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Challenging The Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority

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Abstract
This article considers three recent court judgments that resulted from challenges by homosexual men and women to laws that prohibited them from contracting civil marriage. In examining these judgments, my focus is on the different ways in which courts interpret the social, cultural and legal heteronormativity of marriage. Whilst the issue of judicial interpretations of heteronormativity has not been a significant cause for concern in either lay or academic discourse, I argue that judicial 'ways of thinking' about heteronormativity are vitally important in both the reproduction and disruption of heteronormative law. To demonstrate this, I show how the standpoint of sitting judges in respect of heteronormativity was a key factor determining the outcome of the cases considered here. In contrast to popular accounts of these standpoints, which focus on the 'activism' of individual judges, I argue that judicial standpoints that are critical of heteronormativity reflect social, rather than personal, 'points of view'. In conclusion, I argue that current debates about judicial diversity must acknowledge the importance of these interpretative standpoints within the law and the social processes through which they are both produced and maintained.

Keywords
heteronormativity, homosexuality, judicial diversity, judicial standpoints, same-sex marriage

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Introduction

This article examines three recent judgments issued by the final courts of appeal in the legal jurisdictions of California (USA), South Africa and the Council of Europe. These judgments – the result of challenges made by homosexual men and women to laws that prohibited them from contracting civil marriage – arise from cases originating in very different social, cultural and legal contexts, but they share a common concern to resolve one issue: the extent to which law should support the exclusion of one class of persons from the rights, benefits and responsibilities of a key social and legal institution enjoyed by others. In addressing this issue, all three judgments engage in extensive considerations of the social and legal organization of marriage in contemporary societies and offer a critical analysis of it. As such, the judgments are both reflections on the complex sexual politics that characterize contemporary societies, and authoritative pronouncements on how political disputes about sexual orientation should be resolved in law.

In examining these judgments, my focus is on the different ways in which courts interpret the social, cultural and legal 'heteronormativity' of marriage. Following a discussion of the relationship between heteronormativity and law, and of the role and scope of judicial interpretation and authority, I go on to explore the contrasting judicial interpretations of heteronormativity contained in the three judgments. I argue that the interpretative standpoint of sitting judges in respect of heteronormativity was a key factor in determining the outcome of the cases. I show how the adoption by courts of interpretative standpoints critical of heteronormativity was decisive in their rejection of arguments that marriage can be defensibly limited to opposite-sex couples. In conclusion, I argue that current debates about judicial diversity must acknowledge the importance of these interpretative standpoints within the law in order to facilitate greater legal equity for non-heterosexuals.

The Heteronormativity of Law

As an increasing number of scholars recognize, law is central to the creation, maintenance and reproduction of heteronormativity within contemporary societies (e.g. McGhee, 2001; Stychin, 2003). By heteronormativity I mean what Berlant and Warner call 'the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent ... but also privileged' (1998: 548). Whilst Berlant and Warner understand heteronormativity to comprises less a body of norms that can be located in particular practices, processes or doctrines, and more a 'sense of rightness' that characterizes heterosexuality in the contemporary, the practices, processes and doctrines of law are one of the most important mechanisms for ensuring the 'privilege' of heterosexuality and the 'effortless superiority' that it commonly achieves in social life (Smart, 1996: 173).

The three judgments examined here all originate in challenges by non-heterosexuals to laws that sustain the social and cultural privilege and superiority of heterosexuality. They are laws that support a form of social organization that, to use Adrienne Rich's term, 'flickers across and distorts our lives' (1986: 64). Heteronormative law 'distorts' lives because it helps to enforce a 'silence' in contemporary societies about heterosexuality which means that, instead of speaking about heterosexuality as a social and political

construction and mode of social organization, it is 'taken for granted' as a 'normal' aspect of human life (see e.g. Wilkinson and Kitzinger, 1993). Such a 'silence' is premised on, as Ingraham argues, a 'way of thinking which conceals the operation of heterosexuality ... and closes off any critical analysis of heterosexuality as an organizing institution' (1996: 169). In responding to complaints about heteronormative law, these judgments are examples of how judicial 'ways of thinking' are implicated in both the reproduction and disruption of heteronormative social relations.

A central feature of the judgments examined here is that they adopt very different positions in respect of arguments for and against maintaining the heterosexual exclusivity of marriage through statutory law. Whilst these arguments are multi-faceted and complex, and rely upon a wide range of evidence, the judgments can be seen as considerations of two fundamental and competing claims. On the one hand, those seeking access to same-sex civil marriage claim that laws that prohibit them (or at least do not allow them) to contract marriage are expressions of wider social relations that continue to discriminate against non-heterosexuals. Such a claim was clearly evident in the first judgment examined here, *Minister of Home Affairs* v *Fourie & Lesbian and Gay Equality Project and Eighteen Others* v *Minister of Home Affairs* (Constitutional Court of South Africa, 2005), where the applicants, a female same-sex couple, argued that in excluding them from 'publicly celebrating their love and commitment to each other' the law 'shuts them out' from the wider 'public recognition' and 'rights and responsibilities' that flow from marriage (para. 1–2). This argument resonates with the more widespread (although contested) belief that challenging the 'long-standing heteronormativity inscribed in laws that deny marriage to same-sex couples' (Taylor et al., 2009: 865–866) is the 'engine' to address and end all discrimination against non-heterosexuals and establish their formal equality with heterosexuals (Harding, 2006).[1]

On the other hand, opponents of same-sex marriage often conceptualize marriage very differently, seeing it not as a mechanism through which non-heterosexuals are discriminated against but as a 'traditional' institution founded upon the central principle of sex difference. In this sense, 'protecting' marriage is not, it is argued, concerned with a denial of rights to non-heterosexuals, but with the continuation of a socially important and distinctive way of life. As the defendants in the second judgment examined here, *Perry* v *Schwarzenegger* (Supreme Court of California, 2010: 6–7), argued:

> preserving marriage [is] not an attack on the gay lifestyle [but] protects our children from being taught in public schools that 'same-sex marriage' is the same as traditional marriage ... While death, divorce, or other circumstances may prevent the ideal, the best situation for a child is to be raised by a married mother and father. [W]hile gays have the right to their private lives, they do not have the right to redefine marriage for everyone else.

