USING FRATERNITY AND HUMAN DIGNITY TO COUNTER THE CRIMINALIZATION OF SOLIDARITY IN THE EUROPEAN UNION

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ABSTRACT

Over the past several decades and through a combination of legal, political, and social elements and factors, a logic of border control and securitization has developed in European States. The 2015 migration crisis has only exacerbated this negative approach towards migrants and the logic of securitization. Volunteers have stepped in to support migrants and formed solidarity movements that defy the logic of the securitization approach and propose a different narrative to that of States. To counteract their actions and deter volunteers from helping, States have passed criminal laws and so created a chilling effect that discourages solidarity. Scholars and activists often refer to the "criminalization of solidarity" to indicate this phenomenon. Using the example of the prosecutions of individuals who have helped migrants at the French-Italian border, this Article explains the legal framework relating to the criminalization of solidarity and highlights its effect on individuals and society at large. After asserting that a solution grounded in national law rather than European Union law is more suitable, the Article offers suggestions to curtail laws that criminalize solidarity towards migrants and so, at the very least, limit the negative effects of such laws. The authors argue that using the constitutional principles of fraternité—enshrined in French constitutional law—and of human dignity—found in many European Union Member States' constitutions—is a practical and realistic solution.

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INTRODUCTION

According to a modern understanding of the concept of sovereignty—a fundamental principle of international law—States are endowed with the right to include and exclude individuals from their territories (barring some exceptions).[1] Therefore, "immigration control has become conventionally associated with territorial sovereignty."[2] Over the past decades and through a combination of legal, political, and social elements and factors, European States have developed a logic of border control and securitization. Reinforced by States' efforts to combat organized crime and migrant smuggling, migration has, in the "War on Smuggling,"[3] turned into a security issue, leading to the drafting of national laws to prevent, investigate, and prosecute smuggling. Smuggling is not only a very profitable business for criminal gangs but is also linked to serious human rights violations and deaths.[4] The 2015 migration crisis[5] has only exacerbated this negative approach towards migrants and the logic of securitization, which is defined as the labeling of issues as a fundamental threat to

1. Cecilia Vergnano, *Why Take Such a Risk? Beyond Profit: Motivations of Border-Crossing Facilitators Between France and Italy*, 28 SOC. ANTHROPOLOGY 743, 753–54 (2020). Among the exceptions to this right to include and exclude individuals are the obligation to accept one's own nationals, International Covenant on Civil and Political Rights art. 12, ¶ 4, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 176 (entered into force Mar. 23, 1976) [hereinafter ICCPR], the principle of non-refoulement under refugee law, Convention Relating to the Status of Refugees art. 33, *opened for signature* July 28, 1951, 189 U.N.T.S. 137, 176, and the prohibition under human rights law of returning individuals to countries where they might be tortured, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85, 114 (entered into force June 16, 1987) [hereinafter UNCAT].

2. Vincent Chetail, *Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel*, 27 EUR. J. INT'L L. 901, 922 (2016).

3. *See* Maurizio Albahari, *From Right to Permission: Asylum, Mediterranean Migrations, and Europe's War on Smuggling*, 6 J. ON MIGRATION & HUM. SEC. 121 (2018) (explaining measures taken by the European Union and its Member States to curb smuggling).

4. Eur. Comm'n, *Migration Smuggling*, EUR. UNION, https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/migrant-smuggling_en [https://perma.cc/U73E-Z5H4].

5. The very use of the word "crisis" highlights the way migration is viewed—i.e., as an existential threat to a community that "predispose[s] States and other actors to responding with urgent or extraordinary measures." *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, ¶ 29, U.N. Doc. A/HRC/37/51 (Jan. 16, 2018) [hereinafter *Special Rapporteur Report 2018*].

security.[6] The problem is not only visible at the external borders of the European Union, and notably the Mediterranean Sea, but also at its internal borders.

The key issue with these laws, both at national and European levels, is that while they are used against (groups of) smugglers, for which they have been designed, they are also deployed against individuals who have helped migrants cross borders. Acts of solidarity towards migrants—for example, transporting migrants in a car, buying them a train ticket, providing shelter overnight, distributing food, rescuing them in the mountains, or lending mobile phones—have thus fallen within the purview of criminal law. This reaction across the region is now commonly characterized as "criminalization of solidarity."[7] In this Article, the criminalization of solidarity (which has not acquired a legal meaning[8]) is defined as the establishment of laws that transform an act into a crime, thereby enabling judicial authorities to prosecute individuals for assisting migrants.[9]

Aware that the concept of "criminalization of solidarity" in relation to migration is well-covered from a sociological and political perspective, this Article proposes to examine it from a *legal* perspective and suggest *legal* solutions to the issue. Legal developments are sometimes detailed in reports from non-governmental organizations

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6. *See, e.g.*, Didier Bigo, *Security and Immigration: Toward a Critique of the Governmentality of Unease*, 27 ALTERNATIVES 63, 63 (2002) (arguing that "[m]igration is increasingly interpreted as a security problem" in which the irregular migrants are viewed as an element of insecurity). "The securitisation theory first appeared in the literature of the Copenhagen School of Critical Security Studies in the mid-1990s. This School viewed securitisation as a form of 'speech act' or linguistic representation that designated some particular issues 'such as irregular migration' as existential security threats." Luke Eda, *How Transnationally Effective Are the UK Migration Policies in Relation to Missing Migrants? A Transnational Law Perspective*, 54 VAND. J. TRANSNAT'L L. 343, 376–77 (2023).

7. International organizations and NGOs as well as scholars use this expression. *See, e.g.*, *infra* notes 11, 14, 28 (providing examples of international organizations, NGOs, and scholars using the expression).

8. Abigail Taylor, *'Crimes of Solidarity': France's Contemporary Crisis of Hospitality*, *in* MAKING STRANGERS: OUTSIDERS, ALIENS AND FOREIGNERS 39, 42 (Abbes Maazaoui ed., 2018) [hereinafter Taylor, *'Crimes of Solidarity'*].

9. *See also* Conf. on INGOs of the Council of Eur., Expert Council on NGO L., *Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and Other Migrants in Council of Europe Member States*, ¶ 5 Conf/Exp(2019)1 (Dec. 1, 2019) [hereinafter Expert Council on NGO L., *Using Criminal Law to Restrict the Work of NGOs*] ("The term 'criminalisation' refers to the practice of state legislators to enact legislation which determines particular acts or omissions to be criminal law offences.").

(NGOs) or international organizations, but the same emphasis is lacking in scholarly legal writings,[10] as they tend to highlight issues but fail to offer solutions.[11] Scholars have also focused their attention on the external borders (*e.g.*, the Mediterranean Sea) of the European Union,[12] while this Article is directed at the criminalization of

10. Some academic literature addresses the issue from a human rights perspective by studying the rights of human rights defenders, but without focusing specifically on the issue of criminalization. *See, e.g.*, Cathryn Costello & Itamar Mann, *Border Justice: Migration and Accountability for Human Rights Violations*, 21 GERMAN L.J. 311, 318–21, 325–27 (2020) (providing an overview of the gap in accountability of States for breaching migrants' and refugees' human rights and offering solutions that are mainly founded in human rights law).

