Of soft vengeance and laughter

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We celebrate the judicial career of Justice Albie Sachs. However, we would do well to remember his other careers – as lawyer, freedom fighter, writer, scholar – and to understand how these experiences shape the identity that has left such a unique imprint upon South African justice. Justice Sachs has himself taken note of the existence of 'a fascinating and not very obvious chemistry between [his] non-judicial experiences and [his] decision-making as a judge'.[1] For example, after losing his arm to a car bomb, Sachs spoke of the 'soft vengeance' he would mete out on his oppressors: subjecting them to a regime of human rights for all.[2] Once he had reached the bench, his own experience of captivity and torture was sublimated into support for the right to a fair trial, and respect for dignity as a foundational value of the new South Africa.

Surprisingly, the strange alchemy that exists between the non-judicial experiences and the judicial career of Justice Sachs gives a central role to laughter. This is surprising because so often laughter seems to exist at the expense of dignity, or at least to threaten it. Such a threat should not be taken lightly, for dignity is indeed a founding value of the democratic South Africa[3] and has been given a central role in our constitutional jurisprudence as both a right and an underlying value.[4] Justice Sachs too, in his recent memoir of his judicial career, refers to respect for dignity as 'the unifying constitutional principle' in a society such as our own.[5] Yet in the same book Sachs also allocates a place for laughter.[6] How is it possible for laughter to co-exist with the weightiness of jurisprudence dealing with dignity, and the seriousness of the suffering which the Constitutional Court is so often asked to alleviate?

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[1]Sachs *The strange alchemy of life and law* (1990) 4.

[2]Sachs *The soft vengeance of a freedom fighter* (2000).

[3]Section 1(a) of the Constitution of the Republic of South Africa, 1996.

[4]*S v Makwanyane* 1995 3 SA 391 (CC) paras 144, 328-329; *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 SA 984 (CC) paras 47-49; Barnard-Naudé, Cornell and Du Bois (eds) *Dignity, freedom and the post-apartheid legal order* (2009).

[5]Sachs (n 1) 213.

[6]*Id* 5, 125-139.

In response to such a question, this paper traces a line through the biography of Albie Sachs by reading three texts, one written at the end of his career on the Constitutional Court, one issued from the bench, and one predating his judicial career. Imagine this as a kind of archaeological dig, a search for the origin of the judge's most mature thoughts in the layered soil of his life experiences. Freud was famously fascinated with archaeology, and excavation has remained a central metaphor for psychoanalysis,[7] as well as for autobiography[8] and critical historiography.[9] We proceed on the basis of this metaphor, then, because it seems so uniquely placed to investigate texts that simultaneously illuminate autobiography, history, and the judicial subconscious. Provocatively, this archaeology seems to suggest that even if dignity is sometimes displaced by laughter, it is during such very moments that healing takes place and community is formed. If this thought is jarring at first, it is because we have not yet learned how to take laughter seriously.

I

In *The strange alchemy of life and law*,[10] Albie Sachs combines excerpts from the most influential judgments handed down by our Constitutional Court with his own reminiscences of political transition and thoughts on constitutional adjudication. Sachs has written autobiography before.[11] This time, however, the reminiscences are arranged and told from the perspective of the bench. After recounting episodes such as his detention in South Africa, his drafting of a Code of Conduct for the exiled African National Congress, and his own reaction to seeing torturer Jeff Benzien crying at the Truth and Reconciliation Commission (TRC), Justice Sachs carries on to discuss four cases in which the Constitutional Court was asked to decide whether accused persons who had set out to destroy legal orders were entitled to the protection of the very human rights they had sought to destroy.[12]

The book continues in this manner, alternating reminiscence with legal opinion, mixing events from a life lived outside of the law with decisions that have helped shape a new legal system. Justice Sachs recalls his own involvement with the TRC, its logic of acknowledgement, amnesty, and atonement, and then turns to the subject of

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[7]Freud 'Delusions and dreams in Jensen's *Gradiva*' in *The standard edition of the complete psychological works of Sigmund Freud* 9: 1-95 (1907); Khanna *Dark continents: Psychoanalysis and postcolonialism* (2003) 38.

[8]Benjamin *Selected writings, volume II* (2003) 611.

[9]Foucault *The archaeology of knowledge* (1969); *The order of things: An archaeology of the human sciences* (1974).

[10]Sachs (n 1).

[11]Including Sachs (n 2), *The jail diary of Albie Sachs* (1990); *The free diary of Albie Sachs* (2004).

