

South Africa's Wedding Jitters: Consolidation, Abolition, or Proliferation?

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I. INTRODUCTION

On December 1, 2005, the Constitutional Court of South Africa set that nation on course to join a small and, perhaps, surprising list of countries. Following Belgium,¹ the Netherlands,² Canada,³ Spain,⁴ and the American state of Massachusetts,⁵ South Africa looked set to become the fifth country and sixth jurisdiction to grant full marriage recognition to same-sex couples.⁶ Its entry is surprising, perhaps, because it is the first jurisdiction outside of the northern hemisphere and the so-called “West” to move toward such full recognition. Furthermore, South Africa—while certainly much more tolerant of same-sex relationships than its African neighbors—in many regions remains more hostile to homosexuality than Amsterdam, Madrid, Boston, or Vancouver.⁷

Thanks to its recent history, however, South Africa can also be seen as more actively hostile to discrimination, including that based on sexual orientation, than many “Western” jurisdictions. In the upper reaches of South Africa’s judiciary, this hostility has fostered a deep concern with

1. Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil (Feb. 13, 2003) (Belg.), *Moniteur Belge*, Feb. 28, 2003, at 9880-82; *see also Belgium Votes To Recognize Gay Marriages*, CHI. TRIB., Jan. 31, 2003, at 6.

2. Wet van 21 December 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet openstelling huwelijk), Stb. 2001, nr. 9 (Neth.), *translated in Text of Dutch Act on the Opening Up of Marriage for Same-Sex Partners* (Kees Waaldijk trans.), in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS* 455, 455-56 (Robert Wintemute & Mads Andenaes eds., 2001).

3. Civil Marriage Act, 2005 S.C., ch. 33, s. 2 (Can.); *Halpern v. Toronto City*, [2003] 65 O.R. 3d 161, ¶¶ 108, 154 (Ont. C.A.).

4. On June 30, 2005, Spain legalized same-sex marriage by adding one sentence to its pre-existing marriage law: “Marriage will have the same requirements and results when the two people entering into the contract are of the same sex or of different sexes.” Renwick McLean, *Spain Legalizes Gay Marriage: Law is Among Most Liberal*, N.Y. TIMES, July 1, 2005, at A1.

5. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

6. *Minister of Home Affairs & Others v Fourie & Another* 2006 (3) BCLR 355 (CC) (S. Afr.), 2005 SACLX LEXIS 34, *archived at* <http://www.constitutionalcourt.org.za/>. The Constitutional Court hearing and opinion consolidated two separate cases. The first, brought by Marié Adriaana Fourie and her partner Cecelia Johanna Bonthuys, challenged only the common-law definition of marriage and worked its way up to the Constitutional Court through the typical appellate procedure. *See id.* ¶¶ 6-12, 18-19, 21-22, 33. Because Fourie and Bonthuys failed to challenge the statutory provision that executed the common-law marriage definition, the Lesbian and Gay Equality Project (LGEP) successfully sought leave to appeal directly to the Constitutional Court for the purposes of raising the statutory concern. *See id.* ¶ 34. This consolidation enabled the Court to decide the entirety of the same-sex marriage issue without being forced by the limited pleadings in the *Fourie* matter to thread a fine and twisted needle on questions of remedy. The LGEP is not currently active, and its future is uncertain at the moment. In the interest of continuing to honor their role in the historic judgment, I refer to the case in the text and, where appropriate, in subsequent citations using the slightly unconventional shorthand form of *Fourie/LGEP*.

7. This comparison is more than a bit unfair, for South Africa itself features thriving and visible LGBT communities in urban centers such as Johannesburg and Cape Town, and increasingly strong LGBT communities around the country. Moreover, the entire continent boasts a rich and varied history of same-sex sexual practices and identities. These communities and this history both contribute to and draw strength from the legal change which looks so surprising to many non-South African eyes. To be surprised by South Africa’s LGBT progress is, among other things, to ignore these elements of African society.

discrimination's more slippery, symbolic dimensions. The *Fourie/LGEP* opinion mandating same-sex marriage represented a new threshold for the country's Constitutional Court, mobilizing a strikingly expansive conception of law's symbolic influence. The opinion portrayed law as an important symbolic influence on society and suggested that this influence is mediated by the cross-cutting influences it finds there. More pointedly, the *Fourie/LGEP* opinion also signaled the Court's intention to hold law tightly accountable for any harmful effects that emerge from this interplay of legal and social symbols.⁸ This concern with deleterious downstream symbolic effects did not extend to any that may be wrought by the very existence of marriage itself, however. Indeed, the Court sidestepped a major objection articulated by many LGBT people: that marriage remains the ubiquitous symbolic goal by which all other relationships are judged inferior—if, indeed, they are seen as relationships at all.⁹ In its strongest form, this objection argues that as long as marriage exists, it will paint all other relationships as also-rans. In this strong, *abolitionist* view, the end of such discrimination requires the end of marriage.

This objection shares with the *Fourie/LGEP* Court an expansive symbolic vision of the law-society nexus. But the *Fourie/LGEP* Court not only declined to abolish marriage; it explicitly forbade such a step.¹⁰ In so doing, the Court emphasized marriage's congenial symbolic dimensions as a normative good to which access must be encouraged. Any limitations to marriage were constructed and curable, not intrinsic and intractable. The *Fourie/LGEP* view, in short, was unabashedly pro-marriage. Furthermore, it came on the heels of yet another controversial decision in which the same Court had declined to extend domestic partnership benefits to the survivor of an unmarried opposite-sex couple.¹¹ In my view, these cases taken together sketch the first outlines of what I call the *consolidationist* approach of the current South African Constitutional Court toward questions of relationship recognition. The consolidationist approach attempts to resolve many people's exclusion from the current form of relationship recognition (i.e., marriage) by pulling that one form's boundaries outward to encompass more relationships.

The judiciary's consolidationist project has unfolded alongside a more *proliferationist* alternative centered in the elected branches of South Africa's government. Parliament has enacted legislation providing for the recognition of customary marriages performed under "traditional" indigenous law,¹² while

8. See *infra* Section II.A.

9. This objection is not limited to gay, lesbian, or queer people. For example, the call of Martha Fineman for care-based rather than sex-based relationship recognition is broadly similar. See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

10. *Fourie/LGEP* ¶ 149.

11. *Volks NO v Robinson & Others* 2005 (5) BCLR 446 (CC) (S. Afr.), 2005 SACLR LEXIS 3, archived at <http://www.constitutionalcourt.org.za/>.

12. Recognition of Customary Marriages Act (RCMA) 120 of 1998, available at <http://www.info.gov.za/gazette/acts/1998/a120-98.pdf>.

proposals remain in development that would extend similar recognition to Islamic marriages.¹³ At both symbolic and material levels, these proliferating forms expand the alternatives available to South Africans for the recognition of their conjugal relationships and attempt to rectify the perceived inadequacy of existing marriage forms for protecting and recognizing those diverse relationship practices. Government's¹⁴ proposed response¹⁵ to the *Fourie/LGEP* ruling would have pushed this proliferationist project further in two respects. Most straightforwardly, alongside its proposals for same-sex marriage, the original Civil Union Bill included the creation of two domestic partnership statuses for the regulation of both opposite- and same-sex conjugal relationships—a proposal that was unfortunately dropped from the final legislation.¹⁶ Not only would these new statuses have entailed fewer legal entanglements than those attending marriage, but they also would have enabled South Africans to seek legal recognition for their relationships outside the symbolic confines of marriage itself.

The original bill presented a similar choice to would-be same-sex spouses. Couples who wished to marry under this bill would have been allowed at the moment of consecration to choose whether to call their union a “civil partnership” or a “marriage.”¹⁷ The original bill did not represent a uniformly happy world of relationship autonomy, however. Not only did this bill limit civil partnerships to same-sex couples, but it also seemed to suggest that government would usually call a same-sex union a “civil partnership,” no matter what the union's members chose to call it themselves.¹⁸ The choice of

13. See SA Law Commission Discussion Paper 101 Islamic Marriages and Related Matters (January 2002), available at http://www.doj.gov.za/salrc/dpapers/dp101_prj59/dp101_prj59_2002.pdf. Many South African legal and political actors are also contemplating the creation of a Hindu marriage act. See, e.g., *Fourie/LGEP* ¶¶ 108, 146. No formal research or proposal process has yet begun for Hindu marriages. It should be noted that both Islamic and Hindu South Africans are currently free to marry under section 3(1) of the existing Marriage Act 25 of 1961.

