

DECRIMINALIZATION MATTERS: LGBTQ Transnational Litigation Networks and Movement Lawyering in the Global South

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ABSTRACT

In the last decade, a distinct sociolegal phenomenon has been sweeping across the Global South—the judicial decriminalization of same-sex sexual conduct. On the other hand, progress on LGBTQ rights has occurred in parallel to transnational countermobilization and backlash against LGBTQ rights. Yet, neither the phenomenon of judicial decriminalization nor the countermobilization and backlash to decriminalization has attracted the attention that these phenomena deserve from doctrinal legal scholars, comparative and international law scholars, or legal mobilization scholars.

In this paper, I help to remedy this oversight by making three contributions to legal mobilization scholarship and to international law and relations

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scholarship. First, I demonstrate that at the heart of decriminalization legal mobilization in the Global South is a transnational advocacy network whose goal is to promote and to assist decriminalization of consensual same-sex sexual conduct through litigation—a transnational litigation network.

Second, I discuss two normative critiques of human rights advocacy applicable to transnational litigation networks. The first critique, “human rights imperialism,” posits that Global North states and actors situated therein seek to impose the human rights regime upon the states and populations of the Global South. Consequently, as I describe in the Article, state actors and religious officials are able to invoke an anti-colonial discourse when resisting decriminalization efforts. The second critique, “human rights elitism,” alleges that shifting political contestation to the courts risks marginalizing already marginalized groups that constitute the grassroots of most social movements. Legal mobilization prompted by transnational decriminalization litigation network actors in the Global North is vulnerable to both critiques. Yet, decriminalization is too important an issue to cede the ground entirely to the so-called “traditionalists” or to eschew litigation altogether.

In response to the critiques of human rights imperialism and human rights elitism, the third contribution I make in this paper is to prescribe a set of ethical lawyering approaches for transnational decriminalization litigation network actors to adopt—which I term transnational movement lawyering. Transnational decriminalization litigation network actors must use their financial and knowledge resources to support—rather than to direct, to overshadow, or to supplant—local actors and their goals and strategies. Ultimately, transnational movement lawyering might even mean not litigating in some cases.

This framework has broad implications. In the twenty-first century, human rights litigation is central to domestic and transnational politics. If activists are to spread human rights norms globally, they must take seriously the critiques of the human rights regime and of litigation as a social change strategy.

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INTRODUCTION

In the last decade, a distinct sociolegal phenomenon has been sweeping across the Global South¹—the judicial decriminalization of same-sex sexual conduct.² Since 2016, the high courts of eleven countries have determined that criminalizing same-sex conduct violates their own constitutional law and norms.³ This trend is particularly acute in the former British colonies of the Commonwealth Caribbean.⁴ These judgments are tremendous victories for LGBTQ rights. They add to a growing chorus of Global South actors—activists, judges, legislators, and common folk—rejecting the criminal legal framework for this enforcement of public morality.⁵ Additionally, decriminalization has opened the door to progress in other LGBTQ rights areas, such as the legalization of same-sex marriage⁶ and banning conversion therapy.⁷ Transgender, nonbinary, and intersex activists and their allies have also made progress regarding gender identity, gender expression, and sex characteristics, for example, obtaining legal recognition of one’s gender identity on government documents.⁸

1. In this Article, I use the term “Global South” to refer to those 135 states that have self-identified as part of a global “South” through their membership in the United Nations (“UN”) Finance Center for South-South Cooperation. *Global South Countries 2024*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/global-south-countries> [<https://perma.cc/J4LL-HM5A>] (last visited Feb. 13, 2025).

2. See *Legal Frameworks: Criminalisation of Consensual Same-Sex Sexual Acts*, ILGA WORLD DATABASE, <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts> [<https://perma.cc/6YJE-5Y8G>] (last visited Feb. 13, 2025) (filter “Mechanism” column for “Judicial”).

3. See *id.*

4. See Leah Thompson, *Progress in the Caribbean*, OUTRIGHT INT’L (Feb. 11, 2023, 12:00 PM), <https://outrightinternational.org/insights/progress-caribbean> [<https://perma.cc/ND3E-Z5G3>] (detailing decisions in the Caribbean that have decriminalized same-sex sexual conduct).

5. See *Legal Frameworks: Criminalisation of Consensual Same-Sex Sexual Acts*, *supra* note 2.

6. *Same-Sex Marriage Around the World*, PEW RSCH. CTR. (June 28, 2024), <https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world> [<https://perma.cc/C4N8-TBP6>] (identifying the more than thirty jurisdictions that allow same-sex marriage). In July 2024, a court in the Netherlands ruled that the Dutch territories in the Caribbean must permit same-sex marriage. See *Supreme Court Rules that Same-Sex Marriage Is Now Permitted in Aruba and Curaçao*, NL TIMES (July 12, 2024, 4:40 PM), <https://nltimes.nl/2024/07/12/supreme-court-rules-sex-marriage-now-permitted-aruba-curaçao> [<https://perma.cc/9DSD-D4YA>]; Michael K. Lavers, *Dutch Supreme Court Rules Aruba, Curaçao Must Allow Same-Sex Couples to Marry*, WASH. BLADE (July 12, 2024), <https://www.washingtonblade.com/2024/07/12/dutch-supreme-court-rules-aruba-curaçao-must-allow-same-sex-couples-to-marry> [<https://perma.cc/A8M9-ELEU>] (noting that the ruling, which applies to Aruba and Curaçao, also implicated St. Maarten).

7. The UN’s Independent Expert on sexual orientation and gender identity, Victor MadrigalBorloz, has compared conversion therapy to torture and called for all countries to prohibit practices that constitute conversion therapy. *‘Conversion Therapy’ Can Amount to Torture and Should Be Banned Says UN Expert*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (July 13, 2020), <https://www.ohchr.org/en/stories/2020/07/conversion-therapy-can-amount-torture-and-should-be-banned-says-un-expert>.

8. In 2018, the Mexican Supreme Court of Justice of the Nation held that denial of

It is typical for rights mobilization to constitute only one element in a cycle of movement and countermovement—a cycle resulting in progress, stasis, and regression rather than a linear trajectory.⁹ Yet, when it comes to LGBTQ rights, the world appears to be at a breaking point: part of the world is moving in one direction and part of the world is moving in the opposite direction.¹⁰ Progress on LGBTQ rights in some locations has occurred in parallel to transnational countermobilization¹¹ by conservative groups and legislative backlash¹² against LGBTQ rights in others. In May 2023, for example, Ugandan President Yoweri Museveni signed into law the Anti-Homosexuality Act.¹³ Imposing the death penalty for so-called “aggravated homosexuality,”¹⁴

name and gender change on official documents, such as a birth certificate was unconstitutional gender discrimination. Neela Ghoshal, *Mexico Transgender Ruling a Beacon for Change*, HUM. RTS. WATCH (Oct. 29, 2018, 4:37 PM), <https://www.hrw.org/news/2018/10/29/mexico-transgender-ruling-beacon-change> [<https://perma.cc/E63N-AVE4>]. In April 2024, Yucatan, Mexico became the latest of more than twenty Mexican states to follow Mexico City in allowing legal recognition of one’s gender self-identification, rather than requiring more stringent measures, such as gender affirming surgery, when it signed into law the Civil Registry Law Amendment Bill. *Latest Updates*, ILGA WORLD DATABASE, <https://database.ilga.org/latest-updates> [<https://perma.cc/84PP-3MBW>] (last visited Feb. 13, 2025) (filter “Jurisdiction” column for “Mexico”).

9. Mayer N. Zald & Bert Useem, *Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement*, in *SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY* 247 (Mayer N. Zald & John D. McCarthy eds., 1987).

10. See *Latest Updates*, *supra* note 8 (detailing progress and regression in LGBTQ rights around the world); *A History of LGBT Criminalisation: Over 500 Years of Outlawing Lesbian, Gay, Bisexual and Transgender People*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/lgbt-the-law/a-history-of-criminalisation> [<https://perma.cc/7LCA-PAHX>] (last updated Feb. 11, 2025) (detailing criminalization and decriminalization around the world and throughout history).

11. In this Article, I use the term “countermobilization” to signify legal mobilization by social conservatives (especially Christian religious groups) in response to decriminalization legal mobilization.

12. For the sake of this Article, I define “backlash” in the limited sense of conservative or regressive legislation. *Cf.* Cass R. Sunstein, *Backlash’s Travels*, 42 HARV. C.R.-C.L. L. REV. 435, 435 (2007) (defining “public backlash” in the context of judicial rulings that are met with aggressive resistance as intense and sustained public disapproval accompanied by aggressive steps to resist a ruling and remove its legal force). Other scholars use the term backlash synonymously with countermobilization. See Anton Strezhnev, Judith G. Kelley & Beth A. Simmons, *Testing for Negative Spillovers: Is Promoting Human Rights Really Part of the “Problem”?*, 75 INT’L ORG. 71, 73–75 (2021) (“Backlash refers to a strong, negative, public, and often angry societal reaction to political or social change. It is a social reaction rather than an individual response or a calculated policy decision, and it may worsen other rights, or lead to entrenchment or regress on the targeted right. . . . [W]e understand [backlash] as reasonably broad-based countermobilization against international human rights law, advocacy, or practice, whether or not rights improvements are realized on the ground.”) (footnotes omitted).

13. See Anti-Homosexuality Act, 2023, 116 UGANDA GAZETTE No. 36, <https://ulii.org/akn/ug/act/2023/6/eng@2023-05-30/source> [<https://perma.cc/C5MN-UBZB>].

14. Under the Act, the offense of homosexuality occurs when a person “performs a sexual act” with “a person of the same sex.” *Id.* pt. II § 2(1). The offense of “aggravated homosexuality” involves the offense of homosexuality when committed *against* “a child,”

the 2023 Act is viewed as one of the world's harshest.¹⁵ Far from contemplating the expansion of LGBTQ rights, some countries (or subnational jurisdictions) have been conservative or regressive on LGBTQ rights.

The confluence of these dual or dueling phenomena represents a normative and strategic dilemma for activists to resolve as they contemplate future advocacy goals and tactics. It also represents a puzzle for sociolegal and international human rights scholars to understand and explain. Social scientists and historians have begun to unpack the social movement and legal mobilization processes that have contributed to LGBTQ rights progress and regression transnationally.¹⁶ Yet neither the phenomenon of *judicial* decriminalization nor the countermobilization and legislative backlash that decriminalization litigation has spawned has attracted the attention that these phenomena deserve from legal scholars.¹⁷

an "unconscious person," "a person with a disability," "a person with mental illness," or a person "of advanced age"; when committed *by* "a parent, guardian or relative," by "a serial offender," or by a "person in authority" over the other person; when committed *by means of* "threats, force, fear of bodily harm, duress or undue influence, intimidation of any kind, or through misrepresentation as to the nature of the act"; or when *resulting in* "a terminal illness," "disability," or "mental illness." *Id.* pt. II §§ 3(1), (2)(a)-(j).

15. See Larry Madowo & Bethlehem Feleke, *Uganda Passed One of the World's Harshest Anti-Gay Laws. LGBTQ People Describe Living There as 'Hell,'* CNN, <https://www.cnn.com/2023/06/29/africa/uganda-life-for-lgbt-community-intl-cmd/index.html> [https://perma.cc/5QN9-XU72] (last updated June 29, 2023, 1:47 AM); *Anti-LGBTQ+ Law in Uganda*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/uganda> [https://perma.cc/4HS8-ADU5] (last updated May 29, 2023) (referring to the Act as "one of the most draconian anti-LGBTQ+ laws ever"). In addition to imposing the death penalty for "aggravated homosexuality," the Act criminalizes "marriage between persons of same sex"—with imprisonment for up to ten years. Anti-Homosexuality Act, pt. III § 10. The Act also criminalizes and punishes with imprisonment of up to twenty years the "[p]romotion of homosexuality," which includes distributing "material promoting or encouraging homosexuality," funding "activities that encourage homosexuality," leasing a premises "for the purpose of undertaking activities that encourage homosexuality," and operating "an organisation which promotes or encourages homosexuality." *Id.* pt. III §§ 11(1), (2)(a)-(e).

16. See, e.g., Joke Swiebel, *Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy*, 15 CONTEMP. POL. 19, 22–32 (2009) (analyzing why the international LGBT movement has been more successful at lobbying for LGBT rights in the EU Parliament than in the UN); RYAN R. THORESON, TRANSNATIONAL LGBT ACTIVISM: WORKING FOR SEXUAL RIGHTS WORLDWIDE 26–27 (2014) (exploring the transnational LGBT activism and advocacy of the International Gay and Lesbian Human Rights Commission, known today as Outright International); Kristopher Velasco, *Human Rights INGOs, LGBT INGOs, and LGBT Policy Diffusion, 1991–2015*, 97 SOC. FORCES 377, 378 (2018) (detailing study assessing "the global processes influencing LGBT policy adoption in 156 countries between 1991 and 2015"); LAURA A. BELMONTE, THE INTERNATIONAL LGBT RIGHTS MOVEMENT: A HISTORY 145–70 (2021) (discussing how transnational LGBT advocates dealt with the AIDS epidemic in the 1980s); CLIFFORD BOB, THE GLOBAL RIGHT WING AND THE CLASH OF WORLD POLITICS 36–71 (2012) (discussing an interreligious network the book's author terms the "Baptist-Burqa" network, which is focused on the protection and promotion of "traditional families" at the United Nations).

17. There are two notable exceptions. See ANDREW NOVAK, TRANSNATIONAL HUMAN RIGHTS LITIGATION: CHALLENGING THE DEATH PENALTY AND CRIMINALIZATION OF HOMOSEXUALITY

In this Article, I help to remedy this oversight by making three contributions to legal mobilization scholarship and to international law and relations scholarship. First, I demonstrate that at the heart of decriminalization legal mobilization in the Global South is a transnational advocacy network¹⁸ whose goal is to promote and to assist decriminalization of consensual same-sex sexual conduct through litigation—thus, a *transnational litigation network*.¹⁹ As scholars have long recognized, legal mobilization (or litigation for social change) is a distinct form of advocacy—enabled by and requiring specific political and legal structures, forms of consciousness, and forms of argumentation.²⁰ Few scholars are paying attention to the emergence and operation of transnational litigation networks, however. Those that are doing so have primarily observed these networks in the death penalty²¹ and climate litigation spaces.²² I likewise call attention to the role of these networks in shepherding social and political conflicts to the courts (the judicialization of politics). The presence of

IN THE COMMONWEALTH 115–67 (2020) [hereinafter NOVAK, TRANSNATIONAL HUMAN RIGHTS LITIGATION] (discussing instances of judicial decriminalization); see generally ADRIAN JUUOKO, STRATEGIC LITIGATION AND THE STRUGGLE FOR LESBIAN, GAY AND BISEXUAL EQUALITY IN AFRICA (2020).

18. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 2 (1998) (“A transnational advocacy network includes those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services.”).

19. See NOVAK, TRANSNATIONAL HUMAN RIGHTS LITIGATION, *supra* note 17, at 2–3 (defining “transnational litigation networks” as a particular type of transnational advocacy network that uses strategic litigation to advance human rights goals).

20. See, e.g., Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1661 (“[L]egal mobilization ha[s] been shaped by the complex interplay among political opportunities, resources for collective action, and the ideological frames that motivate groups to believe change is possible.”).

21. See, e.g., Andrew Novak, *The Abolition of the Mandatory Death Penalty in Africa: A Comparative Constitutional Analysis*, 22 IND. INT’L & COMPAR. L. REV. 267, 277 (2012) [hereinafter Novak, *The Abolition of the Mandatory Death Penalty in Africa*] (describing “an international network of lawyers and experts”); Andrew Novak, *The Role of Legal Advocates in Transnational Judicial Dialogue: The Abolition of the Mandatory Death Penalty and the Evolution of International Law*, 25 CARDOZO J. INT’L & COMPAR. L. 179, 182 n.13 (2017) [hereinafter Novak, *The Role of Legal Advocates*]; Andrew Novak, *Toward a Global Consensus on Life Imprisonment Without Parole: Transnational Legal Advocates and the Zimbabwe Constitutional Court’s Decision in Makoni v. Commissioner of Prisons*, 62 J. AFR. L. 315, 319 (2018) [hereinafter Novak, *Toward a Global Consensus*] (describing “transnational legal advocates”).

22. See, e.g., Sarah Mason-Case, *Professional Practice in International Climate Change Law*, 112 AM. SOC’Y INT’L L. PROC. 157, 157 (2018) [hereinafter Mason-Case, *Professional Practice*] (describing “an emergent community of lawyers”); Sarah Mason-Case, *On Being Companions and Strangers: Lawyers and the Production of International Climate Law*, 32 LEIDEN J. INT’L L. 625, 644–45 (2019) [hereinafter Mason-Case, *On Being Companions and Strangers*] (“International climate lawyers are branching out into transnational litigation networks, partnering with local NGOs and sharing accrued knowledge.”); Jill Bähring, *Transnational Litigation Networks: Agents of Change in the Global Constitutional Order*, in HANDBOOK ON GLOBAL CONSTITUTIONALISM 373, 373 (Anthony F. Lang, Jr. & Antje Wiener eds., 2d ed. 2023).

transnational litigation networks in the LGBTQ rights space strongly confirms that these networks are key to understanding domestic and international politics in the twenty-first century, and thus their relevance to legal mobilization scholarship and to international law and relations theory.²³

Second, I discuss two normative critiques of human rights advocacy applicable to transnational litigation networks.²⁴ The first critique, “human rights imperialism,” posits that Global North states and actors situated therein seek to impose the human rights regime—an exclusively Western construct—upon the states and populations of the Global South, including on former colonies in ways that raise charges of neocolonialism.²⁵ Against the backdrop of centuries of European domination, the human rights regime thus appears as a neo-colonial institution not unlike the “civilizing mission” of religious proselytization and colonial law.²⁶ The second critique, which I term “human rights elitism” is a transnational extension of critiques of “rights talk,”²⁷ and of litigating for social change.²⁸ This critique alleges that shifting political contestation to the courts consumes precious resources, empowers legal elites, and risks marginalizing the lived experiences, goals, skills, and preferred strategies

23. See generally NOVAK, TRANSNATIONAL HUMAN RIGHTS LITIGATION, *supra* note 17; Salvatore Caserta & Mikael Rask Madsen, *When the Sun, the Moon and the Stars Align: Litigating LGBTQIA+ Rights and the Death Penalty in East Africa and the Caribbean*, 35 EUR. J. INT’L L. 727 (2024).

24. See Andrew Novak, *Using International and Foreign Law in Human Rights Litigation: The Decriminalization of Homosexuality in Belize*, 10 J. HUM. RTS. PRAC. 346, 348–49 (2018).

25. See, e.g., Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 210 (2001) [hereinafter Mutua, *Savages, Victims, and Saviors*] (suggesting the international human rights movement “fits a historical pattern in which all high morality comes from the West as a civilizing agent against lower forms of civilization in the rest of the world”). One scholar has noted that “[a]nti-LGBT+ advocates argue that because the ‘traditional’ family is a universal, ‘natural’ structure endemic to the human experience, protecting it is paramount to protecting society itself.” Kristopher Velasco, *Opposition Avoidance or Mutual Engagement? The Interdependent Dynamics Between Opposing Transnational LGBT+ Networks*, 101 SOC. FORCES 2087, 2093 (2023).

26. See, e.g., Mutua, *Savages, Victims, and Saviors*, *supra* note 25, at 210 (“[T]he human rights movement is located within the historical continuum of Eurocentrism as a civilizing mission”); Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT’L L. 589, 610 (1996) [hereinafter Mutua, *The Ideology of Human Rights*] (recognizing possibility that “non-Western cultures [could] see crusading rights activists from the west as . . . ‘civilizers’”); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 3 EUR. HUM. RTS. L. REV. 245, 256–58 (2001), *reprinted in* 15 HARV. HUM. RTS. J. 101, 114–16 (2002).

27. See, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 1–17 (1991) (advancing a critique of the “rights revolution” in the U.S. context); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1–7 (1996) (questioning extent to which the United States Supreme Court actually has capacity to protect minority rights, despite popular perception of the Court’s effectiveness in this area).

28. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 339–41 (2d ed. 2008) (discussing value of using litigation to achieve social change in the context of same-sex marriage).

and tactics of already marginalized groups that constitute the grassroots of most social movements.²⁹

Legal mobilization prompted by transnational decriminalization litigation network actors in the Global North is vulnerable to both critiques.³⁰ The salience of the colonial experience engenders countermobilization and backlash against LGBTQ rights. For example, I describe the strength of reactionary and ultra-conservative transnational advocacy networks that mobilize legally in their own right—intervening powerfully on behalf of the status quo in decriminalization challenges.³¹ Government and religious officials opposed to decriminalization—sometimes called “traditionalists” based on their claims to represent most authentically the traditional culture or traditional family values of their country—credibly invoke an anti-colonial discourse when opposing decriminalization plaintiffs in the courts. In the former British colonies of Africa and the Commonwealth Caribbean, these reactionary groups claim to be standing for local values.³² Because of the political salience of the anti-colonialist frame, transnational decriminalization litigation network actors might rethink the “boomerang pattern” of first litigating claims in international courts and tribunals,³³ ensuring that such litigation before international courts and tribunals is a last resort rather than an initial strategy.³⁴

29. See generally Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in Doe v. Unocal*, 43 LAW & SOC'Y REV. 271 (2009); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

30. See *infra* Parts III, IV.

31. See *infra* Section III.B.

32. See, e.g., JUUKO, *supra* note 17, at 134 (explaining that the stated purpose behind Uganda's 2009 proposed Anti-Homosexuality Bill was to “protect the ‘traditional African Family’”). Ironically, these values are the outgrowth of Christianity, Islam, and the colonial legal codes inspired by these religions, which colonial powers imposed without the input of the indigenous populations in the colonies. See *infra* Section III.B.

33. Keck and Sikkink's transnational advocacy network model involved throwing a “boomerang” outside the state—primarily to inter-governmental institutions such as the UN, EU, and OAS who could lobby the domestic target through collective actions, or to foreign governments and international non-governmental organizations who could lobby the domestic target directly or lobby the target indirectly through the IGOs. See KECK & SIKKINK, *supra* note 18, at 13 fig.1.

34. A domestic analog to this prescription sits at the heart of the judicial backlash thesis. See, e.g., William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1310 (2005) (“Judicial review can raise the stakes of politics by taking issues away from the political system prematurely . . .”); *id.* at 1312 (“Not only did [*Roe v. Wade*] energize the pro-life movement and accelerate the infusion of sectarian religion into American politics, but it also radicalized many traditionalists.”); Richard S. Price & Thomas M. Keck, *Movement Litigation and Unilateral Disarmament: Abortion and the Right to Die*, 40 LAW & SOC. INQUIRY 880, 884 (2015) (summarizing the backlash thesis as follows: “social movements should avoid reliance on judicial politics because such strategies will be ineffective at best and counterproductive at worst; in other words, they will often spark political countermobilization that will set the movement further back than where it started”).

Additionally, consistent with critiques of public interest law and of impact litigation,³⁵ transnational decriminalization litigation networks reify judicial institutions and empower cosmopolitan legal elites (whether located in the Global North or the Global South) vis-à-vis grassroots actors and mass mobilization strategies.³⁶ Interventions by cosmopolitan legal elites validate speculation that foreign elites rather than local grassroots and lay actors—such as impoverished people, unhoused youth, LGBTQ-serving health practitioners, and community organizers—are making critical decisions regarding advocacy goals and strategies.³⁷ Thus, transnational decriminalization litigation network interventions are likely to engender a related critique regarding human rights elitism—co-optation of movements and marginalization of the grassroots.³⁸

Yet, decriminalization is too important an issue to cede the ground entirely to the so-called “traditionalists” or to eschew litigation altogether. The prohibition on consensual same-sex conduct is a central justification for other anti-LGBTQ policies such as prohibitions on same-sex marriage, on gay parent adoption, on gay and lesbian teachers, and on LGBTQ-serving organizations.³⁹ Thus, decriminalization matters, not just for sexual freedom, but for other LGBTQ rights goals. This is not to ignore the ethical drawbacks of human rights imperialism and human rights elitism. Instead, it is to assert that decriminalization is central to undercutting some of the justifications for other anti-LGBTQ policies. Consequently, there remains a role for Global North actors as well as cosmopolitan legal elites to play in decriminalization litigation in the Global South. In response to the critiques of human rights imperialism and human rights elitism, the third contribution I make in this paper is to prescribe a set of ethical lawyering approaches for transnational decriminalization litigation network actors to adopt—which I term *transnational movement lawyering*.⁴⁰ Reflecting

35. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471–72 (1976); Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 452–59 (2018) (distinguishing movement lawyering from public interest lawyering in the 1970s).

36. See Corinne Lennox & Matthew Waites, *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth: From History and Law to Developing Activism and Transnational Dialogues*, in HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN THE COMMONWEALTH: STRUGGLES FOR DECRIMINALISATION AND CHANGE 1, 41–43 (Corrine Lennox & Matthew Waites eds., 2013) (suggesting transnational decriminalization litigation might undermine ongoing, local efforts for social change as well as the lived experiences of those dealing with human rights dilemmas).

37. See *id.* at 41.

38. *Id.* (suggesting interventions by transnational litigation networks that co-opt local efforts at reform can be detrimental because “[f]or many global South activists it is important that struggles are seen to emerge from and be led by national movements and cultures”).

39. For a more in-depth discussion on the implication of criminalization of same-sex sexual conduct on LGBTQ rights, see *infra* Section I.A.

40. See Cummings, *supra* note 20, at 1690 (“[M]ovement lawyering is the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain

best practices embedded in a family of theories such as poverty lawyering, community-based lawyering, cause lawyering, and clinical practice,⁴¹ for example, transnational decriminalization litigation network actors must consider whether providing direct legal representation or intervening as third parties and *amici* does more harm than good. They must work toward alternatives including building up the legal expertise and litigation capacity of Global South lawyers and research institutes. They must rethink litigation before international courts and tribunals. In short, they must use their financial and knowledge resources to support—rather than to direct, to overshadow, or to supplant—local actors and their goals and strategies.⁴² Ultimately, transnational movement lawyering might mean relegating the goal of decriminalization to a secondary or tertiary status. It might even mean not litigating at all.

In other words, like their parochial counterparts in the United States,⁴³ Global North actors in the transnational decriminalization litigation network must not only embody client-centered lawyering—which emphasizes that ultimate decision-making power must rest with an individual client. They must also adopt principles of accountability with the local *movements* that they partner with. I demonstrate that there are already numerous examples of South-South transnational decriminalization litigation network linkages and challenges filed by local plaintiffs represented by local or Global South counsel. This is particularly true of the Commonwealth Caribbean.⁴⁴ But decriminalization remains an essential step along the path of a broader promotion of LGBTQ rights. LGBTQ activists should continue to pursue the decriminalization of same-sex sexual conduct in the Global South through transnational litigation networks.

The implications of this research extend beyond decriminalization of same-sex sexual conduct. In the twenty-first century, transnational litigation networks are becoming more and more central to legal mobilization processes. Legal mobilization, in turn, is central to policymaking and to social change processes. If the past is prologue, legal mobilization might very well be the *primary* mechanism through which the human rights culture wars of the twenty-first century are waged. If LGBTQ rights advocates, human rights advocates, environmental rights advocates, and the like are to triumph in the rights wars of the twenty-first century, they not only must be attuned to the

democratic social change goals that they define.”) (emphasis omitted).

41. For a discussion of scholarly literature in these spaces, see *infra* Section IV.C.

42. See Caroline Bettinger-Lopez et al., *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 GEO. J. ON POVERTY L. & POL’Y 337, 384–92 (2011) (reflecting on ways that clinical students dealing with human rights issues can rethink their approach to support the efforts of local communities and organizations in light of critiques of international human rights lawyering).

43. Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 963–69 (2008) (explaining how globalization has shifted the operational field of U.S. public interest law from focus on domestic issues to focus on foreign and transnational issues); *id.* at 1027–34 (applying to transnational lawyering a central tension of public interest lawyering—professional obligations versus personal (ideological) commitments).

44. See *infra* Section II.C.

promises of legal mobilization; they must thoughtfully address its pitfalls as well. Moreover, even issues that we might not imagine as within the arena of culture wars are being arbitrated and adjudicated at the instantiation of legally mobilized actors. Scholars must be attuned to the likelihood that many of the world's most pressing cultural, political, and economic issues will be addressed by domestic and international court judges due to transnational litigation networks, legal mobilization, and countermobilization.

The Article proceeds as follows: In Part I, I outline why decriminalization matters morally and strategically, and why transnational litigation networks matter theoretically. In Part II, I introduce three organizations that emerged between 2009 and 2015 and that are important to this analysis—the University of the West Indies Rights Advocacy Project,⁴⁵ Human Dignity Trust,⁴⁶ and the Eastern Caribbean Alliance for Diversity and Equality.⁴⁷ I analyze the nature of the interventions by these and other transnational decriminalization litigation network actors. In Part III, I summarize the human rights imperialism critique. I then describe the strength of reactionary and ultra-conservative transnational advocacy networks that mobilize legally in their own right—intervening powerfully on behalf of the status quo in decriminalization challenges. In Part IV, I summarize critiques of transnational advocacy networks regarding human rights elitism, and I encourage the development of transnational movement lawyering. In the Conclusion, I discuss the generalizability of this analysis and its future applications to issue areas such as labor rights, public health, climate change—thus its importance to international law and relations scholarship.

I. THE DECRIMINALIZATION OF SAME-SEX SEXUAL CONDUCT AND TRANSNATIONAL LITIGATION NETWORKS IN INTERNATIONAL LAW AND RELATIONS THEORY

Since 1990, thirty-three Global South countries have repealed or invalidated their anti-sodomy laws.⁴⁸ More than 42% of these (fourteen countries)

45. *Rights Advocacy Project, Faculty of Law, University of West Indies, DECRIMINALIZE POVERTY & STATUS*, <https://decrimpovertystatus.org/partner/u-rap> [<https://perma.cc/X9XF-5BMT>] (last visited Feb. 13, 2025).

46. For a broader discussion of Human Dignity Trust, see MATTHEW FARMER, *TRANSNATIONAL LGBT ACTIVISM AND UK-BASED NGOS: COLONIALISM AND POWER* 91–93 (2020).

47. *About ECADE*, ECADE, <https://eequality.org/about-ecade> [<https://perma.cc/4776-MZGD>] (last visited Feb. 13, 2025).

48. See INT'L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS'N, *STATE-SPONSORED HOMOPHOBIA: GLOBAL LEGISLATION OVERVIEW UPDATE* 89–141 (updated ed. 2020), https://ilga.org/wp-content/uploads/2023/11/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf [<https://perma.cc/Z6VR-CAC4>]. In this Article, I occasionally use the term “anti-sodomy law” to describe statutes that criminalize consensual same-sex sexual conduct. Likewise, I occasionally use the term “sodomy decriminalization” (though, more often, simply “decriminalization”), which the reader should infer means decriminalization of consensual same-sex sexual conduct, unless I specify otherwise. “Anti-sodomy law” and “sodomy decriminalization” are used here broadly. Some jurisdictions, such as Mauritius, specifically criminalized “sodomy,”

were instances of judicial decriminalization rather than legislative decriminalization; they resulted from decriminalization legal mobilization by aggrieved individuals and groups pursuing legal reform through litigation.⁴⁹ The Global South judicial decriminalization trend began with the spectacular landmark judgment from post-apartheid South Africa in 1998.⁵⁰ The judicial frontlines shifted to Asia and the Pacific in the 2000s, as Fiji,⁵¹ Nepal,⁵²

explicitly defined or interpreted to mean anal sex. *See, e.g.*, Criminal Code of Mauritius § 250(1) (Mauritius) (“Any person who is guilty of the crime of sodomy or bestiality shall be liable to penal servitude for a term not exceeding 5 years.”). Many statutes do not use this term, however. *See generally* WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 327–37 (1999) [hereinafter ESKRIDGE, *GAYLAW*] (surveying anti-sodomy laws in the U.S. states). Some anti-sodomy laws in Commonwealth jurisdictions often refer instead to “buggery.” *See, e.g.*, Offences Against the Person Act § 76 (1864) (Jam.) (“Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years.”); Criminal Law (Offences) Act, § 354 (1894) (Guy.) (“Everyone who commits buggery, either with a human being or with any other living creature, shall be guilty of felony and liable to imprisonment for life.”). Other criminal codes use neither term or use additional terms such as “carnal knowledge against the order of nature,” “abominable and detestable crime against nature,” “unnatural and lascivious act,” etc.—terms that some courts have interpreted as synonymous with “sodomy” or implying anal sex. *See, e.g.*, BURNS’ IND. STAT. CH. 169 § 10–4221 (“Whoever commits the abominable and detestable crime against nature with mankind or beast . . . shall be deemed guilty of sodomy, and, on conviction, shall be fined not less than one hundred dollars [\$100] nor more than one thousand dollars [\$1,000] to which may be added imprisonment in the state prison not less than two [2] nor more than fourteen [14] years.”); FLA. STAT. ANN. § 800.02 (West 2025) (“A person who commits any unnatural and lascivious act with another person commits a misdemeanor of the second degree . . .”); HUM. RTS. WATCH, *THIS ALIEN LEGACY: THE ORIGINS OF “SODOMY” LAWS IN BRITISH COLONIALISM* 37 (2008) (“‘Carnal intercourse against the order of nature’ had never been precisely defined. One of the first Indian cases to reach the law reports on appeal, though, reflected what was probably the usual judicial understanding. The phrase meant anal sex, since ‘the act must be in that part where sodomy is usually committed.’”). *But see id.* at 38–41 (discussing *Khanu v. Emperor* and succeeding cases that expanded definition of carnal intercourse against order of nature to include oral sex, thigh sex, masturbation, and other “non-procreative” sex acts). Additionally, many jurisdictions criminalize a range of conduct beyond anal sex when the individuals engaged in them are or are perceived to be of the same sex (often using the language “gross indecency” or “serious indecency”). *See* HUM. RTS. WATCH, *THIS ALIEN LEGACY: THE ORIGINS OF “SODOMY” LAWS IN BRITISH COLONIALISM* 13–25, https://www.hrw.org/sites/default/files/reports/lgbt1208_web.pdf [<https://perma.cc/99PD-EQSY>].

