"DISCRIMINALIZATION": Sexuality, Human Rights, and the Carceral Turn in Antidiscrimination Law

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ABSTRACT

As lesbian, gay, bisexual, and transgender (LGBT) rights gain traction around the globe, many states have turned toward carceral punishment as a means of sanctioning discrimination based on sexual orientation and gender identity. The carceral turn has been scrutinized in racial justice and feminist literature, but few queer scholars have grappled with the growing use of incarceration globally to punish offenses like discrimination, degrading or insulting speech, or conversion practices. The use of carceral punishment to deter and punish these offenses—what I call discriminalization—raises questions about whether or when incarceration is appropriate to address affronts to equal dignity. To address these questions, this Article identifies three distinct logics that human rights advocates might use to analyze discriminalization: equal dignity, prison abolition, and proportionality. It argues that a proportionality framework is best suited to account for the various rights at stake and guide the calibration of criminal penalties where they are prescribed. The Article concludes by urging human rights advocates to recognize the limitations of carceral responses and to think creatively about holistic approaches to preventing and addressing stigmatic harm.

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Introduction

On June 13, 2019, Brazil's Supreme Court made global headlines by criminalizing homophobia and transphobia under a long-standing law criminalizing racism.[1] President Jair Bolsonaro, who has been widely criticized for his antipathy toward sexual rights, immediately condemned the decision as an example of judicial overreach.[2] By contrast, many human rights advocates heralded the ruling as an important step in addressing rampant violence and discrimination against lesbian, gay, bisexual, and transgender (LGBT) people in the country.[3] A report from the Brazilian LGBT organization Grupo Gay de Bahia attributed at least 387 murders and fifty-eight suicides to homophobia or transphobia in 2017 alone, marking a 30 percent increase in fatalities from 2016 and an all-time high in the country.[4] Some incidents of violence gained international attention, including the murder of Marielle Franco, a Black queer city councilor in Rio de Janeiro, in 2018.[5] After receiving death threats, gay

1. *Brazil Supreme Court Rules Homophobia a Crime*, Reuters (June 13, 2019), https://www.reuters.com/article/us-brazil-homophobia/brazil-supreme-court-rules-homophobia-a-crime-idUSKCN1TF02N [https://perma.cc/CBJ2-MPDU].

2. *Id.*

3. *See* Lua Da Mota Stabile, *One Step Closer. Criminalization of Homophobia and Transphobia in Brazil.*, Outright Action Int'l (May 30, 2019), https://outrightinternational.org/content/one-step-closer-criminalization-homophobia-and-transphobia-brazil [https://perma.cc/7ZQL-ZQPV].

4. Sam Cowie, *Violent Deaths of LGBT People in Brazil Hit All-Time High*, Guardian (Jan. 22, 2018), https://www.theguardian.com/world/2018/jan/22/brazil-lgbt-violence-deaths-all-time-high-new-research [https://perma.cc/HGK4–3Z98]; *see also* Andrew Jacobs, *Brazil Is Confronting an Epidemic of Anti-gay Violence*, N.Y. Times (July 5, 2016), https://www.nytimes.com/2016/07/06/world/americas/brazil-anti-gay-violence.html [https://perma.cc/U5EU-NFB6].

5. Dom Phillips, *Brazil: Two Ex-Police Officers Arrested Over Murder of Marielle*

congressman Jean Wyllys resigned from his position and fled the country in 2019.[6] LGBT organizations have pointed to these examples of violence and discrimination to emphasize the work that remains to be done in addressing socially sanctioned homophobia and transphobia.

The Brazil Supreme Court's ruling meant that discriminatory conduct based on sexual orientation and gender identity would be subject to criminal penalties akin to those for discriminatory conduct based on race. Discrimination based on race has been criminalized in Brazil since the enactment of Law 1390 in 1951, and was made a more serious crime under Law 7716/89 in 1988.[7] Under those laws, barring access to public accommodations on the basis of race, color, ethnicity, religion, or national origin is punishable with one to three years in prison, with no possibility of bail, no option to pay a fine instead of incarceration, and no statute of limitations for offenses.[8] With the Supreme Court's 2019 ruling, these penalties now extend as well to discrimination based on sexual orientation and gender identity.[9]

In the eyes of the Supreme Court and many advocates, the criminalization of homophobia and transphobia—or, more precisely, the criminalization of discriminatory conduct based on sexual orientation or gender identity—is a proactive intervention to ameliorate a widely acknowledged epidemic of violence in Brazil. The act of criminalization offers both a legal and a symbolic response to homophobia and transphobia. It intends to both deter and punish those who discriminate against LGBT people, and, at the same time, it conveys that the state disapproves of this kind of prejudice, to a degree comparable to racial prejudice.

Brazil is not an outlier. After demanding the decriminalization of same-sex conduct and protesting police harassment for decades, advocates around the globe are increasingly urging states to use the power and authority of criminal law to punish discrimination and bias against LGBT persons.[10] The impetus behind this push is not new; marginalized groups have often demanded the criminalization of their mistreatment in order to signal, if not ensure, that such mistreatment is taken seriously by the state.[11] In recent years,

Franco, Guardian (Mar. 12, 2019), https://www.theguardian.com/world/2019/mar/12/police-officers-arrested-murder-brazilian-politician-marielle-franco [https://perma.cc/9B6N-CQNB].

6. *Jean Wyllys: Gay Brazil Politician Will Not Return Over Death Threats*, BBC (Jan. 24, 2019), https://www.bbc.com/news/world-latin-america-46996206 [https://perma.cc/DXV3–8MFD].

7. Laura Bachmann & Luisa Fenizola, *A Comparative Introduction to Hate Speech Laws in Brazil and the United States*, RioOnWatch (Dec. 20, 2016), https://www.rioonwatch.org/?p=34301 [https://perma.cc/ARA6-G85T].

8. *Id.*

9. *See* Marina Lopes, *Brazil's Highest Court Votes to Extend Anti-discrimination Protections to LGBT People*, Wash. Post (May 23, 2019), https://www.washingtonpost.com/world/brazils-highest-court-makes-it-a-crime-to-attack-a-person-based-on-sexual-orientation-gender-identity/2019/05/23/cc28fcce-7cc8–11e9-b1f3-b233fe5811ef_story.html [https://perma.cc/28U4- XHMR].

10. *See, e.g.*, Jordan Blair Woods, *LGBT Identity and Crime*, 105 Calif. L. Rev. 667 (2017) (charting this evolution in the United States).

11. *See infra* Part I.

many racial justice and feminist critics have questioned the wisdom of this approach.[12] Yet with few exceptions,[13] LGBT advocates have not yet grappled with the complexities of criminalizing discrimination based on sexual orientation and gender identity. Such efforts are frequently framed as a matter of protecting human rights, particularly the equal dignity of marginalized groups. This poses a dilemma for those who understand both the stigmatization of LGBT people and overreliance on carceral punishment as urgent and important human rights concerns.

In this Article, I look to debates over LGBT rights to analyze what I call *discriminalization*, or the adoption and application of carceral penalties for discriminatory conduct.[14] The concept identifies a particular approach that states have taken with regard to antidiscrimination law. It also illuminates a growing tension between efforts to promote the rights of LGBT people and efforts to preserve the rights of those who might face carceral punishment. I argue that the growing use of discriminalization highlights difficult tensions within antidiscrimination law and human rights law, and that these tensions are best resolved by fully appreciating the injuries inflicted by discrimination alongside those inflicted by carceral punishment. When the harms of discriminalization are seemingly in tension, it is of fundamental importance that states respond in a way that meaningfully protects human rights.

The Article explores these issues in three parts. Part I reviews critiques of criminalization, particularly carceral punishment, as a response to offenses targeting marginalized groups. I draw in particular from racial justice literature and critiques of carceral feminism to map some of the complexities of using criminal law to demonstrate that the state takes targeted violence seriously.

Part II documents some of the ways that many LGBT advocates have embraced discriminalization in recent years, focusing on three issues: discrimination in areas such as employment, housing, and the provision of goods and services; degrading or insulting speech; and "conversion practices," or efforts to change someone's sexual orientation or gender identity. Using a global data set of LGBT-inclusive antidiscrimination laws in these three areas, I chart how

12. *See infra* Part I.

13. *See, e.g.*, Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law (Alice M. Miller & Mindy Jane Roseman eds., 2019) [hereinafter Beyond Virtue and Vice]; Morgan Bassichis, Alexander Lee & Dean Spade, *Building an Abolitionist Trans and Queer Movement with Everything We've Got*, *in* Captive Genders: Trans Embodiment and the Prison Industrial Complex 21 (Eric. A. Stanley & Nat Smith eds., 2015) [hereinafter Captive Genders]; Jin Haritaworn, *Queer Injuries: The Racial Politics of "Homophobic Hate Crime" in Germany*, 37 Soc. Just. 69 (2010); Sarah Lamble, *Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment*, 24 Law & Critique 229 (2013); Dean Spade & Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, 21 Chicano-Latino L. Rev. 38 (2000).

14. In this Article, I focus primarily on the use of incarceration as a punishment for discrimination, in part because of the growing number of states that have adopted this approach as a possible punishment. Other criminal penalties, such as fines or community service, are less likely to seriously implicate liberty interests, though these could also be evaluated using the frameworks in Part III to assess whether they comport with human rights guarantees.

discriminalization has been enshrined in both law and practice, and how it raises questions that extend beyond the LGBT context to antidiscrimination law more generally. LGBT advocates' embrace of carceral punishment centers largely, though not exclusively, on the remediation of stigmatic harm, and I consider how expansive understandings of violence might foster discriminalization.

Part III examines whether the human rights framework offers useful tools to take stigmatic harm seriously while keeping the creep of the carceral state at bay. Drawing from human rights law and queer scholarship that is attentive to questions of power, I consider equal dignity, prison abolition, and proportionality as three logics that might guide human rights bodies in evaluating discriminalization. Recognizing that advocates have some discretion in formulating and advancing their goals within a range of permissible options, I then suggest a rough proportionality approach for activists that is attentive to conditions of stigma and punishment in a given context. Such an approach is more flexible, pragmatic, and attuned to grounded notions of justice than the absolutist positions that have thus far guided discriminalization debates. In keeping with this approach, I conclude by urging a principled retreat from criminalization as a primary response to discrimination and a stronger emphasis on proactive measures to address stigma.

I. Equality and the Carceral State

In recent years, a large body of literature has drawn attention to the human toll of overcriminalization and mass incarceration. The expanding carceral state seeks to address a wide range of social ills with confinement for both violent and nonviolent offenses.[15] The growth of the carceral state has been especially pronounced in the United States, which leads the world in the absolute and per capita numbers of people incarcerated and where the population of people in prisons and jails has increased more than 500 percent over the past forty years.[16] The trend is not limited to the United States, however,

15. Scholars have expressed concern about the expansion of criminal law for decades, particularly as it has gone beyond "offenses entailing substantial harm to persons, property, and the state, against which the criminal law is generally accepted as the last and necessary resort," to "kinds which threaten far less serious harms, or else highly intangible ones about which there is no genuine consensus, or even no harms at all." Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 Am. Crim. L.Q. 17, 17 (1968); *see also* Kristof Verfaillie, *Punitive Needs, Society and Public Opinion: An Explorative Study of Ambivalent Attitudes to Punishment and Criminal Justice*, *in* Resisting Punitiveness in Europe? 225, 226 (Sonja Snacken & Els Dumortier eds., 2012) (observing that social problems are increasingly understood as criminal problems and managed through punitive approaches).

16. The Sentencing Project, Trends in U.S. Corrections 1–2 (2021), https://www.sentencingproject.org/wp-content/uploads/2021/07/Trends-in-US-Corrections.pdf [https://perma.cc/NU8U-FTCX]. Two million people are incarcerated in the United States. *Id.* at 2; *see also, e.g.*, Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010) (charting the growth and racialized dimensions of mass incarceration in the United States); Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California (2007) (exploring the economic and political incentives contributing to mass incarceration in the United States); John Conyers,

with scholars identifying a growth of incarceration in many parts of the world and a turn from rehabilitation to retributive justice.[17] To take one example, between 2000 and 2015, the prison population of Brazil skyrocketed by 170 percent, contributing to severe overcrowding and frequent outbreaks of violence in carceral facilities.[18] Over the same period, the world prison population grew by nearly 20 percent, with Asia, Oceania, and the Americas' increases in prison populations considerably outpacing their population growth.[19] While these numbers are staggering, the actual extent of incarceration in many parts of the world is larger than official statistics suggest, both because of secret detentions that go unacknowledged by states and because of uneven documentation of people held in administrative and immigration detention.[20]

As advocates and experts have noted, the expansion of the carceral state threatens a range of internationally recognized human rights. The widespread use of pretrial detention and heavy reliance on plea bargains, for example, can undermine freedom from arbitrary detention and the right to a fair trial.[21] Once a person is convicted and sentenced, poor conditions in prisons, exposure

Jr., *The Incarceration Explosion*, 31 Yale L. & Pol'y Rev. 377, 379–83 (2013) (discussing policy decisions that contribute to overincarceration in the United States).

17. Sonja Snacken has noted that this is not a linear trend; "punitiveness" has both quantitative and qualitative dimensions, and some counterexamples—like the abolition of the death penalty in Europe—complicate any single trend. *See* Sonja Snacken, *Resisting Punitiveness in Europe?*, 14 Theoretical Criminology 273, 274 (2010).

18. Lara Bartilotti Picanço, *Brazil's Mass Incarceration Policy Has Not Stopped Crime*, Wilson Ctr. (Aug. 30, 2019), https://www.wilsoncenter.org/blog-post/brazils-mass-incarceration-policy-has-not-stopped-crime [https://perma.cc/4YMT-KLE7].

19. Roy Walmsley, Inst. for Crim. Pol'y Rsch., World Prison Population List 2, 14 (11th ed. 2015), https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf [https://perma.cc/J2WF-N8ZG]. When the United States, China, and India are removed from the totals over that period, the growth of the prison population is more than twice as high as population growth in Asia and Oceania and five times higher than population growth in the Americas. *Id.* at 14.

20. *See* Martin Scheinin (Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism), Manfred Nowak (Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), Shaheen Sardar Ali (Vice-Chair of the Working Group on Arbitrary Detention) & Jeremy Sarkin (Chair of the Working Group on Enforced or Involuntary Disappearances), *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, ¶¶ 24, 28, U.N. Doc. A/HRC/13/42 (May 20, 2010); Glob. Det. Project, Annual Report 2020, at 15 (2021), https://www.globaldetentionproject.org/wp-content/uploads/2021/04/GDP-Annual-Report-2020-Online-Version.pdf [https://perma.cc/G7GQ- 928S] (noting the difficulty of obtaining comprehensive immigration detention statistics from states).

21. Hum. Rts. Council, Rep. of the Working Group on Arbitrary Detention: Mission to Georgia, ¶¶ 47–58, U.N. Doc. A/HRC/19/57/Add.2 (Jan. 27, 2012) (examining the use of plea bargaining); Comm'n on Hum. Rts., Rep. of the Working Group on Arbitrary Detention, ¶ 64, U.N. Doc. E/CN.4/2006/7 (Dec. 12, 2005) ("Under international law, detention prior to conviction must be the exception, not the rule."); Hum. Rts. Comm., General Comment No. 35: Article 9 (Liberty and Security of Person), ¶ 38, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter Hum. Rts. Comm. Gen. Cmt. 35] (noting that a lack of alternatives, the absence of judicial review, and length of confinement may render pretrial detention arbitrary).

to physical and sexual violence, and the use of tactics like solitary confinement threaten a variety of rights and may rise to the level of torture or cruel, inhuman, or degrading treatment or punishment.[22] Upon release, formerly incarcerated people may be subject to draconian restrictions that jeopardize their privacy, their freedom of movement, and their ability to obtain work, housing, and other basic needs encompassed by the right to an adequate standard of living.[23] And throughout the world, criminal legal systems and regimes of carceral punishment disproportionately affect the most marginalized populations.[24] In the United States, for example, the expansion of the carceral state has been strongly racialized—with Black, Latinx, and Indigenous people facing markedly higher rates of incarceration than other groups—and has disproportionately impacted people living in poverty.[25]

Those who believe that criminalization mitigates the commission of offenses argue that its social benefits outweigh its costs. Although a substantial body of empirical scholarship has cast doubt on the notion that harsh criminal penalties are effective in deterring or preventing many offenses,[26] some

22. Off. of the U.N. High Comm'r for Hum. Rts., Arbitrary Detention, Torture and Ill-Treatment in the Context of Armed Conflict in Eastern Ukraine 2014–2021 ¶ 43 (2021), https://www.ohchr.org/Documents/Countries/UA/UkraineArbDetTorture_EN.pdf [https://perma.cc/2973-AERT] (observing that, of the individuals detained by Ukraine whose detentions were documented by OHCHR between 2014 and 2021, more than two-thirds "were subjected to torture or ill-treatment, including conflict-related sexual violence"); *Connecticut Prison Warning: Prolonged Solitary Confinement May 'Amount to Torture,' UN Expert Warns*, UN News (Feb. 28, 2020), https://news.un.org/en/story/2020/02/1058311 [https://perma.cc/XK63-RYTU] (noting that solitary confinement can amount to torture).

23. *See generally* Devah Pager, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (2007) (documenting challenges that previously incarcerated people encounter in obtaining employment); Dora M. Dumont, Brad Brockmann, Samuel Dickman, Nicole Alexander & Josiah D. Rich, *Public Health and the Epidemic of Incarceration*, 33 Ann. Rev. Pub. Health 325 (2012) (observing lasting effects of incarceration on health as well as employment and housing); Christopher Wildeman & Emily A. Wang, *Mass Incarceration, Public Health, and Widening Inequality in the USA*, 389 Lancet 1464 (2017) (discussing the negative physical and mental health consequences of incarceration, including for families and communities).

24. Such disparities are not limited to the United States. As Sonja Snacken has noted, "[e]mpirical research consistently shows that punishment is divided unequally over social and ethnic lines." Sonja Snacken, *Conclusion: Why and How to Resist Punitiveness in Europe*, *in* Resisting Punitiveness in Europe?, *supra* note 15, at 247, 256.

25. Todd R. Clear, Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse (2007) (detailing how mass incarceration harms low- income and disadvantaged neighborhoods); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271, 1273 (2004) (rejecting the notion that mass incarceration benefits Black communities and arguing that it instead serves to "entrench [B]lack communities' political subordination"); Elizabeth Whalley & Colleen Hackett, *Carceral Feminisms: The Abolitionist Project and Undoing Dominant Feminisms*, 20 Contemp. Just. Rev. 456, 456 (2017) (arguing that an emphasis on incarceration "threaten[s] the safety, stability, and self- determination" of marginalized women).

26. *See, e.g.*, Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 Geo. L.J. 949,

advocates defend these penalties as practically and symbolically important. Proponents of criminal punishment regularly suggest that incarceration deters or incapacitates those who would otherwise be predisposed to commit offenses in the future.[27] In a more symbolic register, the act of criminalization can perform an expressive function by signaling that the state takes certain offenses seriously and sending a clear message that targeted victims are equal members of the polity and will be protected as such.[28] Discriminalization is thus bound up with notions of citizenship and recognition by the state, such that it affirms the equal dignity of protected individuals and groups at the same time that it publicly disavows mistreatment of them.

Indeed, in many instances, discriminalization has been the product of demands that state authorities recognize and punish forms of violence against marginalized groups.[29] Historically, many harmful acts that have been disproportionately aimed at vulnerable populations—for example, lynching, marital rape, or domestic violence—either were not understood to be crimes or were excused because of the context in which they occurred.[30] Over time, advocates have pressed lawmakers to recognize these acts as criminal, mobilizing the machinery of the criminal law to identify and punish offenders. Many advocates have subsequently questioned the punitive focus of these campaigns, both because of the criminal law's limitations in delivering justice to victims and because of its toll on those who come into contact with it.[31]

953–56 (2003) (discussing factors that limit the deterrent effect of criminal law).

27. *See* Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. Crim. L. & Criminology 765 (2010) (tracing the historical development of deterrence theory and noting limited empirical data in support of deterrence). In the United States, few proponents credibly contend that incarceration serves a rehabilitative function, though this has historically been another rationale for exacting criminal punishment.

28. This is a well-established function of criminal law. *See* Joel Feinberg, *The Expressive Function of Punishment*, *in* Doing and Deserving: Essays in the Theory of Responsibility 95, 98 (1970); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 593 (1996) ("Punishment is *not* just a way to make offenders suffer; it is a special social convention that signifies moral condemnation. Not all modes of imposing suffering express condemnation or express it in the same way.").

29. *See* Ely Aharonson, *"Pro-Minority" Criminalization and the Transformation of Visions of Citizenship in Contemporary Liberal Democracies: A Critique*, 13 New Crim. L. Rev. 286, 289 (2010) (describing the growth of "pro-minority" criminalization in the late twentieth century as a product of evolving conceptions of citizenship and public anxiety about crime).

30. *See generally* Victoria Nourse, *The "Normal" Successes and Failures of Feminism and the Criminal Law*, 75 Chi.-Kent L. Rev. 951 (2000) (discussing successes and limitations of feminist interventions in criminal law).