[12]The cases discussed are *Azanian Peoples Organisation v President of the Republic of South Africa* 1996 4 SA 671 (CC), *Mohamed v President of the Republic of South Africa* 2001 3 SA 893 (CC), *S v Basson* 2005 1 SA 171 (CC), *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC). See Sachs (n 1) 9-46.

apology as a remedy in defamation cases,[13] the need for mediation in certain cases of mass eviction,[14] and the meaning of restorative justice.[15] He considers the role of reason in writing judgments, the nature of legal judgment, the enforceability of socio-economic rights, and ends with a discussion of his decision extending the opportunity to marry to same-sex couples.[16] No doubt, some readers will disagree with particular legal decisions or philosophical musings, and some might feel less sanguine about the effect the Constitutional Court has had on alleviating socio-economic inequality on the one hand, or about the doctrinal coherence of the Court's jurisprudence on the other. Nevertheless, *The strange alchemy of life and law* shows how the law might learn from a life full of passion and experience, and will persuade many that it should do so.

Right in the heart of this passionate, poetic book is a chapter that is, paradoxically, at once the darkest and most affirming of episodes.[17] The story is of the car bomb which cost Sachs his arm in 1988. Having spent the early years of exile completing a doctorate and teaching law in England, Sachs moved to Mozambique in the late seventies. There he worked as a legal researcher, continued to teach and witnessed the development of a post-revolutionary Mozambican legal system.[18] It was there too that the apartheid security forces finally reached him. As Sachs writes, he did not take part in the armed struggle, yet the armed struggle came to him.[19] It did so in the form of the bomb detonated in his car as he drove towards a Mozambican beach.

Sachs recalls emerging from a state of serene non-awareness as the sound of a doctor's voice pulled him gently out of the darkness. 'I am elsewhere and other', writes Sachs in his memoir, as he describes this state of limbo. 'This is the time to explore and rediscover myself. What has happened to me, what is left of me, what is the damage?'[20]

It is at this point that he remembers a joke, a Jewish joke about a Himie Cohen who falls off a bus. As Himie picks himself up he seems to make the sign of the cross over his body. 'Himie', says his friend in astonishment, 'I didn't know you were Catholic'. No, says Himie: 'spectacles … testicles … wallet and watch'. And as Sachs makes the same sign over his own body, he discovers that he has lost an arm but has retained much more: his wits, and certainly, his wit. He concludes: 'I joke, therefore I am'.[21]

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[13]The subject of his minority judgment in *Dikoko v Mokhatla* 2006 6 SA 235 (CC).
[14]*Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).
[15]*S v M* 2008 3 SA 232 (CC).
[16]*Minister of Home Affairs v Fourie* 2006 1 SA 542 (CC).
[17]Sachs (n 1) 125-129. The chapter repeats material in Sachs (n 2) 10-12.
[18]As documented in Sachs and Welch *Liberating the law: Creating popular justice in Mozambique* (1990).
[19]Sachs (n 1) 23.
[20]*Id* 123.
[21]*Id* 126-7. It is worth pointing out that Sachs has always had a penchant for a good joke in trying circumstances. In Sachs (n 11) *The jail diary* 185 he recounts the Christmas card he sent his jailors:

But the real punchline – the moral, if you will – is to come. Jacob Zuma is sent by the ANC leadership to visit Sachs in hospital. Sachs tells Zuma of the doctor's gentle words, of being pleased to be in the hands of FRELIMO, and Zuma laughs out of cameraderie and appreciation. Sachs then tells him the joke which he had told himself: Zuma 'doubles up and yells with laughter, his mouth wide open, his head rolling back and then coming down again, his eyes full of sympathetic mirth'.[22] But it is the character of this laughter on which Sachs ends the episode: the way in which that laughter acknowledges both cultural identity and recognition, shows familiarity across the space of difference, and signifies togetherness. Empathy, community, humanity, these are wrapped up in this laugh, held close, so familiar in the moment of mirth that they go almost entirely unremarked. Sachs writes:

> This is what the ANC is, we do not wipe out our personalities and cultures when we become members, rather we bring in and share what we have, Zuma's African-ness, his Zulu appreciation of conversation and humour is mingling with my Jewish joke, enriching it, prolonging and intensifying the pleasure. [W]e are close, yet we do not have to become like each other, erase our personal tastes and ways of seeing and doing things, but rather contribute our different cultural inputs so as to give more texture to the whole.[23]

Now, in the philosophy of humour, difference is a concern. Is it ethical to laugh at others? At the expense of others? Is it funny? Simon Critchley, in his book on humour, writes that 'true humour does not wound a specific victim and always contains self-mockery. The object of the laughter is the subject who laughs'.[24] Whether the stipulation is correct or not, we should consider the distinction between actual laughter and true humour to be well-founded. It is certainly possible to laugh in the absence of humour. A tickled person laughs involuntarily, and an aggressor might laugh snidely or victoriously. Moreover, as alluded to by Critchley, it may be that whether a joke is *truly* funny is independent of whether its audience thinks it to be so or not. One way to capture this as a distinction between the conditions of a humorous *stimulus* (for example, a *truly* funny joke) and those of a humorous *response* (such as genuine laughter or amusement).

