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ARTICLES

THE FREEDOM TO MARRY IN HUMAN RIGHTS LAW WORLDWIDE: ENDING THE EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE

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ABSTRACT

In 2017, the Inter-American Court of Human Rights issued OC-24/17, a breakthrough advisory opinion that made the Court the first human rights mechanism to explicitly hold that States have an obligation to respect same-sex couples' freedom to marry. This Article is the first since OC-24/17 was issued to analyze comprehensively the extent to which human rights law, across international, regional, and national jurisprudence, requires States to respect the freedom to marry. It argues for the reassessment of *Joslin v. New Zealand* and *Schalk and Kopf v. Austria*, earlier cases from other human rights bodies that acknowledge the rights of same-sex couples to equality and family, but so far have fallen short of ending marriage discrimination. The Article then makes the case for these couples' freedom to marry as rooted in the right to marry, the rights to equality and non-discrimination, the rights to privacy and family, and the rights to liberty and dignity, as well as, under certain circumstances, the rights of children and parents, the right to freedom of movement, and the right to be free from inhuman or degrading treatment. This Article not only argues that human rights law can be understood to protect the freedom to marry, but also demonstrates why it is urgent that it should be so understood.

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INTRODUCTION

In May 2020, Alexandra Quiros and Dunia Araya became one of the first same-sex couples to wed in Costa Rica,[1] the twenty-ninth country to stop excluding loving and committed couples like them from civil marriage.[2] The coronavirus-driven restrictions on attendance at the wedding must have seemed only a slight obstacle to the couple after having waited so long for the government to acknowledge their freedom to marry. Years earlier, in 2016, the State of Costa Rica had submitted a request for an advisory opinion to the Inter-American Court of Human Rights (IACtHR), asking the IACtHR to interpret the

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1. *Costa Rica Celebrates First Same-Sex Weddings*, BBC (May 26, 2020), https://www.bbc.com/news/world-latin-america-52808947 [https://perma.cc/VF6V-EVRZ]; AFP News Agency, *Same-Sex Couple Marries after Costa Rica Legalizes Marriage*, YOUTUBE (May 26, 2020), https://www.youtube.com/watch?v=7vRXcsn3D9g&ab_channel=AFPNewsAgency [https://perma.cc/2UXN-5DFS].

2. *During Pride Month, a Look at LGBT Rights: New Map Shows Same-Sex Marriage, Civil Unions and Registered Partnerships Worldwide*, HRW, http://internap.hrw.org/features/features/marriage_equality [https://perma.cc/ZE3M-5XRZ] [hereinafter HRW] ("Just in time for Pride Month, Costa Rica on May 26th become [*sic*] the 29th country to legalize same-sex marriage."). Even more recently, a referendum in Switzerland and the promulgation of a law in Chile brought the total number of States affirming the freedom to marry to thirty-one. *See* Noele Illien, *Swiss Voters Approve Law Allowing Same-Sex Marriages*, N.Y. TIMES (Sept. 26, 2021), https://www.nytimes.com/2021/09/26/world/europe/switzerland-same-sex-marriage.html [https://perma.cc/38PH-PPTF]; Pascale Bonnefoy & Ernesto Londoño, *Chile Legalizes Same-Sex Marriage at Fraught Political Moment*, N.Y. TIMES (Dec. 7, 2021), https://www.nytimes.com/ 2021/12/07/world/americas/chile-gay-marriage.html [https://perma.cc/F2XZ-4HCB]. More than 1.2 billion people worldwide now live in countries where same-sex couples share equally in the freedom to marry. *See Global Landscape of the Freedom to Marry*, FREEDOM TO MARRY GLOBAL (Dec. 2021), https://www.freedomtomarryglobal.org/global-overview [https://perma.cc/DS89-ZXPF].

patrimonial rights of same-sex couples under the American Convention on Human Rights (ACHR).[3] In 2017, the IACtHR issued an opinion that went beyond the scope of Costa Rica's initial request, becoming the first human rights mechanism to hold that States have an obligation to respect same-sex couples' freedom to marry.[4] In 2018, the Supreme Court of Justice of Costa Rica chose to abide by the IACtHR's opinion, but allowed the legislature eighteen months to implement this decision.[5] This meant further delay, and thus injury, for couples like Quiros and Araya.

This Article is the first since the IACtHR's breakthrough advisory opinion was issued in 2017 to analyze comprehensively the extent to which human rights law, across international, regional, and national jurisprudence, requires States to respect same-sex couples' freedom to marry.[6] The Article also, on the basis of these decisions, makes the case for the freedom to marry.[7] Part I provides background on key international and regional human rights jurisprudence. It

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3. *See infra* Section I.A. Patrimonial rights are those that "affect[] the parties' economic situation and estates." Jorge Contesse, *The Inter-American Court of Human Rights's Advisory Opinion on Gender Identity and Same-Sex Marriage*, AM. SOC'Y INT'L L. (July 26, 2018), https://www.asil.org/insights/volume/22/issue/9/inter-american-court-human-rights-advisory-opinion-gender-identity-and [https://perma.cc/ZUW6-HJ58].

4. *See infra* Section I.A.

5. Sala Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Court of Justice] Aug. 8, 2018, Exp. 15-013971-0007-CO, Resolución No. 12782 – 2018 (Costa Rica).

6. Comprehensive examinations of the freedom to marry under human rights law prior to the IACtHR's 2017 advisory opinion include SAME-SEX COUPLES BEFORE NATIONAL, SUPRANATIONAL AND INTERNATIONAL JURISDICTIONS (Daniele Gallo, Luca Paladini & Pietro Pustorino eds., 2014); Jessica Brown, *Human Rights, Gay Rights, or Both?: International Human Rights Law and Same-Sex Marriage*, 28 FLA. J. INT'L L. 217 (2016); and Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797, 847-63 (2008).

7. Many critics have questioned the primacy of marriage as a form of State recognition of relationships. *See, e.g.*, Chao-ju Chen, *Single Equality in the Age of Marriage Equality*, 18 INT'L J. CONST'L L. 461 (2020); Ajnesh Prasad, *On the Potentials and Perils of Same-Sex Marriage: A Perspective from Queer Theory*, 7 J. BISEXUALITY 193 (2008); Gregg Strauss, *What's Wrong with* Obergefell, 40 CARDOZO L. REV. 631 (2018). Various human rights instruments, however, specifically recognize marriage as protected under international law. *See, e.g.*, International Covenant on Civil and Political Rights art. 23(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S 171 [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 12, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; American Convention on Human Rights art. 17(2), *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR]. While critiques of marriage are rich and often generative for thinking about recognition and redistribution, this Article focuses on the freedom to marry insofar as marriage is a recognized institution offered by the State, and the question of whether same-sex couples excluded from that institution should have the right to choose it.

highlights OC-24/17, the IACtHR advisory opinion already mentioned, as well as *Joslin v. New Zealand* from the Human Rights Committee (HRC) and *Schalk and Kopf v. Austria* from the European Court of Human Rights (ECtHR), two earlier cases that affirmed the rights of same-sex couples to equality and family but fell short of protecting their freedom to marry. Part II reassesses *Joslin* and *Schalk and Kopf*, arguing that these decisions are flawed and outdated. This analysis clears the way for the broader, positive case, in Parts III and IV, for securing same-sex couples' freedom to marry under human rights law. Part III makes this case on the basis of the rights most thoroughly litigated at the international and regional levels (the right to marry, the rights to equality and non-discrimination, and the rights to privacy and family) as well as the rights more frequently litigated at the national level that nevertheless found their way into the IACtHR's advisory opinion (the rights to liberty and dignity). Part IV presents an additional set of rights that, depending on the facts of a case, could supplement arguments for the freedom to marry (the rights of children and parents, the right to freedom of movement, and the right to be free from inhuman or degrading treatment). Although the arguments in this Article will be most directly useful in advocating for the freedom to marry before international and regional human rights mechanisms, the case for the freedom to marry in international human rights law is also relevant to domestic efforts and can be highlighted in amicus briefs, human rights reporting, and other advocacy documents.

Before delving into these arguments, however, we first clarify our use of the term "freedom to marry." We use "freedom to marry" instead of "marriage equality" because at issue, first and foremost, is affording individuals in same-sex relationships the same fundamental right and dignity of choosing whether and whom to marry that individuals in different-sex relationships already enjoy. Moreover, we understand marriage equality to encompass issues beyond the mere fact of legal recognition, which is the focus of this Article, such as the persistence of discrimination between married same-sex couples and married different-sex couples and the problematic hierarchy of forms of legal recognition (e.g., marriage, partnership). We also prefer "freedom to marry" over "same-sex marriage" because what is at issue is ending exclusion from marriage, rather than creating something new, different, or lesser called "same-sex" or "gay" marriage.[8]

I. KEY INTERNATIONAL AND REGIONAL JURISPRUDENCE

This Part describes the three human rights cases that have most directly addressed the freedom to marry of same-sex couples. First, it summarizes the 2017 advisory opinion of the IACtHR, which was the first human rights mechanism to interpret its treaty as requiring States to protect same-sex couples' freedom to marry. It then discusses *Joslin v. New Zealand* and *Schalk and Kopf v. Austria*, decisions in which the HRC and the ECtHR, respectively, fell short of acknowledging same-sex couples' freedom to marry, and notes how later

8. Moreover, we do not wish to reinforce the sex/gender binary, recognizing instead that the freedom to marry also matters to those who do not identify as male or female.

decisions have drawn these mechanisms into closer, though still not perfect, alignment with the IACtHR. The reasoning of *Joslin* and *Schalk and Kopf* will be reassessed in Part II. The reasoning of the IACtHR advisory opinion will support the human rights case for the recognition of the freedom to marry in Part III.

A. Inter-American Court of Human Rights: OC-24/17

In 2016, Costa Rica sought an advisory opinion from the IACtHR on the legal recognition of gender identity as well as the rights of couples in same-sex relationships.[9] On the second issue, Costa Rica specifically asked the following questions:

> 2. Taking into account that non-discrimination based on sexual orientation is a category protected by Articles 1 and 24 of the American Convention, as well as the provisions of Article 11(2) of the Convention: does this protection and the American Convention signify that the State must recognize all the patrimonial rights derived from a relationship between persons of the same sex?
> 2.1 If the answer to this question is affirmative, is a law that regulates relationships between persons of the same sex required in order for the State to recognize all the patrimonial rights that derive from this relationship?[10]

Costa Rica thus did not expressly place the issue of the marriage before the IACtHR. Nevertheless, the IACtHR took the opportunity to interpret the ACHR to require States to respect same-sex couples' freedom to marry.

In its 2017 advisory opinion, OC-24/17, the IACtHR found that the freedom to marry without discrimination on the basis of sexual orientation is protected under ACHR Articles 1(1) and 24, on equality and non-discrimination, and ACHR Articles 11(2) and 17, on the rights to privacy and family.[11] The IACtHR began by reaffirming its prior jurisprudence establishing that Article 1(1) of the ACHR prohibits discrimination on the basis of sexual orientation.[12] The IACtHR then found the concept of family in ACHR Articles 11(2) and 17 to encompass the familial bonds formed by same-sex couples and held that, when read in conjunction with ACHR Articles 1(1) and 24, on non-discrimination and equality,

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9. Letter from Ana Helena Chacón Echeverría, Vice Pres. of Costa Rica, to Hon. Roberto F. Caldas, Pres., Int.-Am. Ct. H.R. (May 18, 2016), http://www.corteidh.or.cr/docs/solicitudoc/solicitud_17_05_16_esp.pdf [https://perma.cc/4PCM-WHJ6].

10. *Id.* at 8 (authors' translation).

11. Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples: State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017) [hereinafter OC-24/17].

12. *Id.* ¶¶ 68, 78.

Articles 11(2) and 17 of the ACHR require that the rights to privacy and family extend as far for same-sex couples as they do for different-sex couples.[13] From this holding, the IACtHR turned to the mechanisms through which States could comply with their obligations under the ACHR and asserted that the ability to enter into available forms of "permanent and marital relationship," including marriage itself,[14] is required because marriage is a "free and autonomous choice [that] forms part of the dignity of each person."[15] In support of this assertion, the IACtHR cited not only ACHR Articles 11(2) and 17 on the rights to privacy and family, but also ACHR Article 7(1), which provides that "[e]very person has the right to personal liberty and security."[16]

As of December 2021, OC-24/17 has been implemented directly in Chile,[17] Costa Rica,[18] and Ecuador,[19] and is the basis for ongoing litigation and advocacy in several Latin American countries, including Bolivia, El Salvador, Guatemala, Honduras, Jamaica, Panama, Paraguay, Peru, and Venezuela.[20] OC-24/17 also invites reassessment of earlier human rights jurisprudence that fell short of acknowledging same-sex couples' freedom to marry, such as the HRC's decision in *Joslin v. New Zealand* and the ECtHR's decision in *Schalk and Kopf v. Austria*.

B. Human Rights Committee: Joslin v. New Zealand

In December 1995, Juliet Joslin and Jennifer Rowan applied for a marriage license under New Zealand's Marriage Act of 1995 (Marriage Act).[21] Joslin and Rowan had been a couple since 1988 and had been raising children together in a shared home for many years.[22] Ten days following the filing of their application,

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13. *Id.* ¶ 199.

14. Technically, the mechanism of State compliance has to be marriage not because of qualities inherent in marriage, but because to do otherwise would constitute unlawful discrimination. If a State were to abolish marriage and institute civil unions, equal access to those unions would be required under the logic of the opinion.

15. OC-24/17, *supra* note 11, ¶ 225.

16. *Id.*; ACHR, *supra* note 7, art. 7(1), 11(2) & 17.

17. Press Release, Inter-Am. Comm'n on Human Rights, IACHR Welcomes Recognition of Same-Sex Marriage in Chile (Dec. 9, 2021), https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/330.asp [https://perma.cc/25XM-32TA].

18. Sala Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Court of Justice] Aug. 8, 2018, Exp. 15-013971-0007-CO, Resolución No. 2018012782 (Costa Rica).