14. I use “government” throughout this Comment as a synonym for the executive branch, as is conventional in parliamentary systems. I use “the government” to refer to the South African government as a whole, including Parliament and the judicial system.

15. Civil Union Bill, 2006, B 26-2006 (GG) (submitted to the National Assembly on August 31, 2006) [hereinafter Civil Union Bill (original)], available at <http://www.pmg.org.za/bills/090613b26-06.pdf>. This bill was passed by one House of Parliament in significantly amended form as this Comment went to press, and looked likely to win adoption in that form. See Civil Union Bill, 2006, B 26B-2006 (adopted by the National Assembly on November 14, 2006) [hereinafter Civil Union Bill (amended)], available at <http://www.pmg.org.za/bills/061109B26b-06.pdf>. The discussion contained in this Comment is largely based on the original version of the bill. I highlight the most important changes in the amended version *infra* notes 16-18 and elsewhere, as they arise.

16. Civil Union Bill (original), *supra* note 15, ch. 3. As mentioned, these have been removed from the final version of the bill. See Civil Union Bill (amended), *supra* note 15.

17. Civil Union Bill (original), *supra* note 15, s. 11. See also Civil Union Bill (original) s. 4 (limiting that bill's scope to same-sex couples). The amended bill extends the option discussed here to opposite-sex as well as to same-sex couples. Civil Union Bill (amended), *supra* note 15, s. 4, 11.

18. The final version of the bill strengthens its status as a “marriage” bill, per se, by placing marriage alongside civil partnership as co-equal statuses within the broader category of “civil unions.” Civil Union Bill (amended), *supra* note 15, s. 1. With access to the civil union category as a whole now gender-neutral, as discussed *supra* note 17, the new bill sends a clear signal that the same-sex couples married under this bill are just as married as are the opposite-sex couples.

the foregoing proliferationist project had been retained and extended but with only half the recognition. And so South Africa's government proposed what would probably have been the world's first instance of civil partnership/marriage, a cumbersome and confusing status that practically invited the somewhat tongue-in-cheek name I will use for it in this Comment—the slash marriage.¹⁹ Yet this clumsily discriminatory proposal, for all its flaws, may have contained within it an alternative to the all-or-nothing tug-of-war between consolidationist marriage celebration and abolitionist marriage critique, an alternative the final bill looks to put directly to the test. Why shouldn't every spouse—straight, gay, or otherwise—be allowed to choose what the government calls her union, whilst retaining the full tangible protection of the law?

In this Comment, I will suggest that all other things being equal (and I do mean equal), the proliferation of marriage types—and of relationship recognition forms more generally—may represent a more workable solution than abolition for loosening marriage's normative stranglehold over the relationship order. If marriage were simply abolished, then another word might rise to take its place, continuing to render the un-whatevered among us inferior and invisible. Alternatively, the law's abandonment of marriage could throw marriage's normative power fully back into the hands of private institutions that are not always progressive—notably, but not exclusively, religious institutions. Perhaps marriage proliferation could represent a way to maintain law's right to oversee relationship inclusion and exclusion, without concentrating that oversight in the hands of a monolithically powerful symbol. In time, perhaps it could even cultivate the habits of mind necessary to imagine the proliferation breakthrough we most truly need in the realm of relationship recognition: the expansion of relationship protection beyond the conjugal couple.²⁰

This Comment begins in Part II by outlining the Constitutional Court's consolidationist approach toward marriage, and how that approach limits the Court's otherwise expansive conception of symbolic construction in the law-society nexus. Part III highlights both the commonalities and disagreements of the Court's consolidationist approach with the more abolitionist view advocated by LGBT critics of marriage such as Michael Warner. Part IV then turns to the proliferationist approach of South Africa's elected branches, situating the Civil Union Bill in the context of other recent legislative developments regarding marriage and relationship recognition more broadly.

19. For the reasons discussed *supra* notes 17-18, this may not be a good descriptor of the final bill. Obviously these various proposals force us to ask just *what* defines a marriage. It is a new take on an age-old ambiguity: Now we must puzzle over the "marriage-ness" not of the relationship but of the recognition. I save that interesting knot of questions for another paper.

20. For a recent example of this position, see *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships* (July 26, 2006), <http://www.beyondmarriage.org/BeyondMarriage.pdf>.

Part V concludes that South Africa's proliferationist tendencies may unintentionally suggest new possibilities for mitigating and fracturing marriage's normative power.

II. THE CONSOLIDATIONIST MARRIAGE PROJECT OF THE CONSTITUTIONAL COURT

Fourie/LGEP was a watershed moment in the global struggle for LGBT rights. At a moment when so few countries around the world grant full recognition to same-sex partnerships, one cannot help but admire South Africa's breathtakingly rapid progress on LGBT legal issues. Just to the north, Zimbabwean president Robert Mugabe has perfected the art of ham-handed anti-gay scapegoating,²¹ while the government of former South African possession Namibia also occasionally antagonizes its own LGBT population.²²

Despite this apparent contrast, South Africa shares with its African neighbors particular histories of family arrangements that have influenced the shape of the same-sex marriage debate thus far. In particular, many Africans, both inside and outside South Africa, view marriage primarily as an alliance of extended families rather than as a union of individuals.²³ Many of these same people rightly believe that colonial- and apartheid-era family law did little to accommodate such beliefs. To cure this defect, South Africa now permits its traditionally-minded citizens to register their marriages under distinct laws²⁴ that approach marriage as a moment not only for consummating relationships but also for affirming cultural commitments.²⁵ The relationship of the South African same-sex marriage debate to this broader, self-consciously multicultural South African context is complex. Amid the complexity, however, I believe three underlying assumptions can be discerned in the *Fourie/LGEP* opinion that draw on this history: 1) Marriage is a fundamental institution for the expression of societal values; 2) marriage is capable, properly

21. Mugabe famously banned the organization Gays and Lesbians of Zimbabwe from a book fair, whereupon he commenced an intermittent campaign of anti-gay invective. *See, e.g.*, S. Afr. Press Assoc., *Mugabe Urges People to Arrest Homosexuals*, Aug. 14, 1995 (LEXIS, News & Business Library, Combined Sources); Lewis Machipisa, *Zimbabwe-Human Rights: President Lashes Out at Gays*, Aug. 18, 1995 (LEXIS, News & Business Library, Combined Sources). Comments such as these and the LGBT Zimbabweans who resist them are chronicled in Kai Wright, *Under African Skies: A Four-Part Series on Gay Zimbabwe* (pts. 1-4), WASH. BLADE, Apr. 28-May 19, 2000, available at <http://www.kaiwright.com/gayzimbabwe.php>.

22. *See, e.g.*, *Namibia Gay Rights Row*, BBC NEWS (Oct. 2, 2000), <http://news.bbc.co.uk/2/hi/africa/953657.stm>.

23. *See generally* Eileen Jensen Krige, *A Comparative Analysis of Marriage and Social Structure Among the Southern Bantu*, in *AFRICAN MARRIAGE IN SOUTHERN AFRICA 1* (Eileen Jensen Krige & John L. Comaroff eds., 1981).

24. *See* Recognition of Customary Marriages Act 120 of 1998.

25. *See* Michael W. Yarbrough, *We Thee Wed: Customary Marriage Law and the Meanings of Culture in Post-Apartheid South Africa* (Sept. 28, 2005) (unpublished manuscript on file with author).

arranged, of expressing a wide variety of such values; and 3) sometimes those values are expressed through marriage's exclusions as much as its inclusions.²⁶

Substantively, these assumptions differ little from those that drive same-sex marriage debates in Europe and North America. But South Africa's Constitutional Court was notable, in my opinion, for how seriously it took them. *Fourie/LGEP* employed a strikingly expansive conception of legally cognizable symbolic harms, highlighting a number of marriage's symbolic trappings that fall far outside the four corners of the law, and arguing that the law helps to construct these symbols' significance. It set a high bar for the parliamentary response, demanding symbolic parity not only in the law's language but also in the context and application it would help to bring about. As this Part will argue, this bar would be easiest to clear with a unified, consolidationist marriage solution.

