality, such as coherence, stability and homogeneity unchallenged. This

35 *Du Toit and De Vos v The Minister for Welfare and Population Development* 2003 (2) SA 198 (CC). For further documentation on the case see <<http://concourt.law.wits.ac.za/cases.php?applicant=Du+Toit>> (3 Oct 2006). The Constitutional Court decided the Satchwell issue in July 2002 and the De Vos case in September of the same year.

is particularly problematic as this distribution of differences between, on the one hand lesbian/gay, and on the other, heterosexual, can readily be accommodated within an existing logic that positions heterosexuality as the positive (the superior, the norm, the natural, the civilised, the good and the healthy) over against 'lesbian' and 'gay' which are associated with the negative. As Seidman notes, this threatens to reproduce not only the hetero/homo binary,³⁶ but also the values that secure the status and privilege associated with heterosexuality. Clearly this is problematic and needs to be challenged.

Queer theory, Seidman argues, is not of relevance only to the sexual identities of gay men or lesbians but of significance to all sexual identity categories. It aspires to transform homosexual theory into a general social theory from which to analyse whole societies, thereby bringing heterosexuality into the frame of critical analysis.³⁷ How do you examine heterosexuality without bringing into play all of the problematic assumptions about the nature of sexual identities already identified?

An important tool in achieving this objective is the concept of heteronormativity. Heteronormativity focuses not on sexual identities, such as 'heterosexuality', but on the 'sexual regime' which Seidman describes as 'a field of sexual meanings, discourses and practices that are interlaced with social institutions and movements'.³⁸ In their seminal essay 'Sex in Public', Berlant and Warner explain that 'heteronormativity' is concerned with 'heterosexual culture rather than heterosexuality':

Heteronormativity is thus a concept distinct from heterosexuality. One of the most conspicuous differences is that it has no parallel, unlike heterosexuality, which organizes homosexuality, as its opposite. Because homosexuality can never have the invisible, tacit society-founding rightness that heterosexuality has, it would not be possible to speak of 'homonormativity' in the same sense.³⁹

Heteronormativity offers a way of understanding the fabrication and reproduction of the homo/hetero binary and the fabrication of the hetero as norm, but Berlant and Warner suggest that it does not itself work within that binary relation. It offers a general social theory of the sexual order of whole societies. Heteronormativity requires a shift in approach from identity to culture. It requires that we turn our attention to the institutions, structures of understanding, and practical orientations that not only bring heterosexuality into being but make that sexuality seem not only coherent – that is, organised as a sexuality – but also privileged. Its privilege, they suggest, can take several (sometimes contradictory) forms. One is manifest in the way heterosexuality works as the unmarked, as the basic idiom of the personal and the social. A second manifestation is in heterosexuality's manifestation as a natural state. A third form of privilege is in the way heterosexuality is projected as an ideal or moral accomplishment.⁴⁰ Heteronormativity consists less of norms that

36 Seidman, above n27 at 174.

37 Ibid.

38 Id at 169.

39 Lauren Berlant & Michael Warner, 'Sex in Public' (1998) 24 *Critical Inquiry* 547 at 548 ff 2.

could be summarised as a body of doctrine and more a diffuse sense of rightness produced in contradictory manifestations — often unconscious, immanent to practice or to institutions. Another objective of this cultural turn is to expose the provisional nature of the apparent coherence of heterosexuality. Heterosexuality, Berlant and Warner suggest, is always provisional. This is based upon a conclusion that it is difficult to imagine any culture and more specifically to imagine heterosexuality as a culture that is so one dimensional, or that is reduced to a single ideology, or a unified set of shared beliefs. Where such displays of singularity and coherence are offered, they argue, they are never more than a provisional unity. The purported totality of heterosexuality, and displays of its cohesion and singularity, not only seek to mask but also expose the fragility of the category of heterosexuality. A heteronormative approach requires that these conflicts no longer go unrecognised. It also requires that we take seriously, ‘... the meta-cultural work of the very category of heterosexuality, which consolidates as a single sexuality widely differing practices, norms and institutions.’⁴¹ Thinking of sexuality as a sexual regime or culture, rather than an identity, requires us to recognise the diffusion of heterosexuality. While heterosexual culture is the central organising index of social membership, it has no centre, no singular moment of operation or final moment of realisation. Its temporal and spatial diffusion potentially makes it much more difficult to recognise its forms of operation.⁴² Such is its diffuse nature, Berlant and Warner suggest, ‘[i]t involves so many practices that are not sex that a world in which this hegemonic cluster would not be dominant is, at this point, unimaginable.’⁴³

How does heteronormativity shift the frame of inquiry into sexual diversity in the judiciary? One key insight is that as a ‘regime’ and a pervasive culture, sexuality is not so much absent, rarely spoken of or predominantly missing from the data or the agenda but, as Berlant and Warner explain, it is always in play and always in public. Thus, the perceived absence of sexuality from judicial diversity debates and judicial studies more generally needs to be treated with caution. Queer theory points out that a requirement to be silent about sexuality does not so much lead to the disappearance of sexuality but informs its mode of appearance. Silence is a device by which sexuality appears in public, and more specifically it is one of the devices through which heterosexuality as the norm is (re)produced in society in general and, queer theory would suggest, in the institution of the judiciary in particular. Heteronormativity suggests that the absence of references to sexuality in current judicial studies is nothing more than the public display of the sexuality of the judiciary, as exclusively heterosexual. The appearance of references to same-sex behaviour and same-sex relations of intimacy in judicial settings is not so much an invasion of something that is alien to judicial settings but perhaps more a shift or a disruption of the existing public sexual culture of that institution. Another important insight offered by queer theory is that there is a need to be

40 See Lee Edelman, *No Future: Queer Theory and the Death Drive* (2004).

41 Berlant & Warner, above n39 at 553.

42 Id at 556.

43 Id at 558.

cautious about any alignments between sexuality, privacy and the private. As Sedgwick has noted, the public/private divide has played a major role in the public management and display of sexuality in general, and the generation and display of the homo/hetero binary as a violent hierarchy, in structuring and framing the appearance and representation of sexuality in a particular way, and in requiring conformity with a particular pattern and performance of intimacy.⁴⁴ Attempts to confine sexuality to the private and domestic sphere do not take sexuality out of the public realm, they are central to its public performance. Through heteronormativity various research questions emerge. For example, what public form does sexuality take under the experienced effects of this 'disappearance'? How does the particular ideal or moral model of intimacy associated with heterosexuality, as the unmarked, indistinctive, indifferent, and as a partisan position that takes on the form of being quintessentially non-partisan, come into being in a judicial setting? How does the economy of prohibitions work in the generation and reproduction of the current public sexual culture of the judiciary? I hope to explore some of these matters in the remainder of this article.

3. *Sexual Diversity in the Judiciary: Institutions of Intimacy*

I begin my analysis of the sexual diversity of the judiciary with a study of the judges of Britain's highest judicial body, the House of Lords.⁴⁵ Maxwell Barrett's study of the Law Lords includes a brief biographical note on each of the judges who have been in post between 1876, when the current court was established, and 2000 when his study ended. I have extended Barrett's research adding information about the judges appointed between 2000 and 2006. One aspect of the biographical data is of particular interest here: the marital status of the judges. Between 1876 and 2006 there have been 104 appointments, 103 men and one woman (the first woman, Brenda Hale, was appointed in 2004). Ninety-seven judges were 'married' and six 'never married'.⁴⁶ The marital status of the current court (as of 1 April 2006) is as follows: of the 12 Law Lords 11 are 'married' and one 'never married'.