11. For example, Webber provides an overview of the criminalization of solidarity in various European countries and highlights the unlawfulness of some national and European measures. Frances Webber, *The Trend Towards Criminalising Humanitarian Action*, 34 J. IMMIGR., ASYLUM & NAT'Y L. 121, 125–29, 131–36 (2020). Mentasti assesses whether measures adopted by the Italian State fall within the definition of "crimmigration." Giulia Mentasti, *The Criminalisation of Migration in Italy: Current Tendencies in the Light of EU Law*, 13 NEW J. EUR. CRIM. L. 502, 502 (2022). Moreno-Lax analyzes the New Pact on Migration and Asylum. Violeta Moreno-Lax, *Towards a Thousand Little Morias: The EU (Non)Rescue Scheme – Criminalising Solidarity, Structuralising Defection*, *in* REFORMING THE COMMON EUROPEAN ASYLUM SYSTEM 161, 161–65 (Daniel Thym & Odysseus Acad. Network eds., 2022) [hereinafter Moreno-Lax, *Towards a Thousand Little Morias*]. Mitsilegas demonstrates that the criminalization of migration reflects a security agenda. Valsamis Mitsilegas, *The Criminalisation of Migration in the Law of the European Union: Challenging the Preventive Paradigm*, *in* CONTROLLING IMMIGRATION THROUGH CRIMINAL LAW: EUROPEAN AND COMPARATIVE PERSPECTIVES ON "CRIMMIGRATION" 25, 25–26 (Gian Luigi Gatta et al. eds., 2021). Zirulia is the only one who suggests reforms at the national and European levels. Stefano Zirulia, *Is That a Smuggler? The Blurring Line Between Facilitating Illegal Immigration and Providing Humanitarian Assistance at the European Borders*, *in* CONTROLLING IMMIGRATION THROUGH CRIMINAL LAW, *supra*, at 235, 255–59. At the European level, Zirulia suggests amending the Facilitation Directive (discussed in depth in Part I) with a view to introducing "a profit-making purpose among the elements making up the criminal offence," *id.* at 257, accompanied by an "obligation on Member States . . . to introduce a humanitarian clause," *id.* at 258, or to better reflect that aid to illegal entry is carried out to exploit migrants and gain an unfair advantage, *id.* at 259. This Article argues that, given the current context, it is unlikely that the Directive will be amended and, if it is, it is unlikely to offer a positive outlook. *See infra* Part II. At the national level, Zirulia suggests that States introduce a humanitarian clause and reconsider the penalties for cases of facilitation. Zirulia, *supra*, at 256–57. This Article shows that States are reluctant to implement the humanitarian clause contained in the Directive. As for a change in penalties, they should be considered as a mitigation and not an eradication of the criminalization of solidarity.

12. For example, Janer Torrens focuses on the search and rescue operations in the Mediterranean Sea. Joan David Janer Torrens, *Migrant Search and Rescue*

solidarity within the E.U. borders. Moreover, this inquiry is targeted at the provision of aid by individuals and associations[13] rather than established NGOs.[14]

The criminalization of solidarity has led to harm on numerous levels. It has harmed not only individuals who have been prosecuted and eventually found not guilty, but also communities who have been vilified for showing respect and dignity towards fellow humans. The combination of migrants increasingly taking dangerous routes to avoid capture by the authorities and the deterrence of solidarity through criminalization means that when in distress, such migrants do not receive the required assistance, and some die as a result.[15]

Operations in the Mediterranean by Humanitarian Organizations: Migrant Smuggling or Humanitarian Assistance?, 8 PAIX ET SÉCURITÉ INTERNATIONALES 381, 400 (2020). Several other academics have examined the issue of solidarity towards migrants at the external borders of the European Union. Moreno-Lax, *Towards a Thousand Little Morias*, *supra* note 11, at 161–62; Daniel Thym & Evangelia Tsourdi, *Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions*, 24 MAASTRICHT J. EUR. & COMPAR. L. 605, 605 (2017); Violeta Moreno-Lax, *Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy*, 24 MAASTRICHT J. EUR. & COMPAR. L. 740, 741–44 (2017) [hereinafter Moreno-Lax, *Solidarity's Reach*]. Academics have also assessed the specific situation of Italy. Mentasti, supra note 11, at 504–05; Eugenio Cusumano & Matteo Villa, *From "Angels" to "Vice Smugglers": The Criminalization of Sea Rescue NGOs in Italy*, 27 EUR. J. CRIM. POL'Y RSCH. 23, 23 (2021). Other academics have examined that of Italy and Greece. Jennifer Allsopp, Lina Vosyliūtė, & Stephanie Brenda Smialowski, *Picking 'Low-Hanging Fruit' While the Orchard Burns: The Costs of Policing Humanitarian Actors in Italy and Greece as a Strategy to Prevent Migrant Smuggling*, 27 EUR. J. CRIM. POL'Y RSCH. 65, 65 (2021).

13. Dadusc and Mudu refer to them as "autonomous solidarities." Deanna Dadusc & Pierpaolo Mudu, *Care Without Control: The Humanitarian Industrial Complex and the Criminalisation of Solidarity*, 27 GEOPOLITICS 1205, 1206–07 (2022).

14. Some authors have examined the criminalization of solidarity as applied to NGOs. *See, e.g.*, Mentasti, *supra* note 11, at 507–13 (focusing on search and rescue missions undertaken by NGOs in the Mediterranean Sea); Cusumano & Villa, *supra* note 12, at 28–34 (explaining how Italy has delegitimized and criminalized NGO activities and showing that NGOs do not serve as a pull factor of migration).

15. *See* Emanuele Busa, *Pass of Death: The Treacherous Route Taken by Migrants Trying to Cross Illegally from Italy to France,* GLOB. VOICES (Jan. 24, 2024), https://globalvoices.org/2024/01/24/pass-of-death-the-treacherous-route-taken-by-migrants-trying-to-cross-illegally-from-italy-to-france/ [https://perma.cc/47D4-WP4U] (explaining that migrants opt for dangerous paths in the mountains to avoid being caught by the French police); James Imam, *My Journey Through Italy's "Pass of Death" a Stone's Throw from Seaside Resorts,* I-NEWS (May 13, 2024), https://inews.co.uk/news/world/journey-italys-pass-of-death-

While the obvious solution would be the removal of laws criminalizing acts of solidarity, the reality is that not only are these laws ingrained in a decades-long tradition and discourse of securitization of migration, but also the contemporary hostile environment makes such a solution inoperable. A February 2024 report by the Council of Europe highlights such challenges to stopping the criminalization of solidarity.[16] Generally, in the field of asylum and migration policies, the European continent has seen an overall regression in human rights compliance.[17] A hostile rhetoric against migrants has driven further restrictions against migrants and those assisting them,[18] the latter being subjected to threats and violence[19] as well as being charged with smuggling-related offences and/or facing administrative harassment and technical impediments and restrictions.[20]

This Article argues that even though the problem is located with the States' (mis)understanding and/or abuse of notably E.U. law[21] combined with a logic of securitization, the most suitable way to counteract the criminalization of solidarity lies at the national level and in constitutional law specifically, thereby offering a more practical and realistic approach.[22] The best way to decriminalize solidarity is to find within the constitutional framework solidarity-related concepts that negate, or at least mitigate, the effects of laws that reprimand solidarity practices. Moreover, our *legal* solutions are based on a philosophical inquiry into the notion of solidarity as interpreted and understood in various forms in the E.U. Member States. An improved understanding of solidarity through heeding the cultural, legal, political, and philosophical traditions of E.U. Member States will help devise solutions accepted at the national level. Whereas in France the

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ventimiglia-seaside-resorts-3049693 [https://perma.cc/YMX4-Q6ME] (stating that "[a]t least 40 migrants have died trying to reach France via Ventimiglia").

16. COMM'R FOR HUM. RTS., COUNCIL OF EUR., PROTECTING THE DEFENDERS: ENDING REPRESSION OF HUMAN RIGHTS DEFENDERS ASSISTING REFUGEES, ASYLUM SEEKERS AND MIGRANTS IN EUROPE 9–20 (2024) [hereinafter COMM'R FOR HUM. RTS., PROTECTING THE DEFENDERS], https://rm.coe.int/recommendation-protecting-the-defenders-ending-repression-of-human-rig/1680ae9b1c [https://perma.cc/6YYB-TFPP].

17. *Id.* at 10–11.

18. *Id.* at 11–12.

19. *Id.* at 13–14.

20. *Id.* at 14–20.

21. *See infra* Part I (explaining the process of the criminalization of solidarity in the E.U. Member States).

22. *See infra* Part II (examining whether solutions are best found at the E.U. or national level).

concept of *fraternité* lends itself well to interpreting the law under a solidaristic light—and the French Constitutional Court has in fact done this[23]—in other European countries, the concept of human dignity might be used to soften some of the negative impacts of the laws criminalizing solidarity. Given how widespread the phenomenon of criminalization of solidarity has become in the European Union and the toll it has taken on individuals (both helpers and migrants) and society at large, solutions that are likely to be adopted ought to be found.

The Article begins by presenting the issue of the criminalization of solidarity towards migrants. After justifying the choice for a solution grounded in national law rather than in E.U. law, it analyzes the use of the constitutional principles of *fraternité* and human dignity to curtail laws criminalizing solidarity towards migrants.