A. *The Harm of Symbolic Exclusion*

As presented to the Constitutional Court, the *Fourie/LGEP* litigation was noteworthy for the complete lack of dispute between the plaintiffs and government over the material entitlements of same-sex couples. Through both litigation and legislation, same-sex partners had already won a number of material benefits, including immigration protections,²⁷ public employment pensions,²⁸ joint adoption rights,²⁹ and automatic parental rights for the same-sex partner of a mother who conceived through artificial insemination.³⁰ In dicta, the Court had expressed frustration with this "piecemeal" approach to lesbian and gay rights, calling for "[c]omprehensive legislation regularising relationships between gay and lesbian persons."³¹ But government argued that the extension of these rights had rendered same-sex marriage itself unnecessary because "the position of gay and lesbian couples has significantly improved over the years . . . [T]hey can no longer be regarded as suffering from patterns

26. Where same-sex marriage advocates and some traditional Africanists might differ, of course, is on the question of which such exclusions are normatively desirable and which are not.

27. *Nat'l Coal. for Gay & Lesbian Equal. & Others v Minister of Home Affairs & Others* 1999 (2) SA 1 (CC) (S. Afr.), archived at <http://www.constitutionalcourt.org.za/>.

28. *Satchwell v President of the Republic of S. Afr.* 2002 (6) SA 1 (CC) (S. Afr.), archived at <http://www.constitutionalcourt.org.za/>.

29. *Du Toit & Another v Minister of Welfare & Population Dev & Others* 2003 (2) SA 198 (CC) (S. Afr.), archived at <http://www.constitutionalcourt.org.za/>.

30. *J & Another v Dir. Gen.: Dept. of Home Affairs & Others* 2003 (5) SA 621 (CC) (S. Afr.), archived at <http://www.constitutionalcourt.org.za/>. Rights have also been extended to same-sex couples through various statutes. See, e.g., Independent Media Commission Act 148 of 1993; Independent Broadcasting Authority Act 153 of 1993; Pensions Act 69 of 1996; Lotteries Act 57 of 1997; Basic Conditions of Employment Act 75 of 1997; Housing Act 107 of 1997; Special Medical Schemes Act 131 of 1998; South African Civil Aviation Authority Act 40 of 1998; Employment Equity Act 55 of 1998; Road Traffic Management Corporation Act 20 of 1999.

31. *J & Another* ¶ 23.

of systematic disadvantage.”³² As disingenuous or naïve as this characterization may be, it limited the dispute to issues of status.³³

With the material questions off the table, the Court was free to focus its inquiry on the symbolic effects of marriage discrimination—in its eyes, no trivial undertaking. Writing for the Court, Justice Albie Sachs emphasized that “[i]t should be noted that the intangible damage to same-sex couples is as severe as the material deprivation.”³⁴ A mantra of equal “*status*, entitlements, [and] responsibilities” echoed throughout the opinion.³⁵ Justice Sachs approvingly referenced the opinion below in the Supreme Court of Appeals,³⁶ where openly gay Justice Edwin Cameron had argued that:

the exclusionary definition of marriage injures gays and lesbians because it implies a judgment on them. It suggests not only that their relationships and commitments and loving bonds are inferior, but that they themselves can never be fully part of the community of moral equals that the Constitution promises to create for all.³⁷

In this formulation, marriage discrimination was seen as problematic both for the message it sent and for the ways that message hindered full and equal public participation by lesbian and gay people. A familiar, if infrequently accepted, argument in the worldwide same-sex marriage debate, it starts from the assumed premise that the moral community pins all its relationship recognition on marriage, and that to be excluded from the institution, whatever other inclusions one may enjoy, is thus fundamentally harmful.

The Constitutional Court went even further than Cameron had gone in his own opinion, attempting to understand the ways that law’s messages intersect with the symbolic hierarchies and practices circulating through social action more broadly. In particular, Justice Sachs focused on a brief catalog of societal marital rituals:

To begin with, [gays and lesbians] are not entitled to celebrate their commitment to each other in a joyous public event recognised by the law. They are obliged to live in a state of legal blankness in which their unions remain unmarked by the showering of presents and the commemoration of anniversaries so celebrated in our culture.³⁸

He made this broad statement although same-sex relationships did already occasion some private celebration and gifts at the time. After all, celebrations, gifts, and commemorations are each primarily social, rather than legal

32. Applicants’ Heads of Argument at 41, *Minister of Home Affairs & Another v Fourie & Another*, Mar. 16, 2005, archived at <http://www.constitutionalcourt.org.za/>.

33. *Id.* at 43-47.

34. *Minister of Home Affairs & Another v Fourie & Another* 2006 (3) BCLR 355 (CC) ¶ 72 (S. Afr.).

35. See, e.g., *id.* ¶¶ 72, 75, 78, 81, 98, 105, 147, 149.

36. See *id.* ¶ 17.

37. *Fourie & Another v Minister of Home Affairs & Others* 2005 (3) BCLR 241 (SCA) ¶ 15 (S. Afr.), 2004 SACLX 36. Notice that this formulation references the impact of marriage access not only on gays and lesbians who actually marry but also on the LGBT community in general.

38. *Fourie/LGEP* ¶ 72.

practices. So why did Justice Sachs emphasize them? One answer might be that in the context of opposite-sex marriage, these social events double as legal events—they are, as Justice Sachs wrote, “recognised by the law.”³⁹ This statement is certainly true of the “joyous public event”⁴⁰ of the wedding ceremony. But what of “the showering of presents and the commemoration of anniversaries”?⁴¹ Gifts, as it happens, can play an important evidentiary role in proving the existence of a recognized marriage under the distinct and parallel South African legal framework of customary, or “traditional,” African law.⁴² But customary marriage was not on the table in *Fourie/LGEP*, and gifting certainly plays no analogous legal function in the recognition of civil marriages.

Thus, Justice Sachs's point here could not be only that these symbolic practices are not legally recognized. I would suggest that a more plausible reading is that they are not legally *constituted*. They occur far less frequently and carry far less symbolic weight for same-sex couples than they do for opposite-sex couples, and they do so because the law is not hovering in the background, smiling and nudging them along like the mother of the bride. These performances have a hollowness to them—a “legal blankness”—which the Court unanimously declared a constitutionally impermissible harm.

With this holding, the Court commanded government to be mindful of the far-reaching influence of societal symbolic structures and to set policy accordingly. In hopes that the legitimacy of same-sex marriage might be strengthened by a legislative imprimatur, the Court suspended its order for one year,⁴³ giving Parliament a “free hand” to decide how best to respond.⁴⁴ This free hand was something of a sleight-of-hand, however, as Justice Sachs strung the net so high that only a few limited options realistically stood a chance of

39. *Id.*

40. *Id.*

41. *Id.*

42. “[L]obolo’ means the property, in cash or in kind . . . which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage.” Recognition of Customary Marriages Act (RCMA) 120 of 1998 s. 1. The analogy is not perfect because the gift is to the wife’s family of origin rather than to the couple themselves. Nonetheless, a registering officer typically considers the gifts when deciding whether or not a marriage has been “concluded in accordance with customary law.” RCMA s. 1. The registering officer is also statutorily required to register the amount of the agreed-upon *lobolo* when she or he registers the customary marriage. RCMA s. 4(4)(a). Customary marriage is discussed more extensively *infra* Parts II.C and IV.A.

43. See, e.g., *Fourie/LGEP* ¶ 156. The suspension of the ruling’s application is made explicit in parts 1(c)(ii) and 2(d) of the Court’s order in *Fourie/LGEP*. Even the choice to suspend the remedy temporarily was influenced by symbolic concerns. Justice Sachs argued that the symbolic stability of same-sex marriage would benefit from having weathered a political process. “[Marriage] represents a major symbolical milestone in [the plaintiffs’] long walk to equality and dignity. The greater and more secure the institutional imprimatur for their union, the more solidly will it and other such unions be rescued from legal oblivion[.]” *Id.* ¶ 137. I discuss the outcome of this punt to the legislature at more length below. *Infra* Part IV.B.

44. *Id.* ¶ 155.

clearing it.⁴⁵ In addition to giving Parliament one year to respond, the opinion also promised to judge that response by two guiding principles, both consolidationist: (1) Any “separate but equal” legal framework would be judged very skeptically;⁴⁶ and (2) the word “marriage” must be retained.⁴⁷

The “separate but equal” ideology has at least as ignominious a history in South Africa as it does in the United States. Not content with “mere” education and residential segregation, apartheid South Africa attempted to create ostensibly autonomous countries for the sequestration of much of its black population.⁴⁸ Justice Sachs surely had this example in mind when he invoked the language, although he opted to reference a less inflammatory—if no less painful—example, in which an earlier Court had upheld a black candidate attorney’s contempt of court conviction for sitting at the “European practitioners” table.⁴⁹

By contrast, Sachs asserted that the current Court would be very skeptical of any “assert[ion] that the separation was neutral if the facilities provided by the law were substantially the same for both groups.”⁵⁰ Even if all provisions were equal, Justice Sachs argued, it would still be possible that a segregated dispensation would send a message destructive to the “dignity and sense of self-worth of the persons affected.”⁵¹ Notably, any hypothetical separation would have no actual spatial dimension; the real separation would inhere at the more abstract level of statutory structure, perhaps accompanied by a distinction in nomenclature (as described below). And so Justice Sachs’s expansive concern with almost purely symbolic harm appeared yet again.