49. *Legal Frameworks: Criminalisation of Consensual Same-Sex Sexual Acts*, *supra* note 2.

50. *Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Just.* 1999 (1) SA 6 (CC) ¶ 133 (S. Afr.), <https://www.saflii.org/za/cases/ZACC/1998/15.pdf> [<https://perma.cc/4YCA-6JU8>].

51. *Nadan v. State*, [2005] FJHC 252 (Fiji).

52. *Sunil Babu Pant v. Nepal Government*, Writ No. 917 of 2007 (Nepal), *translated in* 2 NAT’L JUD. ACAD., NEPAL L.J. 261–86 (2008).

and India⁵³ decriminalized judicially. In Africa, Botswana,⁵⁴ Mauritius,⁵⁵ and Namibia⁵⁶ all decriminalized judicially, the latter in June 2024. Since 2016, six Commonwealth Caribbean states have decriminalized. All did so judicially.⁵⁷ In April 2024, the High Court for the eastern Caribbean island-nation of Dominica became the most recent Commonwealth Caribbean court to invalidate prohibitions on consensual same-sex sexual conduct.⁵⁸ Additionally, since 2020, two international human rights mechanisms also declared sodomy prohibitions in Jamaica⁵⁹ and Sri Lanka⁶⁰ to violate international law.

Judicial decriminalization is not a universal trend, however. For example, in the fall of 2023, when the Supreme Court of Mauritius overturned a centuries-old provision of its criminal code that prohibited “sodomy,”⁶¹ it represented

53. *Naz Found. v. Government of NCT of Delhi*, (2009) 160 DLT 277 (Delhi HC) (India). Two judges of the Supreme Court overturned the Delhi High Court in 2013. *See Suresh Kumar Koushal v. Naz Found.*, AIR 2014 SC 563 (India). A constitutional bench of the Supreme Court overturned the two-judge bench in 2018. *See Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321 (India).

54. *Motshidiamang v. Att’y Gen.*, MAHGB-000591–16 (High Ct. 2019) (Bots.), *aff’d*, Att’y Gen. v. *Motshidiamang*, Civ. App. No. CACGB-157–19 (Ct. App. 2021) (Bots.).

55. *Abdool Ridwan Firaas Ah Seek v. State of Mauritius*, No. 119259, 2023 SCJ 399 (Mauritius); *see also* Donald Padgett, *Mauritius Supreme Court Decriminalizes Gay Sex in Landmark Decision*, ADVOCATE (Oct. 4 2023, 9:46 PM), <https://www.advocate.com/law/mauritius-descriminalizes-gay-sex> [<https://perma.cc/8A8U-B9BN>]; HUM. DIGNITY TR., CASE DIGEST: ABDOL RIDWAN FIRAAS AH SEEK V. STATE OF MAURITIUS (2023), <https://www.humandignitytrust.org/wp-content/uploads/2023/10/Mauritius-case-digest-2023.pdf> [<https://perma.cc/BC6K-M974>]; *Mauritius: Toppling Two Centuries of State-Sanctioned Stigma Against LGBT People*, HUM. DIGNITY TR. (June 26, 2024), <https://www.humandignitytrust.org/video/mauritius-toppling-two-centuries-of-state-sanctioned-stigma-against-lgbt-people> [<https://perma.cc/BYJ6-QW39>].

56. *Dausab v. Minister of Just.*, [2024] NAHCMD 331 (Namib.); *see also* *Namibia: Case Before the High Court*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/what-we-do/cases/namibia-case-before-the-high-court> [<https://perma.cc/E7QM-SYNU>] (last visited Feb. 13, 2025).

57. *Orozco v. Att’y Gen.*, Claim No. 668 of 2010, (2016) 90 WIR 161 (Belize); *Jones v. Att’y Gen.*, Claim No. CV2017–00720 (High Ct. Just. 2018) (Trin. & Tobago); *Orden David v. Att’y Gen.*, Claim No. ANUHCv2021/0042 (High Ct. Just. 2022) (Ant. & Barb.); *Holder-McClean-Ramirez v. Att’y Gen.*, Claim No. CV-0044 of 2020, (High Ct. Just. 2023) (Barb.); *Jamal Jeffers v. Att’y Gen.*, Claim No. SKBHCV2021/0013 (High Ct. Just. 2022) (St. Kitts & Nevis); *B.G. v. Att’y Gen.*, Claim No. DOMHCV2019/0149 (High Ct. Just. 2024) (Dominica).

58. *B.G.*, Claim No. DOMHCV2019/0149 at 15; *see also* *Progress in the Caribbean as Dominica Decriminalizes Same-Sex Relations*, OUTRIGHT INT’L (Apr. 22, 2024) <https://outrightinternational.org/press-release/progress-caribbean-dominica-decriminalizes-same-sex-relations> [<https://perma.cc/GA5P-PMKA>].

59. *T.B. & S.H. v. Jamaica*, Case 13.095, Inter-Am. Comm’n H.R., Report No. 401/20, OEA/Ser.L/V/II, doc. 419, ¶ 135 (2020); *Henry & Edwards v. Jamaica*, Case 13.637, Inter-Am. Comm’n H.R., Report No. 400/20, OEA/Ser.L/V/II, doc. 418, ¶ 120 (2020).

60. *Flamer-Caldera v. Sri Lanka*, Commc’n No. 134/2018, U.N. Doc. CEDAW/C/81/D/134/2018 (Comm. on the Elimination of Discrimination Against Women Mar. 23, 2022).

61. *Abdool Ridwan Firaas Ah Seek v. State of Mauritius*, No. 119259, 2023 SCJ 399 (Mauritius); *see also* Padgett, *supra* note 55.

only the third decriminalization judgment from a court on the African continent. Although eight African countries have decriminalized legislatively, the majority of African states still prohibit consensual same-sex sexual conduct.⁶²

In this Part, I first discuss why decriminalization is crucial to the broader LGBTQ human rights culture wars even though it does not garner the attention heaped upon same-sex marriage, certain transgender bans, and the “Kill the Gays” bill. Decriminalization is a moral imperative that furthers the goal of human freedom and flourishing. It is also a strategic necessity. So long as same-sex sexual conduct remains criminalized, LGBTQ rights advocacy can be outlawed or otherwise undermined. I present the central mechanism for decriminalization that I focus on in this Article—transnational litigation networks—and explain its importance to domestic and transnational politics and thus to scholarship.

A. *Why Decriminalization Matters*

Observing the dynamic between LGBTQ rights recognition and even celebration in some jurisdictions and the rejection or regression of LGBTQ rights in others, Mark Gevisser has described the construction of a global “Pink Line”⁶³ dividing the world in two. Gevisser’s “Pink Line”—like the Cold War’s Iron Curtain—shifts and stabilizes as a result of the “proxy war[s]”⁶⁴ being waged to determine its contours. Indeed, war analogies are prevalent, whether Dennis Altman and Jonathan Symonds’ “Queer Wars” or Adrian Jjuuko and colleagues’ “Queer Lawfare.”⁶⁵ Most commonly, commentators have described this confluence of progress on LGBTQ human rights with retrenchment of state-sponsored homophobia and transphobia as the globalization of the

62. See *Legal Frameworks: Criminalisation of Consensual Same-Sex Sexual Acts*, *supra* note 2 (showing thirty-one of fifty-four UN member states in Africa criminalize same-sex sexual conduct).

63. MARK GEVISSER, *THE PINK LINE: JOURNEYS ACROSS THE WORLD’S QUEER FRONTIERS* 17–41 (2020).

64. *Id.* at 32. Gevisser also discusses his vision of a pro-LGBTQ rights “Blue army” fighting an anti-LGBTQ right “Red army” along the frontiers of the pink line. *Id.* at 82–83.

65. See generally DENNIS ALTMAN & JONATHAN SYMONS, *QUEER WARS* (2016); Siri Gloppen, Adrian Jjuuko, Frans Viljoen & Alan Msosa, *Queer Lawfare in Africa: Introduction and Theoretical Framework in QUEER LAWFARE IN AFRICA: LEGAL STRATEGIES IN CONTEXTS OF LGBTQ+ CRIMINALISATION AND POLITICISATION* 3–6 (Adrian Jjuuko, Siri Gloppen, Alan Msosa & Frans Viljoen eds., 2022).

LGBTQ culture wars.⁶⁶ Katherine Stewart has gone one step further—describing a “global holy war.”⁶⁷

Criminalization and decriminalization are fundamental contested ground in the global culture war over LGBTQ rights. As late as the mid-1990s, the majority of the world’s population faced the risk of arrest, conviction, fine, incarceration, corporal punishment, or even execution for engaging in consensual same-sex sexual conduct. That situation has changed dramatically since, particularly with decriminalization in China and India. Yet, criminalization of same-sex sexual conduct continues to limit the sexual freedom of individuals living in more than sixty countries.⁶⁸ And harsh punishments accompany criminal conviction. Currently, a conviction for consensual same-sex sexual conduct carries the risk of the death penalty in at least seven countries, and a maximum sentence of life imprisonment in at least nine countries.⁶⁹

Beyond the harshest punishments imaginable, anti-sodomy laws were and are the basis of a host of adverse collateral consequences. An individual convicted under anti-sodomy laws might need to register as a sex offender or be prohibited from certain categories of employment.⁷⁰ On the basis of such criminal prohibitions, states and subnational jurisdictions might further

66. See *Globalizing the Culture Wars: U.S. Conservatives, African Churches, and Homophobia*, POL. RSCH. ASSOCS. (Dec. 1, 2009), <https://politicalresearch.org/2009/12/01/globalizing-culture-wars> [<https://perma.cc/FP2B-8Q7A>] (“The globalization of the U.S. culture wars requires that human rights advocates reconsider their responsibility and role in respect to Africa, as well as the actions required to overcome the opponents of LGBT equality at home.”); Rebecca Sanders, *Norm Proxy War and Resistance Through Outsourcing: The Dynamics of Transnational Human Rights Contestation*, 17 HUM. RTS. REV. 165, 173–74 (2016) (illustrating norm proxy wars through study of “American anti-gay activists[’ efforts] to enhance persecution of LGBT people in Uganda”); Adriaan van Klinken, *Culture Wars, Race, and Sexuality: A Nascent Pan-African LGBT-Affirming Christian Movement and the Future of Christianity*, 5 J. AFRICANA RELS. 217, 219 (2017) (noting that Christian conservative groups in the U.S. are “exporting and globalizing their ‘culture wars’”).

67. KATHERINE STEWART, *POWER WORSHIPPERS: INSIDE THE DANGEROUS RISE OF RELIGIOUS NATIONALISM* 249 (2020) (“The global holy war now defines itself against a single common, worldwide enemy: global liberalism.”); *id.* (quoting Ignacio Arsuaga, founder of the transnational ultra-conservative organization CitizenGO, as naming the enemies in the global holy war as “‘radical feminists,’ ‘the abortion industry,’ and ‘the LGBT totalitarians’”).

68. *Legal Frameworks: Criminalisation of Consensual Same-Sex Sexual Acts*, *supra* note 2; *List of 65 Countries Where Homosexuality Is Illegal*, ERASING 76 CRIMES, <https://76crimes.com/76-countries-where-homosexuality-is-illegal/> [<https://perma.cc/T6P3-2T59>] (last updated Jan. 2025).

69. The death penalty is prescribed by Brunei, Iran, Mauritania, (Northern) Nigeria, Saudi Arabia, Uganda, and Yemen; life in prison is prescribed by Bangladesh, Gambia, Guyana, Pakistan, Sierra Leone, Sudan, Tanzania, Uganda, and Zambia. See *Legal Frameworks: Criminalisation of Consensual Same-Sex Sexual Acts*, *supra* note 2. In other criminalizing jurisdictions, the maximum confinement ranges from one year to thirty years. See *id.*

70. See, e.g., LILLIAN FADERMAN, *THE GAY REVOLUTION: THE STORY OF THE STRUGGLE* 368–69 (2015) (discussing California state legislator John Briggs’ effort to exclude gay and lesbian teachers from public schools).

criminalize the “promotion of homosexuality”;⁷¹ might deny or withdraw licenses from LGBTQ organizations⁷² and from bars, restaurants, and hotels that cater to LGBTQ clientele;⁷³ might conduct raids and sweeps of gay and lesbian bars;⁷⁴ might engage in surveillance of cruising spots and entrapment ‘sting’ operations;⁷⁵ and might prohibit preventative and crisis intervention measures in the public health sector, such as condom distribution in prisons.⁷⁶

Criminalization effectively renders moot any discussion of legal recognition of same-sex unions, thus generally foreclosing from same-sex couples many of the rights and privileges that so often extend automatically from marriage—from parental rights and immigration to inheritance. Criminalization also creates an environment for corruption, abuse, and service denial by law enforcement⁷⁷ and medical professionals, fueling traumatization and imped-

71. See Carl F. Stychin, *Prohibitions and Promotions: A Comparative Analysis of Legal Interventions*, 5 AUSTRALASIAN GAY & LESBIAN L.J. 42, 44 (1995); Joe Sommerlad, *Section 28: What Was Margaret Thatcher’s Controversial Law and How Did It Affect the Lives of LGBT+ People?*, INDEP. (May 25, 2018), <https://www.independent.co.uk/news/uk/politics/section-28-explained-lgbt-education-schools-homosexuality-gay-queer-margaret-thatcher-a8366741.html>. [<https://perma.cc/G3FU-N384>] (discussing 1988 UK law known as “Section 28,” outlawing the so-called ‘promotion’ of homosexuality, which spawned copycat legislation throughout the Commonwealth).

72. See, e.g., *Att’y Gen. of Botswana v. Thuto Rammoge*, No. CACGB-128–14 (Ct. App. 2016) (Bots.) (upholding High Court finding that it is unconstitutional to refuse to register the LGBTQ organization LeGaBiBo).

73. ESKRIDGE, GAYLAW, *supra* note 48, at 72–73, 78–80 (2d ed. 2002) (describing state and local repression against gay and lesbian people in the United States in the 1940s through 1950s).

74. *Id.* at 80, 81, 112–13. Decriminalization in Ecuador followed a case of police persecution and abuse of bar patrons. Corte Constitucional del Ecuador, *Sentencia No. 111–97–TC* (Nov. 27, 1997); see also *Ecuador: Fourteen Men Arrested During Gay Bar Raid in Cuenca*, OUTRIGHT ACTION INT’L <https://outrightinternational.org/content/ecuador-fourteen-men-arrested-during-gay-bar-raid-cuenca-one-raped-other-inmates-while> [<https://web.archive.org/web/20220525033739/https://outrightinternational.org/content/ecuador-fourteen-men-arrested-during-gay-bar-raid-cuenca-one-raped-other-inmates-while>] (last visited Feb. 13, 2025).

75. See JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* 70–71 (2d ed. 1998) (discussing entrapment of Mattachine Society co-founder Dale Jennings by LAPD in 1951, which became a *cause célèbre* for Mattachine).

76. A similar scenario prompted the AIDS activist group, AIDS Bhedbhav Virodhi Andolan (ABVA), to challenge the legality of India’s anti-sodomy law—Section 377 of the India Penal Code—in 1994. See Kai Friese, *Tihar Jail Bans Condoms*, INDIA TODAY, <https://www.indiatoday.in/magazine/indiascope/story/19940531-tihar-jail-bans-condoms-809220-1994-05-30> [<https://perma.cc/SB8K-NWWE>] (last updated July 9, 2013) (noting ABVA, an AIDS activist group, demanded that condoms be made available to inmates in New Delhi); ARVIND NARRAIN, *QUEER: DESPISED SEXUALITY, LAW AND SOCIAL CHANGE* 72–73 (2004).

77. See, e.g., *Henry & Edwards v. Jamaica*, Case 13.637, Inter-Am. Comm’n H.R., Report No. 400/20, OEA/Ser.L/V/II, doc. 418, ¶¶ 12–13 (2020) (“[P]etitioners claim that . . . Mr. Henry was brutally assaulted two times by police officers because of his sexual orientation. . . . [T]he first attack occurred on Christmas Day of 2003, when Mr. Henry was beaten by an officer in front of a crowd of 70 people who encouraged the attack.”).

ing public health disease mitigation efforts.⁷⁸ For example, jurisdictions that retain criminal prohibitions on consensual same-sex sexual conduct are rife with discrimination in public employment and immigration;⁷⁹ police extortion of operators of bars willing to serve LGBTQ clientele;⁸⁰ police extortion and sexual assault of gay cruisers and sex workers;⁸¹ coerced anal examinations;⁸² medical professionals' refusals to treat LGBTQ patients and police refusal to investigate anti-LGBTQ violence⁸³ or domestic violence between same-sex partners; or the refusal to serve LGBTQ patrons. Criminalization also creates an environment in which hate crimes, death threats, so-called "corrective" rape of lesbian, bisexual, and transgender women become more commonplace, as do physical assaults against LGBTQ people and those perceived to be lesbian, gay, bisexual, trans, and queer.⁸⁴

With the advent of the same-sex marriage cascade in the early 2000s, which followed the decriminalization of consensual same-sex sexual conduct throughout the Global North, it might have seemed that universal

78. See, e.g., *Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic*, HUM. RTS. WATCH (Nov. 15, 2004), <https://www.hrw.org/report/2004/11/15/hated-death/homophobia-violence-and-jamaicas-hiv/aids-epidemic> [<https://perma.cc/RC3C-DDPZ>] (describing how homophobia in Jamaica impedes access to HIV prevention information and health care).

79. See DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* 4–5 (2004) (discussing how purges of government employees suspected of homosexuality predated and continued after the McCarthy era); GARY KINSMAN & PATRIZIA GENTILE, *THE CANADIAN WAR ON QUEERS: NATIONAL SECURITY AS SEXUAL REGULATION* 2–4 (2010) (detailing Canadian anti-homosexual national security surveillance campaign and subsequent purge and demotions of suspected homosexuals from civil service).

80. See MARTIN DUBERMAN, *STONEWALL: THE DEFINITIVE STORY OF THE LGBTQ RIGHTS UPRISING THAT CHANGED AMERICA* 143–44 (Plume rev. ed. 2019) (1993) (discussing extortion of owners of New York City's Stonewall Inn, which precipitated the 1969 Stonewall rebellion).

81. See, e.g., ESKRIDGE, GAYLAW, *supra* note 48, at 80–81; ANNE LVOVSKY, *VICE PATROL: COPS, COURTS, AND THE STRUGGLE OVER URBAN GAY LIFE BEFORE STONEWALL* 144–46 (2021) (describing patterns of police use of enticement tactics to further anti-homosexual prosecution campaigns).

82. *COI v. Chief Magistrate Ukunda L. Cts.* (2018) KECA 15 (KLR) (C.A.K.) (Kenya); *Kenya: Court Finds Forced Anal Exams Unconstitutional*, HUM. RTS. WATCH (Mar. 22, 2018, 3:04 PM), <https://www.hrw.org/news/2018/03/22/kenya-court-finds-forced-anal-exams-unconstitutional> [<https://perma.cc/DV3F-WXXJ>].

83. *Henry & Edwards v. Jamaica*, Case 13.637, Inter-Am. Comm'n H.R., Report No. 400/20, OEA/Ser.L/V/II, doc. 418, ¶¶ 14–15 (2020) (describing how police threatened and assaulted petitioner upon petitioner's attempt to report previous homophobic assault).

84. See, e.g., Diane Taylor, *'If You're Gay in Jamaica, You're Dead'*, *GUARDIAN* (Aug. 2, 2004, 6:20 AM), <https://www.theguardian.com/world/2004/aug/02/gayrights.gender> [<https://perma.cc/ZHY6-SURC>] (noting 2004 killing of activist Brian Williamson—Jamaica's only out gay person—and homophobic violence, particularly against lesbian women and women suspected of lesbianism); see generally AFRICAN COMM'N ON HUM. AND PEOPLES' RTS., INTER-AM. COMM'N ON HUM. RTS. & UNITED NATIONS, *ENDING VIOLENCE AND OTHER HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY* 48 (2016) (discussing experiences of corrective rape specifically targeting lesbian, bisexual, and transgender women).

decriminalization—throughout the Global South—was only a matter of time. But backlash belies this optimism. Countermobilization by religious and conservative groups as well as legislative backlash have occurred in response to decriminalization and the concomitant expansion of LGBTQ rights.⁸⁵ LGBTQ rights norms are polarizing even within national communities. In the United States, organizations such as Lambda Legal, the ACLU, the National Gay Task Force, and Gay & Lesbian Advocates & Defenders worked to decriminalize same-sex sexual conduct, culminating in *Lawrence v. Texas*,⁸⁶ and to achieve marriage equality in *Goodridge v. Department of Public Health*⁸⁷ and *Obergefell v. Hodges*.⁸⁸ Meanwhile, since 1990, organizations such as American Center for Law and Justice and Alliance Defending Freedom have embodied the conservative Christian legal movement's legal mobilization, producing cases such as *Masterpiece Cakeshop v. Colorado Civil Rights Commission*⁸⁹ and *303 Creative, LLC v. Elenis*.⁹⁰ As for legislative backlash, the number of anti-LGBTQ bills introduced in state legislatures has increased

85. Phillip M. Ayoub, *Perils of Success: Backlash and Resistance to LGBT Rights in Domestic and International Politics*, in *CONTRACTING HUMAN RIGHTS: CRISIS, ACCOUNTABILITY, AND OPPORTUNITY* 89, 89–91 (Alison Brysk & Michael Stohl eds., 2018) [hereinafter Ayoub, *Perils of Success*] (describing how historically embedded religion creates higher likelihood of countermobilization across countries). Conservative mobilization is also likely in instances of heightened state-sponsored or political homophobia, even in the absence of pro-LGBTQ rights mobilization. Phillip M. Ayoub & Douglas Page, *When Do Opponents of Gay Rights Mobilize? Explaining Political Participation in Times of Backlash Against Liberalism*, 73 *POL. RSCH. Q.* 696, 696 (2020) (arguing that individuals intolerant of homosexuality are more likely to participate politically in states promoting homophobia).

86. 539 U.S. 558, 577–78 (2003) (finding Texas statute criminalizing sodomy unconstitutional because covered activity was form of liberty protected by due process).

87. 798 N.E.2d 941, 968 (Mass. 2003) (holding that marriage licensing statutes restricted to heterosexual couples lacked rational basis and violated state constitutional equal protection principles).

88. 576 U.S. 644, 675 (2015) (finding right to marry regardless of sexuality protected under Due Process and Equal Protection Clauses).

89. 584 U.S. 617, 640 (2018) (deciding that state civil rights commission's issuance of cease-and-desist order against shop refusing to sell cakes to homosexuals did not comply with religious neutrality requirement of Free Exercise Clause).

90. 600 U.S. 570, 588 (2023) (holding that compelling business owner to create wedding websites for homosexual couples would violate First Amendment); see also *Religious Freedom*, ALL. DEFENDING FREEDOM, <https://adfllegal.org/about-us/who-we-are/#religious> (last visited Feb. 13, 2025) (discussing Alliance Defending Freedom's ("ADF") involvement in *Masterpiece Cakeshop* and *303 Creative*); Sarah Posner, *The Christian Legal Army Behind 'Masterpiece Cakeshop'*, NATION (Nov. 28, 2017), <https://www.thenation.com/article/archive/the-christian-legal-army-behind-masterpiece-cakeshop> [<https://perma.cc/9TU2-3PX8>] (reporting on a "special investigation into the rise of Alliance Defending Freedom"); see generally DANIEL BENNETT, *DEFENDING FAITH: THE POLITICS OF THE CHRISTIAN CONSERVATIVE LEGAL MOVEMENT* 2–5 (2017) (explaining emergence of Christian conservative legal organizations and consolidation around agenda of religious liberty); AMANDA HOLLIS-BRUSKY & JOSHUA C. WILSON, *SEPARATE BUT FAITHFUL: THE CHRISTIAN RIGHT'S RADICAL STRUGGLE TO TRANSFORM LAW AND LEGAL CULTURE* 3–5 (2020) (describing conditions promoting Christian worldview legal institutions and law schools despite lack of mainstream popularity).

every year since 2018, driven primarily by efforts to regulate school curricula by prohibiting discussions of sexual orientation and gender identity⁹¹ and by bills aimed at preventing transgender youth from receiving gender-affirming healthcare.⁹²

Intriguingly, countermobilization and legislative backlash have also occurred *in advance* of decriminalization or of any move by activists toward same-sex marriage or transgender rights domestically. Using the U.S. marriage equality cases as an example, the federal government responded to a favorable 1993 marriage equality trial court ruling in Hawai'i by passing the Defense of Marriage Act, which, for federal purposes, excluded same-sex couples from the definition of marriage,⁹³ and nearly forty U.S. states passed statutory "mini-DOMAs."⁹⁴ Similarly, one year after Massachusetts legalized same-sex marriage in 2003, thirteen states had amended their state constitutions to prohibit same-sex marriage.⁹⁵ These interventions mostly occurred before any activist litigators filed marriage equality cases within their jurisdictions. Additionally, a proposed Federal Marriage Amendment, which sought to add to the U.S. Constitution a definition of marriage as the union between one man and one woman and to prohibit all states from extending marriage rights to same-sex couples, failed in the House of Representatives.⁹⁶

As in the U.S. marriage equality cases, conservative or regressive legislators sometimes respond to developments in other jurisdictions, including foreign jurisdictions. Julie Dorf, founder of the International Gay and Lesbian Human Rights Commission (now known as OutRight Action International), observed in 2014, for example:

91. See, e.g., H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) (outlining Florida's Parental Rights in Education bill, known colloquially as the "Don't Say Gay" bill, which Governor Ron DeSantis signed into law in March 2022).

92. See Annette Choi, *Record Number of Anti-LGBTQ Bills Were Introduced in 2023*, CNN (Jan. 22, 2024, 5:04 PM), <https://edition.cnn.com/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html> [<https://perma.cc/8LKP-EFK6>] (indicating at least 167 anti-LGBTQ bills targeting access to gender-affirming healthcare were introduced in 2023 state legislative sessions).

93. Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996), *repealed by* Respect for Marriage Act, Pub. L. 117–228, 136 Stat. 2305 (2022) ("[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife.").

94. See Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2165–94 (2005) (compiling state statutes barring same-sex marriage at time of publication); Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265, 265 (2007).

95. See JASON PIERCESON, *SAME-SEX MARRIAGE IN THE UNITED STATES: THE ROAD TO THE SUPREME COURT* 153 (2013).

96. H.J. Res 106 (108th), GovTRACK (Sept. 30, 2004), <https://www.govtrack.us/congress/votes/108-2004/h484> [<https://perma.cc/7SRM-E3ZZ>] (showing proposed amendment failed after receiving only 227 yeas votes of the required 290); H.J. Res 88 (109th), GovTRACK, <https://www.govtrack.us/congress/bills/109/hjres88> [<https://perma.cc/G9BT-WZ9J>] (last visited Mar. 9, 2025) (showing proposed amendment failed after receiving only 236 yeas votes of the required 290).

There is always backlash when people come out . . . but what makes this era different is that what happens in the USA today is known in Azerbaijan tomorrow. And what the right wing conservatives fear, is true: rights are rights are rights. When you do start to fight for the equality of LGBT people, it will at some point lead to calls for marriage equality . . . even if marriage equality is not what activists are asking for today in, say, Nigeria or Russia.⁹⁷

Thus, there is a *transnational* and preemptive or anticipatory dimension to anti-LGBTQ rights countermobilization and backlash. As Kristopher Velasco writes, “any global event can potentially catalyze opposition: the success of LGBT+ rights, particularly in the West, can motivate ‘anticipatory’ countermobilizations elsewhere . . . and the elites in one country can provide the necessary resources for opposition efforts continents away.”⁹⁸

Perhaps no country better than Uganda represents how the global culture wars over LGBTQ human rights are being waged. The path to the 2023 Anti-Homosexuality Act began in 2009, when an alliance of conservative clerics and legislators in Uganda sponsored and advocated for what Western media termed the “Kill the Gays” bill,⁹⁹ which sought to expand the criminal legal framework around same-sex conduct by imposing the death penalty.¹⁰⁰ Religious groups based in the United States have been linked to the promotion of anti-homosexuality legislation in Uganda.¹⁰¹ Despite international protestations by the likes

97. See GEVISSER, *supra* note 63, at 29.

98. Velasco, *supra* note 25, at 2090 (citing Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 L. & SOC. INQUIRY 449 (2014)); see also Ashley Currier & Joëlle M. Cruz, *The Politics of Pre-Emption: Mobilisation Against LGBT Rights in Liberia*, 19 Soc. MOVEMENT STUD. 82, 82–83 (2020) (describing how anti-gay organizations anticipatorily mobilized to prevent LGBT activists from achieving their objectives).

99. See Brandon Ambrosino, *Uganda’s Anti-Gay Legislation, Explained*, Vox, <https://www.vox.com/2018/7/11/17562412/ugandas-anti-gay-legislation-explained> [<https://perma.cc/ME32-LUTV>] (last updated Aug. 4, 2014, 11:56 AM).

100. The Anti Homosexuality Bill, 2009, 102 UGANDA GAZETTE No. 47, available at <https://docs.google.com/file/d/0B7pFotabJnTmYzFiMWJmY2UtYWYxMi00MDY2LWI4NWYtYTViOWU1OTEzMzk0/edit?pli=1&hl=en&resourcekey=0-Lvo5sdlvMWahQND8IP1N0Q> [<https://perma.cc/T5D3-8FWQ>].

101. See Jeff Sharlet, *Straight Man’s Burden: The American Roots of Uganda’s Anti-Gay Persecutions*, HARPERS MAG. (2010) <https://harpers.org/archive/2010/09/straight-mans-burden/> [<https://perma.cc/K9Y9-JVVC>] (describing Ugandan anti-gay coalition as extension of American evangelical group); JEFF SHARLET, C STREET: THE FUNDAMENTALIST THREAT TO AMERICAN DEMOCRACY, 129–33, 148 (2010) (discussing relationship between U.S.-based organization called “The Family,” or “The Fellowship,” and Ugandans David Bahati and Pastor Martin Ssempe—the architects of Uganda’s Anti-Homosexuality Bill known as the “Kill the Gays” Bill); see also Kapya Kaoma, *Globalizing the Culture Wars: U.S. Conservatives, African Churches, and Homophobia*, POL. RSCH. ASSOCS. (Dec. 1, 2009), <https://politicalresearch.org/2009/12/01/globalizing-culture-wars> [<https://perma.cc/WC7H-TG8X>] (characterizing African sexual minorities as “collateral damage” in U.S. culture wars); KAPYA JOHN KAOMA, POL. RSCH. ASSOCS., COLONIZING AFRICAN VALUES: HOW THE U.S. CHRISTIAN RIGHT IS TRANSFORMING SEXUAL POLITICS IN AFRICA 2 (2012) (arguing U.S. anti-gay organizations are influential because

of UN Secretary General Ban Ki-moon and U.S. President Barack Obama, in 2014, Ugandan President Museveni signed into law a modified version of the bill without the death penalty provision, but carrying the threat of a life sentence.¹⁰² And during the period from 2009 to 2015, some thirty African states adopted similar legislation.¹⁰³ After Uganda's 2014 law was invalidated on procedural grounds,¹⁰⁴ conservative activists and parliamentarians redoubled their efforts, culminating in the 2023 Act. Human rights advocates, including an alliance of scholars and activists outside Uganda, filed four separate challenges to the 2023 Act in Uganda's courts.¹⁰⁵ But in April 2024, the Supreme Court upheld the bulk of the law.¹⁰⁶ Copycat legislation in other African countries may soon follow.¹⁰⁷

The rise of new, harsh legislation extends beyond the African continent. Iraq in April 2024 passed a law that criminalizes not only consensual same-sex conservative movements espouse charismatic theologies resonating with African Christians, and campaigners characterize pro-LGBT Africans as neo-colonizers).