Distinguishing in this way between laughter and its stimulus opens the door to identifying certain laughter as inappropriate because of its offensiveness. As Berys Gaut has put it, on the one hand we have a theory that joking and justice are related, so that 'joking must be just joking'. Yet on the other hand, for many 'humor is not subject to normal ethical constraints, for we are just joking'.[25] It is easy to be

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ALTHOUGH I HAD MY TWENTY-FIRST SIX YEARS AGO OR MORE,
ALL I WANT FOR CHRISTMAS IS,

and then on the next page,

THE KEY OF THE DOOR.

[22]Sachs (n 1) 128.
[23]*Ibid*.
[24]Critchley *On humour* (2002) 14.
[25]Gaut 'Just joking: The ethics and aesthetics of humor' (1998) 22 *Philosophy and Literature* 51 at 51.

pessimistic about much laughter. Historically the 'superiority theory'[26] of laughter has been popular with philosophers. The theory holds that we find a joke humorous because it in some way denigrates someone, namely the butt of the joke. Hobbes, for example, famously held that 'the passion of laughter is sudden glory arising from some sudden conception of some eminency in ourselves'.[27]

There are obvious counter-examples to such a theory: puns and wordplay, for example, show that superiority is not a necessary condition of being amused. Nor can superiority be a sufficient condition of amusement, given the occurrence of instances of disdain or triumph, seriously felt. The idea that laughter is a kind of aggression may seem to make sense of 'ethnic jokes', in which the protagonist is marked as belonging to a particular collective, and also of self-deprecating jokes, in which the joker makes herself (or her community) the butt of the joke. Sachs's joke might seem to be of both kinds at first blush, but it is hard to specify in what sense its audience might feel superior to Himie, who has after all survived falling from a bus with all the important bits intact, and our amusement does not seem to hang on the joke's being a *Jewish* joke. Indeed, many ethnic jokes can be quite hard to square with the superiority account, since it can be difficult to discern the target of a joke ostensibly aimed at the other. This may be especially true when an ethnic joke is told by a member of that group, but is also the case with sophisticated satire or parody.[28]

A successor to the superiority theory is the more successful incongruity theory, which holds that all jokes work by producing an unexpected and often nonsensical conjunction of affairs. The idea is first clearly stated, perhaps, by Kant, who wrote that humour arises from 'the sudden transformation of a strained expectation into nothing'.[29] Laughter, then, is a response to a particular kind of cognitive surprise. We can see this at work in Sachs's joke: the sign of the cross suddenly transformed into a rather prosaic and slightly crass self-examination. A necessary condition of our laughter is that we seriously entertain some absurdity, if only briefly. Schopenhauer makes this more exact: what makes us laugh is 'the incongruity of the conceived with the perceived'.[30] This theory has become quite commonly espoused in contemporary analytical approaches to humour. [31]

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[26]The classification of theories of humour into superiority theories, incongruity theories and relief theories was allegedly coined by Monro *The argument of laughter* (1951), and occurs in the contemporary literature with great frequency.

[27]Hobbes *The treatise on human nature and that on liberty and necessity* (1812) 65.

[28]Consider Breitz *Aiwa to Zen* (2003), a work by South African video artist Candice Breitz documenting her first trip to Japan. She choreographed and filmed a short theatrical piece in which the script was written using the 150 Japanese words she knew at the time of her visit: sushi, Sapporo, sashimi, Murakami, Daihatsu, and so on. The piece ends with everyone happy, singing 'Sega! Sega! Sega! Anime'. The piece does not so much ridicule the Japanese as parody Western consumer culture's objectification of exotic cultures.

[29]Kant *Critique of judgment* (1790) I, I, 54.

[30]Schopenhauer *The world as will and representation, volume II* (1818) 91.

[31]For example, Clark 'Humour and incongruity' (1970) 45 *Philosophy* 20, Morreall *Taking laughter seriously* (1983).

The incongruity theory places its focus upon the amused response. Rather than asking what we *should* find humorous, as Critchley insists, the theory looks for the common thread that runs through the many things that *do* make us laugh. We have an increasingly detailed scientific understanding of laughter, too. The incongruity theory argues that, whatever it is that makes us laugh, our laughter is as much a cognitive phenomenon as it is an affective one. Neuroscience seems to confirm this, since laughter is accompanied by the activation of regions of the brain associated with cognition before the activation of older systems associated with reward processing and emotion.[32]

Yet none of this should satisfy us as to the point of laughter. It is not enough to understand the logical similarities of jokes, or the physiology of our reaction to them. As Henry Bergson pointed out, we want to know 'why this particular logical relation …contracts, expands, and shakes our limbs, whilst all other relations leave the body unaffected '.[33] In order to proceed, we must place laughter 'back into its natural environment, which is society … Laughter must answer to certain requirements of life in common. It must have a *social* signification'.[34]