If Parliament could violate the Constitution even when providing equal “facilities,” then surely the use of a different word would violate the Court’s standards.⁵² The Court seemed to emphasize as much with its insistence that the word marriage be retained—an insistence that all but presumes its significance for *all* couples.⁵³ “Leveling down so as to deny access to civil marriage to all

45. The lone justice not to sign onto the entire *Fourie/LGEP* opinion, Kate O’Regan, recognized as much, voting against the one-year suspension in her concurrence: “It is true that there is a choice for the legislature to make, but on the reasoning of the majority judgment, there is not a wide range of options.” *Id.* ¶ 168 (O’Regan, J., concurring in part and dissenting in part).

46. *Fourie/LGEP* ¶¶ 150-52.

47. *Id.* ¶ 149 (“Leveling down so as to deny access to civil marriage to all would not promote the achievement of the enjoyment of equality.”).

48. See WILLIAM BEINART, TWENTIETH-CENTURY SOUTH AFRICA 217-27 (2001). The United States has its own ongoing analogue, of course—the Native American reservation—although the sovereignty of the latter is less all-encompassing than the architects of apartheid pretended for the “Bantustan” homelands. See *id.*

49. *Fourie/LGEP* ¶ 150 (quoting *S v Pitje* 1960 (4) SA 709 (CC) at 710 (S. Afr.) (citations omitted)).

50. *Id.* ¶ 150.

51. *Id.* ¶ 151.

52. As already mentioned and as discussed at more length below, *infra* Part IV.C, government’s initial slash-marriage proposal seemed destined to test the certainty of this hypothesis. With that challenge now possibly averted, the final bill may yet test the limits of the Court’s “separate-but-equal” skepticism.

53. See *Fourie/LGEP* ¶ 149.

would not promote the achievement of the enjoyment of equality. Such parity of exclusion rather than of inclusion would distribute resentment evenly, instead of dissipating it equally for all.”⁵⁴ Relying yet again on an expansive conception of the role of government action in constructing symbolic social inequality, Sachs entrenched into South African law not just a freedom to marry, but also a constitutional mandate that government provide an affirmative right to marriage.

B. Consolidation vs. Proliferation in Fourie/LGEP

Each of these guidelines reveals a fundamentally consolidationist view of marriage. The Court's skepticism of separate arrangements would tend to discourage the creation of new statuses, even if the real problem of “separate but equal” ideologies is less the multiplication of statuses in itself than the ascription of some South Africans to one of those statuses based on a constitutionally impermissible characteristic. Its insistence on the value of the word “marriage” effectively insists that the single status which will be retained and expanded must be the single status already in existence: marriage. Only in one brief but important passage does the Court seem to contemplate the possibility that both of these guidelines could realistically be met through a more proliferationist alternative.

In a private memo solicited by the Court during its *Fourie/LGEP* deliberations, the South African Law Reform Commission (SALRC)⁵⁵ suggested the possibility of creating one marriage act available to couples regardless of their gender makeup, and another marriage act restricted to opposite-sex couples who wished not to be married under the same law as same-sex couples.⁵⁶ In the SALRC's proposal, the existing marriage act would be the home of heterosexual objectors and be renamed the “Conventional Marriages Act,” while a new, gender-neutral “Reform Marriages Act” would be created to accommodate the needs of same-sex couples and those heterosexual couples who also chose to marry under the new law.⁵⁷

Although the Court declined to rule on this alternative's constitutionality, it did mention it as one option Parliament might wish to consider.⁵⁸ It noted the SALRC's contention that “the family law dispensation in South Africa would

54. *Id.*

55. The SALRC is an independent agency charged with a research and public consultation role in the development of new legislation.

56. *Minister of Home Affairs & Another v Fourie & Another* 2006 (3) BCLR 355 (CC) ¶ 144 (S. Afr.).

57. *Id.* This is essentially the final bill's approach, under a different nomenclature. An alternative possibility, with slightly different symbolic implications, would amend the existing marriages act to eliminate its gender requirements, and build the heterosexuals-only Conventional Marriages Act through a wholly new statutory structure. This latter possibility was apparently advocated by some in the SALRC after the *Fourie/LGEP* judgment.

58. *Id.* ¶ 147.

therefore make provision for a marriage act of general application together with a number of additional, specific marriage acts for special interest groups such as couples in customary marriages, Islamic marriages, Hindu marriages and now also opposite-sex specific marriages.”⁵⁹ While the primary virtue of this option was apparently that it was sufficiently well-developed for Parliament to consider quickly,⁶⁰ its inclusion by the Court also represents a nod to the proliferationist program of the elected branches, as well as an affirmation of one of the values driving that program—that of expanding “choice.”⁶¹

Notably, however, this option would expand heterosexual autonomy at the expense of homosexual freedom. Parliament has just passed a minor variation on this model,⁶² which may not pass constitutional muster. First, and most abstractly, placing homosexuality on a plane of identity with traditional African culture or Islamic religious commitments presents them as mutually exclusive identity categories. Traditional African, Muslim, and Hindu gays and lesbians are preemptively erased.⁶³ Second and more to the point, the existing customary marriage framework and the proposed Islamic equivalent are also opt-in laws, permitting a couple to choose under which identity, and which corresponding body of law, they want to effect their recognition. In contrast, because gays and lesbians under the SALRC proposal could only marry under a same-sex marriage statute, they would not have the same choice.⁶⁴

C. *Marriage is Sufficient—and Necessary*

As with the SALRC proposal just discussed, choice was an important frame for the Constitutional Court in *Fourie/LGEP*. The Court saw its task, however, not as one of expanding choice as far as possible, but as one of requiring the minimally acceptable alternatives necessary for constitutionally sufficient choice. One of marriage’s many virtues, in the Court’s eyes, was that it is a uniquely sufficient vehicle for the expression of such choice. This sanguine, voluntaristic notion of marriage echoed the Court’s holding and reasoning in a domestic partnership case decided less than a year before *Fourie/LGEP*. In the 2004 case of *Volks v Robinson*, a middle-class white woman asked for maintenance benefits from the estate of her deceased male domestic partner, on grounds that denying her these benefits violated the

59. *See id.* ¶ 146.

60. *Id.* ¶ 147.

61. *Id.* ¶ 146.

62. *See* Civil Union Bill (amended), *supra* note 15, s. 4.

63. None of the options on the table in the *Fourie/LGEP* litigation or the ensuing legislative debate would solve this problem, as only civil marriage was challenged. An enterprising gay or lesbian traditional or Muslim couple could pose this question through litigation. The legal and, especially, political questions of gender-neutral customary and Islamic marriage are extremely difficult and interesting in their own right, and deserve their own full paper.

64. I discuss other problems with this “heterosexual objector” proposal in Part IV, where I consider the various options before government and Parliament.

Constitution's prohibition of discrimination on the basis of marital status.⁶⁵ She lost.⁶⁶

Although the Court agreed with plaintiff Ethel Robinson that the denial of automatic maintenance payments to domestic partners did constitute discrimination on the basis of marital status, they found this discrimination to be constitutionally justifiable.⁶⁷ Advancing a voluntaristic contract theory of marriage, the Court held that "[the plaintiff's] relationship with [her partner] is one in which each was free to continue or not, and from which each was free to withdraw at will, without obligation and without legal or other formalities."⁶⁸ The fatal fact for Robinson was the absence of any "legal impediment" to her and her partner choosing to marry.⁶⁹ Given this fact, it could only be presumed that their failure to marry was freely chosen, and that her partner did not wish maintenance benefits to be paid out to her from his estate.⁷⁰ The Court explained, "The decision to enter into a marriage relationship and to sustain such a relationship signifies a willingness to accept the moral and legal obligations, in particular, the reciprocal duty of support placed upon spouses and other invariable consequences of a marriage relationship."⁷¹ With what seemed to the Court to be a clearly expressed wish to the contrary, and no statutory mandate requiring such a payout, the Court was powerless to help the surviving partner. Where *Fourie/LGEP* invited gays and lesbians to marry, *Robinson* all but required it of heterosexual couples seeking legal protection. These cases, taken together, sketch the outlines of the Court's consolidationist agenda.