31. *See* Aya Gruber, The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration 7–9 (2020); Mariame Kaba, We Do This 'til We Free Us: Abolitionist Organizing and Transforming Justice 113 (2021); Judith Levine & Erica R. Meiners, The Feminist and the Sex Offender: Confronting Sexual Harm, Ending State Violence 4 (2020). While I focus here on racial justice and feminist critiques, other movements have questioned the focus on carceral punishment as well. *See, e.g.*, Justin Marceau, Beyond Cages: Animal Law and Criminal Punishment (2019) (challenging the consensus among animal protection advocates that harsher criminal penalties are needed to

At various points in history, for example, racial justice advocates have sought harsher punishments for particular forms of race-based violence and for crimes that were seen to disproportionately affect communities of color. For more than a century, advocates have sought heightened criminal penalties for lynching as a form of racially motivated violence beyond the act of murder.[32] As James Forman has noted, harsher penalties for the possession and sale of drugs, gun crime, and violent crime have at times been supported by some Black activists, lawmakers, and communities, due in part to a perception that these offenses were ravaging communities of color and were not being taken seriously by the criminal legal system.[33] In recent years, racial justice advocates have vocally criticized the growth of the carceral state, recognizing that the steady expansion of the criminal legal system has allowed for surveillance and overpolicing of communities of color. Yet ambivalence about the appropriate use of criminal law as a tool for racial justice has lingered, as evidenced by debate over the highly publicized decision by Christian Cooper, a Black man, not to cooperate with the criminal prosecution of a White woman charged with filing a false police report against him.[34]

A similar ambivalence has haunted the carceral turn in women's rights advocacy. Campaigns to prohibit pornography, sexual harassment, domestic violence, sex work, and human trafficking have often called for offenders to face criminal prosecution.[35] Such demands for carceral punishment have not been limited to any one context, and have been advanced around the globe.[36]

deal with animal abuse).

32. *See* Robert L. Zangrando, The NAACP Crusade Against Lynching, 1909–1950 (1980); Jacey Fortin, *Congress Moves to Make Lynching a Federal Crime After 120 Years of Failure*, N.Y. Times. (Feb. 26, 2020), https://www.nytimes.com/2020/02/26/us/politics/anti-lynching-bill.html [https://perma.cc/4EWY-4VUN].

33. James Forman, Jr., Locking Up Our Own: Crime and Punishment in Black America 9–14 (2017); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 36 (2012); *see also* Vanessa Barker, The Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders 151 (2009) (describing support for harsher carceral sentences among Black advocacy groups).

34. *See* Christian Cooper, Opinion, *Why I Have Chosen Not to Aid the Investigation of Amy Cooper*, Wash. Post (July 14, 2020), https://www.washingtonpost.com/opinions/christian-cooper-why-i-am-declining-to-be-involved-in-amy-coopers-prosecution/2020/07/14/1ba3a920-c5d4–11ea-b037-f9711f89ee46_story.html [https://perma.cc/JU5U-H55W].

35. Gruber, *supra* note 31, at 6–7; Levine & Meiners, *supra* note 31, at 1–30; Elizabeth Bernstein, *Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights*, 41 Theory & Soc'y 233 (2012).

36. *See, e.g.*, Aziza Ahmed, *"Exploitation Creep" and Development: A Response to Janie Chuang*, 108 AJIL Unbound 268 (2015) (observing that the United States exports carceral feminism abroad); Aparna Polavarapu, *Global Carceral Feminism and Domestic Violence: What the West Can Learn from Reconciliation in Uganda*, 42 Harv. J.L. & Gender 123 (2019) (describing the same phenomenon); *RESURJ Beyond Criminalization Dialogues Series – Collective Reflections*, Realizing Sexual & Reprod. Just. (RESURJ) (2020), https://resurj.org/reflection/resurj-beyond-criminalization-dialogues-series-collective-reflections [https://perma.cc/BJ2B-3HGY] (detailing reflections on criminalization and gender justice

These campaigns for stronger criminal penalties have often united unlikely allies, including evangelical, nationalist, and feminist advocates who seek harsh punishment for violations targeting women.[37] Marie Gottschalk has noted that these campaigns often take the form of "penal populism," whereby advocates seek strict penalties by framing the adoption of such penalties.[38] In some instances, demands for harsher punishment have also led private actors to police sexual conduct that may not amount to discrimination or harassment.[39] Moreover, as Vicki Schultz and others have noted, punitive approaches to sex discrimination and harassment run the risk of being exacted most harshly on marginalized groups, including racial and sexual minorities.[40] The recognition that a punitive orientation may be counterproductive to feminist goals has led to critical reassessments of landmark protections, like the Violence Against Women Act in the United States, and scrutiny of the ways in which a narrow focus on criminal prosecution might leave the most vulnerable women at greater risk.[41] A range of feminist scholars and advocates have envisioned alternatives to punitive interventions, though harsh penalties have often proven resistant to meaningful reform.[42]

Despite growing skepticism from racial justice and feminist advocates, human rights bodies have often looked to criminal law to assess whether states

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from feminist activists in various parts of the world).

37. Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 Signs: J. Women Culture & Soc'y 45, 45–47 (2010).

38. Marie Gottschalk, The Prison and the Gallows: The Politics of Mass Incarceration in America 13 (2006); Verfaillie, *supra* note 15, at 226–28 (discussing penal populism).

39. *See* Vicki Schultz, *The Sanitized Workplace*, 112 Yale L.J. 2061, 2064–65 (2003) ("In the name of preventing sexual harassment, many companies are proscribing sexual conduct that would not amount to sexual harassment, let alone sex discrimination, under the law.").

40. Schultz, *supra* note 39, at 2158–63; Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Calif. L. Rev. 881, 943–46 (2016).

41. *See* Beth E. Richie, Arrested Justice: Black Women, Violence, and America's Prison Nation 18 (2012); *see also* Leigh Goodmark, *Reimagining VAWA: Why Criminalization Is a Failed Policy and What a Non-carceral VAWA Could Look Like*, 27 Violence Against Women 84, 88–92 (2021) (questioning whether criminalization effectively addresses intimate partner violence and examining the costs of criminalization); Judith Levine & Erica R. Meiners, *Violence Cannot Remedy Violence*, Bos. Rev. (Aug. 19, 2020), https://bostonreview.net/law-justice-gender-sexuality/judith-levine-erica-r-meiners-violence-cannot-remedy-violence [https://perma.cc/Z4CV-K4AY] ("In jurisdictions with mandatory arrests for domestic violence, arrest rates of women of color are higher than those without.").

42. *See, e.g.*, M. Joan McDermott, *Criminology as Peacemaking, Feminist Ethics and the Victimization of Women*, 5 Women & Crim. Just. 21, 22 (1994) (developing a "peacemaking" model of restorative justice for all or some offenses); Marie Gottschalk, *Dollars, Sense, and Penal Reform: Social Movements and the Future of the Carceral State*, 74 Soc. Rsch. 669, 679–80 (2007) (calling for feminists to more directly mobilize against mass incarceration and advocate for restorative justice); Polavarapu, *supra* note 36, at 154–61 (describing successful models of restorative justice for domestic abuse in Uganda).

are protecting the rights of marginalized groups.[43] As Françoise Tulkens has noted, "[r]ights and freedoms, which used to be conceived of solely as acting as a brake on the state's power and the limits of punitive action, can appear today, and in parallel, as the drivers of intervention and justification for the deployment by states of their power of punitive action."[44] The idea that rights-respecting states not only *can* criminalize some offenses, but *must* criminalize some offenses, is reflected not only in treaty obligations but also in supranational human rights jurisprudence.[45]

Increasingly, LGBT advocates are turning to the state for support and raising similar questions about the proper relationship between equality law and criminal punishment. One example from the United States is the movement to strengthen criminal penalties for hate crimes, including the passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009.[46] The law strengthened existing hate crimes legislation and bolstered federal assistance to state and local law enforcement. It was widely heralded by many LGBT advocates as the first federal law to expressly prohibit violence based on sexual orientation or gender identity.[47] However, the passage of the law sparked criticism from some progressive LGBT organizations, who argued that hate crimes laws entrench a regime of carceral punishment that disproportionately affects people living in poverty, people of color, and queer people.[48]

43. Alice M. Miller and Tara Zivkovic point to the understanding around the time of the 1993 World Conference on Human Rights in Vienna that states should criminalize violence against women as a means of protecting human rights, such that "the penal state became the rights-protecting state." Alice M. Miller & Tara Zivkovic, *Seismic Shifts: How Prosecution Became the Go-To Tool to Vindicate Rights*, *in* Beyond Virtue and Vice, *supra* note 13, at 39, 45. *See generally* Mattia Pinto, *Historical Trends of Human Rights Gone Criminal*, 42 Hum. Rts. Q. 729 (2020) (charting the gradual embrace of criminal law by human rights mechanisms); Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 Mich. J. Int'l L. 1 (2008) (examining how feminist activists, including human rights activists, shaped prohibitions on sexual violence in international criminal law).

44. Françoise Tulkens, *Human Rights as the Good and the Bad Conscience of Criminal Law*, *in* Resisting Punitiveness in Europe?, *supra* note 15, at 156; *see also* Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 Cornell L. Rev. 1069, 1079–1112 (2015) (documenting this trend in the Inter-American human rights system).

45. Convention Against Torture art. 4, Dec. 10, 1984, T.I.A.S. No. 94–1120.1, 1465 U.N.T.S. 85 ("Each State Party shall ensure that all acts of torture are offences under its criminal law."); Hum. Rts. Comm. Gen. Cmt. 35, *supra* note 21, ¶ 9 ("States parties [to the International Covenant on Civil and Political Rights] must take both measures to prevent future injury and retrospective measures, such as enforcement of criminal laws, in response to past injury."); X. & Y. v. Netherlands, App. No. 8978/80 (Mar. 26, 1985), https://hudoc.echr.coe.int/eng?i=001–57603 [https://perma.cc/A7D8-N2J2] (deeming civil penalties insufficient and requiring the use of criminal punishment).

46. 18 U.S.C. § 249.

47. *The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009*, U.S. Dep't Just. (Oct. 18, 2018), https://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009–0 [https://perma.cc/S3NZ-JE2B].

48. *SRLP on Hate Crime Laws*, Sylvia Rivera L. Project, https://srlp.org/action/hate-crimes [https://perma.cc/HNR5-LWRD]; Eric A. Stanley, *Fugitive Flesh: Gender*

The criticisms resonate with particular force in the United States, where the scope and conditions of mass incarceration have come under increased scrutiny in recent years, but have been articulated in other contexts as well.[49] Nonetheless, these anti-carceral queer critiques have largely been ignored as lawmakers and mainstream LGBT organizations around the globe have increasingly embraced criminal penalties to address discriminatory violence.[50]

Like the criminalization of lynching or domestic violence, the hate crimes example involves violent acts that are typically punished through criminal law. Efforts to criminalize hate crimes typically do not present the question of whether violence is or should be criminal, but ask what form or degree of punishment is appropriate, and whether targeted violence merits a more severe response. Yet in other contexts, many LGBT advocates are pursuing strategies that codify new offenses based on expansive understandings of violence, including offenses that do not involve physical harm but are primarily understood to be injurious to a person's dignity. Often, advocates frame preventing or addressing these more expansive forms of violence as a human rights imperative. As I discuss in the following Part, these strategies have gained traction around the globe, raising new challenges for human rights advocates regarding the conceptualization and limits of using criminal law to punish stigmatic harm.

II. Discriminalization From a Comparative Perspective

Around the globe, many LGBT advocates and sympathetic lawmakers have turned to criminal law to address bias and hostility toward LGBT people. Public debates over these laws suggest that they are often motivated by a commitment to equal citizenship and aim to eradicate longstanding patterns of subordination. In this Part, I consider the harm that discriminalization aims to address in these contexts, and the ways in which stigma is understood as a form of violence subject to the criminal law. I then canvas a data set of antidiscrimination laws and the punishments they prescribe, focusing on three types of legislation that exemplify this trend: laws prohibiting discrimination in contexts like employment, housing, and the provision of goods and services; laws prohibiting degrading or insulting speech; and laws prohibiting conversion practices.

Self-Determination, Queer Abolition, and Trans Resistance, *in* Captive Genders, *supra* note 13, at 7–14.

49. *See, e.g.*, Haritaworn, *supra* note 13; Queer Necropolitics (Jin Haritaworn, Adi Kuntsman & Silvia Posocco eds., 2014).

50. *See* Lamble, *supra* note 13, at 235–36 ("[I]t has become commonplace for European and international LGBT groups to support a dual-pronged legislative strategy of campaigning for the global decriminalisation of homosexuality . . . while simultaneously advocating for expanded criminalisation via hate crime legislation."). *But see* Ryan R. Thoreson, Transnational LGBT Activism: Working for Sexual Rights Worldwide 1–3 (2014) (describing ambivalence among some international LGBT advocates about stronger penalties for hate crimes).

A. *Discriminalization as a Response to Stigmatic Harm*

Discriminalization stems from the belief that discrimination, degrading or insulting speech, and conversion practices injure LGBT people such that penalties up to and including incarceration are appropriate. In this Section, I consider different types of harm that discriminalization has sought to address: economic, psychological, and stigmatic. As I note, the primary impetus behind many of the criminal laws designed to promote LGBT rights is the remediation of stigmatic harm as a type of violence, above and beyond addressing other forms of cognizable injury. Although this understanding resonates powerfully in queer theory and recent scholarship on stigma and violence, it poses difficult questions about appropriate punishment.

Of course, discriminatory conduct can amount to actual or threatened physical harm and may run afoul of existing criminal law. In instances where employment discrimination takes the form of sexual assault or where degrading or insulting speech amounts to incitement to violence, punishment for actual or threatened physical harm may be appropriate. Similarly, conversion practices can involve forms of physical harm that are already recognized, prohibited, and punished under criminal law. But discriminalization typically stretches beyond the specific threat of physical harm and seeks to criminalize precisely those indignities and offenses that are not already cognizable under existing law. Often, criminal penalties for discrimination are designed to protect against harms that are not "violent" in a traditional sense, though they may inflict other forms of injury.

First, discriminalization may be a response to economic harm. Individuals who experience discrimination in hiring, firing, or promotion frequently suffer direct material disadvantage. Advocates pressing for stronger antidiscrimination protections in law, including criminal law, have generated compelling data illustrating the significant material injury that discrimination can inflict on LGBT people as individuals and as a group.[51] States that have imposed criminal penalties for discrimination have most often done so in the context of discrimination in employment and the provision of goods and services, where economic harm may be particularly evident. However, discrimination in education, housing, health care, credit, and other fields can also adversely affect a person's material well-being.

In addition to economic harm, advocates have frequently emphasized the psychological harms associated with discrimination. Research on minority stress powerfully illustrates how the constant stress from dealing with stigmatization as a member of a marginalized group negatively affects a person's

51. *See, e.g.*, S.N. Nyeck, Debra Shepherd, Joshua Sehoole, Lihle Ngcobozi & Kerith J. Conron, The Economic Cost of LGBT Stigma and Discrimination in South Africa (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-South-Africa-Dec-2019.pdf [https://perma.cc/B7CQ-M9YT]; M.V. Lee Badgett, Amira Hasenbush & Winston Ekaprasetia Luhur, LGBT Exclusion in Indonesia and its Economic Effects (2017), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Exclusion-Indonesia-Apr-2017.pdf [https://perma.cc/F4C3-M9S7].

mental and physical health.[52] In the hate speech context, Mari Matsuda has emphasized that "[v]ictims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."[53] Similarly, proponents of bans on conversion practices have drawn a strong linkage between deliberate, systematic attempts to alter a person's sexual orientation or gender identity and a wide range of adverse mental health outcomes.[54] Citing these significant harms, lawmakers have taken decisive action to ban conversion practices, as well as discrimination against marginalized groups more generally.

The most relevant harm in enacting criminal penalties for anti-LGBT discrimination, however, has been stigmatic harm. At the individual level, the sense of violation a person experiences from stigmatization may be as personally damaging as some forms of physical threats or assaults.[55] It may also be injurious at the communal level because discrimination sends a wider message of inferiority or subordination that undermines the equal treatment of all those who share membership in the category in question.[56] In either case, discriminalization represents a symbolic acknowledgment of injuries that have not always been appreciated or taken seriously by traditional frameworks. It recognizes stigmatic harm as both cognizable under criminal law and sufficiently damaging to justify harsh punishment.

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52. *See, e.g.*, Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences with Misgendering*, 3 Stigma & Health 53 (2018); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psych. Bull. 674 (2003).

53. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2336 (1989); *see also* Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. Miami L. Rev. 127, 129 (1987) (framing racism as a crime and noting that "[s]ociety is only beginning to recognize that racism is as devastating, as costly, and as psychically obliterating as robbery or assault").

54. *See* Indep. Forensic Expert Grp., *Statement on Conversion Therapy*, J. Forensic & Legal Med., May 2020, at 3; Timothy W. Jones, Anna Brown, Lee Carnie, Gillian Fletcher & William Leonard, Preventing Harm, Promoting Justice: Responding to LGBT Conversion Therapy in Australia (2018), https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5bd78764eef1a1ba57990efe/1540851637658/LGBT+conversion+therapy+in+Australia+v2.pdf [https://perma.cc/UL7U-JWMY].

55. *See* Williams, *supra* note 53, at 129.

56. Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 Wake Forest L. Rev. 497, 504 (2009) ("Messages that are meant to hurt individuals because of their race, ethnicity, national origin, or sexual orientation have a greater social impact than those that attempt to draw out individuals into pugilistic conflicts."); Wilson v. Glenwood Intermountain Props., Inc., 98 F.3d 590, 596 (10th Cir. 1996) ("Discriminatory advertising stigmatizes the discriminated-against group, and it is true that the stigmatizing injury often caused by racial discrimination can be sufficient in some circumstances to support standing."); *see also* Jeremy Waldron, The Harm in Hate Speech 4–5 (2014) (explaining that hate speech creates an environmental threat to social peace and undermines the dignity of "those at whom it is targeted, both in their own eyes and in the eyes of other[s]").

Indeed, the stigmatic effects of discrimination, degrading or insulting speech, and conversion practices tend to feature prominently in public discourse and legislative debates about these topics. In his recent report on conversion practices, the United Nations (UN) Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity concluded that "means and mechanisms that treat lesbian, gay, bisexual, trans or gender-diverse persons as lesser human beings are degrading by their very definition," and should be "prosecuted and punished, under the parameters established under the international human rights obligations pertaining to the prohibition of torture and cruel, inhuman or degrading treatment or punishment."[57] In this view, discriminalization repudiates the subordinate status of LGBT people, and does so in part by putting the authority and force of the state behind their equal membership in the polity.[58] As I detail in the following Sections, legislative attempts to reject anti-LGBT stigma and affirm LGBT equality have often resulted in harsh carceral penalties for discrimination, degrading or insulting speech, and conversion practices.

B. *Antidiscrimination Laws*

States use laws prohibiting discrimination to implement domestic and international equality guarantees, including those enshrined in human rights law. Since 1948, the Universal Declaration of Human Rights (UDHR) has affirmed that all people are entitled to human rights "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[59] The International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as other core human rights treaties, have unequivocally recognized freedom from discrimination and the equal protection of the law as universal human rights.[60] The same is

57. Hum. Rts. Council, Practices of So-Called "Conversion Therapy": Rep. of the Indep. Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, ¶¶ 64–65, U.N. Doc. A/HRC/44/53 (May 1, 2020).

58. Press Release, Ger. Fed. Ministry of Health, Cabinet Adopts Extensive Ban on So-Called "Conversion Therapies" (Dec. 18, 2019), https://www.bundesgesundheitsministerium.de/en/press/press-release/press/2019/conversion- therapies.html [https://perma.cc/VA6F-WQLM] (quoting Federal Minister of Health Jens Spahn as saying, "We want to ban so-called conversion therapies as far as possible. . . . And a ban sends out an important signal to society, to all those who struggle with their homosexuality: It's okay to be the way you are."); Press Release, Dep't of Just. Can., Federal Government Introduces Legislation to Criminalize Conversion Therapy-Related Conduct in Canada (Mar. 9, 2020), https://www.canada.ca/en/department- justice/news/2020/03/federal-government-introduces-legislation-to-criminalize-conversion-therapy- related-conduct-in-canada.html [https://perma.cc/6U27-LJU9] ("Diversity and inclusion are among Canada's greatest strengths. Canadians must feel safe in their identities, and free to be their true selves. That is why the Government of Canada is acting on its commitment to criminalize conversion therapy in Canada.").

59. G.A. Res. 217 (III) A, art. 2, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

60. International Covenant on Civil and Political Rights arts. 2, 26, Dec. 16, 1966, S. Treaty Doc. No. 95–20, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on

true at the regional level, where human rights charters in Africa, the Americas, and Europe have all included nondiscrimination guarantees as a fundamental principle of human rights law.[61] Although the scope of nondiscrimination guarantees and the enumeration of protected classes differ from country to country, virtually every national legal system also recognizes freedom from discrimination as a right.

Over the past thirty years, international and regional bodies have reached a general consensus that discrimination based on sexual orientation and gender identity undermines human rights. While core human rights treaties do not expressly use the terms "sexual orientation" and "gender identity," treaty bodies have recognized that their equality guarantees are sufficiently broad to prohibit discrimination on these grounds.[62] As international and regional bodies have increasingly embraced the rights of LGBT people as human rights[63] and condemned violence and discrimination based on sexual orientation and gender identity,[64] they have also encouraged member states to prohibit discrimination on these grounds under domestic law.[65]

Economic, Social and Cultural Rights art. 2, Dec. 16, 1966, S. Treaty Doc. No. 95–19, 993 U.N.T.S. 3 [hereinafter ICESCR].

61. African Charter on Human and Peoples' Rights arts. 2–3, 19, June 27, 1981, 1520 U.N.T.S. 217; American Convention on Human Rights: "Pact of San José, Costa Rica" arts. 1, 24, Nov. 22, 1969, S. Treaty Doc. No. 95–21, 1144 U.N.T.S. 123; Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221.