19. Corte Constitucional del Ecuador [Constitutional Court of Ecuador] June 12, 2019, Sentencia No. 10-18-CN/19, Caso No. 10-18-CN.

20. Rex Wockner, *Worldwide Marriage Equality Watch List*, WOCKNER (Dec. 7, 2021), https://wockner.blogspot.com/2018/06/worldwide-marriage-equality-watch-list.html [https://perma.cc/YV8Z-T8MN].

21. Human Rights Comm., Joslin v. New Zealand, ¶ 2.1, U.N. Doc. A/57/40 (July 17, 2002) [hereinafter *Joslin*].

22. *Id.*

New Zealand's Deputy Registrar General rejected it.[23] Shortly after, in January and February 1996, Lindsay Zelf and Margaret Pearl lodged notices of intended marriage at two Registry Offices in New Zealand, but the Registrar declined to process the notices, citing the Marriage Act.[24] Zelf and Pearl had been a couple since 1993 and, like Joslin and Rowan, were raising children together.[25] Joslin, Rowan, Zelf, and Pearl subsequently applied to the High Court of New Zealand requesting it affirm their freedom to marry.[26] The High Court held the Marriage Act applied exclusively to different-sex marriages.[27] It mentioned, in support of its decision, that Article 23(2) of the International Covenant on Civil and Political Rights (ICCPR), which provides, "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized,"[28] "does not point to same-sex marriages."[29] The Court of Appeal of New Zealand later upheld the High Court's decision and additionally found that the Marriage Act's restriction of marriage to different-sex couples did not constitute discrimination in violation of the ICCPR.[30]

In 1998, Joslin, Rowan, Zelf, and Pearl submitted an application to the HRC claiming that New Zealand had violated its obligations under the ICCPR and challenging the domestic courts' interpretation of the ICCPR as exclusively protecting different-sex couples' freedom to marry.[31] Specifically, the applicants argued that the Marriage Act violated their right to recognition before the law under ICCPR Article 16, their rights to privacy and family under ICCPR Article 17,[32] their right to marry under ICCPR Article 23(2), and their rights to equality and non-discrimination under ICCPR Article 26.[33] New Zealand, in response, reiterated the domestic courts' interpretation of ICCPR Article 23(2) as excluding same-sex couples. New Zealand also argued that the interpretive principle *generalia specialibus non derogant*[34] meant that the HRC should consider ICCPR Article 23(2) to the exclusion of the treaty's other provisions, because ICCPR

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23. *Id.*

24. *Id.* ¶ 2.2.

25. *Id.*

26. *Id.* ¶ 2.3.

27. *Id.*

28. ICCPR, *supra* note 7, art. 23(2).

29. *Joslin*, *supra* note 21, ¶ 2.3.

30. *Id.* ¶ 2.4.

31. *Id.* ¶ 1.

32. The applicants asserted this right alone as well as in conjunction with ICCPR Article 2, which requires that States comply with the principle of non-discrimination while respecting and ensuring the rights in the treaty, and under ICCPR Article 23(1), which highlights the role of the State in protecting family life. ICCPR, *supra* note 7, at arts. 2, 23(1).

33. *Joslin*, *supra* note 21, ¶¶ 1, 3.1-.8.

34. *Generalia specialibus non derogant* means "general things do not derogate from specific things." AARON X. FELMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 115 (2009).

Article 23(2) is the only provision that specifically addresses marriage.[35]

In 2002, the HRC found that New Zealand did not violate the ICCPR by preventing Joslin and Rowan or Zelf and Pearl from marrying.[36] The HRC adopted the State's reasoning, interpreting the use of the phrase "men and women" in ICCPR Article 23(2) "to recognize as marriage only the union between a man and a woman"; the HRC involved no other provisions in its interpretation.[37] This decision appeared to break with the HRC's previous jurisprudence, which had established that ICCPR Article 26 prohibits discrimination on the basis of sexual orientation.[38] Two Committee members, however, suggested in a concurring opinion that the HRC might have found a violation of ICCPR Article 26 in *Joslin* if the couples had demonstrated "a denial of certain rights or benefits to same-sex couples that are available to married couples" that were not "otherwise justified on reasonable and objective criteria."[39]

In spite of the outcome of *Joslin*, the New Zealand legislature later guaranteed the freedom of same-sex couples to marry by amending the Marriage Act in 2013 to include the following definition: "marriage means the union of 2 people regardless of their sex, sexual orientation, or gender identity."[40] Although the HRC, unlike New Zealand, has not directly revisited this issue and thus has yet to reconsider whether same-sex couples' freedom to marry is protected by the ICCPR, its approach to marriage also appears to have shifted since *Joslin* was decided.[41] In the 2017 case of *C v. Australia*, an applicant to the HRC challenged the Australian legal regime that prevented her from instituting divorce proceedings against her same-sex partner, whom she had married while abroad.[42] At the time, Australian law did not respect same-sex couples' freedom to marry,[43] and the State argued that it was reasonable and objective for its law on divorce

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35. *Joslin*, *supra* note 21, ¶¶ 4.3-.5.

36. *Id.* ¶ 9.

37. *Id.* ¶¶ 8.2-.3.

38. *See* Human Rights Comm., Toonen v. Australia, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994) [hereinafter *Toonen*].

39. *Joslin*, *supra* note 21, app.

40. Marriage (Definition of Marriage) Amendment Act 2013, s 5 (N.Z.) (emphasis omitted).

41. *See* Oscar I. Roos & Anita Mackay, *A Shift in the United Nations Human Rights Committee's Jurisprudence on Marriage Equality: An Analysis of Two Recent Communications from Australia*, 42 U.N.S.W.L.J. 747 (2019).

42. Human Rights Comm., C v. Australia, ¶¶ 3-10, U.N. Doc. CCPR/C/119/D/2216/2012 (Mar. 28, 2017) [hereinafter *C v. Australia*].

43. Australia's 1961 Marriage Act was amended in 2004 to define marriage as "a union of a man and a woman." Marriage Amendment Act 2004 (Cth) sch. 1, 1 (Austl.). The Act also clarified that Australia would not recognize same-sex foreign marriages. Marriage Amendment Act 2004 (Cth) sch. 1, 3 (Austl.). Only in 2017 did the Australian Parliament amend the Marriage Act to define marriage as "a union of 2 people," thereby allowing same-sex couples to marry in Australia, and to permit marriages of same-sex couples conducted abroad to be recognized in Australia. Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth) sch. 1, 1 (Austl.).

to apply only to foreign marriages recognized in Australia.[44]

The HRC was not convinced the law was reasonable or objective, particularly because Australia failed to justify the difference between its treatment of individuals in unrecognized polygamous foreign marriages, who had access to divorce courts, and individuals in unrecognized same-sex foreign marriages, who did not.[45] The HRC concluded that Australia violated ICCPR Article 26 because it discriminated on the basis of sexual orientation, stating: "In the absence of more convincing explanations from the State party, the Committee considers that the differentiation of treatment based on the author's sexual orientation to which she is subjected regarding access to divorce proceedings is not based on reasonable and objective criteria and therefore constitutes discrimination under [A]rticle 26 of the Covenant."[46]

In another 2017 case, *G v. Australia*, the HRC determined that it was unreasonable for Australia to require a transgender woman to obtain a divorce before it would change the sex marker on her birth certificate.[47] Specifically, the HRC observed that "the author has lived on a day-to-day basis in a loving married relationship with a female spouse that the State party has recognized in all respects as valid. There is no apparent reason for refusing to conform the author's birth certificate to this lawful reality."[48] The HRC found that Australia had arbitrarily interfered with the author's privacy and family, in violation of ICCPR Article 17, and had discriminated based on marital status and/or gender identity, in violation of ICCPR Article 26.[49] The concurring opinion in *Joslin* and the holdings in *C v. Australia* and *G v. Australia* indicate that the HRC might consider provisions beyond ICCPR Article 23(2), as well as find a violation of these provisions, if a case resembling *Joslin* were decided today.

C. European Court of Human Rights: Schalk and Kopf v. Austria

In September 2002, only a few months after the HRC issued its decision in *Joslin*, Horst Michael Schalk and Johan Franz Kopf requested a marriage permit from Austria's Office for Matters of Personal Status.[50] The Vienna Municipal Office refused the request in December 2002, interpreting Article 44 of the Austrian Civil Code to restrict marriage to those unions contracted between a man

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44. *C v. Australia*, *supra* note 42, ¶ 5.10.

45. *Id.* ¶ 8.6.

46. *Id.* ¶ 9.

47. Human Rights Comm., G v. Australia, ¶¶ 7.14-.15, U.N. Doc. CCPR/C/119/D/2172/2012 (Mar. 17, 2017) [hereinafter *G v. Australia*]. At this time, Australia had not yet recognized same-sex couples' freedom to marry, so allowing the applicant to change her sex without getting a divorce would have created a legally married same-sex couple, in violation of domestic law. *Id.* ¶ 4.12; *see also supra* note 43 and accompanying text.

48. *G v. Australia*, *supra* note 47, ¶ 7.9.

49. *Id.* ¶¶ 7.10-.15, 8.

50. Schalk and Kopf v. Austria, 2010-IV Eur. Ct. H.R. 409, 416 [hereinafter *Schalk & Kopf*].

and a woman.[51] The Vienna Regional Governor upheld the Vienna Municipal Office's decision, referring to Article 12 of the European Convention on Human Rights (ECHR), which provides that "Men and women . . . have the right to marry and to found a family, according to the national laws governing the exercise of this right."[52] When Schalk and Kopf brought a complaint to the Austrian Constitutional Court, the Court found that neither the Constitution of Austria nor the ECHR required Austria to recognize same-sex couples' freedom to marry and dismissed Schalk and Kopf's case.[53]

In 2004, Schalk and Kopf petitioned the ECtHR, arguing that Austria, by preventing their marriage, had violated their right to private and family life under ECHR Article 8, in conjunction with their right to freedom from discrimination under ECHR Article 14, as well as their right to marry under ECHR Article 12.[54] Austria reiterated the domestic courts' interpretation of ECHR Article 12 as applying only to different-sex couples and, with respect to ECHR Articles 8 and 14, argued that the issue of whether or not to affirm the freedom to marry was within Austria's margin of appreciation.[55] The United Kingdom and four non-

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51. *Id.* at 416-17.

52. *Id.* at 417; ECHR, *supra* note 7, art. 12. One scholar has traced the ECtHR's deference to consensus in *Schalk and Kopf*, *infra* notes 59-60 and accompanying text, to "the wide discretion offered by the words 'according to the national laws governing the exercise of this right' in [A]rticle 12," Kees Waaldjik, *The Gender-Neutrality of the International Right to Marry: Same-Sex Couples May Still Be Excluded from Marriage, But Their Exclusion—and Their Foreign Marriages—Must Be Recognized* (forthcoming) (manuscript at 15), but, if this was the basis of the ECtHR's reasoning, then it erred significantly because this phrase permits States to determine the procedure for marriage but not to dictate the substance of the right to marry. *See* Bart van der Sloot, *Between Fact and Fiction: An Analysis of the Case-Law on Article 12 of the European Convention on Human Rights*, 26 CHILD & FAM. L. Q. 397, 402 (2014). The age of consent for marriage, for instance, is left to the discretion of States by virtue of this phrase. *See* WILLIAM A. SCHABAS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY 532-33 (2015).

53. *Schalk & Kopf*, *supra* note 50, at 417-18.

54. *Id.* at 415, 424, 430. The applicants also alleged a violation of Article 1 of ECHR Protocol No. 1 based on the financial disadvantage of being an unmarried, as opposed to a married, couple, but the ECtHR decided that this claim had not been substantiated and did not consider it. *Id.* at 439-40.

55. *Id.* at 424-25, 433. The ECtHR's "margin of appreciation" doctrine gives States a degree of discretion in how they fulfill their human rights obligations, often because of a lack of consensus on the interpretation of a right among European States. As such a consensus emerges, however, the margin narrows, and States may be expected to respect human rights under the ECHR in a particular way. *See, e.g.*, Christine Goodwin v. U.K., 2002-VI Eur. Ct. H.R. 1, 34 (justifying a departure from past case law regarding legal recognition of gender identity by recognizing an emerging trend rather than an absolute consensus among European States) [hereinafter *Goodwin*]. The margin of appreciation is an invention of the ECtHR and not contained anywhere in the ECHR. The first use of the doctrine was in *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976). In determining the scope of the margin granted to States, the ECtHR first seeks to balance the importance of the right and the importance of the restriction and then looks for a European

governmental organizations (NGOs) also intervened in the case as third parties.[56] The United Kingdom largely supported Austria's position, while the NGOs supported the position of Schalk and Kopf and expressly asked the ECtHR to recognize the freedom to marry.[57]

The ECtHR declined to affirm same-sex couples' freedom to marry as protected by the ECHR. It reasoned that ECHR Article 12's gendered language (i.e., the phrase "men and women") constituted evidence that the provision was meant to protect only different-sex marriage, but the ECtHR did not consider this evidence conclusive.[58] The ECtHR's decision not to affirm the freedom to marry hinged, instead, on the lack of a European consensus on same-sex couples' freedom to marry.[59] The Court agreed with Austria that, given the lack of a European consensus, this matter should be left to the discretion of the States.[60] The ECtHR did acknowledge in *Schalk and Kopf*, for the first time in its case law, that same-sex couples have a right to family life under ECHR Article 8,[61] but—relying on logic similar to the *generalia specialibus non derogant* principle used by the HRC in *Joslin*[62]—stated that ECHR Article 8 could not, either alone or in conjunction with ECHR Article 14, expand the scope of ECHR Article 12 to require States to protect the freedom to marry of same-sex couples.[63]

In spite of the outcome of *Schalk and Kopf*, the Constitutional Court of Austria later found that excluding same-sex couples from marriage, even while

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consensus on the matter at hand.

