

# NONMARRIAGE AND CHOICE IN SOUTH AFRICA AND THE UNITED STATES

HOLNING LAU\* & SUZANNE A. KIM\*\*

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## INTRODUCTION

Should the law recognize unmarried couples as family for purposes such as joint adoption, workplace leave, property distribution upon dissolution, and intestate succession? Questions concerning nonmarital couples have captured the attention of U.S. legal scholars.<sup>1</sup> Research has drawn on other countries' experiences extending legal recognition to nonmarital families.<sup>2</sup> Yet this scholarship has largely overlooked South Africa. This Article helps to fill that gap. South Africa's law of nonmarriage has undergone a sea change animated in large part by changes to conceptualizations of choice. In this Article, we examine how attention to South Africa can enrich understandings about U.S. law and its relation to principles of choice.

Insights from South Africa are especially meaningful because choice has also played a central role in U.S. debates about whether and how to

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\* Willie Person Mangum Distinguished Professor of Law, University of North Carolina School of Law.

\*\* Professor of Law and Judge Denny Chin Scholar, Rutgers Law School, Rutgers University. We thank the following individuals for reading an earlier version of this Article and providing thoughtful feedback: Cynthia Bowman, Patricia Cain, Chao-ju Chen, Jean-Marc Coicaud, Maxine Eichner, Christina Ho, Kaiponanea Matsumura, Linda McClain, Douglas NeJaime, Bradley Smith, and Allison Anna Tait. We are also grateful for having had the opportunity to present a draft of this Article at the third annual Nonmarriage Roundtable, hosted by the Washington University School of Law on October 1, 2021. In addition, we thank Kevin Biglin, Akansha Chandra, Matthew DeWitte, Alyssa Jasuale, and Jenna Leanza for research assistance; and Aaron Kirschenfeld for excellent library support services.

1. A sign of this scholarly interest is the Nonmarriage Roundtable, an annual scholarly conference in the United States focused on the regulation of nonmarital families. This Article was prepared for the third annual Nonmarriage Roundtable.

2. *E.g.*, CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 173–220 (2010); NANCY POLIKOFF, BEYOND (STRAIGHT AND GAY MARRIAGE): VALUING ALL FAMILIES UNDER THE LAW 110–22 (2008).

recognize unmarried couples.<sup>3</sup> This focus on choice has featured particularly prominently in discourse about proposals such as the American Law Institute’s domestic partnership scheme, which would impose legal consequences on couples who cohabit.<sup>4</sup> If we accept that freedom of choice is indeed an important organizing principle in the law of nonmarriage, we should study South Africa because it illuminates new pathways for understanding choice.<sup>5</sup>

With its underlying conceptualization of choice evolving over the years, South Africa gradually broadened legal recognition of unmarried couples. Litigation fueled much of this change, culminating in the South African Constitutional Court’s 2021 decision in *Bwanya v. Master of the High Court*,<sup>6</sup> which concerned the death of unmarried “permanent life partners.”<sup>7</sup> *Bwanya* ruled it unconstitutional to deny surviving life partners—regardless of sexual orientation—rights to intestate succession and maintenance from a deceased partner’s estate.<sup>8</sup> Prior to *Bwanya*, South Africa already recognized permanent life partnerships in a wide range of legal contexts, including immigration,<sup>9</sup> adoption,<sup>10</sup> tax,<sup>11</sup> bereavement leave,<sup>12</sup> pension benefits,<sup>13</sup> common law “dependants’ actions,”<sup>14</sup> and cohabitation agreements.<sup>15</sup>

In this Article, we examine three insights about free choice that emerge from studying the development of South Africa’s law of nonmarriage. First, South African jurisprudence advances understandings of nonmarriage as a

3. See, e.g., Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 914–15 (2019).

4. See, e.g., June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 57, 66–67 (2016); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 856–67 (2005); Joslin, *supra* note 3, at 986; see also PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 (AM. LAW. INST. 2002).

5. See *infra* notes 16–19 and accompanying text.

6. See *Bwanya v. Master of the High Ct., Cape Town and Others* 2021 ZACC 51 (CC) (S. Afr.).

7. Like the Constitutional Court, we use the phrase “permanent life partners” in this Article to refer to long-term couples who have not registered their relationship with the state as either a marriage or civil partnership. Part IV will examine the criteria for qualifying as a permanent life partnership. This Article sometimes refers to permanent life partnerships simply as “life partnerships” as a shorthand.

8. *Bwanya*, 2021 ZACC 46 (CC) at para. 95.

9. Immigration Act 13 of 2002 § 1 (S. Afr.).

10. Children’s Act 38 of 2005 § 231 (S. Afr.).

11. Estate Duty Act 45 of 1955 § 4(q) (S. Afr.) (read with § 1) (definition of “spouse” inserted by § 1(1) of Revenue Laws Amendment Act 59 of 2000 and amended by § 3(b) of Act 5 of 2001); Income Tax Act 58 of 1962 § 56(1)(b) (S. Afr.) (read with § 1) (definition of “spouse” inserted by § 5(j) of Taxation Laws Amendment Act 5 of 2001).

12. Basic Conditions of Employment Act of 1997 § 27(2)(c)(i) (S. Afr.).

13. See Pension Funds Act 24 of 1956 § 37(c) (S. Afr.) (read with § 1) (definition of “spouse” amended by § 1 of the Pension Funds Amendment Act No. 11 of 2007 (S. Afr.)).

14. *Du Plessis v. Road Accident Fund* 2004 (1) SA 359 (SCA) (S. Afr.) (concerning same-sex life partners); *Paixão and Another v. Road Accident Fund* 2012 (6) SA 377 (SCA) (S. Afr.) (concerning different-sex life partners).

15. Bradley Smith, *The Dissolution of a Life or Domestic Partnership*, in THE LAW OF DIVORCE AND DISSOLUTION OF LIFE PARTNERSHIPS IN SOUTH AFRICA 428–46 (Jacqueline Heaton ed., 2014).

valid choice.<sup>16</sup> Unlike U.S. jurisprudence, which has been accused of over-privileging marriage and demeaning nonmarriage, South African jurisprudence draws attention to people's legitimate reasons for choosing not to marry and the dignity interests attached to that choice.<sup>17</sup> South African law helps to broaden the imagination of what is possible when nonmarriage is respected as a valid choice.

Second, South African jurisprudence illuminates the fact that the choice whether to marry can be severely constrained and even illusory.<sup>18</sup> When couples desire marriage and have de jure legal capacity to marry, de facto conditions may well place marriage out of reach. For example, a gay couple in a homophobic small town may remain closeted for their safety and see marriage as an unrealistic option. Marriage may also be an unrealistic choice due to intra-couple power dynamics, such as when a financially dependent woman wishes to marry but her partner, who has financial leverage, opposes marrying. A couple that jointly wishes to marry may also find marriage out of reach if they face pressures to delay marriage or if one partner dies before wedding plans are realized. South African law prompts us to contemplate how law should respond to the fact that the choice to marry is sometimes severely constrained.

Third, the trajectory of South African law sheds light on how the principle of free choice can help shape the criteria that unmarried couples must satisfy to receive legal recognition.<sup>19</sup> As we will explain, South African law regarding recognition criteria requires elaboration and refinement. Yet, it also contains the nascent idea that criteria for recognition should vary by context. For example, the criteria for legally recognizing an unmarried couple for adoption or workplace leave need not—and should not—be the same as criteria for legally recognizing an unmarried couple for intestate succession. We contend that this contextual approach to recognition criteria serves a variety of salutary goals, including the enhancement of autonomy.

The remainder of this Article will proceed in four steps. Part I provides a brief overview of legal developments in South Africa. Afterwards, we delve into the three abovementioned dimensions of choice: Part II examines nonmarriage as a valid choice; Part III addresses marriage as a constrained choice; and Part IV discusses choice as a factor in designing recognition criteria. We will examine how studying South Africa enriches our

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16. See *infra* Part II.

17. For relevant critiques of the U.S. Supreme Court decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), see Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207 (2016); Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 28–30 (2015).

18. See *infra* Part III.

19. See *infra* Part IV.

understandings of these dimensions of choice. To be sure, choice is not the only principle that should inform the law of nonmarriage. Equality, human vulnerability, and administrative feasibility are some of the other considerations that should play a role in shaping family law.<sup>20</sup> This Article, however, focuses on enriching our understandings of choice.

### I. PRIMER ON SOUTH AFRICA

According to census data, 1.3 million people in South Africa (5.0% of the population) were in an (unmarried) cohabiting partnership in 2006.<sup>21</sup> That number grew to 3.6 million people (9.8%) in 2011.<sup>22</sup> Based on Community Survey data, an estimated 3.2 million people in South Africa were in cohabiting partnerships in 2016, constituting 8.3% of the population.<sup>23</sup> This rate of unmarried cohabitation is not far off from that of the United States, where an estimated 7.7% of people were living with an unmarried partner in 2018.<sup>24</sup> Increases in cohabitation in South Africa have varied by factors such as age, race, language, and location.<sup>25</sup> For example, the increase has been more pronounced for Black South Africans than for

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20. Cf. Brian H. Bix, *Family Law: Values Beyond Choice and Autonomy?*, 40 L. & PHIL. 163 (2021) (illuminating values beyond autonomy that should inform family law's treatment of private ordering); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1 (2008) (arguing for centering vulnerability to foster egalitarianism); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2005) (arguing against relying on autonomy to organize institutions, law, and policy).

21. STATISTICS SOUTH AFRICA, COMMUNITY SURVEY 2016: AN EXPLORATION OF NUPTIALITY STATISTICS AND IMPLIED MEASURES IN SOUTH AFRICA 1, 75 (2018), <http://www.statssa.gov.za/publications/03-01-25/03-01-252016.pdf> [<https://perma.cc/ZS22-RF26>]. Cohabitation statistics might be flawed for a variety of reasons. For example, unmarried couples may be undercounted because individuals might report themselves as married even though they do not satisfy the legal definition of marriage. Note that statistics for unmarried cohabitation do not include couples in long-term relationships who do not live together. Note also that for ease of reference, hereinafter in this Article, all references to "cohabitation" refer to unmarried cohabitation.

22. *Id.* Researchers have attributed changes in South African marriage and cohabitation rates to factors including the economy, the HIV/AIDS epidemic, rural-urban migration, urbanization, and changes to the cultural practice of paying *lobolo* (bride-wealth payments). See Elena Moore & Rajen Govender, *Marriage and Cohabitation in South Africa: An Enriching Explanation?*, 44 J. COMP. FAM. STUD. 623, 623 (2013).

23. STATISTICS SOUTH AFRICA, *supra* note 21, at 75.

24. U.S. CENSUS BUREAU, *Historical Living Arrangements of Adults: Table AD-3. Living Arrangements of Adults 18 and Over, 1967 to Present*, <https://www.census.gov/data/tables/time-series/demo/families/adults.html> [<https://perma.cc/3E4H-2S8V>].

25. See generally STATISTICS SOUTH AFRICA, *supra* note 21. Cohabitation rates in the United States have also varied by demographic factors. For example, unmarried cohabitation in the U.S. has been more common among Blacks and Latinos than whites, and among lower income groups. See Susan L. Brown, Jennifer Van Hook & Jennifer E. Glick, *Generational Differences in Cohabitation and Marriage in the US*, 27 POPULATION RSCH. POL'Y REV. 531, 534–35 (2008).