A key issue in dispute, therefore, is not simply whether non-heterosexuals should have access to civil marriage, but to what extent the legal protection of 'traditional' marriage relies upon the discrimination of non-heterosexuals to maintain its social and cultural status.

Many would argue that heterosexual privilege is sustained by the legal discrimination of non-heterosexuals and that such discrimination is a characteristic of the majority of

states worldwide that continue, in some measure, to use the law to exclude non-heterosexuals from the full range of civil rights and social participation enjoyed by heterosexuals. At its most extreme, this is visible in societies where legislators continue to enact, and courts continue to enforce, laws that criminalize male homosexual sex in private (for example, in over 40 of the states comprising The Commonwealth). This is not to suggest that heteronormative law is monolithic, or to ignore important variations in the social and legal regulation of sex and sexual orientation around the world. Ongoing developments in national laws relating to sexual orientation show that the relationship between law and heteronormativity is highly variable: in some jurisdictions homosexuals continue to gain increasing equality in terms of access to goods, services, employment and relationship recognition (as demonstrated, for instance, by the legalization of same-sex marriage in Argentina in 2010) whilst, in other states, homosexuals face increasing legal repression (as in, for example, attempts to strengthen the criminalization of male homosexual sex in Uganda). Despite these national variations, the almost universal exclusion of non-heterosexuals from civil marriage demonstrates the global hegemony of this form of legally sanctioned heteronormativity. At the time of writing, when only 10 nation states afford same-sex couples the opportunity to contract civil marriage, it is possible to conclude, as Morgan does, that:

> from a liberal, positivist point of view, we [gay men and lesbians] have had some success. We have made some gains in being included in the heteronormative system. But ... we have not been very successful at breaking down that system. We have not managed ... to challenge the heteronormative assumptions upon which the system is based. (2001: 211)

Morgan's observation echoes the more general complaint that, at least in terms of marriage, 'law supports the heteronormative discourses in our culture and our politics that elevate and protect heterosexual social arrangements even as they cause hardship to those living outside those boundaries' (Barclay et al., 2009: 14).

Judging Heteronormativity

The issue of judicial interpretations of heteronormativity has not been a cause for concern in either lay or academic considerations of the types of cases examined here. In popular accounts of judgments that have found in favour of non-heterosexuals, judicial interpretation has been imagined as a feature of the 'activism' of individual judges who act in respect of some personal or political bias. Concerns about judicial activism are not new and nor are they limited to the matter of same-sex marriage; there is a long tradition among legislators, as well as among jurists themselves, of criticizing judges when interpretations of statutory law challenge social and cultural norms (Kmiec, 2004). Yet, in respect of same-sex marriage, the charge of 'judicial activism' has frequently been levelled at judges who, it is claimed, have not heeded Lord Devlin's advice that 'the words [of a statute] must be taken to mean what they say and not what their interpreter would like them to say; the statute is the master and not the servant of the judgment' (1979: 14). This was clearly evident when, following the judgment of the Supreme Judicial Court of Massachusetts in *Goodridge* v *Department of Public Health* (2003)

that the state could not lawfully deny the protections, benefits and obligations conferred by civil marriage to individuals of the same sex, George Bush (then US President) criticized 'activist judges' for 'forcing their arbitrary will upon the people' in respect of 'the most fundamental, enduring institutions of our civilization' (State of the Union address, 22 January 2004).

However, the debate about judges being 'active' or 'passive' is unhelpful (Bingham, 2005) in respect of the judgments examined here since they all arise from cases that necessitate the use of authorized discretion (Hawkins, 1992). As many legal commentators since Hart (1961) have argued, judicial discretion is an important feature of deciding *all* hard cases that involve key (and contentious) social and moral issues. Recognizing the role of discretion does not negate the importance of the established judicial mechanisms of each court through which evidence is interpreted and judgments are reached. It is the application of these mechanisms – the jurisprudential 'tools' of 'margin of appreciation' or 'strict scrutiny' – that underwrites the objectivity, stability and seamlessness to which law aspires (Latour, 2010). Nor does it, as some would suggest, reduce the application of those tools to determinate found in the 'psychologies' of individual judges (Klein and Mitchell, 2010). Rather, it acknowledges that 'in any legal system there will always be certain legally unregulated cases in which on some point no decision either way is dictated by law' and, in order for a judge to reach a decision, 'he [sic] must exercise his *discretion* and *make* law' (Hart, 1961: 272, emphasis in original).