One way to respond to Bergson's request is to point out that shared laughter typically creates a special kind of intimacy between the people who share it. That this is so was first persuasively set out in a little book on jokes by the philosopher Ted Cohen,[35] though precursors do exist.[36] Cohen points out that all jokes are, to varying extents, 'conditional'. Every instance of amusement relies on the audience of a joke supplying some knowledge of their own to complete the joke.[37] At the most minimal level, jokes require a shared language or, in the case of a visual gag, a similar perspective. However, many jokes further require that joker and audience share knowledge about the world (for example that Catholics sign themselves with the cross) and an understanding of certain commonplaces and symbolisms (for example, the conventional fiction of Irish jokes that the Irish are inveterate drinkers). This background knowledge and understanding cannot be imparted explicitly to the audience without ruining the joke. Implicit in the sharing of a successful joke, therefore, is the recognition by the joker and her audience that they form a community and share a perspective upon the world and a feeling about it.[38] This is not the community that is formed when a group of people are aware that they believe the same things about the world. Rather, laughter signals that people are at that moment at one in how they feel, and at one in their recognition of this mutual same-feeling.[39]

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[32]That is, activation of various cortical areas is followed by activation of the mesolimbic pathway and the amygdala. See Goel and Dolan 'The functional anatomy of humor' (2001) 4 *Nature Neuroscience* 237.
[33]Bergson *Laughter: An essay on the meaning of the comic* [1900] (2008) 12.
[34]*Ibid*.
[35]Cohen *Jokes* (1999).
[36]For example, Susan Purdie, who suggested that a 'delicious intimacy' is created by the collusion between a joker and her audience. See Purdie *Comedy: The mastery of discourse* (1993) 6.
[37]Interestingly, this mirrors Purdie's description of humour as essentially discursive. *Id passim*.
[38]Cohen (n 35) 12-32.
[39]*Id* 30.

There are many ways for humans to recognise their humanity when in each other's company. How might we characterise the special nature of the intimacy that arises together with laughter? Consider again that humour often arises because of the incongruity between what the listener is asked to believe and what the listener might take to be or understand as the normal belief. When successful, a joke compels its listener to adopt a momentarily nonsensical view of the world. A punchline, uttered outside of its humorous context, is typically bizarre and pointless. In the world of the joke, however, the listener allows herself to be deceived, and does so quite publicly. In the words of Noël Carroll, 'jokes are designed to guide us in the most coercive way toward marshaling ridiculous interpretations'.[40] Participating in the telling of a joke therefore requires some degree of trust and vulnerability on the part of the listener, and indeed the teller, who commits herself to speaking nonsense in public.[41]

The intimacy of laughter, in other words, is derived from the trust that comes from momentarily setting aside one's dignity and taking refuge in a communal abandonment of reason. Whether a joke is rightly funny or not (in Critchley's sense), all laughter that issues from genuine mirth shares the warmth of this momentary oblivion. It is this closeness that Sachs writes of when he shares his joke with Zuma. And so, the joker who laughs at himself, at his culture, at his situation, does not so much debase his dignity as momentarily set it aside, letting it float, feather light, up and out of his mouth.

II

'Does the law have a sense of humour?'[42] This is how Sachs J begins his separate judgment in *Laugh It Off Promotions CC v South African Breweries International Finance BV*,[43] and this opening gambit, I hope to show, is more than a pun on the name of the appellant.

At its core, Sachs J's judgment is concerned with the balancing of trademark law and freedom of expression.[44] Indeed, it is increasingly a concern for intellectual property scholars that the powers of intellectual property rights holders are being extended at the expense of a vibrant public domain and the rights of the consumers of intellectual property goods.[45] Intellectual property law has become

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[40]Carroll 'Intimate laughter' (2000) 24 *Philosophy and Literature* 435 at 449.
[41]*Ibid*.
[42]*Laugh It Off Promotions CC v South African Breweries International Finance BV t/a SABMark International* 2006 1 SA 144 (CC) para 70.
[43]*Ibid* (hereafter '*Laugh It Off v SAB*').
[44]On this issue and its resolution in *Laugh It Off v SAB*, see further Deacon and Govender 'Trade mark parody in South Africa – the last laugh!' (2007) 32 *Journal for Juridical Science* 18, Rimmer 'The black label: Trade mark dilution, culture jamming and the no logo movement' (2008) 5 *SCRIPT-ed* 71.
[45]On the threat to freedom of expression in particular, see, eg, Griffiths and Suthersanen (eds) *Copyright and free speech: Comparative and international analyses* (2005), Tushnet 'Copy this essay:

a pervasive and significant form of economic and social regulation because of the rise of digital technologies and the tendency to regard culture and knowledge as information that is subject to property rights.[46] Yet traditionally, as histories of copyright and other intellectual property laws make clear, the law has aimed at striking a balance between the interests of rights holders and those of the general public who wish to make use of intellectual property goods.[47] In other words, intellectual property law is not aimed at the absolute enforcement of monopoly rights on the part of creators or their investors, but seeks to balance protection with the maintenance of a healthy public domain.