62. *See, e.g.*, Hum. Rts. Comm., Communication No. 488/1992, § 9, U.N. Doc. CCPR/C/50/D/488 /1992 (1994) [hereinafter *Toonen*] (finding that the ICCPR prohibits discrimination based on sexual orientation); Hum. Rts. Comm., Communication No. 2172/2012, at 17–18, U.N. Doc. CCPR/C/119/D/2172/2012 (2017) (finding that the ICCPR prohibits discrimination based on gender identity); Comm. on Econ., Soc. & Cultural Rts., Gen. Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights), ¶¶ 11, 27, 32, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

63. *See, e.g.*, U.N. Hum. Rts. Off. High Comm'r et al., Ending Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender and Intersex People (2015), https://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF [https://perma.cc/38ZR-T3ES]; State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, ¶ 61 (Nov. 24, 2017), http://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf [https://perma.cc/685W-3ETN]; Oliari & Others v. Italy, App. Nos. 18766/11 & 36030/11, ¶ 185 (July 21, 2015), https://hudoc.echr.coe.int/eng?i=001–156265 [https://perma.cc/N4RZ-64TQ#{%22itemid%22:[%22001–156265%22]}].

64. *See, e.g.*, Human Rights Council Res. 17/19, U.N. Doc. A/HRC/RES/17/19 (July 14, 2011); Human Rights Council Res. 27/32, U.N. Doc. A/HRC/RES/27/32 (Oct. 2, 2014); Human Rights Council Res. 32/2, U.N. Doc. A/HRC/RES/32/2 (July 15, 2016).

65. *See, e.g.*, Hum. Rts. Comm., Concluding Observations on the Fourth Periodic Report of Azerbaijan, ¶¶ 8–9, U.N. Doc. CCPR/C/AZE/CO/4 (Nov. 16, 2016) (calling for passage of inclusive nondiscrimination law); Hum. Rts. Comm., Concluding Observations on the Fourth Periodic Report of Jamaica, ¶¶ 15–16, U.N. Doc. CCPR/C/JAM/CO/4 (Nov. 22, 2016) (calling for passage of inclusive nondiscrimination law); Comm. on Econ., Soc. & Cultural Rts., Concluding Observations on the Combined Fifth and Sixth Periodic Reports

As of 2019, seventy-four countries around the world expressly prohibited discrimination based on sexual orientation.[66] Often, these laws also prohibited discrimination based on gender identity or expression.[67] The form of these antidiscrimination protections, however, varies widely. In many cases, the sanctions for discrimination are civil penalties; those who engage in discrimination are subject to fines or other measures to make victims whole. In the United States, for example, redress for employment discrimination may include hiring, reinstatement, promotion, back pay, reasonable accommodations, fees and costs associated with litigation, and compensatory or punitive damages.[68] Such approaches prohibit and even punish discrimination, but do not utilize the machinery of criminal law in doing so.

Many countries have gone further, making discrimination a criminal offense subject to criminal penalties up to and including incarceration. At least twenty-six countries—Andorra,[69] Angola,[70] Belgium,[71] Bolivia,[72] Brazil,[73]

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of the Philippines, ¶¶ 19–20, U.N. Doc. E/C.12/PHL/CO/5–6 (Oct. 26, 2016) (calling for passage of inclusive nondiscrimination law).

66. Lucas Ramón Mendos, Int'l Lesbian, Gay, Bisexual, Trans & Intersex Ass'n, State-Sponsored Homophobia 2019, at 245 (13th ed. 2019), https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf [https://perma.cc/DFL6–4TM4]. The total does not include those countries where discrimination based on sexual orientation is not expressly enumerated but is prohibited under general equality guarantees, nor does it include those countries where national laws are lacking but some protection is provided under regional or municipal laws. *Id.*

67. *See, e.g.*, Zhan Chiam, Sandra Duffy & Matilda González Gil, Int'l Lesbian, Gay, Bisexual, Trans & Intersex Ass'n, Trans Legal Mapping Report: Recognition Before the Law 1 (2d ed. 2017), https://ilga.org/downloads/ILGA_Trans_Legal_Mapping_Report_2017_ENG.pdf [https://perma.cc/7T59–5MCQ].

68. *See Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. Equal Emp. Opportunity Comm'n (Nov. 21, 2009), https://www.eeoc.gov/fact-sheet/federal-laws-prohibiting-job-discrimination-questions-and-answers [https://perma.cc/9LGJ-3YYH].

69. Andorra criminalizes discrimination based on sexual orientation with regard to employment and the provision of goods and services, with penalties of arrest and prohibition from exercising a trade or position for up to three years. For public officials, the penalty may include up to a year in prison and a three-year ban from public office. *See* Code Pénal [Penal Code] art. 338 (Andorra).

70. Angola criminalizes discrimination based on sexual orientation with regard to employment and the provision of goods and services, with penalties of up to two years in prison. *See* Código Penal [C.P.] [Penal Code] art. 212 (Angl.).

71. Belgium criminalizes discrimination based on sexual orientation with regard to employment, social protection programs, and goods and services. *See* Loi tendant à lutter contre certaines forms de discrimination [Antidiscrimination Law], Moniteur Belge [M.B.] [Official Gazette of Belgium], May 10, 2007, art. 4, https://www.ejustice.just.fgov.be/eli/loi/2007/05/10/2007002099/justel [https://perma.cc/AQL8–26KY] (Belg.).

72. Bolivia criminalizes discrimination based on sexual orientation, with heightened penalties for public officials or private individuals offering public services. *See* Código Penal [Penal Code] Capítulo VI, art. 281 (Bol.).

73. *See supra* notes 1–9 and accompanying text.

Colombia,[74] Estonia,[75] Fiji,[76] Finland[77] France,[78] Greece,[79] Honduras,[80] Iceland,[81]

74. Colombia broadly criminalizes discrimination based on sexual orientation, with penalties of twelve to thirty-six months in prison and a fine of ten to fifteen times the amount of the monthly minimum wage. *See* Código Penal [C. Pen.] [Criminal Code] art. 134A (Colom.). Penalties are enhanced when the conduct occurs in a public space, occurs through mass media, is carried out by public officials or individuals offering public services, is directed at minors or older persons, or involves labor rights. *Id.* art. 134C.

75. Estonia broadly criminalizes discrimination based on sexual orientation, with penalties of a fine or detention. *See* Karistusseadustik [Penal Code] § 152(1) (Est.). Penalties are enhanced when the conduct is committed multiple times or significantly damages the public interest or the legally protected rights or interests of another person. *See id.* § 152(2).

76. Fiji criminalizes discrimination based on sexual orientation with regard to employment, with penalties of $10,000, a term of imprisonment of up to two years, or both. *See* Employment Relations Promulgation 2007 (No. 36/2007), §§ 6(2), 75, 256 (Fiji).

77. Finland criminalizes discrimination based on "sexual preference" in employment and the exercise of a trade or profession or services for the general public, with penalties of a fine or up to six months' imprisonment. *See* Rikoslaki [Criminal Code] ch. 47, § 3 (Fin.).

78. France criminalizes discrimination based on sex and "sexual morals or orientation" with regard to employment and the provision of goods and services, with penalties of a €45,000 fine and three years' imprisonment. *See* Code Pénal [C. Pén.] [Penal Code] arts. 225–1, 225–2 (Fr.). When discrimination in the provision of goods and services takes place in public, bars access to a public place, or is committed by a person holding public authority, the penalties increase to a €75,000 fine and five years' imprisonment. *See id.* arts. 225–2, 432–7.

79. Greece criminalizes discrimination based on sexual orientation with regard to employment and the provision of goods and services, with penalties of a fine of €1000 to €5000 and imprisonment of six months to three years. *See* Nomos (2005:3304) Εφαρμογή της αρχής της ίσης μεταχείρισης ανεξαρτήτως φυλετικής ή εθνοτικής καταγωγής, θρησκευτικών ή άλλων πεποιθήσεων, αναπηρίας, ηλικίας ή γενετήσιου προσανατολισμού [Application of the Principle of Equal Treatment Regardless of Racial or Ethnic Origin, Religion or Other Belief, Disability, Age or Sexual Orientation], Ephemeris Tes Kyverneseos Tes Hellenikes Demokratias [E.K.E.D.] 2013, A:16 (Greece).

80. Honduras broadly criminalizes discrimination based on sexual orientation and gender identity, with penalties of three to five years' imprisonment or fines of four to seven times the minimum wage. Penalties are enhanced for repeat offenders, public officials, or discrimination involving acts of violence. *See* Código Penal [Criminal Code] art. 321 (Hond.).

81. Iceland criminalizes discrimination based on sexual orientation and gender identity with regard to the provision of goods and services, punishable with fines or imprisonment up to six months. *See* Almenn Hegningarlög [General Penal Code] art. 180 (Ice.). It also criminalizes discrimination based on sexual orientation and gender identity and expression with regard to employment, punishable with a fine. *See* Lög um jafna meðferð á vinnumarkaði [Act on Equal Treatment in the Labor Market] (86/2018) (Ice.).

Ireland,[82] Liechtenstein,[83] Lithuania,[84] Luxembourg,[85] Mexico,[86] Mongolia,[87]

82. Ireland criminalizes discrimination based on gender and sexual orientation with regard to employment, with penalties of a fine up to £25,000, up to two years' imprisonment, or both. *See* Employment Equality Act 1998 (Act No. 21/1998), § 6(2)(d) (Ir.), http://www.irishstatutebook.ie/eli/1998/act/21/enacted/en/print [https://perma.cc/DZQ9-EDNP].

83. Liechtenstein criminalizes discrimination based on gender and sexual orientation, with penalties of up to two years' imprisonment. *See* Strafgesetzbuch [Criminal Code] § 283 (Liech.).

84. Lithuania broadly criminalizes discrimination based on sex and sexual orientation, with penalties of community service, a fine, restrictions of liberty, or imprisonment of up to three years. Baudžiamasis Kodeksas [Criminal Code] art. 169 (Lith.).

85. Luxembourg criminalizes discrimination based on sexual orientation and gender identity with regard to employment, economic activity, and the provision of goods and services, with penalties of eight days to two years in prison, fines of €251 to €25,0000, or both. Code Pénal [Penal Code] arts. 454–455 (Lux.). Penalties are enhanced for public authorities or those charged with the provision of a public service, who face one month to three years in prison, fines of €251 to €37,500, or both. *See id.* art. 456.

86. Mexico broadly prohibits discrimination based on sex, gender, or "sexual preferences." *See* Ley Federal Para Prevenir y Eliminar la Discriminación [Federal Law for the Prevention and Punishment of Torture] [LFPED], Diario Oficial de la Federación [DOF] 11–06–2003, últimas reformas DOF 21–06–2018 (Mex.). Discrimination is punishable with one to three years in prison, 150 to 300 days of community service, or a fine of up to 200 days. Penalties are enhanced for various circumstances, including discrimination by public officials, who may also face dismissal or disqualification from their position for the duration of their punishment. *See* Código Penal Federal [Federal Criminal Code] [CPF] art. 149 ter, DOF 14–08–1931, últimas reformas DOF 24–01–2020 (Mex.).

87. Mongolia broadly criminalizes discrimination based on sex and sexual orientation, with penalties of a fine or restrictions on the right to travel ranging from one month to one year. Penalties are enhanced for public officials, who face fines, restrictions on the right to travel ranging from one to five years, or imprisonment of one to five years. *See* ЭРҮҮГИЙН ХУУЛЬ [Criminal Law] art. 14.1 (Mong.).

the Netherlands,[88] Nicaragua,[89] Peru,[90] Spain,[91] Suriname,[92] Sweden,[93] and Switzerland[94]—have criminalized some forms of discrimination based on sexual orientation or gender identity with carceral punishment.[95] In each of these countries, offenders may also be subject to fines, community service, and other possible penalties.

While these laws are animated by respect for freedom from discrimination as a human right, they can exact a hefty toll on the rights of those who are convicted under their provisions. For example, Angola's law—enacted alongside the decriminalization of same-sex conduct in 2019—penalizes employment discrimination and denials of goods and services with up to two years in prison.[96] Such sentences can seriously jeopardize the human rights of people convicted of offenses, particularly in contexts where mistreatment, poor sanitation, and violence are persistent challenges in carceral settings.[97] The

88. The Netherlands broadly prohibits discrimination based on sex or "heterosexual or homosexual orientation or civil status." *See* Wet Gelijke Behandeling op grond van Leeftijd bij de Arbeid van 17 december 2003, Stb. 2004, art. 1. The Netherlands criminalizes taking part in or providing material support for activities that discriminate based on sex or heterosexual or homosexual orientation, with penalties of a fine or up to three months imprisonment. *See* Art. 137(f) Wetboek Van Strafrecht [SR] [Criminal Code] (Neth.).

89. Nicaragua criminalizes discrimination based on sexual orientation with regard to employment, with penalties ranging from six months to a year of imprisonment and a fine of 90 to 150 days wages. Penalties are enhanced if the discrimination is committed through violence or intimidation. *See* Ley No. 641, 16 Nov. 2007, Código Penal [Penal Code] tit. X, art. 315, La Gaceta, Diaro Oficial [L.G.], 5 May 2008 (Nicar.).

90. Peru broadly criminalizes discrimination based on sex, sexual orientation, and gender identity, with penalties of two to three years in prison or 60 to 120 days of community service. Penalties are enhanced if the discrimination is committed by a public servant or carried out by means of "physical or mental violence," with penalties of two to four years in prison and disqualification from public service. *See* Decreto Legislativo No. 1323 [Legislative Decree No. 1323] art. 1, Jan. 6, 2017, El Peruano [The Peruvian] (modifying Código Penal [Penal Code] art. 323 (Peru)).

91. Spain criminalizes discrimination based on sex and sexual orientation with regard to employment, with penalties of six months to two years' imprisonment or a fine of twelve to twenty-four months' wages. *See* Código Penal [C.P.] [Criminal Code] art. 314 (Spain).

92. Suriname broadly criminalizes participating in or materially supporting discrimination based on sexual orientation, with penalties of a fine, up to one year in prison, or both. *See* Wet van 30 maart 2015 [Act of 30 March 2015], Stb. 2015, no. 44, art. 176b (Surin.). Discrimination in the exercise of an office, profession, or business is punishable with penalties of a fine, up to two years in prison, or both. *See id.* art. 176c.

93. Sweden criminalizes discrimination based on sexual orientation and transgender identity or expression by business operators, public authorities, and organizers of public events, with penalties of a fine or up to a year in prison. *See* Brottsbalken [BrB] [Penal Code] 16:9 (Swed.).

94. Switzerland criminalizes discrimination based on sexual orientation with regard to the provision of services, with penalties of a fine or up to three years in prison. *See* Code Penal Suisse [CP] [Criminal Code] art. 261bis (Switz.).

95. *See also* Mendos, *supra* note 66, at 246–56 (discussing some of these provisions).

96. *See* C.P. § 197 (Angl.).

97. *See, e.g.*, Jeremy Sarkin, *Prisons in Africa: An Evaluation from a Human Rights Perspective*, Sur: Int'l J. On Hum. Rts., Jan. 2008, at 23 (describing challenging human

same year Angola's carceral penalties were enacted, the U.S. State Department warned that the country's "[p]rison and detention center conditions were harsh and life threatening due to overcrowding, a lack of medical care, corruption, and violence."[98] These implications should prompt human rights advocates to ask whether criminalization is ever an appropriate response to discrimination in the workplace or in public accommodations. If the answer is yes, advocates should also ask whether the severity of the sanction is appropriate, taking into account the fundamental loss of liberty and the predictable conditions of confinement. Yet thus far, many human rights organizations have celebrated the enactment of discriminalization laws without meaningful commentary on the sanctions they impose and how they are likely to be enforced.[99]

Although demands for LGBT-inclusive antidiscrimination laws have been growing, discriminalization is not limited to sexual orientation and gender identity alone. Typically, provisions focusing on sexual orientation and gender identity have been added to broader legal protections that cover a variety of classes. Angola's law, for example, criminalizes discrimination based on sexual orientation but also gender, race, ethnicity, color, birthplace, religion or belief, political or ideological convictions, and social origin or condition.[100] Thus, rethinking discriminalization in the context of sexual orientation and gender identity has broader consequences for antidiscrimination law and whether criminal penalties are appropriate for pursuing equality more generally. As I describe below, it also poses a strategic dilemma for LGBT advocates: whether to seek inclusion in criminal law frameworks that punish discrimination against other classes or to reject discriminalization and risk either being excluded from existing antidiscrimination frameworks or undermining hard-won protections for other groups.

C. *Degrading or Insulting Speech*

The international human rights framework has been more permissive of hate speech legislation than some domestic settings. The United States, for example, has strong constitutional protections for the freedom of expression that have overridden individual or collective dignitary interests.[101] Courts in France and South Africa have recently circumscribed the scope of hate speech

rights conditions in carceral settings).

98. U.S. Dep't of State, Angola 2019 Human Rights Report 3 (2019), https://www.state.gov/wp-content/uploads/2020/02/ANGOLA-2019-HUMAN-RIGHTS- REPORT.pdf [https://perma.cc/NRK8–8KVS].

99. *See, e.g.*, Graeme Reid, *Angola Decriminalizes Same-Sex Conduct*, Hum. Rts. Watch (Jan. 23, 2019), https://www.hrw.org/news/2019/01/23/angola-decriminalizes-same-sex-conduct [https://perma.cc/SWQ2–7UGW] (suggesting that Angola has "eschewed discrimination and embraced equality" and that "other countries around the world that still criminalize consensual same-sex conduct should follow its lead"); Stabile, *supra* note 3 (suggesting that the decision to criminalize homophobia and transphobia in Brazil "is certainly an extremely welcome one," despite the racially discriminatory enforcement of criminal law).

100. *See* C.P. § 197 (Angl.).

101. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443 (2011).

legislation as well, while human rights advocates have expressed concern about sweeping hate speech prohibitions enacted in Ethiopia, Germany, and elsewhere.[102] By contrast, many core human rights treaties expressly encourage or require the prohibition of speech that fosters discrimination or degrades a particular group. Article 20 of the ICCPR states that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility restrict such speech, but sometimes requiring them to do so.[103] Other human rights treaties have even stronger provisions calling upon States parties to restrict injurious speech. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), for example, requires States parties to take "immediate and positive measures" to eradicate discrimination.[104] These measures must not only prohibit incitement and violence, but must also declare that any "dissemination of ideas based on racial superiority or hatred" is punishable by law.[105]

Globally, laws that recognize anti-LGBT speech as potentially harmful are increasingly commonplace. As of 2019, thirty-nine countries around the world prohibited incitement to hatred, violence, or discrimination based on sexual orientation, typically through criminal law.[106] Many of these laws covered gender identity as well.[107] In some countries, these laws have been enacted against a backdrop of extremely high rates of violence directed at LGBT persons. In South Africa, for example, activists have long called for stronger hate crimes and hate speech laws as a response to brutal violence against Black lesbians and transgender men.[108] In Brazil, activists have highlighted horrific

102. *See* Aurelien Breeden, *French Court Strikes Down Most of Online Hate Speech Law*, N.Y. Times (June 18, 2020), https://www.nytimes.com/2020/06/18/world/europe/france-internet-hate- speech-regulation.html [https://perma.cc/6ARN-6A3M]; Musawenkosi Cabe, *Hate Speech Law to Be More Clearly Defined*, New Frame (Aug. 6, 2021), https://www.newframe.com/hate-speech-law-to-be-more-clearly-defined/ [https://perma.cc/ZQE2-R4CY]; Janosch Delcker, *Germany's Balancing Act: Fighting Online Hate While Protecting Free Speech*, Politico (Oct. 1, 2020), https://www.politico.eu/article/germany-hate-speech-internet-netzdg-controversial-legislation [https://perma.cc/6MKT-KVG5]; Elias Meseret, *Ethiopia Approves Controversial Law Curbing Hate Speech*, Associated Press (Feb. 13, 2020), https://apnews.com/article/1a159efee95f5eaaf9cbcfb6e177c07e [https://perma.cc/E6WK-P7XN].

103. ICCPR, *supra* note 60, art. 20. Article 19 of the ICCPR protects the freedom of expression but acknowledges that such freedom can be subject to restrictions that are provided by law and necessary to protect national security, public order, public health, morals, or the rights and reputations of others. *Id.* art. 19.

104. International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Mar. 7, 1966, S. Treaty Doc. 95–18, 660 U.N.T.S. 195.

105. *Id.*

106. *See also* Mendos, *supra* note 66, at 263–68 (discussing some of these provisions).

107. *Id.* at 263.