What relevance does this have to a study of sexual diversity in the judiciary? Throughout the period covered by this data 'marriage' has been and remains an intimate and domestic relationship and institution that can only be formally entered into and officially recognised by two people who are respectively a man and a woman.⁴⁷ When read through sexuality, marriage is one institution that can be read not only as heterosexual but also as a particularly privileged, state sanctioned ideal of sexual intimacy and sexual identity. The social, political and moral superiority of this form of intimacy is amplified when account is taken of the criminal and civil prohibitions circumscribing other relations of intimacy in general and same-sex

44 Eve Sedgwick, *Epistemology of the Closet* (1990).

45 Maxwell Barrett, *The Law Lords: An Account of the Workings of Britain's Highest Judicial Body and the Men Who Preside Over It* (2001).

46 'Never married' is Barrett's category, not my own.

47 A separate institution, which came into effect in December 2005, has been created in the UK for legally recognised and binding same-sex relationships, under the *Civil Partnership Act 2004*.

relations in particular during the period. Barrett's distinction between 'married' and 'never married' echoes the privilege associated with 'marriage'. Marriage (and thereby heterosexuality) provides the overarching frame of understanding and the basic personal and social idiom against which all is measured and made sense of.⁴⁸ Based upon Barrett's research of the judges who have made up the UK's highest court, the evidence suggests that it is a judicial institution that may best be characterised as exclusively heterosexual.

The dominance of 'married' judges in this institution is perhaps not surprising having regard to the privileges and prohibitions associated with 'marriage' as an institution of intimacy. However, I want to suggest that we should be surprised by the appearance of information about the marital status of judges in Barrett's study. Certainly in England and Wales, official information about judges (and their Lordships in particular) is in general very limited and more specifically contains no information about marital status.⁴⁹ Marital status, at least in this jurisdiction, has no place in official biographies.⁵⁰ Barrett gathered his marital status information from other sources. Like Barrett I turned to unofficial biographical accounts, in particular *Who's Who*, to obtain the information about the marital status of the current Law Lords.⁵¹ How are we to make sense of the marital profile of this judicial institution? Is it right to conclude that a particular marital status and thereby a particular sexuality has been a requirement for judicial office?

One response to these questions might be that the absence of information about marital status from official biographies indicates that neither the institution of marriage nor the (hetero)sexuality that informs that institution is relevant to

48 The distinction between 'married' and 'never married' is also used to accommodate those who have been married but are now divorced and single. It has the effect of bringing them back within the marital institution. It also has the effect of potentially erasing their sexual difference; they might have been divorced subsequent to coming out as lesbian or gay but remain 'married' according to this distinction.

49 The new website, *Judiciary of England and Wales*: <http://www.judiciary.gov.uk/keyfacts/list_judiciary/senior_judiciary_list.htm> (2 Oct 2006), does offer some biographical information under the heading 'Senior Judiciary Biographies'. Only five judges qualify, being the five Heads of Division, who are described as 'the most senior judges in England and Wales'. The biographical information is limited, being made up of details of the judge's official title, name and date of birth, educational background and professional career milestones. With respect to the Law Lords the website offers less information, being limited to their name and title, date of birth and dates that plot their judicial careers. Gender is also part of biographical information, being identified by title and name.

This is a relatively new website. One explanation for the lack of information is that it is a reflection of the novelty of the website and the limited investment, of funding and time, made in this new initiative.

50 This is also the case in Australia, see <<http://www.hcourt.gov.au/justices.html>> (29 Sept 2006). It is not always the case. For example the biographical notes of the judges of the South African Constitutional Court give 'personal' details', which include information about marital status. This is provided for all current judges, see <<http://www.constitutionalcourt.org.za/site/judges/currentjudges.htm>> (2 Oct 2006). Information about former and acting judges is sometimes more limited.

51 The individual named in *Who's Who* provides the information. It is possible to leave information about marital status out.

judicial appointments. This silence is not necessarily indicative of an absence of a policy. Writing in response to an announcement in 1991 that henceforth homosexuality would no longer be a bar to judicial office, English journalist Colin Richardson revealed that in the past, at least under the Lord Chancellor Lord Hailsham (Conservative Lord Chancellor from 1970–1974 and 1979–1987), a policy only to appoint people who were married was in operation. This policy was avowedly to ensure that there would be no ‘homosexual controversy’ in the judiciary. As such, the marital policy operated as a sexuality policy: dedicated to achieving a heterosexual judiciary. Anthony Scrivener QC, then outgoing chairman of the Bar Council,⁵² interviewed at the time of this revelation explained to Richardson that it was an ‘open secret’ that candidates for most judicial appointments were rigorously vetted and that this procedure included their private lives.⁵³ While the paucity of ‘never married’ Law Lords (and with one recent exception they have all been male Law Lords) is not confined to this period, the marital profile of the Law Lords over the 130 years duration of that institution may suggest that a marital requirement was, if not at all times explicitly then at least implicitly, a policy which had the objective, if not the effect, of securing a uniform (male) heterosexual judiciary, at least in that institution.⁵⁴

Returning briefly to queer theory, its insights also suggest that the absence of an explicit sexuality policy is not indicative of the absence of sexual prerequisites. Silence, queer theory shows us, is one manifestation of the privileged status associated with the forms of sexual intimacy and identity that is heterosexuality. Being unmarked is the way heterosexuality as the ‘ideal’ and the ‘natural’ is manifest. Heterosexuality in its absence is not so much a missing requirement but a pervasive one.

Data from an interview with Martin Bowley, a Queen’s Counsel (Silk) now retired, offers an insight into the operation of this norm during the time of Lord Hailsham’s marital policy. Bowley had been appointed as Recorder, a part time judicial appointment, in 1978 and he held this post for 10 years. He never held a permanent judicial post. In the mid 1980s he was called to an interview at Westminster by the head of the judicial appointments division, who was then Sir Thomas Legg QC. Bowley explained that it was the normal procedure of the day to meet with Silks to discuss their career ambitions and in particular to discuss their interest in a full time judicial career. Bowley describes what took place in the following extract:

52 The Bar Council is the senior ruling professional body regulating barristers.

53 Colin Richardson, ‘Homosexuality and the Judiciary’ (1992) 142 *New Law Journal* 130 at 130–131.

54 The requirement of ‘good character’ is another context in which an applicant’s intimate relations have been considered relevant to judicial office. Failure to satisfy the requirement of ‘good character’ is a disciplinary matter. See William Nimmo Smith & James Friel, *The Report on an Inquiry into Allegations of a Conspiracy to Pervert the Course of Justice in Scotland* (1993). ‘Good character’ remains one of the key appointment criteria for judicial appointment in England and Wales, see *Constitutional Reform Act 2005* s63(2), and in relation to the power to discipline members of the judiciary see s108. No guidance has been published as to the meaning of ‘good character’ under the new legislation.

...in the middle of the interview Legg suddenly says to me, 'Are you a homosexual?' This is long before *The Sun* published it.⁵⁵ I replied, 'What has it got to do with you?' This is all on record. He said, 'I have to advise you that it is the policy of the current Lord Chancellor,' who was Hailsham, 'not to appoint a homosexual to any full time judicial appointment because of the dangers of blackmail.' ... I remember saying to Legg at the time, 'Well you may remember that it was only very recently that the 'guilty party' in divorce actions could never be appointed. So that has changed and I hope this will change.' And of course it did when James McKay changed the rules and fought it So that was the attitude in the 1980s. From then on I realised that I would not be appointed. By the time James McKay changed the rules I was nearly 60 so I was well over the age for appointments...