Although some credit Lockean theories of property with being the underlying rationale for intellectual property laws, most contemporary analyses situate conceptions of intellectual property in a utilitarian or instrumentalist framework, with economic analysis playing a particularly valued role.[48] Generally speaking, such frameworks claim that the role of intellectual property law is to approximate an efficient allocation of resources by striking a balance between:

(i) offering incentives to authors and creators by providing them with limited monopoly rights in their creations, and
(ii) protecting the well-being of users of intellectual property goods who would benefit from intellectual property goods but for the monopoly prices charged to make use of them.

This second set of interests includes the general interest of the public in having a public domain that is not subject to monopolistic intellectual property rights. In particular, inventors and authors have an interest in being able to draw upon an existing commons of shared ideas and prior creations in order to fuel their creative processes.

Economic analyses therefore lend support to the careful delimitation of intellectual property rights and the protection of a commons from the encroachment of monopolistic rights. This balancing should be achieved by regulation, given that intellectual property goods share many of the characteristics of public goods, which cannot be allocated efficiently by market mechanisms.[49] It is not only normative economic frameworks that advocate the limiting of the monopolies given by

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How fair use doctrine harms free speech and how copying serves it' (2004) 114 *Yale LJ* 535; Benkler 'Through the looking glass: Alice and the constitutional foundations of the public domain' (2003) 66 *Law and Contemporary Problems* 173; Benkler 'Free as the air to common use: First Amendment constraints on the enclosure of the public domain' (1999) 74 *New York University LR* 354.

[46]Boyle *Shamans, software and spleens* (1996).

[47]'Letter from Thomas Jefferson to Isaac McPherson, August 13, 1813' in Merges and Ginsburg (eds) *Foundations of intellectual property* (2004) 17-21, Patterson *Copyright in historical perspective* (1968), Rose *Authors and owners: The invention of copyright* (1993).

[48]For example, Drahos *A philosophy of intellectual property* (1996); Landes and Posner *The economic structure of intellectual property law* (2003).

[49]Famously explained in Samuelson 'The pure theory of public expenditure' (1954) 36 *Review of Economics and Statistics* 387.

intellectual property rights. Empirical research has tended to show that intellectual property regimes that do not strike the correct balance between rights holders and the public domain can hinder economic development.[50] Indeed, the old 'tragedy of the commons' analysis that claimed that avoiding propertisation of a commons would necessarily result in destructive overconsumption[51] has also been cast into doubt by empirical work.[52] The increasing enclosure and appropriation of the public domain at the behest of corporate interests has therefore provoked anxious concern amongst commentators, and calls for renewed protection of an intellectual commons.[53]

It is worth noting, however, that some of the outrage over the growing imbalance of intellectual property law is not only prompted by the concerns of public welfare economics and development economics. Indeed, intellectual property laws do not only have economic effects. Since they regulate the creation and circulation of knowledge and culture, they are profoundly involved in the construction of our individual and collective identities. For this reason analyses based on exchange and efficiency do not capture well the effects of trademarks and other intellectual property goods which, like advertising and pollution, we consume involuntarily.

For these reasons there has emerged a critique of intellectual property regimes that is not economic in nature. Instead, this critique engages with the insights of literary theory and cultural studies in order to explain how intellectual property regimes help to shape the realm of public debate as well as our private identities.[54] This is part of a larger terrain that the legal anthropologist Rosemary Coombe has dubbed 'critical cultural legal studies', and which shows how law is deeply implicated in the construction of cultural identity.[55] When one takes this perspective the discourse of property rights is shown to be radically inadequate for thinking about intellectual property rights.

Strains of this critical cultural legal studies figure for the first time in our jurisprudence in Sachs J's judgment in *Laugh It Off v SAB*.[56] The facts of the case featured prominently in the media. Laugh It Off Promotions CC (hereafter 'Laugh It Off') was a small close corporation created by Rhodes journalism student Justin

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[50]Gervais (ed) *Intellectual property, trade and development* (2007); Fink and Maskus (eds) *Intellectual property and development* (2005).
[51]Hardin 'Tragedy of the commons' (1968) 162 *Science* 1243.
[52]In particular, the Nobel prize-winning work of Elinor Ostrom. See especially Ostrom *Governing the commons* (1990).
[53]Classic texts of an emerging movement include Lessig *The future of ideas* (2001); Vaidhyanathan *Copyrights and copywrongs* (2001), Bollier *Silent theft: The private plunder of our common wealth* (2003), Lessig *Free culture* (2005).
[54]See especially Gaines *Contested culture* (1991), Coombe *The cultural life of intellectual properties* (1998), McLeod *Owning culture: Authorship, ownership and intellectual property law* (2001), Gibson *Creating selves: Intellectual property and the narration of culture* (2006), Haupt *Stealing empire* (2008).
[55]Coombe 'Critical cultural legal studies' (1998) 10 *Yale Journal of Law and the Humanities* 463.
[56]*Laugh It Off v SAB* (n 42) paras 70-110.