102. *Uganda: Anti-Homosexuality Act's Heavy Toll*, HUM. RTS. WATCH (May 14, 2014, 11:57 PM), <https://www.hrw.org/news/2014/05/14/uganda-anti-homosexuality-acts-heavy-toll> [https://perma.cc/EN39-GD96] ("President Yoweri Museveni signed the Anti-Homosexuality Bill into law on February 24, 2014, and it came into force on March 10. The law permits sentences of life in prison for some sexual acts between consenting adults.").

103. Daniel Anthony, *'Intimidated and Stalked': Citizens Living in Fear over Nation's Shocking New Bill*, NEWS.COM.AU (Aug. 20, 2023, 5:11 PM), <https://www.news.com.au/lifestyle/real-life/news-life/intimidated-and-stalked-citizens-living-in-fear-over-nations-shocking-new-bill/news-story/dde69f4ca90dd07b7af0b1451e2cada9>.

104. *See Uganda Court Annuls Anti-Homosexuality Law*, BBC (Aug. 1, 2014), <https://www.bbc.com/news/world-africa-28605400> [https://perma.cc/9G5R-FJB3] (explaining that law was invalidated because too few lawmakers were present to vote on it).

105. *See Oryem Nyeko & Larissa Kojoué, Ugandans Challenge Anti-Homosexuality Act*, HUM. RTS. WATCH (Dec. 11, 2023, 6:11 AM), <https://www.hrw.org/news/2023/12/11/ugandans-challenge-anti-homosexuality-act> [https://perma.cc/9DD4-M77Z]; Samuel Okior, *Activists in Uganda Finalise Appeal to Overturn Draconian Anti-Gay Law*, GUARDIAN (Dec. 11, 2023, 5:11 AM), <https://www.theguardian.com/global-development/2023/dec/11/activists-in-uganda-finalise-appeal-against-draconian-anti-gay-law> [https://perma.cc/YX5E-KN3F]; *Uganda Court Sets Date to Hear Petition Against Anti-LGBTQ Law*, E. AFR. (Nov. 29, 2023) https://www.theeastafrican.co.ke/tea/news/east-africa/uganda-court-sets-date-to-hear-petition-against-anti-gay-law-4449006#google_vignette [https://perma.cc/ZD43-D8CC] (describing consolidation of petition).

106. The court only invalidated the portions that restrict healthcare access for LGBTQ people, that prohibit renting premises to LGBTQ people, and that require Ugandan residents to report alleged acts of homosexuality or face punishment themselves. *Uganda: Court Upholds Anti-Homosexuality Act*, HUM. RTS. WATCH (Apr. 4, 2024, 1:15 PM), https://www.hrw.org/news/2024/04/04/uganda-court-upholds-anti-homosexuality-act?gad_source=1&gclid=EAIaIQobChM13fXcuqvWhgMVWVIHAR0LRgGQEAAAYASAAEGJ-uPD_BwE [https://perma.cc/8YNP-PF52].

107. *See Daniel Anthony, Uganda's Anti-Gay Bill Leads a Terrifying Domino Effect Across Africa*, DAILY BEAST (Aug. 29, 2023, 4:54 AM), <https://www.thedailybeast.com/ugandas-anti-gay-bill-leads-a-terrifying-domino-effect-across-africa> [https://perma.cc/Z96Z-6RFH] (describing adoption of similar anti-gay policies by Kenya, Ghana, and Tanzania); Catherine Byaruhanga, *LGBT Rights in Africa: Will Kenya Be the Latest to Pass Anti-Gay Law?*, BBC (July 17, 2023), <https://www.bbc.com/news/world-africa-66079603> [https://perma.cc/4MZU-A3FY] (speculating whether Kenyan parliament would pass anti-LGBT legislation after Ugandan law upheld).

sexual conduct but also transgender identity.¹⁰⁸ In Kuwait, several members of parliament are attempting to re-criminalize transgender identity and hormonal replacement therapy after the Supreme Constitutional Court, in 2022, invalidated a vague provision that authorities had used to target transgender individuals.¹⁰⁹ In Eastern Europe, Russia and Georgia have recently adopted laws that make it difficult if not impossible for civil society organizations to support LGBTQ communities and to advocate for LGBTQ human rights, although they do not formally criminalize consensual same-sex conduct.¹¹⁰

Thus, decriminalization matters not only because same-sex conduct remains criminalized in more than sixty countries, but because countries are *re-criminalizing*, as well as using the criminal framework against transgender identity and against the mere discussion of homosexuality and gender identity.

Just as decriminalization matters, the study of decriminalization, including judicial decriminalization, matters. My focus on judicial decriminalization of same-sex conduct is not meant to indicate that litigation is the predominant or even the preferred route to decriminalization. It is merely one route through which decriminalization might occur. Yet litigation offers a particular advantage over legislation that obviates, or at least mitigates, the need for minority or otherwise unpopular groups to generate sympathy among legislators and the wider constituency that legislators represent.¹¹¹ That is, courts can sometimes serve a

108. Hillary Mitchell, *Iraq Passes New 'Morality' Law Criminalising LGBTQ+ Relationships and Making It Illegal to Be Trans*, PINKNEWS (Apr. 28, 2024), <https://www.thepinknews.com/2024/04/28/iraq-bans-lgbtq> [<https://perma.cc/L6YT-QDEC>]; see also Kathryn Armstrong, *Iraq Criminalises Same-Sex Relationships in New Law*, BBC (Apr. 27, 2024), <https://www.bbc.com/news/world-middle-east-68914551> [<https://perma.cc/ELW5-93FF>]; *Iraq Criminalises Same-Sex Relationships with Maximum 15 Years in Prison*, AL JAZEERA (Apr. 27, 2024), <https://www.aljazeera.com/news/2024/4/27/iraq-criminalises-same-sex-relationships-with-maximum-15-years-in-prison> [<https://perma.cc/6FRU-DVE8>].

109. See Rasha Younes, *Kuwait Court Rules Anti-Transgender Law Unconstitutional*, HUM. RTS. WATCH (Feb. 17, 2022, 9:55 AM), <https://www.hrw.org/news/2022/02/17/kuwait-court-rules-anti-transgender-law-unconstitutional> [<https://perma.cc/AFK3-M6K7>] (reporting that Kuwait Constitutional Court ruled Article 198 of the penal code, which criminalized “imitating the opposite sex,” unconstitutional); Nora Noralla, *2023 Was a Bad Year for LGBTQ+ Rights in the MENA Region, and 2024 Is Set to Be Even Worse*, TAHRIR INST. FOR MIDDLE E. POL’Y (June 4, 2024), <https://timep.org/2024/06/04/2023-was-a-bad-year-for-lgbtq-rights-in-the-mena-region-2024-is-set-to-be-even-worse> [<https://perma.cc/Z2VJ-BGCM>] (reporting new anti-LGBTQ+ legislation proposed after the 2022 Constitutional Court’s decision striking down Article 198).

110. See *Putin Signs Law Expanding Russia’s Rules Against ‘LGBT Propaganda,’* REUTERS (Dec. 5, 2022, 11:39 AM), <https://www.reuters.com/world/europe/putin-signs-law-expanding-russias-rules-against-lgbt-propaganda-2022-12-05>; Seb Starcevic, *Georgia Signs Sweeping Anti-LGBTQ+ Bill into Law*, POLITICO (Oct. 3, 2024, 11:10 AM), <https://www.politico.eu/article/georgia-signs-sweeping-anti-lgbtq-bill-into-law> [<https://perma.cc/9X2H-SZFW>].

111. See Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 21 (2002) (“The protection of human rights—the rights of every individual and every minority group—cannot be left only in the hands of the legislature and the executive, which, by their nature, reflect majority opinion.”).

counter-majoritarian function.¹¹² And once the court ruling places a moratorium on criminal prosecution,¹¹³ it creates legal and social space for LGBTQ rights activists to pursue legislative decriminalization and a broader rights agenda.¹¹⁴

An examination of the legal mobilization behind decriminalization litigation in the Global South reveals a striking pattern: almost all decriminalization litigation initiated after 2010 has been initiated or assisted by a specific set of actors deploying the strategy of litigating for social change, and who have fairly close relationships with like-minded activists in other countries.¹¹⁵ In the next sub-part, I discuss transnational litigation networks as a conceptual matter, and I discuss their importance to global politics and thus to international law and relations scholarship.

B. *Why Transnational Litigation Networks Matter*

My analysis of the transnational decriminalization litigation network builds on the framework of “transnational advocacy networks” developed by political scientists Margareth Keck and Kathryn Sikkink.¹¹⁶ In 1998, Keck and Sikkink coined the term “transnational advocacy network” to describe a confluence of “nonstate actors that interact with each other, with states, and with international organizations,” that are “distinguishable largely by the centrality of principled ideas or values in motivating their formation,” that “multiply the channels of access to the international system,” and that “make international resources available to new actors in domestic political and social struggles.”¹¹⁷

112. See Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 285 (2010) (defining courts’ counter-majoritarian function as “protecting minority rights against majoritarian excesses”).

113. High court rulings might or might not serve this moratorium function. In India, the 2018 Supreme Court ruling declaring Section 377 unconstitutional was binding nationally. See 2018: *Section 377 Struck Down*, FRONTLINE (Aug. 15, 2022), <https://frontline.thehindu.com/the-nation/india-at-75-epochal-moments-2018-rainbow-victory-section-377-struck-down/article65730933.ece> [<https://perma.cc/NW3X-2LC6>]. In the case of Tunisia, the Court of Cassation declared the anti-sodomy law unconstitutional in October 2022, but until the Constitutional Court rules, law enforcement may continue to arrest, prosecute, and punish offenders under the provision. See Colin Stewart, *Tunisia: A High Court Says Anti-Gay Law Is Unconstitutional*, ERASING 76CRIMES (Nov. 2, 2022), <https://76crimes.com/2022/11/02/tunisia-a-high-court-says-anti-gay-law-is-unconstitutional> [<https://perma.cc/3TE5-6WP8>]; see also *Homosexualité en Tunisie : La Cour de Cassation S’engage Dans des Décisions Historiques!*, FEMMES DE RÉALITÉS (Oct. 23, 2022), <https://femmesetrealites.com.tn/2022/10/23/homosexualite-en-tunisie-la-cour-de-cassation-sengage-dans-des-decisions-historiques> [<https://perma.cc/BD2J-EEYJ>].

114. See AMNESTY INT’L, LOVE, HATE, AND THE LAW: DECRIMINALIZING HOMOSEXUALITY 5 (2008) (“Without the fundamental protection of legality, it is impossible for activists to form organizations and campaign for the right to engage in consensual same-sex practices, or even to meet in public.”).

115. See generally Ayodeji Kamau Perrin, *The Evolution of Sodomy Decriminalization Jurisprudence in Transnational and Comparative Constitutional Perspective*, 32 WM. & MARY BILL RTS. J. 239, 286–98 (2024).

116. See KECK & SIKKINK, *supra* note 18, at 1–38.

117. *Id.* at 1.

Keck and Sikkink rarely discuss litigation in the text, however.¹¹⁸ Litigation is not central to the transnational advocacy network framework.

Other scholars such as Stephen Meili and Laurence Helfer soon centered litigation as a tool of transnational advocacy, sometimes building on Keck and Sikkink's framework.¹¹⁹ Subsequent scholars described communities or networks of lawyers inhabiting the anti-death penalty¹²⁰ and climate change¹²¹

118. *But see id.* at 135–36 (noting that two decades of environmental rights litigation in the United States preceded the emergence of the transnational campaign targeting multilateral banks' large infrastructure projects); *id.* at 198 (noting that activists framing of violence against women as a human rights issue privileged international law and legal expertise).

119. *See* Stephen Meili, *Latin American Cause-Lawyering Networks*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 307, 307–09 (Austin Sarat & Stuart Scheingold eds., 2001) (using the terminology “transnational cause-lawyering networks”); Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1860, 1877–78 (2002) (using the “transnational advocacy network” terminology to describe the overrepresentation of Caribbean death row petitioners by British law firms and by the transnational human rights NGO Interights).

120. *See* Helfer, *supra* note 119, at 1898 (noting that the three Commonwealth Caribbean nations resisted efforts by “transnational advocacy networks to curtail or abolish their use of the death penalty”); Andrew Novak, *The Decline of the Mandatory Death Penalty in Common Law Africa: Constitutional Challenges and Comparative Jurisprudence in Malawi and Uganda*, 11 LOY. J. PUB. INT. L. 19, 20 (2009) (describing “an international network of anti-death penalty advocates and experts”). In a series of comparative analyses of death penalty jurisprudence, Novak remarked repeatedly that transnational judicial dialogue on the mandatory death penalty was not organic, but was instead the result of intentional strategizing. *See* Novak, *The Abolition of the Mandatory Death Penalty in Africa*, *supra* note 21, at 277 (noting advocates in Singapore invoked “analogies to the constitutional protections of fair trial rights in other Commonwealth countries” in arguing against the death penalty); Andrew Novak, *Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya*, 45 SUFFOLK U. L. REV. 285, 287 n.8, 294 n.43 (2012) (referring to a pro bono organization and “network of international death-penalty experts” that have litigation pending in various African nations and noting that “regional tribunals and national courts are linked on the issue of the mandatory death penalty”); Andrew Novak, *The Mandatory Death Penalty in Ghana: A Comparative Constitutional Perspective on Dexter Johnson v. Republic*, 12 CARDOZO PUB. L., POL'Y & ETHICS J. 669, 671 (2014) (“The strategy of the more recent coordinated mandatory death penalty challenges was deliberate: a small network of international human rights lawyers sought to create a body of transnational jurisprudence from which to draw in bringing incremental challenges in national courts and to thereby restrict the scope of capital punishment.”); Andrew Novak, *The Abolition of the Mandatory Death Penalty in India and Bangladesh: A Comparative Commonwealth Perspective*, 28 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 227, 229–30 (2015) (noting a “network of lawyers helped defend death row inmates in the Caribbean”).

121. *See* Mason-Case, *Professional Practice*, *supra* note 22, at 157 (referencing “community of international climate lawyers”); *id.* at 159 (“[W]e can picture the community as if were a loose network superimposed upon, or embedded in, a web of norms and institutions. . . . [M]y research maps international climate lawyers from a handful of individuals planting seeds for a community at the climate regime to their present, expansive configuration.”). For an earlier social network analysis of the climate justice movement, see generally JENNIFER HADDEN, *NETWORKS IN CONTENTION: THE DIVISIVE POLITICS OF CLIMATE CHANGE* (2015).

spaces, eventually using the term transnational litigation network to describe litigious activists linked across state boundaries.¹²²

Meanwhile, in the LGBTQ rights issue space, scholars and scholar activists have written about the transnational homophile movements and networks of the 1950s,¹²³ the transnational gay rights movements and networks of the 1970s,¹²⁴ and the transnational LGBTQ movements and networks of the 1990s and beyond.¹²⁵ Matthew Waites and his collaborators took note of the transnational dimensions of advocacy in the Commonwealth¹²⁶ and of what Waites termed “the new London-based trans-national politics of LGBT human rights.”¹²⁷

To my knowledge, however, it was Andrew Novak who first commented in print on the institutional linkages between the anti-death penalty network and the LGBTQ transnational litigation network.¹²⁸ The anti-death penalty network included the UK law firm Doughty Street Chambers; the inaugural director of Human Dignity Trust, Jonathan Cooper, was an attorney with Doughty Street Chambers,¹²⁹ and perhaps as a result, Human Dignity Trust adopted a decriminalization litigation strategy similar to the approach Doughty Street Chambers adopted to fight the death penalty.¹³⁰ The following discussion of transnational litigation networks and of the transnational decriminalization litigation network in the Global South builds on this scholarship.¹³¹

A transnational litigation network is a set of actors deploying the strategy of litigating for social change, and who have fairly close relationships with

122. See Mason-Case, *On Being Companions and Strangers*, *supra* note 22, at 644–45 (using the terminology “transnational litigation network”); Bähring, *supra* note 22, at 373 (titling work “[t]ransnational litigation networks”).

123. See BELMONTE, *supra* note 16, at 71–108.

124. See *id.* at 109–44.

125. See, e.g., *id.* at 145–70; THORESON, *supra* note 16, at 182–210.

126. See Lennox & Waites, *supra* note 36, at 33–43 (discussing “transnational and local activism” in the Commonwealth).

127. Matthew Waites, *The New Trans-National Politics of LGBT Human Rights in the Commonwealth: What Can UK NGOs Learn from the Global South?*, in *SEXUALITY, CITIZENSHIP, AND BELONGING* 73, 73 (Francesca Stella, Yvette Taylor, Tracey Reynolds & Antoine Rogers eds., 2016) (footnote omitted).

128. See NOVAK, *TRANSNATIONAL HUMAN RIGHTS LITIGATION*, *supra* note 17 (tracing transnational litigation networks with respect to both anti-death penalty movements and LGBTQ movements).

129. See FARMER, *supra* note 46, at 125–26.

130. See Novak, *The Role of Legal Advocates*, *supra* note 21, at 182 n.13.

131. See NOVAK, *TRANSNATIONAL HUMAN RIGHTS LITIGATION*, *supra* note 17 (describing transnational litigation movements challenging the death penalty and criminalization of homosexuality in Commonwealth countries); see also Novak, *Toward a Global Consensus*, *supra* note 21, at 317–19 (referring to the similarities between the “transnational legal advocates” or “transnational legal networks” in the death penalty and LGBTQ rights issue spaces); Andrew Novak, *The ‘Judicial Dialogue’ in Transnational Human Rights Litigation: Muruatetu & Anor v Republic and the Abolition of the Mandatory Death Penalty in Kenya*, 18 HUM. RTS. L. REV. 771, 773 (2018); *id.* at 789 (using the term “LGBT litigation network”).

like-minded activists in other countries.¹³² The transnational decriminalization litigation network consists of aggrieved individuals and groups (primarily people who identify as gay, lesbian, same-gender loving, bisexual, pansexual); local, national, and transnational LGBTQ-serving and advocacy organizations; individual “cause lawyers”; and an assortment of allies, including law firms (especially those willing to provide pro bono representation), academics (including, but not only, law scholars), and funding entities.¹³³ Importantly, the actors within this network seek out, accept, benefit from, and maintain connections across national borders—whether within or beyond their region or subregion, whether in the Global North or the Global South.¹³⁴ These connections serve numerous purposes, including as sources of solidarity, inspiration, legitimacy, potential plaintiffs in test cases, legal expertise, or funding.¹³⁵ As Novak writes:

Marrying the comparative law expertise of specialized human rights NGOs, the resources of law firms, the pro bono commitment of lawyers and law school clinics, and the grassroots commitment of local activists and partners on the ground, these [transnational] litigation networks have successfully challenged colonial era laws and used that precedent in other jurisdictions.¹³⁶

Allow me to emphasize four points about transnational litigation networks: (1) non-lawyers matter; (2) goals vary among networked actors; (3) domestic litigation matters; and (4) conservative transnational litigation networks are possible if not likely.

First, non-lawyers matter. In my view, it is litigation, but not necessarily lawyers, that makes the transnational decriminalization litigation network a distinct kind of advocacy network. On the one hand, as Meili’s and others’ discussion of cause lawyers has demonstrated, not all lawyering leads to litigation.¹³⁷ On the other hand, litigation would not be possible without the clients—the aggrieved individuals who are the plaintiffs (and sometimes defendants) who decide to challenge the law. There are also non-lawyer activists and organizations that might be critical decision-makers in deciding whether and when to litigate. It can be through these organizations that plaintiffs are identified, that emotional and financial support is provided, and that public

132. See NOVAK, TRANSNATIONAL HUMAN RIGHTS LITIGATION, *supra* note 17, at 2–3.

133. See *id.*

134. See *id.* at 56 (noting “sharing process” between the Global North and Global South “is not unidirectional; courts in [several Global South countries] have made their own contributions to the global body of human rights jurisprudence”).

135. See KECK & SIKKINK, *supra* note 18, at 1–38.

136. NOVAK, TRANSNATIONAL HUMAN RIGHTS LITIGATION, *supra* note 17, at 3.

137. See Meili, *supra* note 119, at 308 (“The methodology of Latin American cause lawyers falls into two general categories: advocacy that consists primarily of traditional forms of lawyering such as litigation and lobbying, and advocacy that rejects such traditions and focuses instead on client-centered, less conventional strategies such as community organizing and citizen empowerment.”).

information campaigns and media engagement are coordinated.¹³⁸ Academics and other researchers who write *amicus curiae* briefs are also part of the transnational decriminalization litigation network.¹³⁹ They may provide historical and empirical materials for judges to consider.¹⁴⁰ Medical doctors and psychologists may provide expert testimony or affidavits.

Second, goals vary among networked actors. Because transnational litigation networks are composed of a variety of actors beyond lawyers, it is important to appreciate the variety of goals and concomitant strategic variation embodied in the network, rather than to view a transnational litigation network as a unitary actor with singular goals and concomitant strategies. Transnational judicial dialogue (or comparative constitutional interpretation) is an important part of the decriminalization norm diffusion process that I have observed and analyzed in other work.¹⁴¹ Some actors within transnational decriminalization litigation networks clearly want to spread the decriminalization norm globally, and some think it important to generate comparative jurisprudence in order to do so.¹⁴² Other actors within the network, however, pursue decriminalization for more instrumental reasons, given the collateral effects of anti-sodomy laws that I discussed above in Section I.A. Such an actor might not be as concerned with the judicial rationales employed by judges, so long as decriminalization results. They might not even be all that concerned with global norms and decriminalization in other jurisdictions except in some abstract sense. Their more provincial or parochial goals might be just as legitimate as the goal of transnational norm diffusion, especially where they are in service of public health, mental health, anti-violence, housing, employment, poverty alleviation, etc.—goals that may feel more immediately pressing to LGBTQ communities in the target jurisdiction.

Third, domestic litigation matters. In contrast with the “boomerang effect” that Keck and Sikkink discussed as a common, if not dominant, strategy among transnational advocacy networks, transnational litigation networks rarely “throw a boomerang” outside the target state.¹⁴³ Across history, more decriminalization challenges have been won or lost in domestic courts than in

138. See, e.g., Perrin, *supra* note 115, at 291 (“London-based human rights NGO, Interights, had been on the ground in Fiji since 2002 . . . looking for a plaintiff to bring a decriminalization test case.”).

139. See NOVAK, TRANSNATIONAL HUMAN RIGHTS LITIGATION, *supra* note 17, at 2.

140. See *id.* at 48.

141. See Perrin, *supra* note 115, at 243–44.

142. See, e.g., NOVAK, TRANSNATIONAL HUMAN RIGHTS LITIGATION, *supra* note 17, at 3 (“By bringing strategic litigation in domestic courts and supranational tribunals, these [transnational] litigation networks can build and cultivate a body of comparative persuasive jurisprudence that they can cite in future litigation challenges elsewhere.”).

143. KECK & SIKKINK, *supra* note 18, at 12–13 (discussing the boomerang pattern, where domestic NGOs in the target state throw a “boomerang” outside the state—primarily to foreign and transnational NGOs, who lobby their own states to pressure the target state to change the offending policy, or lobby inter-governmental institutions such as the UN, EU, or OAS to pressure the target state through collective actions).

international courts and quasi-judicial mechanisms.¹⁴⁴ Indeed, international court procedures almost universally require complainants to have exhausted local remedies—by utilizing domestic administrative and judicial complaint mechanisms—prior to the entity admitting the claim for resolution on the merits.¹⁴⁵ The legal claims are thus primarily constitutional law claims rather than international law claims. Consequently, the interpretation of constitutional rights is shifting the scope of international human rights law.¹⁴⁶

It is certainly true that some decriminalization challenges constitute transnational litigation in international fora. This includes some of the earliest successful challenges in the 1970s through 1990s in the Global North,¹⁴⁷ as well as a few recent challenges in the Global South.¹⁴⁸ Nevertheless, when I

144. Decriminalization activists have prevailed in fourteen domestic court claims and have lost at least eleven times in the high court of a domestic jurisdiction. See *Legal Frameworks: Criminalisation of Consensual Same-Sex Sexual Acts*, *supra* note 2 (sort by “Mechanism”); *A History of LGBT Criminalisation: Over 500 Years of Outlawing Lesbian, Gay, Bisexual and Transgender People*, *supra* note 10 (detailing criminalization and decriminalization around the world). The number is even greater when considering victories and defeats in U.S. state courts (fourteen victories and a potentially unknowable number of defeats). See WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003, at 387–407 (2008); ESKRIDGE, GAYLAW, *supra* note 48, at 327–37 (Appendix A1). Consider also cases that decriminalization activists filed separately and that the courts consolidated, for example, in Singapore (five consolidated filings), Kenya (two consolidated filings), India (eight consolidated filings), and St. Vincent and the Grenadines (two consolidated filings). See *Legal Frameworks: Criminalisation of Consensual Same-Sex Sexual Acts*, *supra* note 2. Conversely, decriminalization activists have produced seven victories in international courts and quasi-judicial mechanisms. *Id.* Unlike domestic challenges, where the number of failed claims is potentially unknowable, there have been no international court claims that failed on the merits, though the European Commission on Human Rights dismissed a handful of claims at the procedural stage in the 1950s through 1970s. See PAUL JOHNSON, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS 19–40 (2013).

145. See A. A. Cançado Trindade, *Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law*, 12 REV. BDI 499, 501–02 (1976). But see Andreas von Staden, *Subsidiarity, Exhaustion of Domestic Remedies, and the Margin of Appreciation in the Human Rights Jurisprudence of African Sub-Regional Courts*, 20 INT’L J. HUM. RTS. 1113, 1125–26 (2016) (arguing that Africa’s subregional human rights courts have begun to abandon the rule); Joel Adelusi Adeyeye, *Non-Exhaustion of Local Remedies: A Unique Attribute of Ecowas Court of Justice*, 13 J. AFR. UNION STUD. 83, 83 (2024) (similar).

146. See, e.g., Perrin, *supra* note 115, at 313–14 (explaining how Kenyan High Court’s decision regarding the constitutionality of anti-sodomy statute “demonstrated the prevalence of comparative constitutional law methodology, and thus transnational judicial dialogue”).

147. For example, activists from Northern Ireland (*Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981)), Ireland (*Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988)), and Cyprus (*Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993)) litigated in the European Court of Human Rights, while activists from Tasmania (*Toonen v. Australia*, Comm’n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (U.N. Hum. Rts. Comm. Mar. 31, 1994)) litigated claims before the UN Human Rights Committee.

148. Activists from Jamaica (*Henry & Edwards v. Jamaica*, Case 13.637, Inter-Am. Comm’n H.R., Report No. 400/20, OEA/Ser.L/V/II, doc. 418 (2020)) and Barbados (*Hoffmann v. Barbados*, Petition 1081–18, Inter-Am. Comm’n H.R., Report No. 239/22, OEA/Ser.L/V/II, doc. 242 (2022)) have complained to the Inter-American Commission

use the term “transnational litigation network,” it is the network, rather than the litigation, that I am describing as transnational. This is an important distinction conceptually, empirically, and theoretically. What makes the transnational litigation network a remarkable sociolegal phenomenon is that the decriminalization network, for example, produces litigation campaigns that non-nationals participate in—such as lawyers from the Global North serving as legal counsel for clients in the Global South and intervening as interested parties or submitting amicus briefs in Global South decriminalization cases.¹⁴⁹ This is true regardless of whether they file in domestic court or in international courts and quasi-judicial mechanisms.¹⁵⁰

Finally, conservative transnational litigation networks are possible. Human rights promotion is not the only goal achievable through transnational networking among litigation-inclined activists. Defenders of the status quo and proponents of a return to the status quo *ante* (e.g., criminalization of same-sex sexual conduct) can and do export the so-called “U.S. culture wars” to other sites.¹⁵¹ It certainly appears true, as an empirical matter, that conservative religious groups have been constructing an anti-LGBTQ transnational *advocacy* network since at least the late 1990s.¹⁵² It is quite possible, as I discuss in Part III, that the conservative and religious groups that have intervened in decriminalization challenges in the Caribbean and in Africa constitute a transnational *litigation* network.¹⁵³

on Human Rights, and activists from Sri Lanka (Flamer-Caldera v. Sri Lanka, Comm’n No. 134/2018, U.N. Doc. CEDAW/C/81/D/134/2018 (Comm. on the Elimination of Discrimination Against Women Mar. 23, 2022)) have complained to the CEDAW Committee.

149. See Perrin, *supra* note 115, at 291 (describing London-based activists’ involvement with constitutional challenge to Fiji’s sodomy law).

150. See *id.* at 286–317.

151. See John Anderson, *Conservative Christianity, the Global South and the Battle over Sexual Orientation*, 32 THIRD WORLD Q. 1589, 1589 (2011) (focusing on “the way in which Northern Christians struggling to win their battles at home look to the global South for allies and support”); Kristen Cheney, *Locating Neocolonialism, “Tradition,” and Human Rights in Uganda’s “Gay Death Penalty,”* 55 AFR. STUD. REV. 77, 77, 84–86 (2012) (exploring how “U.S. evangelical influence” contributed to “widespread opposition to homosexuality” in Uganda); Sanders, *supra* note 66, at 165 (discussing “American evangelical sponsorship of political homophobia in Uganda”); Van Klinken, *supra* note 66, at 217 (responding to “the involvement of American white conservative evangelicals in the spread of homophobia in Africa”); BOB, *supra* note 16, at 36, 59 (discussing American activists advocating against Brazil’s resolution in favor of LGBTQ rights, introduced at U.N. Commission on Human Rights).

152. See BOB, *supra* note 16, at 41–44 (dating the origins of an interreligious “traditional families” network to the 1990s); see also STEWART, *supra* note 67, at 248–54 (discussing the World Congress of Families, which U.S. and Russian religious conservatives co-founded in 1990).

153. See BOB, *supra* note 16, at 72–108 (describing the litigation interventions in Sweden and Romania by the U.S.-based transnational Christian lawyers group Advocates International); STEWART, *supra* note 67, at 266–70 (referencing the European Center for Law and Justice, an extension of the American Center for Law and Justice, and ADF International, a foreign arm of the U.S.-based Alliance Defending Freedom, which is the organization behind U.S. Supreme Court cases *Masterpiece Cakeshop* and *303 Creative* concerning

Although the emerging field of transnational legal mobilization scholarship has done an important service by shifting the lens of analysis from the domestic to the transnational, it tends to focus on litigation before international courts and tribunals,¹⁵⁴ and it sometimes suffers from a Eurocentric focus in doing so.¹⁵⁵ Additionally, transnational legal mobilization scholars have paid insufficient attention to the *foreign* (transnational) actors engaged in domestic court litigation, which is where much “human rights” adjudication occurs.¹⁵⁶ Like their international court counterpart, transnational legal mobilization scholarship that focuses on domestic court litigation is often Eurocentric,¹⁵⁷ paying insufficient attention to transnational legal mobilization in the Global South.

While legal mobilization scholars have long debated whether litigation can bring about social change,¹⁵⁸ this debate largely has been contained within

LGBTQ rights and religious freedom); *International Work*, ALL. DEFENDING FREEDOM, <https://adfflegal.org/about-us/who-we-are> (last visited Feb. 13, 2025) (“ADF International has played a leading role in 38 victories before the European Court of Human Rights.”); *Marriage and Family Are Protected*, ADF INT’L, <https://adfinternational.org/our-focus/marriage-and-family> [<https://perma.cc/63TX-4YAM>] (last visited Feb. 13, 2025) (claiming “37 countries with current cases and legal matters,” “59 active cases around the world,” and “188 ADF International victories”); *Religious Freedom Prevails*, ADF INT’L, <https://adfinternational.org/our-focus/religious-freedom> [<https://perma.cc/E8XR-V37H>] (last visited Feb. 13, 2025) (claiming “67 countries with current cases,” “1,437 active cases around the world,” and “1,072 ADF International victories”); Claire Provost & Ella Milburn, *Christian ‘Legal Army’ in Hundreds of Court Battles Worldwide*, OPENDEMOCRACY (Dec. 13, 2017), <https://www.opendemocracy.net/en/5050/christian-legal-army-court-battles-worldwide> (discussing ADF International’s claimed involvement in “580 ‘ongoing legal matters’ in 51 countries”).