White South Africans,<sup>26</sup> with an estimated 9.0% of Black South Africans in cohabiting partnerships in 2016 as compared with 5.0% of White South Africans.<sup>27</sup>

Commentators in South Africa have called for comprehensive legislative reform to legally recognize unmarried couples.<sup>28</sup> In fact, in 2006 the South African Law Reform Commission (SALRC) issued a report proposing reforms that would extend a bundle of rights and responsibilities to unmarried couples.<sup>29</sup> Based on the SALRC's recommendation, South Africa's Department of Home Affairs published a draft Domestic Partnership Bill for public comment in 2008.<sup>30</sup> Parliament, however, never moved forward with the proposed legislation. Instead of pursuing comprehensive reform, South Africa has extended legal recognition to unmarried couples on a piecemeal basis.<sup>31</sup>

Until the late 1990s, unmarried couples were in similar legal positions regardless of sexual orientation. Unmarried cohabitation had very few legal consequences. Regardless of sexual orientation, unmarried couples could attach legal significance to their relationships through contracts—express or tacit agreements—and legal instruments such as wills and trusts.<sup>32</sup> An individual could bring a claim of unjust enrichment or utilize the defense of estoppel against their nonmarital partner.<sup>33</sup> Additionally, by the late 1990s, discrete pieces of national legislation recognized same-sex and different-sex

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26. See Moore & Govender, *supra* note 22, at 624–25; Dorit Posel, Stephanie Rudwick & Daniela Casale, *Is Marriage a Dying Institution in South Africa? Exploring Changes in Marriage in the Context of Ilobolo Payments*, 25 AGENDA: EMPOWERING WOMEN GENDER EQUITY 102, 103–04 (2011).

27. STATISTICS SOUTH AFRICA, *supra* note 21, at 76.

28. E.g., Pierre de Vos & Jaco Barnard, *Same-Sex Marriage, Civil Unions and Domestic Partnerships in South Africa: Critical Reflections on an Ongoing Saga*, 124 S. AFR. L.J. 795, 822–24 (2007).

29. See generally S. AFR. L. REFORM COMM'N, PROJECT 118: REPORT ON DOMESTIC PARTNERSHIPS (2006), [https://www.justice.gov.za/salrc/reports/r\\_prj118\\_2006march.pdf](https://www.justice.gov.za/salrc/reports/r_prj118_2006march.pdf) [<https://perma.cc/7RE9-RVVG>].

30. The proposed law would extend a range of rights and responsibilities to couples who register as “domestic partnerships” as well as cohabiting couples who satisfy the law’s definition of “unregistered domestic partnership.” See Draft Domestic Partnerships Bill 2008, GN 36 of GG 30663 (14 Jan. 2008). Similar proposals had previously been included as a chapter in the first version of the Civil Union Bill of 2006, but the chapter was subsequently excised. See de Vos & Barnard, *supra* note 28, at 812. While the South African Legal Reform Commission and the draft bill used the term “domestic partnership,” we use the term “life partnership” as does the South African Constitutional Court to refer to unregistered long-term partnerships. See *supra* note 7.

31. Bradley Smith, *Unmarried Same-Sex Couples More Favourable Legal Position than Heterosexual Counterparts*, DE REBUS (July 1, 2016), <https://www.derebus.org.za/unmarried-sex-couples-favourable-legal-position-heterosexual-counterparts> [<https://perma.cc/FX2K-WHJW>].

32. See S. AFR. L. REFORM COMM'N, DISCUSSION PAPER 104 IN PROJECT 118: DOMESTIC PARTNERSHIPS 29–39, 41–42, 88 (2003).

33. *Id.* at 40–41.

unmarried couples for very limited purposes, such as domestic violence protections and bereavement leave in the event of a partner's death.<sup>34</sup>

Starting in the late 1990s, a chasm grew between the legal positions of same-sex and different-sex unmarried couples. Unmarried same-sex couples secured a range of legal rights through constitutional litigation. In a series of cases, courts including the Constitutional Court of South Africa held that same-sex permanent life partners had a right to receive the same benefits as spouses for the purposes of medical benefits,<sup>35</sup> immigration,<sup>36</sup> pensions,<sup>37</sup> joint adoption and guardianship,<sup>38</sup> parenthood through artificial insemination,<sup>39</sup> common law dependants' actions,<sup>40</sup> and intestate succession.<sup>41</sup> These cases all preceded the legalization of same-sex marriage.<sup>42</sup> According to the Court, depriving same-sex life partners of such benefits while also excluding them from marriage amounted to unconstitutional discrimination based on sexual orientation and violated the constitutional right to dignity.<sup>43</sup>

The Court eventually ruled in 2005, in *Fourie v. Minister of Home Affairs*, that excluding same-sex couples from marriage was unconstitutional.<sup>44</sup> Parliament responded by passing the Civil Union Act, which legalized same-sex marriage and also gave both same-sex and different-sex couples the option to register their relationship as a "civil partnership" instead of a marriage.<sup>45</sup> A civil partnership differs from marriage in name only.

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34. *Id.* at 53–55 (citing Basic Conditions of Employment Act 75 of 1997 § 27 (2)(c)(i) and Domestic Violence Act 116 of 1998 § 1(vii)).

35. *Langemaat v. Minister of Safety and Security* 1998 (3) SA 312 (T) (S. Afr.).

36. *Nat'l Coal. for Gay and Lesbian Equality v. Minister of Home Affs. and Others* 2000 (2) SA 1 (CC) (S. Afr.).

37. *Satchwell v. President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC) (S. Afr.) (holding that a permanent same-sex life partner of a judge is entitled to the same pension benefits as a judge's spouse).

38. *Du Toit and Another v. Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC) (S. Afr.).

39. *J and Another v. Dir. Gen.: Dep't of Home Affs. and Others* 2003 (5) SA 621 (CC) (S. Afr.).

40. *Du Plessis v. Road Accident Fund* 2004 (1) SA 359 (SCA) (S. Afr.).

41. *Gory v. Kolver NO and Others* 2007 (4) SA 97 (CC) (S. Afr.).

42. The last of the aforementioned cases, *Gory v. Kolver*, was decided after the Constitutional Court had ruled in favor of same-sex marriage but before the legalization of same-sex marriage went into effect. The same-sex couple in *Gory v. Kolver* never had an opportunity to marry because one of the partners died before same-sex marriage became available in South Africa.

43. See Smith, *supra* note 15, at 396–97.

44. *Minister of Home Affs. v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

45. Civil Union Act 17 of 2006 (S. Afr.). Note that the South African meaning of "civil union" differs from the meaning in the United States, where civil unions and marriages have been separate institutions. In contrast, South Africa's Civil Union Act made same-sex marriages a subcategory of civil unions. See David Bilchitz, *A Short Guide to the Civil Union Act*, in *TO HAVE AND TO HOLD: THE MAKING OF SAME-SEX MARRIAGE IN SOUTH AFRICA* 202 (Melanie Judge, Anthony Manion & Shaun de Waal eds., 2008).

In the 2016 case of *Laubscher v. Duplan*, the Court made it clear that unregistered same-sex life partners continue to possess intestate succession rights notwithstanding the legalization of same-sex marriage and civil partnerships.<sup>46</sup> In other words, the availability of same-sex marriage and civil partnerships did not nullify the Court's earlier case law extending intestate succession rights to same-sex life partners. The majority opinion recognized that, unless Parliament decides otherwise, unregistered same-sex partners will continue to enjoy the legal recognition that had been extended through previous case law.<sup>47</sup> The reasoning in *Duplan* could be applied beyond the context of inheritance to the range of judicially created rights for same-sex life partners.

The legal recognition of unmarried *different-sex* couples, however, lagged behind.<sup>48</sup> *Volks v. Robinson* in 2005 was a major setback.<sup>49</sup> The Constitutional Court rejected Mrs. Robinson's contention that she should be able to claim maintenance from the estate of her deceased life partner, Mr. Shandling. She had argued that denying different-sex life partners the same statutory survivorship rights as spouses amounted to unconstitutional discrimination based on marital status.<sup>50</sup> Six justices (out of eleven) emphasized in a concurring opinion that one reason why differential treatment based on marriage was not unfair was that different-sex couples had the option to marry to secure survivorship rights.<sup>51</sup> *Volks* seemed to close the door to the judicial creation of legal recognition for unmarried different-sex couples. Parliament, however, took some steps to fill the recognition void. Through piecemeal reform both before and after *Volks*, Parliament extended a range of rights to different-sex permanent life partners, in the domains of immigration,<sup>52</sup> adoption,<sup>53</sup> tax,<sup>54</sup> and pensions<sup>55</sup> among others.

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46. *Laubscher v. Duplan* 2017 (2) SA 264 (CC) (S. Afr.).

47. *Id.* at para. 55.

48. Smith, *supra* note 15, at 395–99.

49. *Volks NO v. Robinson and Others* 2005 (5) BCLR 446 (CC) (S. Afr.).

50. *Id.* at para. 12.

51. *Id.* at paras. 91–93 (Ngcobo, J., concurring, joined by all but one justice comprising the majority).

52. Immigration Act 13 of 2002 § 1 (S. Afr.).

53. Children's Act 38 of 2005 § 231 (S. Afr.).

54. Estate Duty Act 45 of 1955 § 4(q) (S. Afr.) (read with § 1) (definition of "spouse" inserted by § 1(1) of Revenue Laws Amendment Act 59 of 2000 and amended by § 3(b) of Act 5 of 2001); Income Tax Act 58 of 1962 § 56(l)(b) (S. Afr.) (read with § 1) (definition of "spouse" inserted by § 5(j) of Taxation Laws Amendment Act 5 of 2001).

55. Pension Funds Act 24 of 1956 § 37(e) (S. Afr.) (read with § 1) (definition of "spouse" amended by § 1 of the Pension Funds Amendment Act No. 11 of 2007 (S. Afr.)).

*Volks* drew widespread criticism from South African scholars.<sup>56</sup> Courts also chipped away at the case by interpreting it narrowly. In *Paixão v. Road Accident Fund*, the Supreme Court of Appeal (South Africa's second-highest court) distinguished *Volks* factually and developed the common law "dependants' action" to recognize different-sex life partners for survivorship rights in wrongful death cases.<sup>57</sup> Later, in the abovementioned *Duplan* matter, the Constitutional Court cast further doubt on the notion that courts should not extend legal rights to unmarried couples simply because the couples at issue have the de jure option to marry.<sup>58</sup> Finally, in *Bwanya*, the Court completed its departure from *Volks*.

Jane Bwanya and Anthony Ruch were a cohabiting couple who were engaged to marry.<sup>59</sup> Mr. Ruch paid for household expenses while Ms. Bwanya provided him with "love, care, emotional support, and companionship."<sup>60</sup> According to Ms. Bwanya, she and Mr. Ruch had assumed a contractual duty of mutual support, whether through express or tacit agreement.<sup>61</sup> Before the couple was able to realize their marriage plans, Mr. Ruch passed away.<sup>62</sup> His will named his mother as his sole heir, but she had predeceased him.<sup>63</sup> Ms. Bwanya sought to inherit and receive maintenance from Mr. Ruch's estate pursuant to South Africa's Intestate Succession Act (ISA) and Maintenance of Surviving Spouses Act (MOSSA).<sup>64</sup> Insofar as these laws did not extend rights to surviving partners of both different-sex and same-sex life partnerships,<sup>65</sup> Ms. Bwanya said they violated constitutional rights to equality and dignity.<sup>66</sup> The Constitutional Court vindicated these claims in a sweeping ruling. The Court afforded legal recognition not only to different-sex life partners who plan to marry eventually—as Ms. Bwanya and Mr. Ruch did—but also to permanent life partners who have no intention of ever marrying.<sup>67</sup> Once *Bwanya* becomes implemented, same-sex and different-sex life partners in South Africa will

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56. See *Laubscher v. Duplan* 2017 (2) SA 264 (CC) at para. 80 n.73 (S. Afr.) (Froneman, J., concurring) (listing sources critical of *Volks*).