Bowley's comments raise several matters. First, it is important to note that prior to this career interview Bowley did in fact hold a (part time) judicial post. How are we to make sense of this in the context of an express or implied requirement of heterosexuality? One explanation might be that through the operation of the assumption of heterosexuality Bowley 'passed' as heterosexual. At least at the time of his appointment we might presume that no one was capable or willing to question the assumption of heterosexuality in this context. Following the insights offered by queer theory in general and heteronormativity in particular, this can be read both as the successful operation of the requirement of heterosexuality, the norm remaining in place and apparently effective, and as evidence of the fact that in this instance it was not fully realised, as other sexualities may go unrecognised. Bowley's experience suggests that the successful operation of the sexual norm has a certain fragility. Second, the extract also offers some evidence of the more explicit operation of the marital policy during Lord Hailsham's time. Here the heterosexual requirement is made explicit and operates to formally prohibit sexual difference on the bench. It is important to bear in mind a couple of further points. The interview referred to here took place some 20 years after intimacy between adult men in private was decriminalised in England and Wales, creating the possibility of a certain intimacy between men in private, at least in that jurisdiction. Yet the spectre of criminality, this time in the form of 'blackmail', still lingers over same-sex intimacy and is put to work to sustain the privileges and moral high ground associated with heterosexuality. A final insight offered by this extract is to be found in relation to Bowley's reference to 'divorce'. Here is a reference to another dimension of the fragile nature of the category of 'marriage' and thereby the category of heterosexuality. Divorce is one context in which the privilege, the moral claims associated with heterosexual intimacy, is challenged and the possibility of other hetero-intimacies (which have in the past been condemned as morally dubious) is revealed. The historical exclusion of the 'guilty' divorce party from consideration as a judicial appointee offers an example of forms of heterosexual intimacy that have to be devalued and erased in order to create and sustain the image of heterosexuality as uniform, essentially coherent, and ideal.

⁵⁵ Bowley was 'outed' by *The Sun* newspaper in 1988. Interview with Martin Bowley, 13 April 2006 on file with author.

How might the removal of prohibitions on the appointment of those who have different relations of intimacy work to produce a more sexually diverse judiciary? One interviewee, a senior barrister, pointed to the potential contribution that legal recognition of same-sex marriage, or in the case of the UK, civil partnerships, might make. He explained:

... we had the first [High Court judge] announcing his civil partnership in *The Times* a few weeks ago.^[56] If you had told me that that was going to happen 20 years ago I'd have thought you were barking mad. And there it was. It was tremendous. But that is what civil partnership has done... it has suddenly given us all a sort of comfort zone, that's really being straight, that is the married bit. In terms of 'don't frighten the horses' behaviour putting a civil partnership in *The Times* is OK. Fine.

On the one hand, this interviewee suggests, the new institution of civil partnership may be something of a radical departure, broadening the parameters of intimate relations that are given state recognition and approval. Within the judicial context this may effectively work to facilitate the sexual diversification of the judiciary. He goes on to explain that civil partnership may work to facilitate such a change by way of its close proximity to the institution of (heterosexuality) intimacy that has long occupied the moral high ground, 'marriage'.

If the expansion of state recognition to patterns of same-sex intimacy has the effect of facilitating the greater sexual diversity of the judiciary, does it also impose new limits? What impact, if any, does it have on the recognition of other patterns of intimate relations? The same senior barrister offered the following comment on the point:

I think the same issues would arise if a straight judge were going to a straight sauna providing sex, as a gay judge going to a gay sauna. I don't think that there is any difference there. I think they are both in big trouble actually because of the reputational issues. The interesting issue is one that we have only recently started to talk about in my world. It is whether you should in some way be allowed to discriminate in favour of the gay, acknowledging that their lifestyle is in general terms potentially slightly different There is a slight assumption that a different [lifestyle] package comes with someone who is gay. Clearly it is not usually a settled life with 2.4 children. In an awful lot of cases... gay men are in a reasonably long-term settled relationship. But there are an awful lot that aren't If the data shows that a comparatively high number of gay men are not in long term monogamous relationships then some of the gay lifestyles that inevitably stray from that are, you might say, naturally part of being a gay man. Therefore how does the system, the establishment, deal with that? Once you get into those areas you start to push quite hard at the *Daily Mail* territory.^[57] I am actually clear that the powers that be these days would be absolutely clear in defending a judge against a charge just of his sexuality. What I am less clear about is how far people

56 Terrence Etherton, appointed as a judge of the High Court in 2001 and assigned to the Chancery Division, announced his civil partnership in *The Times* (8 February 2006). He is currently Chairman of the Law Commission for England and Wales.

57 The *Daily Mail* is a reactionary conservative UK newspaper that presents itself as the voice of the moral majority. Many commentators have suggested that it has been an important force driving government policy producing timidity in several aspects of government policy.

would be comfortable in defending a gay judge who didn't have any family commitments who was having consensual sex behind a closed door in a sauna, but who happened to have made the mistake of choosing a *Daily Mail* journalist.^[58]

The opening comments return us to the point that neither 'heterosexual' nor now 'gay' is reducible to the pattern of respectable intimacy that is privileged under the title of 'marriage' or 'civil partnership'. In order to sustain the illusion of perfection and ideal associated with these privileged categories of intimacy, much work has to be done to exclude other possible relations of intimacy from the realms of morally privileged intimate relations. The 'sauna' works to expose the provisional nature and to reveal the tentative coherence and uniformity of the legitimated relations of intimacy. Having made that point the interviewee introduces a new important point. He makes the suggestion that different sexualities may have different patterns of intimacy, which are equally capable of moral worth: being caring, nurturing, respectful acts and relationships. To impose the same conditions of intimacy upon different sexualities may have the effect of producing disproportionate exclusion and indirect discrimination. This interviewee suggests that official responses to this state of affairs are likely to be driven more by the poetics and perceived expectations of the yellow press, its journalists and their popular audience than by the dictates of equality of opportunity or the civil and human rights objectives of recognition of difference, diversity and equality.

4. *(In)visibility*

Todd Brower, in his analysis of the four existing studies of sexual orientation bias in courtroom settings, highlights the importance of invisibility and visibility in the experiences and perceptions of bias:

Once sexual orientation becomes visible, it significantly affects the experiences of both lesbian and gay court users and court employees....the judicial system is sometimes hostile ...⁵⁹

Most lesbians and gay men, he suggests, are not visibly identifiable either in courtroom settings or more generally. He continues, 'Accordingly, the revelation of minority sexual identity usually occurs through speech or communicative conduct in order to affirmatively break the assumption of heterosexuality that silence often brings.'⁶⁰ While invisibility is not a phenomenon that is exclusive to 'sexual minorities', since it can for example also have significance in the context of disability and faith, it is, Brower concluded, 'particularly significant' in relation to sexual diversity. Non-heterosexual identity, which Brower describes as 'minority sexual identity' in general, involves ongoing conduct dedicated to negotiating and managing the boundary between invisibility and visibility. Crossing the boundary from invisibility to visibility, he suggests, may be a fraught

58 Under the reforms introduced in the *Sexual Offences Act 2003* sex between men in this context would not be a sexual offence.