154. Freek van der Vet & Lisa McIntosh Sundstrom, *Activists in International Courts: Backlash, Funding, and Strategy in International Legal Mobilization*, 57 LAW & SOC’Y. REV. 6, 7 (2023) (introducing a special symposium on legal mobilization before international courts).

155. See generally RACHEL A. CICHOWSKI, *THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE* (Andreas Føllesdal et al. eds., 2007) (discussing transnational litigation on gender equality and environmental protection before the European Court of Human Rights); Lisa Harms, *Claiming Religious Freedom at the European Court of Human Rights: Socio-Legal Field Effects on Legal Mobilization*, 46 LAW & SOC. INQUIRY 1206 (2021) (discussing religious group litigation in European Court of Human Rights and impact in European policy debates).

156. See Wayne Sandholtz, *How Domestic Courts Use International Law*, 38 FORDHAM INT’L L.J. 595, 607 (2015) (“Scholarship on international human rights law suggests, then, that domestic courts are the primary forum for human rights enforcement.”).

157. See generally Rachel A. Cichowski, *Legal Mobilization, Transnational Activism, and Gender Equality in the EU*, 28 CAN. J.L. & SOC’Y 209 (2013) (focusing on women’s rights activism, litigation, and legislative action transnationally in EU); Lisa Conant, *Who Files Suit? Legal Mobilization and Torture Violations in Europe*, 38 LAW & POL’Y 280 (2016) (discussing allegations of human rights abuses litigated in European Court of Human Rights and impact on developing European countries).

158. See GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 336–43 (1991) (arguing that courts rarely act as agents of social change).

a U.S. context¹⁵⁹ or a European context.¹⁶⁰ Legal mobilization scholars—even transnational legal mobilization scholars—have paid insufficient attention to whether and how *domestic* litigation can bring about *global* changes—what I and others have included within the theoretical framework of bottom-up international lawmaking.¹⁶¹ Finally, and perhaps most importantly, there are several long-standing critiques of rights, litigation, and lawyering¹⁶² that are applicable to the transnational decriminalization litigation network. While some of these critiques have been taken up in some pockets of legal mobilization scholarship,¹⁶³ scholars have not yet trained their critical analytical lenses on transnational lawyering in any sustained sense.

159. See, e.g., Malcolm M. Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 17 LAW & SOC. INQUIRY 745, 745–47 (1992) (critiquing ROSENBERG, *supra* note 158); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 290–93 (1994) (refuting the arguments of “neo-realist critical legal scholarship” such as ROSENBERG, *supra* note 158); Gerald N. Rosenberg, *Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann*, 17 LAW & SOC. INQUIRY 761, 763–76 (1992) (responding to his critics); Gerald N. Rosenberg, *Positivism, Interpretivism, and the Study of Law*, 21 L. & SOC. INQUIRY 435, 443–44 (1996) (critiquing MCCANN, *supra*); Michael McCann, *Causal Versus Constitutive Explanations (or, On the Difficulty of Being so Positive . . .)*, 21 LAW & SOC. INQUIRY 457, 459–82 (1996) (responding to Rosenberg’s critique); LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE (David A. Schultz ed., 1998) (featuring chapters by Rosenberg, McCann, and others debating the role of courts in social change processes).

160. See, e.g., Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT’L ORG. 77 (2014) (assessing European development of LGBT rights through case law and national policies).

161. See, e.g., Perrin, *supra* note 115 (discussing Global South sodomy decriminalization litigation as example of bottom-up lawmaking); Ayodeji Kamau Perrin, *Ogoni Activism and Access to Remedy: Business and Human Rights from the Bottom Up*, 55 COLUM. HUM. RTS. L. REV. (forthcoming 2024) (manuscript at 64–84) (on file with author) (discussing Global South corporate accountability litigation as example of bottom-up lawmaking). For a domestic analogy in the LGBTQ rights issue space, see Douglas NeJaime, *The View from Below: Public Interest Lawyering, Social Change, and Adjudication*, 61 UCLA L. REV. DISCOURSE 182, 193 (2013) (“Viewing *Perry* and *Windsor* through this lens [that focuses “on lawyers, activists, and clients, rather than judges” and on “the claims-making process, rather than the act of adjudication”], students would emerge with a more nuanced, bottom-up, decentered, and ultimately accurate understanding of the role of law and courts in social change.”); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064 (2002) (“[M]ost twentieth century changes in the constitutional protection of individual rights were driven by or in response to the great identity-based social movements (“IBSMs”) of the twentieth century.”); *id.* at 2066 (“Many of the Supreme Court’s most radical doctrinal innovations in the last century were originally developed and pressed (often for decades) by social movement or countermovement lawyers.”); and *id.* at 2353–54 (“[N]o theory of constitutional law can be adequate or successful which does not centrally involve IBSMs and their jurisprudence. These social movements and their countermovements have been testing grounds that have deepened the insights and revealed the deficiencies of the big jurisprudential schools of the twentieth century—legal realism and legal process—and have generated a third, critical theory.”).

162. See, e.g., MARY ANN GLENDON, *supra* note 27; Klarman, *supra* note 27; ROSENBERG, *supra* note 158.

163. See, e.g., Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law*

In the following Part, I focus on decriminalization in the Global South and on the forms of transnational litigation network intervention by Global North actors, which began in the 2010s.

II. INTERVENTIONS AND OUTCOMES IN THE GLOBAL SOUTH

In this Part, I introduce the central players in the transnational decriminalization litigation network. I analyze the forms of intervention that these and other actors in the transnational decriminalization litigation network have undertaken. I identify and discuss three main approaches: (1) litigation support; (2) direct legal representation; and (3) third-party intervention as interested party or as *amicus curiae*.

A. *The Transnational Decriminalization Litigation Network in the Global South*

Beginning in the mid- to late-2000s, activists in Africa, the Caribbean, and in Europe began to think proactively about decriminalization, not just locally, but regionally and globally. In the distinct political atmosphere of the small island nation-states of the Commonwealth Caribbean, the transnational decriminalization litigation network first began to crystallize with the founding of the University of the West Indies Rights Advocacy Project (“U-RAP”) in 2009.¹⁶⁴ In the words of U-RAP co-founders Arif Bulkan and Tracy Robinson:

The centrepiece of U-RAP’s work is collaborative and strategic litigation that questions the constitutionality of two very different colonial criminal laws regulating sex and gender—one, an indictable offence which criminalises ‘unnatural’ sex in Belize, and the other, a summary offence in Guyana criminalising cross-dressing in public for an ‘improper purpose.’¹⁶⁵

U-RAP thus functioned as a strategic entrepreneur within the region—bringing to the Caribbean a litigation strategy that had succeeded in the Global North. Once Bulkan and Robinson were able to institutionalize their agenda

and Organizing, 48 UCLA L. REV. 443, 445, 456–69 (2001) (discussing critiques to idea of lawyers as social change agents and community organizing); Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 608–19 (2009).

164. Arif Bulkan & Tracy Robinson, *Enduring Sexed and Gendered Criminal Laws in the Anglophone Caribbean*, 11 CARIBBEAN REV. GENDER STUD. 219, 221 (2017) (“In 2009, we established the Faculty of Law, the UWI Rights Advocacy Project (U-RAP) . . .”). There are twelve independent states in the Commonwealth Caribbean. The Bahamas, which was the first to decriminalize, did so legislatively in 1991. *Country Assessment: The Bahamas*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/reform/countries/bahamas> [<https://perm.a.cc/QA6U-NX26>] (last visited Feb. 13, 2025). The five British Overseas Territories in the Caribbean that are not independent states decriminalized legislatively beginning in 2001, via an order from the UK Privy Council. Caribbean Territories (Criminal Law) Order 2000 (PC 2000).

165. Bulkan & Robinson, *supra* note 164, at 222. In addition to Bulkan and Robinson, the third co-founder of U-RAP was UWI law faculty member Douglas Mendes. *Id.* at 239 n.1.

through U-RAP, they were able to operate less in an ad hoc fashion and more like a policy lab or law school clinic.

In 2011, two years after U-RAP was founded, Tim Otty of Blackstone Chambers and Jonathan Cooper of the UK law firm Doughty Street Chambers helped to found Human Dignity Trust (“HDT”). It was founded as a response to the “Kill the Gays” bill that was working its way through the Uganda legislative process.¹⁶⁶ Human Dignity Trust engages in direct representation and third-party intervention in strategic litigation¹⁶⁷ and provides technical assistance to governments contemplating decriminalization and passage of sexual orientation non-discrimination and protection laws.¹⁶⁸ The organization itself is a transnational network, consisting of a permanent staff and a board of directors; “Patrons,” who are former judges and attorneys general;¹⁶⁹ a “Legal Panel,” which is an assemblage of prominent international firms;¹⁷⁰ a “Bar Panel,” which is an assemblage of individual attorneys primarily from the United Kingdom;¹⁷¹ and a “Commonwealth Group of Experts,” which is an assemblage of lawyers and law scholars who write papers and reports and drafts legislation.¹⁷² According to the HDT website, “the Trust has provided local activists and civil society organisations across five continents with access to over £22 million worth of *pro bono* technical legal assistance since 2011.”¹⁷³ The lawyers of Human Dignity Trust represent the professionalization of the transnational decriminalization litigation network—serving largely as in-house counsel for the decriminalization movement.¹⁷⁴

166. HUM. DIGNITY TR., *DEFENDING DIGNITY: A DECADE OF CHAMPIONING THE RIGHTS OF LGBT PEOPLE 5* (2021), <https://www.humandignitytrust.org/wp-content/uploads/2021/11/HDT10-Defending-Dignity-spreads.pdf> [<https://perma.cc/SCJ7-5BZR>] (last visited Feb. 13, 2025) (discussing the impetus provided by the Uganda bill); FARMER, *supra* note 46, at 92.

167. See *Strategic Litigation*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/what-we-do/cases> [<https://perma.cc/9C6W-3XSE>] (last visited Feb. 13, 2025).

168. *Changing Laws, Changing Lives*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/what-we-do/legislative-reform> [<https://perma.cc/3XCP-HWRA>] (last visited Feb. 13, 2025).

169. *Our Patrons*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/who-we-are/our-patrons> [<https://perma.cc/RU77-NZKX>] (last visited Feb. 13, 2025).

170. These include: Debevoise & Plimpton, LLP; Dechert, LLP; DLA Piper, LLP; Freshfields Bruckhaus Deringer, LLP; Herbert Smith Freehills, LLP; and Taylor Wessing, LLP. *Legal Panel*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/who-we-are/legal-panel> [<https://perma.cc/S4YA-47VT>] (last visited Feb. 13, 2025).

171. *Bar Panel*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/who-we-are/bar-panel> [<https://perma.cc/PW5A-CSK3>] (last visited Feb. 13, 2025).

172. *Commonwealth Group of Experts*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/who-we-are/commonwealth-group-of-experts> [<https://perma.cc/9U74-RUTU>] (last visited Feb. 13, 2025).

173. *Legal Panel*, *supra* note 170.

174. This is not to say that there were not professional lawyers involved in Global South decriminalization before Human Dignity Trust. In addition to Anand Grover, the attorney protagonist behind decriminalization in India, perhaps the most noteworthy of these might be Maurice Tomlinson, who served on the boards of J-FLAG and AIDS-Free World. The latter filed the first Inter-American Commission complaint against an anti-sodomy law in the Commonwealth Caribbean on August 16, 2011, on behalf of two

In 2015, activists at a “litigation and advocacy” workshop decided to challenge anti-sodomy laws within the smaller subregion of the Eastern Caribbean.¹⁷⁵ Human Dignity Trust provided “strategic and technical assistance.”¹⁷⁶ These activists and others formed the Eastern Caribbean Alliance for Diversity and Equality (“ECADE”) and first convened a meeting in 2017.¹⁷⁷ ECADE is an alliance of thirty-one organizations in nine countries in the Caribbean.¹⁷⁸ ECADE indicated that it would lead a coordinated litigation challenge against buggery laws in five countries in the Eastern Caribbean.¹⁷⁹

anonymous petitioners—S.H. (a gay man) and T.B. (a transgender woman). T.B. & S.H. v. Jamaica, Case 13.095, Inter-Am. Comm’n H.R., Report No. 401/20, OEA/Ser.L/V/II, doc. 419 (2020). Although the petition overlaps almost perfectly with Gareth Henry & Simone Edwards’ petition filed four months later, *see* Henry & Edwards v. Jamaica, Case 13.637, Inter-Am. Comm’n H.R., Report No. 400/20, OEA/Ser.L/V/II, doc. 418 (2020), the two petitions were independent of each other. Tomlinson also litigated freedom of speech and freedom of expression cases *Tomlinson v. Television Jam. Ltd.*, [2020] JMCA Civ 52 (Jam.). The NGO AIDS-Free World produced a commercial drawing attention to homophobia and transphobia in Jamaica. *See* HIV Legal Network, “*Love and Respect*,” YouTube (July 20, 2015), <https://youtu.be/AZwCW1LREXk?si=lcuCjrlaXoXRmsA> [<https://perma.cc/G4FC-BUHN>]. Tomlinson also filed challenges to the anti-LGBTQ immigration bans of Belize and Trinidad and Tobago as violations of freedom of movement and of the prohibition on nationality discrimination guaranteed under Caribbean regional international treaty law. *See* *Tomlinson v. State of Belize & State of Trin. & Tobago*, [2016] CCJ 1 (OJ). Tomlinson’s legal team included U-RAP co-founder Douglas Mendes as well as Westmin James. *Id.* at 1. Mendes and James have represented several decriminalization plaintiffs in the Caribbean, including plaintiffs in Belize, Jamaica, Antigua and Barbuda, and Barbados. *See* *Orozco v. Att’y Gen.*, Claim No. 668 of 2010, (2016) 90 WIR 161 (Belize); *Henry & Edwards v. Jamaica*, Case 13.637, Inter-Am. Comm’n H.R., Report No. 400/20, OEA/Ser.L/V/II, doc. 418 (2020); *Orden David v. Att’y Gen.*, Claim No. ANUHCV2021/0042 (High Ct. 2022) (Ant. & Barb.); *Holder-McClean-Ramirez v. Att’y Gen.*, Claim No. CV-0044 of 2020 (High Ct. 2023) (Barb.).

175. Colin Stewart, *Lawyers, Activists Target Anti-LGBT Bias in Caribbean*, ERASING 76CRIMES (Sept. 24, 2015), <https://76crimes.com/2015/09/24/lawyers-activists-target-anti-lgbt-bias-in-caribbean> [<https://perma.cc/4VE7-32FW>] (the workshop was organized by United & Strong Inc., St Lucia, and GrenCHAP, Grenada).

176. *Eastern Caribbean: Constitutional Challenges to Multiple Laws Criminalising Same-Sex Activity*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/what-we-do/cases/eastern-caribbean> [<https://perma.cc/6P3W-A6EG>] (last visited Feb. 13, 2025); *OECs Discusses LGBT Stigma and Discrimination*, DOMINICA NEWS ONLINE (Sept. 23, 2015, 11:28 AM), <https://dominicanewsonline.com/news/homepage/news/general/oecs-discusses-lgbt-stigma-and-discrimination> (among the participants were “persons sharing experiences of litigation in Jamaica and Belize. Representatives of CVC [Caribbean Vulnerable Communities], Heartland Alliance, Arcus Foundation, Human Dignity Trust, Open Society Foundation and the Canadian HIV AIDS Legal Network brought a wealth of knowledge on, and resources for, litigation and advocacy within the Caribbean.”).

177. *See About ECADE*, ECADE, <https://eequality.org/about-ecade> [<https://perma.cc/EAX7-R8WT>] (last visited Feb. 13, 2025) (“The first general meeting of ECADE, in February 2017 on St. John’s, Antigua, saw attendance by representatives of seventeen (17) organisations.”).

178. *See id.*

179. *See Justice Is Never Given, It Is Won: How Eastern Caribbean Activists Developed the Successful Strategy to Defeat the Laws Which Criminalised LGBT People.*, UNAIDS

Operating as a coordinating body and as something of a secretariat, ECADE embodies the bureaucratization of the transnational decriminalization movement in the Caribbean.

B. *Litigation “Support” by Global North Actors*

With the crystallization of the decriminalization norm in the Global North by the end of the 1990s, some Global North activist organizations turned their attention to providing litigation support in the Global South. Even before Human Dignity Trust, another London-based human rights organization, Interights, sought to assist in decriminalization litigation in Fiji by providing advice about human rights case law.¹⁸⁰

Similarly, shortly after its founding, Human Dignity Trust provided support in Singapore in a constitutional challenge to Singapore’s “gross indecency” law.¹⁸¹ Interestingly, in this case, Human Dignity Trust actually advised the plaintiffs *not* to pursue litigation because it viewed the constitutional framework as unsupportive of LGBTQ rights. Obviously, the plaintiffs proceeded to file their claim, and HDT continued to support them.¹⁸²

(Aug. 31, 2022) [hereinafter *Justice Is Never Given, It Is Won*], https://www.unaids.org/en/resources/presscentre/featurestories/2022/august/20220831_decriminalization-strategy-eastern-caribbean [<https://perma.cc/2SGL-QLL3>] (discussing ECADE litigation resulting in nullification of St. Kitts and Nevis law criminalizing private same-sex intimacy and similar litigation in Antigua and Barbuda, Barbados, Grenada, and St. Lucia); *Eastern Caribbean: Constitutional Challenges to Multiple Laws Criminalising Same-Sex Activity*, *supra* note 176 (“[A]ctivists in the region embarked on strategic litigation to challenge these laws, including in Antigua & Barbuda, Barbados, Grenada, St Kitts & Nevis and St Lucia, as a violation of domestic constitutional law and international human rights law.”). Further, the “abominable crime of buggery” is a synonym of sodomy and refers to same-sex intimacy between men. See Westmin R. A. James, *Privacy in Commonwealth Caribbean Law: Emerging Trends in the Protection of Sexual Citizenship*, 44 COMMONWEALTH L. BULL. 237, 245 (2018) (stating St. Kitts and Nevis, Antigua and Barbuda have enforceable laws “which make consensual male same-sex intimacy illegal and punishable with imprisonment” and the “abominable crime of buggery is punishable with up to 10 years imprisonment” (internal quotation marks omitted)).

180. *Landmark Fiji High Court Case Invalidates Laws Criminalising Homosexual Sex*, INTERIGHTS, https://interights.org/page-php_dir_about_page_equalityprogramme_activities.html [<https://perma.cc/6DHS-ZXXJ>] (last visited Feb. 13, 2025) (“INTERIGHTS provided the appellant’s lawyer . . . with comprehensive advice on international and comparative law relating to equality and privacy. . . . The case was the first to test the constitutional protection against sexual orientation discrimination in the Fiji Islands.”).

181. *Singapore’s Court of Appeal Rules in Favour of Keeping Country’s Anti-Gay Law*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/news/singapores-court-of-appeal-rules-in-favour-of-keeping-countrys-anti-gay-law> [<https://perma.cc/C8QK-6Z26>] (last visited Feb. 13, 2025) (discussing challenge to Singapore law outlawing same-sex activity and noting Human Dignity Trust “provided technical legal assistance to support the challenge”). See generally *Lim Meng Suang v. Att’y Gen.*, [2014] SGCA 53, ¶ 190 (Sing.) (dismissing appeals by parties seeking to challenge law criminalizing same-sex sexual activity as “there is nothing that this court can do to assist them” and “their remedy lies . . . in the legislative sphere”).

182. FARMER, *supra* note 46, at 118.

In addition to providing litigation support in the background, Global North actors sometimes serve as counsel of record. This is perhaps most likely where HDT represents aggrieved individuals filing individual complaints or communications before international courts and quasi-judicial human rights mechanisms. For example, HDT lawyers represented Gareth Henry and Simone Carline Edwards in submitting their successful complaint against Jamaica to the Inter-American Commission.¹⁸³ Jonathan Cooper, HDT's founding director, represented an individual petitioner submitting a European Court of Human Rights claim against Northern Cyprus.¹⁸⁴ Human Dignity Trust also represented Rosanna Flamer-Caldera in filing her individual complaint before the CEDAW Committee against Sri Lanka's anti-sodomy law.¹⁸⁵

Human Dignity Trust has also provided legal representation in domestic court cases, however. The Commonwealth jurisdictions have generous rules regarding legal representation within their jurisdictions. These permissive rules grant access to Commonwealth attorneys in the Global North to provide legal counsel in decriminalization cases. And this is what allows HDT to make its interventions in domestic decriminalization cases based primarily on constitutional law. Global North attorneys that are members of HDT in some fashion or another sometimes make formal appearances as counsel in decriminalization litigation proceedings.

Generally speaking, HDT's track record of success in decriminalization litigation is striking. HDT publicly acknowledges participating in thirteen decriminalization challenges.¹⁸⁶ This includes cases where members of the HDT Bar Panel or Legal Panel were counsel of record or merely provided

183. *Jamaica: Case Decided by the Inter-American Commission on Human Rights*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/what-we-do/cases/jamaica-petition-before-the-inter-american-commission-on-human-rights-2> [<https://perma.cc/ACC2-HYTF>] (last visited Feb. 13, 2025) ("The Human Dignity Trust represented Mr Henry and Ms Edwards in this case. . . . Douglas Mendes SC and Edward Fitzgerald QC acted as counsel."). For the full report, see generally Henry & Edwards v. Jamaica, Case 13.637, Inter-Am. Comm'n H.R., Report No. 400/20, OEA/Ser.L/V/II, doc. 418 (2020).

184. *Northern Cyprus: Petition Before the European Court of Human Rights*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/what-we-do/cases/northern-cyprus-petition-before-the-european-court-of-human-rights> [<https://perma.cc/9TQE-68WK>] (last visited Feb. 13, 2025) (stating Human Dignity Trust was legal representative for the applicant, H.C., in case challenging Cyprus's criminal codes as applicant was afraid to live as gay man).

185. See *Flamer-Caldera v. Sri Lanka*, Commc'n No. 134/2018, U.N. Doc. CEDAW/C/81/D/134/2018, at 1 (Comm. on the Elimination of Discrimination Against Women Mar. 23, 2022) (noting the communication was submitted by Rosanna Flamer-Caldera, represented by counsel, the Human Dignity Trust; Christine Chinkin, of the London School of Economics; Karon Monaghan QC, of Matrix Chambers; Keina Yoshida, of Doughty Street Chambers; and Olivia Clark, of DLA Piper).

186. The thirteen cases are from Belize, Jamaica, Singapore (two cases), Northern Cyprus, Sri Lanka, Mauritius, the Eastern Caribbean (five cases), and Namibia. *Strategic Litigation*, *supra* note 167 (listing cases where Human Dignity Trust provided public support).

support. Of the ten that have reached a decision on the merits, eight were successful.¹⁸⁷

C. *Global North Actors Intervening Separately from Plaintiffs*

In addition to serving as legal counsel or providing support to local counsel, Global North actors can intervene separately from the lead named plaintiffs in a decriminalization challenge. Commonwealth states have a unique mechanism in civil litigation that allows non-parties to petition the court to intervene as an “interested party.”¹⁸⁸ This mechanism allows non-parties to make written and oral submissions to the court during a hearing.¹⁸⁹ It also permits interested parties to file appeals.¹⁹⁰ Being added to litigation as an interested party is a step up from simply filing an *amicus curiae* brief, which comes with no privileges in a legal hearing and no appellate rights or privileges.¹⁹¹

The interested party mechanism has been used on occasion by actors within the transnational decriminalization litigation network to participate in decriminalization cases.¹⁹² This mechanism can be used whether the inter-

187. Litigation against Northern Cyprus never reached the merits. *See Northern Cyprus: Petition Before the European Court of Human Rights*, *supra* note 184 (“On 27 January 2014, however, the Northern Cyprus Parliament – prompted in part by this litigation – passed legislation repealing the anti-homosexuality laws effectively bringing the court proceeding to a conclusion.”). HDT failed twice in Singapore’s courts. *See Singapore’s High Court Upholds Discriminatory Colonial-Era Anti-Gay Law*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/news/singapores-high-court-upholds-discriminatory-colonial-era-anti-gay-law> [<https://perma.cc/8EHY-DNAJ>] (last visited Feb. 13, 2025). Parliament ultimately repealed the law. *See infra* note 203. Grenada and St. Lucia are still pending. *See Eastern Caribbean: Constitutional Challenges to Multiple Laws Criminalising Same-Sex Activity*, *supra* note 176 (discussing Eastern Caribbean cases).

188. *See, e.g., Orozco v. Att’y Gen.*, Claim No. 668 of 2010, (2016) 90 WIR 161 (Belize); *Jones v. Att’y Gen.*, Claim No. CV2017–00720 (High Ct. Just. 2018) (Trin. & Tobago).

189. *See, e.g., Abdool Ridwan Firaas Ah Seek v. State of Mauritius*, No. 119259, 2023 SCJ 399 (Mauritius). It is also possible for non-parties to submit evidence via affidavit. *See, e.g., Jamal Jeffers v. Att’y Gen.*, Claim No. SKBHCv2021/0013, ¶ 111 (High Ct. Just. 2022) (St. Kitts & Nevis) (describing the affidavit of Pastor Everton Matthew, Chairperson of the Evangelical Association of St. Kitts, an association of more than thirty churches).

190. In Belize, when the Attorney General appealed the decision of the Supreme Court, two of the interested parties—the International Commission of Jurists and the Commonwealth Lawyers Association—attained the status of Respondents. *Att’y Gen. v. Orozco*, Civil Appeal No. 32 of 2016, ¶ 2 (2019) (Belize). In India, B.P. Singhal, who had intervened in *Naz Found. v. Government of NCT of Delhi*, filed a Special Leave Petition (“SLP”) after the government declined to appeal the Delhi High Court ruling. He was not the first to file an SLP, however. Suresh Kumar Kaushal, an astrologer, was. Kaushal and Singhal were joined by an assortment of actors defending Section 377, including the All-India Muslim Personal Law Board, Trust God Missionaries, Utkal Christian Council, Apostolic Churches Alliance, and Tamil Nadu Muslim Munnatra Kazhagam. *Suresh Kumar Koushal v. Naz Found.*, AIR 2014 SC 563 at ¶ 5, 15 (India).

191. *See* Shai Farber, *The Amicus Curiae Phenomenon—Theory, Causes and Meanings*, 29 TRANSNAT’L L. & CONTEMP. PROBS. 1, 9–13 (2019) (discussing *amicus curiae* and other forms of third-party intervention in non-U.S. common law systems).

192. *See, e.g., Orozco*, Claim No. 668 of 2010 (Belize).

ested party has coordinated with the lead plaintiff or is acting independently.¹⁹³ Perhaps it is most important when the lead plaintiff (or criminal defendant) *has* acted independently—without coordinating a grassroots mobilization, without considering policy rationales supporting decriminalization, or without advancing persuasive constitutional or international legal arguments.¹⁹⁴ For example, more than one year after Caleb Orozco filed a decriminalization challenge in Belize, Human Dignity Trust intervened as an interested party supporting decriminalization.¹⁹⁵ But, as I discuss in greater detail in Part IV, such uncoordinated intervention, especially to raise international legal arguments, might actually undermine the social change goals of some decriminalization activists if they contribute to anti-colonial backlash.¹⁹⁶

In addition to providing legal representation to decriminalization activists in the Global South, actors within the transnational decriminalization litigation network can intervene as *amicus curiae*. As with intervening as an interested party, the purpose of *amicus* practice can be to bring foreign and international jurisprudence to the attention of the adjudicators. This practice also has deep roots in decriminalization strategy. For example, to support his holding in *Lawrence v. Texas*, Justice Kennedy refers to judicial decriminalization cases

193. The mechanism is open to conservative actors and not just to decriminalization advocates, a countermobilization practice that I discuss in Part III.

194. This might have been the case in Kenya, where, following Eric Gitari's submission, eight individuals and organizations filed a second petition, ten individuals and organizations intervened as interested parties, and two organizations filed *amicus* briefs. *See* EG v. Att'y Gen. (2019) KEHC 11288 (KLR) (H.C.K.) (Kenya) (consolidating Petitions No. 156 & 234 of 2016).

195. Lord Peter Goldsmith, an HDT Bar Panel member, and Godfrey Smith represented the interested parties. *Orozco*, Claim No. 668 of 2010, at 1–2 ("Appearances"). Two other transnational NGOs joined the intervention: the International Commission of Jurists and the Commonwealth Lawyers Association. *Id.*; *Hamel-Smith Says Church Doctrine Not Universally Against Decriminalization*, 7 NEWS BELIZE (May 8, 2013), <https://www.7newsbelize.com/sstory.php?nid=25439> [<https://perma.cc/F5Q3-SXZT>] (stating Lord Peter Goldsmith, among others, appears on behalf of the Commonwealth Lawyers Association, the Human Dignity Trust, and the International Commission of Jurists, all in support of Orozco). Godfrey P. Smith was Attorney General of Belize (1999–2003) before becoming Belize's Minister of Foreign Affairs, Defence and National Emergency Management Organization (2003–2006). *Hon. Godfrey P. Smith*, THE ATT'Y GEN.'S MINISTRY & MINISTRY OF FOREIGN AFFS. & COOP., https://archive.is/20061004214017/http://www.belize.gov.bz/cabinet/g_smith/minister.html [<https://perma.cc/2PTX-UTNH>] (last visited Feb. 13, 2025).

196. *See, e.g.*, Lennox & Waites, *supra* note 36, at 41–42 (providing multiple quotes demonstrating Caribbean activists' concerns with the toxic consequences of organization's intervention in cases not belonging to them); Novak, *supra* note 24, at 352–53 (addressing concerns that foreign intervention poses as much risk as it does benefits for those living in post-colonial countries).

by the European Court of Human Rights¹⁹⁷ and cites to an amicus brief discussing foreign and international law.¹⁹⁸

In Global South decriminalization cases, the amicus practice is arguably underutilized. There is some use of amicus practice by local NGOs but relatively little from Global North actors.¹⁹⁹ My explanation for this is that the existence of the interested party mechanism and the permissive nature of Commonwealth courts' interested party procedural rulings makes amicus practice largely superfluous. There is some overlap between the technical aspects of each, in terms of the rights afforded or denied to actors intervening in this way. As a practical matter, however, Global North actors intervening in domestic courts in Commonwealth countries mostly utilize the interested party mechanism, while the few instances of amicus filings involve local rather than Global North actors in domestic courts.

D. *Global South Litigation Outcomes*

The case outcomes are simple to summarize. In fifteen of the twenty-three jurisdictions where decriminalization advocates have filed cases in the Global South, they have succeeded in court: their legal mobilization resulted in decriminalization, innovative jurisprudence, and strategic spillover.²⁰⁰ On

197. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981); *P.G. & J.H. v. United Kingdom*, App. No. 00044787/98, ¶ 56 (Sept. 25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993); and *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988)); *id.* ("The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*.").

198. *Lawrence*, 539 U.S. at 576–77 (citing Brief Amici Curiae of Mary Robinson et al. in Support of Petitioners at 10–13, 26–29, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02–102)) ("Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.").

199. In a decriminalization case in Kenya, for example, a domestic NGO and a domestic quasi-governmental entity filed amicus briefs. See *EG* (2019) KEHC 11288, ¶¶ 3–20 (Kenya) ("The Parties"). In Rosanna Flamer-Caldera's successful complaint before the CEDAW Committee, Professor Diane Otto, of University of Melbourne, submitted what the Committee refers to as a "third-party intervention." Flamer-Caldera v. Sri Lanka, Comm'n No. 134/2018, U.N. Doc. CEDAW/C/81/D/134/2018, at ¶ 7.3 n.18 (Comm. on the Elimination of Discrimination Against Women Mar. 23, 2022) ("The third-party intervention was authored by Dianne Otto, Professorial Fellow at Melbourne Law School.").