III. THE ABOLITIONIST VIEW OF MARRIAGE

From the point of view of many gays and lesbians, however, such naïve celebration of marital choice fails to realize the full implications of a deeply and broadly symbolic conception of legal discrimination. In this view, status symbols such as marriage are status symbols only because they discriminate. The choice, even when it *is* a choice, is ethically loaded. Michael Warner's polemical yet subtle work, *The Trouble with Normal*,⁷² offers one of the most sophisticated articulations of this position. He writes, "To a couple that gets married, marriage just looks ennobling Stand outside it for a second and you see the implication: If you do not have it, you and your relations are less

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

66. *Id.* ¶ 70.

67. *Id.* ¶ 54.

68. *Id.* ¶ 55.

69. *Id.* ¶ 91.

70. His will left her a portion of his estate, but no maintenance benefits. *Id.* ¶ 7.

71. *Id.* ¶ 91.

72. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999).

worthy. Without this corollary effect, marriage would not be able to endow anybody's life with significance."⁷³

In a single footnote, the *Fourie/LGEP* Court acknowledged LGBT concerns, documented in the SALRC research process, that marriage is "an oppressive institution that is wrongly presented by a heterosexual society as the norm against which all other relationships should be measured."⁷⁴ The Court further cited, with apparent approval, the SALRC's suggestion that "the legislature should respect the autonomy of these partners and make provision for both these groups."⁷⁵ This suggestion, however, failed to grapple with the objection's full implications. Would "providing" for the "autonomy" of those who wish not to marry really *lessen* the degree to which the non-marital choice is measured against the marital norm? In other words, despite its groundbreaking concern with symbolic equality and the role it assigned the law in helping to construct those symbolic systems, the Court's ambition remained limited to those who wish to marry. While the Court did leave room for further legal reform regarding those who *cannot* marry, such as rural women who cannot convince their more powerful and resourced male partners to formalize their relationships,⁷⁶ those who view marriage as an *inherently* problematic institution were dismissed—as the consolidationist project demanded.

Like the South African Constitutional Court, many gay marriage advocates speak a voluntaristic language of the right to choose recognition. Abolitionists such as Warner, however, spurn this formulation for its decontextualized vision of choice, a vision that in Warner's view neglects "the very privileged relation to legitimacy that makes people desire [marriage] in the first place."⁷⁷ In this view, marriage is not just a choice. It is also a command—a command disguised as a reward so enticing that one must wonder about the rationality—or, its synonym in this context, the morality—of anyone who would not seek it out. In other words, marriage not only recognizes; it also regulates. By constructing marriage as the normative center of human life, and everything else as either prelude to or denouement from that sanctified state, the regulatory pressure to get and stay married domesticates not just non-normative sexuality, but also non-romantic relationship behavior of all sorts.

Warner's interpretation of law's influence resembles that of the *Fourie/LGEP* Court in its expansiveness, even as it casts this influence in a more pessimistic light. Whereas Justice Sachs sees law's tendrils of influence in its capacity for recognition, Warner situates a similarly omnipresent influence in law's capacity for regulation. In Warner's critique of same-sex marriage advocates' rhetoric of decontextualized choice, he mocks their focus on law as a recognition tool. He highlights a point I raised above: Law is not

73. *Id.* at 82.

74. *Fourie/LGEP* ¶ 129 n.123.

75. *See id.*

76. *Id.* ¶ 160. For more on this topic, see *infra* Part IV.

77. WARNER, *supra* note 72, at 96.

necessary to make a public statement. Warner explains, "You can make a public statement with any kind of ceremony, or by talking to people, or by circulating a queer zine. A legal marriage, on the other hand, might well be private or even secret."⁷⁸ Choosing marriage for the public statement it sends denies the intrinsic statement also sent about those who cannot or do not make the same choice.

For Warner, the implication of this observation is that the role of the law predominantly lies elsewhere. He argues, "The purpose of legal marriage is [not] 'to make a public statement,'"⁷⁹ but to regulate sexuality and exclude the abject. The symbolic power of law does not only operate to confer respect, but also to withhold respect from others. It is not, as same-sex marriage advocates seem to suggest, just a wedding guest. It is both a guest and a bouncer. Recognition and regulation are not just intrinsically linked; they are the same process.

If this is true, the logical conclusion is that marriage should be abolished. If marriage's meaning is only possible through the exclusion of those insufficiently moral or attractive to seek or win its protection, then why should marriage confer meaning at all? It is a fundamentally damning critique. But would abolition of legal marriage really solve the problem? While Warner raises an excellent point—that we need not elevate romantic relationships over all others and that legal marriage plays some role in this elevation—one must also remember that the law is not solely responsible for upholding this normative hierarchy. Indeed, Warner himself correctly points out that law does not always hold this power, and that, in radically different historical situations, the value of a relationship has sometimes actually been seen as inhering in law's *non-recognition* of, or even hostility toward, the relationship.⁸⁰ This important observation points out that the symbolic influence of the law works its magic as it intersects with any number of other normative cultural codes—as it weaves its way through what Sachs might call its "context" of application.

In tying marriage's "legal force" to its "cultural normativity," Warner implicitly acknowledges the tight link between the two.⁸¹ Meanwhile, in agreeing with theorist Gayle Rubin that the "distinctions between good sex and bad do not necessarily come as whole packages,"⁸² Warner implicitly assumes that some other force—be it random social action or an intervening normative system—has the potential to disrupt this link's one-to-one correspondence. This assumption appears all the more true when one takes note of practices such as adultery, still marked by social stigma even if no longer legally regulated.

78. *Id.* at 98. It should be pointed out here that secret marriage ceremonies are currently not permitted under South African law, which requires that they be held in a public place or, at a minimum, with open doors. Marriage Act 25 of 1961, s. 29(2).

79. WARNER, *supra* note 72, at 98.

80. *Id.* at 101-04.

81. *Id.* at 107.

82. *Id.* at 26 (citing Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carol S. Vance ed., 1984)).

Warner's critique is inconsistent because he acknowledges this complex interplay as he constructs his critique, but he disavows it as he transforms that critique into a normative recommendation for the abolition of marriage. If we abolish legal marriage, what next? Can we not expect people to turn to other sources of power—say, the church—to elevate the romantic relationships they may continue to value more than others? Or, in the event that we replace legal marriage with a different scheme for protecting relationships, conjugal and otherwise, how can we be sure that this alternative will not simply come to be another marital synonym? Indeed, is it not possible that merely replacing “marriage” with “relationship contracts” or “domestic partnerships” would actually encourage people to imagine these alternatives as replacements for marriage? If we want to expand the imaginative vocabulary through which we recognize and protect relationships in all their forms, perhaps it makes sense to strategically retain marriage as part of a broadly proliferating menu of relationship recognition options. The first, tentative indications of such a possibility make up the other half of the South African story, located in that government's elected branches.

IV. A PROLIFERATIONIST APPROACH TO RELATIONSHIP RECOGNITION

In the South African context, the need for expanded relationship protection is not abstract. Most immediately, almost 2.5 million South Africans report themselves to be living in non-marital cohabiting relationships.⁸³ Though not legally registered or recognized, there is no formal, legal reason that the partners in these “marriage-like” relationships could not marry. Particularly common in under-resourced communities of color, the “choice” not to marry has been linked by research to gendered power differentials.⁸⁴ Many South African men resist marrying, perhaps in part because there is little incentive for men to entangle themselves in marriage's web of legal obligations.⁸⁵ Many South African women who wish to marry ultimately acquiesce to unmarried relationships with such men, due to power imbalances with, direct economic

83. STATISTICS SOUTH AFRICA, REPORT NO. 03-02-04, CENSUS 2001: PRIMARY TABLES SOUTH AFRICA, CENSUS 1996 AND 2001 COMPARED 31 (2001), available at <http://www.statssa.gov.za/census01/html/RSAPrimary.pdf>. This represents almost eight percent of South Africa's population over the age of fifteen. *Id.* See also Written Submissions on Behalf of the Amicus Curiae at 6, *Volks NO v Robinson & Others* 2005 (5) BCLR 446 (CC) (S. Afr.), archived at <http://www.constitutionalcourt.org.za/>. Not a small proportion of these relationships are de facto polygynous relationships (i.e., relationships involving one male and multiple female partners). Particularly because of migrant labor, many men have a partner in their rural home and another in their urban home, with or without being married to one of them. *Id.* at 10-11 (quoting CENTRE FOR APPLIED LEGAL STUDIES/GENDER RESEARCH PROJECT, COHABITATION & GENDER IN THE SOUTH AFRICAN CONTEXT ¶ 1.4.1 (2001)).