When discretion is exercised to reach a judgment that does not accord with majoritarian opinion or the will of legislators, it becomes contentious because it appears to result from the 'arbitrary will' of an individual judge. Yet, whilst many judges recognize that legal reasoning is influenced by what Lord Justice Etherton, an English Lord of Appeal, calls 'the personal outlook and judicial philosophy of each judge' (2009, para. 3), very few jurists would accept that their judgments were the outcome of arbitrary will. In the social sciences, a useful way of thinking about how individual motivations may underpin forms of reasoning and decision-making is through a consideration of how the 'standpoints' that individuals occupy influence both their comprehension of, and orientation to, 'reality' (Harding, 1991, 1997). Standpoints are not understood to result from 'will' but, as Bourdieu (2000) argues, from our experience of the social relations in which we are situated; individuals embody the social space that they occupy, in their 'habitus', and this generates 'systems of schemes of perception, appreciation and action' that structures their comprehension of, and action in, the world (Bourdieu, 2000: 138). Habitus, Bourdieu argues,

> generates practice immediately adjusted to [a social] order, which are therefore perceived, by their author and also by others, as 'right' … without being in any way the product of obedience to an order in the sense of an imperative, to a norm or to legal rules. (2000: 143)

This understanding of habitus resonates with Ronald Dworkin's argument that in hard cases judges do not exercise their discretion on the basis of *private* interest but, rather, in relation to their perception of the *social* relations in which they operate:

> From time to time a particular case may force a judge to engage [in] a debate, to decide, as it were, a jurisprudential issue. But a judge who believes himself faced with such an issue is no

> more entitled to choose an answer on private grounds [but] is expected to justify his decision in terms of *what he takes to be* the most fundamental community conceptions of social or political justice … [I]n other words, he is expected to argue to public, rather than to rest on private, standards. (Dworkin, 1963: 634, my emphasis)

All three of the judgments examined demonstrate the relationship between standpoints and 'public standards'. They show that judicial standpoints *are* a vital element in determining the judgment of each case but that such standpoints speak to public, rather than private, interests. In other words, when judges engage in an adjudication of competing political claims they do occupy individual standpoints but, in doing so, such standpoints underpin (rather than disregard) a reasoned judgment of what form of social and political justice is fundamental to a community.[2]

When courts do adopt standpoints critical of heteronormativity they can be seen to engage a particular interpretation of heteronormative practices that strongly resonates with 'queer' theory. Specifically, they can be seen to recognize how the social normativity of heterosexuality is maintained by the 'marking out' of its borders with forms of sexuality that are imagined to be 'outside' and 'other' to it (Butler, 1990; Fuss, 1991; Halperin, 1995; Warner, 1993). From this standpoint, claims about the 'necessity' of heterosexuality and its 'natural' and 'traditional' status in human life – claims which are found in all the cases examined here – can be seen to depend upon that which heterosexuality continually repudiates as antithetical to its own nature (Fuss, 1991). 'The homo in relation to the hetero', Fuss argues, 'operates as an indispensable interior exclusion – an outside which is inside interiority making the articulation of the latter possible, a transgression of the border which is necessary to constitute the border as such' (1991: 3). Heteronormativity, understood this way, is founded on the continual abjection of homosexuality and claims about the need for heteronormative marriage demonstrate not the absence of a concern with homosexuality but, rather, the centrality of homosexuality in establishing, and policing, the ontological boundaries of heterosexuality (Butler, 1993). Heteronormativity relies upon, as the applicants in *Fourie* put it, homosexuality being 'shut out'. What the judgments examined below show is that the admission or exclusion of this standpoint in legal reasoning is foundational to the judgments reached by courts and, furthermore, underpins how those judgments are justified as 'right'.

Three Judgments on Heteronormativity

In the analysis that follows I focus on one key aspect of each judgment: the interpretation by courts of the evidence presented by non-heterosexuals to support their claim that heteronormative marriage laws are inherently discriminatory. I examine how the interpretative approach adopted in each judgment departs from one of two fundamentally different standpoints: either heteronormative law is viewed as an expression of 'traditional' heterosexual sociality that bears no historic or contemporary relationship with the more recently developed rights of non-heterosexuals or, alternatively, heteronormative law is seen as an instrument designed to ensure the superiority and dominance of heterosexuality through the social exclusion of non-heterosexuals. I show how the adoption of

these interpretive standpoints underpins judicial authority in respect of upholding or changing heteronormative law.

Judgment #1: Minister of Home Affairs V Fourie & Lesbian and Gay Equality Project and Eighteen Others V Minister of Home Affairs (2005)

In 2005, the Constitutional Court of South Africa (CCSA) heard concurrently two cases that concerned the legal exclusion of same-sex partners from civil marriage. *Fourie* originated in the Pretoria High Court where the applicants had unsuccessfully argued that the common law definition of marriage as 'a union of one man with one woman' should be developed to recognize marriage between persons of the same sex.[3] The High Court ruled that the Marriage Act 1961, which contains the same heterosexual formula for marriage found in the common law, was peremptory. The South African Court of Appeal (SCA) subsequently overturned the High Court judgment, finding that the common law definition discriminated against same-sex couples under the South African Bill of Rights that prohibits the state from unfairly discriminating on the grounds of sexual orientation (section 9(3) of the South African Constitution). Accordingly, the SCA ruled that the common law definition of marriage should be updated to incorporate same-sex marriage. The SCA was keen to eschew any notion of 'activism' in its judgment and stated that it was not engaging in a legislative process: 'developing the common law involves a creative and declaratory function in which the court puts the final touch on the process of incremental legal development that the Constitution has already ordained' (quoted in *Fourie*, para.14). In respect of the Marriage Act, however, the SCA adopted the view that any change to statute was beyond its authority and, as a consequence, upheld the High Court's view that the Act was peremptory.

Neither party in *Fourie* was satisfied by the judgment of the SCA. The state complained that it was inappropriate for the court to make a 'momentous change' to the common law and the applicants complained that the Marriage Act still prevented them from marrying. Both parties appealed to the CCSA. Simultaneously, recognizing the need to challenge the Marriage Act directly, the Lesbian and Gay Equality Project made an application in the Johannesburg High Court to have the statute reworded. Before the case was heard, the Equality Project applied for direct access to the CCSA and, granting this, the court heard this case concurrently with *Fourie*. The CCSA considered two questions common to both cases: should the failure of the common law and the Marriage Act to incorporate same-sex marriage be regarded as constituting unfair discrimination under the Bill of Rights and, if so, what should the appropriate remedy to this discrimination be?