56. *Schalk & Kopf*, *supra* note 50, at 415-16. The NGOs were the International Federation for Human Rights, the International Commission of Jurists, the AIRE Centre, and the European Region of the International Lesbian and Gay Association.

57. *Id.* at 425-26, 433.

58. *Id.* at 428.

59. *Id.* at 428-29. Six out of forty-seven Member States of the Council of Europe had recognized the freedom to marry of same-sex couples at the time the ECtHR decided *Schalk and Kopf*. At the time of this writing, seventeen out of forty-seven European States recognize the freedom to marry. *See* Evan Wolfson, *20 Years of Marriage Equality: A Mountain of Evidence, Expertise, and Experience*, 1 E.H.R.L.R. 50, app. (2021) (describing the pathway to marriage in thirty countries that have affirmed the freedom to marry); HRW, *supra* note 2.

60. *Schalk & Kopf*, *supra* note 50, at 428-29.

61. *Id.* at 436.

62. *See supra* notes 34-37 and accompanying text.

63. *Schalk & Kopf*, *supra* note 50, at 437-38. This view was affirmed in *Oliari & Others v. Italy*, ¶¶ 191-94, App. Nos. 18766/11 & 36030/11, Eur. Ct. H.R. (July 21, 2015) [hereinafter *Oliari*] ("[T]he Court reiterates that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage. Similarly, in *Schalk and Kopf*, the Court held that Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either. The Court considers that the same can be said of Article 14 in conjunction with Article 12. It follows that both the complaint under Article 12 alone, and that under Article 14 in conjunction with Article 12 are manifestly ill-founded and must be rejected.").

granting them access to almost identical legal partnerships, constitutes discrimination on the basis of sexual orientation.[64] On December 4, 2017, the Court ordered that the text of Article 44 of the Austrian Civil Code be altered to affirm the freedom to marry belonging to same-sex couples,[65] and the decision went into effect on January 1, 2019.[66] Meanwhile, the ECtHR has expanded protections for same-sex couples under ECHR Article 8, granting States only a narrow margin of appreciation and arriving so close to the matter of marriage that it appears, at times, to contradict its Article 12 jurisprudence.[67]

In *Vallianatos and Others v. Greece*, for example, the ECtHR found that Greece had violated ECHR Article 8 in conjunction with ECHR Article 14 by offering legal partnerships only to different-sex couples.[68] At the time, the ECtHR limited its decision to finding a negative obligation not to deny same-sex couples access to existing forms of legal recognition (up to, but not including, marriage), and did not discuss the possibility of a positive obligation to create forms of legal recognition for same-sex unions.[69] After the European—and global—consensus had grown,[70] the ECtHR appeared to narrow the margin of appreciation still further, finding, in *Oliari and Others v. Italy*, that Italy had "overstepped their margin of appreciation and failed to fulfil their positive obligation [under ECHR Article 8] to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions."[71]

In both *Vallianatos* and *Oliari*, the developing consensus around same-sex

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64. Verfassungsgerichtshof [VfGH] [Constitutional Court] Dec. 4, 2017, G 258-259/2017-9, III.2.4-2.6 (Austria). An unofficial English translation of the case is available at https://www.sexualorientationlaw.eu/images/EF_VfGH_Entscheidung_G_258-2017_ua_Ehe_gleichgeschlechtl_Paare-korr.pdf [https://perma.cc/U3DB-NG8P].

65. *Id.* at IV.1.

66. *See Austrian Women Become Country's First Same-Sex Couple to Get Married*, INDEP. (Jan. 1, 2019), https://www.independent.co.uk/news/world/europe/same-sex-gay-marriage-australia-nicole-kopaunik-daniela-paier-lgbt-new-years-day-a8706606.html [https://perma.cc/5RUF-63EP].

67. *See* Paul Johnson, *Marriage, Heteronormativity, and the European Court of Human Rights: A Reappraisal*, 29 INT'L J. L. POL'Y & FAMILY 56, 69 (2015).

68. *Vallianatos & Others v. Greece*, ¶ 92, App. Nos. 29381/09 & 32684/09, Eur. Ct. H.R. (Nov. 7, 2013) [hereinafter *Vallianatos*].

69. *Id.* ¶ 75.

70. *Oliari*, *supra* note 63, ¶ 178 ("[O]f relevance to the Court's consideration is also the movement towards legal recognition of same-sex couples which has continued to develop rapidly in Europe since the Court's judgment *in Schalk and Kopf*. To date a thin majority of CoE [Council of Europe] States (twenty-four out of forty-seven, see paragraph 55 above) have already legislated in favour of such recognition and the relevant protection. The same rapid development can be identified globally, with particular reference to countries in the Americas and Australasia (see paragraphs 65 and 135 above). The information available thus goes to show the continuing international movement towards legal recognition, to which the Court cannot but attach some importance").

71. *Id.* ¶¶ 185-87.

partnership played a crucial role in the ECtHR's decisions.[72] Although the ECtHR has yet to acknowledge same-sex couples' freedom to marry, its evolving jurisprudence on sexual orientation suggests that the primary obstacle to marriage is the perceived lack of a European consensus on the specific issue[73] or perhaps, as we suggest in Section II.B, the ECtHR's misguided insistence on obtaining such a consensus.

II. REASSESSING *JOSLIN* AND *SCHALK AND KOPF*

The logic of *Joslin* and *Schalk and Kopf* is dubious and invites deeper analysis, particularly in light of the IACtHR's more faithful interpretation, in OC-24/17, of the rights properly and equally belonging to same-sex couples. This Part highlights flaws in these decisions' reasoning and argues for the reassessment of the protections available to same-sex couples under the ICCPR and the ECHR. The critiques of *Joslin* and *Schalk and Kopf* in this Part clear the way for the broader, positive case, in Parts III and IV, for the recognition of same-sex couples' freedom to marry under international human rights law.

A. Joslin v. New Zealand

The HRC's decision in *Joslin v. New Zealand* only scratched the surface of the rights asserted by the litigants. The HRC's consideration of the merits in this case spans less than a page and hinges entirely on the use of the phrase "men and women," which the HRC stated "has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from [A]rticle 23, paragraph 2, of the Covenant [ICCPR] is to recognize as marriage only the union between a man and a woman wishing to marry each other."[74] Critics have understood the HRC's reasoning to be reliant not only on the expressly invoked *generalia specialibus non derogant* principle, but also implicitly upon either the ordinary meaning of the terms of ICCPR Article 32(2) (in accordance with Article 31 of the Vienna Convention on the Law of Treaties (VCLT), which sets out the general rule of treaty interpretation) or the *travaux préparatoires* (a supplementary means of interpretation under Article 32 of the VCLT).[75] This

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72. *Vallianatos*, *supra* note 68, ¶ 25; *Oliari*, *supra* note 63, ¶ 178.

73. *See* Frances Hamilton, *The Case for Same-Sex Marriage Before the European Court of Human Rights*, 65 J. HOMOSEXUALITY 1582, 1588 (2018) ("Arguably, it is only the concerns about lack of consensus between member states that have prevented the European Court utilizing equality arguments to their full extent. This situation is changing, and a consensus is slowly emerging in favor of the recognition of same-sex marriage").

74. *Joslin*, *supra* note 21, ¶ 8.2.

75. *See* Paula Gerber et al., *Marriage: A Human Right for All*, 36 SYDNEY L. REV. 643, 646 (2014) (*travaux préparatoires*); Malcolm Langford, *Same-Sex Marriage in Polarized Times: Revisiting* Joslin v. New Zealand *(HRC)*, *in* INTEGRATED HUMAN RIGHTS IN PRACTICE: REWRITING HUMAN RIGHTS DECISIONS 119, 129-30 (Eva Brems & Ellen Desmet eds., 2017) (ordinary meaning); Oscar I. Roos & Anita Mackay, *The Evolutionary Interpretation of Treaties and the*

Section argues that the HRC could and, indeed, should have used either means of interpretation to determine ICCPR Article 23(2) requires States to protect same-sex couples' freedom to marry.

The ordinary meaning of ICCPR Article 23(2) does not preclude the provision's guarantee of the freedom to marry of all couples.[76] While the provision does include gendered language in the phrase "men and women," these terms do not expressly exclude same-sex couples as they would, for example, if the words were singular and the phrases "each other" or "a person of the opposite gender" were included. ICCPR Article 23(2) provides that "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized," not that "[t]he right of a man and a woman to marry each other shall be recognized"[77] or "[t]he right of men and women of marriageable age to marry a person of the opposite gender and found a family shall be recognized."[78] General understandings of the terms of the treaty can also change in accordance with changes in State practice.[79] At the time *Joslin* was decided, only one country, the Netherlands, had recognized the freedom of same-sex couples to marry. Now, with thirty-one countries having affirmed same-sex couples' freedom to marry as of December 2021[80] and a trend toward greater recognition, the ordinary meaning of the terms of ICCPR Article 23(2) should be reassessed and considered to include, or at the very least not clearly to exclude, same-sex couples.[81]

The ordinary meaning of ICCPR Article 23(2) certainly allows a reading of the provision that protects the freedom to marry of same-sex couples, but the context of the provision and the object and purpose of the treaty support a more specifically inclusive reading by requiring the terms of the treaty be interpreted in accordance with its prohibition of discrimination on the basis of sexual orientation. Ordinary meaning, context, and object and purpose are interrelated elements of treaty interpretation that must be considered together.[82] The principle

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Right to Marry: Why Article 23(2) of the ICCPR Should be Reinterpreted to Encompass Same-Sex Marriage, 49 GEO. WASH. INT'L L. REV. 879, 901 (2017) (*travaux préparatoires*).

76. *See* Langford, *supra* note 75, at 126-27; Roos & Mackay, *supra* note 75, at 905-06.

77. *See* Langford, *supra* note 75, at 126-27.

78. Brian G. Slocum & Jarrod Wong, *The Vienna Convention and the Ordinary Meaning of International Law*, 46 YALE J. INT'L L. (forthcoming 2021) (manuscript at 72).

79. *See* Langford, *supra* note 75, at 124, 130.

80. *See supra* note 2 and accompanying text.

81. *See* Slocum & Wong, *supra* note 78, at 70-71 ("it is no longer clear, if it ever were, that the ordinary meaning of the 'right of men and women of marriageable age to marry' does not extend to same-sex marriage").

82. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, 340; *see also* RICHARD GARDINER, TREATY INTERPRETATION 181 (2d ed. 2015) ("First and foremost, in considering the role of the 'the ordinary meaning to be given to the terms of the treaty,' it is necessary to stress that the ordinary meaning is not an element of treaty interpretation to be taken separately when the general rule is being applied to a particular issue involving treaty interpretation. Nor is the first impression as to what is the ordinary meaning of a term anything other than a fleeting starting point. For the ordinary meaning of the treaty terms is immediately and

of non-discrimination forms part of the context as well as the object and purpose of the ICCPR[83] and has been interpreted by the HRC to prohibit discrimination on the basis of sexual orientation.[84] In *Joslin*, however, the HRC failed to interpret the terms of ICCPR Article 23(2) in accordance with the principle of non-discrimination.[85] If the HRC had considered the principle of non-discrimination in its interpretation of ICCPR Article 23(2) in *Joslin*, as it should have, it would have found that the ICCPR requires States to protect same-sex couples' freedom to marry.[86]

This conclusion holds even if one assumes that *Joslin* relies on the intentions of the ICCPR's drafters instead of on the ordinary meaning of the terms of ICCPR Article 23(2). The *travaux préparatoires* for this provision show that drafting parties did not include gendered language in ICCPR Article 23(2) to exclude same-sex couples from marriage.[87] Instead, they included the phrase "men and women" to emphasize the need for gender equality in marriage, highlighting that women, as well as men, have a right to choose whether and whom to marry.[88] The phrase "men and women" thus reflects the ideals of inclusion and equality and should not operate to exclude or discriminate. The gendered language in ICCPR Article 23(2) does not preclude the provision's protection of same-sex couples either as a matter of ordinary meaning or as a matter of intent, while the principles of equality and non-discrimination require that the provision be interpreted to prohibit discrimination on the basis of sexual orientation. Either method of interpretation results in ICCPR Article 23(2) requiring States to affirm same-sex couples' equal freedom to marry.

B. Schalk and Kopf v. Austria

In *Schalk and Kopf v. Austria*, the ECtHR, like the HRC in *Joslin*, failed to interpret a right-to-marry provision in context and in light of the object and purpose of the relevant treaty, which would have required recognition of the freedom to marry in accordance with the principles of equality and non-discrimination.[89] Nevertheless, the primary obstacle to the ECtHR's reassessment of marriage post-*Schalk and Kopf* is not the interpretation of gendered language

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intimately linked with context, and then to be taken in conjunction with all other relevant elements of the Vienna rules.").

83. *See* Gerber et al., *supra* note 75, at 651-53.

84. *See Toonen*, *supra* note 38, ¶ 8.7.

85. *See* Kristie A. Bluett, *Marriage Equality Under the ICCPR: How the Human Rights Committee Got It Wrong and Why It's Time to Get It Right*, 35 AM. U. INT'L L. REV. 605, 623 (2020); Gerber et al., *supra* note 75, at 646, 649.

86. *See* Bluett, *supra* note 85, at 641; Roos & Mackay, *supra* note 75, at 905-06.

87. *See* Gerber et al., *supra* note 75, at 647-48; Roos & Mackay, *supra* note 75, at 901.

88. *See* Roos & Mackay, *supra* note 75, at 901; Waaldijk, *supra* note 52.

89. DAMIAN A. GONZALEZ-SALZBERG, *A Queer(er) Human Rights Jurisprudence*, *in* SEXUALITY AND TRANSSEXUALITY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A QUEER READING OF HUMAN RIGHTS LAW 158, 161-62 (2019).

in ECHR Article 12, which the ECtHR did not consider an insurmountable obstacle to the provision's protection of same-sex couples.[90] Instead, it is the ECtHR's decision to cut short its rights analysis in deference to the absence of a European consensus at the time *Schalk and Kopf* was decided.[91] This Section argues that the ECtHR should revisit whether a consensus exists, given the increasing recognition of same-sex-couples' freedom to marry in Europe, as well as whether a consensus must exist, given that marriage is a fundamental right that is being unfairly denied to individuals belonging to a targeted minority.