59 Brower, *Multistable Figures*, above n15 at 2

60 Id at 5.

and dangerous activity. In this section I want to use the interview data from lesbians and gay men who are members of the judiciary to pursue two objectives. First, I want to explore how these men and women experience and manage their sexual invisibility and their sexual visibility. Second, I want to identify some of the factors that appear to influence and inform the generation of the boundary between visibility and invisibility in this context.

Justice Edwin Cameron, in his memoirs, raises the issue of the ‘invisibility’ of gay men on the bench in the following passage:

If the radiologist was thinking media stereotypes, of course I didn’t ‘look’ like someone with AIDS. I was not emaciated nor entubed. I was fresh from a long working day in court — still in a suit. My medical insurance details at the reception must have revealed my judicial status. And judges don’t get AIDS. (Nor are they gay).⁶¹

These thoughts are offered in the context of a radiographer’s reported disbelief that the x-rays taken of Cameron revealed an AIDS-related illness. The invisibility reported here is twofold, once in relation to his health status, and once in the context of sexuality. The assumption of heterosexuality makes gay men (and one could add lesbians) invisible on the bench. In my interview with Justice Cameron he offered the following example of his experiences of the boundary between invisibility and visibility. The incident he described occurred during the course of his visit to London in July 2006. He participated in a meeting about judicial diversity with three members of the English Court of Appeal. At the end of the meeting,

the presiding judge, who was very courteous said to me as we were going to lunch, ‘Is your wife here with you?’ It was so funny because as I said coming out is a never-ending process. I had that trillionth of a second, not even half a second, of hesitation about, how do you deal with this? Do you say, ‘no my wife isn’t with me’ or ‘I’m not married?’ I said to him and I have to admit it wasn’t easy, I said to him, ‘I’m a gay man and I don’t have a spouse and I don’t have a wife with me.’ It was quite interesting and of course they responded very cordially and in a very friendly way It’s more an interesting observation on the continual process of coming out. That one still, 24 years after coming out and 12 years after being appointed as an openly gay man in South Africa and a year and a quarter after publishing a book, one still has coming out moments.

The question ‘is your wife here with you?’ is an example of both the assumption of heterosexuality and an instance of its visibility which in turn demonstrates the invisibility of other sexual possibilities. The (ongoing) requirement for Justice Cameron to use speech and conduct to ‘affirmatively break the assumption’ of heterosexuality occurs despite over 20 years of speech and conduct dedicated to breaking the heterosexual assumption, be it as an ‘out’ gay man, as an activist and a scholar with an extensive body of writings relating to lesbian and gay human rights and HIV/AIDS, including the publication of his memoirs in 2005,⁶² and

61 Cameron, above n25 at 19.

since 1995 as a prominent judge on the bench of South Africa's Supreme Court of Appeal. This instance of the enduring operation of the forceful assumption of heterosexuality takes place in an informal judicial setting in a particular national and jurisdictional context. When I asked him how he dealt with 'invisibility' more generally in judicial settings he explained his approach in the following comment:

The way I deal with it is to be very obtrusive about being gay. I take male partners to judicial functions, although it was frowned upon initially and difficult. I make a point of doing that. I make a point of talking a lot amongst judges about being gay. I deliberately obtrude the fact of my gayness I have found that people would ignore it if one didn't, if one weren't quite so obtrusive about it, because it is an inconvenient or an uncomfortable issue.

Justice Kirby described his approach to breaking the assumption of heterosexuality in the context of his extensive extra-judicial writings and public speaking engagements in the following observations. He explained, '... I think it is important...for me to confront those who have a stereotyped image of the judiciary, not in an aggressive or in an irrelevant way.' He went on to illustrate his approach:

You may have noticed in the lecture last night and if you were in the Scarman lecture, I always work in the issue of sexuality, even if it's just as a tiny minor theme. It's like a great Mahler symphony. There is always that moment where the woodwinds play that issue. I do that so that people who are sitting there will look at me and maybe they hadn't thought about that or didn't know about it. But thereafter they will have to hate me, if they hate gay people. Or they will have to accommodate in their mind that this is a gay person who is not ashamed of being a gay person and regards it as irrational and unscientific to have attitudes of animosity. So it is partly a teaching function. This is one advantage of the position I am in following the step I took in 1999.⁶³

He explained that the lecture:

... gave an opportunity for me to make that point, so the Lord Chief Justice of England and all of their Lordships and Ladyships sitting there were required to confront the issue in a friendly way but none the less a factual way, not so that there wouldn't be gossip. There probably would be gossip but it would be gossip that I have initiated on my terms. And I think that is good for them.

62 See Edwin Cameron, 'Sexual Orientation and the Law' (1992) 3 *S African HR Yr Bk* 87; Edwin Cameron, "'Ubuntu' and Sexual Orientation", paper presented from a public lecture of the Human Rights Awareness Week, Windhoek Namibia, 2001; Edwin Cameron, 'Constitutional Protection of Sexual Orientation and African Conceptions of Humanity' (2001) 118 *S African LJ* 642-650; Edwin Cameron & Mark Gevisser, *Defiant Desire* (1995).

63 During his visit to London in February 2006 Justice Kirby participated in a number of speaking engagements. The first lecture referred to in this extract is the Dame Ann Ebsworth Memorial Lecture, 'Appellate Advocacy – New Challenges' at Inner Temple, 21 February 2006; the second is a lecture to the Law Commission of England and Wales entitled 'Law Reform and Human Rights – Scarman's great legacy' at Gray's Inn, 20 February 2006.

Justice Kirby's reference to relevance is particularly important as it suggests that the management of the boundary between visibility and invisibility and the movement from invisibility to visibility may have certain limits. What factors might facilitate and motivate such a movement and what might inform their limit?

The interview with Justice Kirby offers numerous examples of factors that might have informed his decisions to become visible. In the specific context of his decision in 1999 to announce his relationship with a man in the pages of the Australian edition of *Who's Who* he identified three factors that influenced the event. The first was his professional position and more specifically his elevation in 1996 to the most senior court in Australia, the High Court of Australia. He explained, 'It is a question, sadly, as to whether, had I been open about my sexuality before 1996, I would have been appointed.' A second factor was the impact of the Royal Commission in New South Wales into the police service, which in the mid to the late 1990s generated hysteria in Australia about gay men on the bench.⁶⁴ The Royal Commission investigated alleged links between 'gay judges', 'rent boys' and 'paedophilia'. Justice Kirby explained:

So it was a very extreme and horrible time, aided and abetted by some elements in the media and by some very conservative elements on both sides of politics. So that in discussion with my partner we thought that in such a circumstance it was much better to be up front so that I wasn't going to suddenly be denounced in the Parliament. It would also reveal what everyone knew already anyway. That is the second reason.⁶⁵

The third factor might be described as a combination of social justice and sexual politics. Justice Kirby explained that Johan, his partner of 37 years, 'said that we owed it to the next generation to do something that would make their journey a little easier than ours had sometimes been.' The reference to 'Johan', I'd suggest, points to a fourth factor, the particular relations of intimacy Justice Kirby inhabits. In the light of my earlier analysis of the way particular relations of intimacy might be either an explicit or implicit factor in the disclosure or non-disclosure of sexuality in a judicial setting it is important to note that Justice Kirby's 'coming out' in *Who's Who* takes place in the context of an announcement of his long term domestic partnership with Johan. As an enduring, stable and loving relationship, this has some of the key characteristics associated with those intimate relations that have long been privileged in and through heterosexuality as the basic idiom of personal and social respectability within the judiciary and elsewhere. Domestic respectability may be an important social and cultural value enabling an individual to redraw the boundary between invisibility and visibility. The interview data also

64 In December 1994, the Royal Commission into the New South Wales police service (the Wood Commission) extended its investigations into the existence and extent of corruption in the police service into a new area, the sexual behaviour of members of the judiciary in New South Wales. This investigation arose in relation to allegations of police protection of paedophiles.