Nurse. His work mainly involved the parody of well known brands and their trade marks on printed t-shirts and in literary works. His targets had included Standard Bank, Red Bull, Lego, Steve Hofmeyr, and in fact, any corporation or personality whose brand was large enough to be popularly known and which lent itself to parodic imitation.[57]

As Nurse made plain, Laugh It Off was taking part in a global form of cultural activism known as 'culture jamming'.[58] The problem, in the eyes of culture jammers, is the unnoticed pervasiveness of corporate branding in the public sphere, and the *de facto* possession by capitalist interests of our attention. The only feasible strategy, the only form of critique that can assert itself in this crowded semiotic parade, is parody and appropriation. Culture jammers use the technology of cut and paste in order to appropriate the advertising iconography and brand names, alter them, and re-deploy them in satirical fashion. Mark Dery's seminal pamphlet *Culture jamming: Hacking, slashing and sniping in the empire of signs* remains an exhilerating introduction to the practices mobilised under this term and their rationale. He explains:

> In a society of heat, light and electronic poltergeists … the desperate project of reconstructing meaning, or at least reclaiming that notion from marketing departments and PR firms, requires visually-literate ghostbusters. Culture jamming … is directed against an ever more intrusive, instrumental technoculture whose operant mode is the manufacture of consent through the manipulation of symbols.[59]

In Nurse's words, then, Laugh It Off's irreverent use of corporate trademarks was a kind of 'ideological jujitsu',[60] using the weight of the corporation's marketing machine against itself. This was successful, more so than if they had distributed pamphlets on the subject of corporate power. As Naomi Klein has pointed out:

> Something not far from the surface of the public psyche is delighted to see the icons of corporate power subverted and mocked. There is, in short, a market for it.[61]

One such intervention was Laugh It Off's t-shirt displaying the trade mark of Black Label, a beer manufactured and marketed by South African Breweries (SAB). On the t-shirt, the mark had been altered so as to read 'Black Labour, White Guilt' instead of 'Black Label/Carling Beer'. Two smaller legends which in the original mark read 'America's lusty, lively beer' and 'Brewed in South Africa' now read 'Africa's lusty, lively exploitation since 1652' and 'No regard given worldwide'.

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[57]Steenkamp 'Non standard t-shirt gets bank all worked up' *Saturday Star* 2001-11-2;, 'Laugh it Off gets the wrong end of the stick' *Cape Argus* 2002-08-15; 'Lego bids to block Legover logo' *Cape Argus* 2002-12-17; Beyers 'Hofmeyr should "laugh it off"' *news24.com* (2003-04-23).

[58]The term was coined in 1984 by audio activists Negativland, whose politically pointed collages of found and recorded sounds had famously gotten them into trouble with the band U2. See McLeod (n 54) 116-9.

[59]Dery *Culture jamming* (1993), available online at http://www.markdery.com/culture_jamming.html (accessed 2010-03-05). See also Branwyn *Jamming the media* (1997).

[60]*Laugh It Off v SAB* (n 42) para 14.

[61]Klein *No logo* (2000) 287.

SAB alleged that Laugh It Off had infringed section 34(1)(c) of the Trademark Act,[62] which states that the rights acquired by way of registration of a trade mark are infringed by:

> the unauthorised use in the course of trade in relation to any goods or services of a mark which is identical or similar to a trade mark registered, if such trade mark is well known in the Republic and the use of the said mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception.

This is a so-called 'anti-dilution provision'. It does not flow from the central rationale for trademark law, which is to prevent confusion between competing goods. Instead it attempts to protect the positive goodwill that has been accrued through the marketing of a brand by preserving its selling power and preventing 'tarnishment' by negative associations. Such provisions were slow to emerge in trademark law,[63] and have often been questioned on the grounds that they tip the balance struck by trademark law too far in favour of trademark holders,[64] and even because they detract from economic efficiency.[65]

Here the question was whether Laugh It Off's parodic adaptation had tarnished the goodwill associated with SAB's mark, and if it did, whether the infringing adaptation was protected by the fundamental right to freedom of expression.[66] Laugh It Off had been unsuccessful in the Cape High Court[67] and the Supreme Court of Appeal,[68] and had subsequently appealed to the Constitutional Court. The majority judgment of the Court, handed down by Moseneke J, read section 34(1)(c) as requiring the likelihood of *commercial* prejudice, when seen through the lens of the Constitutional protection of free expression.[69] In this case, Moseneke J held, there was insufficient evidence of commercial prejudice to the trademark holder to decide in the trademark holder's favour.[70]

Justice Sachs concurred, but noted that Laugh It Off's appeal should be seen to be upheld on more substantial grounds than a simple lack of 'clipboard evidence'.[71] The Supreme Court of Appeal, in Sachs' opinion, had given 'far too