The central claim of the state's case was that whilst the Constitution guaranteed same-sex couples certain rights it did not bestow upon them the right to be 'assimilated' into the institution of marriage that, 'in terms of its historic genesis and evolution', is 'heterosexual by nature' (para. 46). The heterosexual 'nature' of marriage was, the state argued, well established in national and international law. The state also argued that even if the Marriage Act and common law were found to be under-inclusive it was inappropriate for the CCSA to remedy this by 'tampering' with or 'radically altering the law of marriage … which by its very nature and as it has evolved historically is concerned with

heterosexual relationships' (para. 83). The state contended that, should the Court find that the Marriage Act and common law were unconstitutional, it was the role of legislators to produce alternative civil partnership arrangements for non-heterosexuals. Whilst the Court acknowledged the validity of the state's arguments, it did not consider the absence of specific same-sex marriage protection within the Constitution or international law to prohibit an examination of the claim under the Bill of Rights. The applicants had concomitant rights, the Court stated, to be treated fairly (section 9(3) of the Constitution), equally (section 9(1)) and with dignity (Section 10). The Court also stated that the Constitution empowered it to invalidate any law that it found to be inconsistent with the Constitution and make an order to ensure justice and equity (sections 172(1a) and 172(1b)).

The CCSA reached the judgment that the failure of the common law and the Marriage Act to provide same-sex couples with the means to enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage was an unjustifiable violation of their rights to equal protection of the law, to not be discriminated against unfairly, and to be treated with dignity (para. 114). In light of this, the Court ruled that the Marriage Act was invalid. In order to achieve 'enduring and stable legislative appreciation' (para. 136), and 'the institutional imprimatur' for same-sex marriage (para. 137), the Court suspended any remedy to allow Parliament time to correct the defects in the Marriage Act. It made clear, however, that it would not accept separate provisions for same-sex civil partnerships as a legislative solution, arguing that this would 'reproduce new forms of marginalisation' and serve 'as a threadbare cloak for covering distaste for or repudiation by those in power of the group subjected to segregation' (para. 150).[4] The Court stated that if after 12 months no suitable remedy had been provided by Parliament, it would read-in new wording to the statute in order to enable same-sex marriage.

A key question raised by the judgment in *Fourie* concerns the reasoning of the Court. Whilst the CCSA stated that it was guided by the standard that a 'universalistic, caring and aspirationally egalitarian society ... embraces everyone and accepts people for who they are' (para. 60) – wording which does not appear in, but arguably resonates with, the South African Constitution – the judgment cannot be seen as the inevitable outcome of the application of the Constitution. On the contrary, it is possible to imagine the application of the human rights standards contained in the Constitution to produce (as it often does in many other jurisdictions which aspire to similar human rights standards) an interpretation of law that supports the exclusion of non-heterosexuals from marriage. Therefore, to understand the judgment in *Fourie* it is necessary to discern how the Court's understanding of social and political justice departed from a particular interpretative standpoint.

Fourie shows that the CCSA adopted the standpoint that heteronormative marriage law is a chief instrument for marginalizing non-heterosexuals in society. Such marginalization, it stated, 'is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew' but represents a 'harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples' (para. 71). The Court argued that heteronormative marriage law 'reinforces the wounding notion' that non-heterosexuals 'do not fit into normal

society' and signifies that non-heterosexuals' 'capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples' (para. 71). The Court interpreted heteronormative law, therefore, to be the expression of a deliberate and direct form of discrimination against non-heterosexuals rather than a mechanism designed to promote or protect a 'traditional' or 'natural' way of life. The exclusion of same-sex couples from marriage, it stated, was not an 'oversight' but a 'direct consequence of prolonged discrimination' (para. 76). Recognizing the 'silent obliteration of same-sex couples from the reach of the law' (para. 117), the Court noted the important role of law in securing heteronormativity by 'both drawing on and reinforcing discriminatory social practices' that deny 'same-sex couples the dignity, status, benefits and responsibilities that it accords to heterosexual couples' (para. 78).

The standpoint adopted by the Court did not lead it to regard the wording of the Marriage Act as a 'master' to be obeyed but, rather, to interpret the 'reference to "'men and women"' in the Marriage Act as 'descriptive of an assumed reality, rather than prescriptive of a normative structure for all time' (para. 100). This critical interpretation of the 'assumed reality' of the Marriage Act is the bedrock of the Court's judgment and of its justification to use its authority to make new law. The Court's judgment, therefore, was not guided simply by legal rules, but by its critical interpretative standpoint in respect of heteronormativity. Yet the standpoint adopted by the Court was not a platform for the personal 'activism' of its individual judges but, rather, a foundation for their expression of a conception of social and political justice that they regarded to be fundamental to their community. The Court stated that the 'issue goes well beyond assumptions of heterosexual exclusivity' and is related to a more fundamental aspect of South African society 'where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage' (para. 60). By invoking this history of racial inequality, the Court appealed to a public standard of justice in order to gain recognition and support for its viewpoint that same-sex couples should not be 'shut out' but, rather, be 'brought in from the legal cold' (para. 138).