The ECtHR should reassess whether ECHR Article 12 requires States to protect the freedom to marry in light of changes in domestic recognition of same-sex unions since *Schalk and Kopf* was decided. The ECtHR has demonstrated that it is willing to impose positive obligations on States to respect same-sex couples' rights to legal recognition where there is a European consensus that such protection should be provided.[92] Although there is not yet a numerical majority of States that protect the freedom to marry—as of December 2021, seventeen out of forty-seven Member States of the Council of Europe ensure the freedom to marry[93]—this does not necessarily mean there is a lack of a consensus, since the ECtHR has not clearly or precisely identified what amount or kind of State recognition of a right is required to achieve a consensus.[94]

When the ECtHR found in *Vallianatos* that offering legal partnerships only to different-sex couples violated ECHR Article 8 in conjunction with ECHR Article 14, only seventeen Member States of the Council of Europe had extended such recognition to same-sex couples.[95] In this case, an absolute majority of States was not required to identify an emerging right protected under the ECHR; a developing consensus sufficed.[96] Like in *Vallianatos*, there is a consensus emerging in the region toward recognition of the freedom to marry. In the past

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90. *See supra* notes 58-60 and accompanying text.

91. *Id.*; *see also* DAMIAN A. GONZALEZ-SALZBERG, *Of Marriage, Partnerships and Parenthood (and Marriage Once Again)*, *in* SEXUALITY AND TRANSSEXUALITY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A QUEER READING OF HUMAN RIGHTS LAW 120, 123 (2019).

92. *See Oliari*, *supra* note 63, ¶ 134; *Vallianatos*, *supra* note 68, ¶ 91.

93. The countries are Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. *See* Wolfson, *supra* note 59; HRW, *supra* note 2; *see also* Michael Lipka & David Masci, *Where Europe Stands on Gay Marriage and Civil Unions*, PEW RES. CTR. (Oct. 28, 2019), https://www.pewresearch.org/fact-tank/2019/10/28/where-europe-stands-on-gay-marriage-and-civil-unions [https://perma.cc/BFB7-LF4U].

94. Jeffrey A. Brauch, *The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights*, 52 HOW. L.J. 277, 278 (2009).

95. *Vallianatos*, *supra* note 68, ¶ 91.

96. *See id.*; *see also* Zaunegger v. Germany, ¶ 60, App. No. 22028/04, Eur. Ct. H.R. (Dec. 3, 2009) (finding a violation of ECHR Article 14 related to a father's parental rights even where "no European consensus" existed and emphasizing that the ECHR is a living document that must be interpreted in light of present-day conditions).

twenty years, the number of European States that respect same-sex couples' freedom to marry has increased from zero to seventeen, with twelve of those States affirming the freedom to marry in the past decade alone.[97] Other States have expanded their recognition of same-sex unions in other ways over the same period, or have declined to constitutionally prohibit same-sex couples from marrying.[98] Additionally, in September 2021, the European Parliament adopted a resolution calling on European States to take a common approach to ending the exclusion of same-sex couples from marriage.[99] In light of these developments, the ECtHR should find there is a European consensus on this issue for the purposes of ECHR Article 12 and States must therefore protect same-sex couples' freedom to marry.

There is a strong case that the consensus requirement has already been met, but even so the ECtHR should be careful not to impose consensus requirements when doing so could result in the denial of a fundamental right to individuals belonging to a vulnerable and often-targeted minority.[100] In *Alekseyev v. Russia*, a judgment rendered a mere four months after *Schalk and Kopf*, the ECtHR found that Russia had violated the right to freedom of assembly and association under ECHR Article 11, the right to an effective remedy under ECHR Article 13, and the right to equality and non-discrimination under ECHR Article 14 by repeatedly suppressing a gay pride parade.[101] The Court rejected Russia's argument that the State should be afforded a wide margin in its treatment of sexual minorities.[102] In its analysis, the ECtHR stated that "it would be incompatible with the underlying

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97. *See* Wolfson, *supra* note 59; HRW, *supra* note 2.

98. *See* Lipka & Masci, *supra* note 93; *see also* Joanna Kakissis, *Romanian Referendum to Ban Same-Sex Marriage Fails*, NPR (Oct. 8, 2018), https://www.npr.org/2018/10/08/655528971/romanian-referendum-that-would-define-marriage-fails [https://perma.cc/5NVG-E2AV].

99. LGBTIQ Rights in the EU, EUR. PARL. RES. 2679 (2021).

100. *See* Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L POL. 843, 847 (1999) ("while resort to the margins doctrine may be justified in certain matters that affect the general population in a given society, the doctrine is inappropriate when conflicts between majorities and minorities are examined" (footnote omitted)); *see also* GONZALEZ-SALZBERG, *supra* note 91, at 124; Loveday Hodson, *A Marriage by Any Other Name?* Schalk and Kopf v Austria, 11 HUM. RTS. L. REV. 170, 173, 177 (2011); Holning Lau, *Rewriting Schalk and Kopf: Shifting the Locus of Deference*, *in* DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR 243, 244, 247-49 (Eva Brems ed., 2012); Masuma Shahid, *The Right to Same-Sex Marriage: Assessing the European Court of Human Rights' Consensus-Based Analysis in Recent Judgments Concerning Equal Marriage Rights*, 3 ERASMUS L. REV. 184, 193-94 (2017). For perspectives more lenient toward the search for a European consensus, see Robert Wintemute, *Same-Sex Marriage in National and International Courts: "Apply Principle Now" or "Wait for Consensus"?*, 1 PUB. L. REV. 134 (2020), and Hamilton, *supra* note 73, at 1599.

101. Alekseyev v. Russia, ¶¶ 88, 100, 110, Apps. No. 4916/07, 25924/08 & 14599/09, Eur. Ct. H.R. (Oct. 21, 2010) [hereinafter *Alekseyev*].

102. *Id.* ¶¶ 54, 58, 83, 85.

values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority."[103]

The ECtHR distinguished the use of the margin of appreciation doctrine in *Alekseyev* from its use in *Schalk and Kopf* by suggesting that whether a State may invoke morality to limit LGBT individuals' exercise of a right an individual surely has and whether a State may decline to extend a right to LGBT individuals at all are separate inquiries.[104] Advocates could question the validity of this distinction[105] and, more generally, could emphasize that the freedom to marry must be recognized as a fundamental right that cannot be categorically withheld from a minority group. Advocates might also choose to question the validity of the margin of appreciation doctrine itself, which has long been critiqued for producing unjust and incoherent results.[106]

This Part has highlighted the weaknesses in key cases in which human rights mechanisms have faltered in acknowledging States' obligation to respect the freedom to marry. It has argued that neither gendered language in right-to-marry provisions nor a lack of consensus among States on the freedom to marry justify

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103. *Id.* ¶ 81; *see also* Obergefell v. Hodges, 576 U.S. 644, 676-77 (2015) ("Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights. . . . The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right.").

104. *Alekseyev*, *supra* note 101, ¶ 83; *see also* Bayev and Others v. Russia, ¶ 66, App. No. 67667/09, Eur. Ct. H.R. (June 20, 2017).

105. *See* Paul Johnson, *Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights:* Alekseyev v. Russia, 11 HUM. RTS. L. REV. 578 (2011).

106. *See* Eyal Benvenisti, *The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy*, 9 J. INT'L DISP. SETTLEMENT 240 (2018) (criticizing the margin of appreciation doctrine and proposing subsidiarity as a better alternative); Brauch, *supra* note 94, at 292 ("Unfortunately the 'consensus' standard at times does not act as a legal standard at all. The Court has variously applied, changed, and ignored the standard without any apparent legal reason to do so. Observers are left with the distinct impression that the ECHR instead uses the standard to rationalize political judgments already reached. This results in decisions that lack legal certainty, foreseeability, and equality."); Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113 (2005) (calling on the ECtHR to abandon the margin of appreciation doctrine and instead focus its attention on the text of the ECHR); Janneke Gerards, *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, 18 HUM. RTS. L. REV. 495 (2018) (criticizing the margin of appreciation doctrine and proposing incrementalism as a better alternative); Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 INT'L & COMP. L.Q. 638, 649 (1999) ("Reliance on the margin of appreciation is an announcement of deference, and not a coherent jurisprudential principle. Indeed, . . . the margin in fact makes the Court's decision-making processes more opaque than is necessary."); Jan Kratochvíl, *The Inflation of the Margin of Appreciation by the European Court of Human Rights*, 29 NETH. Q. HUM. RTS. 324 (2011) (arguing that the margin of appreciation doctrine should be applied more narrowly and consistently).

the HRC, the ECtHR, or any other court's hesitation to affirm that human rights law protects same-sex couples' freedom to marry. By pointing out the flaws in *Joslin* and *Schalk and Kopf*, this Part has cleared the way for the positive case for the freedom to marry under human rights law, which follows in Parts III and IV.

III. THE CASE FOR SAME-SEX COUPLES' FREEDOM TO MARRY UNDER HUMAN RIGHTS LAW

This Part draws on international, regional, and domestic jurisprudence to argue that human rights law requires States to affirm the freedom to marry of same-sex couples. This requirement arises most directly out of right-to-marry provisions, discussed in Section III.A. The rights to equality and non-discrimination, discussed in Section III.B, are also crucial to the case for the freedom to marry. Because these rights prohibit discrimination on the basis of sexual orientation, they can be interpreted, either on their own or in conjunction with other rights, to impose an obligation on States to respect same-sex couples' freedom to marry.

States are also under an indirect obligation to protect the freedom to marry as the best means of ensuring same-sex couples' rights to privacy and family, discussed in Section III.C. Meanwhile, the rights to liberty and dignity, which more often appear in national jurisprudence on the freedom to marry but arose in OC-24/17 and are discussed in Section III.D, also impose an obligation on States to respect same-sex couples' freedom to marry. The most effective case for the freedom to marry under human rights law acknowledges how these rights operate in conjunction with each other, as exemplified by OC-24/17.

A. Right to Marry

As previewed in the reassessment of *Joslin v. New Zealand* in Section II.A, a faithful interpretation of the right-to-marry provisions found in the Universal Declaration of Human Rights (UDHR),[107] the ICCPR,[108] the ECHR,[109] and the ACHR[110] requires States to affirm the freedom to marry of same-sex couples. This Section first explains that the ordinary meaning of these right-to-marry provisions not only may, but must, include marriages of same-sex couples, since the context

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107. G.A. Res. 217 (III) A, art. 16, Universal Declaration of Human Rights (Dec. 10, 1948) ("Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family.") [hereinafter UDHR].

108. ICCPR, *supra* note 7, art. 23(2) ("The right of men and women of marriageable age to marry and to found a family shall be recognized.").

109. ECHR, *supra* note 7, art. 12 ("Men and women of marriageable age have the right to marry and to found a family.").

110. ACHR, *supra* note 7, art. 17(2) ("The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.").

of these provisions and the object and purpose of their treaties require that they be interpreted consistently with the principle of equality and non-discrimination. This Section also notes that same-sex couples' freedom to marry is consistent with the intention of the drafters of these treaties, who included the phrase "men and women" in the interest of gender equality in marriage, not to enable the exclusion of same-sex couples from marriage. Finally, the Section shows that this interpretation of the right to marry finds support in IACtHR, ECtHR, and national jurisprudence.

The ordinary meaning of the right-to-marry provisions in human rights treaties is consistent with the freedom of same-sex couples to marry. The UDHR, the ICCPR, the ECHR, and the ACHR describe the right to marry as belonging to everyone, "men and women" in the plural, instead of specifying that marriage is a union of "a man and a woman" in the singular.[111] None of these provisions includes language that expressly restricts rightsholders to marriages with persons of a different sex, gender, or gender identity.[112] Moreover, general understandings of the meaning of marriage have broadened and deepened as countries increasingly recognize the freedom to marry of same-sex couples.[113] The context of these right-to-marry provisions and the object and purpose of the treaties in which they are set out—which must be considered together with their ordinary meaning under the general rules of interpretation of the VCLT[114]—further require that these provisions be interpreted consistently with the principles of equality and non-discrimination and, consequently, that they protect same-sex couples' freedom to marry. Section III.B provides a detailed explanation of why the principles of equality and non-discrimination require that right-to-marry provisions protect same-sex couples' freedom to marry.[115]

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111. UDHR, *supra* note 107, art. 16(1); ICCPR, *supra* note 7, art. 23(2); ECHR, *supra* note 7, art. 12; ACHR, *supra* note 7, art. 17(2).

112. *See supra* notes 77-78 and accompanying text. Indeed, rights in general, including the freedom to marry, belong to individuals, not couples, groups, or categories. As the first U.S. court to strike down the discriminatory restrictions on individuals desiring to marry a person of a different race stated in 1948, "the essence of the right to marry is freedom to join in marriage with the person of one's choice." Perez v. Sharp, 32 Cal. 2d 711, 718 (1948). The court explained that because of discriminatory restrictions on marriage, an individual of the "wrong" race "may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." *Id.* at 726. Dr. Martin Luther King, Jr. was likewise paraphrased by late U.S. Congressman and civil rights figure John Lewis as saying "races don't fall in love and get married; individuals fall in love and get married. So, if two men or two women want to fall in love and get married it's their business." Cong. John R, Lewis, "A Mean Bill," speech in the U.S. House of Representatives, Washington, DC, July 11, 1996, quoted in EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 43 (2004).

113. *See supra* notes 79-81 and accompanying text.

114. *See* GARDINER, *supra* note 82, at 181.