65 In 2001 Senator Heffernan made allegations against Justice Kirby in the Federal Parliament in Australia, which arose in the context of a complaint about his supposed misuse of official cars. The allegations were shown to be groundless. See Enid Campbell & Michael Groves, 'Attacks on Judges under Parliamentary Privilege: A Sorry Australian Episode' [2002] *Public Law* 626.

suggests another significant factor. It appears in the context of a reflection about the unwillingness of other gay people in different prominent positions who have partners, long-term partners, to disclose their relationship in their entry in *Who's Who*. Job security, which Justice Kirby described in terms of his own constitutionally protected position, is another important factor.

It is also important to note the institutional and social settings in which these instances of visibility take place. Some occur in what might be described as informal judicial settings, such as business meetings and judicial social events. Another context is in extra-judicial settings. Sometimes those settings might be the wider legal community, such as a lecture to members of the profession including judges, sometimes they might be more popular locations. *Who's Who* is a publication that falls within the wider parameters of the mass media. All are out of the courtroom. So what about visibility in relation to the official role of the judge and in the courtroom?

An interview with Justice Adrian Fulford, a judge appointed to the High Court of England and Wales in 2002 sitting as a judge in the Criminal division,⁶⁶ offers data on experiences and perceptions of invisibility/visibility in the context of judicial office and in relation to the judicial role. Justice Fulford explained his understanding of the relationship between sexual orientation and the role of the judge in the following comment: 'I don't think that the fact that I am a gay man has very much, if anything, to do with the way I perform my job as a judge. It is almost entirely irrelevant.' Justice Fulford's comments about the irrelevance of sexual orientation need to be put into the context of his pre-judicial career. Called to the bar in 1978, he was one of the first 'out' gay men working as a barrister in the UK. He explained his decision to break the assumption of heterosexuality in the following terms:

I made a decision early on in my career that I was always going to be honest and up front about this. Not preaching from the rooftops in a proselytising sort of way but simply being honest and making sure that people knew.'

In turn, early in his legal career, as a result of his perception that there was a lack of interest in defending men who were charged with criminal offences relating to sex between men, Fulford 'made it known' that he was interested in doing that kind of work. He explained:

In terms of work, back in the late 70s early 80s there was, I felt at the time anyway, whether it was true or not, a lack of interest at the bar in the position of gay men and the relationship between gay men and the police and in relation to the quite often used charges of importuning and gross indecency in a public place. So certainly for a period I made it known that I was interested in doing that kind of work. I was a young junior member of the bar and I'm glad that I did.

66 In 2003, supported by the UK Government, he was elected to be a judge of the International Criminal Court in the Hague.

A desire to change attitudes, promote social justice, generate an income and develop a career, appear here to have been factors influencing this decision to be 'out'. He described a key characteristic of this phase of his career, as working in '... a partisan way'. How does his portrait of the judge differ from this portrait of the lawyer as advocate? Fulford described the differences in the context of a reflection about factors that had made him interested in pursuing a judicial career:

Having spent years in a partisan way really arguing points of law and arguing cases I was really attracted to the process of trying to find the right answer and resolving problems rather than simply, and to an extent opportunistically, developing arguments to suit a particular party that I was representing. That process of resolving things, and in particular writing judgments and summing up, I have found hugely enjoyable, very stimulating and a really worthwhile exercise.

Of particular interest here is the dramatic contrast between Justice Fulford's characterisation of his practice at the bar, where there is a connection between sexual visibility, a partisan approach and the role of an advocate, and the judicial role, which is radically different; characterised by sexual invisibility, which is conjoined with the performance of a role that is 'non-partisan'. The particular requirement to remove sexuality from the portrait of the judge is reinforced in a suggestion that sexuality is different from other strands of diversity:

I can see, I think reasonably easily, that, particularly in days when women and members of ethnic minorities were underrepresented, judges from those groups can bring something to bear on their role as a judge by virtue of the fact that they are either a woman or from the ethnic minorities and so I think that there probably is a legitimate reason for that to have been stressed, for the lack of judges from those areas to be stressed. Whereas the lack of openly gay men and lesbians on the bench has not been stressed. I think that on reflection that probably does make good sense. I really don't think that one's own individual sexual orientation has very much if anything to do with what you do day-by-day making decisions in cases. It is pretty much irrelevant.

This seems to point to a rather rigid boundary between sexual invisibility and sexual visibility in the context of the judicial role. How might this be explained and understood? Justice Cameron offers an insight. In his memoirs he describes the 'resplendent robes' of judicial office, the bib, sash, waistband and flowing scarlet robes that English judges imported into South Africa in the early 19th century as 'a full-body disguise'.⁶⁷ Here the disguise worked to mask not his sexuality per se but his ill health. But does it have significance in relation to sexuality? We explored this during the course of my interview with him. Cameron explained his position on the function of court dress, and also the spatial arrangements of the court, in terms of the role of the judge:

... the fact that you wear formal clothes and the fact that the bench sits on a raised tier above the advocates, the fact that you don't speak to the advocates outside the courtroom during the hearing, all of those contribute to the functionality of the role-play. But it is a distinctive role-play.

⁶⁷ Cameron, above n25 at 31.

More specifically the dress and the staging are concerned with the performance of distance that is understood to be a key feature of impartiality. Distance, Justice Cameron suggested, is '... functional to the work that you do and have got to do. But before saying that it is necessary, which implies approval, I'd say it is unavoidable. It is both necessary and unavoidable.' This suggests that in a courtroom setting the visibility of a judge's sexuality may break the magic otherwise produced by the paraphernalia that stages distance.

In the context of the social and cultural forces that make non-heterosexual sexualities invisible, the paraphernalia and staging of the judicial role as non-partisan may make it easier for a lesbian or a gay man (as already invisible) to achieve that required performance. At the same time, this 'necessary and unavoidable' performance may make it more difficult for a lesbian or gay man to 'affirmatively break the assumption of heterosexuality that silence often brings.'⁶⁸ Feminist scholars have noted the dangers women on the bench face when they attempt to break gender assumptions. In some instances invisibility may either not be an option or be more difficult to achieve. The visibility of a woman's performance of gender, and the visibility of some ethnic minorities may make the visual performance of judicial impartiality even more challenging and more difficult for women and ethnic minorities on the bench.⁶⁹ Nor are the challenges of gender, colour and ethnicity remote from sexuality. In some instances they may work to enhance the difficulties facing individuals, for example gender may impact differently on lesbians than gay men, or colour and ethnicity may generate

68 Cameron, above n25 at 5. Both Justice Fulford and Justice Cameron do offer some support for an argument that the sexual diversification of the judiciary will bring onto the bench individuals who might be able to offer different perspectives and insights. Putting Justice Fulford's response back into the context of arguments about the importance of the different perspective that women and people from black and minority ethnic backgrounds might bring to the bench I asked Justice Fulford if a similar argument might not apply to lesbians and gay men. He responded:

Of course coming from a minority and having grown up in days when there was a lot of discrimination that is something which I have been informed by and of course on occasion I am able to bring that personal experience to bear when I am dealing with a discrimination issue. I have a particular sensitivity or awareness about it. But I would also like to think that my colleagues who have been properly informed and trained as they have been would be able to bring to bear an appropriate view and judgement of that issue so as to inform what they eventually do in that case. Although it is right that it is good to have balance on the Bench in terms of ensuring that minorities are represented, I think it is dangerous to carry that argument too far. Without in any way wanting to blow my own trumpet what one has got to be looking for is good judges, rather than trying to select people because they just happen to fit a category that you are looking for because there is a lack of it on the bench at any given time.