Judgment #2: Perry V Schwarzenegger (2010)

The plaintiffs in *Perry*, two same-sex couples, challenged a voter-enacted amendment to the California Constitution that stated 'Only marriage between a man and a woman is valid or recognized in California' (Article I, s.7.5). They complained that the amendment (popularly known as 'Proposition 8') deprived them of their rights to due process and of equal protection of the law guaranteed by the United States Constitution (Fourteenth Amendment). The Supreme Court of California (SCC) heard a range of testimony from plaintiffs, defendants and their expert witnesses regarding the rational and legitimate basis for interfering with these fundamental rights. On hearing this evidence, and applying the established jurisprudential principle of strict scrutiny to interpret it, the SCC ruled that in 'singling out' of gay men and lesbians for denial of a marriage licence, Proposition 8 'does nothing more than enshrine in the California Constitution the notion that opposite sex couples are superior to same-sex couples' (p. 135) and, in doing so, prevents California from fulfilling its constitutional obligation to ensure due process and fairness of the law.

Central to the judgment of the SCC was the recognition that not only does an exclusion of same-sex couples from marriage discriminate against them under the US Constitution but, furthermore, that such a practice ensures the 'superiority' of heterosexuality. This recognition, of the inherent concern of heteronormative law to sustain the cultural and social privileging of heterosexuality, resonates with the critical interpretation adopted by the CCSA outlined above. The SCC did not accept the argument, advanced by the defendants, that Proposition 8 was not concerned with the rights of non-heterosexuals but with protecting a 'traditional' way of life. On the contrary, the Court found that whilst at 'face value' the amendment did not refer to non-heterosexuals, its only purpose was to deny same-sex couples access to the rights and freedoms enjoyed by heterosexuals: 'Proponents argue that Proposition 8 does not target gays and lesbians because its language does not refer to them. In so arguing, proponents seek to mask their own initiative' (p. 120). In 'unmasking' the initiative of Proposition 8, the SCC can be seen to have adopted an interpretative standpoint critical of heteronormative culture and law.

The standpoint adopted by the Court is made clear by its interpretation of the expert testimony advanced by the two key proponents of Proposition 8: David Blankenhorn, president of the Institute for American Values (who testified on marriage, fatherhood and family structure) and Kenneth P Miller, a Professor of Government (who testified as an expert in American and California politics). Plaintiffs objected that Miller lacked sufficient expertise in issues relating to gays and lesbians and the Court upheld this view. Blankenhorn advanced heteronormative arguments about the importance of 'traditional' marriage for society and argued that same-sex marriage would 'weaken' a fundamental social institution. For example, proponents argued that the essential purpose for maintaining a separate legal definition for same-sex partnerships (such as that afforded by The California Domestic Partner Rights and Responsibilities Act 2003 which allows same-sex couples to be designated as 'Domestic Partners') is to protect traditional, natural and important arrangements for heterosexual marriage that are vital for society: marriage is essential, for instance, to 'promote naturally procreative sexual relationships' (p. 8). The Court found that these opinions were 'not supported by reliable evidence or methodology' and were therefore 'unreliable and entitled to essentially no weight' (p. 49).

The judgment to reject the 'scholarship' of this testimony is the outcome of the Court's adoption of a critical standpoint in respect of heteronormativity. The Court judged these arguments to be evidence of a *desire* to continue a historically entrenched mode of discrimination rather than of a *need* to protect existing social relations. The Court stated that the 'withholding of the designation "marriage" significantly disadvantages' homosexuals because it 'reflects that marriage is a culturally superior status' and offers same-sex couples 'a substitute and inferior institution' (p. 116). Law that protects the superiority of heterosexual marriage, the Court stated, 'exists as an artifact' of the historical and social relations from which it stems (p. 111) but such relations are an inadequate foundation on which to create law: '[t]radition alone cannot form a rational basis for a law' (p. 124). The Court stated that 'Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples' and that, reflecting a 'traditional' rather than a 'rational' view, such a belief is not 'a proper basis on which to legislate' (p. 132).

As in *Fourie*, the judgment of the SCC was not inevitable. It is possible to imagine the claims presented in support of Proposition 8 being interpreted from a heteronormative

standpoint in order to deem them credible evidence for, and rational and legitimate reasons to, protect the 'traditional' institution of marriage. It is also possible to envisage such evidence being interpreted, as it was during the enactment of the Defense of the Marriage Act 1996, as having little concern with gay and lesbian rights or lives. The most significant aspect of the judgment, therefore, is the judicial standpoint adopted in respect of heteronormativity. It was from this standpoint that the Court concluded that the 'evidence at trial regarding the campaign to pass Proposition 8 uncloaks the most likely explanation for its passage: a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples' (pp. 133–134). This idea of 'uncloaking' the basis of heteronormative law strongly resonates with Ingraham's advocacy of 'ways of thinking' that reveal how evidence advanced in support of 'natural' and 'traditional' marriage 'naturalizes heterosexuality and conceals its constructedness in the illusion of universality' (1996: 196).

Because Proposition 8 was a voter-enacted amendment to the Constitution of California, its judicial invalidation created considerable criticism. Much of this criticism has focused on the interpretative 'bias' of the judge who heard the case, Judge Walker, who opponents have claimed used his discretion and authority to pursue partisan political interests. Tim Wildmon (2010), for example, representing the American Family Association, argued that the judgment constitutes a 'tyrannical, abusive and utterly unconstitutional display of judicial arrogance'. Criticizing the SCC for 'trashing' the will of the people, Wildmon (2010) went on to state it was 'extremely problematic that Judge Walker is a practicing homosexual himself … because his judgment is clearly compromised by his own sexual proclivity'. This 'black-robed tyrant' could not be 'impartial', Wildmon (2010) argued, because being homosexual made it impossible for him to be objective: 'his situation is no different than a judge who owns a porn studio being asked to rule on an anti-pornography statute'.