115. The extent to which gendered right-to-marry provisions protect the freedom to marry of individuals who do not identify with the categories "men" and "women" also merits attention, but

Were it necessary to resort to the *travaux préparatoires* as a supplementary means of interpretation within the framework of Article 32 of the VCLT, the *travaux* would not generate a contrary result. It is clear from the *travaux préparatoires* of UDHR Article 16, on whose wording the right-to-marry provisions in the ICCPR, ECHR, and ACHR are based, drafters incorporated the phrase "men and women" into these provisions in the interest of gender equality in marriage, not to enable the exclusion of same-sex couples from marriage. At the suggestion of the Commission on the Status of Women, the Commission on Human Rights' Drafting Committee changed the language of the right to marry in the UDHR from the general "everyone" to the specific "men and women" to emphasize that women, as well as men, have the right to marry.[116] The use of "men and women" was also intended to underscore that marriage should be contracted between adults, not children.[117] In other words, the Drafting Committee chose the terms "men and women" not to restrict the right to marry, but to promote equal access to the right for consenting adults. The *travaux préparatoires* for the UDHR, ICCPR, ECHR, and ACHR, moreover, do not document any discussions of whether right-to-marry provisions should or should not apply to same-sex couples.[118]

This gender-neutral interpretation of the right to marry finds support in IACtHR and ECtHR precedents. Both courts cleared a path for recognition by finding that the gendered language in their respective treaties does not prevent them from protecting the freedom of same-sex couples to marry. In OC-24/17, the IACtHR found that the gendered language in Article 17(2), the right-to-marry provision of the ACHR,

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is, unfortunately, beyond the capacity of this Article to address because it is understudied. *See* Waaldijk, *supra* note 52, at 2 ("[I]n spite of some major lost cases, the international human right to marry appears to be of *some* relevance to lesbian, gay and transgender persons. The specific ways in which this right is relevant to intersex people, are something that will require further study (and the same seems true as regards non-binary, third sex, bisexual, polyamorous or asexual individuals)." (footnote omitted)).

116. *See id.* at 9; Roos & Mackay, *supra* note 75, at 900-02 (citing U.N. Comm'n on Human Rights, Rep. of the Drafting Comm. to the Comm'n on Human Rights on the Work of Its Second Session, U.N. Doc. E/CN.4/95, at 3, 8 (May 21, 1948); U.N. Comm'n on Human Rights, Rep. of the Drafting Comm. to the Comm'n on Human Rights on the Work of Its First Session, U.N. Doc. E/CN.4/21, at 13, 55, 76 (July 1, 1947); U.N. Comm'n on Human Rights, Int'l Bill of Rights, U.N. Doc. E/CN.4/AC.1/3/Add.1, at 98-99 (June 11, 1947); U.N. Comm'n on Human Rights, Draft Outline of Int'l Bill of Rights, U.N. Doc. E/CN.4/AC.1/3, at 6 (June 4, 1947)); *see also* JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 121-22 (1999) (setting forth arguments and counterarguments in discussions leading to the UDHR); Glenda Sluga, *"Spectacular Feminism": The International History of Women, World Citizenship and Human Rights*, *in* WOMEN'S ACTIVISM: GLOBAL PERSPECTIVES FROM THE 1890S TO THE PRESENT 44 (Francisa de Haan et al. eds., 2013).

117. *See* Sloot, *supra* note 52, at 400.

118. *See* Waaldjik, *supra* note 52, at 6, 11.

> does not propose a restrictive definition of how marriage should be understood or how a family should be based. In the opinion of this Court, Article 17(2) is merely establishing, expressly, the treaty-based protection of a specific model of marriage. In the Court's opinion, this wording does not necessarily mean either [*sic*] that this is the only form of family protected by the American Convention.[119]

The IACtHR then went on to find that the rights to equality and non-discrimination, privacy and family (including within this the right to marry), and liberty and dignity require States to recognize the freedom to marry.[120] In *Schalk and Kopf*, the ECtHR likewise determined that the gendered language in ECHR Article 12 did not bar the application of this provision to same-sex couples, stating that "looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women."[121] In later judgments, although continuing to hold that a State's refusal to recognize same-sex couples' freedom to marry is not a violation of ECHR Article 12, the ECtHR asserted that this right-to-marry provision could, under certain circumstances, apply to same-sex couples.[122]

National judgments from South Africa, Colombia, and Ecuador also support the interpretation of gendered right-to-marry provisions, both in human rights treaties and in national constitutions, as applicable to same-sex couples. In its 2005 *Fourie* decision, which recognized the freedom to marry, the Constitutional Court of South Africa explained the use of the phrase "men and women" in UDHR Article 16 and ICCPR Article 23(2) as

> descriptive of an assumed reality, rather than prescriptive of a normative structure for all time. [Their] terms make it clear that the principal thrust of the instruments is to forbid child marriages, remove racial, religious or nationality impediments to marriage, ensure that marriage is freely entered into and guarantee equal rights before, during and after marriage.[123]

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119. OC-24/17, *supra* note 11, ¶¶ 182, 199.

120. *See supra* notes 11-16 and accompanying text.

121. *Schalk & Kopf*, *supra* note 50, ¶ 55. The bar, instead, was the lack of a European consensus. *See supra* notes 58-60 and accompanying text.

122. *Oliari*, *supra* note 63, ¶¶ 191-92 ("The Court notes that in *Schalk and Kopf* the Court found under Article 12 that it would no longer consider that the right to marry must in all circumstances be limited to marriage between two persons of the opposite sex. . . . The Court notes that despite the gradual evolution of States on the matter (today there are eleven CoE [Council of Europe] states that have recognised same-sex marriage) the findings reached in the cases mentioned above remain pertinent. In consequence the Court reiterates that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage."); *see also* Orlandi and Others v. Italy, ¶ 145, App. No. 26431/12, 26742/12, 44057/12 & 60088/12, Eur. Ct. H.R. (Dec. 14, 2017).

123. Minister of Home Affairs v. Fourie (1) SA 524 (CC) at 62-64 para. 99-100 (S. Afr.) [hereinafter *Fourie*].

Later, in 2016, the Constitutional Court of Colombia held that Article 42 of the Colombian Constitution, which describes marriage as between a man and a woman,[124] did not preclude the extension of marriage to same-sex couples.[125]

In 2019, the Constitutional Court of Ecuador similarly ruled that the definition of marriage as between a man and a woman contained in the Constitution of Ecuador[126] did not preclude extending the freedom to marry to same-sex couples as required by OC-24/17.[127] These cases illustrate that gendered language in right-to-marry provisions should not impede the affirmation of same-sex couples' freedom to marry; on the contrary, right-to-marry provisions should be interpreted consistently with the principles of equality and non-discrimination to require States to recognize every individual's freedom to marry, regardless of sexual orientation.

B. Rights to Equality and Non-discrimination

The rights to equality and non-discrimination, universally present in human rights instruments,[128] require States to protect same-sex couples' freedom to

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124. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 42.

125. Corte Constitucional [C.C.] [Constitutional Court], abril 28, 2016, Sentencia SU-214/16 (Colom.).

126. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [C.P.] art. 67.

127. Corte Constitucional del Ecuador [Constitutional Court of Ecuador], June 12, 2019, Sentencia No. 10-18-CN/19, Caso No. 10-18-CN.

128. The ICCPR, the ECHR, the ACHR, and the African (Banjul) Charter on Human and Peoples' Rights all contain provisions on equality and non-discrimination that guide the interpretation of the rights contained in their respective instruments. ICCPR, *supra* note 7, art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); ECHR, *supra* note 7, art. 14 ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."); ACHR, *supra* note 7, art. 1(1) ("The State Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."); Organization of African Unity, African (Banjul) Charter on Human and People's Rights art. 2, OAU Doc. CAB/LEG/67/3 rev. 5 (1982) [hereinafter Banjul Charter] ("Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."). The ICCPR, the ACHR, and the Banjul Charter additionally contain a freestanding right to equal protection before the law. ICCPR, *supra* note 7, art. 26 ("All

marry. This Section first explains that human rights mechanisms have consistently interpreted the rights to equality and non-discrimination to prohibit discrimination on the basis of sexual orientation. It then argues that excluding individuals from marriage on the basis of sexual orientation violates these individuals' rights to equality and non-discrimination and cannot be justified by arguments that the purpose of marriage is procreation, that marriage must be limited to protect its social meaning, or that marriage is a protected religious institution. Finally, the Section draws on the IACtHR's reasoning in OC-24/17 as an instructive illustration of how the rights to equality and non-discrimination should be interpreted to protect same-sex couples' freedom to marry.

Human rights mechanisms have consistently interpreted the rights to equality and non-discrimination to prohibit discrimination on the basis of sexual orientation. In *Toonen v. Australia*, the HRC interpreted the prohibition of discrimination on the basis of sex in ICCPR Article 26 to include a prohibition of discrimination on the basis of sexual orientation.[129] The HRC has since applied that interpretation to determine that States' refusal to grant pension benefits to deceased persons' same-sex partners constitutes a violation of ICCPR Article 26[130] and that other taxation and social welfare benefits, such as housing, social security, health care, and education, must be extended equally to same-sex and to different-sex couples.[131]

Similarly, in *Atala Riffo and Daughters v. Chile*, the IACtHR held that

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persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); ACHR, *supra* note 7, art. 24 ("All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."); Banjul Charter, *supra*, art. 3(2) ("Every individual shall be entitled to equal protection of the law."). The ECHR, notably, contains no such provision. In practice, this means that the ECtHR, unlike other human rights mechanisms, must connect an instance of inequality or discrimination in a State's law or practice to another right provided in the ECHR before it can find a violation of the ECHR. *See Schalk & Kopf*, *supra* note 50, at 435 ("As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions—and to this extent it is autonomous—there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.").

129. *Toonen*, *supra* note 38, ¶ 8.7.

130. Human Rights Comm., *Young v. Australia*, ¶ 10.4 U.N. Doc. CCPR/C/78/D/941/2000 (Sept. 18, 2003); *see also* Human Rights Comm., *X v. Colombia*, ¶ 7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (Mar. 30, 2007).

131. *See* Human Rights Comm., *Concluding Observations on the Fifth Periodic Report of Japan*, ¶ 29, U.N. Doc. CCPR/C/JPN/CO/5 (Dec. 18, 2008); Human Rights Comm., *Concluding Observations on the Third Periodic Report of Ireland*, ¶ 8, U.N. Doc. CCPR/C/IRL/CO/3 (July 30, 2008).

Article 1(1) of the ACHR prohibits discrimination on the basis of sexual orientation, reasoning that the phrase "any other social condition" in Article 1(1) encompasses sexual orientation.[132] The IACtHR thereby found a violation of the right to equal protection under ACHR Article 24 when Chile denied a lesbian mother custody of her children because of her sexual orientation.[133] The IACtHR subsequently confirmed this interpretation of "any other social condition" as extending to sexual orientation in *Duque v. Colombia*.[134] Applying this interpretation, the IACtHR found a violation of ACHR Article 24, read in conjunction with ACHR Article 1(1), when the State denied the petitioner access to his deceased partner's pension on the basis of the petitioner's sexual orientation.[135] The ECtHR,[136] the Committee on Economic, Social and Cultural Rights,[137] and the Committee on the Rights of the Child[138] have likewise interpreted the rights to equality and non-discrimination under their respective treaties to prohibit discrimination on the basis of sexual orientation.

The widespread rejection of discrimination based on sexual orientation can serve as the basis for refuting States' assertions that differential treatment in marriage does not violate same-sex couples' rights. The HRC has said that differential treatment on the basis of sexual orientation or other prohibited grounds is permitted only "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant [ICCPR]."[139] If these non-discrimination criteria were applied to the

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132. Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 83-93 (Feb. 24, 2012) [hereinafter *Atala Riffo*].

133. *Id.* ¶ 314.

134. Duque v. Colombia, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 310, ¶ 104 (Feb. 26, 2016).

135. *Id.* ¶ 138; *see also* Flor Freire v. Ecuador, Preliminary Exceptions, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 315, ¶ 118 (Aug. 31, 2016) (recognizing sexual orientation as a prohibited ground for discrimination under the American Convention).

136. *See* Salgueiro da Silva Mouta v. Portugal, 1999-IX Eur. Ct. H.R. 309.

137. *See* Comm. on Econ., Soc. and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2 Para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 32, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

138. *See* Comm. on the Rights of the Child, *General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24)*, ¶ 8, U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013).

139. Human Rights Comm., *General Comment No. 18: Non-Discrimination*, *in* COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev.1, 26, at 28, ¶ 13 (1994); *see also* Human Rights Comm., X v. Colombia, U.N. Doc. CCPR/C/89/D/1361/2005 (May 14, 2007); Gerber et al., *supra* note 75, at 651-53. The ECtHR, IACtHR, and other human rights mechanisms apply a similar standard. *See* THOMAS M. ANTKOWIAK & ALEJANDRA GONZA, THE AMERICAN CONVENTION ON HUMAN RIGHTS: ESSENTIAL RIGHTS 41 (2017) ("The Inter-American Court and Commission . . . have generally followed European Court case law, also endorsed by the Human Rights Committee and other

restriction of marriage to different-sex couples, States would not be able to offer a justification that satisfies the standard,[140] especially given the high level of scrutiny to which differential treatment on the basis of sexual orientation should be subjected.[141] Common justifications for denying the freedom to marry—for example, that the purpose of marriage is procreation, that marriage must be limited to protect the institution and the notion of family, and that marriage is a protected religious institution—do not satisfy this test.[142]

The first argument, that the purpose of marriage is procreation, is flawed. Although human rights mechanisms have on occasion acknowledged promoting procreation to be a legitimate purpose of a State, such as in the case of certain pro-natal policies,[143] they should not consider it reasonable or objective to differentiate between same-sex and different-sex couples in marriage to promote procreation. To do so would be to ignore how marriage is extended and recognized in practice. States do not require different-sex couples to show that they can procreate in order to receive a marriage license, because procreation is only one reason among many for marrying and not all different-sex couples are interested in or capable of having children. Same-sex couples also found families through procreation and adoption both in and outside of marriages, and there is no evidence that recognizing same-sex couples' freedom to marry would decrease rates of procreation. Procreation is therefore not a reasonable or objective basis on which to exclude same-sex couples from marriage.