Of particular interest here is the interface between merit and diversity. While, he suggests, there may be an aspect of the gay (and one might add lesbian) experience that gives a person a different and heightened sensitivity and awareness that is of significance in carrying out the judicial function, he goes on to suggest that these are qualities and characteristics that distinguish a 'good judge'. As such they are qualities that ought to be a part of the merit criteria and thereby applicable to all judicial appointees rather than qualities and characteristics associated with the representation of diversity on the bench. For an extended analysis of the interface between merit and diversity see Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 *Journal of Law and Society* 126.

more challenges for gay Muslims who wish to pursue a judicial career. The combination of these different hierarchies of difference may also facilitate visibility. For example, returning to Justice Satchwell, she explained that she had never had any problems being a lesbian on the bench. I suggested above that a number of factors were at work in the generation of this experience, including ethnicity and race, social class, education and political beliefs. Finally, the adoption of invisibility may at best leave unquestioned and unproblematised the nature and meaning of ‘distance’ and ‘impartiality’, and at worst may reproduce the hierarchy of social distinctions that has in the past made a group of white, middle aged, upper middle class, privately educated men the embodiment of ‘impartiality’.⁷⁰

Does this mean that the sexuality of, for example Justice Kirby or Justice Cameron, never appears in the official setting of the court? The short answer, my research suggests, is no. It does appear. Justice Kirby provided the following example:

... if you are open about your sexuality then it does make it easier to speak candidly about things including in the court. We had a case once where, oh yes, it was about in vitro fertilisation and whether that could be available to unmarried people. Some of the documents filed by a Catholic Church group, I think it was, opposing the interpretation of the Act that would give access to unmarried people, had the most amazing stories about gay people having sex with Alsatian dogs. I confronted the barrister with these statements because I’m pretty careful in my reading of the record. There was a great flurry and lots of apologies and withdrawal and offers to remove it from the record and so on. I told them that I wanted it to stay there. People know my position and they know when they are putting things to the court they have to be aware of that. That is a good thing. It has made people in the highest court of the land much more aware of this element, that there is a percentage of people in society who are or who happen to be homosexual or a member of a sexual minority. They have all just had to adjust to that. Whether that will survive my departure I don’t know.

Justice Cameron offered the following example:

One of the very first murders I sat in was a very tragic murder of a gay man by two people who he had picked up off the street. It was very interesting, ...everyone in the courtroom knew that I was a gay man, it was shortly after my appointment. The prosecutor and the defending counsel equally knew that I was a gay man and I think the investigating officer as well knew that I was a gay man.

In both examples the sexuality of both male judges appears to be visible. In these examples it is described as, not so much the result of an overt performance in the courtroom by these judges, but more as something that others in the court, the lawyers presenting the argument and fellow judges, might read into the proceedings due to performances of sexual visibility that have occurred elsewhere.

69 Hunter, *Fear and Loathing*, above n1; Omatsu, above n2; Boyle, Bhandar, Backhouse, MacCrimmon & Kobayashi, above n2; Rackley, above n3.

70 Omatsu, above n2.

In 2004 Anna Marie de Vos, who was then a judge sitting on the bench of the South African High Court in Pretoria, appeared with her partner and their two children in a South African television documentary, *Two Moms*.⁷¹ *Two Moms* profiles Justice de Vos, her partner Suzanne du Toit and their two adopted children. The filming, which took place during the judicial recess, followed the family on a trip from Pretoria, where Justice de Vos worked, to the family's organic farm in the south of the country near Plettenberg Bay on the Cape coast. The production crew spent four days shooting in Pretoria and Johannesburg, two days travelling down to the coast and a further four days at the family farm. The production company, Underdog, describes the film as 'a revealing multifaceted portrait of an extraordinary, yet very normal family.' The film's director Luiz Debarros explained the aim of the film in the following terms, '...to focus on the human stories we found within the family, and not on the issues themselves, although these invariably came to the fore in a natural way'.⁷² The screening of the documentary, Justice de Vos explained to me, was something of a turning point in her relations with her fellow judges:

After the screening of that programme I started to feel a slight negativity about the fact that I'm gay, ...in fact one of my colleagues said to me, 'You know it's one thing to be gay but do you really have to push it down our throats.' So you can be gay but you can't say it and you can't show it. But then you are fine. And since then I haven't been a friend of the Judicial Services Commission or the powerful structures within the judiciary. And it's not just a perception that comes from nowhere. It was clear to me that I...definitely overstepped a boundary, an unwritten rule that you can't be public in that way, because you are a judge. Coming back to the British traditional idea that everything is secrecy. Can you image a TV programme about a judge's life?

What is the nature of the boundary that has been crossed here? Justice de Vos describes it in part as an issue of visibility in contrast to invisibility, and her use of the term 'public' also suggests that it was represented as the violation of a boundary between the private and the public. Is this a breach, pure and simple, of an unspoken rule that prohibits the representation of family life or the intimate life of the judges in South Africa? There are at least three factors which might suggest that this is not the case. First, the judicial biographies on the website of the Constitutional Court of South Africa give details of the family lives of the judges of that court, present and past. Nothing in the descriptions of the programme suggests that the de Vos/ du Toit family strays far from the pattern of intimacy and domestic family relationships either of the judges of the Constitutional Court or with the heterosexual ideal more generally. Second, there have been other

71 Since its first broadcast in August 2004 on South African TV (SABC2), *Two Moms* has been screened at a number of festivals around the world. These include: *The South African Gay & Lesbian Film Festival 2005*; *Frameline 29 2005* (San Francisco); *Reel Pride/Triangle Foundation 2005* (Michigan); and is set to be screened at *Pink Apple 2006* (Zurich, Switzerland) and the *African Film Festival, Inc New York* – 2006.