57. See *Paixão and Another v. Road Accident Fund* 2012 (6) SA 377 (SCA) (S. Afr.).

58. See *Duplan*, 2017 (2) SA 264 (CC) at para. 55.

59. *Bwanya v. Master of the High Ct., Cape Town and Others* 2021 ZACC 51 (CC) at paras. 3–6 (S. Afr.).

60. *Id.* at 9, para. 19.

61. Applicant's Head of Arguments, *Bwanya v. Master of the High Ct.* 2021 ZACC 51 (CC) at para. 25. See also *Bwanya*, 2021 ZACC 51 (CC) at paras. 71–72.

62. *Bwanya*, 2021 ZACC 51 (CC) at para. 7.

63. *Id.*

64. *Id.* at para. 2.

65. Same-sex couples already had rights under the ISA due to the Court's previous rulings in *Gory* and *Duplan*.

66. *Bwanya*, 2021 ZACC 51 (CC) at para. 9.

67. See *id.* at para. 95.

have access to the same rights and responsibilities regarding intestate succession and post-death maintenance that are held by spouses.<sup>68</sup>

In sum, couples in South Africa may choose to register their relationship as a civil partnership pursuant to the Civil Union Act to receive the same legal consequences that a marriage confers.<sup>69</sup> If a couple neither marries nor registers their relationship as a civil partnership, the couple may still be recognized for certain legal purposes if they function as permanent life partners. It should be noted that life partnerships are not akin to common law marriages (which do not exist in South Africa) because, even after *Bwanya*, some legal consequences will remain within the exclusive domain of marriage and registered civil partnerships. These exceptional domains include evidentiary privileges and divorce.<sup>70</sup> The dissolution of life partnerships remains regulated by contracts (either express or tacit) and by principles of unjust enrichment and estoppel, not by the law of divorce.<sup>71</sup>

In the United States, much debate has focused on whether states should impose a legal status such as “domestic partnership” on couples based on cohabitation, and have legal consequences attached to that status.<sup>72</sup> The American Law Institute proposed such a regime in 2002.<sup>73</sup> Commentators responded with concerns that such “conscriptive” approaches to legal recognition would undermine individual autonomy.<sup>74</sup> In light of such critiques, it is worth noting that South Africa has, generally speaking, not adopted a conscriptive approach. Much of the expansion of nonmarried couples’ rights in South Africa involves situations in which both members of the unmarried couple consent to—indeed actively seek—legal recognition together, whether it be for immigration, adoption, tax, employment benefits, or other legal entitlements.<sup>75</sup> If a couple is neither married nor registered as civil partners, courts will only play a role in their dissolution if there was either an express or tacit contractual agreement

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68. The Constitutional Court ordered Parliament to rectify the unconstitutional aspects of the ISA and MOSSA; if Parliament fails to act within eighteen months of the Court’s ruling, ISA’s and MOSSA’s coverage will automatically be extended to permanent life partnerships regardless of sexual orientation by virtue of the implementation of the “reading-in” orders granted by the Court. *Id.* at para. 95.

69. In South Africa, people can marry pursuant to the Marriage Act, Customary Marriages Act, or Civil Union Act. *See* Marriage Act, 25 of 1961 (S. Afr.); Customary Marriages Act, Act 120 of 1998 (S. Afr.); Civil Union Act, 17 of 2006, §§ 11 & 12(3) (S. Afr.) (noting a civil union can be solemnized and registered as either a “marriage” or “civil partnership”).

70. *See* Applicant’s Head of Arguments, *supra* note 61, at para. 101. *See also* Criminal Procedure Act 51 of 1977, §§ 195–198 (S. Afr.) (limiting the statutes’ applicability to a “husband” and a “wife”); Civil Proceedings Evidence Act 25 of 1965 § 10 (S. Afr.) (same).

71. *See* Smith, *supra* note 15, at 428–46.

72. *See* Joslin, *supra* note 3.

73. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, *supra* note 4, at 6.

74. *E.g.*, Carbone & Cahn, *supra* note 4; Garrison, *supra* note 4. *But see* Joslin, *supra* note 3.

75. *See supra* notes 9–13 and accompanying text.

between the partners, or if there was unjust enrichment.<sup>76</sup> If the relationship ends because one partner dies, the surviving partner only has (financially related)<sup>77</sup> rights as a permanent life partner if the couple had contracted an express or tacit agreement to support each other.<sup>78</sup> Post-death legal consequences technically extend beyond the contract, but they stem from an inquiry about whether the couple had contracted to support each other in the first place. Consent thus plays an important role, and the state does not conscribe individuals into a legal status based on cohabitation.

Scholars in the United States have noted that judicial enforcement of tacit agreements risk becoming conscriptive if courts are extremely assertive in inferring contracts from parties' behaviors even when one partner claims there was no agreement.<sup>79</sup> For example, if a cohabiting couple breaks up and they disagree about whether a tacit financial agreement existed between them, the court arguably conscribes the dissenting party into the contractual relationship if the court is very activist in inferring an agreement. Further research is required to examine how inclined South African courts are to infer tacit agreements when one party objects to such a finding.<sup>80</sup> Notwithstanding this potentially conscriptive aspect of enforcing tacit contracts, the law of contracts is at least grounded theoretically in notions of formal and implied consent.<sup>81</sup>

Indeed, the law of nonmarriage in South Africa is generally moored to notions of consent and choice. The following Parts of this Article will examine more closely how studying the development of South African law can enrich understandings about choice and the closely related principle of autonomy.

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76. See Smith, *supra* note 15, at 428–46.

77. See *infra* Part IV.

78. See *Bwanya v. Master of the High Ct., Cape Town and Others* 2021 ZACC 51 (CC) at paras. 71–72 (S. Afr.).

79. See e.g., Katharine K. Baker, *What Is Nonmarriage?*, 73 SMU L. REV. 201, 243–44 (2020) (explaining that implicit contracts can create a conscriptive “opt-out” regime).

80. For an example of relevant case law from South Africa’s Supreme Court of Appeal, see *Ponelat v. Schrepfer* 2012 (1) SA 206 (SCA) (S. Afr.) at paras 17–25 (finding a tacit agreement despite the defendant’s denial that such agreement existed). Citing the earlier case of *Mühlmann v. Mühlmann* 1984 (3) SA 102 (A) (S. Afr.) at paras. 124(C)–(D), 634(F)–(H), the court stated in *Ponelat* at para. 20:

[W]hether a tacit agreement can be held to have been concluded was said to be, ‘whether it was more probable than not that a tacit agreement had been reached’. It was also stated that a court must be careful to ensure that there is an *animus contrahendi* and that the conduct from which a contract is sought to be inferred is not simply that which reflects what is ordinarily to be expected of a wife in a given situation.

See also *McDonald v. Young* 2012 (3) SA 1 (SCA) (S. Afr.) at paras. 22–25 (refusing to find that a tacit agreement existed between a couple that had cohabited for approximately seven years).

81. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 312–17 (1986).

## II. NONMARRIAGE AS A VALID CHOICE

One theme from South African cases is that nonmarriage is a valid choice. This theme is apparent when reading *Bwanya* in conjunction with earlier cases. In *Bwanya*, Justice Madlanga's majority opinion noted that "a predominant refrain in this Court's reasoning in [earlier cases] . . . is that manifestations of families are many and varied and all are worthy of respect and legal protection."<sup>82</sup> The opinion acknowledged that marriage is an important institution that has meaningful significance to many people,<sup>83</sup> but it also stated: "we should be wary not to so emphasise the importance of the institution of marriage as to devalue, if not denigrate, other institutions that are also foundational to the creation of other categories of families."<sup>84</sup> The opinion also quoted, with approval, Justice Albert "Albie" Sachs's dissent in *Volks*: "Respecting autonomy means giving legal credence not only to a decision to marry but to choices that people make about alternative lifestyles."<sup>85</sup> Justice Froneman made a similar point in *Duplan*.<sup>86</sup> His concurrence endorsed the criticism that "marriage-centric" laws reflect unjustified moral preferences, and he said unmarried couples who function similarly to married couples should receive the same treatment.<sup>87</sup>

Justice Sachs's majority opinion in *Fourie*, South Africa's same-sex marriage case, was also careful not to over-privilege marriage even though it acknowledged marriage's importance.<sup>88</sup> Noting that same-sex couples might choose not to marry if given the opportunity, the Court suggested that the rejection of marriage is a valid personal decision.<sup>89</sup> It explained that the decision *whether* to marry—and whether to marry someone of the same sex—is central to dignity.<sup>90</sup> "[W]hat is in issue is not the decision to be taken, but the choice that is available. If heterosexual couples have the

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82. *Bwanya*, 2021 ZACC 51 (CC) at para. 32.

83. *See id.* at paras. 50–51.

84. *Id.* at para. 52.

85. *Id.* at para. 69 (quoting *Volks v. Robinson* 2005 (5) BCLR 446 (CC) at para. 156 (S. Afr.) (Sachs, J., dissenting)).

86. *Laubscher v. Duplan* 2017 (2) SA 264 (CC) at paras. 82–84 (S. Afr.) (Froneman, J., concurring).

87. *Id.* (quoting Denise Meyerson, *Who's In and Who's Out? Inclusion and Exclusion in the Family Law Jurisprudence of the Constitutional Court of South Africa*, 3 CONST. CT. REV. 295, 298 (2010)).

88. *See Minister of Home Affs. v. Fourie* 2006 (1) SA 524 (CC) at paras. 63–72 (discussing the significance of marriage), para. 72 (discussing the choice not to marry) (S. Afr.). For elaboration on this point, see Holning Lau, *Marriage Equality and Family Diversity: Comparative Perspectives from the United States and South Africa*, 85 FORDHAM L. REV. 2615 (2017). It is worth noting that only one member of the Court, Justice Kate O'Regan, dissented. She disagreed with the majority only with respect to its remedy because she preferred to grant same-sex couples immediate access to marriage instead of giving Parliament a year to legalize same-sex marriage.

89. *See Fourie*, 2006 (1) SA 524 (CC) at para. 72.