108. *See* Melany Bendix, *South Africa's Law to Stop Hate Crimes Against Gays*, Inter Press Serv. (Feb. 14, 2014), http://www.ipsnews.net/2014/02/south-africas-law-stop-hate-crimes-love [https://perma.cc/BJ73-KXAY]; Melanie Judge, Opinion, *Hate Speech Cannot Be Disentangled from Its Violent Consequences*, News24 (Aug. 22, 2019), https://www.news24.com/news24/columnists/guestcolumn/

rates of violence against LGBT people, particularly transgender women, in pressing for stronger legal protections against prejudicial speech.[109]

Not all laws discouraging anti-LGBT speech are narrowly aimed at addressing incitement to violence, however; many extend to messaging that ridicules, disparages, or insults members of a protected class. Of the thirty-nine countries with hate crime or hate speech laws that encompassed sexual orientation and gender identity, at least ten had laws that were sufficiently broad to prohibit degrading or insulting speech, even when that speech does not amount to incitement. The Netherlands, for example, criminalizes "intentionally mak[ing] an insulting statement about a group of persons" in public based on protected grounds, including sexual orientation, with penalties of a fine or imprisonment for up to one year.[110] Unless conveying factual information, anyone who publicly makes a statement that they should *reasonably suspect* to be insulting to a protected group faces a fine or imprisonment for up to six months.[111] The penalties are enhanced if these offenses are habitual or done by two or more people in concert.[112] The primary harm that such provisions seek to prevent is not violence as it is traditionally understood, but rather a dignitary injury inflicted on marginalized groups. Such provisions also demonstrate state support for the more general public good of inclusiveness and belonging.[113]

opinion-hate-speech-cannot-be-disentangled-from-its-violent-consequences-20190822 [https://perma.cc/CZ6D-TL8B]; Bheki C. Simelane, *Hate Crimes Bill – 'The Buck Stops with Parliament,' Says Department of Justice*, Daily Maverick (June 2, 2021), https://www.dailymaverick.co.za/article/2021–06–02-hate-crimes-bill-the-buck-stops-with-parliament-says-department-of-justice [https://perma.cc/83Z2–8NX4]; *see also* Nonhlanhla Mkhize, Jane Bennett, Vasu Reddy & Relebohile Moletsane, The Country We Want to Live In: Hate Crimes and Homophobia in the Lives of Black Lesbian South Africans (2010).

109. *See* Tyler Strobl, *Brazil as World LGBT Murder Capital and Rio's Place in the Data*, RioOnWatch (July 10, 2017), https://www.rioonwatch.org/?p=37249 [https://perma.cc/7QJN- FGQY].

110. Art. 137(c) SR (Neth.).

111. Art. 137(e) SR (Neth.).

112. Art. 137(c) SR (Neth.); Art. 137(e) SR (Neth.).

113. *See* Waldron, *supra* note 56, at 4–5.

The Netherlands is not alone in attempting to curb degrading or insulting speech. Denmark,[114] Finland,[115] Iceland,[116] Lithuania,[117] Norway,[118] Slovenia,[119] Suriname,[120] Sweden,[121] and Switzerland[122] have also criminalized degrading or insulting speech about protected groups, with penalties of imprisonment or a fine.[123] Other countries are considering similar provisions as part of omnibus antidiscrimination legislation championed by many LGBT advocates.[124]

114. Denmark criminalizes "mak[ing] a statement or impart[ing] other information by which a group of people are threatened, insulted or degraded" on protected grounds, including "sexual inclination," with penalties of a fine or up to two years' imprisonment. Straffeloven [Criminal Code] § 266b (Den.).

115. Finland criminalizes "an expression of opinion or another message where a certain group is threatened, defamed or insulted" on protected grounds, including sexual orientation, with penalties of a fine or up to two years' imprisonment. Rikoslaki [Criminal Code] ch. 11, § 10 (Fin.).

116. Iceland criminalizes "ridicule, calumniation, insult, [or] threat" toward a person or group on protected grounds, including "sexual inclination," with penalties of a fine or up to two years' imprisonment. General Penal Code art. 233a (Ice.).

117. Lithuania imposes criminal penalties on anyone who "publicly ridicules, expresses contempt for, urges hatred of or incites discrimination" against a person or group on protected grounds, including sex and sexual orientation, with penalties of a fine, restriction of liberty, arrest, or imprisonment for up to two years. Baudžiamasis Kodeksas [Criminal Code] art. 170(2) (Lith.). Anyone who produces, acquires, sends, transports, or stores materials for those purposes also faces a fine, restriction of liberty, arrest, or imprisonment for up to one year. *Id.*

118. Norway imposes criminal penalties on anyone who "willfully or through gross negligence publicly utters a discriminatory or hateful expression," which includes insulting people based on their "homosexuality, lifestyle or orientation." Straffeloven [Penal Code] § 135(a) (Nor.).

119. Slovenia imposes criminal penalties on anyone who "provokes . . . inequality" based on sexual orientation, with punishment of up to two years' imprisonment. Kazenski Zakonik [Penal Code] art. 297(1) (Slovn.).

120. Suriname criminalizes publicly insulting people based on their sexual orientation with a fine and up to a year of imprisonment. Wet van 30 maart 2015 [Act of 30 March 2015], Stb. 2015, no. 44, arts. 175–176a (Surin.). Unless it is to convey factual information, anyone who publicly makes a statement that they should reasonably suspect to be insulting on those grounds faces the same penalties. *Id.* The penalties are harsher if either offense is habitual or done by two or more people in concert. *Id.*

121. Sweden criminalizes statements that express contempt toward protected classes, including by allusion to sexual orientation or transgender identity or expression, punishing them with a fine or up to two years in prison. BrB 16:8 (Swed.). The penalties are enhanced for statements that are particularly offensive or disseminated widely, which are subject to six months to four years of imprisonment. *Id.*

122. Switzerland criminalizes the public dissemination of ideologies that aim to systematically denigrate or defame a person or group, as well as any public denigration of an individual or group based on their sexual orientation in a manner that violates human dignity, with penalties of a fine or up to three years in prison. CP art. 261bis (Switz.).

123. *See supra* notes 114–122.

124. *See, e.g.*, Xavier Javines Bilon & Claire De Leon, *With No National Law, Can We Rely on Local Ordinances to Protect LGBTQs Against Discrimination?*, CNN Philippines (June 25, 2018), https://cnnphilippines.com/life/culture/2018/06/25/antidiscrimination-bill-lgbtq.html [https://perma.cc/74Z9-GHBX] (discussing the history of advocacy for LGBT-inclusive antidiscrimination protections in the Philippines); Hannah Roberts, *LGBT Hate*

In the Philippines, the SOGI Equality Bill unanimously passed by the House of Representatives in 2017 defined "discrimination" to include "[e]ngaging in public speech meant to shame, insult, vilify, or which tends to incite or normalize the commission of discriminatory practices against LGBTs, and which acts or practices in turn, intimidate them or result in the loss of their self-esteem."[125] If the bill had passed, those types of speech, along with other discriminatory conduct, would have been punishable with steep fines and anywhere from one to six years in prison.[126] Various provisions of the bill sparked pushback from opponents who argued it would infringe on freedoms of expression and religion, at times referencing the provision on insulting speech.[127] While attempts to enact a SOGI Equality Bill are still pending, debates about speech restrictions are likely to recur as advocates press for omnibus LGBT rights bills in jurisdictions that do not yet have them.[128]

Like laws prohibiting discrimination in employment and other contexts, laws criminalizing degrading or insulting speech are often couched in the language of human rights. Proponents contend that these laws promote equality and provide a necessary safeguard for the dignity of LGBT persons. Opponents argue that they threaten the liberty of those who face prosecution for expressing their views, and often criticize them as overly restrictive of speech and religion.[129] Despite these similarities, laws prohibiting degrad-

Crime Bill Polarizes Italy, Politico (May 21, 2021), https://www.politico.eu/article/lgbt-hate-crime-bill-italy [https://perma.cc/VQ2M-ARBK] (discussing advocacy for LGBT-inclusive hate crime and hate speech laws in Italy).

125. An Act Prohibiting Discrimination on the Basis of Sexual Orientation or Gender Identity (SOGI) and Providing Penalties Therefor, H.R. 4982, 17th Cong. § 4(l) (2017) (Phil.).

126. *Id.* § 7.

127. *FALSE: SOGIE Equality Bill Will 'Undercut' Freedoms, Destroy Family*, Rappler (Sept. 6, 2019), https://www.rappler.com/newsbreak/fact-check/sogie-equality-bill-will-undercut-freedoms- destroy-family [https://perma.cc/MF9Q-6UU2].

128. Cathrine Gonzales, *Senate Panel Approves SOGIESC-Based Anti-discrimination Bill*, Inquirer (Dec. 9, 2020), https://newsinfo.inquirer.net/1370022/senate-panel-approves-sogiesc-based-anti-discrimination-bill [https://perma.cc/AJJ9-FSNC]. A version of the bill filed in 2020 does not include incarceration as a potential penalty and contains narrower speech restrictions, but would still prohibit "promoting and encouraging stigma" in media, textbooks, and other platforms. An Act Prohibiting Discrimination, Marginalization, and Violence Committed on the Basis of Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics and Providing Sanctions Therefor, S. 1934, 18th Cong, § 5(a) (2020) (Phil.). A proposed antidiscrimination bill in Italy also prompted heated debate about the interplay of speech restrictions and criminal law, despite safeguards for the expression of personal opinions. Andrea Carlo, *How a Bill to Fight Homophobia Has Polarised Italy and Sparked a Culture War*, EuroNews (Aug. 9, 2021), https://www.euronews.com/2021/08/09/how-a-bill-to-fight-homophobia-has-polarised-italy-and-sparked-a-culture-war [https://perma.cc/4MRQ-6TXA].

129. A large body of literature has examined whether and when hate speech laws comport with the freedom of expression under international law. *See, e.g.*, Kevin Boyle, *Hate Speech—the United States Versus the Rest of the World?*, 53 Me. L. Rev. 487 (2001); Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 Berkeley J. Int'l L. 1 (1996). While this

ing or insulting speech also differ in important ways from those prohibiting the denial of employment, housing, and the provision of goods and services. Specifically, laws prohibiting discrimination in the context of employment, housing, and the provision of goods and services typically address economic injury and exclusion of LGBT persons from the marketplace, while laws restricting speech are primarily aimed at protecting people from stigmatic injury. As a result, the weight lawmakers and advocates give to stigmatic injury is particularly important in their determination of whether and when criminal law is an appropriate tool to protect LGBT persons from degrading or insulting speech. The question of whether criminalization is an appropriate response to different types of harm also arises in the emerging context of conversion practices, where stigmatic harms may coexist with serious physical or psychological injury.

D. *Conversion Practices*

A final category of laws used to address anti-LGBT hostility are bans on conversion practices, often colloquially known as "conversion therapy." While these laws differ from one another in focus and scope, they generally aim to prohibit efforts to change a person's sexual orientation or gender identity, recognizing that such efforts can be traumatic and psychologically damaging for those subjected to them. While some conversion practices are readily cognizable as violent or coercive, a growing number of bills seek to expand prohibitions to cover more subtle forms of dignitary offense.

Particularly in medical or therapeutic settings, conversion practices are grounded in the discredited notion that same-sex attraction or transgender identity are disorders to be "cured." Health professionals have widely rejected the idea that one's sexual orientation or gender identity can be deliberately changed, bringing new scrutiny to practices that promise to make individuals cisgender and heterosexual. As diverse sexual orientations and gender identities have come to be understood as normal forms of human development, the World Health Organization declassified homosexuality as a mental disorder in 1990 and later declassified "gender identity disorder" in 2019.[130] Along with recognizing sexual and gender diversity, mental health professionals have increasingly recognized that attempts to change a person's sexual orientation or gender identity can be profoundly harmful and may foster anxiety, depression, self- harm, suicidality, and other negative mental health outcomes.[131] In

is a rich field of scholarly discussion, this Article primarily focuses on the tension between dignity and the deprivation of liberty and other rights as a result of carceral punishment, rather than on the tension between dignity and the freedom of expression.

130. Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 Behav. Sci. 565, 571 (2015); *Transgender No Longer Recognized as 'Disorder' by WHO*, BBC (May 29, 2019), https://www.bbc.com/news/health-48448804 [https://perma.cc/E2KS-YB64].

131. Hilary Daniel & Renee Butkus, *Lesbian, Gay, Bisexual, and Transgender Health Disparities: Executive Summary of a Policy Position Paper from the American College of Physicians*, 163 Annals Internal Med. 135 (2015) (reviewing research findings on the efficacy and dangers of conversion practices).

the United States, the American Medical Association, American Psychological Association, American Psychiatric Association, American Counseling Association, and American Academy of Pediatrics have all rejected the use of conversion practices, indicating an overwhelming consensus across professional disciplines that these treatments are inappropriate and dangerous.[132] A wide range of professional associations across the globe have also condemned these efforts, including the World Medical Association, the World Psychiatric Association, the Pan American Health Organization, and national psychological associations in Brazil, Hong Kong, India, Lebanon, the Philippines, South Africa, Thailand, and Turkey.[133]

While conversion practices have traditionally been associated with medical or therapeutic settings, these are not the only, or even the primary, spaces where efforts to alter a person's sexual orientation or gender identity take place. Conversion practices also take place in religious settings, where they may take the form of pseudo-therapeutic spiritual counseling or may involve prayers, exorcisms, or other practices to compel the person to turn away from same-sex activity or perceived gender transgression.[134] In some instances, the provision of conversion services has also been a lucrative commercial enterprise, prompting high-profile lawsuits against those who fraudulently purport to be able to change a person's sexual orientation or gender identity.[135] Whether in therapeutic, religious, or commercial settings, conversion practices may range from counseling or talk therapy to more aggressive tactics that can amount to prolonged physical, sexual, or verbal abuse. Encouragement to change a person's sexual orientation or gender identity may also vary in duration, intensity,

132. *Health Care Needs of Lesbian, Gay, Bisexual, Transgender and Queer Populations H- 160.991*, AMA (2018), https://policysearch.ama-assn.org/policyfinder/detail/H-160.991?uri=%2FAMADoc%2FHOD.xml-0–805.xml [https://perma.cc/38AQ-X34M]; *Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, *in* Am. Psych. Ass'n, APA Policy Statements on LGBT Concerns 29 (2009), http://www.apa.org/about/policy/sexual-orientation.pdf [https://perma.cc/Y8P9-FWCU]; Am. Psychiatric Ass'n, *Position Statement on Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)*, 157 Am. J. Psychiatry 1719 (2000); Joy S. Whitman, Harriet L. Glosoff, Michael M. Kocet & Vilia Tarvydas, *Ethical Issues Related to Conversion or Reparative Therapy*, Am. Counseling Ass'n (Jan. 16, 2013), http://www.counseling.org/news/updates/2013/01/16/ethical-issues-related-to-conversion-or-reparative-therapy [https://perma.cc/SSB8-YULW]; Am. Acad. of Pediatrics Comm. on Adolescence, *Homosexuality and Adolescence*, 92 Pediatrics 631, 633 (1993).

133. Hum. Rts. Watch, "Have You Considered Your Parents' Happiness?": Conversion Therapy Against LGBT People in China 53 (2017), https://www.hrw.org/sites/default/files/report_pdf/china1117_web_0.pdf[https://perma.cc/U4UL- QFF8].

134. *See* Amie Bishop, OutRight Action Int'l, Harmful Treatment: The Global Reach of So-Called Conversion Therapy 19 (2019), https://outrightinternational.org/sites/default/files/ConversionFINAL_1.pdf [https://perma.cc/8M76- ZAG4].

135. Jacob M. Victor, Note, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives*, 123 Yale L.J. 1532, 1562–63 (2014) (describing *Ferguson v. JONAH*, in which a provider charged patients thousands of dollars for conversion practices.).

and specificity, creating a particular challenge for lawmakers crafting prohibitions and punishments.

While conversion practices can take different forms and exact different harms, efforts to change sexual orientation or gender identity increasingly have been recognized as threats to human rights.[136] OutRight Action International's comprehensive report on conversion practices raises concerns about "the right to health, the right to freedom from non-consensual medical treatment, the right to non-discrimination, the right to privacy, and the rights of the child in cases where minors are subjected to these practices."[137] Human Rights Watch has also noted that conversion practices can threaten freedom from arbitrary deprivation of liberty, as many people subjected to these practices are held against their will.[138] These concerns have been echoed by international human rights mechanisms. In 2015, twelve UN agencies issued a joint statement condemning violence and discrimination based on sexual orientation and gender identity which expressed concern about "unethical and harmful so-called 'therapies' to change sexual orientation" in healthcare settings.[139] The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has warned that conversion practices in healthcare settings "can amount to torture and ill- treatment."[140] The UN Special Rapporteur on the freedom of religion or belief has stated that these practices are sufficiently harmful that they can be validly regulated by states even in religious settings.[141] In 2020, the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity issued the most comprehensive analysis to date on the topic, concluding that attempts to subject LGBT people to conversion practices are "by their very nature degrading, inhuman and cruel and create a significant risk of torture."[142] Recognizing these varied dangers, the European Parliament has called on states to expressly ban these practices, though it stopped short of articulating how they should be

136. *See, e.g.*, Jayne Ozanne, *"Conversion Therapy," Spiritual Abuse and Human Rights*, 3 Eur. Hum. Rts. L. Rev. 241 (2021) (discussing conversion practices and human rights); Ilias Trispiotis & Craig Purshouse, *'Conversion Therapy' as Degrading Treatment*, Oxf. J. Legal Stud. Online (2021) (discussing conversion practices as degrading treatment.

137. Bishop, *supra* note 134, at 19.

138. Hum. Rts. Watch, *supra* note 133, at 2.

139. U.N. Hum. Rts. Off. High Comm'r et al., *supra* note 63, at 1.

140. Hum. Rts. Council, Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 48, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016); *see also* Josina Bothe, Int'l Rehab. Council for Torture Victims, It's Torture Not Therapy: A Global Overview of Conversion Therapy 4 (2020), https://irct.org/uploads/media/IRCT_research_on_conversion_therapy.pdf [https://perma.cc/5K7V-VMZX] (examining conversion practices worldwide "to provide a framework for examining the practice of conversion therapy through the lens of state obligations to prevent and prosecute torture and other cruel, inhuman or degrading treatment").

141. Ahmed Shaheed, *There Is No Legal Defense of LGBT+ Conversions*, Guardian (Apr. 23, 2021), https://www.theguardian.com/commentisfree/2021/apr/23/legal-defence-lgbt-conversions-sexuality-rights-belief [https://perma.cc/RA6S-6DVQ].

142. Hum. Rts. Council, *supra* note 57, ¶ 83.

prohibited.[143] While some human rights advocates have endorsed non-punitive approaches, including public education and support for survivors, efforts to end conversion practices often have centered first and foremost on banning the practice and punishing practitioners.

As advocates highlight that conversion practices often inflict serious harm, global efforts to criminalize conversion practices have rapidly gained momentum. In 2016, Malta became the first country to criminalize some forms of conversion practices,[144] punishing these efforts with a fine of €1000 to €5000, one to six months' imprisonment, or both, with enhanced penalties if conversion practices are performed on a vulnerable person.[145] Professionals who offer or refer a person for conversion practices are subject to harsher penalties.[146] In 2020, a German law took effect that similarly criminalized advertising, arranging for, or providing conversion practices to children and those who did not give informed consent.[147] The law applies to any person who deliberately tries to change another person's sexual orientation or gender identity, including parents or guardians.[148] Its penalties are even harsher than those in Malta, with fines of up to €30,000 and up to a year in prison for those who actually engage in conversion practices.[149] In 2021, Canada adopted an even more expansive ban and prohibited conversion practices aimed at adults as

143. Nick Duffy, *European Parliament Condemns Gay 'Cure' Therapy and Tells EU Member States to Ban It*, PinkNews (Mar. 1, 2018), https://www.pinknews.co.uk/2018/03/01/european-parliament-condemns-gay-cure-therapy-and-tells-eu-member-states-to-ban-it [https://perma.cc/X3BR- MCFM].

144. Liam Stack, *Malta Outlaws 'Conversion Therapy,' a First in Europe*, N.Y. Times (Dec. 7, 2016), https://www.nytimes.com/2016/12/07/world/europe/malta-outlaws-conversion-therapy- transgender-rights.html [https://perma.cc/M64W-R32H]. Under Malta's law, "conversion therapy" expands beyond healthcare settings to include any "treatment, practice or sustained effort that aims to change, repress and/or eliminate a person's sexual orientation, gender identity and/or gender expression." *See* The Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, 2016 (Act No. LV/2016) (Malta). The bill prohibits advertising conversion therapy and performing conversion therapy on people who are forced into the therapy or who are under eighteen years of age, suffer from a "mental disorder," or are deemed to be particularly at risk. *Id.*

145. The Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act, 2016 (Act No. LV/2016) (Malta).

146. *Id.*

147. Ger. Fed. Ministry of Health, *supra* note 58.

148. *Id.*; *Germany's Cabinet Approves Ban on Gay, Transgender 'Conversion Therapy*,' Deutsche Welle (Dec. 18, 2019), https://www.dw.com/en/germanys-cabinet-approves-ban-on-gay- transgender-conversion-therapy/a-51717750 [https://perma.cc/X83Y-GFLB]. A representative of Germany's largest LGBT organization argued the bill should go further to prohibit conversion practices on anyone up to age twenty-six. Tim Fitzsimons, *Germany Is 5th Country to Ban Conversion Therapy for Minors*, NBC News (May 8, 2020), https://www.nbcnews.com/feature/nbc-out/germany-5th-country-ban-conversion-therapy-minors-n1203166 [https://perma.cc/TC6M-ZVJ2].