I. THE CRIMINALIZATION OF SOLIDARITY IN EUROPE

The process of criminalization of solidarity in Europe started at the national level in the early 1990s and was later boosted by the transposition into national law[24] of the 2002 Facilitators Package (comprising the Facilitation Directive[25] and the Council Framework Decision,[26] which were adopted to supplement other instruments combatting illegal immigration, illegal employment, trafficking in

23. M. Cédric H. et autre, Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-717/718QPC, July 6, 2018, 0155 JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL JOURNAL OF THE REPUBLIC OF FRANCE] text no. 107/160, ¶¶ 7–13 (Fr.).

24. Under Article 288 TFEU, directives must be transposed, i.e., implemented into national law by Member States. Consolidated Version of the Treaty on the Functioning of the European Union art. 288, June 7, 2016, 2016 O.J. (C 202) 47, 171–72 [hereinafter TFEU]. Although directives "leave to the national authorities the choice of form and methods" of implementation, they are legally binding as to their "result to be achieved." *Id.* at 172; *see also* Consolidated Version of the Treaty on European Union art. 28, June 7, 2016, 2016 O.J. (C 202) 13, 32 [hereinafter TEU] (providing standards and procedures for operational action by the European Union undertaken by the Council).

25. Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorised Entry, Transit and Residence, 2002 O.J. (L 328) 17 [hereinafter Facilitation Directive].

26. Council Framework Decision 2002/946/JHA of 28 November 2002 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence, 2016 O.J. (E 47) 1.

human beings, and the sexual exploitation of children[27]). That Package provided Member States with a legal basis for criminalizing solidarity and fostered nationalist and exclusionary policies that targeted individuals showing solidarity toward migrants.[28] The application of national laws implementing the Directive, in particular, has led to a flurry of prosecutions, usually concluding in defendants being found not guilty and being discharged on all counts.[29] Yet, these prosecutions have deterred many others from engaging in solidarity,[30] and States have thus been able to reaffirm a migration policy based on a security paradigm.

The process of criminalization of solidarity was based precisely on this logic of securitization—inherent in the migration laws and policies of the European Union and its Member States—and developed gradually. To avoid attracting more migrants, especially in so-called "hotspots,"[31] States limited access to support and facilities.[32] As a result, a combination of institutional neglect, denial of basic services by the State, a "hostile environment,"[33] and a discourse

27. *Id.* pmbl., ¶ 5, at 1; Facilitation Directive pmbl., ¶ 5, *supra* note 25, 2016 O.J. (L 328) at 17.

28. Christian Dadomo, Noëlle Quénivet, & Francesco Tava, *The Criminalization of Solidarity in Today's European Union*, *in* EUROPEAN SOLIDARITY - INTERDISCIPLINARY PERSPECTIVES 313, 320–28 (Francesco Tava & Noëlle Quénivet eds., 2023).

29. CARITAS EUROPA, THE "CRIMINALISATION" OF SOLIDARITY TOWARDS MIGRANTS 6 (2019), https://www.caritas.eu/wordpress/wp-content/uploads/2019/06/190617_Caritas_Europa_criminalisation_solidarity_FINAL.pdf [https://perma.cc/GK6G-ZCPK]; *Report of the Special Rapporteur on the Human Rights of Migrants: Right to Freedom of Association of Migrants and Their Defenders*, ¶ 73, U.N. Doc. A/HRC/44/42 (May 13, 2020) [hereinafter *Special Rapporteur Report: The Right to Freedom of Association of Migrants and Their Defenders*].

30. The deterrent effect takes different forms. Individuals err on the side of caution, Jennifer Allsopp, *Solidarity, Smuggling and the European Refugee Crisis: Civil Society and Its Discontents*, 3 DIRITTO, IMMIGRAZIONE E CITTADINANZA, 1, 12 (2017) (It.), to the effect that regardless of judicial outcomes, prosecution "has served to discourage solidarity," Expert Council on NGO L., *Using Criminal Law to Restrict the Work of NGOs*, *supra* note 9, ¶ 119, and the fear of sanction has contributed to "collective indifference," Allsopp, *supra,* at 9.

31. Expert Council on NGO L., *Using Criminal Law to Restrict the Work of NGOs*, *supra* note 9, ¶ 17.

32. *Id.*; Webber, *supra* note 11, at 126.

33. *See* Expert Council on NGO L., *Using Criminal Law to Restrict the Work of NGOs*, *supra* note 9, ¶ 17 ("Those who manage to arrive in Europe often face enforced 'hostile environments.'"); COMM'R FOR HUM. RTS., PROTECTING THE DEFENDERS, *supra* note 16, at 11–12 (explaining the "hostile environment" and its impact on human rights defenders).

disincentivizing irregular migration[34] emerged.[35] In response to migrants' dire situations, self-funded volunteers and activists stepped in to fill the protection gap, driven by moral, political, and humanitarian convictions.[36] Citizen initiatives emerged at the local level and built support networks across Europe.[37] Moral and political convictions and a common humanitarian sense characterized the behavior of these volunteers and facilitators.[38] They tended to form communities of interest, in which solidarity providers and recipients coalesced around the same ideals and principles of behavior.[39] The political and organizational dimension of these initiatives almost always led to the growing political awareness of its members,[40] who deemed contemporary policies and laws unfit to address the refugee crisis.[41] These refugee solidarity movements, often comprising individuals who were originally not politically engaged, turned into

34. Although there is no official definition of "irregular migration," it is usually defined as entry or stay in a State without the proper documents authorizing a foreigner to be or stay in the State. Eur. Comm'n, *Irregular Migration,* EUR. UNION, https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/irregular-migration [https://perma.cc/MSZ5-Y3AC]; *see* Franck Düvell, *Paths into Irregularity: The Legal and Political Construction of Irregular Migration*, 13 EUR. J. MIGRATION & L. 275, 275–76 (2011) (providing an overview of the legal and political construction of the concept of irregular migration).

35. *See* European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration*, at 7–10, COM (2015) 240 final (May 13, 2015) (explaining how to reduce the incentives for irregular migration).

36. Expert Council on NGO L., *Using Criminal Law to Restrict the Work of NGO*, *supra* note 9, ¶¶ 18, 117; LIZ FEKETE ET AL., HUMANITARIANISM: THE UNACCEPTABLE FACE OF SOLIDARITY 2 (2017); Pietro Castelli Gattinara & Lorenzo Zamponi, *Politicizing Support and Opposition to Migration in France: The EU Asylum Policy Crisis and Direct Social Activism*, 42 J. EUR. INTEGRATION 625, 628 (2020).

37. Martina Tazzioli & William Walters, *Migration, Solidarity and the Limits of Europe*, 9 GLOB. DISCOURSE 175, 177 (2019); Dadusc & Mudu, *supra* note 13, at 1206–07. As Bessone explains, the act of assisting is not only a personal political gesture but also a public policy demonstration. Magali Bessone, *Le vocabulaire de l'hospitalité est-il républicain ?*, 17 ÉTHIQUE PUBLIQUE ¶ 24 (2015) (Fr.), http://journals.openedition.org/ethiquepublique/1745 [https://perma.cc/5HES-V7Z4].

38. Vergnano, *supra* note 1, at 752, 754.

39. *Id.* at 754.

40. *Id.* at 751.

41. Castelli Gattinara & Zamponi, *supra* note 36, at 626.

mass movements that defied the logic of the securitization approach and proposed a different narrative from that of the State.[42]

As these movements increasingly gained traction, they needed to be counteracted. Nationalist politicians, far-right groups, and the media exploited nationalistic discourse to portray migrants as threats to social cohesion[43] while equating humanitarian assistance with smuggling.[44] Considering such individuals "an obstacle to the implementation of asylum and migration policies focused on deterrence and security,"[45] States launched "campaigns of government intimidation"[46] to deter volunteers from helping and to cast a negative light on those doing so. These States created a chilling effect on volunteers and discouraged solidarity.[47] Eventually, this narrative was used to pass or leverage laws to criminalize solidarity towards migrants with the effect of "censuring acts that embody the principles and values of humanity and civility."[48]

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42. Liz Fekete, *Migrants, Borders and the Criminalisation of Solidarity in the EU*, 59 RACE & CLASS 65, 81 (2018); Abigail Taylor, *Domopolitics, Citizenship and Dissent: An Analysis of 'Crimes of Solidarity' and Hospitality in Contemporary France*, 33 INT'L J. POL., CULTURE & SOC'Y 495, 497 (2020) [hereinafter Taylor, *Domopolitics, Citizenship and Dissent*]; Allsopp, *supra* note 30, at 25; Mathilde Du Jardin, *Solidarité en Europe: état de l'art sur la criminalisation de l'aide aux personnes en situation irrégulière*, 46 DÉVIANCE ET SOCIÉTÉ 519, 531 (2022) (Fr.).