90. *Id.*

option of deciding whether to marry or not, so should same-sex couples have the choice . . . .”<sup>91</sup> The Court recognized that South Africa has a “multitude of family formations” and is committed to “respect across difference.”<sup>92</sup>

We can extract from South African cases at least three reasons why nonmarriage is a choice to be respected. First, in *Fourie*, the Court acknowledged criticisms of marriage, including queer and feminist critiques.<sup>93</sup> It noted that couples may reject marriage as being too rigidly conventional, commercialized, or linked symbolically to stereotypical gender roles.<sup>94</sup> Instead of dismissing decisions to reject marriage based on such concerns, the Court recognized them as valid.<sup>95</sup> It is important to note that while some couples may choose to reject marriage, they may also wish to be recognized for legal purposes: the availability of civil partnerships as an alternative to marriage in South Africa provides an opportunity for couples to obtain legal recognition while also expressing dissent against marriage.<sup>96</sup> Second, the Court noted in *Bwanya* that permanent life partnerships serve valuable family functions, just as marriages do: they provide mutual support and care.<sup>97</sup> The state’s underlying interests in supporting marital relationships therefore apply to life partnerships as well. As we discuss further below, however, life partnerships should not be required to mirror all aspects of marriage in order to receive respect and recognition from the state.<sup>98</sup> Third, *Bwanya* recognized the demographic reality that a substantial and growing segment of the population consists of unmarried partnerships. The Court was persuaded by this social reality and

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91. *Id.*

92. *Id.* at paras. 59–60. This appreciation of diversity in family forms is also reflected in the fact that South Africa recognizes multiple forms of marriage. South Africa recognizes not only civil marriages but also customary marriages of indigenous African groups, including polygyny under certain circumstances; in addition, South Africa recognizes religious marriages for limited legal purposes. *See* S. Afr. LAW REFORM COMMISSION, PROJECT 144: SINGLE MARRIAGE STATUTE 13–18 (Jan. 2021), <https://www.justice.gov.za/salrc/dpapers/dp152-prj144-SingleMarriageStatute-May2021.pdf> [<https://perma.cc/3HC8-BTLP>]; Elsje Bonthuys, *A Patchwork of Marriages: The Legal Relevance of Marriage in a Plural Legal System*, 6 OñATI SOCIO-LEGAL SERIES 1303, 1308–09 (2016).

93. *Fourie*, 2006 (1) SA 524 (CC) at paras. 60, 72.

94. *Id.*

95. *Id.*

96. *See de Vos & Barnard, supra* note 28, at 813. In Part IV, we will examine other ways through which the state can legally recognize couples who reject marriage, and we will elaborate on reasons why affording such recognition advances public policy goals.

97. *Bwanya v. Master of the High Ct., Cape Town and Others* 2021 ZACC 51 (CC) at paras. 54–56 (S. Afr.). *See also Laubscher v. Duplan* 2017 (2) SA 264 (CC) at paras. 82–84 (S. Afr.) (Froneman, J., concurring) (observing that the difference between marriages and permanent partnerships is often just a formality).

98. *See infra* Part IV.

noted that it is not the Court's place to denigrate and "wish away" couples who comprise this societal trend.<sup>99</sup>

South Africa's treatment of nonmarriage as a valid choice is glaring when we juxtapose it with rhetoric from the U.S. Supreme Court. When the Supreme Court struck down same-sex marriage bans in *Obergefell v. Hodges*,<sup>100</sup> Justice Kennedy's majority opinion contained strongly worded dicta valorizing marriage which can easily be read to imply that nonmarital families are less worthy—perhaps unworthy—of respect and legal recognition.<sup>101</sup> *Obergefell* put marriage on a pedestal, asserting that "[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family."<sup>102</sup> The opinion seemed to express pity for unmarried persons. According to the Court, "Marriage responds to the universal fear that a lonely person might call out only to find no one there."<sup>103</sup> The Court compared being unmarried with "be[ing] condemned to live in loneliness."<sup>104</sup> Indeed, *Obergefell* suggested that the institution of marriage confers dignity, stating that marriage "promise[s] nobility and dignity to all persons, without regard to their station in life."<sup>105</sup> This conceptualization of the relationship between dignity and marriage contrasts sharply with the conceptualization in *Fourie*, which located dignity not in marriage itself but in the decision whether to marry.<sup>106</sup>

Not only does *Obergefell*'s rhetoric undermine the equal dignity of nonmarital families, but some commentators have worried that *Obergefell* set back efforts to extend tangible legal protections to nonmarital families.<sup>107</sup> As Melissa Murray pointed out, the Court had previously developed a "jurisprudence of nonmarriage," in which it offered tentative constitutional protections for nonmarital families, but "*Obergefell*'s pro-marriage impulse, by contrast, demeans and challenges the status of nonmarriage."<sup>108</sup> Such worries have materialized to some extent. After

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99. See *Bwanya*, 2021 ZACC 51 (CC) at para. 52:

[W]e should be wary not to so emphasise the importance of the institution of marriage as to devalue, if not denigrate, other institutions that are also foundational to the creation of other categories of families. And this must be so especially because the other categories of families are not only a reality that cannot be wished away, but are on the increase.

100. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

101. See *infra* notes 102–105 and accompanying text. See also Lau, *supra* note 88, at 2616–19. For a different reading, contending that parts of *Obergefell* can be harnessed to argue in favor of legally recognizing nonmarital families, see Courtney Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425 (2017).

102. *Obergefell v. Hodges*, 576 U.S. at 681.

103. *Id.* at 667.

104. *Id.* at 681.

105. *Id.* at 656.

106. See *supra* notes 88–90 and accompanying text.

107. Murray, *supra* note 17, at 1216–24; Huntington, *supra* note 17, at 28–30. But see Joslin, *supra* note 3.

108. Murray, *supra* note 17, at 1210.

*Obergefell*, five states discontinued their civil union registries instead of maintaining them as an alternative to marriage.<sup>109</sup> Some private employers similarly stopped extending benefits to employees' domestic partners, requiring employees to marry their partners to receive benefits.<sup>110</sup> The Illinois Supreme Court also invoked *Obergefell*'s glorification of marriage to support its decision not to recognize nonmarital cohabitation for the purposes of property distribution.<sup>111</sup>

The impact of *Obergefell*'s "hyperveneration"<sup>112</sup> of marriage on policy decisions is, however, unclear and contested.<sup>113</sup> Many states decided to preserve registries that provide legal recognition to nonmarital partners, and they expanded the registries to include different-sex as well as same-sex partnerships.<sup>114</sup> A few cities also created or expanded domestic partnership registries after *Obergefell*.<sup>115</sup> Legal innovations that were originally created to recognize unmarried same-sex couples as co-parents—such as second-parent adoptions and de facto parentage doctrines—have generally continued to exist post-*Obergefell* and have even become more firmly established.<sup>116</sup> Still, even if *Obergefell* did not lead to the demise of existing legal protections for nonmarital families, its rhetoric may nonetheless be cited to hinder the expansion of nonmarital family recognition.

As other countries around the world consider how to situate same-sex marriage in the larger context of family law reform, the United States and South Africa offer divergent approaches to follow. South Africa offers a powerful counternarrative to the United States' story about same-sex

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109. The five states were Connecticut, Delaware, New Hampshire, Rhode Island, and Vermont. See Kaiponanea Matsumura, *The Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1518–26 (2016).

110. Stephen Miller, *Employers Are Dropping Domestic Partner Health Care Benefits*, SHRM (Aug. 18, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/employers-dropping-domestic-partner-benefits.aspx> [https://perma.cc/F3N2-YCEE].

111. *Blumenthal v. Brewer*, 69 N.E.3d 834, 868 (Ill. 2016).

112. Murray, *supra* note 17, at 1210.

113. See Gregg Strauss, *What's Wrong with Obergefell*, 40 CARDOZO L. REV. 631, 643–47 (2018).

114. *Civil Union and Domestic Partnership Statutes*, NAT'L CONF. STATE LEGISLATURES (Mar. 10, 2020), <https://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> [https://perma.cc/A2DZ-XATN].

115. See, e.g., George Hesselberg, *Opposite-Sex Partners Get Same Benefits as Same-Sex Partners Do in Dane County*, WIS. ST. J. (May 13, 2016), [http://host.madison.com/wsj/news/local/opposite-sex-partners-get-same-benefits-as-same-sex-partners/article\\_9e383647-600f-566a-9fca-8ef741c105a9.html](http://host.madison.com/wsj/news/local/opposite-sex-partners-get-same-benefits-as-same-sex-partners/article_9e383647-600f-566a-9fca-8ef741c105a9.html) [https://perma.cc/6WBM-4Q4L] (discussing Dane County, Wisconsin's decision to grant different-sex couples the ability to register as domestic partners, an option previously available only to same-sex couples); Ken Jackson, *Commission Creates Domestic Partner Registry*, OSCEOLA NEWS-GAZETTE (Aug. 10, 2016, 9:43 AM), <http://www.aroundosceola.com/commission-creates-establishment> [https://perma.cc/GU5H-BFHU] (discussing development of a new domestic partnership in Osceola County, Florida).

116. See Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016) (explaining that the legalization of same-sex marriage has enabled the recognition of parenthood beyond marital families). *But see* Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. U. L. REV. 909 (2018–19) (supporting the dismantling of de facto parentage doctrines now that same-sex marriage is legal nationwide).

marriage impeding the expansion of legal protections for unmarried couples because the legalization of same-sex marriage glorified marriage.<sup>117</sup> In South Africa, the legalization of same-sex marriage arguably served as a steppingstone to subsequent expansion of legal recognition for unmarried couples. This is because *Fourie* contained language that reinforced the idea of nonmarriage as a valid choice. *Fourie* also put the South African Constitutional Court in a position to elaborate on nonmarriage in the subsequent case of *Duplan*.<sup>118</sup> The United States case of *Obergefell* has garnered a great deal of attention around the world and has been cited by numerous foreign courts.<sup>119</sup> *Fourie*, although decided a decade before *Obergefell*, has received less attention. One goal of this Article is to spotlight South Africa as having blazed an alternative path than *Obergefell*.

Juxtaposing the United States and South Africa also enriches discussions within the United States. As noted earlier, discourse in the United States often assumes that choice is an important organizing principle for family law.<sup>120</sup> A growing number of U.S. scholars also support giving people the option to choose among different family forms.<sup>121</sup> This view is supported by the developments in South Africa that value nonmarriage as a valid choice. South Africa illuminates ways in which the United States can preserve and expand rights of unmarried couples.<sup>122</sup>

Specifically, the South African experience sheds light on the role of courts in treating nonmarriage as a valid choice. Prior to the legalization of same-sex marriage in the United States, some U.S. courts extended limited

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117. See *supra* note 17 and accompanying text; Osamudia James, *Superior Status: Relational Obstacles in the Law to Racial Justice and LGBTQ Equality*, 63 B.C. L. REV. 199, 238–39 (2022). Cf. also Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 38 (2011) (arguing that marriage equality could facilitate a pluralistic vision of family recognition).

118. Justice Froneman’s concurrence in *Duplan* was particularly notable for its critique of “marriage-centric” law. See *supra* notes 86–87 and accompanying text.

119. For examples of citations in foreign courts, see J.Y. Interpretation No. 748 (2017) (Taiwan); *Oliari v. Italy* (2015) 65 E.H.R.R. 26; *Capin-Cadiz v. Brent Hospital and Colleges* [2016] PHSC 19 (Phil.); *Navtej Singh Johar v. Union of India*, Writ Petition (Criminal) No.76 of 2016 (India 2018); *Centre for Justice v. Attorney General and Minister of Legal Affairs* [2016] SC 72 Civ. (Bermuda); *Godwin and Another v. Registrar General and others* [2017] SC 36 Civ. (Bermuda); *Coman v. Inspectoratul General Pentru Imigrări (C-673/16)* EU:C:2018:385; *Lim Meng Suang and Another v. Attorney General* [2013] SGHC 73; *MK v. The Government of HKSAR*, [2019] 5 H.K.L.R.D. 259 (Hong Kong).