149. Ger. Fed. Ministry of Health, *supra* note 58.

well as children.[150] In 2022, France and New Zealand enacted similar laws.[151] The harshest penalties to date have been imposed by Ecuador, where the infliction of pain and suffering that amounts to torture—including acts committed to change a person's sexual orientation or gender identity—are punishable with ten to thirteen years in prison.[152]

Other states may soon follow suit. Ireland has also considered legislation that would criminalize advertising or performing conversion practices not only on children or vulnerable individuals, but also on adults who consent to or seek out such efforts.[153] The legislation would have imposed carceral penalties on offenders.[154]

While the use of criminal law to address conversion practices is increasingly commonplace, it is not a foregone conclusion. Some states have sought to end conversion practices using alternative approaches, including regulation by professional bodies, denunciations, and consumer fraud penalties. In Brazil, the Federal Council of Psychology prohibited the "pathologisation of homoerotic behaviours and practices" and instructed psychologists to "refrain from coercive or unsolicited treatment to homosexuals" and attempts to cure same-sex attraction.[155] In Albania, the Order of Psychologists prohibited its

150. An Act to Amend the Criminal Code (Conversion Therapy), S.C. 2021, c 24 (Can.). Anyone who causes another person to undergo conversion practices faces up to five years in prison, and anyone who promotes or advertises conversion practices faces up to two years in prison. *Id.*

151. *LGBT Rights: New French Law to Criminalise 'Conversion Therapy,'* BBC (Jan. 26, 2022), https://www.bbc.com/news/world-europe-60145970 [https://perma.cc/9EG8–2JRG]. France's ban makes conversion practices punishable with a €30,000 fine and two years' imprisonment, with heightened penalties when these practices are aimed at minors or vulnerable adults. Eva Corlett, *New Zealand Bans Conversion Practices in Vote Hailed as "Win for Humanity"*, Guardian (Feb. 15, 2022), https://www.theguardian.com/world/2022/feb/16/new-zealand-bans-conversion-practices-in-vote- hailed-as-win-for-humanity [https://perma.cc/GCN6-RMCL]. New Zealand's ban prohibits conversion practices on people under age eighteen or with limited decision-making capacity, with punishments up to three years in prison, as well as conversion practices that cause serious harm, with punishments up to five years in prison.

152. Código Penal [Criminal Code] art. 151(3) (Ecuador). Mexico City has also recently adopted harsh carceral penalties, with up to five years in prison for conversion therapy and enhancements when the practice is performed on minors. *Mexico City Outlaws Gay Conversion Therapy*, Reuters (July 24, 2020), https://www.reuters.com/article/us-mexico-lgbtq/mexico-city-outlaws-gay-conversion-therapy-idUSKCN24P2LL [https://perma.cc/5LUU-BU84].

153. Ireland's bill would have made it a criminal offense to advertise or perform "any practice or treatment by any person that seeks to change, suppress, and, or eliminate a person's sexual orientation, gender identity, and, or gender expression." Gov't of Ir., Prohibition of Conversion Therapies Bill 2018, https://data.oireachtas.ie/ie/oireachtas/bill/2018/39/eng/initiated/b3918s.pdf [https://perma.cc/N8WY-T3K9].

154. Ireland's bill would have punished advertising or performing conversion therapy with a fine of up to €5000 and imprisonment of up to six months, with professionals who provide or refer patients for conversion therapy subject to fines of up to €10000 and imprisonment of up to a year. Gov't of Ir., *supra* note 153.

155. Mendos, *supra* note 66, at 270 (quoting *Resolução CFP N° 001/99* [*Resolution*

members from engaging in conversion practices, curtailing these efforts in a country where all psychologists must be members of the association.[156] Israel's Ministry of Health issued regulations prohibiting medical professionals from offering or advertising conversion practices, and Chile's Ministry of Health denounced those practices but stopped short of a formal ban.[157] The United States has not yet adopted a federal ban on conversion practices, but proposed legislation would prohibit some forms of these practices as consumer fraud.[158] Similarly, state and local lawmakers have prohibited conversion practices by deeming them fraudulent or suspending the licenses of professionals who provide them.[159]

Although these and other civil alternatives are possible, states have often found it easier to prohibit conversion practices as abuse or violence subject to the criminal law. Taiwan's ban provides an instructive example. Initially, Taiwan's Ministry of Health and Welfare sought to prohibit conversion practices by punishing practitioners who engaged in the practices with fines and possible suspensions of their professional licenses for up to a year.[160] When officials expressed doubt about using professional regulations to curb a non-medical practice, the government turned to existing criminal laws to introduce a more sweeping ban. It ultimately announced that conversion practices were in violation of existing provisions of the Code of Criminal Procedure and the Protection of Children and Youths Welfare and Rights Act, reading a

CFP 001/99], Presidência da República (Mar. 22, 1999), http://site.cfp.org.br/wp- content/uploads/1999/03/resolucao1999_1.pdf [https://perma.cc/32X6-U2HU]).

156. *Albanian Psychologists Ban So-Called Conversion Therapy*, Associated Press (May 16, 2020), https://apnews.com/99cd641ad6344a3e29caaabb36873b83 [https://perma.cc/XM94-EKY9].

157. Ido Efrati, *Israel's Health Ministry Bans LGBTQ "Conversion Therapy"*, Haaretz (Feb. 14, 2022), https://www.haaretz.com/israel-news/premium-israel-s-health-ministry-bans-lgbtq-conversion-therapy-1.10610998 [https://perma.cc/CJ8F-TKAL]; Michael K. Lavers, *Chilean Officials: Conversion Therapy Is a 'Grave Threat,'* Wash. Blade (Feb. 19, 2016), https://www.washingtonblade.com/2016/02/19/chilean-officials-conversion-therapy-is-a-grave-threat [https://perma.cc/HW34-W9GC].

158. *Therapeutic Fraud Prevention Act*, Hum. Rts. Campaign (Mar. 10, 2020), https://www.hrc.org/resources/therapeutic-fraud-prevention-act [https://perma.cc/SY6L-FWEM]; *see also* Victor, *supra* note 135, at 1562–64.

159. *Conversion "Therapy" Laws*, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/conversion_therapy [https://perma.cc/K9DQ-V4L2]. Connecticut and Illinois expressly prohibit conversion practices under statutory provisions on consumer fraud. All twenty states that prohibit conversion practices—namely, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Virginia, and Washington—classify conversion practices as unprofessional conduct for licensed professionals. *See Conversion "Therapy" Laws*, Movement Advancement Project, https://www.lgbtmap.org/img/maps/citations- conversion-therapy.pdf [https://perma.cc/L8CL-V5R3].

160. Chang Ming-hsuan & Kuo Chung-han, *Conversion Therapy to be Prohibited by Regulation*, Focus Taiwan (Jan. 2, 2017) (on file with author).

ban into these laws and subjecting anyone who attempts to change a person's sexual orientation or gender identity to criminal punishment.[161]

Whether prohibitions are civil or criminal, bans on conversion practices increasingly extend beyond therapeutic or commercial settings where the provision of conversion practices could be considered fraudulent. Indeed, proponents argue that broader bans are necessary to address the dignitary and psychological harm that the practice may still inflict on the people who undergo it in private settings. Such a sentiment is common among activists who note that religiously motivated conversion practices remain widespread and are often damaging to those who undergo them. For that reason, many have called for stronger penalties even for conversion efforts that are grounded in religious belief or are not offered for profit.[162] In Australia, for example, both the Australian Capital Territory and Victoria have banned conversion practices in religious as well as healthcare settings, with the possibility of carceral penalties.[163]

Lawmakers' preference to use criminal law to combat a spectrum of conversion practices may reflect that these practices can at times involve physical, sexual, or psychological violence that is recognizably impermissible under existing law. But some recent attempts to ban conversion practices extend far more broadly, opening a wide range of speech and acts that are not obviously violent or coercive to potential criminal prosecution. Often, the penalties are the same whether the practices result in physical, sexual, psychological, or stigmatic harm, or no demonstrable injury at all, and almost always include the possibility of incarceration. As I discuss in the following Section, the permissibility of these punishments under human rights law depends in part on whether the full range of conversion practices is understood to necessarily exact a kind of harm that is comparable to other types of legally cognizable injury.

* * *

The harm that discrimination inflicts on LGBT people and other marginalized groups can be real and significant, and lawmakers should take it seriously. At the same time, incarceration can undermine human rights as well, and stigmatic harm is a potentially far-reaching justification for imposing harsh criminal penalties.

Thus far, laws criminalizing anti-LGBT discrimination seem to have had little utility in addressing abuses. One underappreciated characteristic of

161. *Taiwan Finalizes Conversion Therapy Ban*, Shangaiist (Feb. 24, 2018), https://medium.com/shanghaiist/taiwan-finalizes-conversion-therapy-ban-adb417e5ff44 [https://perma.cc/Y2JR-JDAL].

162. *See e.g.*, Ozanne, *supra* note 136, at 248–49.

163. *Victoria Bans Gay Conversion Practices after 12-Hour Debate*, Guardian (Feb. 4, 2021), https://www.theguardian.com/australia-news/2021/feb/05/victoria-bans-gay-conversion-practices-after-12-hour-debate [https://perma.cc/KMA3-M3C2]; Jordan Hirst, *ACT Passes Ban on Harmful 'Conversion Therapy,'* Q News (Aug. 28, 2020), https://qnews.com.au/australian-capital-territory-passes-ban-on-harmful-conversion-therapy [https://perma.cc/5TAN-QWPF].

conversion practice bans, for example, is that they have thus far been largely symbolic. As of 2021, very few people have been prosecuted for conversion practices in states that have enacted bans. The primary effect of these provisions has not been to incapacitate or punish those who engage in conversion practices, but to send a broader message condemning these practices and those who purport to offer them. In this regard, advocates have considered the bans successful, as they have garnered an enormous amount of media attention and prompted public education by state agencies, professional associations, journalists, and LGBT people and their families. In these and other instances, the actual enforcement of criminal law to alleviate anti-LGBT bias has been less relevant than the message that states have sent when they take discrimination, degrading or insulting speech, or conversion practices seriously.

However, criminal prohibitions on other kinds of discrimination do generate investigations, prosecutions, and convictions. In Brazil, for example, a survey of cases in one court from 2003 to 2011 found that roughly 15 percent of allegations of racial discrimination resulted in legal inquiries or prosecutions.[164] In Switzerland, data from 2014 to 2017 show that dozens of decisions regarding incitement to racial hatred and other acts of racial discrimination are issued each year and that 89 percent of these cases result in a guilty verdict.[165] Even after criminal laws are in place, prosecution itself has often become a rallying cry for advocates, with activists pushing for more prosecution or harsher sentences as proof that these guarantees do not only exist on paper and that the state is sufficiently committed to protecting marginalized groups.

The carceral trend is worrying, even if criminal prohibitions do not necessarily result in carceral sentences in all instances. The dangers of excessive criminalization may be ameliorated to some extent by reluctance to press charges, barriers to seeing a case through to its conclusion, or exercise of prosecutorial discretion. Yet many laws criminalizing discriminatory conduct are enforced around the globe, and the gradual creep of discriminalization toward broader and more punitive bans should give advocates pause. The act of criminalizing discrimination also has significant spillover effects, for social movements as well as the state. For example, the possibility of prosecution has proven to be a powerful tool for right-wing actors who argue that they are being persecuted by the state and has made them into martyrs as they seek to weaken antidiscrimination protections for LGBT people more generally.[166] The scope

164. Assessoria Especial de Assuntos Internacionais, Relatório do Estado Brasileiro à Convenção Internacional sobre a Eliminação de Todas as Formas de Discriminação Racial [Report of the Brazilian State to the International Convention on the Elimination of All Forms of Racial Discrimination] ¶ 58 (2019), https://www.gov.br/mdh/pt-br/navegue-por-temas/atuacao-internacional/relatorios-internacionais-1/copy2_of_IIIRelatriodoEstadobrasileiroConvenoInternacionalsobreaEliminaodeTodasasFormasdeDiscriminaoRacial..pdf [https://perma.cc/D7WJ-R76Z].

165. Eur. Comm'n Against Racism & Intolerance, ECRI Report on Switzerland (Sixth Monitoring Cycle) ¶ 26 (2020), https://rm.coe.int/ecri-report-on-switzerland-sixth-monitoring-cycle-/16809ce4bd [https://perma.cc/H33T-59Q5].

166. *See, e.g.*, Liam Stack & Kit Gillet, *Kim Davis, Once Jailed in America,*

of many of the laws in question—for example, criminalizing offensive speech on the basis of religion or political ideology as well as sexual orientation or gender identity—further raises the possibility that they could also be used against LGBT advocates and human rights defenders. Examples of this are common. For instance, in Poland, an activist was arrested and charged with offending religious beliefs for distributing posters of the Virgin Mary with a rainbow halo.[167] In Turkey, students were arrested and charged with "inciting hatred and insulting religious values" for displaying a poster depicting Mecca alongside LGBT flags.[168] To ensure that antidiscrimination laws are maximally protective of human rights, advocates should be precise about offenses and penalties rather than broadly criminalizing behavior and relying on lax or selective enforcement to avoid overreach.[169]

Both discrimination and restrictions on liberty can jeopardize fundamental human rights. How, then, should advocates understand the appropriate use of criminal law to address various forms of discriminatory conduct? In Part III, I explore how advocates might consider the stakes of both discrimination and criminalization in tandem to navigate possible responses within a human rights framework.

III. Human Rights Approaches to Discriminalization

Many recent debates over LGBT-inclusive antidiscrimination laws have been framed as a matter of competing rights and freedoms, with opponents invoking freedoms of religion and expression, children's rights, parental rights, and even women's rights as a cudgel against equality law.[170] In the United States, opponents of LGBT rights have argued that even basic prohibitions on discrimination jeopardize the freedom of religion and freedom of expression.[171] Restrictions on hateful speech can also raise difficult tensions

Campaigns Against Gay Marriage in Romania, N.Y. Times (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/world/europe/kim-davis-romania.html [https://perma.cc/FP2V-DX8Q]; Press Release, Alliance Defending Freedom, ADF Protecting Religious Freedom Internationally, Assisting Defense of Pastor in Sweden (Nov. 9, 2005), http://web.archive.org/web/20190713033038/http://www.adfmedia.org/News/PRDetail/1555?search= 1.

167. Rachael Kennedy, *Polish Activist Detained for 'Offending Religious Beliefs' over LGBTQ Virgin Mary*, EuroNews (May 7, 2019), https://www.euronews.com/2019/05/07/polish-activist-detained-for-offending-religious-beliefs-over-lgbtq-virgin-mary [https://perma.cc/N3NX-5QHY].

168. Zeynep Bilginsoy, *Outcry, Arrests in Turkey Over Mecca Poster with LGBT Flags*, Associated Press (Jan. 31, 2021), https://apnews.com/article/world-news-turkey-mecca-istanbul- arrests-faccf466f8bdd4c50bbc3a8fd96e6398 [https://perma.cc/ZS9Y-Q5MX].

169. Kadish, *supra* note 15, at 27.

170. Laura Saldivia Menajovsky & Ryan Thoreson, *Legal Developments in the Domain of Sexual Rights*, *in* SexPolitics: Trends & Tensions in the 21st Century – Critical Issues 37, 57–63 (Sonia Corrêa & Richard Parker eds., 2018).

171. *See, e.g.*, Adam Liptak, *In Narrow Decision, Supreme Court Sides with Baker Who Turned Away Gay Couple*, N.Y. Times (June 4, 2018), https://www.nytimes.com/2018/06/04/us/politics/supreme-court-sides-with-baker-who-turned-away-gay-couple.html [https://perma.cc/6BS7–9QK9] (describing lawsuit against the enforcement

between the freedom of expression and the dignity and equality of marginalized groups.[172] The regulation of conversion practices has raised thorny questions about rights, including the validity of restrictions on the capacity of children, older adults, and people with disabilities to provide consent to dubious or harmful interventions.[173]

While the notion of competing rights has been carefully scrutinized by advocates, academics, and jurists, this Part poses a different question. How should human rights scholars and practitioners think about the use of criminal law to punish anti-LGBT bias, and discrimination generally? If we acknowledge that discriminatory treatment can inflict a kind of economic, psychological, or stigmatic harm, how might states permissibly punish that conduct while still promoting human rights principles? To answer this question, I draw from human rights scholarship and queer theory to consider three possible approaches that advocates might employ: equal dignity, prison abolition, and proportionality. As this Part illustrates, there are different ways that one might think about discriminalization as a human rights issue depending on one's vantage point and normative priors. Applying a queer lens in this context invites scholars to look beyond the demands of any one particular group and to instead consider where and how state power is exercised, who benefits, who suffers, and why.[174] Noting the pros and cons of each of the three approaches, I argue that proportionality provides the most useful framework for lawmakers and human rights bodies trying to balance the competing rights and interests at stake in discriminalization. I also suggest that activists seeking stronger protections can benefit from a rough proportionality approach that invites more holistic thinking about the nuances of stigma and conditions of criminalization in a given context. Ultimately, however, I suggest that the most

of Colorado's nondiscrimination law); Andrew Chung, *U.S. Top Court Rejects 'Gay Conversion' Therapy Ban Challenge*, Reuters (May 1, 2017), https://www.reuters.com/article/us-usa-court-gayconversion/u-s-top-court-rejects-gay-conversion-therapy-ban-challenge-idUSKBN17X1SJ [https://perma.cc/P9E3-MXER] (describing Supreme Court's denial of certiorari to a legal challenge to California's conversion therapy ban).

172. *See, e.g.*, Waldron, *supra* note 56, at 4–5; Boyle, *supra* note 129, at 489–91; Farrior, *supra* note 129, at 3–6; Jacob Mchangama, *The U.N. Hates Hate Speech More Than It Loves Free Speech*, Foreign Policy (Feb. 28, 2019), https://foreignpolicy.com/2019/02/28/the-u-n-hates-hate-speech-more-than-it-loves-free-speech [https://perma.cc/P7VC-6KR6].

173. *See, e.g.*, Comm. on the Rts. of the Child, General Comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/4 (July 1, 2003); Comm. on the Rts. of Persons with Disabilities, General Comment No. 1 (2014): Article 12: Equal Recognition Before the Law, U.N. Doc. CRPD/C/GC/1 (May 19, 2014).

174. Queering the push toward incarceration "refuses to see sexuality as a singular mode of inquiry and instead makes sexuality a central category of analysis in the study of racialization, transnationalism and globalization." Jack Halberstam, *Reflections on Queer Studies and Queer Pedagogy*, 45 J. Homosexuality 361, 361 (2003); *see also* Michael Warner, *Introduction* to Fear of a Queer Planet: Queer Politics and Social Theory, at vii, xiii (Michael Warner ed., 1993) (arguing that the deep imbrication of sexuality in social institutions makes it a useful vehicle to challenge the assumptions that structure those institutions).

rights-respecting solutions may require advocates to look beyond discriminalization and think creatively and expansively about other effective approaches to stigma and marginalization.

A. *Equal Dignity*

One approach that is conceivably consistent with human rights law is the maximization of dignity. The UDHR proclaims that "[a]ll human beings are born free and equal in dignity and rights,"[175] and various domestic constitutions recognize and affirm the centrality of human dignity as well.[176] Dignity functions not only as a rhetorical flourish, but as a core interpretive value for other rights—for example, prohibitions on cruel, inhuman, or degrading treatment or punishment—and at times as a standalone guarantee.[177] Accordingly, many human rights bodies and constitutional courts have recognized stigmatization as an affront to dignity and a cognizable form of injury.[178] One rights-based approach to discriminalization would be to focus on maximizing equal dignity for marginalized groups.

A dignity-maximizing approach resonates with a growing body of jurisprudence recognizing LGBT rights as human rights around the world. The UN's Free and Equal campaign, a public education initiative to promote LGBT rights that takes its title from the UDHR's opening affirmation of human dignity and rights, exemplifies the central role that dignity has played in the advancement of LGBT rights.[179] Dignity has provided a basis for regional human rights bodies to affirm LGBT rights, as is evident in the Inter-American Court of Human Rights' ruling that states must extend the freedom to marry to same-sex couples and provide legal recognition for transgender people.[180] And

175. UDHR, *supra* note 59, art. 1.

176. *See* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 Eur. J. Int'l L. 655, 664–65, 672–73 (2008); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Mont. L. Rev. 15, 15 (2004); G.P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U.W. Ontario L. Rev. 171 (1984).

177. *See* McCrudden, *supra* note 176, at 680–81; *see also* Aghdgomelashvili & Japaridze v. Georgia, App. No. 7224/11, ¶ 42 (Aug. 10, 2020), http://hudoc.echr.coe.int/eng?i=001–204815 [https://perma.cc/CX9T-E9U7] (noting that, under the European Convention on Human Rights, "treatment can be qualified as 'degrading'—and thus fall within the scope of the prohibition set out in Article 3 of the Convention—if it causes in its victim feelings of fear, anguish and inferiority, if it humiliates or debases an individual in the victim's own eyes and/or in other people's eyes, whether or not that was the aim, if it breaks the person's physical or moral resistance or drives him or her to act against his or her will or conscience, or if it shows a lack of respect for, or diminishes, human dignity").

178. In the LGBT context, see, for example, Navtej Singh Johar v. Union of India, AIR 2018 SC 4321 (India) (citing dignity as a rationale for striking down laws prohibiting same-sex activity); *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Just*. 1999 (1) SA 6 (CC) at 17–21 (S. Afr.) (same).

179. *See* Free & Equal, https://www.unfe.org [https://perma.cc/QNE2-DNQK].

180. *See* State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, In Relation to Article 1, of the American

it has functioned as a central rationale for a range of domestic court decisions affirming the constitutional rights of LGBT persons in Canada, India, South Africa, the United States, and elsewhere.[181]

As an invitation to unsettle identity-based politics, queer theory offers one vantage point to think about the various interests at stake in criminalization, including the real trauma that discrimination can inflict.[182] While queer scholars are often wary of dignitary reasoning,[183] the idea that we should take stigma seriously is one that resonates deeply in queer theory and scholarship. In recent years, the affective turn in queer theory has generated rich analyses of what it means to inhabit a body in the world, foregrounding lived experiences of "feeling, emotion, intimacy, and sentimentality."[184] The move toward understanding affect offers one framework to analyze the psychic harm that discrimination, rejection, and indignity can inflict on individuals who are excluded from equal membership in the community. Such a framework gives greater credence to feelings of stigmatization and exclusion as forms of violence, recognizing the psychic injury that such violence can inflict.