43. COMM'R FOR HUM. RTS., PROTECTING THE DEFENDERS, *supra* note 16, at 12.

44. Cusumano & Villa, *supra* note 12, at 24; Galya Ben-Arieh & Volker Heins, *Criminalisation of Kindness: Narratives of Legality in the European Politics of Migration Containment*, 42 THIRD WORLD Q. 200, 206 (2021); COMM'R FOR HUM. RTS., PROTECTING THE DEFENDERS, *supra* note 16, at 14.

45. COMM'R FOR HUM. RTS., PROTECTING THE DEFENDERS, *supra* note 16, at 11.

46. *Special Rapporteur Report: The Right to Freedom of Association of Migrants and Their Defenders, supra* note 29, ¶ 74; *see also Special Rapporteur Report 2018, supra* note 5, ¶¶ 23–25 (explaining the different tactics adopted by States with a view to shrinking space for civil society).

47. CARITAS EUROPA, *supra* note 29, at 1; *Special Rapporteur Report 2018, supra* note 5, ¶¶ 55–56; Carlo Caprioglio et al., *Solidarity as "Organised Crime": The Criminalisation of Facilitation in Italy*, BORDER CRIMINOLOGIES (June 14, 2023) (U.K.), https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2023/06/solidarity-organised-crime-criminalisation-facilitation [https://perma.cc/PLZ9-RMQ6].

48. *Special Rapporteur Report: The Right to Freedom of Association of Migrants and Their Defenders*, *supra* note 29, ¶ 68.

The State sends two messages by resorting to criminal law.[49] First, that irregular migration, as a phenomenon, is intrinsically dangerous. By using criminal law to sanction irregular migration, the State conveys the impression that such migration is synonymous with criminality.[50] Second, and resulting from the first, is the message that a strong response is warranted to ensure that there will be no further arrivals. Such "[d]eterrence is largely achieved through the criminalization of these humanitarian services."[51] Scholars and activists often refer to the "criminalization of solidarity" to describe this phenomenon.[52] This ultimate step fits within the wider criminalization of migration. Policies aimed at redefining a social issue as a crime "[sent] a signal on the undesirability and dangerousness of the migrant"[53] and categorized an entire group as criminal.[54] Such policy thus enabled the State to bring acts carried out by those helping migrants within the scope of criminal law.[55] As the U.N. Special Rapporteur on the Human Rights of Migrants explained, "[o]nce the act of migration is tarred as a crime, it is easy to label any group

49. Mentasti, *supra* note 11, at 505; *see also* Mitsilegas, *supra* note 11, at 39 (explaining that criminal law is used to prevent irregular entry, transit, and stay (deterrence), as well as to stigmatize migrants).

50. After all, "criminal law sanctions can have an impact on discourse and public perceptions concerning irregular migrants and the conflation of irregular migration and criminal activity." MARC PROVERA, CTR. FOR EUR. POL'Y STUD., THE CRIMINALISATION OF IRREGULAR MIGRATION IN THE EUROPEAN UNION 3 (2015), https://www.ceps.eu/ceps-publications/criminalisation-irregular-migration-european-union/ [https://perma.cc/35Y2-5WME].

51. *Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions: Saving Lives Is Not a Crime*, ¶ 53, U.N. Doc. A/73/314 (Aug. 7, 2018) [hereinafter *Special Rapporteur Report: Saving Lives Is Not a Crime*].

52. Dadomo, Quénivet, & Tava, *supra* note 28, at 313–15; Tazzioli & Walters, *supra* note 37, at 178; Melina Duarte, *The Ethical Consequences of Criminalizing Solidarity in the EU*, 86 THEORIA 28, 29–30 (2020). In France, the expression "*délit de solidarité*" was coined by the Group for Information and Support of Immigrants (GISTI) in the 1990s. Benjamin Boudou, *The Solidarity Offense in France: Egalité, Fraternité, Solidarité!*, VERFASSUNGSBLOG (July 6, 2018), https://verfassungsblog.de/the-solidarity-offense-in-france-egalite-fraternite-solidarite/ [https://perma.cc/E4ZG-L5CD].

53. Mitsilegas, *supra* note 11, at 39.

54. SHAHRAM KHOSRAVI, "ILLEGAL" TRAVELLER: AN AUTO-ETHNOGRAPHY OF BORDERS 21 (2010).

55. It might also be contended that criminalizing the act of helping migrants is part of "crimmigration." *See* Maartje Van Der Woude & Joanne Van Der Leun, *Crimmigration Checks in the Internal Border Areas of the EU: Finding the Discretion That Matters*, 14 EUR. J. CRIMINOLOGY 27, 31 (2017) (explaining the concept and process of crimmigration).

assisting these 'criminals' as acting illegally itself."[56] In social sciences, this phenomenon is often called "crimmigration"[57] (a crasis between crime and migration). Crimmigration is a concept based on the observation of three trends: (1) the tendency of criminal law to expand into migration issues, (2) an obsession with security and the dangerous "other," and (3) the development of an enemy penology.[58]

Scholars often argue that the legal basis for the criminalization of solidarity at the national level is found in the Facilitators Package,[59] or is, at least, a "by-product" thereof.[60] The U.N. Independent Expert on Human Rights and International Solidarity stated that, at the European level, the two legal instruments contained in the Facilitators Package—the Facilitation Directive and the Framework Decision—have "contributed the most directly and significantly to the maintenance of the legal regimes in most European states that suppress and criminalize humanitarian assistance to irregular

56. *Special Rapporteur Report: The Right to Freedom of Association of Migrants and Their Defenders*, *supra* note 29, ¶ 67; *see also* Expert Council on NGO L., *Using Criminal Law to Restrict the Work of NGOs*, *supra* note 9, ¶ 63 (using a report of the Special Rapporteur on the Human Rights of Migrants to show that the criminalization of migration and migrants has made it possible for the State to criminalize aspects of the work of NGOs towards migrants).

57. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–77 (2006) (discussing the concept of crimmigration and offering a unifying theory explaining how and why criminal and immigration law converged).

58. Van Der Woude & Van Der Leun, *supra* note 55, at 31; *see also* Mentasti, *supra* note 11, at 503–04 (explaining the concept of crimmigration in the context of Italian legislation relating to border control and migration management).

59. *See, e.g.*, Juan Pablo Aris Escarcena, *Punishing Solidarity. The Crime of Solidarity at the Land and Sea Borders of the European Union.*, 45 DPCE ONLINE 5240, 5243–45 (2021) (It.), https://doi.org/10.57660/dpceonline.2020.1211 [https://perma.cc/SGW2-CMFF] ("The legal basis for the criminal prosecution of humanitarian actions is to be found in European law, in particular in the 'Facilitators Package.'"); Lucia Della Torre, *Facilitators' Package: Discretion in a Time of Challenge*, 148 NAÇÃO E DEFESA 88, 89 (2018) (Port.) ("Such crimes can all though be reconnected to a unique source (if not of origin, at least clearly) of inspiration, the European Directive 90/2002 and the Council Framework Decision implementing it: together, they are known as the Facilitators' Package."); Dadusc & Mudu, *supra* note 13, at 1205–06 (citing the Directive as an example of a legal technique that has criminalized acts of solidarity towards migrants). Zirulia claims that "[t]he European legislator was aware that such a legislative framework . . . could have led to the criminalisation of conduct motivated by purely solidarity purposes." Zirulia, *supra* note 11, at 238–39.