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[62]Act 194 of 1993.
[63]Pattishall 'Dawning acceptance of the dilution rationale for trademark-trade identity protection' (1984) 74 *The Trademark Reporter* 289.
[64]For example, Handler 'Are the state antidilution laws compatible with the national protection of trademarks?'(1985) 75 *The Trademark Reporter* 269.
[65]Landes and Posner (n 48) 206-9.
[66]Section 16(1) of the Constitution of the Republic of South Africa, 1996.
[67]*South African Breweries International Finance BV t/a SABMark International v Laugh It Off Promotions CC* 2003 BIP 83 (C).
[68]*Laugh It Off Promotions CC v South African Breweries International Finance BV t/a SABMark International* 2005 2 SA 46 (SCA).
[69]*Laugh It Off v SAB* (n 42) para 56.
[70]*Id* para 59.
[71]*Id* para 74.

little regard to the uniquely expressive weight of the parodic form used'.[72] Sachs therefore went on to consider the nature of parody, inherently paradoxical because simultaneously creative and derivative,[73] and unlike plagiarism involving 'a deliberate dislocation'.[74] Imitation is a necessity for the parody to be successful:

> It keeps the image of the original in the eye of the beholder and relies on the ability of the audience to recognise, with whatever degree of precision, the parodied work or text, and to interpret or 'decode' the allusion; in this sense the audience shares in a variety of ways the creation of the parody with the parodist. Unlike the plagiarist whose intention is to deceive, the parodist relies on the audience's awareness of the target work or genre; in turn, the complicity of the audience is a *sine qua non* of its enjoyment.[75]

Though they make no references to grand theory, Sachs J's thoughts are largely in concordance with the approach of literary criticism and cultural studies. Parody has been called a meta-fiction because of its capacity for self-reflexivity and its capacity for the kind of Foucauldian archaeology in which the social and political conditions of the original text are excavated and critiqued.[76] The etymological roots of the word betray its strategies. *Para* has two possible meanings in Greek: 'counter' and 'beside'. The parody is therefore not only a kind of 'counter-song', that creates an opposition between the original and its reproduction, but can also operate through complicity with the original. The pleasure of parody lies in 'the degree of engagement of the reader in the intertextual "bouncing"…between complicity and distance'.[77]

Sachs J's exegesis of a cultural genre takes Laugh It Off's position seriously. Their t-shirt is not simply 'predatory' as characterised by the Supreme Court of Appeal,[78] disguising a deliberate attack on the trademark holder as political commentary. Parody does not cause us to laugh at the source of appropriation so much as at the 'deliberate dislocation' itself.[79] Sachs, by taking seriously the aesthetics of this new cultural tactic, is able to recognise that Laugh it Off comments not on SAB but on practices of branding themselves:

> In a society driven by consumerism and material symbols, trademarks have become important marketing and commercial tools that occupy a prominent place in the public mind. Consequently, companies and producers of consumer goods invest substantial sums of money to develop, publicise and protect the distinctive nature of their trademarks; in the process, well-known trademarks become targets for parody.[80]

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[72] *Ibid*.
[73] *Id* para 76.
[74] *Id* para 77.
[75] *Ibid.*
[76] Rose *Parody/meta-fiction* (1979).
[77] Hutcheon *A theory of parody* (1985) 32.
[78] *Laugh It Off* (n 68) para 32.
[79] *Laugh It Off v SAB* (n 42) para 78.
[80] *Ibid*.

The question – '[d]oes the law have a sense of humour?' – abbreviates a less frivolous question that we have already glimpsed: can the law take laughter seriously, especially when it is difference that makes us laugh? As Sachs J points out, it is not the role of the court to determine whether the joke is funny or not.[81] Rather, they must take the joke seriously. Yet, Laugh It Off's t-shirt should not be taken as 'solemn social history'.[82] It is, after all, just a joke. Can the law abide an antinomy, and take a joke seriously while accepting that it is just a joke? Sachs J does his best to embrace the paradox:

> A society that takes itself too seriously risks bottling up its tensions and treating every example of irreverence as a threat to its existence. Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. It promotes diversity. It enables a multitude of discontents to be expressed in a myriad of spontaneous ways. It is an elixir of constitutional health.[83]

As with the joke that Sachs told himself in a Maputo hospital, the joke devised by Laugh It Off makes us laugh when we might otherwise be uncomfortable. The question of the political valence of these jokes is a legitimate one, yet it remains somehow oblique to the intimate moment of laughter. It is true that laughter can be a site of resistance.[84] Yet much laughter, especially that provoked by the carnivalesque, has a quite ambivalent relationship to order and authority, since it only temporarily inverts the established order and thereby confirms it.[85]

Whether jokes attempt to subvert social norms or merely end up affirming them, they certainly succeed in foregrounding those norms. The right joke at the right time can throw the shape of society into sharp relief, for humour is an x-ray through the structure of everyday life, showing up who we wish to be beside who we actually are. Critchley calls the joke an anti-rite, as it turns upside down the unwritten norms of social life. As Milan Kundera writes in his *Book of laughter and forgetting*: 'Someone's hat falls on the coffin in a freshly dug grave, the funeral loses its meaning and laughter is born'.[86]