120. See *supra* notes 3–5 and accompanying text.

121. See Joslin, *supra* note 3, at 914; William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1889 (2012).

122. To be clear, we are not suggesting that doctrinal arguments from South Africa can be easily transplanted to the U.S. context. South African constitutional doctrine is distinguishable for a variety of reasons, including the fact that South Africa’s constitution expressly mentions marital status as a prohibited basis of discrimination. See S. AFR. CONST., 1996, ch. 2, § 9(3). Looking beyond doctrine, however, one sees that South African law reform can inform understandings in the United States about how to conceptualize choice and how to reform the law of nonmarriage to enhance autonomy.

legal recognition to same-sex couples who could not marry.<sup>123</sup> For example, a federal court interpreted the Foreign Sovereign Immunities Act (FSIA) purposively to count unmarried cohabiting same-sex partners as “immediate family members” for solatium damages.<sup>124</sup> Similarly, in the famous case of *Braschi v. Stahl Associates Company*, the highest court in New York interpreted New York City’s rent control ordinance capaciously to include cohabiting same-sex couples as “family members.”<sup>125</sup> Some scholars have wondered whether the legalization of same-sex marriage, in tandem with *Obergefell*’s glorification of marriage, may lead courts to require same-sex couples to be married—or at least be engaged to marry<sup>126</sup>—in order to receive legal recognition.<sup>127</sup> These courts should take a cue from the South African Constitutional Court, which chose not to discontinue judicially created protections for unmarried same-sex couples after it legalized same-sex marriage.<sup>128</sup> The Court chose instead to value nonmarriage as a valid choice and expand its legal recognition of unmarried partnerships to include different-sex couples.<sup>129</sup>

More generally, the South African experience inspires broadening our imagination of what the law would look like if nonmarriage were taken seriously as a valid choice. U.S. scholarship on nonmarriage has overwhelmingly focused on the economic rights of unmarried couples *inter se*, but the South African experience suggests that we should also consider expanding unmarried couples’ legal rights vis-à-vis third parties and the state. Demonstrating respect for unmarried couples, South Africa has extended rights to permanent life partners in domains such as immigration, adoption, and tax.<sup>130</sup> These are all areas in which U.S. law—in contrast to South Africa—typically does not legally recognize unmarried life partners.<sup>131</sup> Some U.S. scholars have advocated for giving unmarried

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123. *In re Terrorist Attacks* on September 11, 2001, No. 03-MDL-1570, 2017 WL 9533073 (S.D.N.Y. Aug. 8, 2017); *Braschi v. Stahl Associates Company*, 543 N.E.2d 49 (N.Y. 1989).

124. *In re Terrorist Attacks*, 2017 WL 9533073, at \*6.

125. *Braschi*, 543 N.E.2d at 53–54.

126. Some judges have suggested nonmarital relationships should not be legally recognized except in cases concerning fiancés. *See, e.g.,* *Moreland v. Parks*, 191 A.3d 729, 734–45 (N.J. Super. Ct. App. Div. 2018) (quoting and rejecting a motion judge’s argument that distinguished fiancés from other unmarried cohabiting couples).

127. *E.g.,* *Murray*, *supra* note 17, at 1249–50. *Cf. Holguin v. Flores*, 18 Cal. Rptr. 3d 749, 757 (Cal. Ct. App. 2004) (rejecting the wrongful death claim brought by the surviving member of a different-sex cohabiting partnership because the couple did not avail themselves of marriage).

128. *See supra* notes 46–47 and accompanying text.

129. *See supra* notes 56–67 and accompanying text.

130. *See supra* notes 9–15 and accompanying text.

131. Very few states allow unmarried couples to adopt jointly. *See, e.g., In re Adoption of M.A.*, 930 A.2d 1088 (Me. 2007) (holding that statute allowing joint adoption petitions by married couples did not foreclose joint petitions by unmarried persons); *In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227, 228–29 (N.Y. App. Div. 2004) (holding that unmarried partners who are not biologically related to a child have standing to adopt the child jointly); *In re Infant Girl W.*, 845 N.E.2d 229, 233 & 247 (Ind. Ct.

couples rights against third parties, but this literature remains quite limited.<sup>132</sup> South African law inspires further exploration of these domains within U.S. policy debates.

### III. MARRIAGE AS AN ILLUSORY OR CONSTRAINED CHOICE

In South African jurisprudence, legal recognition of life partnerships is not only supported by the appreciation of nonmarriage as a valid choice. The Constitutional Court has articulated another aspect of choice that supports legal recognition of nonmarriage: it is the understanding that, even when people desire marriage, their de facto ability to choose marriage is all too often constrained by social factors.

South African jurisprudence on this aspect of choice has undergone a sea change. In *Volks*, the Constitutional Court rejected a constitutional challenge against MOSSA, brought by the surviving partner in an unmarried different-sex relationship. The Court justified the law's differential treatment of unmarried couples based in large part on the fact that the couple had chosen not to marry.<sup>133</sup> Commentators have referred to this reasoning as *Volks*'s "choice argument."<sup>134</sup> In dissent, Justice Albie Sachs challenged the blanket assumption that those who do not marry are exercising free choice. Specifically, he recognized that a gendered power imbalance may

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App. 2006) (determining that the Indiana Adoption Act allows "any unmarried couple, regardless of gender or sexual orientation—to file a joint petition for adoption"). See also Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 334 (2006). Likewise, registered domestic partnerships or civil unions are legally recognized for tax purposes in only a small number of states. See, e.g., OR. REV. STAT. ANN. § 106.340(8) (West 2008) ("For purposes of administering Oregon tax laws, partners in a domestic partnership, surviving partners in a domestic partnership and the children of partners in a domestic partnership have the same privileges, immunities, rights, benefits and responsibilities as are granted to or imposed on spouses in a marriage, surviving spouses and their children"); *The Domestic Partnership Act – New Jersey Income Tax/Inheritance Tax (2/18/04)*, N.J. DIV. TAX'N (Mar. 12, 2020), <https://www.state.nj.us/treasury/taxation/dompartact.shtml> [<https://perma.cc/FJP3-PP29>]. For information on the treatment of registered domestic partnerships and civil union for federal tax purposes, see INTERNAL REVENUE SERV., ANSWERS TO FREQUENTLY ASKED QUESTIONS FOR REGISTERED DOMESTIC PARTNERS AND INDIVIDUALS IN CIVIL UNIONS, (2021), <https://www.irs.gov/newsroom/answers-to-frequently-asked-questions-for-registered-domestic-partners-and-individuals-in-civil-unions> [<https://perma.cc/2ES4-6LKP>].

132. See, e.g., Deborah A. Widiss, *Chosen Family, Care, and the Workplace*, 131 YALE L.J.F. 215 (2021) (discussing nonmarital families and family leave); POLIKOFF, *supra* note 2, at 88–90, 121–22, 146–207 (proposing rights for nonmarital families in a variety of contexts, including but not limited to immigration, family leave, and wrongful death lawsuits).

133. *Volks v. Robinson* 2005 (5) BCLR 446 (CC) at para. 94 (S. Afr.); Tshepo Aubrey Manthwa, *Recognition of Domestic Partnerships in South African Law* 7 (Sept. 2015) (M.A. dissertation, Univ. of S. Afr.).

134. E.g., Bradley Smith, *Rethinking Volks v Robinson: The Implications of Applying a "Contextualised Choice Model" to Prospective South African Domestic Partnership Legislation*, 13 POTCHEFSTROOM ELEC. L.J. 238, 238 (2010).

affect different-sex couples, wherein men have historically held greater power to decide whether and when the couple will marry.<sup>135</sup>

Subsequent court opinions echoed Justice Sachs's observations about constrained choice. In *Paixão v. Road Accident Fund*, the Supreme Court of Appeal distinguished *Volks* and extended the common law "dependants' action" for wrongful death recovery to unmarried different-sex couples.<sup>136</sup> While doing so, the Court implicitly criticized *Volks*'s choice argument by observing that couples may be unable to marry for "social, cultural or financial reasons."<sup>137</sup> More recently, in *Bwanya*, the Constitutional Court discussed at greater length why couples who have the legal right to marry may face severe constraints on their ability to choose marriage.<sup>138</sup>

Recall that *Bwanya* held that ISA and MOSSA must cover both same- and different-sex life partnerships.<sup>139</sup> To reach this conclusion, the Court rejected the choice argument in *Volks*.<sup>140</sup> The Court acknowledged various constraints on the choice to marry.<sup>141</sup> It noted, for example, that same-sex couples may face pervasive homophobia that makes it difficult for them to out themselves and avail themselves of marriage even though same-sex marriage is legal.<sup>142</sup> The Court also spotlighted the vulnerability that women in different-sex life partnerships may face in exercising choice.<sup>143</sup> They might want to marry, but with "patriarchal culture" rendering women economically disadvantaged and heightening men's power in partnerships, a woman's desire to marry might be overridden due to diminished bargaining power.<sup>144</sup> Although the Court focused on gendered power dynamics, one can imagine that unequal bargaining power can also constrain marital choice in ways that do not necessarily map onto patriarchal

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135. *Volks*, 2005 (5) BCLR 446 (CC) at paras. 156–69 (Sachs, J., dissenting).

136. *Paixão v. Road Accident Fund* 2012 (6) SA 377 (SCA) at para. 26 (S. Afr.). The court observed: "[T]here was clearly a tacit agreement that he would assume the obligation to support the family before the marriage – the marriage would change nothing except for the relationship being formally recognised." *Id.* at para. 21.

137. *Id.* at para. 31–32.

138. *Bwanya v. Master of the High Court, Cape Town and Others* 2021 ZACC 51 (CC) para. 62 (S. Afr.).

139. *Bwanya*, 2021 ZACC 51 (CC) at para. 95. See *supra* notes 63–64 and accompanying text. Same-sex life partners already had the right to intestate succession under ISA due to the Constitutional Court's rulings in *Gory* and *Duplan*. See *supra* notes 39, 43–44 and accompanying text. *Bwanya* ruled that ISA's coverage must extend to different-sex life partners as well. *Bwanya*, 2021 ZACC 51 (CC) at para. 95. *Bwanya* also ruled that MOSSA must cover both same-sex and different-sex life partners. *Id.*

140. *Bwanya*, 2021 ZACC 51 (CC) at para. 46.

141. *Id.* at paras. 62–65.

142. *Id.* at paras. 86–87 & para. 19 n.24. See also Bradley Smith, *Intestate Succession and Surviving Heterosexual Life Partners: Using the Jurist's "Laboratory" to Resolve the Ostensible Impasse that Exists after Volks v Robinson*, 133 S. AFR. L.J. 284 (2016).

143. *Bwanya*, 2021 ZACC 51 (CC) at para. 67.

144. *Id.* at para. 88.

dynamics.<sup>145</sup> In addition, sometimes both members of a couple may want marriage but choose not to pursue formal marriage because they believe wrongly that they are already in a legally binding common law marriage.<sup>146</sup> The case of *Bwanyana* also highlights that a couple that desires marriage might never be able to marry because one partner passes away before marriage is realized.<sup>147</sup>

Outside of courts, scholars in South Africa have also identified a number of forces that constrain a couple's choice to marry. For instance, numerous scholars have observed that the South African customary bride wealth known as *lobolo*, which a man pays to his future wife's family, constrains marital choice.<sup>148</sup> A man may be unable to deliver *lobolo* due to his financial position and the "commercialization" of *lobolo* practices, which has made the custom more financially burdensome.<sup>149</sup> These observations support the point in *Bwanyana* that couples who want to marry may face significant difficulty realizing that choice.