84. Written Submissions on Behalf of the Amicus Curiae, *supra* note 83, at 11-15 (citations omitted).

85. *Id.* at 15.

dependence on, and the threat of violence from their partners.⁸⁶ Countless women are thus left at the mercy of their male partners' whims and good health, with no legal recognition of their relationship and no accordant rights of protection should the relationship end.

The first well-intentioned policy extension implemented to help such women was the reform and revival of customary marriage. The Recognition of Customary Marriages Act (RCMA), passed in 1998, allows South Africans to consecrate their marriages under either the civil or customary law at their choosing.⁸⁷ This legislation increased access to legal protection for many of the women just described, especially in rural areas, by rendering traditional African weddings legally binding—even those which occurred prior to the statute's adoption.⁸⁸ It still required, nonetheless, consent from the would-be husband.⁸⁹ It also left the door open to a future polygynous marriage by that husband,⁹⁰ requiring only that the first wife be consulted regarding the ensuing property arrangements.⁹¹ Moreover, many women in such cohabiting relationships do not define themselves in terms of African tradition and would almost certainly consider marriage under such a law to be inappropriate. By itself, therefore, customary marriage would be insufficient to help all women in these circumstances.

Parliament's response to *Fourie/LGEP* had the potential to further address this situation. The first proposed Civil Union Bill⁹² included provisions for both registered⁹³ and de facto domestic partnerships.⁹⁴ These provisions drew on the SALRC investigation process that was already well underway, a process whose

86. *Id.* at 14-15.

87. Recognition of Customary Marriages Act (RCMA) 120 of 1998. The law provides, inter alia, that:

- One may not be married under civil and customary law simultaneously [s. 10(4)];
- Customary marriages are legal marriages for all intents and purposes [s. 2], which raises them to equal legal status with civil marriages;
- Women in customary marriages are full legal persons with equal status to their husbands before the law [s. 6];
- Both parties must consent to be married under customary law [s. 3(1)(a)(ii)];
- Should the husband wish to enter an additional customary marriage, his current spouse(s) must participate in the hearing determining property arrangements going forward [s. 7(4)(b) & s. 7(8)];
- Married partners may move their marriage from customary law to civil law provided they are not married to anyone else under customary law [s. 10(1)];
- Married partners may pursue divorce; such proceedings are limited to the civil courts [s. 8(1)].

88. RCMA ss. 2(1)-(2). Ordinarily legal force depends on the marriage's registration by an authorized registering officer, although lack of such registration does not in itself invalidate the marriage. *See* RCMA s. 4(9).

89. RCMA ss. 3(1)(a)(ii).

90. *See* RCMA ss. 2(3)-(4). The term "polygynous" refers to a marriage involving one husband and multiple wives.

91. RCMA s. 7(8).

92. Civil Union Bill (original), *supra* note 15.

93. *Id.* at ch. 3, pt. I (2006).

94. Civil Union Bill (original) at ch. 3, pt. II. Both forms of domestic partnership have been removed from the final bill. *See* Civil Union Bill (amended), *supra* note 15.

ultimate recommendations deftly balanced the very difficult conflict between concerns about protecting vulnerable partners, on the one hand, and relationship autonomy, on the other.

A. Proposed Domestic Partnership Policy Reforms

The SALRC's discussion paper put forth two possible domestic partnership regimes: one requiring registration,⁹⁵ and the other for de facto partnerships.⁹⁶ Generally speaking, the legal entanglements suggested for registered partnerships were more extensive than those proposed for de facto partnerships, with the property arrangements of the latter to be adjudicated by courts according to principles of equity.⁹⁷ The SALRC suggested that, because of this divergence in approach, it may be possible, even advisable, to adopt both regimes.⁹⁸ It would of course also be possible to choose just one or the other—or, of course, none. As mentioned above,⁹⁹ the Civil Union Bill submitted to Parliament included both frameworks and broadly resembled the SALRC proposal. The final bill has removed all domestic partnerships.¹⁰⁰

The rights and obligations attending registered domestic partnerships in the SALRC proposal were built on a “blank-slate plus” framework.¹⁰¹ Rather than beginning with the basic legal template of marriage and excluding particular rights and obligations, this framework starts from zero and selects those rights and obligations deemed appropriate.¹⁰² The SALRC proposed various legal consequences, including:

- A means-tested duty of support;
- Enforceable joint liability for household expenses;
- Joint liability to third-party creditors; and
- “Accrual” as the default property arrangement.¹⁰³

The first three of these also apply to marriages; the last is in effect a limited version of community-of-property, which is the default property arrangement

95. SA Law Reform Commission Discussion Paper 104 Domestic Partnerships (ch. 9) (2003) 266-89, available at <http://www.doj.gov.za/salrc/dpapers.htm> (cited URL contains links to paper in several chapters).

96. *Id.* at 302-18. The SALRC also proposed an ex post facto relationship option, substantially similar to the de facto partnership option except that it could only be ascribed after the relationship's dissolution following a petition by one or both parties. *Id.* at 318-29. In practice, it seems unlikely that de facto relationships would become legally cognizable until some sort of dispute arose, either between the partners themselves or between one or both partners and a third party. In other words, broadly speaking, the ex post facto option could be viewed as a limited version of the de facto option.

97. *Id.* at 294.

98. *Id.* at 334.

99. *Supra* notes 16, 93-94.

100. See Civil Union Bill (amended), *supra* note 15.

101. *Id.* at 266.

102. *Id.* at 265.

103. *Id.* at 274-75. Roughly speaking, while “community-of-property” effectively gives each spouse or partner claim to half the combined estate as a whole, “accrual” limits the shared portion to the change in value after the marriage or partnership commences. See D.S.P. CRONJÉ & JACQUELINE HEATON, SOUTH AFRICAN FAMILY LAW 97-106 (2d ed. 2004).

for marriages.¹⁰⁴ In addition to this difference, the plan does not provide for several legal consequences of marriage, including immigration and parental rights.

Despite its decision to build the material framework of registered domestic partnerships upwards from a blank slate, the SALRC curiously listed the possible reasons that couples might choose this option over that of marriage as “religious, political or philosophical.”¹⁰⁵ This focus on intangible motivations suggests that their primary vision for the new status was precisely that—a new *status* in the symbolic sense. The expansion of relationship recognition would be achieved, in this view, through the proliferation of status distinctions. Notably, the SALRC did not order these symbolic distinctions hierarchically. The implicit assumption was a liberal one of ethical impartiality: Some people value marriage more and some people value domestic partnership more, and the state's role is simply to make all the alternatives available. Whether this ostensible value neutrality would translate into a similar, ethically impartial normative framework amongst South African society at large, were such a proposal to be adopted, is a complicated and, at this stage, unpredictable empirical question. It represents, nonetheless, an intriguing alternative to the marriage abolitionist position.

The SALRC proposal for *de facto* partnerships complicated the question of status even further through its post hoc ascription of the status to partners who may never have chosen such a self-definition, or even have been aware that they might be defined as such. The exclusive power to determine the existence and contours of a *de facto* partnership would lie with the court.¹⁰⁶ While this would certainly compromise the autonomy of the relationship's members, the SALRC believed such a step necessary in order to protect those many women who are relatively powerless to secure formal, legal agreements from their partners.¹⁰⁷ This crucial policy goal does little, however, to explain the SALRC's choice to advance *de facto* partnerships as the only option available to non-conjugal relationships.¹⁰⁸ In the SALRC view, “[T]he remedies available under contract law and other legislation, together with the fact that they are included in the unregistered relationships proposal, provide adequate protection for partners in such [non-conjugal] relationships.”¹⁰⁹ With this language the SALRC distinguished the prosaic protection needs of non-

104. See CRONJÉ & HEATON, *supra* note 103, at 69. Some scholars also refer to it “as a type of postponed community of profit” system. *Id.* at 98. Notably, accrual is currently the default option for those South Africans who choose not to marry in community of property. See *id.* at 97. From this point of view, one could understand the registered domestic partnership proposal as a kind of customary “opposite” of the default marital property regime.