60. Allsopp, *supra* note 30, at 7.

migrants."[61] Criticism is particularly directed at the Facilitation Directive, which defines the "facilitation of illegal immigration" and obliges States to impose sanctions on individuals who intentionally aid irregular migrants.[62] The lack of clarity and explicit definitions in the Directive allows E.U. Member States to criminalize a range of acts of solidarity by individuals and organizations.[63] For example, the Directive specifies that States must impose sanctions for acts carried out for financial gain with regard to the assistance of migrants in relation to residence;[64] however, it requires sanctions for such acts in relation to entry and transit regardless of financial gain.[65] As a result, States have criminalized a broader array of acts. As the Commission explained, in "an attempt to remedy the lack of financial or other material benefit requirement,"[66] the Directive includes a humanitarian

61. *Report of the Independent Expert on Human Rights and International Solidarity: Human Rights and International Solidarity*, ¶¶ 21–22, U.N. Doc. A/HRC/41/44 (Apr. 16, 2019) [hereinafter *Independent Expert Report 2019: Human Rights and International Solidarity*]; *see also* COMM'R FOR HUM. RTS., PROTECTING THE DEFENDERS, *supra* note 16, at 15 ("There has been long-standing criticism that the rules contained in the Directive fail to provide adequate protection against the criminalisation of human rights defenders.").

62. Facilitation Directive art. 1, *supra* note 25, 2002 O.J. (L 328) at 17. The Court of Justice of the European Union stressed that Member States are required to prosecute "any person who has intentionally assisted a third-country national to enter the territory of that Member State in breach of the applicable provisions." Case C-83/12 PPU, Minh Khoa Vo v. Germany, ECLI:EU:C:2012:202, ¶ 43 (Apr. 10, 2012).

63. Dadomo, Quénivet, & Tava, *supra* note 28, at 325–28; Mirentxu Jordana Santiago, *Addressing Migrant Smuggling in the European Union, Challenges for a Non-Criminalized, Coordinated and Effective Response*, 6 CUADERNOS EUROPEOS DE DEUSTO 164, 175 (2022) (Spain); *see also* European Commission, *Proposal for a Directive of the European Parliament and of the Council Laying down Minimum Rules to Prevent and Counter the Facilitation of Unauthorised Entry, Transit and Stay in the Union, and Replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA*, at 9, COM (2023) 755 final (Nov. 28, 2023) [hereinafter European Commission, *Proposal for a Directive Replacing the Facilitators Package*] (explaining that stakeholders bemoaned the "varied approaches to what constitutes a crime across Member States" and that civil society highlighted "that a wide definition of the offence leads to a lack of clarity and legal certainty as well as to risks of criminalisation of humanitarian assistance by civil society organisations or individuals assisting and/or working with irregular migrants").

64. Facilitation Directive art. 1, ¶ 1(b), *supra* note 25, 2002 O.J. (L 328) at 17.

65. *Id.* art. 1, ¶ 1(a).

66. European Parliament, *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 Update*, at 30, PE 608.838 (Dec. 2018) [hereinafter European Parliament, *Fit for Purpose?*],

assistance exemption in Article 1(2). This exemption permits Member States to temper the obligation to impose sanctions on anyone who assists a foreigner to enter, or transit across, the territory of a member state unlawfully.[67] However, the voluntary nature of this exemption and the lack of a definition for the concept of "humanitarian assistance"[68] leave room for inconsistent implementation across States.[69] When implemented by E.U. Member States, the Directive's poor phrasing, omissions, and lack of definitions have been weaponized against civil society organizations.[70]

The criminalization of solidarity occurs not only in legislation (i.e., on paper), but also in actual practice as the law is applied and

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https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf [https://perma.cc/T4Y9-LTTA].

67. Article 1(2) reads: "Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned." Facilitation Directive art. 1, ¶ 2, *supra* note 25, 2002 O.J. (L 328) at 17.

68. For example, some states have adopted vague definitions or narrow interpretations by limiting "humanitarian assistance" to include only assistance to migrants in distress at sea, as in the case of Greece. European Parliament, *Fit for Purpose?*, *supra* note 66, at 37; Ben-Arieh & Heins, *supra* note 44, at 205.

69. *See, e.g.*, European Parliament, *Fit for Purpose?*, *supra* note 66, at 11 (reporting that only seven States had introduced an express humanitarian exemption as of 2018 and noting that "formal prosecutions [still] occurred in countries where humanitarian exemptions were declared"); European Commission, Commission Guidance on the Implementation of EU Rules on Definition and Prevention of the Facilitation of Unauthorised Entry, Transit and Residence, 2020 O.J. (C 323) 1, 4 [hereinafter European Commission Guidance on EU Rules on Prevention of the Facilitation of Unauthorised Entry] (reporting that as of 2020 only eight States had introduced legislation including a humanitarian exemption and noting that there was "a variety of national interpretations of the Directive"); Mitsilegas, *supra* note 11, at 28 (noting that the value of the Directive's provision of discretion to exempt humanitarian assistance is questionable because only seven States had included such an exemption in their domestic laws); European Commission, *Proposal for a Directive Replacing the Facilitators Package*, *supra* note 63, at 9 ("The analysis of the implementation of the Facilitators Package revealed the existence of varied approaches to what constitutes a crime across Member States . . . ."); COMM'R FOR HUM. RTS., PROTECTING THE DEFENDERS, *supra* note 16, at 15 (asserting that the non-mandatory nature of the Facilitation Directive's humanitarian exception has led "to the inconsistent application of this exemption across different member states").

70. *Special Rapporteur Report: The Right to Freedom of Association of Migrants and Their Defenders*, *supra* note 29, ¶ 70; Du Jardin, *supra* note 42, at 525. The voluntary nature of the humanitarian exemption led States to criminalize the work of human rights defenders. European Parliament, *Fit for Purpose*?, *supra* note 66, at 13–14.

enforced. It is in this context that courts play a major role in enforcing border control during humanitarian crises.[71] Reports from think tanks, NGOs, and international organizations, including the European Union, provide numerous examples of the criminalization of solidarity.[72] However, the lack of a comprehensive survey makes it challenging to gauge the extent of this practice across E.U. Member States.[73] Research shows four patterns in the prosecution of solidarity activities. First, prosecutions tend to cluster around border hotspots like Ventimiglia, Calais, the Øresund bridge, Lesbos,[74] and the Austrian-German and Austrian-Hungarian borders.[75] In France, most cases relate to passage through the Alps, particularly the Roya Valley.[76] Second, the type of acts prosecuted include offering

71. *See, e.g.*, Marta Kolankiewicz & Maja Sager, *Clandestine Migration Facilitation and Border Spectacle: Criminalisation, Solidarity, Contestations*, 16 MOBILITIES 584, 591 (2021) (discussing the role that courts can play in countering unlawful legislation and criminalization of humanitarian assistance).

72. CARITAS EUROPA, *supra* note 29, at 1–4; *Special Rapporteur Report: The Right to Freedom of Association of Migrants and Their Defenders*, *supra* note 29, ¶¶ 66–73; Expert Council on NGO L., *Using Criminal Law to Restrict the Work of NGOs*, *supra* note 9, at 21–39.

73. European Parliament, *Notice to Members – Subject: Petition No 1247/2016 by Paula Schmid Porras (Spanish) on Behalf of NGO Professional Emergency Aid (PROEM-AID) Concerning the Criminalisation of Persons Engaging with Migrants in an Irregular Situation and the Criminalisation of Humanitarian Assistance at Sea*, at 2, PE 609/434v03-00 (Aug. 9, 2023), https://www.europarl.europa.eu/doceo/document/PETI-CM-609434_EN.pdf [https://perma.cc/XQ3H-D2BD]. As the Platform for International Cooperation on Undocumented Migrants (PICUM) explains, there is no official data. PLATFORM FOR INT'L COOP. ON UNDOCUMENTED MIGRANTS, MORE THAN 100 PEOPLE CRIMINALISED FOR ACTING IN SOLIDARITY WITH MIGRANTS IN THE EU IN 2022, at 3 (2023) [hereinafter PICUM, PEOPLE CRIMINALISED FOR ACTING IN SOLIDARITY WITH MIGRANTS], https://picum.org/wp-content/uploads/2023/03/More-than-100-people-criminalised-for-acting-in-solidarity-with-migrants-in-the-EU-in-2022_EN.pdf [https://perma.cc/84CV-AM8P]. Instead, PICUM uses media monitoring to gather data on criminal and administrative proceedings against individuals showing solidarity with migrants. *Id.*; *see also* COMM'R FOR HUM. RTS., PROTECTING THE DEFENDERS, *supra* note 16, at 15 ("[C]omprehensive data on criminalisation in member states is lacking, and outcomes are difficult to assess, as cases may become extremely protracted, sometimes taking years."). To avoid relying on anecdotal evidence, this paper combines judicial cases from France involving solidarity with migrants in the Ventimiglia "hotspot," stakeholder reports, and academic literature to illustrate the practice and draw conclusions.