III

Ashraf Jamal's *Predicaments of culture in South Africa* is a meditation on the parameters of the South African cultural imagination, and the freedom with which we might re-encounter and remake our South African identities.[87] Jamal centres

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[81] *Id* para 88.
[82] *Id* para 99.
[83] *Id* para 109.
[84] See, eg, Van Marle 'Laughter, refusal, friendship: Thoughts on a "jurisprudence of generosity"' (2007) *Stellenbosch LR* 194; Bakhtin *Rabelais and his world* (1968).
[85] Purdie (n 36).
[86] Kundera cited in Critchley (n 24) 5.
[87] Jamal *Predicaments of culture in South Africa* (2005).

this meditation upon a remarkable text written by Albie Sachs before his judicial career. Appropriately, Jamal concludes his meditation with the following quote from Andre Brink:

> It is one thing to die for liberation:
> it is something entirely different to live with freedom.[88]

There is indeed more to Sachs' judgment in *Laugh It Off v SAB* than an alternative analysis of policy claims upon the development of our IP jurisprudence. There is also the trace of a judge, a writer, an author, grappling with how to live with freedom. Nor is Sachs new to this mode of struggle. In 1989 he wrote an essay titled 'Preparing ourselves for freedom' for an ANC in-house seminar on culture.[89] It is this essay that is the starting point and the focal point for Jamal's book. In early 1990, that time of newness and ineluctable change, an excerpt was published in the *Weekly Mail*, sparking debate amongst artists and cultural organisations across the country.[90] The paper began thus:

> We all know where South Africa is, but we do not yet know what it is. Ours is the privileged generation that will make that discovery, if the apertures in our eyes are wide enough. The problem is whether we have sufficient cultural imagination to grasp the rich texture of the free and united South Africa that we have done so much to bring about.[91]

Sachs went on, in what turned out to be his most provocative move, to suggest a five year banning order on the phrase 'culture is a weapon of struggle'. He criticised struggle literature for its 'solemnity': indeed it is music that he thought then to be at the forefront of a new South African consciousness, because it 'tells us something lovely and vivacious about ourselves, not because the lyrics are about how to win a strike or blow up a petrol dump'.[92] Art, unlike a gun, reveals contradictions and tensions, asks for criticism, and tells us about love.[93]

South Africans have always laughed at themselves, but quietly. Our cultures are cultures of mirth, but when we are together we take ourselves too seriously: we are quicker to trade punches than punchlines. Yet a punchline for Sachs's essay already emerged during the year of its publication. Sachs reports that in the ANC's New York office, Lindiwe Mabuza confessed: 'Comrade Albie contradicts himself – his very paper is an instrument of struggle'.[94]

More recently, Ashraf Jamal has come to a different answer, although it has a similar air about it: 'Sachs's paper, in its highest and most delirious moments,

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[88]Brink quoted in Jamal (n 87) 159.
[89]Reproduced as Sachs 'Preparing ourselves for freedom' in De Kok and Press (eds) *Spring is rebellious: Arguments about cultural freedom* (1990) 19-29.
[90]*Id* 9.
[91]*Id* 19.
[92]*Id* 21.
[93]*Id* 20-1.
[94]Sachs 'Afterword: The taste of an avocado pear' in De Kok and Press (n 89) 147.

has come to exemplify a radicalism that is unconscripted and unscripted'.[95] The paper was written during Sachs' convalescence, at a time when Sachs 'felt free free free free, immune to fate and criticism'.[96] But this 'delirious' sense of freedom, born of terror and its overcoming, seems to describe the wellsprings from which Sachs' remarkable and singular judgments derive. We can learn much from Sachs, then, about living with freedom.

There is a lightness that accompanies Sachs' writing, whether as a judge or a revolutionary, whether in exile or authority. This freedom of spirit that manifests itself even during imprisonment and the aftermath of trauma, and certainly during moments of judgment in which he strays far from the path of positivist adjudication. Let us call this consciousness of freedom, even in moments of apparent constraint, 'playfulness'. For a working definition of playfulness we might do no better than to say it is the thread that weaves itself through the three texts that we have read here. Playfulness is not just the ability to discover freedom amidst constraint, but to embrace the ambivalence of the carnivalesque, and to exchange vulnerability for trust during the intimate duration of laughter.

We do well to place dignity at the core of our constitutional jurisprudence, but we must not on that account abandon our capacity for play. There are moments that seem distant from dignity, yet which bear with them the opportunity for us to grow to know each other better, and for the bonds of intimacy to knit tighter. Laughter is such a moment. (Another, perhaps, is when a student deigns to give the Presidential convoy the finger.)[97]

It is ironic, yes, but not a paradox, that in order to take our humanity seriously we must learn to laugh at ourselves.

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[95]Jamal (n 87) 161.
[96]Quoted in Jamal (n 87) 161.
[97]Milo 'Giving leaders the finger is our right' *Sunday Times* 2010-02-27.