Although not yet considered by the HRC, the argument that same-sex couples should be denied the freedom to marry due to marriage's role as a procreative

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authorities, which broadly defines discrimination as differential treatment lacking a 'reasonable and objective justification.'").

140. *See* Roos & Mackay, *supra* note 75, at 926 ("[T]here are no reasonable and objective criteria for differentiation in treatment on the grounds of sexual orientation in relation to a couple's capacity to marry if they choose to do so.").

141. *See* OC-24/17, *supra* note 11, ¶ 81 ("[I]n the case of a measure that establishes a differentiated treatment involving one of these categories [including sexual orientation], a thorough examination must be made, incorporating especially rigorous elements in the analysis; in other words, the different treatment should constitute a necessary measure to achieve an objective that is imperative pursuant to the Convention. Thus, in this type of examination, in order to analyze the validity of the differentiating measure, the end pursued must not only be legitimate under the Convention, but also imperative. Also, the means chosen must not only be adequate and truly enabling, but also necessary; that is, that it could not be replaced by other less harmful means. In addition, there must be a strict proportionality analysis of the measure by which the benefits of adopting the measure in question must be clearly more advantageous than the restrictions it imposes on the treaty-based principles it affects."); *see also* Karner v. Austria, 2003-IX Eur. Ct. H.R. 199, 212 ("[D]ifferences based on sexual orientation require particularly serious reasons by way of justification." (citations omitted)).

142. *See* Roos & Mackay, *supra* note 75, at 927-36.

143. *See Rethinking Population Policies: A Reproductive Rights Framework*, CTR. FOR REPRODUCTIVE RTS. (Feb. 2003), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bP_rethinkingpop.pdf [https://perma.cc/9Y4K-WU9A].

institution has been rejected as both under- and over-inclusive in national court judgments from the United States,[144] Canada,[145] South Africa,[146] and Mexico.[147] The ECtHR, in a case involving a transgender woman seeking the right to marry, also expressly rejected the argument that the ability to procreate is a necessary prerequisite to the right to marry, stating that "Article 12 [of the ECHR] secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision."[148] The Court suggested that to do so would be to "restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired."[149] If the argument that the purpose of marriage is procreation and thus same-sex couples must be excluded from marriage were brought before a human rights body such as the HRC, the body would be hard-pressed to find this justification reasonable or objective.

The second argument, that the institution of marriage must be limited to protect its social meaning, is similarly uncompelling. Human rights mechanisms such as the HRC are unlikely to find that protecting the social meaning of marriage is a legitimate purpose of the State, especially given that marriage has always evolved and was a rapidly evolving institution at the time human rights treaties such as the ICCPR were being drafted.[150] Even if fixing the social meaning of marriage were a legitimate aim of the State, the typical grounds for differential treatment of same-sex couples are not reasonable and objective but, instead, depend on the mistaken assumption that some marriages diminish the significance or meaning of other marriages.[151]

Courts that have recognized the freedom to marry have correctly rejected this justification. The IACtHR, for example, said in OC-24/17 that "the Court is not diminishing the institution of marriage but, to the contrary, considers marriage necessary to recognize equal dignity to those persons who belong to a human group that has historically been oppressed and discriminated against."[152] The Constitutional Court of South Africa also stressed that the rights to equality and dignity mean that "protecting the traditional institution of marriage as recognised

144. Obergefell v. Hodges, 576 U.S. 644, 675-76 (2015).

145. Egan v. Canada [1995] 2 S.C.R. 513 (Can.).

146. *Fourie*, *supra* note 123.

147. Matrimonio. La ley de cualquier entidad federativa que, por un lado, considere que la finalidad de aquél es la procreación y/o que lo defina como el que se celebra entre un hombre y una mujer, es inconstitucional, Primera Sala de la Suprema Corte de Justicia [SCJN], Semanario Judicial de la Federación y su Gaceta, 10a. Época, tomo I, Tesis 1a./J. 43/2015 (10a.), Junio de 2015, Página 536 (Mex.).

148. *See Goodwin*, *supra* note 55, ¶ 98.

149. *Id.* ¶ 97.

150. *See* Roos & Mackay, *supra* note 75, at 893-94.

151. *Id.* at 932.

152. OC-24/17, *supra* note 11, ¶ 225.

by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership."[153] Fixing the meaning of marriage is not a legitimate purpose and mistaken assumptions about the validity and repercussions of marriages of same-sex couples are neither reasonable nor objective. Marriage, moreover, "is not defined by who is denied it."[154] Therefore, human rights mechanisms should reject arguments seeking to limit same-sex couples' freedom to marry based on a desire to freeze a conception of marriage's social meaning, particularly when that effort is aimed at invidious exclusion.

Lastly, some argue that protecting the freedom to marry infringes on others' freedom of religion.[155] Although international human rights law protects the freedom of religion, this argument misstates the scope of the right. The HRC, for example, has emphasized that the right to freedom of thought, conscience, and religion under ICCPR Article 18 do not permit one group to impose its views on another.[156] The HRC has distinguished the right to freedom of thought, conscience, religion, or belief, which is absolute, from the freedom to manifest religion or belief, which may be subject to limitations to protect the fundamental rights and freedoms of others.[157] The HRC has also suggested that "the right to freedom of thought, conscience and religion implies that the legislation of each State should provide for the possibility of both religious and civil marriages,"[158] such that the freedom to marry can be offered through the civil system without infringing on the rights of religious groups.

Like the above arguments, the argument that marriage is a protected religious institution and that same-sex couples must therefore be excluded from it has been

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153. *Fourie*, *supra* note 123, ¶ 54.

154. Wolfson, *supra* note 59, at 51.

155. This is distinct from individuals who invoke freedoms of religion and expression to argue that they should have a license to discriminate against engaged or married couples of whom they disapprove, a pressing concern that is nevertheless beyond the scope of this Article. For more on how conservative actors borrow the language and concepts of human rights in attempts to justify discrimination on the basis of sex, gender, gender identity, and sexual orientation, see NAUREEN SHAMEEM, RIGHTS AT RISK (The OURs Working Group, Alejandra Sarda-Chandiramani & Shareen Gokal eds., 2017), https://www.awid.org/sites/default/files/atoms/files/rights-at-risk-ours-2017.pdf [https://perma.cc/8EH6-M4QY].

156. Human Rights Comm., *General Comment No. 22*, *in* COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev.1, 26 (1994) [hereinafter *General Comment No. 22*]. In 2020, the UN Special Rapporteur on Freedom of Religion or Belief echoed this understanding in a report exploring the relationship between the freedom of religion and belief and the rights of women, girls, and LGBT individuals. *See* Human Rights Council, *Report of the Special Rapporteur on Freedom of Religion or Belief*, U.N. Doc. A/HRC/43/48 (Aug. 24, 2020).

157. *See* ICCPR, *supra* note 7, art. 18; *General Comment No. 22*, *supra* note 156, at 26-27.

158. Human Rights Comm., *General Comment No. 19*, *in* COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev.1, 28 (1994).

rejected by national courts and, were it to be presented before human rights mechanisms, would likely be rejected by those bodies as well.[159] The law correctly distinguishes between rites of marriage (celebrated in various faiths and subject to their doctrines), and the right to marry (governed by the law and not subject to deprivation based on others' religious beliefs or preferences). Courts must safeguard that distinction, vital for the protection of not only equality and dignity, but also liberty, including freedom of religion. The State should not take sides in religious differences, nor should the law be used as a weapon to impose the views of some on others in violation of fundamental rights.

The IACtHR properly interpreted and applied the rights to equality and non-discrimination in OC-24/17 to affirm same-sex couples' freedom to marry. The judgment also illustrates how to respond effectively to each of the counterarguments discussed in this Section. The IACtHR first reiterated that discrimination on the basis of sexual orientation is prohibited under ACHR Article 1(1).[160] Then, it set out the criteria for finding violations of the rights to equality and non-discrimination, applying a heightened standard due to sexual orientation's protected status:

> [I]n the case of a measure that establishes a differentiated treatment involving one of these categories, a thorough examination must be made, incorporating especially rigorous elements in the analysis; in other words, the different treatment should constitute a necessary measure to achieve an objective that is imperative pursuant to the Convention. Thus, in this type of examination, in order to analyze the validity of the differentiating measure, the end pursued must not only be legitimate under the Convention, but also imperative. Also, the means chosen must not only be adequate and truly enabling, but also necessary; that is, that it could not be replaced by other less harmful means. In addition, there must be a strict proportionality analysis of the measure by which the benefits of adopting the measure in question must be clearly more advantageous than the restrictions it imposes on the treaty-based principles it affects.[161]

Since OC-24/17 is an advisory opinion, no State was called on to justify the exclusion of same-sex couples from the institution of marriage.

Nevertheless, the IACtHR was able to find that "[t]he establishment of a differentiated treatment between heterosexual couples and couples of the same sex regarding the way in which they can form a family—either by a *de facto* marital union or a civil marriage—does not pass the strict test of equality because, in the Court's opinion, there is no purpose acceptable under the Convention

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159. *See* Roos & Mackay, *supra* note 75, at 933-36 (citing Obergefell v. Hodges, 576 U.S. 644, 680 (2015); Halpern v. Can. (Att'y Gen.) (2003), 65 O.R. 3d 161, para. 53 (Can. Ont. C.A.); and *Fourie*, *supra* note 123, ¶ 88).

160. OC-24/17, *supra* note 11, ¶ 68.

161. *Id.* ¶ 81.

[ACHR] for which this distinction could be considered necessary or proportionate."[162] The IACtHR dismissed the notion that procreation is a necessary condition for exercising the right to marry as contrary to the reality of families and demeaning to couples who do not or cannot have children.[163]

The IACtHR also observed that the meaning of marriage and family have changed over time and stated that, although the traditional meaning may be "enlightening," the IACtHR would not attempt to fix this meaning.[164] Finally, the IACtHR declined to consider religious opposition to the freedom to marry and indicated that the principle of separation of church and state prevents it from interpreting the ACHR through a religious lens.[165] It specifically noted that religious "convictions cannot condition what the Convention establishes in relation to discrimination based on sexual orientation."[166]

The IACtHR also clarified in OC-24/17 that the recognition of same-sex relationships short of marriage would not suffice to meet State obligations under the rights to equality and non-discrimination. The Court stated:

> [T]here would be no sense in creating an institution that produces the same effects and gives rise to the same rights as marriage, but that is not called marriage except to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference or that, at the very least, belittles them. On that basis, there would be marriage for those who, according to the stereotype of heteronormativity, were considered "normal," while another institution with identical effects but with another name would exist for those considered "abnormal" according to this stereotype. Consequently, the Court deems inadmissible the existence of two types of formal unions to legally constitute the heterosexual and homosexual cohabiting community, because this would create a distinction based on an individual's sexual orientation that would be discriminatory and, therefore, incompatible with the American Convention.[167]

The IACtHR thus established that the exclusion of individuals from marriage on the basis of sexual orientation is discrimination in violation of the rights to equality and non-discrimination. Either alone or in conjunction with right-to-marry provisions, the rights to equality and non-discrimination require States to protect the freedom to marry for same-sex couples as they do for other couples.

C. Rights to Privacy and Family

States are also under an obligation to respect the freedom to marry as the best means of ensuring same-sex couples' rights to privacy and family, which are

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162. *Id.* ¶ 220.
163. *Id.* ¶ 221.
164. *Id.* ¶¶ 177, 222.
165. *Id.* ¶ 223.
166. *Id*.
167. *Id.* ¶ 224.

contained in the ICCPR and in regional human rights instruments.[168] This Section first explains that, although the right to privacy is not absolute, regional and national jurisprudence has established that discrimination on the basis of sexual orientation is not a permissible purpose for State interference in privacy. It then explains that human rights mechanisms either have interpreted or should interpret "family" inclusively, such that same-sex couples have a right to family life under international human rights law. Finally, it argues that the rights to privacy and family require that States provide a mechanism for recognizing and protecting same-sex relationships and that marriage is the best mechanism for ensuring these rights.

Although the right to privacy is not absolute, the extent to which States may interfere in privacy is closely circumscribed.[169] The HRC has determined that States have limited authority to interfere with an individual's privacy, and such interference may be only "on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant."[170] The HRC has clarified that "even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."[171] The ECHR also allows State interference with privacy but only when this "is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[172] The jurisprudence of the IACtHR has incorporated the same exceptions that the ECHR sets out.[173]

Since discrimination on the basis of sexual orientation is prohibited under

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168. ICCPR, *supra* note 7, art. 17(1) ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."); *Id.* art. 23(1) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); ECHR, *supra* note 7, art. 8(1) ("Everyone has the right to respect for his private and family life, his home and his correspondence."); ACHR, *supra* note 7, art. 11(2) ("No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation."); *Id.* art. 17(1) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); Banjul Charter, *supra* note 128, art. 18 (1) ("The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.").

169. *See* Human Rights Comm., *General Comment No. 16*, *in* COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev.1, 22 (1994) [hereinafter *General Comment No. 16*].

170. *Id.* ¶ 3.

171. *Id.* ¶ 4.