200. In two instances of successful transnational litigation before quasi-judicial human rights mechanisms, the target states have not complied with the judgments yet. *Henry & Edwards v. Jamaica*, Case 13.637, Inter-Am. Comm'n H.R., Report No. 400/20, OEA/Ser.L/V/II, doc. 418, ¶ 119 (2020) ("Jamaica has not taken any additional steps to comply with any of the Commission's Recommendations since the approval of report No. 249/20."); Flamer-Caldera, U.N. Doc. CEDAW/C/81/D/134/2018, at ¶ 11 (listing committee's recommendations to the State party and mandating State party to give due consideration to committee's views). In 2022, a Private Member's Bill to amend Sections 365 and 365A of the Penal Code, which criminalize same-sex sexuality activity, was presented to the Parliament. *Where We Work*, EQUAL GROUND, <https://www.equal-ground.org/our-work> [<https://perma.cc/JZS9-AJSY>] (last visited Feb. 13, 2025) (stating introduction and aim of the bill under "Litigation by EQUAL GROUND"). In May 2023, the Supreme Court of Sri Lanka ruled on the constitutionality of this bill and determined that it is not unconstitutional and is consistent

the other hand, judges in eight jurisdictions have rejected decriminalization claims.²⁰¹ While these failed cases are too few to identify any concrete patterns, it is noteworthy that two of the eight were very early criminal defendant cases that were not the product of transnational decriminalization networks or even any local grassroots social movement activism.²⁰² Moreover, in two of the eight jurisdictions, subsequent litigation succeeded in invalidating the anti-sodomy laws, and in a third, the Court of Appeal effectively imposed a moratorium on the “gross indecency” law, which resulted in parliament repealing the law.²⁰³

Against the backdrop of overwhelming courtroom success of the decriminalization legal mobilization in the Global South, one must consider its shortcomings. In Parts III and IV, I discuss two critiques of the decriminalization and broader LGBTQ rights agenda and of transnational litigation networks. In Part III, I address the first critique—human rights imperialism.

with upholding the dignity of human beings. *Id.*; *Sri Lanka*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/country-profile/sri-lanka/> [<https://perma.cc/APX4-QKFF>] (last updated Feb. 6, 2025) (quoting Supreme Court’s opinion that the bill is not unconstitutional). In November 2023, the Human Rights Commission of Sri Lanka recommended to the government the repeal of Sections 365 and 365A of the Penal Code. *See* Letter from Justice L.T.B. Dehideniya, Chairman, Hum. Rts. Comm’n of Sri Lanka to Minister of Justice, Prison Affs., and Const. Reforms, *Recommendation to Repeal / Amend Sections 365 and 365A of the Penal Code* (Nov. 22, 2023), <https://www.hrcsl.lk/wp-content/uploads/2023/11/HRCSL-Letter-to-Minister-of-Justice-re.-Penal-Code-on-22-11-2023.pdf> [<https://perma.cc/J5F5-ZNB7>] (“The said observations were made in the Court’s determination on the constitutionality of a Private Member’s Bill to amend section 365 and repeal section 365A.”).

201. *Banana v. State*, [2000] 4 LRC 621, 622 (Zim.) (holding the criminalization of sodomy in Zimbabwe was not unconstitutional); *Kanane v. State*, [2003] (2) BLR 67 (CA) (Bots.) (holding that the time had not yet arrived to decriminalize homosexual practices between consenting adult males in Botswana); *Suresh Kumar Koushal v. NAZ Found.*, AIR 2014 SC 563 (India) (holding that Section 377 of the Indian Penal Code, which criminalizes consensual sexual acts of adults in private, is not unconstitutional); *Tan Eng Hong v. Att’y-Gen.*, Originating Summons No. 488 of 2010, [2011] SGHC 56, ¶¶ 24–27 (Sing.) (striking out petitioner’s claim that section 377A of the Penal Code contravened the Constitution); *Lim Meng Suang v. Att’y-Gen.*, Civil Appeals Nos. 54 & 125 of 2013, [2014] SGCA 53, ¶ 181–87 (Sing.) (holding section 337A of the Penal Code is reasonable and does not violate the Constitution); *EG* (2019) KEHC 11288, ¶ 405 (Kenya) (finding the impugned sections are not unconstitutional); *Johnson v. Att’y Gen.*, SVGHCv2019/0110 & SVGHCv2019/0111 (consolidated), ¶ 88 (High Ct. Just. 2024) (St. Vincent) (dismissing claimants’ complaints challenging statutes criminalizing homosexual activity).

202. *Banana*, [2000] 4 LRC at 622 (stating Zimbabwe’s conservative society does not put it at the forefront of “liberal democracy in sexual matters”); *Kanane*, [2003] (2) BLR 67 (CA) (finding no evidence that Botswana’s society had evolved to demand the decriminalization of homosexual practices).

203. Following the High Court ruling, Singapore’s Court of Appeal ruled the law unenforceable in its entirety and opined that it might violate the right to equality. *See Singapore: Two Separate Cases Before the Court of Appeal*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/what-we-do/cases/singapore-two-separate-cases-before-the-court-of-appeal/> [<https://perma.cc/J8TS-FSUU>].

III. TRANSNATIONAL LITIGATION NETWORKS AS HUMAN RIGHTS IMPERIALISM

States and their societies have not universally implemented pro-LGBTQ law and policies, much less internalized LGBTQ human rights norms everywhere that activists have mobilized.²⁰⁴ Indeed, mobilization has often resulted in a vigorous backlash against LGBTQ human rights norms—in Europe²⁰⁵ and the United States,²⁰⁶ as well as anticipatory countermovements²⁰⁷ in some parts of the Global South,²⁰⁸ and thus caused what some have termed “norm polarization.”²⁰⁹

In this Part, I discuss the critique of human rights imperialism, which underpins much of the countermobilization and backlash that is taking place during decriminalization challenges and sometimes in advance of any decriminalization challenge being filed. I argue that decriminalization is too important a steppingstone to the broader pursuit of LGBTQ human rights to cede the ground entirely to the conservative status-quo maintaining forces in society.

204. Phillip M. Ayoub, *Contested Norms in New-Adopter States: International Determinants of LGBT Rights Legislation*, 21 EUR. J. INT'L RELS. 293, 293–97 (2015) [hereinafter Ayoub, *Contested Norms in New-Adopter States*] (analyzing changes in different EU countries' LGBTQ rights legislations between 1970 and 2009).

205. See, e.g., Phillip M. Ayoub, *With Arms Wide Shut: Threat Perception, Norm Reception, and Mobilized Resistance to LGBT Rights*, 13 J. HUM. RTS. 337, 337–38 (2014) [hereinafter Ayoub, *With Arms Wide Shut*].

206. See, e.g., Michael J. Klarman, Brown and Lawrence (and Goodridge), 104 MICH. L. REV. 431, 431–32 (2005); ROSENBERG, *supra* note 28, at 361–68 (discussing same-sex marriage opponents, focusing on efforts of conservative religious groups to lobby for constitutional change); LOREN CANNON, *THE POLITICALIZATION OF TRANS IDENTITY: AN ANALYSIS OF BACKLASH, SCAPEGOATING, AND DOG-WHISTLING FROM OBERGEFFEL TO BOSTOCK* 81 (2022) (focusing on a “conceptual analysis of the term ‘backlash’ and . . . the political climate of anti-trans sentiment and policy”).

207. See, e.g., Meredith L. Weiss, *Prejudice Before Pride: Rise of an Anticipatory Countermovement*, in GLOBAL HOMOPHOBIA: STATES, MOVEMENTS, AND THE POLITICS OF OPPRESSION 149, 149 (Meredith L. Weiss & Michael J. Bosia eds., 2013) (“[T]ransnational discursive flows in particular may . . . shift the sequence, yielding a form of anticipatory countermobilization.”).

208. See, e.g., Rahul Rao, *The Locations of Homophobia*, 2 LONDON REV. INT'L L. 169 (2014) (discussing Uganda); Anthony J. Langlois, *Making LGBT Rights into Human Rights*, in THE OXFORD HANDBOOK OF GLOBAL LGBT AND SEXUAL DIVERSITY POLITICS 75, 83–85 (Michael J. Bosia, Sandra M. McEvoy & Momin Rahman eds., 2020) (discussing Southeast Asia); Lennox & Waites, *supra* note 36, at 41–42 (discussing activist concerns regarding mobilization in the Caribbean); Bruce M. Wilson & Camila Gianella-Malca, *Overcoming the Limits of Legal Opportunity Structures: LGBT Rights' Divergent Paths in Costa Rica and Colombia*, 61 LATIN AM. POL. & SOC'Y 138 (2019) (discussing different pathways to LGBT rights and results through case studies of Costa Rica and Colombia).

209. See Jonathan Symons & Dennis Altman, *International Norm Polarization: Sexuality as a Subject of Human Rights Protection*, 7 INT'L THEORY 61, 66 (2015) (“We define ‘international norm polarization’ as a ‘process wherein a candidate norm is accepted by some states but is resisted by others leading to a period of international disputation between two groups in each of which socializing pressures pull states toward compliance with rival norms.’”).

However, overly aggressive intervention into the politics of criminalizing states in the Global South can backfire, especially when conservatives or “traditionalists” invoke the anti-imperial frame. Counterintuitively, in order to mitigate anti-LGBTQ backlash, Global North actors might need to eschew utilization of the international human rights fora that their predecessors have used in successful decriminalization campaigns elsewhere.

A. *The Anti-Colonialism Frame*

The international human rights regime has been criticized as Eurocentric and neo-imperialist from its outset. When the United Nations adopted the Universal Declaration of Human Rights in 1948, only fifty-seven states had a vote. Most African and Asian countries were still under colonial rule; thus, their citizens had practically no say in the matter.²¹⁰ Some prominent criticism came from actors within the Global North, namely, the American Anthropological Association (“AAA”), which put out a critical *Statement on Human Rights* in 1947, even before the Universal Declaration was adopted.²¹¹ The AAA Statement laid the groundwork for the “universalism-versus-cultural-relativism” debate,²¹²

210. But see Susan Waltz, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights*, 23 HUM. RTS. Q. 44, 54–66 (2001) (detailing participation and contribution of various small powers, such as “Chile, Lebanon, China, Egypt, India, Panama, Philippines, and Uruguay,” in the historic development of the Universal Declaration of Human Rights).

211. 1947 *Statement on Human Rights*, AM. ANTHROPOLOGICAL ASS’N, <https://humanrights.americananthro.org/1947-statement-on-human-rights> [<https://perma.cc/AF7H-J7CK>] (last visited Feb. 13, 2025) (“What is held to be a human right in one society may be regarded as anti-social by another people or by the same people in a different period of their history.”).

212. Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 400–02 (1984) (explaining that relativism supports the idea that moral norms are culturally specific, while universalism asserts the global applicability of certain moral and human rights standards); Dianne Otto, *Rethinking the “Universality” of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 7 (1997) (“In 1947, the American Anthropological Society cautioned the U.N. Commission on Human Rights about this danger [of erasing cultural diversity] during the drafting of the UDHR.”); Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211, 213 (1999) (“This claim that the international law of human rights derived from universally valid absolute moral principles set the stage for the universalism-cultural relativism debate.”); Bonny Ibhawoh, *Cultural Relativism and Human Rights: Reconsidering the Africanist Discourse*, 19 NETH. Q. HUM. RTS. 43, 46–49 (2001) (“To enhance its legitimacy, the emerging universal human rights regime must draw upon the cultural peculiarities of each society.”); Roda Mushkat, *Culture and International Law: Universalism v. Relativism*, 6 SING. J. INT’L & COMP. L. 1028, 1028–33 (2002) (discussing the emergence of cultural relativism, its impact on and relation to a universalist conception of international law, and points of convergence and divergence).

for example, in controversies over female genital mutilation/circumcision,²¹³ veiling in Islam and among Muslim diasporic populations,²¹⁴ and Asian values.²¹⁵

Fast forward to the twenty-first century, and the divide between LGBTQ rights-affirming states and states insisting on sovereignty to maintain the status quo has begun hardening into what journalist Mark Gevisser has called the “global pink line.”²¹⁶ Gevisser’s “pink line” is not geographic, or at least not only geographic,²¹⁷ but temporal, given that the state of a country’s present level of LGBTQ human rights recognition is always measured against that country’s own past.²¹⁸ Nevertheless, the boundaries of the global pink link

213. See, e.g., Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 LAW & INEQ. 367, 395–98 (1989) (examining the “practical effects of the conflict between cultural relativism and human rights theory” through discussion of the international evaluation of the practice of female circumcision); Preston D. Mitchum, *Slapping the Hand of Cultural Relativism: Female Genital Mutilation, Male Dominance, and Health as a Human Rights Framework*, 19 WM. & MARY J. WOMEN & L. 585, 586, 597–98 (2013) (recognizing the role of both universality and cultural relativism in influencing human rights standards and views towards female genital mutilation, with references to the UDHR).

214. See, e.g., Reza Afshari, *An Essay on Islamic Cultural Relativism in the Discourse of Human Rights*, 16 HUM. RTS. Q. 235, 235–37 (1994) (exploring how Islamic laws are used to maintain social and political power while often disregarding individual rights, which are essential to the UDHR’s principles); Cyra Akila Choudhury, *Beyond Culture: Human Rights Universalisms Versus Religious and Cultural Relativism in the Activism for Gender Justice*, 30 BERKELEY J. GENDER L. & JUST. 226, 250–60 (2015) (“Liberal feminism in its universalist mode has yet to come to grips fully with its own cultural particularity and exclusionary history.”).

215. See, e.g., Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT’L L. & POL. 291, 308–10 (2000) (stating how relativism in AAA’s *Statement on Human Rights* spurred a reaction in the formation of the AAA’s Committee for Human Rights, which aims to protect cultural rights among others); Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates about “Values in Asia,”* 14 IND. INT’L & COMP. L. REV. 1, 14–17 (2003) (explaining the threat the Asian values debates have on the universality of human rights).

216. GEVISSER, *supra* note 63, at 8 (“[T]he Pink Line: a human rights frontier that divided and described the world in an entirely new way in the first two decades of the twenty-first century.”).

217. In 2014, the African Commission on Human and Peoples’ Rights adopted the landmark resolution on LGBTQ human rights—Resolution 275. Afr. Comm’n on Hum. and Peoples’ Rts. [ACHPR], *Resolution on Protection Against Violence and Other Human Rights Violations Against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity*, ACHPR/Res.275(LV) (2014), <https://achpr.au.int/en/adopted-resolutions/275-resolution-protection-against-violence-and-other-human-rights-violations> [<https://perma.cc/BL5X-L3US>] (condemning discrimination and violence against any individual on the basis of sexual orientation or gender identity); Clément Voule, *African Commission Landmark Resolution on LGBT Rights*, INT’L SERV. FOR HUM. RTS. (May 22, 2014), <https://ishr.ch/latest-updates/african-commission-adopts-landmark-resolution-lgbt-rights> [<https://perma.cc/8MEN-L3DB>] (“Africa’s peak human rights body has adopted a landmark resolution condemning violence and discrimination against gay, lesbian, bisexual and transgender persons.”).

218. See GEVISSER, *supra* note 63, at 118 (stating it is more accurate to understand the Pink Line as “a progression of eras, from an oppressive past to an egalitarian future”).

can appear particularly sharp between the Global North and the Global South, where the history of imperial and colonial rule makes ever salient any allegations of human rights imperialism.

In December 2008, just after the sixtieth anniversary of the Universal Declaration of Human Rights, a *Statement on Human Rights, Sexual Orientation and Gender Identity* garnered sixty-six signatories in the UN General Assembly.²¹⁹ State leaders from some African and majority-Muslim countries, who felt that the statement sought to interfere illegally in their domestic affairs,²²⁰ led the mobilization around the counter-declaration, which garnered approximately sixty signatories.²²¹ This preceded several examples of Global North actors taking a heavy-handed approach to the promotion of LGBTQ human rights.

For example, in Malawi in 2010, a transgender woman and a cisgender man were sentenced to fourteen years imprisonment with hard labor after newspapers announced their engagement.²²² Shortly thereafter, at a joint press

The pink line also may be used to denote norm polarization within a political community, or “culture wars.” Patrick Buchanan, in a speech at the Republican National Convention in 1992, was perhaps the first to declare explicitly the “culture wars” in the United States. See Patrick Buchanan, Culture War Speech, Address to the Republican National Convention (Aug. 17, 1992), in VOICES OF DEMOCRACY, <https://voicesofdemocracy.umd.edu/buchanan-culture-war-speech-speech-text> [<https://perma.cc/EQJ2-WHAW>] (“There is a religious war going on in this country. It is a cultural war, as critical to the kind of nation we shall be as was the Cold War itself, for this war is for the soul of America.”). But see MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY C. POPE, CULTURE WAR? THE MYTH OF A POLARIZED AMERICA 55–64 (Eric Stano ed., 2005) (using polling data to show notion of U.S. culture war over homosexuality is overblown).

219. See U.N. GAOR, 63d Sess., 70th plen. mtg. at 30, U.N. Doc. A/63/PV.70 (Dec. 18, 2008) (“We reaffirm the principle of universality of human rights, as established by the Universal Declaration of Human Rights, the sixtieth anniversary of which is celebrated this year.”); UN: General Assembly Statement Affirms Rights for All, HUM. RTS. WATCH (Dec. 18, 2008, 7:28 PM), <https://www.hrw.org/news/2008/12/18/un-general-assembly-statement-affirms-rights-all> [<https://perma.cc/9EWZ-GGY3>] (“66 nations at the UN General Assembly today supported a groundbreaking statement confirming that international human rights protections include sexual orientation and gender identity.”).

220. See U.N. GAOR, 63d Sess., 70th plen. mtg. at 30–31, U.N. Doc. A/63/PV.70 (Dec. 18, 2008); GEVISSER, *supra* note 63, at 34 (calling the statement and counter-declaration “the first Pink Line across the floor of the United Nations”).

221. FRÉDÉRIC MARTEL, GLOBAL GAY: HOW GAY CULTURE IS CHANGING THE WORLD 170 (Patsy Baudoin trans., MIT Press 2018) (2013) (stating Syria, on behalf of fifty-nine countries, led the initial read of the counterargument, and Turkey and six other OIC countries abstained).

222. Godfrey Mapondera & David Smith, *Malawian Gay Couple Jailed for 14 Years*, GUARDIAN (May 20, 2010, 6:11 AM), <https://www.theguardian.com/world/2010/may/20/malawian-gay-couple-jailed-14-years> [<https://perma.cc/XX33-NXGZ>] (“The first same sex couple in Malawi to seek marriage will now join a population of 12,000 inmates scattered throughout the country’s 23 prisons.”). Godfrey Mapondera & David Smith, *Human Rights Campaigners Attack Malawi Gay Couple Conviction*, GUARDIAN (May 18, 2010, 6:34 AM), <https://www.theguardian.com/world/2010/may/18/malawi-gay-couple-jailed> [<https://perma.cc/JZT3-BLRR>] (“Police prosecutor Barbra Mchenga asked the magistrate to mete out a harsh punishment because the couple had left a ‘scar on morality’ in Malawi.”). For a case study, see GEVISSER, *supra* note 63, at 42–69.

conference with UN Secretary General Ban Ki-moon,²²³ Malawian President Bingu wa Mutharika announced that he was pardoning the couple, but only due to international pressure.²²⁴ Despite what appeared a victory for LGBTQ human rights in Malawi, UK Prime Minister David Cameron's government cut aid to Malawi by nineteen million euro early in 2011; two misleading articles in the UK *Daily Mail* made it seem like the cuts were a direct response to the prosecution and imprisonment of the couple.²²⁵ Then, in October 2011, Cameron addressed the Commonwealth Heads of Government Meeting in Perth, Australia and indicated that LGBTQ human rights would be part of the British government's aid conditionality, sounding to the Global South leaders in attendance like a threat to withdraw aid.²²⁶ Two months later, President Obama followed his British counterpart when he made countries' LGBTQ records a criterion of U.S. foreign aid policy.²²⁷ In May 2012, Malawi's new president, Joyce Banda, announced a moratorium on enforcement of the country's anti-sodomy law as legislators contemplated repeal.²²⁸

Not surprisingly, what appeared to some Global South leaders as Cameron's "gunboat" diplomacy²²⁹ engendered protestations and assertions of sovereignty

223. The announcement coincided with Ban's visit to Malawi to discuss the Millenium Development Goals in the African region. *In Malawi, Ban Welcomes Pardoning of Gay Couple*, UN NEWS (May 29, 2010), <https://news.un.org/en/story/2010/05/340182> [<https://perma.cc/J2KD-M3F7>] (quoting Secretary-General Ban, "It is unfortunate that laws that criminalize people on the basis of their sexual orientation exist in some countries. They should be reformed"). Secretary-General Ban had been critical of the sentence. *Id.*

224. *See* GEVISSER, *supra* note 63, at 7–8 (quoting Bingu wa Mutharika on the pardoning: "the two had 'committed a crime against our culture, our religion and our laws.'").

225. FARMER, *supra* note 46, at 168–69.

226. *Id.* at 165–66; *see also* Abdul Musah Sidibe, *President Mills, Prime Minister Cameron and Homosexual Rights*, MOD. GHANA (Nov. 4, 2011), <https://www.modernghana.com/news/359362/president-mills-prime-minister-cameron-and-homosexual-right.html> (describing Ghanaian President Atta Mill's defensive response to Cameron's speech).

227. Karen McVeigh, *Obama Tells US Officials to Use Overseas Aid to Promote Gay Rights*, GUARDIAN (Dec. 6, 2011, 3:32 PM), <https://www.theguardian.com/world/2011/dec/06/us-overseas-aid-human-rights> [<https://perma.cc/URA5-FCJY>] ("A presidential memo issued on Tuesday instructs agencies using foreign aid to promote [LGBTQ] rights."); *see also* Robbie Corey-Boulet, *The Obama Administration's Bold but Risky Plan to Make Africa Gay-Friendly*, ATLANTIC (Mar. 7, 2012), <https://www.theatlantic.com/international/archive/2012/03/the-obama-administrations-bold-but-risky-plan-to-make-africa-gay-friendly/254086> ("A new U.S. initiative to improve the sub-Saharan's notoriously poor LGBT rights could already be inspiring a backlash.").

228. David Smith & Godfrey Mapondera, *Malawi President Vows to Legalise Homosexuality*, GUARDIAN (May 18, 2012, 1:05 PM), <https://www.theguardian.com/world/2012/may/18/malawi-president-vows-legalise-homosexuality> ("Banda said her government wanted to normalise relations with 'our traditional development partners who were uncomfortable with our bad laws.'"); *Malawi: Courageous Move to Suspend Anti-Gay Laws*, HUM. RTS. WATCH (Nov. 6, 2012, 12:15 AM), <https://www.hrw.org/news/2012/11/06/malawi-courageous-move-suspend-anti-gay-laws> [<https://perma.cc/2C6U-7GG7>].

229. *See* Gbenga Kayode, *Aid to Africa and UK's Gunboat Diplomacy*, PM NEWS NIGERIA (Nov. 28, 2011), <https://www.pmnewsnigeria.com/2011/11/28/aid-to-africa-and-uk-s-gunboat-diplomacy> ("[G]unboat diplomacy in form of a subtle threat of imminent foreign aid cuts to Africa . . . should be a cause for concern for African leaders and peoples.").

from Commonwealth leaders.²³⁰ Ghana's president, for example, declared that the UK "does not have the right to direct other sovereign nations as to what they should do especially where their societal norms and ideals are different from those that exist" in Britain.²³¹ Politicians in Uganda advancing the 2009 "Kill the Gays" bill invoked the anti-colonial frame as they responded to similar threats of aid conditionality.²³² Barbados Attorney General Adriel Brathwaite declared that "Barbados' position on homosexuality was not for sale and its legislative agenda would be determined at home."²³³ That the UK and several other governments did suspend aid to Uganda in 2012 only increased the salience of the anti-colonial frame, even if these aid cuts were due to corruption in Uganda rather than a pursuit of LGBTQ human rights.²³⁴ Then, in 2014, UK activists orchestrated a boycott of a chain of hotels owned by the Sultan of Brunei in response to the Kingdom passing a new law that applied the death penalty for sodomy.²³⁵

Many Global South governments later made clear their oppositional stance on LGBTQ human rights. In 2016, the United Nations Human Rights Council institutionalized LGBTQ human rights through the Independent Expert on sexual orientation and gender identity, or the "IE SOGI."²³⁶ The African Group of States fiercely opposed the creation of the IE SOGI;²³⁷ they led a failed effort to block the appointment, losing by a narrow margin of eighty-four to seventy-seven.²³⁸

230. FARMER, *supra* note 46, at 172–75; *Uganda Fury at David Cameron Aid Threat over Gay Rights*, BBC (Oct. 31, 2011), <https://www.bbc.com/news/world-africa-15524013> [<https://perma.cc/TRY3-8DTW>].

231. *I Will Never Support Legalizing Homosexuality, Ghana's President Says*, NAT'L POST (Nov. 2, 2011), <https://nationalpost.com/news/ghanas-president-vows-to-never-support-any-attempts-to-legalize-homosexuality> [<https://perma.cc/47DB-AXF8>]; see also Sidibe, *supra* note 226 (discussing Ghanaian President Atta Mills invoking divine authority and well as political sovereignty in his rejection of Cameron's speech tying British foreign aid to LGBTQ rights); FARMER, *supra* note 46, at 172–73.

232. FARMER, *supra* note 46, at 173–74.

233. See *Barbados Says Will Not Be Dictated to by UK on Gay Laws*, STABROEK NEWS (Nov. 3, 2011), <https://www.stabroeknews.com/2011/11/03/news/guyana/barbados-says-will-not-be-dictated-to-by-uk-on-gay-laws> [<https://perma.cc/M3JT-7MRN>]. Years later, Prime Minister Freundel Stuart echoed this stance. See Arshy Mann, *What Does Barbados' Prime Minister Have to Say About the Country's Harsh Buggery Laws?*, XTRA (Apr. 19, 2017, 2:54 PM), <https://xtramagazine.com/power/what-does-barbados-prime-minister-have-to-say-about-the-countrys-harsh-buggery-laws-73370> ("Barbados is still a predominately Christian society. . . . And we are reluctant to discard things that have worked for us over the last 50 years, for the better part of our history.").

234. Mark Tran & Liz Ford, *UK Suspends Aid to Uganda as Concern Grows over Misuse of Funds*, GUARDIAN (Nov. 16, 2012, 11:56 AM), <https://www.theguardian.com/global-development/2012/nov/16/uk-suspends-aid-uganda-misuse>.

235. FARMER, *supra* note 46, at 129.

236. Human Rights Council Res. 32/2, U.N. Doc. A/HRC/RES/32/2 (July 15, 2016).

237. OUTRIGHT ACTION INT'L, INT'L SERV. FOR HUM. RTS., INT'L LESBIAN, GAY, BISEXUAL, TRANS, AND INTERSEX ASSOC. & ARC INT'L, DEFENDING THE INDEPENDENT EXPERT ON PROTECTION AGAINST VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY 13–14 (Oct. 2017), <https://xpolitics.org/ptbr/wp-content/uploads/2017/10/Report-Defending-IE-SOGI.pdf> [<https://perma.cc/HE29-VJ98>].

238. Arvind Narrain & Kim Vance, *A Success in 2016: The First UN Independent*

Nevertheless, the Brunei boycott was echoed in 2023 after the passage of the Anti-Homosexuality Act in Uganda. Some activists asked for the World Bank and the IMF to suspend funding to Uganda. Others pointed out that sanctions of this kind often have harmed rather than helped local LGBTQ communities.²³⁹ In August 2023, the World Bank suspended its funding to Uganda.²⁴⁰

Although domestic and international court judges have neither gunboats nor foreign aid at their disposal, many of the same tensions and criticisms that afflict the human rights regime²⁴¹ and transnational advocacy networks²⁴² also afflict the transnational decriminalization litigation network. One critique posits LGBTQ rights as a neo-colonial agenda and posits transnational decriminalization litigation network actors and LGBTQ rights advocates more generally as agents of the neo-colonialist Global North.²⁴³ When transnational litigation

Expert on Sexual Orientation and Gender Identity, ARC INT'L, <https://arc-international.net/research-and-publications/new-arc-reports/a-success-in-2016-the-first-un-independent-expert-on-sexual-orientation-and-gender-identity> [<https://perma.cc/SH27-2HWU>] (last visited Feb. 13, 2025).

239. Soita Khatondi Wepukhulu, *The World Bank Funding Freeze Will Harm the Queer Ugandans It Claims to Defend*, OPENDEMOCRACY (Aug. 15, 2023, 4:09 PM) <https://www.opendemocracy.net/en/5050/world-bank-uganda-lending-anti-homosexuality-act> (“If the World Bank is trying to advocate for queer people, then pushing them further into poverty while withholding life-saving healthcare, infrastructural and entrepreneurial support hardly seems the way to do it.”).

240. *World Bank Group Statement on Uganda*, WORLD BANK GRP. (Aug. 8, 2023), <https://www.worldbank.org/en/news/statement/2023/08/08/world-bank-group-statement-on-uganda> [<https://perma.cc/53U3-HACA>] (“Uganda’s Anti-Homosexuality Act fundamentally contradicts the World Bank Group’s values. We believe our vision to eradicate poverty on a livable planet can only succeed if it includes everyone irrespective of race, gender, or sexuality. This law undermines those efforts.”).

241. See, e.g., Mutua, *The Ideology of Human Rights*, *supra* note 26, at 592–95; Mutua, *Savages, Victims, and Saviors*, *supra* note 25, at 203–06; Kennedy, *supra* note 26, at 102–04.

242. See, e.g., RESTRUCTURING WORLD POLITICS: TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS, AND NORMS (Sanjeev Khagram, James V. Riker & Kathryn Sikkink eds., 2002) (cataloging transnational human rights organizations among categories including history, breadth, approaches, and global context); J. Sebastián Rodríguez-Alarcón & Valentina Montoya-Robledo, *The Unrestrained Corporatization and Professionalization of the Human Rights Field*, 2 INTER GENTES 3 (2019).

243. See Lennox & Waites, *supra* note 36, at 41–43; *I Will Never Support Legalizing Homosexuality, Ghana’s President Says*, *supra* note 231. Even within Europe, that is, beyond the Global North/Global South binary, Europeanization through transnational advocacy networks plays a significant role in the adoption of LGBTQ human rights. Ayoub, *Contested Norms in New-Adopter States*, *supra* note 204, at 296–97 (2015) (“[T]he transnational embeddedness of a state’s LGBT advocacy organizations—a brokered transnational channel—is a powerful explanation for successful policy diffusion to new EU-12 member states, alongside other transnational channels that lead to LGBT visibility in society and in the minds of state authorities. . . . [N]ew EU-12 member states display greater dependence on transnational actors and are more influenced by international social and political channels.”). This would help to explain anti-LGBTQ countermobilization and backlash in Eastern Europe, where the neo-colonialism or anti-imperialism frame is not entirely apt. See, e.g., Ayoub, *With Arms Wide Shut*, *supra* note 205, at 345–53 (distinguishing Poland, where the Catholic Church, which embedded itself within the Polish national identity and is able to frame LGBTQ rights as a Western threat, from Slovenia, where the Catholic Church failed

network actors target a formerly colonized country's anti-sodomy law, it is reminiscent of colonial and neo-colonial power imbalances and of the coercive tactics of gunboat diplomacy and aid conditionality. In the next sub-Part, I discuss how transnational litigation network activism engenders conservative countermobilization—particularly conservative Christian countermobilization—that co-opts the anti-colonialism frame in its attempts to undermine the legitimacy of decriminalization litigation supported by transnational actors from the Global North.

B. *Conservative (Christian) Countermobilization*

Decriminalization litigation has resulted in consciousness raising *among opponents*—domestically and transnationally, not unlike non-litigation forms of political advocacy that result in countermobilization and backlash. Some decriminalization mobilizations have engendered countermobilization by religious individuals and groups and official governing bodies who intervene in cases. These interventions create procedural delays in litigation, but they also allow intervenors to present legal arguments to the judiciary and to lay claim to representing the “traditions” of the community more authentically than decriminalization advocates who are represented by foreign lawyers and supported financially by foreign organizations, especially from the Global North.

In addition to countermobilization is the phenomenon of legislative backlash.²⁴⁴ Constitutional amendments in response to pro-LGBTQ decisions in same-sex marriage cases are a prominent example of legislative backlash in the United States.²⁴⁵ Alternatively, backlash legislation might require public

to embed itself in the national identity and could not mobilize resistance to LGBTQ rights to the same extent as Poland using the anti-Western frame); Ayoub, *Perils of Success*, *supra* note 85, at 99–101 (using the Poland and Slovenia case comparison to discuss LGBTQ “norm polarization” between the West and other regions).

244. In addition to backlash from legislators, backlash from the executive and judicial branches is also possible. For examples of executive backlash, see Kathryn Sikkink, *The United States and Torture: Does the Spiral Model Work?*, in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 145, 150–53 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 2013) (describing George W. Bush administration torture memos as “denial and backlash”); Helfer, *supra* note 119, at 1836 (defining as “Commonwealth Caribbean backlash” governments’ withdrawals from treaties and human rights tribunals). For examples of judicial backlash, see Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 *BERKELEY J. EMP. & LAB. L.* 19, 22 (2000) (“The backlash thesis suggests that judges are not simply confused by the ADA; rather, they are resistant to it. It suggests that the courts are systematically nullifying rights that Congress conferred on people with disabilities.”); Laurence R. Helfer & Erik Voeten, *Walking Back Human Rights in Europe?*, 31 *EUR. J. INT’L L.* 797, 813–16 (2020) (demonstrating how regressive judicial decisions have responded to political backlash against earlier progressive decisions).