Such criticism is an example of the homophobia that homosexual judges are likely to experience (Moran, 2006) and of the claims that their sexual orientation makes them incapable of achieving judicial objectivity. Such a claim reiterates the argument that heteronormative judgments (from heterosexual judges) are impartial and politically disinterested interpretations of evidence and law whereas judgments critical of heteronormativity are partial and politically motivated. Yet, this fails to acknowledge that, in adjudicating competing claims in *Perry*, the Court was by necessity required to justify its interpretation in respect of community (rather than personal) standards of social and political justice. In attempting to discern such standards, the SCC, as in *Fourie*, relied heavily on the 'historical prevalence' of 'archaic, shameful or even bizarre' restrictions on marital partners in respect of race (p. 112). In drawing an analogy with racial segregation in marriage – which stands in 'stark contrast to the concepts of liberty and choice inherent in the right to marry' (p. 112) – the Court appealed to a fundamental conception of social and political justice as the justification for its critical interpretation of heteronormativity.

Judgment #3: Schalk and Kopf V Austria (2010)

Schalk originated in 2002 when the Vienna Municipal Office refused a same-sex couple the right to contract civil marriage under the Civil Code 1812 that states that marriage

can only be contracted by persons of the opposite sex. The applicants lodged an unsuccessful appeal with the Vienna Regional Governor who informed them that Austrian law, and Article 12 of the European Convention on Human Rights ('the Convention'), guaranteed the right only for persons of opposite sex to marry. In a subsequent appeal in the Constitutional Court, the couple contended that marriage had evolved since the enactment of the Civil Code and that the law should be amended in light of present day conditions. The Constitutional Court rejected this claim, again citing Article 12 of the Convention which provides that: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.

The couple made an application to the European Court of Human Rights (ECHR) on two grounds: first, that Article 12 should be read in light of present day conditions (*Tyrer* v *United Kingdom*, 1978: para. 31) to acknowledge the existence and importance of same-sex partnerships; second, that excluding same-sex couples from marriage constituted a form of discrimination contrary to Article 14 (which prohibits discrimination in respect of Convention rights) taken in conjunction with Article 8 (which protects 'private and family life'). By the time the ECHR heard the case, Austria had enacted The Registered Partnership Act which, coming into force in January 2010, enables 'two persons of the same sex' to become 'registered partners' and 'thereby commit themselves to a lasting relationship with mutual rights and obligations'. There are a number of differences between marriage and registered partnership with the most significant involving parental rights: registered partners, unlike married couples, cannot adopt a child, cannot adopt a step-child, and have no access to state regulated artificial insemination. On the basis of these recognized differences, the ECHR refused an application from the Austrian government to have the case struck from the Court's list in light of the enactment of The Registered Partners Act. Therefore, the ECHR considered the applicants' case in respect of Article 12 and Article 14 taken in conjunction with Article 8 of the Convention.

In contrast to *Fourie* and *Perry*, the ECHR did not adopt a critical standpoint in respect of heteronormativity and the judgment does not contain a critical interpretation of marriage. This is made most clear by the Court's rejection of the applicants' claim that, since the Convention is a 'living instrument' (*Tyrer* v *United Kingdom*, 1978: para. 31), Article 12 should be read in light of the present day existence of same-sex relationships. The Court noted that, in light of changes to Article 9 of the Charter of Fundamental Rights of the European Union that has deliberately omitted the reference to men and women in its provision on marriage, 'it would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex' (para. 61). However, according greater weight to the 'deep-rooted social and cultural connotations' of marriage in Europe, the Court stated that it 'must not rush to substitute' the legal provisions of 'national authorities, who are best placed to assess and respond to the needs of society' (para. 62).

The Court's heteronormative standpoint in respect of the 'connotations' of marriage underpinned its examination of the wording of Article 12. The Court stated that, in contrast to all of the other substantive Articles of the Convention that grant rights to 'everyone', the specification that Article 12 makes to 'men and women' must be 'regarded as

deliberate' (para. 55). It interpreted the inclusion of this deliberate wording as evidence that the original drafters of the Convention 'clearly understood [marriage] in the traditional sense of being a union between partners of different sex' (para. 55). Unlike in *Fourie*, the ECHR engaged in no critical consideration of the 'assumed reality' contained within the wording of Article 12. Rather, the Court adopted the 'traditional sense' of marriage that it claimed underwrote the textual formulation of Article 12 and justified this interpretation by stating that the majority of contracting states still enforce these 'traditional' arrangements in their domestic law (only six out of 47 allow same-sex marriage).[5] Whilst the Court noted that the 'institution of marriage has undergone major social changes since the adoption of the Convention' (para. 58), it did not consider 'tradition' to have transformed significantly enough to allow it to impose alternative legal conditions.

This heteronormative interpretation of marriage was significantly influenced by the Court's existing case law relating to transsexual marriage. In *Cossey* v *United Kingdom* (1990), the Court found that 'the attachment to the traditional concept of marriage which underpins Article 12 provided sufficient reason for the continued adoption ... of biological criteria for determining a person's sex for the purposes of marriage' (para. 46). However, in *Goodwin* v *United Kingdom* (2002) the Court departed from that position and stated that the terms 'man' and 'woman' in Article 12 should no longer be understood as being determined by purely biological criteria. The judgment in *Goodwin,* which has been the basis for legislative changes in Europe that afford transsexuals legal recognition and rights in relation to their acquired sex (e.g. The Gender Recognition Act 2004 in England and Wales), was initially viewed as providing a strong basis for advancing claims for same-sex marriage under Article 12 (see e.g. Wintemute, 2005: 192). However, in *Schalk* the Court advanced two reasons why the principles established in *Goodwin* did not impose any obligation on contracting states to grant same-sex couples access to marriage: first, unlike in *Goodwin*, there was no evidence of a convergence in standards regarding same-sex marriage in Europe; and second, *Goodwin* was concerned with marriage of partners who are of different genders (even if gender is not defined by purely biological criteria). As a result, the Court found there had been no violation of Article 12.