74. FEKETE ET AL., *supra* note 36, at 4.

75. Webber, *supra* note 11, at 126–27.

76. Peirotti, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nice, Chambre Correctionnelle No. 6, May 19, 2017, 2938/, at 3 (Fr.) (on file with the *Columbia Human Rights Law Review*); X & Y, Tribunal de

transportation,[77] aiding border crossings,[78] and facilitating communication and financial transactions for migrants.[79] Third, those targeted for investigations and prosecutions are often ordinary citizens[80] and volunteers associated with solidarity movements.[81] Fourth, despite the fact that States have amended their national legislation over time,[82] the practice of prosecuting ordinary citizens for

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grande instance [TGI] [ordinary court of original jurisdiction] Nice, Chambre Correctionnelle No. 6, Nov. 6, 2018, 3165/18, at 6 (Fr.) (on file with the *Columbia Human Rights Law Review*); Faye-Prio, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nice, Chambre Correctionnelle No. 5, Oct. 2, 2017, 2938/17, at 2 (Fr.) (on file with the *Columbia Human Rights Law Review*); Herrou, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nice, Chambre Correctionnelle No. 6, Feb. 10, 2017, 534/17, at 6 (Fr.) (on file with the *Columbia Human Rights Law Review*).

77. *See, e.g.*, X & Y, TGI Nice, Chambre Correctionnelle No. 6, Nov. 6, 2018, 3165/18, at 5 (noting that X and Y had transported two migrants in their personal vehicle).

78. *See, e.g.*, Peirotti TGI Nice, Chambre Correctionnelle No. 6, May 19, 2017, 1793/17, at 3 (noting that Peirotti helped eight migrants cross the border); Faye-Prio, TGI Nice, Chambre Correctionnelle No. 5, Oct. 2, 2017, 2938/17, at 3 (noting that Faye-Prio helped four migrants cross the border); Herrou, TGI Nice, Chambre Correctionnelle No. 6, Feb. 10, 2017, 534/17, at 5 (noting that Herrou helped eight migrants cross the border).

79. Expert Council on NGO L., *Using Criminal Law to Restrict the Work of NGOs*, *supra* note 9, ¶ 85. For a fuller list of the various actions that have been reprimanded using criminal law, see PICUM, PEOPLE CRIMINALISED FOR ACTING IN SOLIDARITY WITH MIGRANTS, *supra* note 73, at 5.

80. Webber, *supra* note 11, at 137; *see, e.g.*, X & Y, TGI Nice, Chambre Correctionnelle No. 6, Nov. 6, 2018, 3165/18, at 1–2 (referring to X as a delivery driver and Y as a shopkeeper; the case does not refer to them being members of an NGO); Herrou, TGI Nice, Chambre Correctionnelle No. 6, Feb. 10, 2017, 534/17, at 2 (referring to Herrou as a farmer; the case does not refer to him being a member of an NGO).

81. Expert Council on NGO L., *Using Criminal Law to Restrict the Work of NGOs*, *supra* note 9, ¶ 91. In France, prosecutors targeted the movement known as '*Habitat citoyenneté de Nice*' [Citizenship Housing in Nice]. Peirotti, Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, 13ème chambre des appels correctionnels, June 6, 2018, 2018/432, at 3 (Fr.) (on file with the *Columbia Human Rights Law Review*). They also targeted the group known as '*Roya Solidaire*.' Herrou, TGI Nice, Chambre Correctionnelle No. 6, Feb. 10, 2017, 534/17, at 9.

82. For example, in 2012, France amended Article L.622-4 of its *Code de l'entrée et du séjour des étrangers et du droit d'asile* [Code on the entry and stay of foreigners and the right of asylum] (CESEDA) to exempt providing legal advice, food, shelter, and medical assistance to ensure humane and decent living conditions to the foreign national or any other assistance aimed at preserving his/her dignity and physical integrity from the scope of criminalization. Dadomo, Quénivet, & Tava, *supra* note 28, at 327. In 2018, the word "humanitarian" was introduced, exempting acts that consisted of providing legal, linguistic or social advice or

solidarity acts persists[83] as courts adopt narrow interpretations of the concept of "humanitarian assistance."[84]

Prosecutions of solidarity activists have significant consequences, both for individuals and the broader society. While most cases do not lead to convictions,[85] they support the government's aim to discourage solidarity acts.[86] Those prosecuted suffer psychological effects, reputational damage, surveillance, financial burdens, and disruption to their work.[87] For example, "they face the pain of spending

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support or any other aid provided for an exclusively humanitarian purpose. *Id.* Such wording was then transferred into the new Article L.823-9 CESEDA that entered into force on May 21, 2021. *Id.*

83. Della Torre, *supra* note 59, at 95; Aris Escarcena, *supra* note 59, at 5245.

84. LINA VOSYLIŪTĖ & CARMINE CONTE, CRACKDOWN ON NGOS AND VOLUNTEERS HELPING REFUGEES AND OTHER MIGRANTS 7 (2019), www.migpolgroup.com/wp-content/uploads/2019/06/Final-Synthetic-Report-Crackdown-on-NGOs-and-volunteers-helping-refugees-and-other-migrants_1.pdf [https://perma.cc/SG8F-UU4A]; European Commission Guidance on EU Rules on Prevention of the Facilitation of Unauthorised Entry, *supra* note 69, ¶ 6; Serge Slama, *Délit de solidarité: actualité d'un délit d'une autre époque*, 456 DROIT DES ÉTRANGERS (2017) [hereinafter Slama, *Délit de solidarité*], https://hal.science/hal-01964922/document [https://perma.cc/D66H-NB9Q]. An exception is the Court of Cassation's rejection of the idea that militancy/activism fell outside of the scope of the humanitarian clause. Faye-Prio, Cour de cassation [Cass.] [Supreme Court for Judicial Matters], crim., Feb. 26, 2020, 19-81.561, Bull. crim. No. 33, ¶ 15 (Fr.). The Court asserted that acts that are deemed exclusively humanitarian are not limited to acts that are purely individual and personal and do not exclude actions that are not spontaneous and of a militant nature when exercised as a member of an association. *Id.*

85. CARITAS EUROPA, *supra* note 29, at 6; *Special Rapporteur Report: The Right to Freedom of Association of Migrants and Their Defenders*, *supra* note 29, ¶ 73; COMM'R FOR HUM. RTS., PROTECTING THE DEFENDERS, *supra* note 16, at 15–16. For France, see Slama, *Délit de solidarité*, *supra* note 84 (explaining that the majority of investigations do not lead to prosecutions or, if they do, end up in the defendant being freed); JOACHIM DEBELDER, LE DELIT DE SOLIDARITE: DE L'HOSPITALITE A LA DESOBEISSANCE CIVILE? (2020) (Fr.), https://www.irfam.org/le-delit-de-solidarite-de-lhospitalite-a-la-desobeissance-civile/ [https://perma.cc/Q6Q3-F5T4] (stating that the repression of solidarity does not lead to prosecution in the vast majority of cases). For examples from Italy, see Caprioglio et al., *supra* note 47; *La solidarietà non è un reato: archiviate le accuse contro Gian Andrea e Lorena di Linea d'Ombra*, TRIESTE PRIMA (Nov. 24, 2021) (It.), https://www.triesteprima.it/cronaca/archiviate-accuse-volontari-linea-d-ombra.html [https://perma.cc/HGG2-2YS6].