To be sure, the *Bwanyana* majority's approach to choice has its detractors. Indeed, Chief Justice Mogoeng's dissenting opinion strongly criticized the majority's contentions, noting that both women and men can choose to stay or leave a cohabiting relationship, including when one partner is unwilling to marry eventually.<sup>150</sup> According to Chief Justice Mogoeng, when courts develop legal doctrines based on women's curtailed bargaining power, courts effectively accept and perpetuate "women's victimhood as a norm."<sup>151</sup> He suggested that the law should instead focus on empowering and encouraging women to exit their relationships if they desire marriage and their partners are resolute about rejecting marriage.<sup>152</sup> While we agree

145. Some men have weak bargaining power due to being financially dependent on their partner. In the United States, a study from 2021 found that "Among partnered men, a quarter say they are entirely (11%) or somewhat (13%) financially dependent on a partner." Jamie Ballard, *Over One-Third of Coupled Women Are Financially Dependent on Their Partner*, YOUGOVAMERICA (May 27, 2021, 4:15 PM), <https://today.yougov.com/topics/lifestyle/articles-reports/2021/05/27/financial-dependence-couples-partner-poll-data> [https://perma.cc/5DL2-YE9X]. Among partnered men who are fathers, 16% said they are entirely financially dependent on their partner. *Id.*; cf. also Holning Lau, *Shaping Expectations about Dads as Caregivers: Toward an Ecological Approach*, 45 HOFSTRA L. REV. 183, 183–85 (2016) (noting growth in the number of stay-at-home fathers in the United States despite cultural dynamics that discourage this growth).

146. *Bwanyana*, 2021 ZACC 51 (CC) at para. 62. For discussion of the common misunderstanding that a period of cohabitation automatically confers legal protection akin to marriage, see Manthwa, *supra* note 133, at 18.

147. This was the case for Ms. *Bwanyana*. She and her partner were engaged, but he passed away before the couple's wedding. See *Bwanyana*, 2021 ZACC 51 (CC) at para. 7.

148. E.g., Posel, Rudwick & Casale, *supra* note 26; Manthwa, *supra* note 133, at 18. Manthwa has argued that "South African law should do away with the 'choice to marry' argument, as it affords recognition only to a minority of intimate relationships." *Id.* at 5–6.

149. Posel, Rudwick & Casale, *supra* note 26, at 407–08.

150. *Bwanyana*, 2021 ZACC 51 (CC) at para. 121 (Mogoeng, C.J., dissenting).

151. *Id.* at para. 128.

152. *Id.*

with Chief Justice Mogoeng about the importance of empowering women, we do not think legally recognizing unmarried couples necessarily undermines efforts to empower women. Recognition does not foreclose or undermine such initiatives as expanding educational opportunities for women and girls, providing governmental support for women-owned businesses, and pursuing measures that seek to close the gender wage gap.

Chief Justice Mogoeng's dissent also argued that one cannot assume both that the choice whether (or not) to marry is a valid one and also maintain that choice is "illusory."<sup>153</sup> This argument, however, wrongly presupposes that the couples who choose not to marry are the same ones experiencing constrained choice. Instead, as the majority noted, there are different categories of unmarried couples.<sup>154</sup> Specifically, the majority recognized that "permanent life partnerships where there is a choice not to marry" are different from "those in which some of the partners do not really exercise a choice" not to marry.<sup>155</sup>

The majority's insight on choice constraints enriches understandings about how choice should influence whether to legally recognize unmarried couples. Being unmarried—either by choice<sup>156</sup> or by de facto restrictions<sup>157</sup>—should not necessarily bar couples from being recognized for legal purposes.<sup>158</sup> Instead, South African law examines whether the unmarried couple chose to form a permanent life partnership. In *Bwanya*, for the purposes of the ISA and MOSSA, this inquiry involved asking whether the couple entered an agreement—either explicit or tacit—for reciprocal duties of support.<sup>159</sup> Importantly, the state will not require a formal written agreement, which may be difficult for a partner to secure in light of unequal bargaining power and other social factors.<sup>160</sup>

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153. *Id.* at para. 124.

154. *Id.* at para. 59–60.

155. *Id.* at para. 60.

156. *See supra* Part II.

157. *See supra* Part III.

158. With respect to de facto restrictions, it is worth emphasizing that our focus is *Bwanya*'s rejection of *Volks*'s "choice argument," which suggested that barring unmarried couples from recognition is justified due to the couple's decision not to marry. *Bwanya* illuminated constraints on choice, thus calling into question *Volks*'s rationale. This rejection of *Volks*'s reasoning made it possible to legally recognize unmarried couples for the purposes of ISA and MOSSA, but it did not mean all unmarried surviving partners automatically have rights to recognition. To be recognized with reference to ISA and MOSSA, a nonmarital relationship must involve an explicit or tacit agreement to reciprocal duties of support. *See Bwanya*, 2021 ZACC 51 (CC) at para. 55 (S. Afr.).

159. *Id.*

160. Where an unmarried couple included a partner who sought to be free of any duty of support, such that a court would not find even a tacit agreement of support between the couple, the relationship would not be recognized for the purposes of ISA and MOSSA. In contrast, for example, in an unmarried couple where a partner insisted on delaying marriage but tacitly agreed to reciprocal duties of support, there would be a stronger claim to have the relationship recognized for the purposes of ISA and MOSSA. As discussed earlier, further research is necessary to determine how inclined South African courts are to

In contrast to South African jurisprudence, the U.S. legal regime lacks robust recognition of the various factors that undermine individuals' de facto capacity to choose marriage. In the United States, unmarried couples lack most of the legal protections that attach to marriage.<sup>161</sup> The law often stems from the view that nonmarital couples should be treated differently from marital couples because of the couples' choice not to marry. This view is evident, for example, in decisions to abolish domestic partnership registries after the legalization of same-sex marriage as well as in court decisions that refuse to interpret laws capaciously to protect unmarried couples.<sup>162</sup>

The developments in South Africa, informed by a multidimensional conception of choice that accounts for de facto constraints, can richly inform understandings about choice in the United States. As discussed above, South African discourse has highlighted economic factors that constrain choice, for example *lobolo* and gendered financial disparities. Similarly, commentators have shed light on economic dynamics in the United States affecting choices to marry.<sup>163</sup> Economic pressure is one reason couples forego or delay marriage in the United States.<sup>164</sup> Kathryn Edin's and Maria Kefalas's sociological work, for instance, illuminates the fact that some women who deeply respect and desire marriage feel pressure to delay getting married until they have established financial security.<sup>165</sup> Other dynamics discussed in South Africa are also evident—albeit to varying degrees—in the United States. For example, U.S. commentators have brought attention to gendered power imbalances in couples' decision-

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infer a tacit agreement based on a couple's behaviors. *See supra* note 81 and accompanying text. It is also worth recalling that the expansion of unmarried couples' rights in South Africa has largely involved contexts where both members of the couple agree that they have reciprocal duties of support, and they are united in seeking legal recognition of their relationship. *See supra* note 75 and accompanying text.

161. *See supra* notes 68–74, 124 and accompanying text. This is not to say that the legal system never recognizes unmarried couples. As noted previously, unmarried couples in numerous states can receive legal recognition by registering as domestic partners (or “designated beneficiaries” or “reciprocal beneficiaries”). Unregistered cohabiting couples may also be recognized by the state for specific purposes such as domestic violence protections and tort liabilities.

162. *See, e.g.*, *Blumenthal v. Brewer*, 69 N.E.3d 834, 868 (Ill. 2016).

163. *See, e.g.*, *BOWMAN*, *supra* note 2, at 138–39; *Baker*, *supra* note 79, at 249 (2020); Wendy D. Manning & Pamela J. Smock, *Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data*, 67 J. MARRIAGE & FAM. 989, 995 (2005); *see also* *Joslin*, *supra* note 3, at 971.

164. *See, e.g.*, Pamela J. Smock, Wendy D. Manning & Meredith Porter, “*Everything’s There Except Money*”: *How Money Shapes Decisions to Marry Among Cohabitants*, 67 J. MARRIAGE & FAM. 680 (2005) (discussing couples attributing decision not to marry to insufficient economic resources); KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* 111, 131 (2005) (describing widespread desire to marry among unmarried interviewees).

165. EDIN & KEFALAS, *supra* note 164, at 9, 111, 131. This desire to marry is borne out in social science research showing that over seventy percent of women who give birth outside of marriage marry by the age of forty. *Id.* at 111.

making about their relational status.<sup>166</sup> It is also not difficult to imagine that the South African concern about homophobia preventing some same-sex couples from marrying may also manifest in the United States. In addition, it is certainly possible that some couples who desire marriage see one partner pass away before marriage is realized, as was the case in *Bwanya* and in *Paixão*.

South Africa's attention to choice invites introspection in the United States about additional ways in which choice is constrained beyond the examples found in South African jurisprudence. These factors might include various types of social or community pressure. Parents or family members might urge a couple to wait to marry due to personal preference, cultural custom, age, or attitudes about race and ethnicity. For instance, while rates of interracial marriage have dramatically increased since the 1960s, and attitudes toward interracial marriage have become considerably more favorable, attitudes diverge widely based on factors such as age and partisan status.<sup>167</sup> These attitudes can translate into family or community pressure on couples to forego marriage.<sup>168</sup> The social pressures that influence couples in the United States may differ in degree and type than those raised in South Africa, but they still raise important concerns about how free the exercise of choice really is.

An appreciation for how marriage can be a severely constrained choice weighs in favor of extending legal recognition to unmarried couples. In light of the social realities that sometimes make it difficult for people to choose marriage, couples should not be penalized—that is to say, excluded from legal protection—due to the simple fact that they are not married.<sup>169</sup> One

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166. Courtney Joslin has highlighted the work of social scientists documenting men's influence over marital choice in different-sex couples. Joslin, *supra* note 3, at 971–74 (discussing Manning & Smock, *supra* note 163, at 995; SHARON SASSLER & AMANDA JAYNE MILLER, COHABITATION NATION: GENDER, CLASS, & THE REMAKING OF THE RELATIONSHIPS 151 (2017); EDIN & KEFALAS, *supra* note 164; Penelope M. Huang, Pamela J. Smock, Wendy D. Manning & Cara A. Bergstrom-Lynch, *He Says, She Says: Gender and Cohabitation*, 32 J. FAM. ISSUES 876, 879 (2011)). See also Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 IND. L.J. 517 (1998); Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1 (2017).

167. Gretchen Livingston & Anna Brown, *Intermarriage in the U.S. 50 Years After Loving v. Virginia*, PEW RSCH. CTR. (2017), at 5, 9, 24, <https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2017/05/Intermarriage-May-2017-Full-Report.pdf> [https://perma.cc/B9Z7-K64M].

168. Findings from a recent study using data from the National Survey of Family Growth “support claims that racial differences [within couples] continue to be one of the most formidable barriers to marriages.” Kate H. Choi, Rachel E. Goldberg & Patrick A. Denice, *Stability and Outcome of Interracial Cohabitation Before and After Transitions to Marriage*, 46 DEMOGRAPHIC RSCH. 957, 978 (2022). “Disapproval of interracial marriages is generally stronger than that of interracial cohabitations. . . . Therefore, for some interracial couples, cohabitation may be a substitute to marriage where they can carry out ‘married life’ without the added challenges of intermarriage.” *Id.* at 960 (internal citations omitted). See also *id.* at 979 (discussing related empirical research).