245. See *Baehr v. Miike*, LAMBDA LEGAL, <https://legacy.lambdalegal.org/in-court/cases/baehr-v-miike> [<https://perma.cc/US9T-WYSL>] (last visited Feb. 13, 2025) (describing how Hawai’i passed amendment banning same-sex marriage following NGO effort to win marriage equality via judiciary); Kevin G. Clarkson, David Orgon Coolidge & William C. Duncan, *The Alaska Marriage Amendment: The People’s Choice on the Last Frontier*, 16 *ALASKA L. REV.* 213, 216 (1999) (noting that Alaska Marriage Amendment originated as a reaction to judicial finding that State Constitution allowed same-sex marriage).

disclosure of funding sources, particularly foreign sources of funding, which, when disclosed, allow the government to substantiate allegations of neo-colonial imposition and to stymie alliance-formation, even in the absence of any disclosures.²⁴⁶ Additional backlash strategies include the defunding of litigious NGOs²⁴⁷ and the prohibition on laws “promoting” homosexuality.²⁴⁸ These measures work independently or in tandem to chill speech and association in order to undermine or even to criminalize LGBTQ human rights advocacy.

Notably, countermobilization and legislative backlash can occur *transnationally* and *preemptively*—in anticipation of LGBTQ rights advocacy arriving within their borders.²⁴⁹ In a reversal of Martin Luther King’s famous line “Injustice anywhere is a threat to justice everywhere,”²⁵⁰ for some conservative actors, “the advancement of LGBT+ rights anywhere, meant that pro-’natural family’ advocates felt threatened everywhere.”²⁵¹ For example, in 2022, the government of Singapore responded to decriminalization through jurisdiction stripping: at the same time that it decided to decriminalize consensual same-sex sexual conduct, parliament amended the Constitution of Singapore to prevent the Singaporean courts from hearing any plaintiffs attempting to litigate the right to same-sex marriage.²⁵²

There is an ironic (practically ahistorical) alignment between the religious frame and the national sovereignty/anti-colonialism frame. Numerous scholars have documented the pre-colonial existence—in Africa and elsewhere—of variations in sexual orientations and gender identities, which largely

246. See *Uganda Fury at David Cameron Aid Threat Over Gay Rights*, *supra* note 230; see also *I Will Never Support Legalizing Homosexuality*, *Ghana’s President Says*, *supra* note 231.

247. Cf. van der Vet & Sundstrom, *supra* note 154, at 7 (introducing special symposium issue exploring human rights NGOs’ strategies for navigating diminishing resources and international judicial backlash); see also Darin Christensen & Jeremy M. Weinstein, *Defunding Dissent: Restrictions on Aid to NGOs*, 24 J. DEMOCRACY 77, 79–83 (2013) (examining national restrictions on human rights NGO funding globally).

248. See, e.g., Ryan Thoreson, *From Child Protection to Children’s Rights: Rethinking Homosexual Propaganda Bans in Human Rights Law*, 124 YALE L.J. 1327, 1330–32 (2015); Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1465 (2017) (“[A]nti-gay curriculum laws are more prevalent than previously recognized.”); Abbie E. Goldberg, *Impact of HB 1557 (Florida’s Don’t Say Gay Bill) on LGBTQ+ Parents in Florida*, WILLIAMS INST. (Jan. 2023), <https://williamsinstitute.law.ucla.edu/publications/impact-dont-say-gay-parents> [<https://perma.cc/DG9N-A5VT>] (“Based on surveys of 113 LGBTQ+ parents, this study represents a first look at how HB 1557 is negatively affecting LGBTQ+ parent families in the state.”).

249. See Weiss, *supra* note 207, at 149; Dorf & Tarrow, *supra* note 98, at 450.

250. See MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM CITY JAIL 3 (Am. Friends Serv. Comm. 1963).

251. Velasco, *supra* note 25, at 2093.

252. See Goh Yan Han, *Parliament Repeals Section 377A, Endorses Amendments Protecting Definition of Marriage*, STRAITS TIMES (Nov. 29, 2022, 6:16 PM), <https://www.straitstimes.com/singapore/politics/parliament-repeals-section-377a-endorses-amendments-protecting-marriage-definition> [<https://perma.cc/GAH8-VJ7P>].

were tolerated in society.²⁵³ Christianity and Islam were colonial imports to the African continent, not homosexuality.²⁵⁴ European colonizers likewise imposed colonial law upon African (and Caribbean) subjects—law criminalizing same-sex sexual conduct that was indigenous to those societies and that had never been punished previously.²⁵⁵

On the African continent, however, proponents of the status quo often allege that homosexuality was unknown before European colonizers imported it.²⁵⁶ They also contend that homosexuality is against their Christian or Muslim tradition.²⁵⁷ They even assert that, against the degradation of Western society, they are the guardians of Christian or Muslim virtues such as so-called family values.²⁵⁸ These proponents of the status quo depict LGBTQ human rights, like homosexuality before it, as a foreign imposition—a form of neocolonialism.²⁵⁹

It is similarly ironic that proponents of the anti-LGBTQ rights status quo allege that local activists are agents of the Global North. One could plausibly conceptualize proponents of the *anti*-LGBTQ status quo as mere pawns or agents of the Global North.²⁶⁰ While scholars have analyzed the foundations and operations of the conservative *Christian* legal movement in the United States,²⁶¹ others have uncovered the *transnational* nature of the anti-LGBTQ,

253. See HUM. RTS. WATCH, *supra* note 48, at 10–11; CLAIRE STEPHANIE WESTMAN, FREE STATE CTR. FOR HUM. RTS., COLONIALISM AND SEXUAL ORIENTATION AND GENDER IDENTITY: SOUTH AFRICA 2–3 (2023), <https://www.ohchr.org/sites/default/files/documents/cfi-subm/2308/subm-colonialism-sexual-orientation-oth-westman.pdf> [<https://perma.cc/PZH4-S8XL>].

254. See Margari Hill, *The Spread of Islam in West Africa: Containment, Mixing, and Reform from the Eighth to the Twentieth Century*, STAN. PROGRAM ON INT’L AND CROSS-CULTURAL EDUC. (Jan. 2009), https://spice.fsi.stanford.edu/docs/the_spread_of_islam_in_west_africa_containment_mixing_and_reform_from_the_eighth_to_the_twentieth_century [<https://perma.cc/32N9-3467>] (“While the motivations of early conversions remain unclear, it is apparent that the early presence of Islam in West Africa was linked to trade and commerce with North Africa.”); *The Story of Africa: Christianity*, BBC WORLD SERV., https://www.bbc.co.uk/worldservice/africa/features/storyofafrica/index_section8.shtml [<https://perma.cc/2UE5-CSG5>] (last visited Feb. 13, 2025) (tracing Christianity’s multiple introductions to Africa by colonial empires).

255. HUM. RTS. WATCH, *supra* note 48, at 5.

256. See Siri Gløppen & Lise Rakner, *LGBT Rights in Africa*, in RESEARCH HANDBOOK ON GENDER, SEXUALITY AND THE LAW 194, 199–200 (Chris Ashford & Alexander Maine eds., 2020).

257. See *id.*

258. See *id.*

259. See *I Will Never Support Legalizing Homosexuality, Ghana’s President Says*, *supra* note 231.

260. Arshy Mann, *Battleground Barbados: LGBT Activists Face Off Against North American Homophobes in the Caribbean*, XTRA (Apr. 13, 2017, 5:58 PM), <https://xtramagazine.com/power/battleground-barbados-lgbt-activists-face-off-against-north-american-homophobes-in-the-caribbean-73349> (“The World Congress of Families was using the playbook it had perfected in Russia, Nigeria and Uganda The message was clear: unless Christians in the Caribbean draw a line in the sand, their countries would become havens for feminism and gay rights, just like the United States and Canada.”).

261. See, e.g., STEVEN P. BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS 7 (2002) (“Thus, in addition to defending its values

anti-feminist,²⁶² and anti-“gender ideology” movements—what might be termed the “global right.”²⁶³ Decriminalization litigation might thus result in consciousness raising *among opponents*—domestically and transnationally.

Some decriminalization mobilizations have engendered countermobilization by religious individuals and groups and official governing bodies who intervene in cases, making the arguments described in the preceding paragraph. In Belize, the Roman Catholic Diocese, Anglican Diocese, and Evangelical Association of Churches intervened in Caleb Orozco’s case. The Bishop of the Anglican Diocese of Belize “commenced his affidavit by reference to the Preamble to the Constitution” which “acknowledged the Supremacy of God,” while the President of the Belize Association of Evangelical Churches argued that “the Constitution recognises that God is the ultimate authority for law and the people of Belize are the agents of that authority.”²⁶⁴ The Bishop of the Roman Catholic Diocese of Belize argued “an alien world view is being foisted on the people of Belize.”²⁶⁵ As Chief Justice Benjamin summarized the church groups’ interventions: “The Churches argued that the Claim has joined issue on matters that represent a clash of world views with the Defendant.”²⁶⁶

Notably, but not surprisingly—given the inherently transnational nature of organized religion and the “global culture war” context—the religious groups apparently had transnational linkages with the U.S. religious right.²⁶⁷ After the initial judgment in 2016, the government of Belize appealed, narrowly challenging the holding that the prohibition on same-sex sexual conduct violates freedom of expression. The Roman Catholic Church, as an interested

from further erosion, the New Christian Right came to appreciate the offensive component of its legal activism in the courts as well.”); HANS J. HACKER, *THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION* (2005); R. JONATHAN MOORE, *SUING FOR AMERICA’S SOUL: JOHN WHITEHEAD, THE RUTHERFORD INSTITUTE, AND CONSERVATIVE CHRISTIANS IN THE COURTS* (2007); KEVIN M. KRUSE, *ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA* (2015); ANDREW R. LEWIS, *THE RIGHTS TURN IN CONSERVATIVE CHRISTIAN POLITICS: HOW ABORTION TRANSFORMED THE CULTURE WARS* (2017); BENNETT, *supra* note 90; BRUSKY & WILSON, *supra* note 90, at 26–28.

262. See Rebecca Sanders & Laura Dudley Jenkins, *Patriarchal Populism: The Conservative Political Action Coalition (CPAC) and the Transnational Politics of Authoritarian Anti-Feminism*, 58 INT’L SPECTATOR 1, 2 (2023).

263. David Paternotte & Roman Kuhar, *Disentangling and Locating the “Global Right”: Anti-Gender Campaigns in Europe*, 6 POL. & GOVERNANCE 6, 7 (2018) (“[P]henomena as diverse as populism, far right parties, religious fundamentalism, nationalism, racism, neoliberalism or austerity politics. . . . are often gathered under the broad umbrella term of ‘Global Right’ . . .”).

264. *Orozco v. Att’y Gen.*, Claim No. 668 of 2010, (2016) 90 WIR 161, ¶¶ 76, 78 (Belize).

265. *Id.* at ¶ 80.

266. *Id.* at ¶ 52.

267. See S. POVERTY L. CTR., *DANGEROUS LIAISONS: THE AMERICAN RELIGIOUS RIGHT & THE CRIMINALIZATION OF HOMOSEXUALITY IN BELIZE* 5 (2013) (noting the involvement of ADF in the Belize case).

party in the litigation, had the right to appeal as well, as long as it could prove that it was “aggrieved” by the ruling.²⁶⁸

In subsequent cases in the Caribbean, organized religious entities seemed to follow the playbook employed by the religious groups that intervened in Orozco’s case. In St. Vincent and the Grenadines, the High Court permitted Christian Coalition—a group of ten churches—to intervene as interested parties in a case brought by decriminalization activists.²⁶⁹ The Christian Coalition’s formal intervention paralleled its advocacy outside the court. At a November rally organized by the Christian Coalition, an attorney depicted the plaintiffs’ litigation as “a challenge against God himself because in the essence of this challenge, we are called upon to call a wrong right and to call what is wrong permissible and allowable in the guise of human rights . . . the essence of it, I believe it is a challenge against morality.”²⁷⁰ A similar pattern of conservative Christian countermobilization was evident in Jamaica,²⁷¹ and in the most recent decriminalization judgment in Dominica, the interested parties were once again all religious entities.²⁷²

There have not been as many instances of decriminalization legal mobilization in Africa, and intervention by religious groups appears less common there than in the Commonwealth Caribbean.²⁷³ Nevertheless, recent litigation

268. See Arif Bulkan & Tracy Robinson, *supra* note 164, at 239 n.11 (2017) (describing the appellate rights of the Roman Catholic Diocese as an interested party).

269. *Johnson v. Att’y Gen.*, SVGHCv2019/0110 & SVGHCv2019/0111 (consolidated), ¶ 4 (High Ct. Just. 2024) (St. Vincent). The church groups were all local churches or local branches of transnational church organizations: (1) the Seventh-day Adventist Church in Saint Vincent, (2) the Evangelical Church of the West Indies, (3) the New Testament Church of God, (4), the Archbishop and Primate (Spiritual Baptist) of Saint Vincent and the Grenadines, (5) the Church of God (6), the New Life Ministries, (7) the Light of Truth Church of God, (8) Kingstown Baptist Church of Saint Vincent and the Grenadines, (9) Living Water Ministries International, and (10) Hope Evangelism Outreach Ministries. *Id.* at 1.

270. *Buggery Law Case ‘A Challenge Against God Himself’—Lawyer*, IWITNESS NEWS (Nov. 14, 2019), <https://www.iwnsvg.com/2019/11/14/buggery-case-a-challenge-against-god-himself-lawyer> [<https://perma.cc/7Y5D-YGVN>] (quoting conservative attorney Mandella Peters on behalf of Christian Coalition); see also *Saint Vincent and the Grenadines, HUM. DIGNITY TR.*, <https://www.humandignitytrust.org/country-profile/saint-vincent-and-the-grenadines> [<https://perma.cc/NFJ5-UAF9>] (noting Christian Coalition attorney Mandella Peters’ description of decriminalization litigation as “an assault on religious freedoms”).

271. The Jamaica Coalition for a Healthy Society, the Lawyers’ Christian Fellowship, Hear the Children’s Cry, and a group the court refers to as “The Churches” intervened in the case. See Michael K. Lavers, *Jamaican Supreme Court Upholds Colonial-Era Sodomy Law*, WASH. BLADE (Oct. 27, 2023), <https://www.washingtonblade.com/2023/10/27/jamaican-supreme-court-upholds-colonial-era-sodomy-law> [<https://perma.cc/24K6-ZYL6>].

272. The interested parties were the Bishop of Roseau of the Anglican Church, the Methodist Church, and the Dominica Association of Evangelical Churches. See *B.G. v. Att’y Gen.*, Claim No. DOMHCv2019/0149 (High Ct. Just. 2024) (Dominica) (case seeking declaration that provisions of Sexual Offenses Act criminalizing homosexual acts violated Dominican Constitution).

273. In Botswana, the LGBTQ rights organization LeGaBiBo submitted an amicus curiae brief. No religious groups intervened in the case. *Motshidiemang v. Att’y Gen.*, MAHGB-000591-16 (High Ct. 2019) (Bots.), *aff’d*, *Att’y Gen. v. Motshidiemang*, Civ. App.

reveals countermobilization by religious groups is possible. In a decriminalization challenge in Kenya, the court permitted three groups to intervene as interested parties—the Kenya Christian Professionals Forum, a Christian politician named Inguru Kang’ata, an organization named Jamie Masjid Ahle Sunneit Waljamait, and the Ummah Foundation.²⁷⁴ The Kenya Christian Professionals Forum argued: “the Petition seeks to invoke international conventions and judicial decisions . . . contrary to the will of the people.”²⁷⁵ Kang’ata claimed: “foreign decisions interfere with the independence of the court and . . . only the Constitution and the law bind this court,”²⁷⁶ and “decriminalizing homosexuality is tantamount to compelling communities to embrace the practice in breach of their right to preservation of their culture.”²⁷⁷ And Jamie Masjid Ahle Sunneit Waljamait and the Ummah Foundation argued: “the Holy Quran and Hadith abhor homosexuality, which echoes Kenyan cultural values.”²⁷⁸

Global North actors in the transnational decriminalization litigation network must take seriously the entrenched nature of these religious, nationalist, sovereigntist, and anti-colonialist views. There are more than sixty countries that retain criminal prohibitions on consensual same-sex conduct.²⁷⁹ All are in the Global South; all are former European colonies; and the majority are former British colonies. The salience of the anticolonialism frame makes countermobilization and backlash more likely in response to a decriminalization challenge. In light of this salience, in the next Section, I argue that Global North actors should reconsider whether to engage in *transnational* legal mobilization—to seek declarations from international human rights mechanisms that anti-sodomy laws violate the target state’s international treaty obligations.

C. *International Mechanisms and Decriminalization*

While most decriminalization litigation takes place in domestic courts relying on constitutional rights claims, the last three decades have witnessed the proliferation of “new-style” international courts, tribunals, and quasi-judicial mechanisms that allow individuals to lodge complaints against governments—complaints grounded in international human rights treaty law.²⁸⁰ It is an open question whether decriminalization advocates should invest resources in transnational litigation before such bodies. In the first wave of such cases in the Global

No. CACGB-157–19 (Ct. App. 2021) (Bots.). In Mauritius, the LGBTQ rights organization Collectif-Arc-en-Ciel and the Mauritius Director of Public Prosecutions intervened as interested parties, but no religious groups intervened. HUM. DIGNITY TR., *supra* note 55.

274. EG v. Att’y Gen. (2019) KEHC 11288 (KLR), ¶¶ 14–18 (H.C.K.) (Kenya).

275. *Id.* at ¶ 187.

276. *Id.* at ¶ 240.

277. *Id.* at ¶ 101.

278. *Id.* at ¶ 103.

279. See sources cited *supra* note 68.

280. KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* 81–85 (2014); Caserta & Madsen, *supra* note 23, at 3–4.

North, decriminalization activists achieved landmark victories in the European Court of Human Rights²⁸¹ and in the U.N. Human Rights Committee.²⁸² Yet, they faced lengthy delays in compliance, between two and five years, requiring subsequent mobilization including follow-on domestic litigation.²⁸³

Human Dignity Trust appeared to follow this model when it served as legal counsel before the Inter-American Commission of Human Rights in *Henry & Edwards v. Jamaica*.²⁸⁴ But the manner in which this process played out should serve as a cautionary tale. Originally filed in December 2011, the petition lingered in the Inter-American system for roughly seven years, only advancing to a hearing in 2018. The Commission released its judgment to the parties confidentially in late 2020 and published the judgment in early 2021.²⁸⁵

More recently, Human Dignity Trust served as legal counsel in a decriminalization challenge filed before the CEDAW Committee by Rosanna Flamer-Caldera against Sri Lanka.²⁸⁶ Notably, the Committee permitted Professor Dianne Otto, a human rights law scholar from Melbourne Law School, to intervene in Flamer-Caldera's proceeding.²⁸⁷ By comparison with the Inter-American Commission, CEDAW took a "mere" four years to resolve

281. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 22–23 (1981) (holding United Kingdom's homosexual criminalization laws violated Article 8 of European Convention on Human Rights, which protects right to respect for private and family life); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) at 18–19 (1988) (holding Ireland's homosexual criminalization laws violated Article 8); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) at 8–10 (1993) (holding Cyprus' homosexual criminalization laws violated Article 8).

282. *See Toonen v. Australia*, Commc'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, ¶ 10 (U.N. Hum. Rts. Comm. Mar. 31, 1994) (holding Sections 122(a), 122(c), and 123 of Tasmanian Criminal Code, which criminalize homosexual acts, violated plaintiff's rights, warranting repeal as proper remedy).

283. *See Croome v Tasmania* (1997) 191 CLR 119 (Austl.) (reviewing plaintiffs' claims that Sections 122(a), 122(c), and 123 continue to subject them to arbitrary interference in their privacy due to state noncompliance with recommendations from *Toonen*).

284. Case 13.637, Inter-Am. Comm'n H.R., Report No. 400/20, OEA/Ser.L./V/II, doc. 418 (2020).

285. *Id.* at 23–24 (finding Jamaica's anti-sodomy laws violate American Convention on Human Rights); *see also Jamaica: Case Decided by the Inter-American Commission on Human Rights*, *supra* note 183. Henry and Edwards' case was the second of two Inter-American Commission petitions filed against Jamaica. *See generally* T.B. & S.H. v. Jamaica, Case 13.095, Inter-Am. Comm'n H.R., Report No. 401/20, OEA/Ser.L./V/II, doc. 419 (2020).

286. *Flamer-Caldera v. Sri Lanka*, Commc'n No. 134/2018, U.N. Doc. CEDAW/C/81/D/134/2018, at 1 (Comm. on the Elimination of Discrimination Against Women Mar. 23, 2022) (finding Sri Lanka's anti-sodomy law violates Convention on the Elimination of All Forms of Discrimination Against Women); *see also Sri Lanka: Case Before UN Committee on the Elimination of Discrimination Against Women (CEDAW)*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/what-we-do/cases/sri-lanka-case-before-un-committee-on-the-elimination-of-discrimination-against-women-cedaw> [<https://perma.cc/2Y53-P3LL>] (last visited Feb. 13, 2025).

287. Otto argued that Section 365A violated Articles 7 and 15 of the Convention. *Flamer-Caldera*, U.N. Doc. CEDAW/C/81/D/134/2018, at ¶ 7.3. Otto was the editor of a groundbreaking volume examining international law through a combination of queer, feminist, and postcolonial theoretical lenses. *See QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS* (Diane Otto ed., 2018).

Flamer-Caldera's petition. Nevertheless, while the advocates in *Henry & Edwards* and *Flamer-Caldera* both obtained landmark rulings, neither Jamaica nor Sri Lanka has yet complied with these judgments.²⁸⁸

After the Inter-American Commission's 2020 ruling in *Henry*, a domestic challenge to Jamaica's anti-sodomy law brought by Jamaican lawyer and activist Maurice Tomlinson could have been rendered moot had Jamaica simply repealed the offending provisions.²⁸⁹ Instead, in 2023, the Supreme Court of Jamaica dismissed Tomlinson's case on procedural grounds.²⁹⁰ In other words, despite an adverse ruling by an international tribunal,²⁹¹ Jamaica's courts dismissed a suit that would have helped implement the ruling, thus providing its Parliament a degree of legal cover for its noncompliance.²⁹² To obtain a ruling on the merits of his claim, Tomlinson will likely appeal this ruling to the Court of Appeals and, if he fails there, appeal that ruling to the Judicial Committee of the Privy Council in London. Even if Tomlinson gets this ruling overturned by the Privy Council, almost certainly it will be construed as British colonialism in the service of the international "gay agenda."

Judicialized decriminalization on the African continent stands in contrast with judicialized decriminalization in the Commonwealth Caribbean. Only four African countries have decriminalized judicially.²⁹³ The recent judgments from the Inter-American Commission and the CEDAW Committee hint at the possibility of the African Commission on Human and Peoples' Rights as a decriminalization mechanism. The Coalition of African Lesbians ("CAL") and the Socio-Economic Rights and Accountability Project ("SERAP") have filed

288. In November 2023, the Human Rights Commission of Sri Lanka recommended the government repeal Sections 365 and 365A of the Penal Code. Letter from Justice L.T.B. Dehideniya, Chairman, Hum. Rts. Comm'n of Sri Lanka to Minister of Justice, *supra* note 200. A notable counterexample offers a sharp contrast: in decriminalization litigation before the European Court of Human Rights, Northern Cyprus repealed its criminal prohibition in 2014 rather than defend itself in court. *Northern Cyprus: Petition Before the European Court of Human Rights*, *supra* note 184.

289. See *Tomlinson v. Att'y Gen.*, [2016] JMSC Civ. 119, ¶ 91 (Jam.).

290. See *Lavers*, *supra* note 271.

291. The report from the Inter-American Commission is non-binding as a technical matter. See Christina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FLA. J. INT'L L. 195, 204 (2004) (noting that, under American Convention on the Rights and Duties of Man, decisions of Inter-American Commission are not explicitly binding).

292. Noncompliance with Inter-American Commission rulings is quite common. *Strategic Implementation*, ESCR-NET, [https://www.escr-net.org/initiative/implementation/\[https://per.ma.cc/24WC-4WBG\]](https://www.escr-net.org/initiative/implementation/[https://per.ma.cc/24WC-4WBG]) (last visited Feb. 13, 2025). This, in itself, should be reason for actors such as Human Dignity Trust to question whether litigation before such bodies is worth the risk of countermobilization and backlash.

293. See *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Just.* 1999 (1) SA 6 (CC) ¶ 133 (S. Afr.); *Motshidiemang v. Att'y Gen.*, MAHGB-000591-16 (High Ct. 2019) (Bots.), *aff'd*, *Att'y Gen. v. Motshidiemang*, Civ. App. No. CACGB-157-19 (Ct. App. 2021) (Bots.); *Dausab v. Minister of Just.*, [2024] NAHCMD 331 (Namib.); *Abdool Ridwan Firaas Ah Seek v. State of Mauritius*, No. 119259, 2023 SCJ 399 (Mauritius).

African Commission cases.²⁹⁴ Yet non-compliance with the Inter-American Commission and CEDAW Committee judgments also cautions against too much optimism in the African Commission.

Given the risk of countermobilization and backlash, as well as the possibility of non-compliance with the decisions of quasi-judicial mechanisms (including the length of implementation delays and the need for resource-sapping follow-on litigation),²⁹⁵ the transnational decriminalization litigation network must rethink litigation before mechanisms such as the UN Human Rights Committee, the African Commission, the Inter-American Commission, and the CEDAW Committee. Notably, there is the specific risk faced by international mechanisms that state actors who reject the pronouncements of international court judges and human rights experts might react by stripping jurisdiction from these courts, or by implementing other forms of legislative backlash that narrow the transnational legal opportunity structure for future human rights claims.²⁹⁶

Admittedly, the ultimate outcome from a judgment is difficult to predict. A radical, particularly violent, backlash against a pro-LGBTQ judgment might result in sympathy for LGBTQ citizens;²⁹⁷ an unfavorable judgment might mobilize complacent members of the LGBTQ community or shift public opinion.²⁹⁸ Moreover, there is an argument to be made for utilizing an international mechanism if activists have tried unsuccessfully to obtain local remedies. This

294. *Press Release: African Court Denies Civil Society Access to Justice*, SEXUAL RTS. INITIATIVE (Sept. 30, 2017) <https://www.sexualrightsinitiative.org/news/2017-sep/press-release-african-court-denies-civil-society-access-justice> [<https://perma.cc/6ZLR-AEMY>] (expressing CAL's and SERAP's disapproval of African Court's limitations to African Commission's independent decision-making).

295. See ALTER, *supra* note 280, at 52–58.

296. See Helfer, *supra* note 119, at 1860–86 (discussing backlash to human rights movements in Caribbean); Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 306–14 (2016) (detailing backlash against judgment of the Southern African Development Community Tribunal that resulted in removal of private litigant access to Tribunal and ultimately its termination); Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J.L. CONTEXT (2018) 197, 200–01 (discussing general backlash to international court decisions); Erik Voeten, *Populism and Backlashes Against International Courts*, 18 PERSPS. ON POLS. 407, 407–08 (2020) (detailing further state actor backlashes against international court rulings).

297. See Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82 (1994) (arguing Southern backlash against *Brown*, including racist white Southerners' violent resistance to desegregation and African American voting rights, led to Civil Rights Act of 1964 and Voting Rights Act of 1965).

298. See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 969–72 (2011); MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 116–39 (2013) (discussing dramatic shifts in public opinion in favor of same-sex marriage following marriage equality in Massachusetts in 2004, but at a time when most state high courts rejected same-sex marriage claims (as in Georgia, Maryland, New York, and Washington) or settled for civil unions or domestic partnerships rather than grant full marriage rights to same-sex couples (as in Vermont and New Jersey)).

is especially the case in those Commonwealth jurisdictions, such as Jamaica and Sri Lanka, where a “savings clause” in the constitution explicitly prohibits domestic courts from hearing challenges to certain provisions of the constitution, such as those pertaining to colonial criminal codes.²⁹⁹ Nevertheless, Global North actors must (re)consider whether obtaining an unenforceable judgment from an international human rights court or quasi-judicial human rights mechanism is worth the risk of having the target state and other states subject to the mechanism’s jurisdiction shut down the mechanism entirely for the wider panoply of human rights claims that it might otherwise hear.

Recommendations such as these invite a broader discussion regarding the ethics of transnational lawyering in the Global South. In the remainder of this paper, I summarize critiques of litigation for social change and of transnational advocacy applicable to the emerging sociolegal phenomenon of transnational litigation networks. I then prescribe an approach—*transnational movement lawyering*—that can help to mitigate such critiques.

IV. HUMAN RIGHTS ELITISM IN TRANSNATIONAL LITIGATION NETWORKS

In this Part, I discuss a critique that arises from certain dilemmas inherent in transnational decriminalization litigation networks. When the aggrieved population and the target law or policy are in one country while at least some of the lawyers are in another—that is, when the policy or social change movement is transnational—power imbalances can arise that echo imbalances in the international political system. These generate criticisms regarding human rights elitism—the prioritization of decriminalization over more pressing social and economic needs, elite-led institutional strategies versus mass mobilization and direct action, and moderate reforms versus radical or revolutionary change. After summarizing this critique, I address how Global North actors within the transnational decriminalization litigation network can mitigate its salience by engaging in transnational movement lawyering. This involves adopting the best practices of traditional client-centered lawyering or client empowerment, which, in turn, involves following the lead of local actors. This client-centered focus is common among lawyers in the United States working with marginalized groups such as impoverished persons, immigrants, and the elderly. It also involves adopting alternative frameworks that go beyond the conventional

299. See generally Margaret A. Burnham, *Saving Constitutional Rights from Judicial Scrutiny: The Savings Clause in the Law of the Commonwealth Caribbean*, 36 U. MIA. INTER-AM. L. REV. 249 (2005); Justice Adrian Saunders, *The Savings Law Clause in the Constitutions of the Caribbean Countries and its Impact on the Protection of Human Rights*, Presentation at the Fifth Caribbean Judges’ Forum (Oct. 27, 2023), https://ccj.org/wp-content/uploads/2023/10/Saunders_20231027.pdf [<https://perma.cc/B6AQ-KF39>]; HUM. DIGNITY TR., *FROM RULINGS TO REALITY: JAMAICA MUST REPEAL HOMOPHOBIC LAWS 9*, <https://www.humandignitytrust.org/wp-content/uploads/resources/From-Rulings-to-Reality.pdf> [<https://perma.cc/QB32-V37H>] (noting that the existence of a similar savings clause in the Constitution of Jamaica led the Supreme Court of Jamaica to determine that Maurice Tomlinson may not challenge the prohibition on same-sex conduct in Jamaica’s courts).

practice of law, such as cause-lawyering, which involves engaging in non-litigation strategies such as community development and capacity building.

A. *North-South Power Dynamics and Classism*

Scholars within the legal realist strands of sociolegal theory specify that litigation diverts scarce resources while providing limited relief.³⁰⁰ Some critical legal studies scholars observe that litigation—an institutional strategy—preserves the status quo through limited relief that pacifies or even alienates movements and non-elites.³⁰¹ Thus, litigation marginalizes grassroots activism and eschews radical social goals while empowering legal elites to pursue individual remedies and incremental reforms.³⁰² On the other hand, as Critical Race theorists have pointed out in their longstanding critique of “rights,” some lawyers pursue impact litigation—seeking to change the rules of the game—while their clients might instead seek a more individualized remedy such as monetary compensation.³⁰³ Meanwhile, as I discussed in Part III, litigation victory might mobilize

300. This tradition dates to the 1970s. See JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 23–25 (1978) (pointing out that judicial remedies take significant time and resources to enforce, and may only indirectly impact certain actors).

301. See Cheryl Holzmeyer, *supra* note 29, at 274 (discussing CLS critiques on individualizing claims in ways that hampers collective action and fractures movements); see also Peter Gabel & Jay Feinman, *Contract Law as Ideology*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 497, 507–09 (David Kairys ed., 3d ed. 1998) (discussing steelworkers’ unsuccessful attempt to prevent U.S. Steel plant in Youngstown, Ohio, from closing through litigation).

302. See Holzmeyer, *supra* note 29, at 274; William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 145–73 (2004) (summarizing critique of litigation paradigm emerging from activism of, for example, ACLU and NAACP Legal Defense Fund). But see Jennifer Gordon, *Concluding Essay: The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CALIF. L. REV. 2133, 2137–39 (2007) (observing community lawyers seek to empower constituents rather than to use litigation to solve problems).