72 'About *Two Mums*' in *Two Mums (Official Website)*: <<http://www.underdog.co.za/twomoms/index.html>> (1 October 2006).

instances where details of the intimate lives of people who are senior members of the South African judiciary have been made public with little or no hostile reaction. For example, Albie Sachs, who was appointed to South Africa's Constitutional Court in 1994, published a memoir first in 1990 with a new edition in 2000. The memoir deals mainly with the attempt on his life in Mozambique on 7 April 1988, as a result of which his right arm and the sight in one eye were destroyed, and describes his journey back to good health. This journey works in part as a metaphor for the journey of South Africa from the struggle against apartheid to the challenges facing the establishment of the new post-apartheid democracy. There are several passages in the book where Sachs describes fantasies of intimacy. Early in the book we find the following description of an experience and reflection focusing on his sexual body at the beginning of his journey to recovery:

My arm is free and mobile and ready to respond to my will. It is on the left side and I decide to alter the order a little Testicles My hand goes down. I am wearing nothing under the sheet, it is easy to feel my body. My penis is all there, my good old cock (I'm alone with myself and can say the word) that has involved me in so much happiness and so much despair and will no doubt lead me up hill and down dale in the future as well, and my balls, one, two, both in place, perhaps I should call them testes since I am in hospital.⁷³

Justice Cameron, in the published memoirs about his HIV status, activism and his life as a gay man, countering the anti-semitic denialism that suggests that gay men with AIDS succumbed to errors of 'lifestyle choice', shares the following with his readers:

I didn't party or take drugs or have multiple exposure to the seminal deposits of innumerable sexual partners. I led the generally cautious life of a hard-working lawyer. Yet I fell ill from AIDS. I fell ill from a single virus. It was transmitted to me in a single, incautious episode of unprotected receptive sexual intercourse during Easter 1985.⁷⁴

During the course of my interview with him he described the judicial reaction to the book in the following terms:

... when a couple of my colleagues read the manuscript they expressed discomfort about the measure of self disclosure but once the book was published, given the very emphatically positive public response it received, I've had no reservations expressed. A number of people have gone out of their way to be positive. Many, many colleagues in provincial divisions over a whole range, I haven't actually collated the response but your question makes me think I should have done, they cover a whole range, have been positive. I actually address the issue in the book of the propriety of what I am doing I had a book launch in Bloemfontein ... in May last year, in 2005, a month after the book was launched in Johannesburg and Cape Town. Every single one of my colleagues came to Bloomfontein. It was just a silent, emphatic, universal turnout. Judges from the

⁷³ Albie Sachs, *The Soft Vengeance of a Freedom Fighter* (2000).

⁷⁴ Cameron, above n25 at 121.

provincial divisions came, both black and white. That to some extent is a reflection of how seriously judges take the problem of AIDS but I think it is also a reflection of the fact that they knew that I was aware of the problem that I was creating. I'd advanced a justification for it.

In part, he suggests that the positive reaction was due to the cultural, political and moral context in which the disclosures were made. He explained, 'I think that people see the argument that there was a moral emergency, which justified my stepping out of the judicial role.' Second, he identifies the HIV/AIDS pandemic as the political and discursive frame that made putting his private life in the public frame acceptable to his colleagues. In that context the explicit reference to his intimate relations appears to attract little hostile judicial attention. In sharp contrast is the reported reaction to Justice de Vos. The documentary of her family life does have an important cultural, moral and political setting; the recognition of different family forms and relationships, the human rights of children and the constitutional provisions outlawing discrimination based on sexual orientation. Perhaps the moral urgency is less extreme if not only because by the time the documentary was screened the South African Constitutional Court had found in favour of de Vos and her partner. But it remains the case that in this instance this portrait of family life was, at least for some of her fellow judges, read as unacceptable and more specifically as nothing more than a portrait of her sexuality, of her 'gay' sexuality.⁷⁵

Before trying to make sense of the reaction to the screening of *Two Moms* let me refer to another incident involving Justice de Vos. In 2005 during the course of her public interview before the Judicial Services Commission, for promotion to the post of deputy judge president of the Transvaal Provincial circuit, one of the commission members, a fellow lawyer, advocate Silas Nkanunu asked Justice de Vos about the impact of her sexual orientation upon her relations with her fellow judges.⁷⁶ While many of the media reports were supportive of Justice de Vos, she explained:

... it wasn't nice for me. I was driving down the road and saw a big poster 'Lesbian Judge Grilled'. It wasn't nice to see that. I had to walk into our tearoom. I felt exposed and humiliated.

Commenting on his own experiences of Judicial Service Commission interviews, Justice Cameron explained:

I was appointed in 1994, at the end of 1994, and since then I was interviewed for the Labour Appeal Court twice, for the Constitutional Court and for the Supreme

75 There may also be other factors at play here. Justice Cameron suggested that the hostility from fellow judges might be concerned with Justice de Vos being involved in the litigation to challenge the constitutional validity of the adoption laws. The boundary is here one between sitting on the bench as a judge and coming before the bench as a litigant.

76 Sheena Adams, 'Judge Grilled on Her Sexual Orientation' *Cape Times* (South Africa) (19 Oct 2005): <<http://www.capetimes.co.za/index.php?fArticleId=2952832>> (3 Nov 2005); Carmel Rickards, 'Judging Women Harshly' *Sunday Times* (South Africa) (23 Oct 2005): <<http://www.sundaytimes.co.za/Articles/TarkArticle.aspx?ID=1735237>> (3 Nov 2005).

Court of Appeals so I've been to four or five interviews and not once has the issue of my sexual orientation even glimmered through. At my very first interview, which is on the website, it did arise but after that not once at all has the issue even been raised.

How are we to make sense of Justice de Vos's experiences? There is some evidence here of a common denominator between the various judges who have made the 'private', 'public'; all the disclosures referred to above are framed by reference to important political and moral causes and objectives informing the uses of publicity/visibility and an awareness of the dangers that might flow from the loss of privacy. However, at the same time I would suggest that these examples offer some evidence in support of a conclusion that gay men and lesbian women are differently positioned both with respect to privacy and publicity and in relation to invisibility and visibility. There is some evidence here of the gendered character of these boundaries and their deployment. Men appear to be more able to exercise control over boundary formation and boundary maintenance. This draws our attention to the way the formation and management of the boundary between invisibility and visibility and between privacy and publicity is informed by a hierarchy of power.⁷⁷

Finally I want to return to Justice Cameron's experience with the three judges from the English Court of Appeal. For Justice Cameron the particular significance of that incident was that it illustrates the ongoing nature of the assumption of heterosexuality and thereby the ongoing requirement to assert sexual difference. I want to draw out another dimension.

Most biographical accounts of Justice Michael Kirby make reference to 1999, the date when Kirby revealed his sexual identity in the pages of the Australian edition of *Who's Who*. The repeated references to this date suggest that this moment was pivotal, marking a move from invisibility to visibility. In turn it suggests that 1999 marks the absolute start of what Justice Cameron's example illustrates as the ongoing process of annunciation that will be required until the assumption of heterosexuality has been displaced. But Justice Kirby's experience suggests that this is an overly simplistic, partial and a very limited picture of the operation of the boundary between invisibility and visibility. In response to my question, 'Would you agree that [1999] was the first moment in your professional life that everybody knew that you were gay?' he said, 'Certainly not.' He explained, prior to that date:

It was commonly known that I was homosexual because I had a partner from the 11th of Feb 1969 and lived together with him in the suburbs of Sydney. We lived quite openly. We went shopping and did other things that ordinary people did. Australia is quite a small society, 20 million people, and concentrated in a few cities, therefore I think it was generally known that I was gay. But that was not asserted. Remember, in the early days, from 1969 till 1974, homosexual acts even

⁷⁷ These insights draw heavily upon Nancy Fraser, 'Sex, Lies and the Public Sphere: Some Reflections on the Confirmation of Clarence Thomas' (1992) 18 *Critical Inquiry* 595. Fraser also explores how hierarchies of race and social class inform these boundaries.

between consenting adults in private were still illegal. Mind you, they hadn't for many years been prosecuted and it was something of a dead letter. They were used occasionally to harass people. But it wasn't the subject of very many criminal prosecutions. But that was a reason for a certain degree of discretion. As well as that, I'm quite a discrete sort of a person. Most people who end up on the judiciary are. So, that was a period in my life and the life of my partner when we were not, as it were, in your face.