105. SA Law Reform Commission, *supra* note 95, at 269.

106. *Id.* at 302-04.

107. *Id.* at 290.

108. See *id.* at 269 (limiting the registered partnership proposal to conjugal couples).

109. *Id.* (internal citations omitted).

conjugal relationships from the full entry into moral society sought by conjugal relationships.

Perhaps that would be true for many such non-conjugal relationships. It is difficult at this point to imagine a mother and her adult daughter seeking a public ceremony to affirm their financial interdependence. But other possible categories of non-conjugal relationships are less of a stretch. What about long-term, intimately cohabiting friends, for example? Not coincidentally, this last model of relationship is particularly common in the LGBT community. Imagine how much more stable such relationships could be and how much more central they could become to the creation of individual and community identities if they were granted recognition through a ceremony or, to invoke Justice Sachs's words, "recognised by law."

And this, again, is where we should push Justice Sachs's expansive vision of law-in-society to the critical edge invoked by Warner. If law constitutes, perhaps it also generates. Thus, the availability of a legally recognized ceremony might lead to conditions under which a mother and her adult daughter *would* begin to contemplate the possibility of formalizing their relationship with some sort of ceremony. If we are interested in mitigating the hierarchies of status by which we romanticize some relationships while we lack the vocabulary with which to recognize others, perhaps we should give them that option. One small change in the SALRC's proposal would have made that possible: opening up registered domestic partnerships to non-conjugal couples.¹¹⁰ With a little bit of reimagination, such a reform could be seen as an extension of the steadfast expansion of relationship recognition that South Africa has been advancing in recent years, until now under the exclusive banner of marriage. Unfortunately, the bill eventually put before Parliament did not even go as far as the SALRC. Under this bill, even *de facto* partnerships would be limited only to conjugal relationships.¹¹¹

B. How Might Parliament Have Met the Challenge of Fourie/LGEP?

Despite these shortcomings, the inclusion of domestic partnerships in government's first response to the *Fourie/LGEP* ruling was a welcome surprise—and its eventual removal an unwelcome one. Particularly in the wake of the consolidationist *Robinson* ruling, there was an even greater need for some sort of protection to be extended to unmarried partners. That the elected branches almost accepted this challenge in the absence of a court order highlights their broadly proliferationist agenda with respect to relationship

110. A few consequential provisions would also require amendment, namely the prohibitions on consanguinity. See SA Law Reform Commission, *supra* note 95, at 270. This could open its own set of "problems," however, insofar as one believes that incestuous conjugal relationships should be prohibited. I leave that loaded issue aside in this Comment.

111. See Civil Union Bill (original), *supra* note 15, s. 1(e) (defining "unregistered domestic partnership").

recognition. This agenda was equally important in influencing their response to the *Fourie/LGEP* ruling's central mandate: marriage for same-sex couples.

In August of this year, the deliberation over government's response to the *Fourie/LGEP* ruling finally came out from behind the closed doors of intra-Cabinet squabbles. From the record that is now emerging, it appears that there had been three options on the table, each with varying chances of surviving constitutional scrutiny. First, Parliament could have simply enacted the remedy ordered by the Court: gender-neutral marriage, a proposal that was advanced in a bill leaked by the Department of Home Affairs.¹¹² Second, as already discussed briefly in Part II, in addition to neutralizing marriage's gender requirements, they could have created a new marriage status for those heterosexuals who object to solemnizing their marriage under the same law that recognizes same-sex couples. Finally, they could provide civil unions or another status with all the material benefits of marriage save the word itself.

1. Gender-Neutral Marriage

The first and most obvious option was that sought by the LGEP and, in the event of Parliament inaction within a year of judgment, granted by the Constitutional Court in *Fourie/LGEP*. This proposal would render the marriage formula of the Marriage Act of 1961 gender-neutral. This marriage formula is the default oath with which authorized marriage officers solemnize common-law marriages in the country, and it reads:

Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?¹¹³

Underlying this oath is a common-law marriage prescription, limiting marriage to "the legally recognised voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts."¹¹⁴ Echoing an earlier,

112. Marriage Act Amendment Bill, 2006. The bill was never formally released. It quietly appeared on the website of the Parliamentary Monitoring Group (PMG) on August 1, 2006, the same date that the Department of Home Affairs first briefed the Portfolio Committees on Justice and Constitutional Development and on Home Affairs regarding the *Fourie/LGEP* decision. At least one Home Affairs official expressed surprise to me that it had been made public, and it has since been pulled from the PMG website. It was nonetheless a focus of LGBT and human-rights sector advocacy efforts around this issue for much of the month of August 2006. See, e.g., Stephanie Saville, *Rights Groups Want Bill to Legalise Same-Sex Marriage*, THE MERCURY, Aug. 14, 2006, at 4; Slindokuhle Bhengu, *Balwela Ilungelo Lokushada [They Fight for the Right to Marry]*, ISOLEZWE, Aug. 16, 2006, at 13. The leaked bill is on file with the author.

113. Marriage Act 25 of 1961 s. 30(1).

114. 1 JUNE D. SINCLAIR (ASSISTED BY JACQUELINE HEATON), THE LAW OF MARRIAGE 305 (1996); see also *Seedat's Executors v The Master* 1917 A.D. 302 (Natal) at 309 (S. Afr.); *Hyde v Hyde & Woodmansee*, (1866) 1 L.R.P. & D. 130, 133. The proceedings of *Fourie/LGEP* revealed some disagreement in the judiciary about the relative priority of the statutory oath and the common-law definition. For example, Justice Cameron argued for the Supreme Court of Appeals majority in the *Fourie* matter that common-law reform would not automatically trigger corresponding reform in the statutory oath, while Justice Farlam argued in his concurrence for the same court that the statutory oath

very similar proposal by the SALRC, the LGEP petitioned for and received (subject to the one-year suspension) a remedy that would simply add the word "spouse" after the words "wife (or husband)" in section 30(1) of the Marriage Act.¹¹⁵

2. *A New Statute for Heterosexual Objectors*

As already mentioned, a second option was floated by the SALRC in a private memo to the Court during the *Fourie/LGEP* deliberations. Under this option, one gender-neutral marriage statute would be created, accompanied by an additional statute under which opponents to same-sex marriage would be permitted to choose a "conventional" marriage. The template for this option was customary marriage, a provenance that reveals the influence of the proliferationist approach. It was thought that conventional marriage would allow heterosexual objectors to register their own cultural commitments, just as traditional Africans do through the customary marriage statute. However, in my judgment the analogy is faulty. Most significantly, customary law is an actual body of *law*, backed in the final instance by the coercive power of the state. As such, it is subject to both constitutional support and constitutional restrictions of an entirely different order from those attending, for example, religious beliefs.¹¹⁶ Furthermore, customary law is both substantively and methodologically distinct from the civil law that otherwise governs South Africa, and therefore requires some sort of meta-law integrating it with South African civil law.¹¹⁷

Less tangibly, but perhaps more importantly, registering one's marriage as a conventional marriage would do far more than merely affirm one's own felt

merely describes the common-law definitions that were current at the time of the statute's enactment, and that the oath was thus subject to judicial reform to the extent necessary for proper reflection of any common-law reform the court might adopt. *Compare Fourie & Another v Minister of Home Affairs & Others* 2005 (3) BCLR 241 (SCA) ¶ 27 (S. Afr.) (Cameron, JA writing for the majority), with *id.* ¶¶ 133-38 (Farlam, JA, concurring in the judgment). In yet another view, the SALRC proposal seems to suggest that legislative amendment of the oath would by itself have the effect of changing the common law, as it nowhere mentions the need for common-law reform. In any event, these questions became moot when *Fourie's* case challenging the common law was consolidated with the Equality Project's case against the statute. See *Minister of Home Affairs & Others v Fourie & Another* 2006 (3) BCLR 355 (CC) ¶¶ 33-36 (S. Afr.); see also *supra* note 6.

115. The original SALRC proposal was to substitute "spouse" for "wife (or husband)," rather than to add it.

116. The status of customary law as law is constitutionally enshrined. S. AFR. CONST. 1996, ch. 12, s. 211-12. On the other hand, it is explicitly subordinated to the Bill of Rights. *Id.* ch. 2, s. 39(3).