303. See, e.g., Bell, *supra* note 35 (discussing tensions between NAACP movement lawyers’ integration goals and individual plaintiff parents’ goals in obtaining quality public education for their children—whether in segregated or integrated public schools). But see Dorothy E. Roberts, *The Meaning of Blacks’ Fidelity to the Constitution*, 65 FORDHAM L. REV. 1761, 1762 (1997) (“Black people’s first commitment is to establishing their inclusion in the American polity, and fidelity to the Constitution is a way of achieving that objective.”); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 148–49 (1991) (“[T]he insistence of certain scholars that the ‘needs’ of the oppressed should be emphasized rather than their ‘rights’ amounts to no more than a word game. . . . [R]ights may not be ends in themselves, [but] rights rhetoric . . . [is] an effective form of discourse . . .”); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 1012 (1990) (explaining how King’s intellectualism provides direction to “progressive scholars concerned about the exclusionary, repressive and non-communal dimensions of American life”); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356 (1988) (arguing critical legal scholars are not “grounded in the reality of the racially oppressed” and noting how this failure “leads to an inability to appreciate fully the transformative significance” of civil rights movements).

a countermovement, leading to backlash or retrenchment of rights, and might thus be politically costly. Within the human rights paradigm, there can be an additional shortcoming: Global North frameworks and approaches simply might be insufficient to challenge structures of impoverishment in the Global South.³⁰⁴

One critique of litigation and the actors who promote such approaches highlights the possibility that the human rights regime and transnational advocacy networks reify oppressive legal structures and racial, class, gender (gender identity), and international power imbalances. The transnational decriminalization litigation network has actors in the Global North as well as the Global South, yielding potentially problematic North-South dynamics. And, because the network is a *litigation* network, transnational decriminalization litigation networks reify judicial institutions and empower cosmopolitan legal elites in the Global North and the Global South vis-à-vis grassroots actors and mass mobilization strategies more likely to involve direct-action tactics.³⁰⁵

A prominent example of Global North elites discussed throughout this paper is Human Dignity Trust. As Matthew Farmer has discussed in detail, its founding in 2011 coincided with that of several LGBTQ-serving and advocacy NGOs based in the United Kingdom.³⁰⁶ These and other new UK organizations³⁰⁷ joined older entities such as Stonewall, founded in 1989, which was pivoting to an international strategy.³⁰⁸ This relatively sudden emergence of UK NGOs as the central hub of LGBTQ rights promotion in the Commonwealth of Nations was perhaps entirely too reminiscent of the center-periphery architecture of British imperialism. Sociologist Matthew Waites has termed it “the new London-based transnational politics of LGBT human rights.”³⁰⁹

At its outset, Human Dignity Trust had declared that it might bring cases in its own name.³¹⁰ This strategy never materialized. It could have led to a situation in which local actors had intentionally eschewed a litigation strategy, only to see Global North actors initiate a court challenge nevertheless. This would place the local actors in the uncomfortable position of having to support a litigation campaign that might destabilize the sociopolitical equilibrium at an inopportune time—for example, in the midst of a public health or anti-poverty

304. See generally HARRI ENGLUND, *PRISONERS OF FREEDOM: HUMAN RIGHTS AND THE AFRICAN POOR* 8–11 (2006) (describing how individual rights framework undermines collective action and grassroots mobilization).

305. Lennox & Waites, *supra* note 36, at 41–43.

306. FARMER, *supra* note 46, at 94–96.

307. Other organizations founded around that time include Justice for Gay Africans Society (founded 2009), Out & Proud African LGBTI (founded 2011), and Rainbow International LGBT Activist Solidarity Fund (founded 2013). *Id.* at 93–97.

308. *Id.* at 97. Alongside Stonewall was the UK Lesbian and Gay Immigration Group, founded 1993. *Id.* at 98. Trinidadian decriminalization plaintiff Jason Jones was a longstanding member. Tiara Jade, *Jason Jones: The LGBTQ+ Activist Breaking Ground in Trinidad and the United Kingdom*, CARIBBEAN COLLECTIVE MAG., <https://www.caribbeancollectivemag.com/social-impact/jason-jones> [<https://perma.cc/7T5X-FL72>] (last visited Feb. 13, 2025).

309. Waites, *supra* note 127, at 5.

310. FARMER, *supra* note 46, at 118–19.

initiative—or watch the campaign fail for lack of grassroots support. It led to at least one prominent Global South activist, Colin Robinson, openly critiquing Human Dignity Trust and other likeminded actors from the Global North.³¹¹

In 2012, Robinson,³¹² cofounder in 2009 of the Coalition Advocating for the Inclusion of Sexual Orientation (“CAISO”) in Trinidad and Tobago,³¹³ published an essay in which he remarked on the blatant human rights imperialism of some Global North actors, such as the Australian jurist Michael Kirby, who asserted that the Commonwealth states of the Global North would effect decriminalization in the Global South.³¹⁴ To Robinson, “[t]his is ‘new’ in the sense of *neocolonial*.”³¹⁵ Robinson was particularly critical of Human Dignity Trust, quoting its founding CEO, Jonathan Cooper, who perhaps overpromised when he reportedly told a journalist for *The Guardian*: “If you give us £50,000, I can more or less guarantee that you will have decriminalized homosexuality in Tonga.”³¹⁶

In addition to recoiling from the hubris of the statement, Robinson was not yet a proponent of the decriminalization priority or the litigation-based strategy. In his view at the time: “The heavy focus on litigating sodomy laws is in itself questionable, when there are several much more fruitful fronts for policy change and opportunities for including sexuality in frameworks of gender justice, kinship and humanity.”³¹⁷ For Robinson, “the most productive pathways to change may include some in which institutional nonprofits in the North are prohibited or deemed ill-suited to work.”³¹⁸ Robinson instead focused on local and national (i.e., Global South) organizations that “understand the necessary intersections between sexual citizenship and other justice and gender preoccupations.”³¹⁹ He explicitly endorsed several groups within the Caribbean region.³²⁰

Robinson’s trenchant analysis, early in the formation of the transnational decriminalization litigation network, reflected the experiences of Global South

311. Colin Robinson, *Decolonising Sexual Citizenship: Who Will Effect Change in the South of the Commonwealth?*, OPINIONS, Apr. 2012, at 3, 4.

312. Juan Michael Porter II, *Remembering Colin Robinson: A Father of Black Queer Liberation*, BODY (June 22, 2021), <https://www.thebody.com/article/remembering-colin-robinson-black-queer-liberation> (detailing Robinson’s work as Black HIV activist).

313. Coalition Advocating for the Inclusion of Sexual Orientation changed its name in 2016 to CAISO: Sex and Gender Justice. *What We Do*, CAISO: SEX & GENDER JUST., <https://caisott.org/about-us> [<https://perma.cc/CF2N-S4B2>] (last visited Feb. 13, 2025).

314. Robinson disclosed an exchange he had with Kirby where Robinson “cautioned him . . . that such lecturing was ineffective because it was perceived as imperial,” and Kirby apparently responded that “countries like [Robinson’s] [i.e., Trinidad and Tobago] had had 30 years to get rid of our sodomy laws. . . . As we hadn’t abolished them, he said, others were stepping in to do the job.” Robinson, *supra* note 311, at 3 (footnote omitted).

315. *Id.* at 4.

316. *Id.*

317. *Id.*

318. *Id.* at 5.

319. *Id.* at 4.

320. *Id.* at 4 (referencing Caribbean Forum for Liberation and Acceptance of Genders and Sexualities and the Caribbean Vulnerable Communities Coalition, as well as groups situated in other Global South regions, such as Coalition of African Lesbians and India’s Alternative Law Forum).

activists marginalized in Commonwealth forums, despite the considerable expenses and personal risks of engaging in such meetings—particularly ones held in criminalizing jurisdictions and jurisdictions with immigration bans on individuals who self-identify as, or are perceived to be, lesbian, gay, or bisexual, etc.³²¹ More broadly, it also represented the experiences of Global South actors in transnational advocacy networks dominated by the Global North, recalling colonial experiences.³²²

In response to such concerns about human rights elitism by Global North actors, Human Dignity Trust asserts that it follows the lead of local actors.³²³ The organization claims that its goal is merely to level the playing field by “providing LGBT activists with access to the same world-class law firms that governments have access to.”³²⁴ The support that HDT provides then corresponds to the local activists’ goals and tactics.³²⁵ For example, in the HDT missive celebrating a June 2024 decriminalization victory in Namibia, Chief Executive Téa Braun gives the local activist plaintiff Friedel Dausab the bulk of the credit for initiating, arguing, and winning the case.³²⁶

B. *Lack of Coordination and Movement Discord*

In Part II, I discussed the nature of the interventions by actors in the transnational decriminalization litigation network. Global North actors do not always intervene in Global South decriminalization cases, however. More problematic are those scenarios where Global North actors intervene without obtaining consensus or majority support from local LGBTQ communities and their representative organizations. Under a client-centered model of lawyering, attorneys are beholden to their specific clients, and under a cause lawyering or movement lawyering model, attorneys are, in some sense, trustees of the movement’s goals, rather than the goals of any individual “client.” How should Global North legal counsel proceed when there is movement discord?³²⁷

321. *Id.* at 5 (“[T]he Commonwealth did not provide waivers from Trinidad and Tobago’s immigration prohibitions on entry by homosexuals, something the Government did for Elton John’s visit for a 2007 jazz festival.”).

322. *Id.*

323. FARMER, *supra* note 46, at 118.

324. *Id.* (citing HDT inaugural director Jonathan Cooper).

325. *Id.*

326. Posting of Téa Braun, Chief Exec., Hum. Dignity Tr., to administrator@humandignitytrust.org (June 21, 2024, 8:32 AM) (on file with author).

327. See Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 676–77 (2012) (discussing paradox whereby successful same-sex marriage litigation encouraged litigation beyond coordinated effort of organizations recognized as leaders in marriage equality movement); Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement’s Agenda*, 47 U.C. DAVIS L. REV. 1667, 1737–41 (2014) (arguing successful litigation prompted pivot by non-litigation organizations to issues litigation organizations had presented to courts). For a discussion of internal movement dissent and lawyering outside the LGBTQ movement, see, for example, Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups*, 78 VA. L. REV. 1103, 1117–18, 1143–46 (1992); and William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members*

Despite examples of coalition formation leading to successful litigation, there are numerous examples of prominent LGBTQ rights organizations not initiating or even discouraging the litigation. Indeed, Global South actors do not always agree on whether to prioritize decriminalization over other issues, and whether and when to be involved in decriminalization challenges. This has led to dual (and potentially dueling) intervention—scenarios in which litigants within the same jurisdiction and supported by actors within the transnational decriminalization network filed separate, uncoordinated challenges. For example, when ECADE was coordinating its five-nations challenge in the Eastern Caribbean, challenges were already pending in Barbados³²⁸ and in St. Vincent and the Grenadines.³²⁹ An independent challenge was also filed in Dominica after ECADE launched its cases.³³⁰

In those scenarios, the plaintiffs were largely supportive of each other's cases. In other cases, however, the movement is more divided. An example—largely domestic, but with some transnational strands—occurred in Kenya in 2016.³³¹ When several activists and organizations filed decriminalization challenges, they had not coordinated their efforts, reflecting some tension or even division within the decriminalization and larger LGBTQ rights movement.³³² The lead named plaintiff in the case, Eric Gitari, had something of a history of striding out on his own, having previously litigated a case to register a gay and lesbian NGO that others in the LGBTQ community had discouraged Gitari from bringing.³³³ This initial discord set the context for lack of coordination

and *Lawyers in Civil Rights Campaigns*, 106 *YALE L.J.* 1623, 1635–39 (1997). See also Carle & Cummings, *supra* note 35, at 459–64 (2018) (discussing “intra-movement dissent”—i.e., lawyers’ management of dissent within movements regarding goals and strategies and management of long-term movement goals versus short-term goals of certain individuals within movements).

328. Alexa Hoffman, a trans woman, filed an Inter-American Commission petition alongside two anonymous plaintiffs. See *Call to Repeal Sexual Offences Act—Petition Filed*, LOOP NEWS (June 7, 2018, 8:20 AM), <https://barbados.loopnews.com/content/call-repeal-sexual-offences-act-petition-filed> [<https://perma.cc/6KST-ZPFN>].

329. Johnson’s and MacLeish’s challenges to the prohibition in Saint Vincent and the Grenadines were not only filed separately from ECADE but were also filed separately from each other and consolidated by the High Court. *Johnson v. Att’y Gen.*, SVGHCV2019/0110 & SVGHCV2019/0111 (consolidated), ¶ 1 (High Ct. Just. 2024) (St. Vincent). Peter Laverack, who assisted Jason Jones’ decriminalization efforts in Trinidad and Tobago when Human Dignity Trust declined to assist Jones, assisted Johnson and Macleish. *Peter Laverack*, 5 *ESSEX CHAMBERS*, <https://www.5essex.co.uk/profile/peter-laverack> [<https://perma.cc/LQ7K-6U6Q>].

330. An anonymous petitioner referred to as B.G. challenged the anti-sodomy law in Dominica. *B.G. v. Att’y Gen.*, Claim No. DOMHCV2019/0149 (High Ct. Just. 2024) (Dominica).

331. Videoconference Interview with Eric Gitari, Plaintiff (July 27, 2020) (notes on file with author).

332. *Id.*

333. *Id.*; see *EG v. Non-Governmental Orgs. Coordination Bd.* (2015) KEHC 5425 (KLR), ¶ 148 (H.C.K.) (Kenya) (containing favorable judgement for Gitari’s NGO registration). Similarly, some LGBTQ Kenyans discouraged Gitari from challenging the magistrate’s authority to conduct non-consensual anal examinations of gay Kenyans.

between Gitari and others. Specifically, all of the additional petitioners except for Gitari were grantees of a litigation fund created by, among others, UHAI East Africa Sexual Health and Rights Initiative (“UHAI EASHRI”),³³⁴ which had pitched to multinational and private donors that they were creating a litigation fund basket, part of which would fund decriminalization litigation.³³⁵

The example of Eric Gitari points to tensions that might emerge within movements—tensions between decriminalization and other priorities such as public health, and tensions between institutional or elite-led strategies such as litigation versus direct action or other tactics that require grassroots mobilization. Yet for attorneys in particular, litigation might not only be a sound strategy for pursuing policy change; it might be a *preferred* strategy vis-à-vis non-litigation strategies.

C. *Transnational Movement Lawyering: A Redress to the Elitism Critique*

A healthy scholarly debate about the promises and pitfalls of the role of lawyers and litigation in policy and social change campaigns dates back a half century to the 1970s.³³⁶ In the U.S. legal academy, the critique of civil rights litigation and its negative consequences—marginalization of grassroots activism, discouragement of mass mobilization and direct action, and/or engendering a potent backlash—runs deep among scholars of the political left in fields such as critical legal studies.³³⁷

In spheres such as the movements for racial, economic, and immigrant justice, the prescription from scholar activists and progressive scholars has been not only to embody client-centered lawyering but to expand their advocacy repertoire beyond traditional litigation³³⁸—denoted by terms such as poverty

Interview with Eric Gitari, *supra* note 331. Gitari litigated anyway, and prevailed. COI v. Chief Magistrate Ukunda L. Cts., (2018) KECA 15, ¶¶ 32–33 (KLR) (Kenya).

334. UHAI EASHRI is “Africa’s first indigenous feminist, activist, participatory fund for and by sexual and gender minorities and sex worker communities that supports civil society organising across 7 Eastern African states Burundi, Democratic Republic of Congo, Ethiopia, Rwanda, Tanzania and Uganda as well as Pan-African organising that is allied to our movements.” UHAI EASHRI USA INC, BENEVITY CAUSES PORTAL, <https://causes.benevity.org/causes/840-352618978> [<https://perma.cc/F7UH-KCS6>] (last visited Feb. 13, 2025). See also Nana Afua Brantuo, *The Transforming African Feminist Funding Ecosystem: A Desk Review*, MEDIUM (June 20, 2022), <https://medium.com/@nanabrantuo/the-transforming-african-feminist-funding-ecosystem-a-desk-review-57009bdf8418> [<https://perma.cc/CP5S-9AUZ>] (discussing UHAI’s community-centered philosophy and funding model).

335. UHAI has an independent fundraising arm in the United States. *Empowering the LGBTQ Community in East Africa*, UHAI US, <https://uhaius.org> [<https://perma.cc/4J5Q-TPY7>] (last visited Feb. 13, 2025).

336. See, e.g., Bell, *supra* note 35, at 487–88.

337. See, e.g., Cummings & Eagly, *supra* note 163, at 453–55.

338. See, e.g., Cummings & Rhode, *supra* note 163, at 651 (describing “need to coordinate litigation with broader mobilizing efforts”); Michelle N. Meyer, *The Plaintiff as Person: Cause Lawyering, Human Subject Research, and the Secret Agent Problem*, 119 HARV. L. REV. 1510, 1511 (2006).

lawyering,³³⁹ rebellious lawyering,³⁴⁰ community-based lawyering,³⁴¹ and cause lawyering.³⁴² In the 1980s, there was even a “lay lawyering” movement³⁴³ that centered narratives of impoverished folk,³⁴⁴ designed to respond to the ways in which elitist strategies and tactics such as litigation inherently marginalize the marginalized.³⁴⁵ In such a movement, “poor people could transform commu-

339. See Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 696–97 (1987–1988) (“Riven by marginalizing tendencies, the attorney/client relation has shattered into a cracked monologue or at best a technical dialogue of lawyer domination. To repair this relation and restore dialogue, poverty lawyers must address and penetrate the marginalized social role of the poor.” (footnote omitted)); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2147 (1991).

340. See Gerald P. López, *Keynote Address: Living and Lawyering Rebelliously*, 73 FORDHAM L. REV. 2041, 2043 (2005); Betty Hung, *Movement Lawyering as Rebellious Lawyering: Advocating with Humility, Love and Courage*, 23 CLINICAL L. REV. 663 (2017).

341. See Richard F. Klawiter, ¡La Tierra es Nuestra! *The Campesino Struggle in El Salvador and a Vision of Community-Based Lawyering*, 42 STAN. L. REV. 1625, 1627 (1990) (“By abandoning our inclinations toward one-on-one lawyer-client relationships and all the limits such a view imposes, we avoid the pitfalls of taking legal norms and rules as given.”); Angelo N. Ancheta, *Review Essay: Community Lawyering*, 81 CALIF. L. REV. 1363, 1365 (1993) (reviewing GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992)); Michael Grinthal, *Power with: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 28 (2011); Betty Hung, *Law and Organizing from the Perspective of Organizers: Finding a Shared Theory of Social Change*, 1 L.A. PUB. INTEREST L.J. 4, 7–23 (2009); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 464–79 (1994); Joseph Phelan, *Purvi & Chuck: Community Lawyering*, CMTY. JUST. PROJECT (June 15, 2010) [<https://perma.cc/827W4FRK>].

342. See, e.g., CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998); CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001); THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE (Austin Sarat & Stuart Scheingold eds., 2005); CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart Scheingold eds., 2006).

343. See Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 2 (1984) (explaining lay lawyering as the “things one person does when he helps another solve a problem”).

344. See Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 546–47 (1987–88) [hereinafter White, *Mobilization*] (discussing “speak outs” and a theater group for the homeless among non-litigation tactics meant to empower marginalized groups to use their own voice in change efforts); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1, 21–32 (1990) [hereinafter White, *Subordination*]. But see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 959–62 (2007) (critiquing lay lawyering).

345. White, *Mobilization*, *supra* note 344, at 542 (“[T]he majority of poor people perceive litigation as an alien or even hostile cultural setting.”); Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1615 n.21 (1989) (“[T]he relatively disempowered feel profoundly ambivalent about law and lawyers.”).

nities and entrenched legal systems through their assertions of power against bureaucrats and lawyers.³⁴⁶

Although some of these lawyering turns are correctives of each other (for example, rebellious law practice as an alternative to progressive legal practice),³⁴⁷ many of these ideas have culminated in the concept of movement lawyering.³⁴⁸ I extend this work to help resolve the conundrum facing Global

346. Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1906 (2007). Recent scholarship along similar lines discusses concepts such as critical legal empowerment, resistance lawyering, abolitionist lawyering, participatory litigation, and participatory defense. See Sukti Dhital, Lam Nguyen Ho & Margaret Satterthwaite, *Foreword: Critical Legal Empowerment*, 97 N.Y.U. L. REV. 1547, 1551 (2022) (“[T]he potential of legal empowerment will be more fully realized when it embraces a ‘critical’ shift to understanding that social change—and transformations in major economic, social, and cultural structures—will come only when legal efforts effectively build the power of communities facing human rights violations to transform those systems.”); Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1932–52 (2019) (describing certain anti-death penalty, criminal defense, and immigration lawyers as modern-day resistance lawyers who represent individual client needs and interests while challenging underlying legal structure); Jamelia Morgan, *Lawyering for Abolitionist Movements*, 510 CONN. L. REV. 605, 611–13 (2021) (discussing lawyers pursuing not only prison abolition, but adopting “abolitionist critique” and “radical imagination” while engaging in community lawyering); Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 STAN. L. REV. 87, 151–61 (2022) (discussing the Pelican Bay prisoner class action litigation, which empowered prisoners to make crucial decisions about legal strategies and tactics, as case study demonstrating departure from lawyers as clients’ representatives (“acting for”) to lawyers as accompanying clients (“acting with”)); Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1281 (2014).

Participatory defense amplifies the voices of the key stakeholders—people who face criminal charges, their families, and their communities—in the struggle for system reform. [It] empowers these key stakeholders to transform themselves from recipients of services provided by lawyers and other professionals into change agents who force greater transparency, accountability, and fairness from criminal justice systems.

Id.; Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 719–25 (2018) (noting elements of participatory defense framework, including humanizing criminal defendant clients by telling the ir stories, recognizing lay expertise within clients and communities, potentially excluding lawyers from strategy sessions, and shifting control over cases to these communities, for example, by holding defense counsel accountable for their performance); Cynthia Godsoe, *Disrupting Carceral Logic in Family Policing*, 121 MICH. L. REV. 939, 957–62 (2023) (discussing application of abolitionist lawyering and participatory defense frameworks to family policing system).

347. Ancheta, *supra* note 341, at 1365–66 (contrasting rebellious lawyering with traditional advocacy models and scholarship using narrative and alternative theories of jurisprudence to change institutions).

348. Cummings, *supra* note 20, at 1645; Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 FORDHAM L. REV. 1987, 1987–89 (2017); Alexi Nunn Freeman & Jim Freeman, *It’s About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 CLINICAL L. REV. 147, 148–51 (2016) (presenting movement lawyering as way to expand repertoire beyond progressive methods like rebellious lawyering and community lawyering); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 405 (2018); Hung, *supra* note 340, at 663;

North actors in the transnational decriminalization litigation network. The transnational movement lawyering approach that I discuss here quite likely is applicable in other human rights issue spaces³⁴⁹ and even beyond human rights.

1. Community-Based Lawyering: Agenda Setting in the Global South

One way for organizations like Human Dignity Trust to overcome elitism critiques is to implement client empowerment and community-based lawyering through the transnational movement lawyering model. Decriminalization might not be the priority for members of LGBTQ communities in the Global South. Many jurisdictions that criminalize consensual same-sex sexual conduct rarely enforce anti-sodomy laws through formal arrest, prosecution, and sentencing.³⁵⁰ In an environment in which poverty, violence, crime, and dis-

Veryl Pow, *Grassroots Movement Lawyering: Insights From the George Floyd Rebellion*, 69 UCLA L. REV. 80, 88–89 (2022) (calling on movement lawyers to adopt praxis of supporting grassroots strategies that depart from rights-based approaches grounded in capitalism in the short term, and to seek to transform property law regime fundamentally in the long term). There is an analog to movement lawyering for legal scholars (such as me) who seek in ways both explicit and subtle to disrupt social and political power dynamics. See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021) (discussing how legal scholars can stand in solidarity with, and be accountable to, grassroots movements); Daniel Farbman, *A Commons in the Master's House*, 90 FORDHAM L. REV. 2061, 2084 (2022) (“[Radical pragmatism] requires the institutional actors to be in active and integrated relationships with movement actors and to seize the opportunities to open a commons when they appear at the cracks and joints of their institutional practice. This means humility. But it also means more than that. It means a thoughtful and self-reflective practice of space making.”); Rachel López, *Participatory Law Scholarship*, 123 COLUM. L. REV. 1795, 1802 (2023). López states:

PLS [Participatory Law Scholarship] aims to pull back the layers so that those for whom the law is most consequential can see themselves reflected in it and know that they are and can be a part of the making of legal meaning. PLS does this by ensuring that people who are formally educated in the law are not the only people who are able to contribute to legal scholarship and the development of legal theory. By validating alternative ways of knowing what the law is and what changes are needed for it to realize its full potential, PLS thus aims to democratize the law.

Id.; Kempis Songster, Rachel López & Gerald Torres, *Participatory Law Scholarship as Demosprudence*, 110 VA. L. REV. ONLINE 298, 300–301 (2024).

Throwing aside many of the conventions of legal scholarship, we have been building, word by word, a rebellious form of legal scholarship—one in which legal elites are not the only ones to inform the making of legal meaning on the pages of law journals. Instead of being a product of legal academics alone, Participatory Law Scholarship (“PLS”) is written in collaboration with those who have not been formally trained in the law but who have expertise in law through bearing the bluntest consequences of its injustice.

Id. (footnote omitted).

349. See Bettinger-Lopez et al., *supra* note 42, at 339 (“By bridging international human rights lawyering with domestic poverty and community lawyering, we have found that our collective advocacy . . . can be enhanced . . .”).

350. Graeme Reid, *Outlawed: Legal Discrimination Against Gays and Lesbians*, HUM. RTS. WATCH (May 15, 2015, 5:47 AM), <https://www.hrw.org/news/2015/05/15/outlawed-legal-discrimination-against-gays-and-lesbians> [<https://perma.cc/5C6E-CR3J>] (“In some countries, sodomy laws are retained on the books, but are largely dormant, with prosecutions

ease are visceral threats, a decriminalization campaign might appear to create turmoil with state and society, consume resources that might be deployed elsewhere, and thwart efforts to ameliorate these other ills.

Human Dignity Trust has been involved in most of the decriminalization cases in the Commonwealth Caribbean.³⁵¹ They have not been involved in all cases, however. In December 2015, Jason Jones, a Trinidadian expatriate living in the United Kingdom,³⁵² asked HDT to assist in his case challenging Trinidad & Tobago's anti-sodomy law.³⁵³ Jones was intent on bringing a litigation challenge, but HDT thought that the "savings clause" in the Constitution of Trinidad and Tobago would serve as a procedural impediment to the challenge moving forward.³⁵⁴

Additionally, Jones lacked the support of the leading LGBTQ human rights organization in Trinidad and Tobago—CAISO.³⁵⁵ Colin Robinson, CAISO's

rare.").

351. *Eastern Caribbean: Constitutional Challenges to Multiple Laws Criminalising Same-Sex Activity*, *supra* note 176.

352. Jason Jones has resided in the United Kingdom from 1985 to 1992, from 1996 to 2010, and since 2014—thus for most of the thirty years before filing his challenge and while his litigation was pending. Jade, *supra* note 308. It is clear from Jones' testimony, however, that he would prefer to live in Trinidad and Tobago, but he feels unable to do so as an openly homosexual man. *See* Jones v. Att'y Gen., Claim No. CV2017-00720, ¶ 148.2 (High Ct. Just. 2018) (Trin. & Tobago) ("The claimant deposed that he returned to Trinidad and Tobago in 2010 with the intention of staying permanently. He however returned to England in April 2014 because of the homophobia he experienced and what he described as the negative effects the impugned sections had on his life.").

353. Jason Jones, *We Won in Trinidad. Now It's Time to End All Homophobic Laws in the Commonwealth*, GUARDIAN (Apr. 13, 2018, 7:04 PM), <https://www.theguardian.com/commentisfree/2018/apr/13/trinidad-homophobic-laws-win-case-commonwealth> [<https://perma.cc/PX2P-HMZK>]; Jason Jones & Amar Wahab, *The LGBT Activism of Jason Jones*, 2 J. INDENTURESHIP 106, 116 (2022) ("I called up a friend of mine, Jonathan Cooper, who is an executive director of the human dignity trust. They were helping Caleb Orozco with the decriminalization case in Belize, and I said, Jonathan, there must be a way to bring a case in Trinidad.").

354. *See* Jones & Wahab, *supra* note 353 ("[HDT inaugural director Jonathan Cooper] said, 'savings law clause'. . . . So, we started work on searching for a way around the savings law clause, to bring this challenge. Eventually, human dignity just dropped my case; no reason has ever been given. But I hear that there was a fight between Jonathan and the executive director, Tea Braun, who predicted that this case would fail."); *see also* Ruth Green, *Privy Council: Trinidad Death Penalty Appeal Reignites Debate on UK Judicial Authority Abroad*, INT'L BAR ASS'N (Feb. 1, 2022), <https://www.ibanet.org/Privy-Council-Trinidad-death-penalty-appeal-reignites-debate-on-UK-judicial-authority-abroad> [<https://perma.cc/HP6L-KBAK>] (quoting Tim Otty, founder and deputy chair of the Human Dignity Trust, saying: "Sometimes because of the 'savings clauses' it can be difficult to ensure that fundamental rights, as we understand them today, are fully respected and you can't avoid addressing the issue and problems that savings clause give rise to.").

355. Joshua Surtee, *Homophobic Laws in Caribbean Could Roll Back in Landmark Case*, GUARDIAN (Apr. 7, 2018, 3:30 PM), <https://www.theguardian.com/world/2018/apr/07/caribbean-anti-gay-law-ruling-high-court-trinidad-tobago> [<https://perma.cc/4AAD-VFTK>] ("Is removing this law a strategy that we support as a movement? No," says Robinson. "The political cost is relatively high. [The buggery law] enhances the stigma attached to certain

founder, had been critical publicly of HDT's strategic litigation approach as early as 2012, going as far as to deem it neocolonial.³⁵⁶ However, Peter Laverack, a UK attorney with HDT, remained invested in the case and was particularly influential.³⁵⁷ Ultimately, Jones convinced UK attorney Richard Drabble to represent him. Drabble argued successfully in the domestic High Court of Trinidad and Tobago that "savings clauses" did not bar challenges to sodomy/buggery laws.³⁵⁸ The High Court invalidated Trinidad and Tobago's anti-sodomy laws, and the Attorney General appealed the judgment to the Court of Appeals.³⁵⁹

This, therefore, is an instance where the central Global North actor in the transnational decriminalization litigation network declined to intervene in a decriminalization case because, in addition to the unfavorable legal opportunity structure dictated by the savings clause, HDT was listening to local grassroots actors, like CAISO, embedded in the community. Other Global North actors felt differently, however, and decided to move forward with a challenge from an expatriate plaintiff. The attorney general has vowed to appeal the case to the Judicial Committee of the Privy Council—a colonial institution.³⁶⁰ While the decriminalization outcome is welcome, the litigation, which involves a UK-based plaintiff, UK-based counsel, and which ultimately might be resolved in a UK judicial forum, marginalized grassroots organizations like CAISO. Opponents to decriminalization used these facts to undermine Jones' decriminalization mobilization as a foreign venture.³⁶¹ Even if the case succeeds in the Privy Council, it might engender an anti-colonial backlash.³⁶² As Douglas

types of sexuality,' he concedes. 'But I'm not aware of any arrests for consensual sex.'"). Colin Robinson and others founded CAISO in 2009. "Proud of 10 Years" By Colin Robinson, CAISO (June 19, 2019), <https://caisott.org/caiso-a-history> [<https://perma.cc/N83C-PXWS>] ("CAISO's gone from a forced acronym to a household word.").

356. Robinson, *supra* note 311, at 4.

357. Matthew Waites, *Decolonizing the Boomerang Effect in Global Queer Politics: A New Critical Framework for Sociological Analysis of Human Rights Contestation*, 34 INT'L SOCIO. 382, 395 (2019). Laverack was an HDT legal consultant from 2014 to 2016. Peter Laverack, 5 ESSEX CHAMBERS, <https://www.5essex.co.uk/profile/peter-laverack> [<https://perma.cc/LQ7K-6U6Q>].