In relation to Article 14, taken in conjunction with Article 8, the applicants complained that The Registered Partnership Act maintains differences between heterosexuals and non-heterosexuals and that no weighty reasons had been provided by the Austrian state to support this difference in treatment. ECHR jurisprudence considers that difference in treatment between persons in relevantly similar situations is discriminatory when it has no objective and reasonable justification. The Court has frequently found that difference in treatment on the grounds of sexual orientation is disproportionate (Johnson, 2010). However, in *Schalk*, whilst the Court acknowledged that same-sex and different-sex couples are in a relevantly similar situation, in respect of their need for legal recognition and protection of their relationships, it felt unable to extend the protection of Article 14 to the applicants. A key aspect of the Court's reasoning in respect of Article 14 was the importance it accorded to the protection of heterosexual marriage by Article 12. Having found that 'Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage', the Court concluded that 'Article

14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either' (para. 101).

The judgment reached by the ECHR was far from inevitable. It is possible to imagine that, within the scope of its case law and judicial methodology, it could have interpreted Article 12 within the light of present day conditions to reach an alternative view. For instance, it could have invoked the recently established principle in *E.B.* v *France* (2008) that discrimination suffered as a result of public authorities placing 'systematic' and 'excessive' emphasis on heteronormative arrangements is illegitimate and disproportionate under Article 14 of the Convention (Johnson, in press). However, the sitting judges in *Schalk* adopted a heteronormative standpoint in respect of marriage. Whilst they acknowledged the 'substantial differences' between same and opposite-sex couples they stated that maintaining such differences 'corresponds on the whole to the trend in other member States' and that, as such, 'the Court does not see any indication that the respondent State exceeded its margin of appreciation' (para. 109). In contrast to *Fourie* and *Perry*, where the sitting judges appealed to wider conceptions of social and political justice (primarily around race) to ensure public recognition for their critical standpoints, the judgment in *Schalk* shows that the Court appealed to existing 'deep rooted' heteronormative standards to justify its view that the Austrian state should be granted a wide margin of appreciation to maintain distinctions around sexual orientation in respect of marriage.

Conclusion: Standpoints and Diversity

The judgments examined here demonstrate the importance of judicial standpoints in cases where non-heterosexuals challenge heteronormative law. They show that cases of this type are not resolved through the judicial application of existing legal rules but through an assessment of, and appeal to, particular standards of social and political justice. As such, a key question often raised by judgments of this type is: what factors determine the adoption of a particular standpoint that, in turn, influences a judge's conception of justice? The answer that is commonly provided is that the standpoints that individual judges occupy are significantly influenced by their social identities. The recognition that identities generate standpoints, which in turn produce 'knowledge', has led to calls to ensure greater diversity among judiciaries in respect of gender (e.g. Rackley, 2007), race (e.g. Milligan, 2006) and sexuality (e.g. Moran, 2006) in order to promote a 'multiple subjectivities' approach to understanding and adjudicating complex social phenomena (Harding, 1991).

This approach to judicial diversity, as Milligan argues, is premised on the belief that an assortment of identities among judiciaries produces a multiplicity of views: 'the identity of a judge ... will affect legal outcomes' because it is 'linked to their understanding of and respect for certain moral viewpoints' (2006: 1210–1211). Nowhere did this idea receive a higher public profile than when US Supreme Court Justice Sotomayor (2001) claimed that a 'wise Latina' judge might reach better conclusions than a white judge. However, the judgments examined here question any assumption of a simple causative relationship between social identity and interpretative standpoints and problematize the idea that promoting judicial diversity on the basis of identity will ensure particular views

among judges. Since the senior judges sitting in both *Fourie* and *Perry* did not share identities based on sexual orientation, but did share a common interpretation of heteronormativity, the judgments empirically demonstrate the problem of assuming a correlation between sexual identity and standpoint. Justice Albie Sachs, the presiding judge in *Fourie*, has discussed at length how 'experience ... becomes part of your being' and 'shapes your responses and your reactions' so that 'the way you tend to lean one way or the other when choosing between forms of persuasive reasoning, each with its own internal rationality, [leads] to different outcomes' (2009: 239). Yet Sachs identifies as a heterosexual man and does not possess the 'experience' of living as a non-heterosexual. Comprehension and critical analysis of heteronormativity is not necessarily determined by sexual orientation and, as Moran (2006) has argued, the idea that sexual identities produce commonality of views among judges is highly contestable.

Sachs's account of how his 'personal outlook' affected his judgment does not focus on his sexual identity but on his experience of Apartheid and his repudiation of the law that protected its forms of segregation and discrimination. This experience, he argues, underpinned his desire in *Fourie* 'to find a way of accommodating the intense significance [of marriage] for both communities [and] to speak with equal voice to both groups' (Sachs, 2009: 239). This raises interesting questions about how it might be possible to encourage an 'equal voice' approach within judiciaries in respect of sexual orientation issues. A recent report by the UK Ministry of Justice suggests that appointing judges 'from a wide range of backgrounds and life experiences will bring varying perspectives to bear on critical legal issues' and that this is 'particularly important where there is scope for the exercise of judicial discretion or where public interest considerations are a factor' (Ministry of Justice, 2010: 16). Yet, the judgments examined here show that the adoption of standpoints critical of socially normative and entrenched understandings of the world (and, in the case of *Perry*, views democratically established in law) depends not only on the 'background' of the individual who occupies that standpoint but, more importantly, on whether the standpoint has broad appeal in respect of public conceptions of social and political justice. *Perry* and *Fourie* demonstrate that the critical interpretative standpoint adopted by the Courts relied upon the social coherence and intelligibility of claims relating to racial equality and civil rights (Ball, 1997) to justify and legitimate it. The judgment in *Schalk*, by contrast, appealed to another standard of justice – in respect of the 'deep rooted' nature of marriage – to justify the heteronormative standpoint adopted by the court.