117. The RCMA forms but one part of this larger program, known as "harmonisation." SA Law Commission Issue Paper 3 Harmonisation of the Common Law and the Indigenous Law (Customary Marriages) (1996), available at http://www.doj.gov.za/salrc/ipapers/ip03_prj90_1997.pdf. Other harmonisation legal reforms include the Traditional Leadership and Governance Framework Amendment Act 41 of 2003, available at <http://www.info.gov.za/gazette/acts/2003/a41-03.pdf> (regulating the recognition of traditional communities and traditional leaders); and *Bhe & Others v Magistrate, Khayelitsha & Others* 2005 (1) BCLR 1 (CC) (S. Afr.), archived at <http://www.constitutionalcourt.org.za/> (overturning the customary legal practice of primogeniture under the Constitutional Court's authority to reform customary law).

cultural beliefs, as is ostensibly the case with customary marriage. It necessarily implies a disapproval of someone else's cultural beliefs—namely, the belief that lesbian and gay couples are entitled to civic recognition through marriage. One could question the sharpness of this distinction: To choose an identity is always, of course, to define oneself against what one imagines lies beyond that identity's borders. As already argued, however, distinctions need not necessarily be hierarchical. Whatever symbolic politics may be involved in choosing customary marriage, to choose so-called "conventional" marriage quite clearly sends an intentional message, not only of distinction, but also of disapproval. Furthermore, it does so with resources specifically provided by the State for that purpose. This dimension of a conventional marriages proposal is only underlined by the fact that the existing Marriage Act already has an escape valve by which religious institutions can submit their own marriage formulas for approval.¹¹⁸ Ample space already exists in the Marriage Act for South Africans to solemnize a marriage that affirms their own religious beliefs. There is no need for the law to ingest those beliefs into itself or to select out one aspect of those beliefs—disapproval of same-sex marriages—for special treatment.¹¹⁹

3. *Civil Unions, Slash Marriages, and other Gay-Specific Options*

The original SALRC discussion paper on domestic partnerships proposed one final option: civil unions. In the SALRC's formulation, civil unions would carry all the same rights and responsibilities as marriages. With some modifications that may mitigate its constitutional problems, the Cabinet eventually proposed this option.¹²⁰ The proposal retained the civil union language but defined civil unions to include both same-sex, marriage-like "civil partnerships," as well as "domestic partnerships" which, as already discussed, would be available to conjugal couples regardless of gender makeup.¹²¹ Confusingly, but encouragingly, same-sex partners to a civil partnership would have the option to refer to their union as a "marriage" during their official ceremony.¹²² Otherwise, however, the statute refers to the union as a marriage

118. Marriage Act 25 of 1961 s. 30.

119. Yet another proposal that could be adopted alongside any of these options would separate civil and religious marriage completely, by authorizing only officers of the State to perform legally binding marriages. The SALRC discussion paper floated such a proposal, but it has since apparently been abandoned. Indeed, the Civil Union Bill, in both its original and amended forms, permits state marriage officials to refuse to perform civil unions on grounds of conscience.

120. The final, amended bill more closely resembles the heterosexual objectors option discussed *supra* Part IV.B.2.

121. Civil Union Bill (original), *supra* note 15. LGBT advocates pointed out that this associated civil partnerships with a status lower than marriage, that of domestic partnership. OUT LGBT Well-being, Parliamentary Submission: Civil Union Bill, at 8-9 (Sept. 29, 2006), *available at* <http://www.pmg.org.za/docs/2006/061017out.pdf>. The final bill defines "civil unions" to encompass both "marriages" and "civil partnerships." Civil Union Bill (amended), *supra* note 15, s. 1.

122. Civil Union Bill (original), s. 11(1).

in only one location, a provision that defines “marriage” in all other laws to encompass civil partnerships performed under the proposed bill.¹²³ This latter provision is probably better understood as a practical “bridging” provision designed to efficiently and tightly ensure that civil partnerships and marriages carry the same tangible benefits, rather than as an attempt to close the symbolic distinction between marriage and civil partnership.¹²⁴ After all, if the Cabinet wished to close the symbolic gap, why would they use different terms at all?

However one interprets the bridging provision, it is difficult to say with certainty whether the original Civil Union Bill would have provided for same-sex marriage or not. If it were passed and eventually challenged in Court, it would have been evaluated in terms of the messages it helped to construct about same-sex unions. In the original proposal that message appeared to be something like, “Call yourself married if you want, but don’t expect us to do so.” A cynic might suggest that this is precisely the symbolic tightrope government intended to walk: marriage enough to satisfy the Court, yet far enough from marriage to placate anti-gay critics.

V. CONCLUSION

The slash marriage proposal—both in its original and, less so, in its amended form—remains insulting. Both the original and the amended bills limit LGBT people to the slash marriage option, a limitation that would be no limitation at all were heterosexuals not given the additional option to choose slash-free marriage under the conventional statute. This asymmetry was but one reason that the status of slash-marriage was questionable at best in the original proposal. The amended bill clarifies that the slash marriage originally afforded to—or, if you prefer, forced upon—lesbian and gay South Africans will be extended to heterosexuals as well. It further seems to clarify that the slash marriage is indeed a marriage in the eyes of the state. Such developments fit within the broader proliferationist project surrounding the Civil Union Bill. In the foreseeable future, South Africans in conjugal relationships could choose to affirm their relationships as civil marriages, customary marriages, Islamic marriages, Hindu marriages, civil partnerships, or registered domestic partnerships. The choice to marry, or to register, will probably remain morally preferable in the eyes of most, as abolitionists like Warner might worry. The proliferation of relationship statuses would not thoroughly shatter marriage’s normative power. But, perhaps by multiplying the dimensions and scope of

123. Civil Union Bill (original), s. 13(2). The new bill contains more references to marriage, most notably in the section regarding religious officers. Civil Union Bill (amended), s. 5, *supra* note 15.

124. In the course of my advocacy work with OUT LGBT Well-being, it was suggested by a colleague that this bridging provision could ironically open up full civil marriage under the Marriage Act 25 of 1961 to same-sex couples, as the bridge could be interpreted to redefine the common-law definition of “marriage” to encompass civil partnerships, and the common-law definition of marriage is precisely what underlies the Marriage Act.

choice available, that normative power would not remain so thoroughly concentrated in the status of marriage alone—and the marriage status that remains would itself take many different forms. No longer would the choice not to marry be balanced against its monolithic opposite—the choice to marry. Instead it would be one option among many on the menu.

Consolidationist same-sex marriage advocates and marriage abolitionists seem to have become locked in an ever more intractable, yet ever more irrelevant debate as same-sex marriage evolves into the seemingly inevitable civil rights issue of our time.¹²⁵ Abolitionists have a powerful point, to be sure—a point whose very power is both underscored and undercut by their difficulty in getting the point heard. Most people do ask too much of marriage. And most people do expect other people to get married. However, precisely because this is so true, it would be naïve to expect such sentiment to be easily surrendered.

Abolition, I have come to suspect, might be a band-aid. Like many abolitionists, I think other relationships, beyond simply the romantic and the conjugal, deserve honor and support. I also think that marriage must recede in symbolic importance if such alternative honor and support are to be fostered. I have come to doubt, however, that the surest path to deemphasizing marriage lies in abolition. I have come to wonder if, instead, it may lie in proliferation.

For its own unique demographic, economic, cultural, and political reasons, South Africa has been multiplying the categories through which it recognizes relationships for almost a decade, starting long before it confronted the question of same-sex marriage *per se*. This history has helped to legitimize unique, if somewhat problematic, responses to the same-sex marriage question. The heterosexual objector “conventional marriage” was the first such proposal to be seriously considered. In its place the Cabinet first proposed an alternative that bore more marks of homophobic accommodation than proliferationist reform. The slash marriage would have permitted same-sex couples to call themselves married, even as it dangled government’s ambivalence about the same term in front of them. In so doing, however, the slash marriage would also have granted same-sex couples a measure of self-definitional autonomy that not only converges with proliferationism’s underlying logic, but that could also help render marriage more of a true choice for everyone. A gender-neutral slash marriage, particularly in the context of an ever-proliferating menu of marriage and partnership options, might just help all South Africans truly choose marriage for their own reasons. With the National Assembly’s adoption of just such a reform in its final bill, the opportunity is imminent for us to test the integrity of this unexpected promise.

125. To clarify: while I do see relationship recognition as a civil-rights issue, I do not see same-sex marriage either as inevitable or as the most important civil-rights issue of our time. I do not even see it as the most important civil-rights issue facing LGBT people, but that is a subject for another time. The genuine belief of many in its inevitability and importance, however, is a crucial piece of data with which I think abolitionists have not yet thoroughly grappled.