169. See *Bwanya v. Master of the High Ct., Cape Town and Others* 2021 ZACC 51 (CC) at para. 69 (S. Afr.) (quoting with approval *Volks v. Robinson* 2005 (5) BCLR 446 (CC) at 84 para. 156 (S. Afr.))

might contend that most choices are constrained to some degree by societal pressures, and perhaps we should not expect to have a legal regime in which choice is pure. But in the realm of family law, the stakes are often too high—implicating livelihood and the human right to family life—for nonmarital couples to be excluded from legal recognition based on an imaginary or romanticized understanding of marriage as free choice.<sup>170</sup> Also, to be sure, the fact that marital choice is constrained may not in and of itself present a compelling case for legally recognizing unmarried couples. But there is a strong normative case for respecting and recognizing unmarried life partners because the fact that choice is constrained comes together with the idea of nonmarriage as a valid choice<sup>171</sup> and the fact that unmarried life partnerships—between those who reject marriage as well as those who are unable to choose marriage—are often caregiving relationships that the state has an interest in supporting to advance a flourishing society.<sup>172</sup> While marriage has been treated as a proxy for such relationships, it is an imperfect one.

#### IV. CRITERIA FOR RECOGNITION AND IMPLICATIONS FOR CHOICE

The preceding Parts suggest that understandings about choice—recognition of nonmarriage as a valid choice and acknowledging constraints on the choice to marry—favor giving unmarried couples the ability to receive legal recognition. This impulse to recognize, however, prompts the question: what criteria should unmarried couples be required to meet to receive legal recognition in functionalist regimes such as South Africa’s system of permanent life partnerships? We use the term “functionalist” to refer to recognition that is given to couples based on how the couple functions, as opposed to recognition stemming from the formal process of registering a relationship in a government registry. In this Part, we explore recognition criteria in functionalist systems and discuss their relation to principles of choice. We also identify inherent weaknesses of functionalist recognition and examine ways to address them.

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(Sachs, J., dissenting)) (“[I]f the resulting [nonmarital] relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not be astute to penalise or ignore them because they are unconventional.”).

170. International instruments recognize the human right to form and maintain a family life. *E.g.*, G.A. Res. 217 A, Universal Declaration of Human Rights, Art. 16 (Dec. 10, 1948); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, Art. 23 (Dec. 16, 1966); G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Art. 10 (Dec. 16, 1966).

171. *See supra* Part II.

172. Regarding caregiving in the context of life partnerships, see *supra* note 97 and accompanying text. For exploration of the crucial role of the state in supporting familial caregiving as part of a flourishing society, see MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* (2010).

The issue of recognition criteria arose in *Bwanya*. In his dissent, Chief Justice Mogoeng noted the difficulty of determining which relationships should qualify as permanent life partnerships.<sup>173</sup> Life partnerships are not formalized through any particular process; instead, life partnerships are established based on the couple's behaviors.<sup>174</sup> According to Chief Justice Mogoeng, ascertaining whether a life partnership exists is too thorny; accordingly, legal recognition for purposes of the ISA and MOSSA should be given to different-sex couples only if they marry or register as civil partners.<sup>175</sup> The *Bwanya* majority discounted this worry, noting that South African courts already determine whether couples count as permanent life partnerships in other legal contexts, so much so that such inquiries have become a "bread and butter issue of the legal process."<sup>176</sup> The majority noted that, in the judgment in *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*, the Court had identified a list of factors to be weighed in determining whether a couple qualifies as a permanent life partnership.<sup>177</sup>

The *Bwanya* majority missed an opportunity to clarify and refine how functionalist criteria are used to determine whether an unmarried couple should receive legal recognition. The Court did not say much about the recognition factors from *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*, except to add two factors to the list.<sup>178</sup> In our view, *Bwanya* should have further developed the law of nonmarriage by stating clearly that these factors are not all equally important to one another. Instead, the criteria that matter most should vary depending on the legal

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173. *Bwanya*, 2021 ZACC 51 (CC) at para. 114. (Mogoeng, C.J., dissenting).

174. *Id.* at para. 112.

175. *Id.* at para. 114.

176. *Id.* at para. 78.

177. *Id.* at para. 76 (citing *Nat'l Coal. for Gay and Lesbian Equal. v. Minister of Home Affs.* 2000 (1) BCLR 39 (CC) at para. 88 (S. Afr.)).

178. The factors set forth in *National Coalition for Gay and Lesbian Equality* include:

the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another. None of these considerations is indispensable for establishing a permanent partnership.

*Nat'l Coal. for Gay and Lesbian Equal.*, 2000 (1) BCLR 39 (CC) at para. 88. In *Bwanya*, the Court added two more factors: "whether cohabitants have children" and "whether they have associated in public as an intimate couple." *Bwanya*, 2021 ZACC 51 (CC) at para. 77 (citing Sachs, J., dissenting in *Volks NO v Robinson* 2005 (5) BCLR 446 at n.219 (CC) (S. Afr.)).

context in which the partnership claim arose. Let us call this a “context-based approach” to recognition criteria. Under a context-based approach, the criteria germane to legally recognizing a couple for intestate succession may differ from the criteria for recognizing a couple for purposes of adoption, for instance.

Although *Bwanya* did not clearly articulate a context-based approach, the Constitutional Court of South Africa had previously voiced support for context-specificity in *J v. Director General*, stating “that the precise parameters of [nonmarital] relationships entitled to constitutional protection will often depend on the purpose of the statute.”<sup>179</sup> In other words, the Court endorsed the notion that the criteria for legal recognition of unmarried couples should vary depending on the governmental purposes underlying relationship recognition in any given issue area. In this vein, commentators have noted that the Court seems to have constructed two different main contexts, each involving different recognition criteria.<sup>180</sup> In cases concerning financial matters, such as *Bwanya*, the Court has emphasized that the couple at issue must have entered into an express or tacit agreement concerning a financial duty of support.<sup>181</sup> Meanwhile, in cases concerning rights to co-parent, the Court has focused less on the couple’s financial support obligations and has looked to other factors instead.<sup>182</sup> For example, in *Du Toit*, which concerned joint adoption, the Court focused on the fact that the couple were in a committed “stable, loving, and happy” relationship,<sup>183</sup> in which the couple made joint decisions and shared a common household with commingled resources.<sup>184</sup> The Court did not find that the couple had contracted an agreement concerning financial support.<sup>185</sup>

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179. *J and Another v. Dir. Gen.: Dep’t of Home Affs. and Others* 2003 (5) SA 621 (CC) at para. 24 (S. Afr.).

180. See L.I. Schäfer, *Same-Sex Life Partnerships*, FAM. L. SVC. (LexisNexis SA) No. 72, at R7 (Brigitte Clark ed., Oct. 2019) [hereinafter Schäfer, *Same-Sex Life Partnerships*]; Lawrence Schäfer, *Marriage and Marriage-Like Relationships: Constructing a New Hierarchy of Life Partnerships*, 123 S. AFR. L.J. 626, 630 (2006) [hereinafter Schäfer, *Marriage and Marriage-Like Relationships*]; Smith, *supra* note 15, at 411–26.

181. See Schäfer, *Same-Sex Life Partnerships*, *supra* note 180; Schäfer, *Marriage and Marriage-Like Relationships*, *supra* note 180, at 630; Smith, *supra* note 15, at 411–26.

182. See Schäfer, *Same-Sex Life Partnerships*, *supra* note 180; Schäfer, *Marriage and Marriage-Like Relationships*, *supra* note 180, at 630; Smith, *supra* note 15, at 411–26.

183. See *Du Toit v. Minister of Welfare and Population Dev.* 2003 (2) SA 198 (CC) at para. 23 (S. Afr.).

184. See *id.* at para. 4. South Africa’s adoption statute now explicitly states that joint adoption is available to permanent partners “or [o]ther persons sharing a common household and forming a permanent family unit”; this language appears to broaden the scope of the statute even further to include not only unmarried couples and but other family members who wish to adopt jointly. Children’s Act 38 of 2005 § 231 JSRSA (S. Afr.).

185. The Court noted the couple’s commingled finances and listing of each other as beneficiaries in financial instruments, but the Court did not frame any of its findings in terms of financial dependency or a duty to provide financial support. See *Du Toit v. Minister of Welfare and Population Dev.* 2003 (2) SA 198 (CC) at para. 2 (S. Afr.).

Likewise, in *J.*, which concerned assisted reproduction, “a mutual duty to support . . . was not an essential element” to finding a permanent life partnership.<sup>186</sup>

A context-specific approach to relationship recognition advances important goals, one of which is autonomy-enhancement through the expansion of choice. Context-specificity bolsters couples’ ability to shape their relationships in accordance with their own wishes and intentions. For instance, a loving and committed long-term couple may maintain financial independence from each other because of their particular careers and financial backgrounds; yet they may also wish to start a family as co-parents. A context-based approach would give this couple the opportunity to be legally recognized for the purposes of joint adoption and access to assisted reproductive services even though the couple would not be legally recognized for intestate succession, maintenance, or partnership-based pension benefits. A context-based approach enhances this couple’s autonomy to define the parameters of their relationship.<sup>187</sup>

Indeed, contextual variability helps guard against coercing couples to mimic traditional marriages.<sup>188</sup> Courts in South Africa have often, but not always, looked at how much an unmarried couple’s relationship looks “like marriage”<sup>189</sup> to determine whether the couple should receive legal recognition.<sup>190</sup> In adopting a greater and more purposeful focus on context, courts would abstain from sweeping inquiries about whether a couple’s relationship resembles marriage. This would enhance autonomy by allowing couples to adopt some behaviors that are traditionally associated with marriage while rejecting others.

Context-specificity is also beneficial because it promotes the evaluation of couples in accordance with criteria that are aligned with specific public policy goals. For example, the paramount policy goal of joint adoption

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186. *J and Another v. Dir. Gen.: Dep’t of Home Affs. and Others* 2003 (5) SA 621 (CC) at para. 24 (S. Afr.).

187. See Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. ST. L.J. 1325, 1364–65 (2020).

188. For critiques of policies that require marriage mimicry, see Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1843–50, 1979–83 (2006); Eskridge, Jr., *supra* note 121, at 1985; Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2697–99 (2008).

189. See, e.g., *Paixão v. Road Accident Fund* 2012 (6) SA 377 (SCA) at para. 29 (S. Afr.) (examining whether a relationship was “akin to and had similar characteristics—particularly a reciprocal duty of support—to a marriage”). The court in *Paixão*, however, did reject the argument that the contractual duty of support should only be recognized when parties are engaged to be married. *Id.* at para. 40.