While the affective turn in queer theory underscores the felt experience of indignity as an individual embedded in a wider network of social relationships, discrimination against marginalized groups has effects on the political level as well. Whether an individual's gender or sexuality is valorized as good, proper, and productive or rejected as undignified is central to the notion of sexual citizenship, which considers how gender and sexuality are bound up with the conditions of membership in political communities.[185] As scholarly work has shown, nation-states' embrace of sexual rights has been predicated in myriad ways on the exercise of certain kinds of sexuality, including entry into heteronormative or patriotic institutions.[186] The rejection of criminal laws pro-

Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, ¶ 61 (Nov. 24, 2017), http://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf [https://perma.cc/TCY5-JW82] (citing dignity as a rationale for recognizing the freedom to marry as a human right).

181. Yuvraj Joshi & Ryan Thoreson, Dignity Pragmatism and LGB Rights Cases (Aug. 30, 2020) (unpublished manuscript) (on file with author).

182. *See supra* note 14 and accompanying text.

183. *See* Stephen M. Engel & Timothy S. Lyle, Disrupting Dignity: Rethinking Power and Progress in LGBTQ Lives (2021) (cautioning against an uncritical embrace of dignitary reasoning); Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron's* Dignity, Rights, and Responsibilities, 43 Ariz. St. L.J. 1177, 1197–1200 (2011) (book review).

184. *See* Wen Liu, *Feeling Down, Backward, and Machinic: Queer Theory and the Affective Turn*, 20 Athena Digital e2321, e2322 (2020); *see also* Senthorun Sunil Raj, Feeling Queer Jurisprudence: Injury, Intimacy, Identity (2020).

185. For foundational work on sexual citizenship, see David Bell & Jon Binnie, The Sexual Citizen: Queer Politics and Beyond (2000); Lauren Berlant, The Queen of America Goes to Washington City: Essay on Sex and Citizenship (1997); Diane Richardson, *Sexuality and Citizenship*, 32 Sociology 83 (1998). For recent work refining and revisiting the concept, see Jyl J. Josephson, Rethinking Sexual Citizenship (2016); Isaac West, Transforming Citizenships: Transgender Articulations of the Law (2014); Diane Richardson, *Rethinking Sexual Citizenship*, 51 Sociology 208 (2017.

186. *See, e.g.*, Lisa Duggan, *The New Homonormativity: The Sexual Politics of*

hibiting same-sex activity and relationships has been accompanied, sometimes virtually simultaneously, with new possibilities to serve in government, fight in the armed forces, or enter into institutions such as marriage and adoption.[187] While sex and gender systems can limit the conditions of possibility for groups deemed transgressive or undesirable, a widening circle of political membership also creates conditions of possibility and agency for those recognized and legitimated as members.[188]

One marker of sexual citizenship has been inclusion in the criminal law. Sarah Lamble has attributed demands for harsh penalties for anti-LGBT offenses to "queer investments in punishment," charting how the carceral state "has shifted from being a key *target* of queer protest to a celebrated *guardian* of sexual citizenship."[189] Such investments are deeply intertwined with the affective feeling of belonging and inclusion and with the mutual recognition that comes with unequivocal state rejection of anti-LGBT discrimination and violence. Taken together, queer attention to both affect and sexual citizenship illuminate how advocates of LGBT equality "become invested emotionally, libidinally, and erotically in global capitalism's mirages of safety and inclusion," and how these promises have pulled LGBT politics toward an embrace of the carceral state as a means of solidifying a newfound sense of full membership in the polity.[190]

With these insights in mind, a dignity-maximizing approach might defend discriminalization as appreciating the significant psychic and symbolic injuries that discrimination exacts on LGBT people. Such an approach would take the preservation and promotion of equal dignity as its lodestar, using criminal law as a means of eradicating the stigmatic injury that threatens recognition and participation in political and social life. It would center equality and dignity

Neoliberalism, *in* Materializing Democracy: Toward a Revitalized Cultural Politics 175 (Russ Castronovo & Dana D. Nelson eds., 2002); Jasbir K. Puar, Terrorist Assemblages: Homonationalism in Queer Times (2007).

187. Angola offers a striking example, simultaneously decriminalizing same-sex activity and criminalizing anti-LGBT discrimination. The same may be said of the United States, however, where the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003) was quickly followed by the extension of marriage equality in Massachusetts in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

188. *See* Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* Culture, Society and Sexuality: A Reader 143, 153 (Richard Parker & Peter Aggleston eds., 1999) (visually depicting the "charmed circle" of normatively valued and devalued sex).

189. Lamble, *supra* note 13, at 230; *see also* Eric A. Stanley, Atmospheres of Violence: Structuring Antagonism and the Trans/Queer Ungovernable 5 (2021) (noting the progress narrative constructed around marriage, military service, and representation in popular culture and arguing that "inclusion, rather than a precondition of safety, most properly names the state's violent expansion"); Woods, *supra* note 10, at 679 (observing the recasting of LGBT people from perpetrators to victims of crime and calling this "the new visibility").

190. Anna M. Agathangelou, M. Daniel Bassichis & Tamara L. Spira, *Intimate Investments: Homonormativity, Global Lockdown, and the Seductions of Empire*, Radical Hist. Rev., Winter 2008, at 120, 122.

protections in human rights law, opting to preserve these even when it comes at the expense of the liberty of those who discriminate.

While this approach sounds in the register of human rights, it raises significant dilemmas in practice. First, discriminalization narrowly focuses on the equal dignity of those who experience discrimination, and any dignity- maximizing approach must also attend to the dignity of those who are incarcerated. As Sara Ahmed has illustrated, taking affect seriously also requires understanding the ways in which emotion and feeling place constraints on ourselves and others.[191] Criminalizing discrimination against LGBT people affirms that victims of such mistreatment are full and equal members of the polity, but it also employs an often dehumanizing and degrading system to punish those who engage in such discrimination. While being fired for one's sexual orientation may be humiliating, for example, arrest, trial, incarceration, and release practices may inflict even greater stigmatic harm on those who are put through the criminal legal process.[192] Being attentive to dignitary stakes on all sides does not necessarily foreclose the use of criminal law in all instances, but it counsels a more cautious approach to stigmatic harm that does not replicate the kinds of violence it seeks to remediate.

Second, as changing conditions of sexual citizenship might suggest, a robust notion of dignity as a justification for discriminalization can be a double- edged sword. While dignity has helped expand rights for LGBT people, it has also been invoked by jurists to *uphold* laws that criminalize sex work and other practices that are deemed insufficiently "dignified."[193] Nor are LGBT people immune to reformulations of dignitary logic, as illustrated by recent cases where religious objectors have argued that antidiscrimination laws jeopardize their dignity and stigmatize their religious beliefs. The Canadian

191. *See* Sara Ahmed, The Cultural Politics of Emotion 69 (2d ed. 2014). As Ahmed observes, "fear works to align bodily and social space: it works to enable some bodies to inhabit and move in public space through restricting the mobility of other bodies to spaces that are enclosed or contained." *Id.* at 70.

192. One can recognize that incarceration inflicts stigmatic harm of its own. The same is true of material, psychological, or physical harm. Discrimination in employment, for example, may deprive a victim of the ability to work, but so does a period of incarceration, and with collateral effects that can impair a person's earning potential for life. *See, e.g.*, James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. St. Thomas L.J. 387, 389 (2006) (noting how criminal records limit access to government benefits and loans after release from incarceration). *See generally* Pager, *supra* note 23 (describing the ways in which incarceration and economic disadvantage are mutually reinforcing). The idea that punishment may not perfectly match the crime committed is commonplace in criminal law, but I note it here as a factor that may give human rights advocates pause. As I discuss *infra* Part III.C, proportionality offers one helpful framework to try to link the degree of punishment to the gravity of the offense.

193. Esteban Restrepo Saldarriaga has called these rulings "poisoned gifts," as they laud the dignity of marginalized groups at the same time as they limit their autonomy and entrench a system of deeply moralizing criminal laws that regulate their behavior. *See* Esteban Restrepo Saldarriaga, *Poisoned Gifts: Old Moralities Under New Clothes?*, *in* Beyond Virtue and Vice, *supra* note 13, at 199, 202 (examining the Colombian Constitutional Court's ruling upholding a criminal law against inducement into prostitution).

Supreme Court previewed this tension in *Law Society of British Columbia v. Trinity Western University*, where it ruled that provincial authorities could deny accreditation to a law school that would have prohibited its students from engaging in same-sex relationships.[194] The majority concluded that the dignity of LGBT students would be harmed by "being treated in substance as 'less worthy' than others,"[195] reasoning that "LGBTQ students enrolled at TWU's law school may suffer harm to their dignity and self-worth, confidence and self-esteem, and may experience stigmatization and isolation."[196] But the dissenting justices disagreed, arguing that "accommodating diverse beliefs and values . . . is necessary to ensure that the dignity of all members of society is protected."[197] Similar arguments have been advanced in the United States, where the Supreme Court has insisted on respect for religious beliefs in the enforcement of antidiscrimination protections. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, involving a baker who declined to bake a wedding cake for a same-sex couple, Justice Kennedy sought to accommodate the dignity of all involved when he urged "tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[198] Under a dignity-maximizing approach, advocates should expect that a capacious understanding of dignitary harm will also be wielded by those with strong religious or political convictions who regard the promotion of LGBT rights as an affront to their dignity.

Finally, and perhaps most fundamentally, even when a dignity-maximizing approach is attentive to dignity on all sides, it sheds little light on what punishment *is* appropriate for stigmatic harm. Because affect and belonging are so subjectively felt, a criminal law predicated only on equal dignity and stigmatic injury becomes exceedingly difficult to administer in practice.[199] A singular focus on protecting the dignity of marginalized groups threatens to eclipse the significant harms to liberty, equality, and other rights that might be exacted by the state in the process. As I discuss in the following Section, the nature and extent of punishment should also be a concern for human rights advocates, as abolitionist scholarship has made abundantly clear.

194. Law Soc'y of B.C. v. Trinity W. Univ., [2018] 2 S.C.R. 293 (Can.).

195. *Id.* at 348.

196. *Id.* at 350.

197. *Id.* at 446 (Côté & Brown, JJ., dissenting). In an earlier case involving religious objections to books depicting same-sex parents, Justice Gonthier similarly warned in dissent of a "collision of dignities" and urged the court not to "pick one." Chamberlain v. Surrey Sch. Dist. No. 36, [2002] 4 S.C.R. 710, 788 (Can.).

198. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018).

199. *See* Restrepo Saldarriaga, *supra* note 193, at 200 (reviewing constitutional debates over dignity and concluding that "as a general rule, feelings should not be protected by criminal norms").

B. *Prison Abolitionism*

A separate approach to discriminalization that finds support in human rights advocacy is prison abolitionism, which draws critical attention to the abuses inherent in carceral punishment and punitive restrictions on liberty and other rights.[200] Concern about the violations generated by involvement with the criminal legal system has fostered a growing movement seeking the abolition of the prison-industrial complex and its technologies of surveillance and control.[201] Abolitionists have simultaneously sought to move away from an excessive focus on punishment within and beyond criminal law and to imagine more just alternatives.[202]

The relationship between abolition and traditional human rights mechanisms is a vexed one. As Sonja Snacken has noted, criminal punishment—and particularly incarceration—is the most severe way in which a state can interfere with a person's fundamental human rights.[203] A growing movement in support of prison abolition has aligned with pronounced trends in international human rights law, including the gradual abolition of the death penalty in Europe and increased scrutiny of punitive practices in carceral settings.[204] Yet historically,

200. Both decarceration and some types of prison reform are other frameworks that one could use to assess many of these same questions and concerns, and also resonate in important ways with human rights values. I use the framework of abolitionism deliberately to consider the widest range of objections to punitive restrictions on liberty, as well as a positive project of imagining alternatives to these restrictions. While the abolitionism I discuss here is broad enough to include some reforms, it does not merely seek to make incarceration more palatable but to meaningfully challenge and reject the use of carceral punishment as an appropriate response to misconduct. *See* Levine & Meiners, *supra* note 31, at 157–58; Kaba, *supra* note 31, at 13, 96; *see also* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156, 1161 (2015) ("[A]bolition may be understood instead as a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement.").

201. *See, e.g.*, Angela Y. Davis, Are Prisons Obsolete? 84, 105–15 (2003); Gilmore, *supra* note 16; Kaba, *supra* note 31, at 148; Derecka Purnell, Becoming Abolitionists: Police, Protests, and the Pursuit of Freedom (2021); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 Harv. L. Rev. 1, 11–49 (2019) (discussing abolitionist theory and organizing from anti-slavery activism to the present day).

202. *See, e.g.*, Liat Ben-Moshe, Decarcerating Disability: Deinstitutionalization and Prison Abolition (2020) (examining abolitionism and psychiatric deinstitutionalization); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 Geo. L.J. 1587 (2012) (questioning the turn toward specialized criminal courts); Dorothy E. Roberts, *Constructing a Criminal Justice System Free from Racial Bias: An Abolitionist Framework*, 39 Colum. Hum. Rts. L. Rev. 261, 283–85 (2007) (advocating an abolitionist approach alongside reinvestment of resources into low-income neighborhoods and communities).

203. Snacken, *supra* note 17, at 275; *see also* Davis, *supra* note 201, at 10.

204. *See, e.g.*, William A. Schabas, The Abolition of the Death Penalty in International Law (3d ed. 2002). Generally, human rights institutions have taken on a more reformist tone, seeking to address the very worst conditions and excesses of punishment rather than rejecting carceral logics altogether. *See, e.g.*, *Why Promote Prison Reform?*, U.N. Off. on Drugs & Crime, https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to- imprisonment.html [https://perma.cc/G7BB-KAS4] ("Central to the

the human rights framework has given a wide berth to states in the formulation of criminal law, even as it sets procedural and substantive boundaries on the administration of criminal punishment.[205] Thus, international and regional bodies have been critical of punishments that do not comport with due process guarantees,[206] are discriminatory in their application,[207] or violate other fundamental rights.[208] They have set minimum standards for the treatment of people who are incarcerated and have indicated that if a person cannot be incarcerated safely and humanely, that person should not be in custody.[209]

Yet many abolitionist demands are framed in the language of fundamental human rights. Where prison abolitionists have embraced the language of human rights, it primarily has been to argue that incarceration is inherently unsafe or inhumane, and should therefore be minimized and ideally eliminated. As Dylan Rodríguez has argued, the carceral state is "a violent system that is *fundamentally asymmetrical* in its production and organization of normalized misery, social surveillance, vulnerability to state terror, and incarceration."[210] While some abolitionists support short-term interventions to protect people from the worst excesses of the carceral state while pursuing a longer-term abolitionist vision, they simultaneously stress that the criminal legal system as it is currently constituted is fundamentally unreformable.[211]

At times, mainstream LGBT activism and scholarship has been similarly critical of the criminal legal system, drawing from a history of criminalization to argue against overincarceration and police harassment.[212] Early

arguments to promote prison reforms is a human rights argument – the premise on which many UN standards and norms have been developed."); Human Rights Council Res. 24/12, U.N. Doc. A/HRC/RES/24/12, at 4 (Oct. 8, 2013) (noting human rights dimensions of incarceration and encouraging states to address overcrowding and reduce pretrial detention

205. *See* Miller & Zivkovic, *supra* note 43, at 40; Hum. Rts. Comm. Gen. Cmt. 35, *supra* note 21, ¶ 10 (noting that the ICCPR "recognizes that sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws," but underscoring that "deprivation of liberty must not be arbitrary, and must be carried out with respect for the rule of law").

206. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Compar. & Int'l L. 235, 292 (1993).

207. Nkechi Taifa, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 How. L.J. 641, 648–55 (1997).

208. *Connecticut Prison Warning: Prolonged Solitary Confinement May 'Amount to Torture,' UN Expert Warns*, *supra* note 22.

209. *See, e.g.*, G.A. Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (Jan. 8, 2016); G.A. Res. 45/111, Basic Principles for the Treatment of Prisoners (Dec. 14, 1990).

210. Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 Harv. L. Rev. 1575, 1576–77 (2019).

211. Angel E. Sanchez, *In Spite of Prison*, 132 Harv. L. Rev. 1650, 1652 (2019) ("I yearn to empower and alleviate the inhumane treatment of the imprisoned, even if it is within existing structures. I believe that the prison system is like a social cancer: we should fight to eradicate it but never stop treating those affected by it.").

212. *See, e.g.*, Joey L. Mogul, Andrea J. Ritchie & Kay Whitlock, Queer (In)Justice:

interventions emphasized the troubled relationship between LGBT people and law enforcement, finding common cause with other marginalized groups in a shared history of selective targeting and police brutality. Over time, however, more privileged LGBT communities have often forged relationships with law enforcement and sought increased policing as a response to concerns about anti- LGBT violence, prompting critique from other LGBT communities who have borne the brunt of heightened surveillance and enforcement.[213] More recently, LGBT activism and scholarship have focused on the criminalization of HIV and sex work and the overpolicing of LGBT people of color, particularly transgender women of color, as part of intersectional movements.[214] Increasingly, these analyses have fed into wider critiques of the carceral state and demands for abolition.[215]

A related strain of queer theory has looked beyond narrow identity categories to consider the operation of power in the carceral state. Among other insights, this scholarship has emphasized how state punishment can function to "queer" those it targets and legitimate violence against them. In the United States, for example, popular culture regularly reinforces the expectation that heterosexual individuals will be involved in same-sex sexual activity in confinement and makes light of, normalizes, or even endorses the commission of sexual violence against them. In this and other ways, the dignification and affirmation of LGBT people through the criminal law can feed into a queer necropolitics, which Jasbir Puar has analyzed as the imbrication of gender and sexuality in the management of violence, suffering, and death.[216] In the post-9/11 security apparatus, for example, affirming the sexual citizenship of "good" LGBT subjects often has been bound up with the dehumanization of

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The Criminalization of LGBT People in the United States (2012); Against Equality: Queer Revolution Not Mere Inclusion (Ryan Conrad ed., 2014).

213. *See* Timothy Stewart-Winter, Queer Clout: Chicago and the Rise of Gay Politics 210 (2016); Joseph J. Fischel, *In the Fight for Policing Reform, LGBT Is a Threadbare Alliance*, Bos. Rev. (June 17, 2020), https://bostonreview.net/gender-sexuality/joseph-j-fischel-fight-policing-reform-lgbt-threadbare-alliance [https://perma.cc/BQV5–894H] (noting the distinctive relationships that different LGBT communities have with contemporary policing).

214. *See, e.g.*, Captive Genders, *supra* note 13, at 119, 161, 211; Jane Hereth & Alida Bouris, *Queering Smart Decarceration: Centering the Experiences of LGBTQ+ Young People to Imagine a World Without Prisons*, 35 Affilia: J. Women & Soc. Work 358, 362–65 (2020).

215. S. Lamble, *Transforming Carceral Logistics: 10 Reasons to Dismantle the Prison Industrial Complex Using a Queer/Trans Analysis*, *in* Captive Genders, *supra* note 13, at 269; Beth Ritchie, *Queering Antiprison Work: African American Lesbians in the Juvenile Justice System*, *in* Global Lockdown: Race, Gender, and the Prison-Industrial Complex 73, 82 (Julia Sudbury ed., 2005) (urging a "queer antiprison politic").

216. The concept of necropolitics, developed by Achille Mbembe, distinguishes the separation of those who are recognized as worthy of living fully and those who are consigned to death, either in a literal sense or in a political sense. The application of carceral punishment, relegating a person to reduced life chances, political disenfranchisement, and sometimes physical death, is a necropolitical act. *See* Puar, *supra* note 186, at 32–36.

other racial and religious populations.[217] The valorization and protection of some sexual subjects performs a Foucauldian function of creating other abject populations subjected to carceral punishment, exclusion, and violence, including sexual violence.[218] Recognizing these dynamics, Sonia Corrêa and Maria Lucia Karam have categorically concluded that "[t]he inherent racism and classism of imprisonment suggests that criminal law can never be a means for promoting and protecting human rights."[219] This queer lens on discriminalization illuminates a wider field of power relations than one that more narrowly focuses on criminalizing or valorizing LGBT identities alone. More fundamentally, it foregrounds the possibility that everyone, perhaps particularly LGBT people and others who are marginalized, has a stake in an abolitionist future where the carceral state is not invested in abjection and dehumanization, including on sexual grounds.

Abolitionism has much to offer as a horizon for human rights advocacy and a broader queer politics, but it faces challenging obstacles as a global framework for navigating discriminalization in the short or medium term. First, while an abolitionist approach is compatible with and even protective of fundamental human rights, it is not compelled by human rights law as it is currently constituted. In some instances, states are obligated or expected to criminalize certain acts under domestic law. States also enjoy broad discretion in formulating and enforcing criminal laws, with the understanding that this is a sovereign prerogative of states and that universal criminal codes are neither feasible nor desirable. As noted above, this does not give states carte blanche in the imposition of carceral punishment; both treaty obligations and soft law instruments set boundaries on the permissible formulation and application of criminal law.[220] It does, however, make more ambitious and immediate

217. Puar offers the example of the media treatment of Mark Bingham, a gay man aboard United Flight 93 who, with other passengers, attempted to take control of the flight from the hijackers and caused it to crash in rural Pennsylvania, noting that "exemplary of this transference of stigma, positive attributes were attached to Mark Bingham's homosexuality: butch, masculine, rugby player, white, American, hero, gay patriot, called his mom (i.e. homonational), while negative connotations of homosexuality were used to racialize and sexualize Osama bin Laden: feminized, stateless, dark, perverse, pedophilic, disowned by family (i.e., f[*]g)." Puar, *supra* note 186, at 46.