Judicial standpoints critical of heteronormativity are therefore not simply the outcome of the individual experience of judges but of the social relations that generate standpoints and, importantly, accord them legitimacy (that make them seem 'right'). The standpoints that judges adopt are the product of, and function within, the broader social, political and legal landscape of contemporary societies. Judges are not, as Foucault would argue, 'all-powerful subject[s]' who 'manipulate', overturn', or 'renew' the 'discursive fields' in which they are situated but, rather, they are:

> discoursing subjects [who] form a part of a discursive field – they have their place within it (and their possibilities of displacement) and their function (and their possibilities of functional mutation). Discourse is not a place into which subjectivity irrupts; it is a space of differentiated subject-positions and subject-functions. (Foucault, 1991: 58)

Whilst this acknowledges the discretion and agency of judges (to displace and mutate discourse) it recognizes that the discursive context in which they are situated determines the 'limits and forms of the *sayable*' (Foucault, 1991: 59, emphasis in original). It is, in other words, the social relations in which judges are situated which determine their habitus that, in turn, influences how they adopt, appropriate, deploy and justify particular standpoints in respect of certain issues.

An important conclusion, therefore, is that whilst these judgments show that the adoption by judges of critical interpretative standpoints is a decisive aspect of challenging the heteronormativity of marriage law, these standpoints are produced in relation to, and rely upon, broader conceptions of social and political justice. Whilst all of the judgments examined here use the significant cultural and social capital of the law to mandate their authority, their symbolic power ultimately depends upon a social recognition of the pronouncements they make. Therefore, ensuring a diversity of voices among judiciaries in respect of heteronormativity depends less on determining who should speak from these standpoints, but on who will listen to arguments when they are made (Spivak, 1990). The symbolic legitimacy of certain standpoints does not result from the categorical identities of those who speak from them (regardless of how often those same categorical identities are used to discredit the speakers) but from the legitimacy accorded to their standpoint by others. As Dworkin (1963) argues, judges appeal to public standards of justice and, if in doing so they adopt critical positions on majoritarian opinion, they must convince that their conception is legitimate. Whilst the role of judicial interpretation is vital in challenging heteronormative marriage laws, ensuring that such interpretation exists depends less upon appointing particular judges and more upon fostering wider social relations in which such critical standpoints are recognized as legitimate and authoritative.

Notes

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1. For a critique of the view that gaining legal access to civil marriage will result in a transformation of heteronormative social relations or a weakening of social discrimination on the grounds of sexual orientation, see Robson (1998).
2. Gabel (1980) argues that all legal reasoning involves adjudicating between diverse political claims and opposing views of justice, but that such reasoning is inherently repressive because judges tend to adopt dominant political ideologies and, as a result, sanction existing social relations.
3. The common law definition of marriage is founded on the principle, established in *Hyde* v *Hyde and Woodmansee* (1866), that marriage is 'the voluntary union for life of one man and one woman to the exclusion of all others'. The relevance of this definition for homosexual partnerships has been a matter of debate since at least the 1970s (see e.g. Veitch, 1976) and it has been subject to challenge by same-sex couples in a number of common law jurisdictions. For example, in *Wilkinson* v *Kitzinger* (2006) the petitioner, a British woman who had legally contracted marriage to her same-sex partner in British Colombia, challenged the exclusion of same-sex partners from marriage under English law. One aspect of the case made by the petitioner was that the common law should be developed to afford same-sex couples the opportunity to

marriage. The Court, unlike in *Fourie*, rejected this argument and adopted a heteronormative interpretation of marriage: 'it is apparent that the majority of people, or at least of governments, not only in England but Europe-wide, regard marriage as an age-old institution, valued and valuable, respectable and respected, as a means not only of encouraging monogamy but also the procreation of children and their development and nurture in a family unit (or "nuclear family") in which both maternal and paternal influences are available in respect of their nurture and upbringing' (*Wilkinson* v *Kitzinger*, 2006: para.118). For a discussion of this case, and the common law more generally, see Probert (2007).

4. All three of the judgments examined in this article considered legal provisions that afford same-sex couples the opportunity to register partnerships but deny them access to marriage. The question of whether such legislation advances greater equality for homosexuals, or constitutes new forms of regulation and discrimination, has become much debated in contemporary societies (see e.g. Beresford and Falkus, 2009; Stychin, 2005). It is not possible to synthesize or comment upon the wide range of cultural and political opinion advanced in respect of the merits or drawbacks of civil partnership legislation. However, one important point to note in respect of the judgments discussed here is that judges who adopt a critical view of heteronormative marriage law are also highly critical of separate civil partnership legislation (the sitting judges in *Fourie*, for example, described it as based on the discredited 'separate but equal' principle that underpinned Apartheid), whereas judges who are uncritical of heteronormative marriage do not view separate partnership provisions as problematic.
5. This interpretation of the Convention was adopted in *Wilkinson* v *Kitzinger* (2006) where the Court stated that to accord 'a same-sex relationship the title and status of marriage would be to fly in the face of the Convention' (para. 120).

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