172. ECHR, *supra* note 7, art. 8(2).

173. *See Atala Riffo*, *supra* note 132, ¶ 164.

international human rights law,[174] this form of status-based discrimination is not a reasonable or necessary method for achieving State objectives within exceptions to the right to privacy. In *Toonen v. Australia*, the HRC found that criminalizing private sex between consenting adults of the same sex violated their right to privacy, rejecting the State's arguments that this measure was a reasonable and proportionate means of achieving public health and moral objectives.[175] Similar criminal laws have been found to violate the right to privacy by the ECtHR[176] and the Supreme Court of the United States.[177] Nor is criminal law the only area in which State interference in an individual's personal life can constitute a violation of the right to privacy. In *Smith & Grady v. United Kingdom*, the ECtHR found a violation of the right to privacy when the State investigated the sexual orientation of members of the air force and discharged them on the basis of their sexual orientation.[178] The ECtHR stated that sexual orientation is "a most intimate aspect of an individual's private life" and scrutiny of it thus required "particularly serious reasons by way of justification."[179] The State's asserted reason for the investigations and discharge, "morale,"[180] was not "convincing and weighty" and thus did not justify interference in the applicant's right to privacy.[181]

Similarly, discrimination on the basis of sexual orientation is not a permissible exception to the right to family life. On the contrary, regional human rights mechanisms have expressly acknowledged that the right to family life protects same-sex relationships.[182] In OC-24/17, the IACtHR held that "the American Convention protects the family ties that may derive from a relationship between persons of the same sex."[183] In so doing, the IACtHR expressly relied on the ECtHR's decision in *Schalk and Kopf*,[184] which had broken with the ECtHR's prior jurisprudence by finding that it would be "artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life.'"[185] The HRC, on the other hand, has not resolved this question in its jurisprudence but has stated in a General Comment that the term "family" must "be given a broad interpretation to include all those comprising the family as

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174. *See supra* notes 130-39 and accompanying text.

175. *Toonen*, *supra* note 38, ¶¶ 8.5-.6.

176. Dudgeon v. United Kingdom, App. No.7525/76, Eur. Ct. H.R. (Feb. 24, 1983).

177. Lawrence v. Texas, 539 U.S. 558 (2003).

178. Smith and Grady v. United Kingdom, ¶ 112, App. Nos. 33985/96 & 33986/96, Eur. Ct. H.R. (Sept. 27, 1999).

179. *Id.* ¶¶ 81, 90.

180. *Id.* ¶ 95.

181. *Id.* ¶ 111.

182. In addition to the examples mentioned in this paragraph, the Committee on the Rights of the Child defines "family" inclusively. *See* Comm. on the Rights of the Child, *Role of the Family in the Promotion of the Rights of the Child*, ¶ 2.1, annex V, U.N. Doc. CRC/C/24 (Mar. 8, 1994).

183. OC-24/17, *supra* note 11, ¶ 199.

184. *Id.* ¶ 192.

185. *Schalk & Kopf*, *supra* note 50, at 436; *see also* P.B. & J.S. v. Austria, ¶ 30, App. No. 18984/02, Eur. Ct. H.R. (July 22, 2010).

understood in the society of the State party concerned."[186] The definition of family under the ICCPR thus will vary somewhat depending on the State but should, nevertheless, reflect the global trend toward acceptance and understanding of the diversity of sexual orientations[187] and be interpreted consistently with the principles of equality and non-discrimination.[188]

Together, the rights to privacy and family life impose on States a positive obligation not only generally to provide legal status to same-sex couples but also specifically to affirm their freedom to marry. The ECtHR, in *Oliari and Others v. Italy*, found that ECHR Article 8 imposed a positive obligation on Italy to provide legal recognition and protection to same-sex unions.[189] Although the ECtHR has thus far kept its right to privacy and family jurisprudence under ECHR Article 8 separate from its right to marry jurisprudence under ECHR Article 12 for cases involving sexual orientation,[190] this is an artificial and ultimately unhelpful distinction; moreover, cases like *Oliari* indicate that the space between these parallel tracks of jurisprudence is narrowing and has the potential to be bridged.[191]

One bridge could be arguing that marriage is the best means of securing the enjoyment of the rights to privacy and family under ECHR Article 8. In OC-24/17, for example, the IACtHR explained "the most simple and effective way to ensure the rights derived from the relationship between same-sex couples" under ACHR Articles 11(2) and 17, which protect the rights to privacy and family, was "to extend those [legal institutions] that exist to couples composed of persons of the same sex—including marriage."[192] Human rights mechanisms should find that States are obligated to respect same-sex couples' freedom to marry because, as for different-sex couples, marriage is the best means by which to secure the rights to privacy and family.

D. Rights to Liberty and Dignity

The IACtHR and national courts have also interpreted liberty, a right

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186. *General Comment No. 16*, *supra* note 169, at 22.

187. *See* Jacob Poushter & Nicholas Kent, *The Global Divide on Homosexuality Persists: But Increasing Acceptance in Many Countries Over Past Two Decades*, PEW RES. CTR. (June 25, 2020), https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists [https://perma.cc/WCJ4-FHHN] ("[A]ttitudes on the acceptance of homosexuality are shaped by the country in which people live . . . . But even with these sharp divides, views are changing in many of the countries that have been surveyed since 2002, when Pew Research Center first began asking this question. In many nations, there has been an increasing acceptance of homosexuality").

188. *See supra* Section III.B.

189. *Oliari*, *supra* note 63, ¶ 185.

190. *See* Hämäläinen v. Finland, 2014-IV Eur. Ct. H.R. 369, 393; Chapin and Charpentier v. France, ¶¶ 38-39, App. No. 40183/07, Eur. Ct. H.R. (June 9, 2016).

191. *See* Johnson, *supra* note 67, at 69-72.

192. OC-24/17, *supra* note 11, ¶ 218.

provided in international and regional human rights instruments,[193] and dignity, a principle common to international human rights law,[194] to require State recognition of the freedom to marry. This Section first explains how the IACtHR, the only human rights court that has considered the relation between liberty and dignity and same-sex couples' freedom to marry, strengthened the protection that human rights law provides to the freedom to marry by treating marriage not only as an issue of equality but also as one of autonomy. The Section next discusses national jurisprudence that supports the IACtHR's reasoning. Finally, the Section suggests that, moving forward, the rights to liberty and dignity could play a greater role in reaffirming the freedom to marry in international and regional fora.

In OC-24/17, the IACtHR found that the right to liberty and the principle of dignity require States to recognize the freedom to marry.

> [T]he principle of human dignity derives from the complete autonomy of the individual to choose with whom he or she wishes to enter into a permanent and marital relationship, whether it be a natural one (*de facto* union) or a formal one (marriage). This free and autonomous choice forms part of the dignity of each person and is intrinsic to the most intimate and relevant aspects of his or her identity and life project (Articles 7(1) and 11(2)). Also, the Court considers that, provided there is an intention to enter into a permanent relationship and form a family, ties exist that merit equal rights and protection whatever the sexual orientation of the parties (Articles 11(2) and 17). When asserting this, the Court is not diminishing the institution of marriage but, to the contrary, considers marriage necessary to recognize equal dignity to those persons who belong to a human group that has historically been oppressed and discriminated against.[195]

The IACtHR's interpretation authoritatively states that the rights to liberty and dignity impose an obligation on States to recognize the freedom to marry. This interpretation is also, unless a State has abolished the institution of marriage, a realistic accounting of the harms that result from exclusion from marriage on the basis of sexual orientation.[196]

National court judgments provide further support for the IACtHR's determination that liberty and dignity constitute an additional basis for the State obligation to respect the freedom to marry. In *Fourie*, for example, the Constitutional Court of South Africa found not only "that the failure . . . to

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193. ICCPR, *supra* note 7, art. 9(1) ("Everyone has the right to liberty and security of person."); ECHR, *supra* note 7, art. 5(1) ("Everyone has the right to liberty and security of person."); ACHR, *supra* note 7, art. 7(1) ("Every person has the right to personal liberty and security."); Banjul Charter, *supra* note 128, art. 6 ("Every individual shall have the right to liberty and to the security of his person.").

194. ICCPR, *supra* note 7, pmbl., art. 10; ACHR, *supra* note 7, arts. 5, 6, 11; Banjul Charter, *supra* note 128, pmbl., art. 5.

195. OC-24/17, *supra* note 11, ¶ 225 (footnotes omitted).

196. *See infra* notes 234-41 and accompanying text.

provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right to equal protection of the law . . . and not to be discriminated against unfairly," but also that "such failure represents an unjustifiable violation of their right to dignity."[197]

In *Obergefell*, the Supreme Court of the United States, while making frequent reference to the principle of dignity,[198] determined that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex [sic] may not be deprived of that right and that liberty."[199] Advocates for the freedom to marry could consider invoking the rights to liberty and dignity in at least two circumstances: first, when targeting national forums, where liberty- and dignity-based claims generally have been most successful, and, second, when targeting international and regional human rights mechanisms, where liberty- and dignity-based claims can reaffirm arguments primarily grounded in the rights to marriage, equality, non-discrimination, privacy, and family.

IV. ADDITIONAL RIGHTS-BASED ARGUMENTS FOR THE FREEDOM TO MARRY

The freedom to marry also implicates other rights that, thus far, have not figured into arguments for marriage before human rights mechanisms. This Part discusses the rights of children and parents in Section IV.A, the right to freedom of movement (also known as the right to travel) in Section IV.B, and the right to be free from inhuman or degrading treatment in Section IV.C as rights that could, when relevant to the facts of a case, weigh in favor of the recognition of same-sex couples' freedom to marry. While these arguments are not likely to provide an independent basis for the freedom to marry, they have the potential to supplement the principal arguments presented in Part III and thus to strengthen the overall human rights case for States' obligation to protect same-sex couples' freedom to marry.

A. Rights of Children and Parents

The rights of children and parents, although not previously raised in freedom-to-marry cases before human rights mechanisms, could establish separate claims

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197. *Fourie*, *supra* note 123, ¶ 114.

198. Obergefell v. Hodges, 576 U.S. 644, 663 (2015) ("Under the Due Process Clause of the Fourteenth Amendment, no State shall 'deprive any person of life, liberty, or property, without due process of law.' The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." (citations omitted)); *id.* at 666 ("There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices."); *id.* at 681 ("They ask for equal dignity in the eyes of the law. The Constitution grants them that right.").

199. *Id.* at 675.

that States violate the rights to equality and non-discrimination when they do not recognize same-sex couples' freedom to marry. Article 2(1) of the Convention on the Rights of the Child (CRC) prohibits discrimination against a child, whether directly against the child or indirectly through discrimination against a parent or legal guardian.[200] The Committee on the Rights of the Child has interpreted this provision to prohibit discrimination on the basis of sexual orientation.[201] The United Nations Children's Fund (UNICEF) similarly interprets a child's right to non-discrimination to prohibit discrimination against LGBT parents[202] and has stated that discrimination against LGBT parents cannot be justified as protective of children's interests because it "actually harms rather than protects children."[203] In the interest of protecting children's rights to education and health care, as well as diminishing uncertainty regarding custody in cases of death or divorce, UNICEF supports the legal recognition of LGBT couples.[204]

The IACtHR similarly rejected discriminatory rationales when determining whether removing children from the custody of a mother in a same-sex relationship violated ACHR Article 19. Article 19 states, "[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state."[205] In *Atala Riffo and Daughters v. Chile*, the IACtHR determined that a parent's sexual orientation was a prohibited basis for discrimination and that taking three girls from their mother's custody because she had entered into a same-sex relationship violated ACHR Article 19.[206] The IACtHR stated that discrimination on the basis of sexual orientation in custody matters cannot be justified by specious references to the child's best interest or by stereotypes.[207] On this basis, the IACtHR concluded that discrimination against LGBT parents might also violate the rights of their children.

The ECtHR was initially reluctant to address discrimination on the basis of sexual orientation in Member States' treatment of parent-child relationships. In *Fretté v. France*, decided by the ECtHR in 2002, a single gay man alleged that his rights to privacy and family under ECHR Article 8 and to non-discrimination under ECHR Article 14 had been violated when he was prevented, on the basis of his sexual orientation, from adopting a child.[208] Rather than invoking children's right to be free from discrimination against a (potential) parent, the ECtHR ruled

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200. Convention on the Rights of the Child art. 2(1), *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

201. Comm. on the Rights of the Child, *General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24)*, ¶ 8, U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013).

202. UNICEF, *Eliminating Discrimination Against Children and Parents Based on Sexual Orientation and/or Gender Identity*, CURRENT ISSUES, 1 (Nov. 2014).

203. *Id.* at 3.

204. *Id.* at 3-4.

205. ACHR, *supra* note 7, art. 19.

206. *Atala Riffo*, *supra* note 132, ¶¶ 150-55, 314.

207. *Id.* ¶¶ 110-11.

208. Fretté v. France, 2002-I Eur. Ct. H.R. 345.

that the applicant's rights were permissibly "limited by the interests of children eligible for adoption," specifically invoking children's interest in "a dual maternal and paternal role model."[209] The Court thus allowed Member States a wide margin of appreciation in designing their criteria for adoption.

Six year later, however, in *E.B. v. France*, the ECtHR cabined *Fretté*'s reasoning on this issue by "question[ing] the merits of such a ground" (i.e., "the lack of a paternal or maternal referent in the household") in the context of a woman who was in a permanent relationship with another woman and wished, on her own, to adopt.[210] Moreover, the ECtHR expressed concern that, in the context of adoption, "if the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant's sexual orientation this would amount to discrimination under the Convention [ECHR]."[211] Although the ECtHR has been reluctant to embrace same-sex couples' freedom to marry on this basis alone,[212] the gradual shift in the ECtHR's adoption jurisprudence suggests that it might nevertheless be more receptive to an argument in favor of the freedom to marry that highlights how marriage advances the best interests of children—and more critical of arguments that frame LGBT people as inherently unsuitable parents—than it was at the beginning of the twenty-first century.

When same-sex couples are denied access to marriage, this denial impairs their ability to support and care for each other, and to pool their resources.[213] Moreover, their legal relationships to their children are made more precarious and ill-defined, and their children are vulnerable to stigmatization and other forms of discrimination.[214] The resulting harms violate the rights of both children and parents to equality and non-discrimination. They might also violate the rights to privacy and family. In future litigation, advocates could emphasize the ways in which denying the freedom to marry harms children and parent-child relationships. This approach could strengthen arguments for State obligations to respect the freedom to marry under human rights law.

B. Right to Freedom of Movement

Violations of the right to freedom of movement (also known as the right to travel) have not yet been alleged in cases on the freedom to marry before human rights bodies like the IACtHR, the ECtHR, and the HRC. Freedom of movement has, however, factored into the cross-border recognition of same-sex couples at the European Court of Justice (ECJ).[215] Under European Union Directive

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209. *Id.* at 367.