218. One can think of laws and policies that implicitly or explicitly frame racial and ethnic minorities, immigrants, and others as potential threats to sexual diversity, and incorporate these understandings into policing and immigration regimes. *See, e.g.*, Kira Kosnick, *A Clash of Subcultures? Questioning Queer-Muslim Antagonisms in the Neoliberal City*, 39 Int'l J. Urb. & Reg'l Rsch. 687 (2015) (examining the political mobilization of race, migration, and sexuality in Germany and elsewhere); Suhraiya Jivraj & Anisa de Jong, *The Dutch Homo-Emancipation Policy and Its Silencing Effects on Queer Muslims*, 19 Feminist Legal Stud. 143 (2011) (examining consequences of the "homo-emancipation" policy in the Netherlands).

219. Sonia Corrêa & Maria Lucia Karam, *Brazilian Sex Laws: Continuities, Ruptures, and Paradoxes*, *in* Beyond Virtue and Vice, *supra* note 13, at 114, 133.

220. *See, e.g.*, ICCPR, *supra* note 60, arts. 6–11, 14–15 (regarding capital punishment, torture, prison labor, criminal procedure, juvenile justice, due process protections, and ex post facto laws); G.A. Res. 45/110, annex, United Nations Standard Minimum Rules for

forms of abolitionism a difficult goal from an international law perspective, as these would require a fundamental transformation of how human rights bodies approach criminal law and the prerogatives of sovereign states.

A second challenge relates to the pervasive use of criminalization to punish similar forms of discriminatory conduct in the present day. Consider the proposal in the Philippines to criminalize discrimination against LGBT people, including disparaging or insulting speech, with penalties including incarceration.[221] One might object that this response is disproportionate to the harm that discrimination typically inflicts, lends itself to overcriminalization and mass incarceration, and should be rejected. At the same time, criminalization is a standard response to discrimination and offense against other groups in the Philippines. Article 133 of the Penal Code, for example, criminalizes offending religious feelings in a place of worship, with penalties including incarceration.[222] The Philippines more recently criminalized discrimination against people living with HIV/AIDS, introducing carceral penalties for discrimination in employment, education, credit, health care, and other fields—a move that was tacitly accepted by many human rights advocates.[223] In 2021, the Philippines moved to similarly criminalize discrimination based on race, ethnicity, and religion, punishable with one to six months in prison.[224] When lawmakers file a bill that would similarly ban discrimination based on sexual orientation or gender identity, advocates are put in the difficult position of either refusing the protections others enjoy or calling for the elimination of all criminal penalties for discrimination, including for other marginalized groups. Such an approach should not deter advocates from working toward abolition, but the deep roots of discriminalization may complicate piecemeal efforts to reject the criminal law framework and seek alternatives in the short or medium term.

Finally, an ambitious abolitionist approach invites questions about which kinds of interventions *are* appropriate to address discrimination and stigmatic harm, which may vary considerably in different contexts. One might question the deterrence or rehabilitation value of penalties like incarceration, but still

Non-Custodial Measures (The Tokyo Rules), ¶ 1.1 (Dec. 14, 1990) (detailing "a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment"); G.A. Res. 40/22, annex, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (Nov. 29, 1985) (articulating goals for the administration of juvenile justice).

221. *See* An Act Prohibiting Discrimination on the Basis of Sexual Orientation or Gender Identity (SOGI) and Providing Penalties Therefore, H.R. 4982, 17th Cong. §§ 4, 7 (2017) (Phil.).

222. Revised Penal Code, § 133, Act No. 3815, as amended (Phil.).

223. *See Philippines: Discrimination Against Workers with HIV*, Hum. Rts. Watch (Feb. 9, 2018), https://www.hrw.org/news/2018/02/09/philippines-discrimination-against-workers-hiv [https://perma.cc/K8YA-73KT].

224. Neil Arwin Mercado, *House Passes Bill vs Discrimination Based on Race, Ethnicity, Religion*, Inquirer (Feb. 2, 2021), https://newsinfo.inquirer.net/1391216/house-passes-bill-vs-discrimination-based-on-race-ethnicity-religion [https://perma.cc/WD5W-EMJS].

feel it is important for the state to recognize stigmatic harm as an injury subject to other forms of penalty or redress. Such recognition may send a compelling signal that the state takes such harm seriously, for example, and may help address conduct in instances where victims would be unable or unwilling to pursue private remedies. The operation of criminal law varies transnationally, and a blanket ban on criminalization may deprive advocates of tools that are appropriate and measured in context or push them toward alternatives that pose their own threats to human rights.[225] While abolitionism is useful in providing a long-term vision and imagining alternatives to the carceral state, it has limited immediate utility as a governing framework for human rights bodies in a world where criminalization remains a common and permissible response to various kinds of harm under international and domestic law.

C. *Proportionality*

At the extremes, dignity-maximizing approaches and abolitionist approaches are limited in their capacity to balance the harms inflicted by discrimination with the harms inflicted by harsh punishment. Neither framework is fully compatible with a human rights system that gives states considerable discretion to identify and criminalize different forms of harm, but sets important limits on acceptable punishment. While debates over discriminalization have often centered around competing rights, the human rights framework also offers useful guidelines for understanding permissible restrictions on rights and addressing tensions as they arise.[226]

For human rights bodies confronting discriminalization, proportionality offers a practical and familiar framework to balance state policy with individual rights.[227] When criminalization threatens an individual right, judicial bodies have sometimes used proportionality tests to determine whether an offense can be criminalized at all—for example, in cases evaluating whether

225. Various authors have noted that alternatives to incarceration can have unintended and rights- restricting consequences of their own, particularly those that involve financial penalties or invasive supervision or monitoring. *See* Maya Schenwar & Victoria Law, Prison By Any Other Name: The Harmful Consequences of Popular Reforms (2021) (highlighting the harmful effects alternatives to incarceration often have); Chaz Arnett, *From Decarceration to E-Carceration*, 41 Cardozo L. Rev. 641 (2019) (discussing the adverse effects of electronic ankle monitors); Penal Reform Int'l, Implementation of the Ungass Outcome Document in Regard to Human Rights 8–9 (2018) https://www.ohchr.org/Documents/HRBodies/HRCouncil/DrugProblem/HRC39/PRI.pdf [https://perma.cc/Y9B4-PMQA] (explaining the issue of "net-widening," wherein alternatives to incarceration are merely punishment "add-ons" that do not reduce the incarcerated population).

226. *See, e.g.*, Els Dumortier, Serge Gutwirth, Sonja Snacken & Paul De Hert, *The Rise of the Penal State: What Can Human Rights Do About It?*, *in* Resisting Punitiveness in Europe?, *supra* note 15, at 107, 122–24 (discussing the application of proportionality in the human rights context by the European Court of Human Rights).

227. *See* Restrepo Saldarriaga, *supra* note 193, at 217 ("[P]roportionality . . . has achieved such widespread popularity among judges around the world because it offers a formal and (presumptively) objective template for reasoning that supposedly shields against personal biases, motivations, moralities, and worldviews.").

banning same-sex activity between consenting adults violates the right to privacy, or whether states can criminalize certain forms of expression or religious practice.[228] In other instances, proportionality tests have also been used to determine whether particular punishments or sentences are appropriate.[229]

To the extent that human rights bodies have adopted a proportionality approach to punishment, it has typically been in condemning dehumanizing treatment or recognizing that grossly disproportionate punishments are impermissible. The European Court of Human Rights, for example, has repeatedly affirmed that grossly disproportionate sentences can violate the European Convention on Human Rights.[230] Often, these cases involve a determination that lengthy sentences violate the right to be free from cruel, inhuman, or degrading treatment or punishment, but some bodies have invoked proportionality in a more general way.[231] The UN Working Group on Arbitrary

228. *See, e.g.*, *Toonen*, *supra* note 62 (finding that the criminalization of same-sex activity between consenting adults violates the right to privacy); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A), ¶¶ 41–49 (1981) (applying proportionality analysis to find that legislation criminalizing same- sex activity was not proportional to the interest of safeguarding moral standards); Dumortier et al., *supra* note 226, at 118–20 (examining the European Court of Human Rights's use of proportionality in its privacy, expression, and religion jurisprudence). In some cases involving sex work, abortion, and sexual activity, judicial bodies have concluded that criminal prohibitions *are* permissible; notably, they often have accepted that the state's interest in preserving dignity or equality suffices to justify criminalization. Joanna N. Erdman, *Harm Production: An Argument for Decriminalization*, *in* Beyond Virtue and Vice, *supra* note 13, at 248, 253 (noting how presumptions of inherent dignitary and psychic harm have been used to justify prohibitions on sex work and restrictions on abortion).

229. *See* Mary Rogan, *Out of Balance: Disproportionality in Sentencing*, Prison Reform Int'l (Aug. 25, 2014), https://www.penalreform.org/blog/balance-disproportionality-sentencing [https://perma.cc/K3M7-L7AX] (discussing growing oversight of criminal sentences in the European human rights system); Ikanyeng S. Malila, *Modulating and Limiting Punishment Through the Application of the Proportionality Principle: A Perspective from Botswana*, 37 Nordic J. Hum. Rts. 123 (2019) (exploring the application of the proportionality principle in Botswana).

230. *See, e.g.*, Harkins & Edwards v. United Kingdom, App. Nos. 9146/07 & 32650/07, ¶ 133 (Jan. 17, 2012), http://hudoc.echr.coe.int/fre?i=001–108599 [https://perma.cc/ME6D-W42S]; Rrapo v. Albania, App. No. 58555/10, ¶ 90 (Sept. 25, 2012), http://hudoc.echr.coe.int/fre?i=001–113328 [https://perma.cc/EM5N-KBUU]; Babar Ahmad & Others v. United Kingdom, App. Nos. 24027/07, 11949/08, 36742/08, 66911/09 & 67354/09, ¶¶ 122–56 (Apr. 10, 2012), http://hudoc.echr.coe.int/fre?i=001–110267 [https://perma.cc/8XU3–8X2A]. These decisions have been primarily concerned with extremely long or punitive sentences, rather than shorter sentences that may arguably nonetheless be disproportionate to the offense committed. The International Criminal Court has also recognized proportionality in sentencing, giving added credibility to its use in the context of international criminal law. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 623 n.238 (2005).

231. Rogan, *supra* note 229 (discussing European Court of Human Rights jurisprudence); Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment*, 55 Vill. L. Rev. 321, 331–34 (2010) (noting how the U.S. Supreme Court has applied proportionality principles to a range of punishments challenged in the Court).

Detention has clarified, for example, that states should only deprive a person of their liberty insofar as it is "suitable, necessary and proportionate" to meet a pressing social need.[232] Although states enjoy considerable discretion in the formulation of criminal prohibitions, a requirement that penalties be necessary to achieve legitimate aims and proportionate to the gravity of the offense can set significant limits on the imposition of carceral punishment.[233]

Notably, a proportionality approach also has resonance in many domestic judicial systems, and thus has the potential to influence scrutiny of discriminalization before laws are reviewed for their compliance with regional and international human rights commitments. Some courts have used a proportionality framework to weigh constitutional limitations on excessive punishment, albeit mainly in sentencing. In Canada, for example, section 12 of the Canadian Charter of Rights and Freedoms prohibits cruel and unusual treatment or punishment; the Supreme Court has interpreted that provision to encompass disproportionate criminal sentences.[234] Courts in Germany, Ireland, South Africa, the United Kingdom, the United States, and elsewhere have similarly invoked proportionality in the criminal law context, using it to apply protections against cruel and unusual punishment and other protections for human dignity.[235]

D. *Proportionality and Discriminalization*

What might a proportionality approach to discriminalization entail? At a fundamental level, such an approach would require asking whether the restriction on the right to liberty associated with a given punishment is justified by the aim the state seeks to advance in ameliorating dignitary harm.[236] In prac-

232. Pathmanathan Balasingam, et al. v. Sri Lanka, Working Group on Arbitrary Detention, No. 26/2012, ¶ 26, U.N. Doc. A/HRC/WGAD/2012/26 (2012).

233. *See, e.g.*, Dirk van Zyl Smit & Andrew Ashworth, *Disproportionate Sentences as Human Rights Violations*, 67 Mod. L. Rev. 541, 542 (2004) (noting that, in order to limit "the arbitrary use of state power," serious punishments "should only be permissible if the offender has committed a very serious offence"); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 Crime & Just. 55, 56 (1992) ("Departures from proportionality—though perhaps eventually justifiable—at least stand in need of defense."). *But see* Adam J. Kolber, *Against Proportional Punishment*, 66 Vand. L. Rev. 1141 (2013) (assessing challenges with proportionality as a means of calibrating punishment and arguing for more consequentialist approaches to punishment).

234. *See, e.g.*, R. v. Smith, [1987] 1 S.C.R. 1045 (Can.).

235. Frase, *supra* note 230, at 625–26, 623 n.238; José David Rodríguez González, *Human Dignity and Proportionate Punishment: The Jurisprudence of Germany and South Africa, and Its Implications for Puerto Rico*, 87 Rev. Jur. U.P.R. 1179 (2018). *But see* Ewing v. California, 538 U.S. 11 (2003) (plurality opinion) (significantly expanding the state's discretion in proportionality determinations); Lynch v. Minister for Just., Equal. & L. Reform [2010] IESC 34 (Ir.) (holding that the imposition of a mandatory life sentence for murder did not violate proportionality principles enshrined in the Constitution).

236. The approach proposed here is a more radical approach than considering whether particular punishments are cruel, inhuman, or degrading, in that it takes the fundamental right to liberty and any other deprivations of rights associated with the mere fact of punishment as the touchstone for the analysis. *See, e.g.*, ICCPR, *supra* note 60, art. 9 ("Everyone has the

tice, human rights bodies evaluating discriminalization would be faced with questions about whether the punishment prescribed is necessary to achieve a legitimate aim and proportionate to the aim pursued.[237] This evaluative process could follow a four- step analysis, consistent with the use of proportionality by most constitutional courts and human rights bodies that utilize the framework.[238]

At the first step of the analysis, human rights bodies confronted with discriminalization would examine the legitimacy of the state's aims.[239] Within a human rights framework, it is well-established that states have a legitimate interest in protecting fundamental rights and freedoms, including equality and nondiscrimination.[240] The protection of feelings can also, in some jurisdictions, rise to the level of a proper purpose.[241] Provided that the laws in question aim to advance a proper purpose in at least some instances, laws criminalizing various types of discrimination would survive this step of the analysis.

Second, human rights bodies would examine whether there is a rational connection between the aim pursued and the restriction imposed.[242] This step requires states to articulate how they envision the criminal law in question preventing discrimination, advancing the equal dignity of LGBT people, or remediating other forms of economic, psychological, or physical harm. Here, adjudicators only ask whether the means used will actually effect the purpose; even if it only weakly advances that purpose, it survives this stage of the

right to liberty and security of person."); Dumortier et al., *supra* note 226, at 116 (discussing the European Convention and arguing that "since the right to liberty is the norm, restrictions must be exceptional and respect the principles of legality, legitimacy and proportionality").

237. In this discussion, I primarily examine how the proportionality test might cabin criminal penalties for discrimination as an affront to dignity, rather than applying it to criminalization writ large. I do this in part because criminal law is highly contextual, such that a blanket analysis of the use of criminal law to address harm would be difficult to do in the abstract. The risk of punishments being arbitrary or disproportionate is arguably highest when harms are subjectively felt. This approach does, however, have the potential to bring broader scrutiny to a range of criminal laws, and not only those in which the serious deprivation of liberty exacted by carceral punishment is excessive or disproportionate to the stigmatic or symbolic harm it seeks to address.

238. The precise articulation of the proportionality test varies; here, I break it into four steps to be as thorough as possible in identifying how and when different types of discriminalization might be scrutinized in the analysis. *See* Aharon Barak, Proportionality: Constitutional Rights and Their Limitations 243–454 (Doron Kalir trans., 2012) (identifying these four steps); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L. 72, 75–76 (2008).

239. Barak, *supra* note 238, at 245–302.

240. *See* Paul Sieghart, The International Law of Human Rights 103 (1983) (recognizing that the protection of the rights of others is a proper purpose); Ryan Thoreson, *The Limits of Moral Limitations: Reconceptualizing 'Morals' in Human Rights Law*, 59 Harv. Int'l L.J. 197, 240– 44 (2018) (listing the limitation clauses in regional and international human rights treaties that permit the restriction of human rights to protect, among other state interests, the rights and freedoms of others).

241. *See, e.g.*, HCJ 5016/96 Horev v. Minister of Transport, 51(4) PD 1 (1997) (Isr.).

242. Barak, *supra* note 238, at 303–16.

proportionality test.[243] In the discriminalization context, criminalization may serve the purpose of ameliorating discrimination—if only by discouraging or incapacitating offenders—but this step permits judicial and public scrutiny of whether goals such as preventing mistreatment, affirming equal dignity, or remediating various forms of harm are in fact served by a criminal prohibition.

At the third stage, human rights bodies engaging in a proportionality analysis would ask whether the proposed restriction is necessary to achieve the aim.[244] If a less rights-restrictive approach would be equally effective, that alternative should be adopted instead.[245] The most draconian forms of discriminalization, particularly incarceration, are unlikely to survive this step of the analysis, even if they functionally serve to incapacitate offenders for a period of time. Such punishments generally are not necessary to discourage or prevent an entity from engaging in discrimination, and other less rights-restrictive means typically suffice to address mistreatment and prevent it from happening again. In some instances—for example, where individuals deliberately and repeatedly discriminate against LGBT people—a series of graduated punishments that culminate in more punitive measures may be justifiable.[246] In general, however, it is difficult to imagine circumstances where a carceral sentence would be considered necessary to advance the state's legitimate aims in eradicating discrimination, particularly when the injuries inflicted are primarily stigmatic. This is especially true insofar as a growing body of abolitionist work has drawn attention to restorative justice and transformative justice as alternatives to incarceration and cast doubt on the necessity or wisdom of carceral punishment in remediating harm.[247]

In the fourth and final step of the proportionality analysis, human rights bodies would ask whether the benefits gained by the proposed restriction are proportional to the costs the restriction imposes on individual rights.[248] This inquiry involves a more fine-grained balancing of the punitive consequences of punishment and the harms to be ameliorated as a result.[249] Aside from lengthy periods of incarceration, which are unlikely to survive the necessity test, other criminal penalties are likely to face scrutiny at this stage. The state's interest in ameliorating stigmatic harm and any other relevant economic, psychologi-

243. Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 Cambridge L.J. 174, 189 (2006).

244. Barak, *supra* note 238, at 317–39.

245. It is worth noting here that carceral sentences empirically may be no more effective, and may be less effective, than other alternatives. *See* Jennifer E. Copp, *The Impact of Incarceration on the Risk of Violent Recidivism*, 103 Maro. L. Rev. 775, 787 (2020).

246. *See* Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action 94–100 (1990).

247. *See, e.g.*, Kaba, *supra* note 31, at 132–56.

248. Barak, *supra* note 238, at 340–70.

249. *Id.*; Stone Sweet & Mathews, *supra* note 238, at 75–76 (observing that, in the fourth stage, "the judge weighs the benefits of the act . . . against the costs incurred by infringement of the right, in order to determine which 'constitutional value' shall prevail, in light of the respective importance of the values in tension, given the facts").

cal, or physical injuries would be squarely weighed against the severity of the restrictions, including the costs they inflict upon those who engage in discrimination. Taken together, the steps of the proportionality approach permit the use of criminal law to address discrimination, thereby keeping with the discretion states enjoy to criminalize a wide range of conduct under regional and international law; however, the framework also places meaningful limitations on how and when particular approaches and penalties could be used.

Of course, proportionality is not foolproof, particularly insofar as context influences the normative judgments that lawmakers and jurists make at each step of the framework.[250] Discriminalization has often been animated by subjective understandings of stigmatic harm and a desire to unequivocally affirm the equal dignity of LGBT persons within the polity. As LGBT rights gain traction, those who engage in discrimination have not been particularly sympathetic figures. This matters insofar as the turn toward retribution in criminal law has been motivated in part by "a politics of anger, affective blaming and 'othering' of offenders—a process against which appeals to proportionality have little bite."[251] Without some degree of social consensus around the magnitude of a crime and the severity of a punishment, proportionality may be limited in its ability to meaningfully keep discriminalization in check.[252] Conversely, when proportionality does succeed in limiting punishment, "this is because of its articulation of, and resonance with, deeper conventions, normative systems, political institutions, and social structures."[253] While research suggests that there is some degree of cross-cultural consensus around the seriousness of standard offenses,[254] it is not clear that such a consensus exists around discrimination based on sexual orientation and gender identity or other constraints on sexual rights, which are not only legal but affirmatively encouraged in many places.[255] And there is far less consensus about which punishments are appropriate for which crimes, both cross-culturally and over time, which can make proportionality a less precise tool for advocates operating in different sociolegal contexts around the globe.[256] In the discriminalization context, this means that the appropriate balance between policing stigmatic harm and exacting

250. *See generally* Philip Smith, Punishment and Culture (2008) (examining cultural foundations of punishment across time and place).

251. Nicola Lacey & Hanna Pickard, *The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems*, 78 Mod. L. Rev. 216, 220 (2015).

252. *See id.* at 219.

253. *Id.* at 220.

254. Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 Vand. L. Rev. 1633, 1636 (2007) ("A wide variety of empirical studies indicate that people broadly share intuitions that serious wrongdoing should be punished and also share intuitions about the relative blameworthiness of different transgressions.").