86. Liz Fekete, *Europe: Crimes of Solidarity*, 50 RACE & CLASS 83, 84 (2009). As Geisser observes, the judiciary is increasingly used to instil fear. Vincent Geisser, *Délinquance humanitaire? Du "délit de solidarité" au "devoir de délation,"* 123–124 MIGRATIONS SOCIETE 7, 14 (2009).

87. Geisser, *supra* note 86, at 14–15; *Special Rapporteur Report: The Right to Freedom of Association of Migrants and Their Defenders*, *supra* note 29, ¶ 73; Aris

time in detention, paying high fees for attorneys and loss of reputation."[88] In addition, they are put under police surveillance, their details are entered into a register, and their houses are searched.[89] Often, the press, the authorities, and the general population vilify them.[90] The spectacle of arrests and prosecutions serves to stigmatize individuals[91] and undermine the emergence of citizen initiatives challenging migration governance.[92] Despite the formation of solidarity groups around those prosecuted,[93] the continuous arrests and prosecutions create exhaustion and attrition, aiming to deter

Escarcena, *supra* note 59, at 5245; Allsopp, Vosyliūtė, & Smialowski, *supra* note 12, at 81.

88. *Special Rapporteur Report: The Right to Freedom of Association of Migrants and Their Defenders*, *supra* note 29, ¶ 73.

89. Geisser, *supra* note 86, at 14; Allsopp, Vosyliūtė, & Smialowski, *supra* note 12, at 81.

90. Geisser, *supra* note 86, at 15.

91. Individuals like Herrou are stigmatized. *See* Taylor, *Domopolitics, Citizenship and Dissent*, *supra* note 42, at 496 (explaining that Herrou was remanded in police custody eleven times between 2017 and 2019 and that an NGO had "publicly denounce[d] the degree of harassment levelled at Herrou"); Peirotti, Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, 13ème chambre des appels correctionnels, June 6, 2018, 2018/432, at 3 (Fr.) (on file with the *Columbia Human Rights Law Review*) (documenting another case against an individual charged with a crime of solidarity). Yet members of the same association are also targeted, such as the case for '*Roya citoyéenne*.' Faye-Prio, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nice, Chambre Correctionnelle No. 5, Oct. 2, 2017, 2938/17, at 3–4 (Fr.) (on file with the *Columbia Human Rights Law Review*) (noting that Faye-Prio and the migrants were questioned on their alleged links with or knowledge of the '*Roya citoyéenne*' association and Herrou). De Genova explains the importance of the spectacle as a means of instant communication. Nicholas de Genova, *Spectacles of Migrant "Illegality": The Scene of Exclusion, the Obscene of Inclusion,* 36 ETHNIC & RACIAL STUD. 1180, 1187 (2013). It should be noted that no report provides comprehensive data on the number of individuals prosecuted. Lists published by NGOs have even sometimes been contested by national authorities. Consequently, this Article does not use figures but provides examples cited in a variety of documents.

92. Aris Escarcena, *supra* note 59, at 5242.

93. For example, in France, support has stemmed not only from well-known international (e.g., Amnesty International France) or national (e.g., *l'Anafé* and *La Cimade*) NGOs, but also from groups created for the very purpose of supporting individuals (e.g., the *Comité de Soutien au 3+4 de Briançon*; *Délinquants Solidaires*). *See, e.g.*, Petition, La Cimade et al., Freedom for the "7 of Briançon" (Oct. 24, 2018) (Fr.), https://www.lacimade.org/freedom-for-the-7-of-briancon/ [https://perma.cc/QS2W-35TG] (presenting a joint petition from a variety of national and local French NGOs).

solidarity and wear down activists;[94] more generally, they lead to collective indifference and a decline in acts of solidarity.[95] Legal proceedings are undeniably a deterrent—a warning to people who might want to act in solidarity with migrants.[96]

By criminalizing solidarity, States aim to maintain strict control over migration and prevent the emergence of autonomous solidarity networks.[97] This goal is demonstrated by the way States distinguish between co-opted NGOs and (formal) humanitarian associations,[98] on the one hand, and (networks of) individuals, on the other. The former are welcome to assist migrants, provided they follow the order the State institutes. The State accepts the presence and assistance of such bodies because they are regarded as endowed with relevant knowledge and experience, staffed by professionals, and organized in a hierarchical manner with advanced structures of coordination.[99] But, most importantly, the State can steer their work by preventing them from accessing certain areas or carrying out certain acts—often by threatening to impose sanctions or to shut down them down. Meanwhile, the State forbids spontaneous acts of solidarity by individuals and groups because such individuals and groups are less inclined to follow government policies and are more

94. Aris Escarcena, *supra* note 59, at 5253; *see also* Plaidoirie de Maître Paul Mathonnet, Avocat au Conseil d'Etat et à la Cour de Cassation, au nom des douze organisations intervenantes [Plea of Paul Mathonne, Lawyer at the Council of State and the Court of Cassation, on Behalf of the Twelve Intervening Organizations] at 2, M. Cédric H. et autre, Conseil constitutionnel [CC] [Constitutional Court] case No. 2018-717/718QPC, June 26, 2018 (Fr.) [hereinafter Mathonnet, Pleading on Behalf of Intervenors] (arguing that the aim of arresting individuals, registering them into the police database, etc., is to deter ordinary citizens from practicing solidarity).

95. Allsopp, *supra* note 30, at 9, 12; Expert Council on NGO L., *Using Criminal Law to Restrict the Work of NGOs*, *supra* note 9, ¶19.

96. CARITAS EUROPA, *supra* note 29, at 6; *Special Rapporteur Report: The Right to Freedom of Association of Migrants and Their Defenders*, *supra* note 29, ¶¶ 72–73; European Parliament, *Fit for Purpose?*, *supra* note 66, at 16; Geisser, *supra* note 86, at 14.

97. Tazzioli & Walters, *supra* note 37, at 185; Ben-Arieh & Heins, *supra* note 44, at 207; Vergnano, *supra* note 1, at 754.

98. *See* Aris Escarcena, *supra* note 59, at 5253 (postulating that governments operate a process of situational co-optation of humanitarian activities undertaken by NGOs).

99. VALÉRIE LÉON, LES SOLIDARITÉS FACE AUX FLUX MIGRATOIRES: QUELLES MARGES DE MANŒUVRE EN FRANCE AUJOURD'HUI ?, (2018) (Fr.), https://www.urd.org/wp-content/uploads/2018/09/MESSAGES_CLES_Migrations-2018_v4_FINAL.pdf [https://perma.cc/7E4W-VZYN]; Expert Council on NGO L., *Using Criminal Law to Restrict the Work of NGOs*, *supra* note 9, ¶ 19.

likely to be vocal about State actions,[100] and thus they cannot be manipulated as easily by the State.[101] The eruption of solidarity practices and spaces is highly problematic for the State, as it contests "the rise of a neo-Westphalian world order, the reaffirmation of the discretionary control of states over their national borders, and the criminalization of migration itself."[102] These acts of solidarity disrupt a State's border regime and threaten its sovereignty.[103]

As a result, prosecutions primarily target individuals who are challenging E.U. and Member States' migration policies and forming grassroots movements.[104] This targeting occurs because these practices of solidarity challenge the securitization of migration and the State's approach.[105] In particular, such individuals defy the State "by uncovering discrepancies between penal power and core values such as human dignity and compassion."[106] Their actions thus lead to civil

100. Expert Council on NGO L., *Using Criminal Law to Restrict the Work of NGOs*, *supra* note 9, ¶ 21.

101. Tazzioli & Walters, *supra* note 37, at 185.

102. Ben-Arieh & Heins, *supra* note 44, at 207.

103. *Special Rapporteur Report 2018*, *supra* note 5, ¶ 30.

104. Webber, *supra* note 11, at 137; Tazzioli & Walters, *supra* note 37, at 186; Herrou, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nice, Chambre Correctionnelle No. 6, Feb. 10, 2017, 534/17, at 15 (Fr.) (on file with the *Columbia Human Rights Law Review*).