358. Jones v. Att'y Gen., Claim No. CV2017–00720, ¶¶ 68–73 (High Ct. Just. 2018) (Trin. & Tobago).

359. See *id.* at ¶ 176; Derek Achong, *Activist to Fight for Same-Sex Marriage Laws in T&T*, TRIN. & TOBAGO GUARDIAN (Oct. 25, 2023), <https://www.guardian.co.tt/news/activist-to-fight-for-samesex-marriage-laws-in-tt-6.2.1834755.087742411c> [<https://perma.cc/2HDD-9J54>]; Derek Achong, *Court Reserves Decision in Buggery Law Appeal*, TRIN. & TOBAGO GUARDIAN (Oct. 26, 2023), <https://www.guardian.co.tt/news/court-reserves-decision-in-buggery-law-appeal-6.2.1835570.2c77059bfl> [<https://perma.cc/99FH-PXXF>].

360. Jarrel De Matas, *The Savings-Law Clause and LGBTQ+ Rights*, DAILY EXPRESS (Oct. 31, 2023), https://trinidadexpress.com/opinion/columnists/the-savings-law-clause-and-lgbtq-rights/article_5f5c57e4-785e-11ee-b589-975812c1c7ca.html [<https://perma.cc/R8ES-RHTF>] (expressing skepticism that Privy Council would hold sodomy law unconstitutional given savings clause).

361. Dylan Kerrigan, *Love Is Love: The Recent Jason Jones Judgement in Trinidad and Tobago*, 2 J. LEGAL ANTHROPOLOGY 125, 128 (2018).

362. There is a well-known precedent for such a backlash against the Privy Council. See Helfer, *supra* note 119, 1879–84 (describing the backlash against the Privy Council following

NeJaime has helpfully demonstrated, activists have a variety of goals, not all of which require, or can be encapsulated in, victory in court. NeJaime called this phenomenon “winning through losing.”³⁶³ The Trinidad and Tobago decriminalization might end up representing an example of “losing by winning.”

2. Lay Lawyering: Empowering Local Plaintiffs

One way for Global North actors like HDT to overcome elitism critiques through the transnational movement lawyering model is to make its non-intervention in Jason Jones’ case something akin to standard operating procedure by ensuring that if HDT is supporting litigation, the face of the litigation is local. To the extent possible, both the plaintiffs and the lead counsel should be located domestically rather than abroad. Plaintiffs and lawyers who are from the Global South but who have been educated or who have resided in the Global North might best serve as supportive intermediaries rather than as primary actors in a decriminalization legal mobilization. Somewhat ironically, this has not been the case.

In the decriminalization challenges that litigants filed against anti-sodomy laws in twenty-three countries, plaintiffs and lawyers in twelve cases were individuals who resided temporarily or permanently in the Global North.³⁶⁴ Most of these plaintiffs reside abroad because of the virulent and, at times, violent homophobia they experienced in their home countries. In addition to Jason Jones,³⁶⁵ these include plaintiffs from Jamaica³⁶⁶ and Saint Vincent and the

judgments against application of the death penalty).

363. NeJaime, *supra* note 298, at 941.

364. *See infra* notes 368-75 and accompanying text (discussing expatriate plaintiffs from Trinidad and Tobago, Jamaica, Saint Vincent and the Grenadines, and Kenya); *see infra* notes 402-05 and accompanying text (discussing plaintiffs and lawyers challenging laws in Belize, Sri Lanka, Namibia, India, Singapore, and Nepal who were educated or had lived in the Global North). Additionally, Thomas McCoskar, one of the criminal defendants who challenged the anti-sodomy law in Fiji, was a tourist—an Australian national. *Nadan v. State*, [2005] FJHC 252 (Fiji); *Australian Home After Fiji Gay Sex Conviction Overturned*, SYDNEY MORNING HERALD (Aug. 29, 2005, 6:33 AM), <https://www.smh.com.au/world/australian-home-after-fiji-gay-sex-conviction-overturned-20050829-gdlyoo.html>

365. *See supra* note 352 and accompanying text (highlighting Jones’ preference to live in Trinidad and Tobago but his decision to return to the UK due to homophobia and the impact of discriminatory laws).

366. *See, e.g.*, *Henry & Edwards v. Jamaica*, Case 13.637, Inter-Am. Comm’n H.R., Report No. 400/20, OEA/Ser.L/V/II, doc. 418, ¶ 15 (2020) (“Petitioners allege that subsequent homophobic aggression led Mr. Henry to flee his country, and that he was granted asylum in Canada in June 2008 and obtained the citizenship in 2015.”); *id.* at ¶ 16 (“Petitioners claim that Ms. Edwards and her brothers, one of whom is also gay, were shot multiple times in her home in Spanish Town by two men who belong to a homophobic gang. . . . They indicate that she fled Jamaica in September 2009 after receiving two more homophobic threats, and that she was granted asylum in the Netherlands.”).

Grenadines.³⁶⁷ Kenya's Eric Gitari was pursuing graduate legal education in the United States during the pendency of his decriminalization claim in Kenya.³⁶⁸

Nevertheless, being an expatriate or living overseas grants decriminalization plaintiffs a degree of insulation from persecution and from prosecution in their native country, although they were compelled to leave for safety reasons. For example, Maurice Tomlinson of Jamaica filed his decriminalization challenge in 2015³⁶⁹ after a petitioner who lived locally withdrew his petition due to safety concerns.³⁷⁰ Tomlinson has resided in Canada since 2012, when he fled Jamaica after receiving death threats.³⁷¹ In other words, despite the fact that he felt compelled to leave Jamaica rather than leave of his own volition, Tomlinson had made his home abroad, which provided him with a certain amount of security. Tomlinson explicitly understands the irony of his situation: "I know my privilege. I can come to Jamaica, do my work, and leave. That's not the reality for many of the people I try to advocate for. They're the ones who are facing death threats or being evicted from their homes or job losses."³⁷²

The foreign residency status of some plaintiffs might lead to lack of standing to litigate many of their decriminalization claims.³⁷³ But aside from the fact that a foreign plaintiff might lack standing, having a foreign plaintiff serve as the face of a decriminalization challenge runs the risk that the plaintiff is disconnected from the community, which has to bear the brunt of whatever fallout there is from the decriminalization campaign. Organizations like Human Dignity Trust can mitigate such risks by making sure that they work *within* communities rather than with, or at least not only with, expatriates.

Recalling the lay lawyering model, local activists might be best positioned to represent local LGBTQ communities—mitigating the anti-colonialism

367. Javin Johnson and Sean MacLeish of Saint Vincent and the Grenadines reside in the United Kingdom and the United States, respectively. *Johnson v. Att'y Gen.*, SVGHCv2019/0110 & SVGHCv2019/0111 (consolidated), ¶¶ 152, 162 (High Ct. Just. 2024) (St. Vincent).

368. Gitari pursued an LL.M. degree, followed by an S.J.D., both at Harvard University. Audrey Kunycky, *Eric Gitari LL.M. '18 on Litigating a Landmark LGBT Case in Kenya: "It Has Given People Confidence to See What's Possible,"* HARV. L. TODAY (May 14, 2018), <https://hls.harvard.edu/today/eric-gitari-ll-m-18-litigating-landmark-lgbt-case-kenya-case-given-people-confidence-see-whats-possible/> [<https://perma.cc/4XGQ-587T>]. Gitari became concerned for his safety after news media falsely depicted him as being involved in a same-sex relationship with Makau Mutua, a co-founder of the Kenya Human Rights Commission. Interview with Eric Gitari, *supra* note 333.

369. *Tomlinson v. Att'y Gen.*, [2016] JMSc Civ. 119 (Jam.).

370. Javed Jaghai, like Tomlinson a member of Jamaica's largest gay rights group, J-FLAG, filed a decriminalization petition in 2013. David McFadden, *Jamaican Ends Legal Challenge to Anti-Sodomy Law*, ASSOCIATED PRESS (Aug. 29, 2014, 6:03 PM), <https://apnews.com/general-news-69ed7e58f88b44efa0f30c179c4b4edc>.

371. Rob Salerno, *Canadian Man Fights Anti-Gay Laws in Caribbean Court*, XTRA (Mar. 23, 2015, 11:16 AM), <https://xtramagazine.com/power/canadian-man-fights-anti-gay-laws-in-caribbean-court-66832> [<https://perma.cc/9QQC-DB5R>].

372. *Id.*

373. *See Johnson v. Att'y Gen.*, SVGHCv2019/0110 & SVGHCv2019/0111 (consolidated), ¶ 174 (High Ct. Just. 2024) (St. Vincent).

critique and the challenge of identifying plaintiffs' willing to accept increased exposure to violence. Activists are privileged vis-à-vis criminal defendants or non-activist plaintiffs because activists have already made the cost-benefit analysis of being visible to the state and to society.³⁷⁴ Being an activist does not, in itself, ensure any protection for LGBTQ-identifying individuals. Indeed, as I described in Part I.A, being openly-LGBTQ or being suspected of being an LGBTQ person comes with an increased risk of being targeted violently.³⁷⁵ LGBTQ-identifying activists then—especially those affiliated with formal organizations—are not only open to their partners and to trusted family and friends, but to neighbors, to government, indeed to all of society. David Kato of Sexual Minorities Uganda was killed in 2011, shortly after winning a lawsuit against a newspaper that had published his photograph and home address and called for him to be executed.³⁷⁶ Other activists have died under similarly questionable circumstances—from the scapegoating of Harvey Milk in San Francisco (1978),³⁷⁷ to the murders of J-FLAG founder Brian Williamson (2004),³⁷⁸ AIDS activist Steve Harvey (2005),³⁷⁹ and Dexter Pottinger (2017)³⁸⁰ in Jamaica. These are the personal risks that activists are forced to accept while fighting against such risks for the protection of themselves and others.

Perhaps for this reason, the five-nation decriminalization strategy that ECADE coordinated in 2019³⁸¹ seemed almost to require activists as plaintiffs. For example, in *Jamal Jeffers v. Attorney General*,³⁸² the co-plaintiff was a leading local organization whose founder was an ECADE board member.³⁸³ In the

374. See Salerno, *supra* note 371.

375. See *supra* note 84 and accompanying text (addressing the prevalence of hate crimes, death threats, “corrective” rape, and physical assaults against LGBTQ individuals).

376. Barry Malone, *Man Confesses to Uganda Gay Activist Murder—Police*, REUTERS (Feb. 2, 2011, 11:59 AM), <https://www.reuters.com/article/uk-uganda-murder-idUKTRE7116MT20110202>; CNN Wire Staff, *Judge Orders Ugandan Paper to Stop Publishing “Gay Lists,”* CNN (Nov. 2, 2010, 10:23 AM), <https://web.archive.org/web/20240918170756/https://edition.cnn.com/2010/WORLD/africa/11/02/uganda.gay.list>.

377. Peter Dreier, *Why Is Harvey Milk Still Dangerous, 46 Years After He Was Assassinated?*, JACOBIN (June 11, 2023), <https://jacobin.com/2023/06/harvey-milk-lgbtq-history-temecula-california-school-board-curriculum> [https://perma.cc/FJ8T-2VF5].

378. *Jamaica: Amnesty International Mourns Loss of Leading Human Rights Defender*, AMNESTY INT’L (June 10, 2004), <https://www.amnesty.org/ar/wp-content/uploads/2021/06/amr380102004en.pdf> [https://perma.cc/E752-KDDB].

379. Gary Younge, *Jamaican Gay Activist Shot Dead After Being Abducted*, GUARDIAN (Dec. 6, 2005, 6:58 PM), <https://www.theguardian.com/world/2005/dec/06/gayrights.garyyounge> [https://perma.cc/NR47-MLNK].

380. Jon Sharman, *Dexter Pottinger Dead: Gay Activist and Face of Jamaica Pride Found Murdered in His Home*, INDEP. (Sept. 2, 2017), <https://www.independent.co.uk/news/world/americas/dexter-pottinger-dead-jamaica-gay-pride-murder-stabbed-kingston-a7925556.html> [https://perma.cc/9GDH-5V3G].

381. See *Justice Is Never Given, It Is Won*, *supra* note 179; *Eastern Caribbean: Constitutional Challenges to Multiple Laws Criminalising Same-Sex Activity*, *supra* note 176.

382. Claim No. SKBHCV2021/0013 (High Ct. Just. 2022) (St. Kitts & Nevis).

383. *Id.* at ¶ 2 (“The second claimant, the St. Kitts and Nevis Alliance for Equality (SKNAFE) . . . represents, provides services to and advocates for the rights of members of the LGBT community in St Kitts and Nevis. Ms. Tynetta McKoy is its founder.”). See *Our*

case *Orden David v. Attorney General*,³⁸⁴ ECADE partnered with two local activists and a women's organization.³⁸⁵ And the same was true in Barbados, where one plaintiff was an ECADE board member, another led a local LGBTQ-serving NGO, and the third was an LGBTQ-serving organization.³⁸⁶ Global North members of the transnational litigation network might do well to emulate ECADE in this regard, and to require local activist-plaintiffs as standard operating procedure.

3. Empowering Local Counsel: Transnational Clinical Partnerships and Capacity Building

Likewise, Global North actors like Human Dignity Trust should deploy cautiously the attorneys and law firms that are its members. In the clinical literature, part of the concern about whether and when to intervene in cases stems from questions over pedagogy, efficient use of resources, impact litigation and the balance of long-term goals against emergency relief and short-term goals.³⁸⁷ A separate concern regarding intervention relates to local empowerment.

Although decriminalization in the Commonwealth Caribbean and elsewhere in the Global South now exists in a thoroughly transnationalized space replete with Global North actors, it is important to remember that Global South actors have been filing decriminalization challenges since the mid-1990s, without direction, assistance, or intervention from Global North actors. In 1994, the AIDS activist group AIDS Bhedbhav Virodhi Andolan ("ABVA") challenged the legality of India's anti-sodomy law—Section 377 of the Indian Penal Code.³⁸⁸ The National Coalition for Gay and Lesbian Equality ("NCGLE"), a domestic

Team, E. CARIBBEAN ALL. FOR DIVERSITY & EQUAL., <https://eequality.org/our-team> [<https://perma.cc/7343-5LSF>] (listing Tynetta McKoy); Michael K. Lavers, *St. Kitts and Nevis Sodomy Law Struck Down*, WASH. BLADE (Aug. 30, 2022), <https://www.washingtonblade.com/2022/08/30/st-kitts-and-nevis-sodomy-law-struck-down> [<https://perma.cc/8FQU-ANJ4>] (discussing SKNAFE's participation in the case).

384. Claim No. ANUHCv2021/0042 (High Ct. 2022) (Ant. & Barb.).

385. *Id.* at ¶¶ 5, 13 (listing Alexandrina Wong, director of the local non-governmental organization Women Against Rape, as second-named claimant); see Luis Andres Henao, *Meet the LGBTQ Activist Who Challenged His Caribbean Country's Anti-Sodomy Law and Won*, ASSOCIATED PRESS (June 11, 2023, 8:03 AM), <https://apnews.com/article/lgbtq-caribbean-religion-antigay-law-christians-f44674fbc7442eb4c7d752c8f4e992de> (profiling Orden David, president of a the LGBTQ-serving group called Meeting Emotional and Social Needs Holistically).

386. *Holder-McClean-Ramirez v. Att'y Gen.*, Claim No. CV-0044 of 2020 (High Ct. 2023) (Barb.) (listing as named claimants Raven Gill, founder of Butterfly Barbados, and the NGO Equals Barbados); see *Our Team*, *supra* note 383 (listing René Holder-McClean-Ramirez).

387. See, e.g., Daniel Bonilla, *Legal Clinics in the Global North and South: Between Equality and Subordination—An Essay*, 16 YALE HUM. RTS. & DEV. L.J. 1, 3–21 (2013); James J. Silk, *From Empire to Empathy? Clinical Collaborations Between the Global North and the Global South—An Essay in Conversation with Daniel Bonilla*, 16 YALE HUM. RTS. & DEV. L.J. 41, 42–47 (2013) (asserting that despite resource imbalances, North-South legal collaborations can achieve equality by prioritizing empathy, solidarity, and mutual recognition in pursuing social justice goals).

388. See NARRAIN, *supra* note 76, at 72–73.

alliance of South African LGBTQ-serving organizations, filed the first successful decriminalization challenge in the Global South in South Africa in 1996.³⁸⁹ The very existence of a coalition of LGBTQ rights organizations such as NCGLE (subsequently known as the Lesbian and Gay Equality Project), as well as its coordination of a strategic litigation campaign resulting in decriminalization, immigration and adoption rights, and marriage equality has served as a model for coordinating decriminalization challenges on the African continent.³⁹⁰

While decriminalization activists have sought out HDT support in the preparation stages of litigation and utilized members of HDT's Bar Panel and Legal Panel as counsel,³⁹¹ HDT's initial foray into decriminalization litigation was somewhat problematic. The first two decriminalization challenges filed in the Commonwealth Caribbean were almost exclusively indigenous efforts.³⁹² Caleb Orozco of United Belize Advocacy Movement ("UNIBAM") filed the first challenge against "buggery" law in the Caribbean in 2010.³⁹³ Orozco, Tracy Robinson, and others had conceived of a Caribbean test case as early as a 2007 meeting, where Orozco volunteered to be the litigant in a test case Robinson was looking to bring in either Guyana or Belize.³⁹⁴ This was four years before HDT

389. *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Just.* 1999 (1) SA 6 (CC) ¶¶ 133–35 (S. Afr.) (holding anti-sodomy laws violate South African Constitution's equality clause, which prohibits discrimination based on sexual orientation and affirms acceptance of "principle of difference"); see also Zanele Nyoni, *The Struggle for Equality: LGBT Rights Activism in Sub-Saharan Africa*, 20 HUM. RTS. L. REV. 582, 589–90, 594–95 (2020) (highlighting case as first successful decriminalization effort in sub-Saharan Africa and examining NCGLE's—subsequently known as Lesbian and Gay Equality Project—role and strategy in achieving this outcome). The South African Human Rights Commission was a co-plaintiff in the case. *Nat'l Coal. for Gay & Lesbian Equal.*, 1999 (1) SA 6 ¶ 4. NCGLE (or its successor organization Lesbian and Gay Equality Project) was the named plaintiff in cases pursuing LGBTQ rights in immigration and marriage equality, and submitted an amicus curiae brief in support of the adoption rights of same-sex couples. See *Nat'l Coalition for Gay and Lesbian Equal. v. Minister of Home Affs.* 1999 (2) SA 1 (CC) (S. Afr.) (immigration); *Du Toit v. Minister for Welfare & Population Dev.* 2003 (2) SA 198 (CC) (S. Afr.) (adoption); *Minister of Home Affs. v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.) (same-sex marriage); *Lesbian and Gay Equal. Project v. Minister of Home Affs.* 2006 (1) SA 524 (CC) (S. Afr.) (same-sex marriage).

390. See Gustavo Gomes da Costa Santos, *Decriminalising Homosexuality in Africa: Lessons from the South African Experience*, in HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN THE COMMONWEALTH: STRUGGLES FOR DECRIMINALISATION AND CHANGE 313, 330–33 (Corinne Lennox & Matthew Waites eds., 2013) (suggesting South African experience provides lessons for advocates to use incremental litigation, frame sexual rights within human rights, and leverage equality clauses for decriminalization efforts).

391. See sources cited *supra* notes 167–68.

392. See *supra* notes 195, 352–59 and accompanying text.

393. Julia Scott, *The Lonely Fight Against Belize's Antigay Laws*, N.Y. TIMES MAG. (May 22, 2015), <https://nytimes.com/2015/05/24/magazine/the-lonely-fight-against-belizes-antigay-laws.html> (characterizing Orozco's case as "first challenge in Caribbean history to the criminalization of sodomy").

394. Videoconference Interview with Caleb Orozco, July 30, 2021 (discussing the 2007 meeting) (notes on file with author); see also Caleb Orozco, *Inside Caleb Orozco's Fight to Overturn Belize's Anti-Gay Laws*, DAILY BEAST (Sept. 5, 2017, 1:00 AM), <https://www.thedailybeast.com/inside-caleb-orozcoss-fight-to-overturn-belizes-anti-gay-laws> [<https://>

was even founded.³⁹⁵ The lawyers representing Orozco were initially all from the Caribbean.³⁹⁶ HDT ultimately intervened in the case more than a year after Orozco filed the challenge.³⁹⁷ Yet, as Matthew Farmer suggests, HDT's press releases implied that it had designed the Belize litigation strategy as a "first test case" in a "global campaign to decriminalise homosexuality."³⁹⁸ This allowed opponents of decriminalization to undermine the fruit of indigenous labor as instead the culmination of foreign intervention by the Global North.

As the constitution of Orozco's legal team shows, many Global South attorneys have participated in decriminalization challenges. This includes the Caribbean decriminalization norm entrepreneur Tracy Robinson³⁹⁹ and several other attorneys and plaintiffs who might be described as intermediaries – individuals with Global South origins who had resided temporarily in the Global North⁴⁰⁰ or who were educated at least partly in the Global North⁴⁰¹ or else-

perma.cc/9LK3-JU5D] (describing a 2007 meeting with Robinson about challenging the Belize sodomy law). *But see* Scott, *supra* note 393 (reporting Orozco's first discussion of potential litigation as occurring in 2009).

395. HDT was founded in 2011. HUM. DIGNITY TR., *supra* note 166, at 3.

396. *See* Interview with Caleb Orozco, *supra* note 394 (discussing extensive work done by Caribbean lawyers Lisa Shoman, Christopher Hamel-Smith, and law students from U-RAP at beginning of case).

397. *See supra* note 195 and accompanying text.

398. FARMER, *supra* note 46, at 119; *see* Owen Bowcott, *Global Campaign To Decriminalize Homosexuality to Kick off in Belize Court*, GUARDIAN (Nov. 16, 2011, 9:55 AM), <https://www.theguardian.com/world/2011/nov/16/global-campaign-decriminalise-homosexuality-belize-court> [<https://perma.cc/T8AV-4SH8>] ("A new British legal rights group will this week kick off a global campaign to decriminalise homosexuality in scores of countries across the world when it embarks on a first test case in the courts of Belize."). In contrast, in a retrospective published in 2021, HDT founder Tim Otty wrote: "We cut our teeth supporting the leading Caribbean Activist Caleb Orozco in his constitutional case in Belize. . . . *He and his legal team deserve immense credit* for the successful decriminalisation case there, which *provided a strong template for how the Human Dignity Trust's litigation work would later unfold.*" HUM. DIGNITY TR., *supra* note 166, at 6 (emphasis added).

399. In additions to earning her LLB from University of the West Indies, Tracy Robinson received law degrees from Oxford and Yale. *Faculty of Law: Prof Tracy Robinson*, YALE, <https://www.mona.uwi.edu/law/prof-tracy-robinson> [<https://perma.cc/W9JX-V2KP>] (last visited Feb. 13, 2025).

400. *See* Rosanna Flamer-Caldera, who filed an individual complaint against Sri Lanka with the UN's Committee on the Elimination of All Forms of Discrimination Against Women, lived in the United States for more than fifteen years. Raisa Wickrematunge, *On Overcoming Prejudice: Rosann Flamer-Caldera*, SUNDAY LEADER, available at <https://web.archive.org/web/20141126215115/http://www.thesundayleader.lk/wp-content/uploads/2012/11/25-Weekend-Page1.pdf> (last visited Feb. 13, 2025); ILGA, *ILGAFiles*, https://web.archive.org/web/20101031065436/http://old.ilga.org/news_results.asp?LanguageID=1&FileCategory=6&FileID=94. Friedel Dausab, whose legal challenge overturned Namibia's anti-sodomy law, had lived in the United Kingdom. *See* Dausab v. Minister of Just., [2024] NAHCMD 331 (Namib.); Rose Marie Berger, *Meet the Born-Again Christian Who Brought Down Namibia's Sodomy Laws*, SOJOURNERS (Sept. 10, 2024), <https://sojo.net/articles/interview/reconstruct/meet-born-again-christian-who-brought-down-namibia-s-sodomy-laws>.

401. Anjali Gopalan, the founder and executive director of Naz Foundation (India)

where outside of their country of origin.⁴⁰² Commonwealth jurisdictions have generous rules regarding legal representation within their jurisdictions. These permissive rules grant access to Commonwealth attorneys in the Global North to provide legal counsel in decriminalization cases, but HDT and other Global North actors should look to build up the capacity of domestic attorneys rather than appear as counsels of record themselves.

In some of the cases I have described, particularly those before international courts and quasi-judicial mechanisms, members of the HDT Bar Panel and Legal Panel have served as lead counsel.⁴⁰³ In numerous others, however, HDT-affiliated attorneys provided support to local counsel.⁴⁰⁴ This latter approach is preferable from the vantage of the transnational movement lawyering model that I am advancing here. Indeed, in addition to providing litigation support to local counsel, organizations like HDT should follow the community empowerment model or the lay lawyering model, building up the capacity of lay people and local cause lawyers to lead decriminalization legal teams.

4. Community Lawyering Beyond Litigation

Despite some similarities across jurisdictions, there is no one-size-fits-all model of social change. The best way for organizations like Human Dignity Trust to proceed is to respond to the invitation of local LGBTQ communities to discuss decriminalization strategies. While religious countermobilization is often transnational,⁴⁰⁵ local circumstances will still determine whether religious adherents or clergy are likely to mobilize against decriminalization by

Trust, was educated and worked in the United States. *See* Naz Found. v. Government of NCT of Delhi, (2009) 160 DLT 277 (Delhi HC) (India); *Anjali Gopalan*, ASHOKA, <https://www.ashoka.org/en-us/fellow/anjali-gopalan> [<https://perma.cc/SN6R-HSY9>]; *Anjali Gopalan*, WORLD ECON. F., <https://www.wef.org.in/anjali-gopalan> [<https://perma.cc/J46X-KT99>]. Anand Grover, the lead attorney for Naz India, was educated in the United Kingdom. *See* Videoconference Interview with Anand Grover (June 4, 2021) (notes on file with author); Kian Ganz, *The Lawyer Who Fought the 377 Law and Won: Anand Grover*, LEGALLYINDIA.COM (Aug. 17, 2009, 4:25 PM), <https://web.archive.org/web/20110407221142/http://www.legallyindia.com/20090817134/Interviews/anand-grover-the-lawyer-who-fought-the-377-law-and-won>. The Singaporean human rights attorney Ravi Madasamy, known as M Ravi, who defended Ivan Tan (Tan Eng Hong) in the 2010 challenge against Singapore's anti-sodomy law and who represented Dr. Roy Tan (Tan Seng Kee) in a 2019 challenge against the law, received his law degree from University of Cardiff in the United Kingdom. *See* Ong Ming Johnson v. Att'y Gen., Originating Summons No. 1114 of 2018, [2020] SGHC 63, ¶¶ 249, 255 (Sing.); *M Ravi*, FANDOM, https://the-singapore-lgbt-encyclopaedia.fandom.com/wiki/M_Ravi.

402. Sunil Babu Pant, the lead named plaintiff in Nepal, was educated partly in Belarus and Japan. *See* Sunil Babu Pant v. Nepal Government, Writ No. 917 of 2007 (Nepal); Sunita Neupane, *How One Man Helped Nepal Become Asia's LGBT Leader*, GLOB. PRESS J., <https://globalpressjournal.com/asia/nepal/one-man-helped-nepal-become-asias-lgbt-leader>.

403. *See supra* notes 183-84 and accompanying text.

404. *See Eastern Caribbean: Constitutional Challenges to Multiple Laws Criminalising Same-Sex Activity, supra* note 176.

405. *See supra* Section III.C (discussing transnational element of Christian countermobilization).

intervening in cases. Indeed, direct consultation with clergy—including through dialogue between formal religious organizations and LGBTQ communities—should be a central element of any HDT intervention.⁴⁰⁶

Here, embodying a community-based lawyering approach within the framework of transnational movement lawyering might require defining “community” inclusively (rather than adversarially) to *include* religious adherents and clergy. It might entirely obviate the need for litigation. If litigation is necessary, having built alliances with religious adherents could facilitate a strategy in which these adherents or clergy intervene as interested parties or file amicus briefs *in favor of* decriminalization, thus undermining the claims of the traditionalists to being the sole legitimate representatives of indigenous society against human rights imperialism.⁴⁰⁷ But even an organization like HDT, in adopting a transnational movement lawyering perspective (rather than a strategic litigation perspective), would need to reorient itself toward litigation as a last resort.

To a certain extent, HDT recognizes this. In addition to strategic litigation, HDT consults with governments to reform sexual offense laws and to draft anti-discrimination law and hate crimes laws.⁴⁰⁸ Yet, it does not appear that HDT engages in community organizing or other non-litigation strategies that would be part of the cause lawyering or movement lawyering approach. Thus, HDT and likeminded organizations might be missing out on opportunities for community empowerment and for dialogue with state and religious actors that might mitigate countermobilization and backlash.

CONCLUSION

In this Article, I analyze the central, yet potentially problematic, role played in the judicialized decriminalization of consensual same-sex sexual conduct in the Global South by a distinct sociolegal phenomenon—the transnational decriminalization litigation network. As I show, the individuals and organizations involved are diverse in their geographic locations and demographic backgrounds, and the nature of their intervention in decriminalization legal mobilization varies. I examine criticisms of decriminalization litigation,

406. HDT is a member of the Commonwealth Equality Network. See *Our Members*, COMMONWEALTH EQUAL. NETWORK, <https://commonwealthequality.org/our-members> [<https://perma.cc/G7VD-NKMP>] (last visited Feb. 13, 2025) (listing HDT as member). Another member of the Commonwealth Equality Network is a transnational organization called Rainbow Faith and Freedom. *Id.* Rainbow Faith and Freedom believes: “If Religious-Based Homophobia Is Not Directly Confronted, The World Will Remain An Unsafe Space For LGBTI Folks. A Religious Problem Requires A Religious Response.” RAINBOW FAITH & FREEDOM, <https://rainbowfaithandfreedom.org> [<https://perma.cc/P3S4-NLV3>] (last visited Feb. 13, 2025). Rainbow Faith and Freedom “is focused on three pillars of activity to address religious-based LGBTI discrimination—faith-based resources, strategic nation-focused programming, and domestic faith-based initiatives.” *Id.*

407. For argumentation that operates along these lines in the U.S. context and based on U.S. constitutional law, see ANDREW KOPPELMAN, *GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT* (2020).

408. *Changing Laws, Changing Lives*, *supra* note 168.

and I discuss implications of transnational decriminalization litigation network intervention for LGBTQ rights advocacy.

The findings described in the preceding parts have strategic implications for activists who support decriminalization as well as for human rights initiatives in the Global South more broadly. Despite their functional differences, central actors within transnational litigation networks largely agree that decriminalization is a critical goal within the broader LGBTQ human rights arena,⁴⁰⁹ and most appreciate the strategic value of litigation in pursuit of policy change (e.g., decriminalization) and with an eye toward broader social changes. Due in large part to their efforts, decriminalization challenges are pending in as many as ten countries.⁴¹⁰

In the twenty-first century, human rights litigation is central to domestic and transnational politics. If activists are to spread human rights norms globally, they must take seriously the critiques of the human rights regime and of litigation as a social change strategy. The legal mobilization literature has emerged from case studies in a wide variety of issue areas, including civil liberties, racial justice, women's rights and reproductive justice, labor rights, disability and health rights, transitional justice, environmental conservation, and climate change. Notably, activists are still at work in all of these movements, suggesting that there are broader implications of this research beyond the LGBTQ rights issue space. The framework that I outline around transnational litigation networks is applicable to these and other issue areas.

In particular, I urge a bottom-up legal mobilization perspective. If domestic and international politics are being judicialized as an empirical matter, it is important to understand the circumstances in which judicialization is most likely—which actors are most likely to litigate which issues in which jurisdictions, under which laws and in which forums, and what impacts legal mobilization and countermobilization have on judicial decisions, compliance, and social change. Legal mobilization that produces transnational judicial dialogue that is inclusive of Global South jurisprudence might be the one legitimate mechanism for pursuing cross-cultural consensus on “universal” human rights.⁴¹¹

409. Not all agree, though. *See generally* Robinson, *supra* note 311 (arguing for prioritizing local and sub-regional solutions in Global South over Northern-led litigation strategies to advance sexual citizenship).

410. Colin Stewart, *Legal Challenges to Anti-LGBTQ Laws Are Under Way in at Least 10 Nations*, ERASING 76CRIMES (Oct. 18, 2023), <https://76crimes.com/2023/10/18/legal-challenges-to-anti-lgbtq-laws-are-under-way-in-at-least-10-nations> [<https://perma.cc/G9N8-47GC>].

411. Ayodeji Kamau Perrin, *Fragmentation or Cross-Cultural Consensus? Transnational Judicial Dialogue and Comparative Constitutional and International Law as Habermasian Ideal Type Discursive Spaces 1–2* (Nov. 2022) (unpublished manuscript) (on file with author) (focusing on the role of transnational judicial dialogue in shaping human rights norm diffusion through communicative action).