255. For a contemporary example, see Eszter Kováts, *Questioning Consensuses: Right-Wing Populism, Anti-populism, and the Threat of 'Gender Ideology'*, 23 Socio. Rsch. Online 528 (2018) (examining populist appropriation of the affirmative encouragement of discrimination and anti-gender sentiment in Poland).

256. Lacey & Pickard, *supra* note 251, at 231.

punishment will depend significantly on evolving intuitions about what is reasonable and what is excessive—trends that may simultaneously see growing global concern for the dignity of LGBT people and growing commitments to addressing indignity without reflexively relying on the carceral state.

Despite some limitations, proportionality offers a far richer framework than existing approaches to discriminalization or other alternatives that might currently be employed. The proportionality framework challenges human rights bodies to consciously identify the aim of a given restriction, evaluate whether it advances that aim, consider other alternatives, and take stock of the prohibitions and punishments that lawmakers enact. Importantly, it also provides a vehicle for advocates and social movements to weigh in on these questions through adjudication, drawing attention to perspectives that may have been ignored in the legislative process and challenging taken-for-granted assumptions.[257] It thereby provides opportunities to bring abolitionist insights and alternatives to carceral punishment into scrutiny of criminal law. Of course, it is possible and even expected that different adjudicators will resolve these questions differently. The framework primarily sets the outer edges of what is permissible, requiring first and foremost that states carefully scrutinize the different interests at stake in discriminalization, rather than prescribing a universal model for all countries to adopt. In doing so, it articulates a series of questions for adjudicators to ask to ensure that laudable efforts to address stigmatic harm are carefully calibrated and that excessive punishment is kept in check.

Within these boundaries, advocates will continue to confront the question of whether or not to press for discriminalization as a response to stigmatic harm. As examples of discriminalization suggest, the push for carceral punishments for anti-LGBT conduct has been driven in part by sympathetic lawmakers eager to show that they do not tolerate discrimination based on sexual orientation and gender identity. But it has also been driven by activists, including human rights activists, who have demanded harsh punishment as a response to discrimination. Their embrace of criminalization sits uneasily with the aims of a growing movement against the expansion and abusiveness of the carceral state. All of these varied goals are shaped in no small way by the historical experiences of exclusion and abuse that many advocates and their communities have experienced. While proportionality offers a useful framework for human rights bodies, it is important to consider how it might also provide guidance for human rights advocates navigating this contested terrain.

257. Widney Brown has underscored the importance of this opportunity for social dialogue in her analysis of criminalization, noting that "some of the hammering out of the definition of harm will require public debate and discussion informed in part by sociological studies. This process can only be legitimate if voices from all sectors of society are heard." Widney Brown, *Reflections of a Human Rights Activist*, *in* Beyond Virtue and Vice, *supra* note 13, at 75, 88.

E. *Rough Proportionality in Human Rights Advocacy*

Proportionality is not only a tool for judicial bodies; it has value for human rights advocates as well. As proportionality analysis has been adopted by domestic and regional courts, it has also been internalized by legislators and officials who shape law and policy accordingly so that it will survive judicial review.[258] For various reasons, advocates seeking robust antidiscrimination protections may have fewer incentives to carefully craft their demands to satisfy regional and international human rights mechanisms. They may be focused on maximizing rights for particular constituencies, or may intentionally advance strong protections expecting that lawmakers will water them down in the legislative process. They may not reside in states that are part of regional human rights systems or bound by relevant human rights treaties; if they are, the likelihood that a given law will come under scrutiny by a regional or international body is low, and human rights bodies are generally deferential to states in their criminalization and punishment of cognizable harm.[259] For human rights advocates invested in just outcomes, a rough proportionality analysis nevertheless offers a useful framework to engage in a fine-grained consideration of lived conditions to formulate and advance rights-respecting proposals.

At the domestic level, where advocates have some leeway to formulate rights-respecting responses, human rights advocates might adopt a rough proportionality approach that takes stock of the specific contours of stigmatic harm and the consequences of punishment within a particular jurisdiction, and pursue punishment and restrictions on rights only as needed to address actual harm. Such an approach would counsel thinking beyond narrow identity categories to the broader repercussions of addressing discrimination in particular ways. This approach would, for example, consider historical subordination and its lasting effects; examine how the polity deals with discrimination against other marginalized groups; solicit input from affected communities; and document the extent to which discrimination affects life prospects, relational ties, and physical and mental well-being. At the same time, advocates would seriously consider the individual and societal consequences of carceral punishment and the likely outcomes of penalties that lawmakers might adopt. This might require examination of the scope and conditions of incarceration, racial or economic disparities in punishment, and the collateral effects of involvement with the criminal legal system in a given jurisdiction. Advocates should also engage in consultation with the communities most likely to bear the brunt of particular forms of regulation and punishment. Such an approach would not only examine in theory whether a prescribed punishment is necessary to achieve a legitimate aim and proportionate to the aim pursued, but would consider the likely consequences of discriminalization for real people in

258. *See* Stone Sweet & Mathews, *supra* note 238, at 112, 151.

259. *See* van Zyl Smit & Ashworth, *supra* note 233, at 559 (distinguishing scrutiny of gross disproportionality from scrutiny of disproportionate sentences generally).

light of lived conditions. In doing so, it paints a fuller picture of what the most rights-respecting legislation might prescribe.

The outcomes of these inquires will vary. In practice, a rough proportionality approach might mean that advocates feel more emboldened to call for stiffer punishments for discriminatory conduct in Brazil or South Africa, where discrimination frequently goes hand in hand with brutal violence that has been the subject of sustained activism and demands for stronger state involvement.[260] They might seek civil penalties or restorative justice in contexts like the Philippines, where discrimination is less often accompanied by violence and where the criminal legal system can put people at real risk of extrajudicial killing.[261] In these and other settings, this rough proportionality approach can assist advocates in deciding whether criminal law is an effective tool at all. While this Article focuses on discriminalization, the majority of countries that prohibit discrimination based on sexual orientation or gender identity do not do so using incarceration or even criminal punishment.[262] Proportionality and a rough proportionality approach are helpful tools to more carefully calibrate state and social movement responses, but human rights advocates should also think creatively about tools they might use outside of the criminal law to effectively address discrimination.

Where advocates conclude that any involvement in criminal legal systems is likely to jeopardize human rights, they might look more closely at using civil penalties to allow aggrieved individuals to seek redress. The use of civil rights law is commonplace to address discrimination, and advocates around the globe have fought for LGBT-inclusive protections and expanded understandings of civil rights guarantees that already exist for other marginalized groups.[263] In the employment discrimination context, for example, advocates may seek legislation that allows victims to pursue remedies such as hiring, reinstatement, back pay, or compensatory or punitive damages. To curb conversion practices, advocates might seek the imposition of consumer fraud penalties, up to and including the closure of commercial enterprises, or the suspension or revocation of the professional licenses of practitioners.[264]

260. *See supra* notes 106–108 and accompanying text.

261. *"License to Kill": Philippine Police Killings in Duterte's "War on Drugs,"* Hum. Rts. Watch (Mar. 2, 2017), https://www.hrw.org/report/2017/03/02/license-kill/philippine-police-killings-dutertes-war-drugs [https://perma.cc/W8SP-U99U] (detailing the risk of police killings for petty criminals, drug users, and those who come into contact with the criminal legal system).

262. *See* Mendos, *supra* note 66, at 235–44; statutes cited *supra* notes 69–94, 114–122.

263. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738–54 (2020) (holding that Title VII of the Civil Rights Act protects employees against discrimination because they are gay or transgender); Oncale v. Sundowner Offshore Servs., Inc. 523 U.S. 75, 77–82 (1998) (holding that Title VII of the Civil Rights Act's protection against workplace discrimination "because of . . . sex" applies to harassment in the workplace between members of the same sex); *see also* Catherine A. Mackinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979) (arguing that sexual harassment in the workplace should be considered legally redressable sex discrimination).

264. In the conversion practices context, scholars have not only suggested using

Alternatively, tort law may provide a useful vehicle to recognize and reformulate harms that civil rights law and criminal law have failed to adequately identify and address.[265] A tort framework may be more remedially flexible, with the possibility of apologies, compensation, and other forms of redress, and offers opportunities to foster judicial dialogue about the stigmatic harms of discrimination and the equal dignity of members of the polity.[266]

Advocates might also consider non-punitive remedies and invest energy in creating mechanisms to encourage mediation, apologies, reparations, or other forms of restorative justice. A growing body of human rights scholarship has explored restorative justice as a means of addressing wrongs, both for individuals and for communities that have been subject to abuses.[267] In recent years, officials in various countries have issued apologies for past discrimination against LGBT communities, including the Canadian government's apology for criminalization and the New York Police Department's apology for the Stonewall raid and police harassment.[268] More robust mechanisms to recognize wrongdoing and facilitate healing after incidents of discrimination could be replicated at the community and interpersonal levels, drawing

consumer fraud statutes but also suing in tort for intentional infliction of emotional distress. Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 B.U. Pub. Int. L.J. 219, 245–47 (1999); *see also* Craig Purshouse & Ilias Trispiotis, *Is 'Conversion Therapy' Tortious?*, Leg. Stud. Firstview (2021) (examining possibilities and limitations of a tort-based approach in the United Kingdom).

265. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133, 134 (1982) (discussing tort law as an option where criminal prohibitions are foreclosed); Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. Pa. L. Rev. 1461 (1986) (noting the limits of civil rights laws in providing redress for sexual harassment).

266. *See* Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 Cornell L. Rev. 575, 584–85 (1993) (considering that tort law may center survivors more effectively than criminal law); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 Wm. & Mary L. Rev. 2115, 2118 (2007) (discussing the material and symbolic advantages of tort law as a means of addressing discrimination and harassment).

267. *See, e.g.*, Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to* Civis *in Rwanda*, 75 N.Y.U. L. Rev. 1221, 1253–76 (2000) (examining restorative justice in Rwanda); Caroline D. Kelly, Note, *Contextual Complementarity: Assessing Unwillingness and "Genuine" Prosecutions in Colombia's Special Jurisdiction for Peace* 48 Geo. J. Int'l L. 807, 821–25 (2017) (examining restorative justice in Colombia); Hum. Rts. Council, Rep. of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance, U.N. Doc. A/74/321 (Aug. 21, 2019) (providing a human rights analysis of the need for reparations to address legacies of racial injustice).

268. Kathleen Harris, *'Our Collective Shame': Trudeau Delivers Historic Apology to LGBT Canadians*, CBC (Nov. 28, 2017), https://www.cbc.ca/news/politics/homosexual-offences-exunge-records-1.4422546 [https://perma.cc/895L-XEJ4]; Michael Gold & Derek M. Norman, *Stonewall Riot Apology: Police Actions Were 'Wrong,' Commissioner Admits*, N.Y. Times (June 6, 2019), https://www.nytimes.com/2019/06/06/nyregion/stonewall-riots-nypd.html [https://perma.cc/Q8NH- EKVJ].

from restorative justice traditions used around the world.[269] While lawmakers should be mindful of the limits of restorative justice—from underlying power dynamics to ensuring that participants feel justice has been done—it merits deeper consideration by human rights advocates as a supplement or alternative to punitive approaches.[270]

Finally, advocates should consider proactive, transformative approaches designed to end rather than remediate stigmatic harm. In some countries, affirmative action or quota systems have proven useful to ensure that historically underrepresented groups are able to find and retain employment. Under a comprehensive transgender rights bill enacted in Uruguay, for example, the government has set aside 1 percent of government jobs for transgender applicants for fifteen years.[271] The quota was accompanied by policies to facilitate legal gender recognition, expand access to gender-affirming healthcare, and provide a special pension for transgender people who experienced abuses under the country's military dictatorship.[272] India's Supreme Court has also ordered the government to utilize a quota system to provide transgender people with education and employment opportunities, and at least one provincial police department in Pakistan has adopted an employment quota as well.[273]

Where degrading and offensive speech is concerned, advocates have highlighted a range of non-punitive interventions that promote respect and acceptance. Among the earliest interventions are diversity and inclusion initiatives in schools, including the acknowledgement of LGBT individuals in textbooks and school curricula. Such interventions can be accompanied by teacher training, anti-bullying programs, and antidiscrimination policies to ensure that LGBT identities are affirmed and normalized at a young age.[274]

269. *See* Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice 113–33 (2006) (discussing the human rights debate surrounding *bulubulu* as an approach to rape in Fiji).

270. *See* Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 Harv. Hum. Rts. J. 39 (2002) (exploring when transitional justice frameworks may or may not be appropriate in addressing human rights violations); Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. Ill. L. Rev. 45 (considering the appropriateness of restorative justice in confronting sexual assault and harassment claims).

271. Sirin Kale, *Uruguay Has Massively Expanded Trans Rights*, Vice (Oct. 25, 2018), https://www.vice.com/en_us/article/pa9ny7/uruguay-congress-passes-transgender-law [https://perma.cc/D6H4-F78Q]. Argentina has also adopted a law reserving 1 percent of public sector jobs for transgender people. Marcela Valente, *Transgender Job Quota Law Seen 'Changing Lives' in Argentina*, Reuters (June 25, 2021), https://www.reuters.com/article/us-argentina-lgbt-lawmaking-trfn/transgender-job-quota-law-seen-changing-lives-in-argentina-idUSKCN2E11QV [https://perma.cc/4N3U-TSFH].

272. Kale, *supra* note 271.

273. *India Court Recognises Transgender People as Third Gender*, BBC (April 15, 2014), https://www.bbc.com/news/world-asia-india-27031180 [https://perma.cc/W274-RWJ2]; Ben Farmer, *Pakistani Police Force Plans Quota for Transgender Recruits*, National (April 4, 2019), https://www.thenational.ae/world/asia/pakistani-police-force-plans-quota-for-transgender-recruits-1.845219 [https://perma.cc/36BR-VEG9].

274. *See, e.g.*, Ghio Ong & Helen Flores, *LGBT Sector Lauds Provision of*

Basic public education campaigns can also be helpful; the UN's Free and Equal campaign and a variety of initiatives launched by the UN Development Programme offer models of what such interventions might entail.[275] Advocates might also consider developing trainings and resources for journalists, healthcare workers, service providers, law enforcement, the judiciary, and others to ensure LGBT people are treated with dignity.

Finally, conversion practices may be addressed through a range of interventions that are not primarily punitive.[276] Efforts to change sexual orientation and gender identity often extend into the private sphere, including religious counseling or more subtle messaging suggesting that LGBT identities are a form of sickness or brokenness. To end the demand for conversion practices, advocates might pursue interventions that destigmatize LGBT identities, celebrate diversity and inclusion, and increase LGBT visibility. They might also seek to end the supply of conversion practices by developing professional trainings that alert mental health practitioners to their dangers, reporting mechanisms that identify practitioners, and counseling and other support for survivors who may be struggling.[277] None of these approaches are likely to

Anti-bullying Act, Philippine Star (Dec. 24, 2013), https://www.philstar.com/headlines/2013/12/24/1271564/lgbt-sector-lauds-provision-anti-bullying-act [https://perma.cc/WTC9–3YFY] (discussing adoption of LGBT-inclusive anti-bullying regulations in the Philippines); *Japan: Anti-bullying Policy to Protect LGBT Students*, Hum. Rts. Watch (Mar. 24, 2017), https://www.hrw.org/news/2017/03/24/japan-anti-bullying-policy-protect-lgbt-students [https://perma.cc/JVC6–3YZB] (discussing adoption of LGBT-inclusive anti-bullying policy in Japan); *Progress Towards LGBTI Inclusion in Education in Europe*, Educ., Sci. & Cultural Org. (UNESCO) (Mar. 7, 2018), https://en.unesco.org/news/progress- towards-lgbti-inclusion-education-europe [https://perma.cc/7U5C-JXVV] (discussing progress on LGBT-inclusive antidiscrimination protections and action plans to prevent bullying in educational systems in Europe).

275. *See* U.N. Educ., Sci. & Cultural Org. (UNESCO), From Insult to Inclusion: Asia- Pacific Report on School Bullying, Violence and Discrimination on the Basis of Sexual Orientation and Gender Identity (2015), https://unesdoc.unesco.org/ark:/48223/pf0000235414 [https://perma.cc/XP78-ZQ5Q] (highlighting the impacts of discrimination on the basis of sexual orientation and gender identity as part of a larger education campaign).

276. Some survivors of conversion practices and human rights advocates have advocated for such an approach, and have helpfully outlined a range of steps to eradicate conversion practices that might be taken short of criminalization. *See, e.g.*, Sexual Orientation & Gender Identity Change Efforts Survivors, SOGICE Survivor Statement 8 (2018), https://web.archive.org/web/20200307121125/http://socesurvivors.com.au/wp-content/uploads/2019/11/SOGICE-Survivor-Statement-v2-Nov-2019.pdf ("The broader LGBTIQA+ community should be consulted in determining the scope and appropriateness of civil penalties for practitioners and referrers. Legislation that criminalises referral to conversion activities may impact a very large number of Australian faith communities and has not traditionally been recommended by LGBTIQA+ conversion survivors.").

277. *See* David J. Kinitz, *How I Ended Up in Conversion Therapy and Why Canada's Proposed Ban Is Only a First Step for LGBTQ+ Youth*, Conversation (Mar. 10, 2020), https://theconversation.com/how-i-ended-up-in-conversion-therapy-and-why-canadas-proposed-ban-is-only-a-first-step-for-lgbtq-youth-131647 [https://perma.cc/T5RU-5FB7]; Ryan Thoreson, Opinion, *Why Banning Anti-LGBT 'Conversion Therapy' Isn't Enough*, Open Democracy (May 15, 2020), https://www.opendemocracy.net/en/5050/why-banning-anti-lgbt-conversion-therapy-isnt-enough [https://perma.cc/9CET-CVVX].

end conversion practices on their own, but they collectively offer much more promise in discrediting these practices than the primarily punitive approaches that some states have opted to pursue.

In some jurisdictions, advocates have advanced antidiscrimination protections that more carefully calibrate criminal penalties and incorporate non- punitive interventions. The conversion practices legislation adopted in Victoria, for example, creates a civil response scheme that empowers the Victorian Equal Opportunity and Human Rights Commission to receive and investigate reports of conversion practices, refer reports to other agencies or facilitate an appropriate outcome, provide support to survivors, and engage in research and public education.[278] While the legislation does create criminal penalties, these are designed to reflect the degree of injury inflicted, with conversion practices that inflict "injury" punishable with up to five years in prison or a fine and those that inflict "serious injury" punishable with up to ten years in prison or a fine.[279] The conversion practices legislation in New Zealand similarly created a civil response scheme alongside calibrated criminal penalties.[280]

Promising alternatives to discriminalization will be shaped by context, and may vary based on the type of discrimination, the consequences of a given form of discrimination, and the remedies that are likely to make a person whole. The most effective approaches for advocates will depend in no small part on the intensity of discrimination and consequences of stigma, operation of criminal law and conditions of incarceration, nature of the legal system, ability of civil society to assist with and pursue claims, and other factors they can weigh in proposing solutions. Attention to context makes a rough proportionality assessment too fine-tuned a tool for regional and international human rights bodies, which are—and should be—primarily concerned with the general fit between the state's aims and the prohibitions it imposes. A rough proportionality approach merely offers a supplemental tool for human rights advocates to think about the stakes of discriminalization in a given context and whether other interventions might be more appropriate.

Conclusion

Discriminalization has proven attractive to lawmakers in dozens of states around the world who have turned to carceral penalties to emphasize

278. *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic) pt 3 (Austl.).

279. *Id.* pt 2. The scope of these terms is defined by the Crimes Act 1958. In that act, "injury" is defined as "physical injury or harm to mental health, whether temporary or permanent," where "physical injury" is defined to include "unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function," and "harm to mental health" is defined to include "psychological harm but does not include an emotional reaction such as distress, grief, fear or anger unless it results in psychological harm." A "serious injury" is defined as one or more injuries that "endangers life or is substantial and protracted." *Crimes Act 1958* (Vic) s 15 (Austl.).

280. Conversion Practices Prohibition Legislation Bill 2021 (56–2) (N.Z.).

that discrimination threatens the rights of LGBT people and warrants strict sanctions. As public opinion shifts and LGBT people gain rights and recognition globally, other states are likely to follow a similar path. The drive to punish is a powerful one, and general arguments about the dangers of overcriminalization are unlikely to sway lawmakers who are convinced of the necessity of decisive measures.[281] This is especially true in contexts where LGBT movements, emerging from longstanding patterns of historical subordination, demand punitive responses as proof that the state takes discrimination seriously. Dismissing stigmatic harm out of hand is unlikely to be successful, and proportionality offers a more systematic way to cabin the growth of discriminalization and adopt a more critical orientation toward carceral punishment. Proactively identifying other approaches to remedy stigmatic harm is an important component of any rights- respecting response.

In the immediate term, the embrace of discriminalization by lawmakers should give pause to communities who are critical of the draconian measures being taken in their name. It should also trigger reflection by human rights advocates who are committed to human dignity and concerned about overincarceration, discriminatory enforcement, and the range of abuses that arise from engagement with the criminal legal system. A proportionality framework offers a first step to slow the march to punishment and critically assess what such punishment aims to achieve, whether it does so, who benefits, and who bears the costs. Without such a framework to recognize and address the real harms that both discrimination and criminalization inflict, and to maximize the enjoyment of human rights, advocates are unlikely to be effective in protecting those whose dignity, equality, and fundamental liberties are most at stake.

281. Kadish, *supra* note 15, at 33–34.