210. E.B. v. France, ¶ 73, App. No. 43546/02, Eur. Ct. H.R. (Jan. 22, 2008).

211. *Id.* ¶ 93.

212. Gas and Dubois v. France, 2012-II Eur. Ct. H.R. 245.

213. Gerber et al., *supra* note 75, at 658-59, 664.

214. *Id.* at 664-65.

215. Note that the European Court of Justice, which interprets the laws of the European Union (EU) for EU Member States, is not the same as the European Court of Human Rights, which interprets the ECHR for Member States of the Council of Europe.

2004/38/EC, family members of citizens of the European Union, including their spouses, have the right to move freely within the territory of Member States.[216] In *Coman v. Romania*, the ECJ interpreted the word "spouse" to be gender-neutral and found that all Member States were obligated to respect a marriage entered into under the laws of another Member State.[217] The ECJ ruled that Romania could not restrict the freedom of movement of a person's same-sex spouse on the basis of its own restrictions on marriage or by cloaking discrimination or prejudice under an asserted right to culture.[218]

Freedom of movement has also figured into the strategies pursued by some litigants at the national level. For instance, Mexican law required that same-sex couples' marriages contracted in Mexico City be honored throughout the country years before Mexico's Supreme Court of Justice of the Nation began to find state and local bans on the freedom to marry unconstitutional,[219] and Israel, which does not have civil marriage for different-sex or same-sex couples, nevertheless provides equal treatment under the law, including in its legal respect for the marriages of same-sex couples contracted outside of Israel.[220] Thus, the freedom of movement might be a useful human right to invoke in expanding the freedom to marry within a given jurisdiction.[221]

In addition to using the right to freedom of movement as a strategy to achieve intermediate steps in States' gradual expansion toward the freedom to marry, advocates could expressly invoke this right in cases in which the petitioners' relationship has encountered obstacles due to restrictions on travel or immigration. Freedom of movement is a fundamental right that is implicated both in the recognition of a marriage performed outside of a State's borders and in the ability of a couple of differing nationalities to maintain a relationship without fearing a partner's deportation.

The right to freedom of movement is widely reflected in human rights instruments, including the UDHR.[222] ACHR Article 22 also provides for freedom of movement and residence,[223] although it has not been necessary to invoke this

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216. 2004 O.J. (L 158) 77.

217. Case C-673/16, Coman v. Inspectoratul General pentru Imigrări & Ministerul Afacerilor Interne, 2018 EUR-Lex CELEX LEXIS 62016CA0673 (June 5, 2018).

218. *Id.*

219. *See* JORDI DÍAZ, THE POLITICS OF GAY MARRIAGE IN LATIN AMERICA: ARGENTINA, CHILE, AND MEXICO 152 (2015). For details on the current status of same-sex couples' gradually expanding freedom to marry in Mexico, see Rex Wockner, *Mexico's Wild Ride to Marriage Equality*, WOCKNER (Sept. 23, 2021), https://wockner2.blogspot.com/2018/09/mexicos-wild-ride-to-marriage-equality.html [https://perma.cc/YL5K-4QJR].

220. HCJ 3045/05 Ben-Ari v. Dir. Of Population Admin., Ministry of Interior 61(3) PD 537 (2006) (Isr.).

221. For example, Alina Tryfonidou, suggests that this strategy could be used in Europe to build on *Orlandi*. *Positive State Obligations Under European Law: A Tool for Achieving Substantive Equality for Sexual Minorities in Europe*, 13 ERASMUS L. REV. 98, 107 (2020).

222. UDHR, *supra* note 107, art. 13.

223. ACHR, *supra* note 7, art. 22.

right to expand the freedom to marry, in light of the IACtHR's 2017 advisory opinion. This strategy might be better used in front of the ECtHR, relying on the right to freedom of movement under Article 2 of Protocol No. 4 to the ECHR;[224] the African Court on Human and Peoples' Rights, relying on the right to freedom of movement and residence under Article 12 of the Banjul Charter;[225] or the HRC, relying on the right to freedom of movement and residence under ICCPR Article 12.[226] To the extent that restrictions on marriage limit the freedom of movement of same-sex couples, advocates could invoke these provisions in litigation to support arguments in favor of ending State's exclusion of same-sex couples from marriage.

This use of the right to freedom of movement is strengthened when combined with the rights to equality and non-discrimination. The pairing of these rights is foreseen by the HRC, which has stated that non-discrimination principles are relevant to the right to freedom of movement and that "it would be a clear violation of the [ICCPR] if the rights enshrined in [A]rticle 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[227] As same-sex couples move across borders, some with the sole purpose of marrying before returning home,[228] advocates could gradually advance the freedom to marry by alleging violations of same-sex couples' right to freedom of movement in conjunction with the rights to equality and non-discrimination. The right to freedom of movement and rights to equality and non-discrimination could be relevant in Taiwan, for example, which has affirmed the freedom to marry but is still moving toward addressing the situation of couples

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224. Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 2-3, Sept. 16, 1963, E.T.S. No. 46, 1496 U.N.T.S. 263. Thus far, the ECtHR has found violations of the right to family life under ECHR Article 8 in conjunction with the right to non-discrimination under ECHR Article 14 in cases regarding the separation and reunification of same-sex couples. *See* Taddeucci and McCall v. Italy, App. No. 51362/09, Eur. Ct. H.R. (June 30, 2016); Pajić v. Croatia, App. No. 68453/13, Eur. Ct. H.R. (Feb. 23, 2016). Similar claims could be made even stronger in the future by alleging not only that the couple's rights to family life and non-discrimination have been violated, but also that their right to freedom of movement has been violated.

225. Banjul Charter, *supra* note 128, art. 12.

226. ICCPR, *supra* note 7, art. 12.

227. Human Rights Comm., *General Comment No. 27: Freedom of Movement (Article 12)*, U.N. Doc. CCPR/C/21/Rev.1/Add.9, para. 18 (Nov. 1, 1999).

228. *See, e.g.*, Simeon Tegel, *Buenos Aires Is Becoming a Mecca for Gay Marriage Tourism*, GLOB. POST (Sept. 12, 2015), https://www.pri.org/stories/2015-09-12/buenos-aires-becoming-mecca-gay-marriage-tourism [https://perma.cc/59KN-YXKN]; Andrew Gorman-Murray, *New Zealand Experience Shows Same-Sex Marriage Could Provide Huge Economic Boost for Australia*, CONVERSATION (Nov. 20, 2017), https://theconversation.com/new-zealand-experience-shows-same-sex-marriage-could-provide-huge-economic-boost-for-australia-87623 [https://perma.cc/2823-TPDH].

when a party to the marriage is a foreigner from a country that denies same-sex couples' freedom to marry.[229]

C. Right to Be Free from Inhuman or Degrading Treatment

Another novel claim that advocates could bring before the ECtHR, specifically, is that the inability to marry violates same-sex couples' right to be free from inhuman or degrading treatment. Article 3 of the ECHR guarantees that "[n]o one shall be subjected to torture or inhuman or degrading treatment or punishment."[230] Recent ECtHR decisions have expanded the scope of ECHR Article 3, in conjunction with the right to non-discrimination under ECHR Article 14, in cases involving severely discriminatory State treatment of LGBT people.[231] The ECtHR has found that:

> discriminatory treatment as such can in principle amount to degrading treatment within the meaning of Article 3 where it attains a level of severity such as to constitute an affront to human dignity. More specifically, treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority may, in principle, fall within the scope of Article 3.[232]

The ECtHR has specifically found that an affront to human dignity in violation of ECHR Article 3, in conjunction with ECHR Article 14, can occur where applicants experience "feelings of fear, anguish and insecurity"[233] as a result of treatment directed towards them as a result of their identity. Some applicants to the ECtHR, in cases involving the freedom to marry, have described feeling excluded or marginalized as a result of being denied the ability to marry, but these applicants have not specifically made a claim under ECHR Article 3.[234]

As noted above, some courts and legal scholars have underscored the harm that accompanies the inability to marry and have found dignitary arguments for the freedom to marry compelling.[235] The IACtHR, for example, noted that the inability to marry undermined the dignity of same-sex couples,[236] the Supreme Court of the United States stressed that "laws excluding same-sex couples from

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229. *See 'Happily Ever After' Eludes Some in Taiwan a Year After Asia's First Same-Sex Marriages*, JAPAN TIMES (May 21, 2020), https://www.japantimes.co.jp/news/2020/05/21/asia-pacific/social-issues-asia-pacific/taiwan-lgbt-marriage-one-year [https://perma.cc/996B-U8C2].

230. ECHR, *supra* note 7, art. 3.

231. *See e.g.*, X v. Turkey, App No. 24626/09, Eur. Ct. H.R. (Oct. 9, 2012); Identoba and Others v. Georgia, App No. 73235/12, Eur. Ct. H.R. (May 12, 2015) [hereinafter *Identoba*].

232. *Identoba*, *supra* note 231, ¶ 65.

233. M.C. and A.C. v. Romania, ¶ 119, App. No. 12060/12 09, Eur. Ct. H.R. (Apr. 12, 2016); *see also Identoba*, *supra* note 231, ¶ 71.

234. *See Vallianatos*, *supra* note 68, ¶ 43.

235. *See, e.g.*, WILLIAM N. ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 123-182 (1996); Martha C. Nussbaum, *A Right to Marry*, 98 CALIF. L. REV. 667, 711 (2010).

236. *See supra* note 196 and accompanying text.

the marriage right impose stigma and injury,"[237] and the Constitutional Court of South Africa found that denying LGBT people the freedom to marry "manifestly affects their dignity as members of society."[238] Scientific research also provides evidence of the harms of exclusion from marriage. For example, researchers attributed a 46% decline in suicide rates among individuals in same-sex relationships in Sweden and Denmark from 1989 to 2016 to a reduction in stigma and discrimination following the passage of marriage laws and other LGBT rights legislation.[239] Alleging violations of ECHR Article 3 claims in future cases before the ECtHR might prove to be a powerful argument for the freedom to marry.

Advocates could use this argument to circumscribe the ECtHR's negative precedents on the freedom to marry under ECHR Article 12. Although the ECtHR has ruled that ECHR Article 12 does not guarantee same-sex couples the right to marry, denying access to marriage could cause harms that are prohibited by ECHR Article 3. Marriage could thus be seen as a means of securing the right to be free from inhuman or degrading treatment under ECHR Article 3, in the same sense as it could be found to secure the rights to privacy and family under ECHR Article 8, as discussed in Section III.C. This argument has the added benefit of pushing past the ECtHR's reluctance to compare married and unmarried couples.[240] This argument is all the more compelling in light of the abundant cross-national refutation of all other proffered justifications for withholding marriage from same-sex couples. As other excuses and rationales are eliminated, what is left is the bare and unacceptable intent to inflict and perpetuate stigma, division, subordination, and exclusion.[241] If challenges to the denial of marriage are framed in terms of the right to be free from inhuman or degrading treatment, the ECtHR may be more willing to acknowledge the dignitary harms that occur when States do not protect the freedom to marry of same-sex couples.

CONCLUSION

This Article has laid out the case for State obligations to affirm the freedom to marry under human rights law. It is time for the HRC and the ECtHR to reassess their key cases on the freedom to marry, *Joslin* and *Schalk and Kopf*, in light of growing understanding and awareness and consequent changes in State practice. The IACtHR's more faithful interpretation of the right to marry, the

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237. Obergefell v. Hodges, 576 U.S. 644, 671 (2015).

238. *Fourie*, *supra* note 123, ¶ 114.

239. *See* Annette Erlangsen et al., *Suicide Among Persons Who Entered Same-Sex and Opposite-Sex Marriage in Denmark and Sweden, 1989–2016: A Binational, Register-Based Cohort Study*, 74 J. EPIDEMIOLOGY & CMTY HEALTH 78 (2020).

240. Cases in which the ECtHR has been reluctant to compare married and unmarried couples include X and Others v. Austria, 2013-II Eur. Ct. H.R. 1, 44-45; *Vallianatos*, *supra* note 68; and *Oliari*, *supra* note 63.

241. *See, e.g.*, Wolfson, *supra* note 59, at 50 (refuting common objections to ending marriage discrimination and tracing success in implementation, growth in acceptance, and consequent gains in thirty countries that have so far affirmed the freedom to marry for same-sex couples).

rights to equality and non-discrimination, the rights to privacy and family, and the rights to liberty and dignity in OC-24/17 should inform this reassessment, as should the mountain of evidence, expertise, and experience in the countries that have debated and then affirmed the freedom to marry. The rights of children and parents, the right to freedom of movement, and the right to be free from inhuman or degrading treatment, although less frequently litigated in this context in international and regional fora, also have emerged as potential foundations or support for same-sex couples' freedom to marry.

This Article has not only argued that human rights law can be interpreted to protect the freedom to marry, but it has also demonstrated why it is urgent that it should be so interpreted. Excluding same-sex couples from marriage causes both tangible and intangible dignitary harms, and every day of denial is a day of injury and injustice. Parents face barriers to adopting and gaining custody of their children. Gay people's love is degraded and disdained. Couples of different nationalities fear deportation. Stigmatization and discrimination lead to mental health issues and even suicide.

The rights at issue are so fundamental, the harms so pervasive and severe, the costs of delay so high, and the community so long oppressed that courts, whether national, regional, or international, cannot justify waiting any longer to recognize the freedom to marry of same-sex couples. As the IACtHR stated in OC-24/17, "the presumed lack of consensus within some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to reproduce and perpetuate the historical and structural discrimination that such minorities have suffered."[242] States should stand on the side of people's well-being, rights, inclusion, and love. It is imperative that human rights law protect the freedom to marry for all, including loving and committed couples of the same sex.

242. OC-24/17, *supra* note 11, ¶ 219; *see also Atala Riffo*, *supra* note 132, ¶ 92.