190. Smith, *supra* note 15, at 410; see also Elsje Bonthuys, *A Duty of Support for All South African Unmarried Intimate Partners Part I: The Limits of the Cohabitation and Marriage Based Models*, 21 POTCHEFSTROOM ELEC. L.J. 1 (2018) (critiquing reliance on cohabitation as a recognition factor).

regulations is the best interest of children.<sup>191</sup> Recognition criteria regarding a couple's joint decision-making and shared, stable, loving home life are more relevant to a child's welfare than questions about the couple's financial obligations vis-à-vis each other.<sup>192</sup> In contrast, it would make sense to focus on financial agreements between a couple to determine whether they constitute a life partnership for purposes of pension benefits and financial maintenance upon death. In these financial contexts, steady cohabitation is less germane to the policy goal of promoting financial stability. Accordingly, it would make sense to omit cohabitation as a requirement for legal recognition, instead allowing couples who "live apart together" to be legally recognized as life partners for certain financial purposes.<sup>193</sup> It is worth noting that financial hardship has caused many people to pursue economic migration internally within South Africa, leading couples to maintain relationships without cohabitation.<sup>194</sup> Making cohabitation a requirement for legal recognition excludes many couples who are in serious relationships, and this exclusion has a disproportionate effect on Black and lower-income South Africans.<sup>195</sup>

Chief Justice Mogoeng's dissent in *Bwanya* drew attention to the fact that unmarried couples are not all similar in the legal consequences they want for their relationships.<sup>196</sup> The Chief Justice argued that these differences justify differential legal treatment for marriage and nonmarriage.<sup>197</sup> It would have been helpful for the majority to state in response that diversity among unmarried couples can—and should—affect the ways the legal system recognizes them. A context-based approach to legal recognition would account for some of the variation among couples. This is a strength of the context-based approach.

To be sure, functionalist approaches to relationship recognition have their shortcomings. In functionalist regimes, resources are spent on evaluating whether couples satisfy recognition criteria. This burden may become extremely heavy depending on how many couples seek legal recognition. In addition, functionalist approaches can create uncertainty for

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191. Children's Act 38 of 2005 § 230 JSRSA (S. Afr.) (stating that adoption can take place if it is in the "best interests of the child").

192. To be sure, in some cases, a couple's lack of financial obligations vis-à-vis each other may create financial risks for an adoptive child. Such risks can be considered on a case-by-case basis as opposed to barring all unmarried couples from joint adoption.

193. For more information on couples who live apart together, see CYNTHIA GRANT BOWMAN, *LIVING APART TOGETHER* (2020).

194. Bonthuys, *supra* note 190, at 1.

195. *Id.*

196. *Bwanya v. Master of the High Ct., Cape Town and Others* 2021 ZACC 51 (CC) at para. 101 (S. Afr.) (Mogoeng, C.J., dissenting).

197. *Id.*

couples.<sup>198</sup> Whereas a couple can be sure they will be legally recognized after obtaining a marriage, a couple cannot be certain that their relationship will be recognized as a permanent life partnership until relevant third-party decision makers evaluate the couple based on recognition criteria. The fact that criteria change across context can add further uncertainty.

To mitigate the shortcomings of the functionalist system, we would recommend that South Africa establish a domestic partnership registry that would exist alongside the functionalist system.<sup>199</sup> This suggestion is perhaps especially timely in light of the fact that the SALRC is currently investigating possible legislative reforms addressing marriage and unmarried partnerships.<sup>200</sup> Establishing a domestic partnership registry would provide greater certainty to the extent that legal consequences automatically attach to registration.<sup>201</sup> If the state were to create such a domestic partnership registry, it should educate people about it and encourage people to take advantage of the registry to promote certainty about their relationships. Currently, couples in South Africa already have the option of registering as civil partners instead of marrying. Unfortunately, for many people, civil partnerships probably are not a meaningful alternative to marriage because the two institutions differ in name only; they confer on couples identical legal consequences.<sup>202</sup> South Africa could expand couples' choices by establishing a registry that is inspired by Colorado's unique designated beneficiary system.<sup>203</sup> The Colorado scheme allows any two adults to register themselves as designated beneficiaries and

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198. For discussion about costs of legal uncertainty and lack of legal awareness about family rights, see Suzanne A. Kim, *Transitional Equality*, 53 U. RICH. L. REV. 1149, 1186 (2019).

199. As discussed *supra*, in notes 30–32 and accompanying text, the South African Law Reform Commission's 2006 report and the ensuing draft Domestic Partnership Bill proposed extending a range of rights and responsibilities to couples who register as domestic partnerships as well as cohabiting couples who satisfy the law's definition of "unregistered domestic partnership." Similar proposals had previously been included as a chapter in the first version of the Civil Union Bill of 2006, but the chapter was subsequently excised. In the United States, commentators such as Cynthia Grant Bowman have similarly suggested allowing for domestic partnership registration while also providing a recognition status based on functionalism. Unlike South Africa's current functionalist approach, however, Bowman's proposal involved a conscriptive component. Cynthia Grant Bowman, *Social Science & Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 45, 48 (2007). Research shows increased interest in partnership registration schemes among both different-sex and same-sex couples in parts of Europe. See Nausica Palazzo, *Marriage Apostates: Why Heterosexuals Seek Same-Sex Registered Partnerships*, 42 COLUM. J. GENDER & L. 13–17 (forthcoming) (draft on file with authors). Nausica Palazzo has mapped out arguments advanced by different-sex couples in Europe seeking inclusion in registered partnership regimes, categorizing the arguments as focusing on "status," "utilitarianism," and "choice." *Id.* at 27–41.

200. For information on this SALRC project, see S. AFR. L. REF. COMM'N, *supra* note 92.

201. For example, if registration automatically confers intestate succession rights on a couple, registration offers greater certainty to a couple who would otherwise need to have a court evaluate their relationship on functionalist criteria to determine whether they constitute a permanent life partnership.

202. See Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 576–77 (2013).

203. COLO. REV. STAT. § 15-22-105 (2017).

choose from an à la carte menu of sixteen different legal consequences they can assume.<sup>204</sup> These menu options include consequences such as intestate succession, medical decision-making rights, and the right to be appointed as a beneficiary in pension and insurance plans.<sup>205</sup> This flexible approach enhances the autonomy of couples, allowing each couple to customize the legal significance of their relationship. Even upon establishing a new domestic partnership registry, however, South Africa would have good reason to maintain a functionalist approach to accommodate couples who lack the legal awareness or foresight to formally register their relationship as a domestic partnership.<sup>206</sup>

To some extent, recent developments in the United States echo South Africa's nascent development of context-based functionalism. In the United States, different functionalist criteria are used by different actors to determine whether an unmarried couple will be officially recognized. For example, some private employers recognize unmarried couples for employee insurance benefits, and the employers use criteria such as cohabitation, financial interdependence, or relational closeness to determine eligibility.<sup>207</sup> Meanwhile, in some parts of the United States, the state will legally recognize unmarried couples based on functionalist criteria for purposes such as domestic violence laws<sup>208</sup> and tort liability against third parties.<sup>209</sup> These diverse contexts involve different decision makers and different criteria for determining whether the couple's nonmarital relationship will be recognized.<sup>210</sup> As Kaiponanea Matsumura put it, inconsistent criteria in the United States cause legal recognition of unmarried couples to "flicker" on and off.<sup>211</sup> Matsumura has noted that flickering may comport well with unmarried couples' expectations, allowing couples to flick recognition on and off, thereby advancing autonomy.<sup>212</sup> On the other hand, inconsistency in recognition criteria may

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204. *Id.*

205. *Id.* For further discussion about the Colorado scheme, see John G. Culhane, *Cohabitation, Registration, & Reliance: Creating a Comprehensive & Just Scheme for Protecting the Interests of Couples' Real Relationships*, 58 FAM. CT. REV. 145 (2020).

206. For further discussion on the limitations of relationship registries, see Lau, *supra* note 88, at 2627–28; Aloni, *supra* note 202.

207. Matsumura, *supra* note 187, at 1338–41.

208. *Id.* at 1346 (discussing civil restraining orders and criminal prosecution for domestic abuse).

209. *Id.* at 1352–53.

210. Kaiponanea Matsumura and others in the U.S. have engaged the concept of "flickering" to refer to the phenomenon in which legal recognition of a couple turns on and off depending on context. Matsumura, *supra* note 187, at 1363.

211. *Id.*

212. *Id.* at 1364–65.

lead to confusion.<sup>213</sup> As we discussed with respect to South Africa, we believe such confusion and uncertainty could be mitigated by creating a flexible domestic partnership registry and encouraging couples to make use of it.<sup>214</sup>

We will watch closely as the context-based approaches in South Africa and the United States continue to evolve. One value of comparative law is that countries serve as laboratories for testing new approaches to complex problems.<sup>215</sup> Both South Africa and the United States can learn from the experiences of the other. It remains to be seen whether and how law reforms in each country will refine their context-based systems. Future research can also explore, based on empirical data, how these systems are affecting couples' lived legal experiences.

#### CONCLUSION

South Africa has expanded legal recognition of nonmarital families over the years in remarkable ways. As we have examined in this Article, principles of choice played a key role in forging this path toward recognition. South African law's emphasis on choice bears insights for the United States, where concepts of choice have commanded attention in debates about whether and how to recognize nonmarital families. South Africa's story helps to widen the imagination about what is possible for incorporating choice principles into the law of nonmarriage.<sup>216</sup>

Principles of choice have animated South Africa's recognition of nonmarriage in three main ways. First, South African law has established the choice not to marry as a valid one deserving of respect. Second, South African jurisprudence has also complicated the picture of what it means to exercise choice. This jurisprudence illuminates social conditions that can impede free choice as a *de facto* matter. Lastly, South African legal developments have demonstrated how criteria for recognition can be designed in ways that enhance couples' choices and autonomy.

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213. *Id.* at 1365–66. Matsumura also notes but dismisses concerns that context-based “flickering” may frustrate the state’s regulatory goals because it allows couples to seek legal recognition in opportunistic ways. *Id.* at 1365.

214. *See supra* notes 199–206 and accompanying text.

215. “Just as our states are laboratories for social experiments from which other states and the federal government can learn, so are foreign nations laboratories from whose legal experiments we can learn.” Richard Posner, *No Thanks, We Already Have Our Own Laws: The Court Should Never View a Foreign Legal Decision as a Precedent in Any Way*, LEGAL AFFS. (July–Aug. 2004), [https://www.legalaffairs.org/issues/July-August-2004/feature\\_posner\\_julaug04.msp](https://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp) [<https://perma.cc/3JK5-L6JW>].

216. As discussed above, we do not argue that choice is or should be the only animating force shaping family law. *See supra* note 21 and accompanying text. South Africa does, however, provide an important window onto how principles of choice can and do drive recognition of nonmarriage in productive ways.

South African law still has room for improvement in recognizing nonmarital couples. For instance, South Africa may benefit from establishing a domestic partnership registry that exists alongside functionalist relationship recognition. A domestic partnership registry could improve legal certainty by conferring clear rights and obligations upon couples who register. We believe recommending this dual-track (registry and functionalist) approach to legal recognition is especially valuable in view of the SALRC's ongoing investigation into possible reform of South Africa's marriage laws and the potential legislative regulation of unmarried partnerships.

In addition to pursuing reforms to establish a dual-track approach, South Africa could address common public misunderstandings of the law. While some couples may assume incorrectly they are already in a common law marriage, others may lack sufficient legal awareness to ensure that their relationships will be treated functionally as life partnerships. Regardless of what additional reforms emerge in South Africa, the government should pursue efforts to educate the public about legal rights and obligations associated with family status.

Notwithstanding these opportunities for continued reform, examining South Africa's experience is instructive for the United States and for other jurisdictions. Studying the law of nonmarriage in South Africa provides insights into different pathways for taking nonmarriage seriously, particularly those based on robust notions of choice.