More specifically Kirby went on to explain that his sexual orientation was well known prior to 1999 within the legal community:

Lawyers live in a very small cocoon. It's a cocoon, which resonates constantly with gossip. They are great gossips. They love gossip. I've never really been so keen on gossip myself. I've often been the subject of it. There would have been plenty of gossip about me. When it appeared in *Who's Who* and the journalists went around the legal profession to see 'shock horror' what everyone thought about this there was a great 'yawn'. The legal profession responded with, 'Well everyone has known about that. Move on.'

I want to highlight three matters. The first is that Justice Kirby's experiences suggest that neither the division between invisibility and visibility nor between the public and the private work as either single or simple distinctions. I would suggest that there is some evidence in Justice Kirby's experiences (and in other examples offered in this article) to suggest that there is a multiplicity of simultaneous different experiences of these boundaries in different locations. There are in short many different, simultaneously operating public spheres. These include official governmental public spheres, mass mediated mainstream public spheres, professional public spheres, counter-public and informal everyday public spheres. Justice Kirby's relationship and thereby his sexuality may appear differently at the same time in these different publics; for example, visible in the everyday public sphere of his immediate domestic neighbourhood, invisible in the official government public sphere, visible within the public sphere of the legal professional community but invisible in the mass mediated public sphere. My second observation relates to Kirby's comment about lawyers, gossip and the knowledge produced about his sexual orientation within the community of lawyers by way of gossip. Various anthropological studies have noted the importance of gossip in the formation of elite groups and several have identified lawyers and legal communities more generally as groups in which gossip plays a particularly important role in the process of group formation.⁷⁸ Gossip, this research suggests, works to form communities and to set, represent and police the moral values of each particular community of gossipers. Furthermore it works to create community not only by way of separation and exclusion but also by way of

78 Max Gluckman, 'Gossip and Scandal' (1963) 4 *Current Anthropology* 307; John Flood, 'Middlemen of the Law: An Ethnographic Inquiry into the English Legal Profession' (1981) 6 *Am Bar Foundation Res J* 377.

inclusion and incorporation. Nor is gossip merely a matter of community. Individuals use gossip for their own particular purposes to make their way in these communities.⁷⁹ Kirby's experience is of interest in various ways. Gossip, he suggests, worked to make his sexual orientation well known within the legal community. While it might have been used to exclude him and destroy his professional career it does not in the general scheme of things appear to have worked in that way. He has had a highly successful career and more specifically a highly successful judicial career. While his sexual identity would seem to have become visible in the mass mediated public sphere in 1999 by way of the *Who's Who's Who* entry, it was already visible, and had been for many years in a different public sphere, that of legal professionals. A key point here is the possibility that a person's sexual orientation may be both widely known and yet remain largely invisible. Social, cultural and spatial factors produce multiple locations of differently drawn boundaries. Brower makes the point in his overview of the research on sexual orientation bias in the courtroom:

This combination of diverse environments, different perceptions, and varying degrees of sexual orientation disclosure complicates analysis of sexual minorities' experiences within the judicial system.⁸⁰

I would suggest that Brower's observation also captures something of the nature of the complexity of the experiences of lesbians and gay men who hold judicial office.

My final point is that while it may be a trite point to say that there may be considerable distance between these different public realms, for example between the everyday public sphere of his immediate domestic neighbourhood and the official government public sphere, there is also considerable connection. I want to explore this by reference to a comment by Justice Kirby about his appointment to the High Court. He begins:

It is a question, sadly, as to whether, had I been open about my sexuality before 1996, I would have been appointed. Not because I was any different or that my values were any different or that people didn't really know, but there are people in public life who have a lot to do with the issues of appointment of the judiciary who get nervous about somebody who is bucking the system and is being open about their sexuality. It shouldn't be so but I think it might have been so.

This observation begins with the suggestion that information about his sexual orientation, had it escaped from a context where it had a certain visibility, the legal professional public sphere, into the political arena, a different public sphere, then

⁷⁹ One of the criticisms of anthropological work on gossip is that it has paid too much attention to the group and collective significance of gossip and paid too little attention to the significance and use of gossip by individuals. See Robert Paine, 'What is Gossip About? An Alternative Hypothesis' (1967) 2 *Man* 278.

⁸⁰ Brower, *Multistable Figures*, above n15 at 3.

this would have ended his chances of appointment. Does his appointment suggest that there was a clear separation between the public sphere of the legal professional community and the community of politicians who were involved in making the decision to appoint? He continued:

... it might not have been so because I've been told by a person who worked in the office of the Prime Minister at the time, that the Prime Minister on my appointment said to this person who was himself gay and known by the Prime Minister to be gay, 'Well, XXX, there's one for you.' XXX, in return replied to the Prime Minister, 'Prime Minister, I've got news for you. There are lots of others.' So it may not have influenced things. But it might have.

This suggests both some connection between these different publics and some movement of information across and between them. However, the response to the Prime Minister's comment suggests that the connection and flow of information may be partial rather than total. Finally the example also suggests that individual actors may play a key role in the flow and mobilisation of gossip/knowledge across different public spheres. What social, political and moral factors influenced the formation and management of the boundaries of visibility and invisibility illustrated here? My answer will have to wait for another time and place.

5. *Conclusion*

In an equalities context in which sexual orientation in general, and lesbian and gay sexualities in particular, appear to be a largely unspoken and unspeakable aspect of judicial diversity, one might be forgiven for believing that putting sexuality on the agenda is, if not a novel initiative, then a challenging development. I hope that this essay has provided some evidence that putting sexuality in the agenda is far from being a radical or shocking departure. One key insight arising out of the research and analysis offered here is that sexuality is not so much absent or rarely spoken, or predominantly missing from the judicial institution and the lives of the judiciary, but is always present and more specifically it is always in public. Silences and the formation and maintenance of boundaries of visibility and invisibility are central to its pervasive operation. Sexuality is already a part, and a very public part, of judicial institutions, judicial roles and judicial cultures.

It may, however, still be the case that putting sexual diversity on the judicial agenda will be experienced by government officials, the judiciary themselves, fellow academics and researchers, and the public at large, as a vertiginous journey across a boundary that is fraught with danger. It is likely to remain a hotly contested and highly controversial issue. These responses are not so much a reaction to violating social taboos associated with the preservation of an institution or a culture that is free from sexuality, which effectively confines and preserves sexuality to places beyond the public gaze, but are more a reaction that reveals the nature and operation of the existing public sexual culture we occupy, dedicated to the pursuit of a dream of a sexually homogenous social order. Research focusing

on the experiences of gay men and lesbians provides a unique opportunity not only to analyse particular identities, but to examine and critically explore the whole of that public sex culture.

The different sources of data I have re-used and introduced here are designed to open up informed debate and enable critical reflection about the nature and challenges of sexual diversity and the judiciary. The restraints of this particular essay mean that there is not the opportunity to do justice to the full richness of either the data presented here or other existing data. Much more research generating new data and a more sustained analysis of new and existing data is necessary. I hope that this article will be a useful platform for further research and that it will raise awareness that future research projects in this area must not only be acutely aware of the complexities of sexual identity and the idiosyncrasies and peculiarities of each jurisdictional and institutional setting, but also must be sensitive to the multiplicity of different contexts in which the culture of sexuality is put to work.