105. Martina Tazzioli, *Crimes of Solidarity: Migration and Containment Through Rescue*, 2.01 RADICAL PHIL. 4, 9 (2018); Kolankiewicz & Sager, *supra* note 71, at 591. Haddeland and Franko have convincingly argued that "the legitimacy of penal power requires powerholders to respect core societal values—values on which there is a broad consensus, and which have foundational validity." Hanna B. Haddeland & Katja Franko, *Between Legality and Legitimacy: The Courtroom as a Site of Resistance in the Criminalization of Migration*, 24 PUNISHMENT & SOC'Y 551, 554 (2022). Through that lens, certain acts of solidarity operate by illuminating the discrepancy between these core societal values and the practices inherent in the securitization of migration.

106. Haddeland & Franko, *supra* note 105, at 553; *see also* Thea Rabe & Hanna Buer Haddeland, *Diverging Interpretations of Humanitarian Exceptions: Assisting Rejected Asylum Seekers in Norway*, 49 J. ETHNIC & MIGRATION STUD. 1630, 1642 (2023) (demonstrating the "linkage between formal law and how people perceive law and legality" and that individuals act upon their inner moral obligation even when such acts undermine the will of the authorities); Annalisa Lendaro, *Désobéir en faveur des migrants. Répertoires d'action à la frontière franco-italienne*, 152–153 JOURNAL DES ANTHROPOLOGUES 171, 171–72 (2018) (Fr.) (explaining the complex connections between law and disobedience as applied to solidarity acts towards migrants at the French-Italian border).

disobedience[107] and calls for political and legal change.[108] The comments made by defendants in front of and before the tribunal, as well as those by support groups attending the trials, may lead to heightened media attention, which these groups then use to amplify their demands.[109] The courtroom becomes the site not only for a legal contest of the securitization policy,[110] but also for social interaction between the various stakeholders—national authorities (including the judiciary), citizens, local and national NGOs, *et cetera*—and for mobilization, giving citizens a voice and making them visible.[111] Support groups take this opportunity to underline the aberrance of the prosecution of individuals for acts of solidarity. However, as Marta Kolankiewicz and Maja Sager highlight, the trial concomitantly "becomes a manifestation of the state's power over its borders, through criminalization of some forms of mobility and some practices of solidarity with migrants."[112] These prosecutions (and the ensuing spectacle) are used by the State to show its power, to reclaim its sovereignty, and to strengthen its authority with the aim of restoring public order.[113] It is not always victorious, however, as the *Herrou* case shows.[114]

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107. Danièle Lochak, *La solidarité, un délit?*, 358 REVUE PROJET [REV. PROJET] 56, 60–62 (2017) (Fr.).

108. Robin Celikates, *Constituent Power Beyond Exceptionalism: Irregular Migration, Disobedience, and (Re-)Constitution*, 15 J. INT'L POL. THEORY 67, 70 (2019); Aris Escarcena, *supra* note 59, at 5248; *see also* DEBELDER, *supra* note 85, at 4 (calling for a clear legal framework to protect citizen solidarity).

109. Dadomo, Quénivet, & Tava, *supra* note 28, at 334.

110. *See* Kelly Loiseau, *Quand les militants font le procès du « délit de solidarité »*, 20 E-MIGRINTER (2020) (Fr.), https://journals.openedition.org/e-migrinter/2337 [https://perma.cc/FS68-X2KX] (arguing that citizens and associations have used the judicial arena to challenge the State's immigration policies and the criminalization of solidarity).

111. Haddeland & Franko, *supra* note 105, at 554.

112. Kolankiewicz & Sager, *supra* note 71, at 591.

113. *See, e.g.*, Peirotti, Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, 13ème chambre des appels correctionnels, June 6, 2018, 2018/432, at 9 (Fr.) (on file with the *Columbia Human Rights Law Review*) (increasing the defendant's sentence due to the supposed seriousness of the offense of assisting irregular migrants and thereby disturbing public order).

114. *See infra* Section III.B (discussing the historic Constitutional Court ruling that "fraternity" is a constitutional principle which guarantees the freedom to assist others for humanitarian reasons without consideration as to whether the assisted person is legally residing within the French territory).

II. DECRIMINALIZING SOLIDARITY: E.U. OR NATIONAL SOLUTIONS?

Only a change in the law can correct the harmful consequences of the criminalization of solidarity. While it may seem logical to tackle the criminalization of solidarity at the E.U. level, because the problem lies with national legislation and attitudes, this Article argues that the most adequate and appropriate solution is found at the national level. Indeed, the approach that has worked best so far is the national one. By "breaking the law and taking action to protect human rights," citizens have managed to change the law at the national level.[115] After examining and dismissing solutions at the E.U. level, this Part highlights the benefits of a solution grounded in national and, in particular, constitutional law of the E.U. Member States.

A. Solutions at the E.U. Level

It might be argued that the solution to the criminalization of solidarity, which is a national phenomenon precipitated by the Facilitators Package, is best countered at the regional level. Two key options are available to this end: (1) to amend the Facilitation Directive (which has received the most criticism from international organizations, NGOs, and scholars), and (2) to use the principle of solidarity anchored in E.U. law.[116] This Article contends that neither of these solutions is likely to yield positive and practical results—i.e., to put an end to the criminalization of solidarity.

1. Amending the Facilitation Directive

The most obvious solution would be to amend the Facilitation Directive.[117] The NGO Caritas propounded such a recommendation in

115. Costello & Mann, *supra* note 10, at 333. On the power of individuals to change the law, see *Special Rapporteur Report: Saving Lives Is Not a Crime*, *supra* note 51, ¶ 8 (recounting a statement by Holocaust survivors who acknowledged that their lives were saved by a group of lawbreakers, and sharing that today they "stand with those who show solidarity with people in precarious situations without regard to the legality of their residency status" and "pass the torch of solidarity to whistleblowers, to citizens critical of xenophobic policies, to those in solidarity with everyday life").

116. Other potential solutions include the European Commission starting infringement proceedings against States, the European Commission setting up a monitoring mechanism, and the European Commission and the E.U. Member States implementing balanced E.U. migration policies. CARITAS EUROPA, *supra* note 29, at 9–10.

117. For example, Zirulia observes that "[c]ertainly, optimal results would be achieved where a radical reform of the Facilitators package . . . were to be carried

2019,[118] as have multiple scholars.[119] Even so, such a move may be neither politically possible nor legally justifiable. One might argue, to begin, that the culprit is not the Facilitation Directive as such, but rather its poor interpretation. In fact, as Christine Lazerges points out, the Directive encourages States to use the humanitarian exemption to decriminalize the facilitation of illegal entry and movement of a foreign national.[120] While the Authors disagree with this argument—and maintain both that the Directive is riddled with flaws (mainly relating to the lack of definitions of essential notions) and that Member States have used the resulting leeway to pursue their own national(ist) interests and approaches to migration governance[121]—the fact remains that the European Union's restrictive policy on migration, and especially its view of migration through the security prism, is unlikely to change.[122] This suggests that not only does the law itself need to change, but the ideology behind the law must be revised; a new, alternative vision to the securitization of migration must be proposed and adopted.

At the European level, there seems to be little appetite for a different approach towards migration—i.e., one that does not take a hostile, security-oriented, and punitive approach towards migrants and those showing them solidarity.[123] As Violeta Moreno-Lax explains,

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out, as all the authors who have dealt with the subject envision." Zirulia, *supra* note 11, at 257.

118. CARITAS EUROPA, *supra* note 29, at 9.

119. *See, e.g.*, Zirulia, *supra* note 11, at 257–59 (proposing reforms to the Facilitators Package and noting that many other authors have proposed similar reforms); Janer Torrens, *supra* note 12, at 400 (concluding that the European Commission "should show more determination in amending Directive 2002/90 so as to make the [humanitarian] clause compulsory for Member States").

120. Christine Lazerges, *Le délit de solidarité, une atteinte aux valeurs de la République*, 1 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PENAL COMPARE 267, 274 (2018) (Fr.).

121. Dadomo, Quénivet, & Tava, *supra* note 28, at 323–25; *see also* Mentasti, *supra* note 11, at 510–11 (arguing that the "criticisms directed to the Facilitators package . . . proved to be well-founded" and that States have used the package to repress humanitarian aid and protect European borders).

122. For example, Zirulia observes that "clear signs of the European legislator's desire to strengthen existing measures to protect external borders exist." Zirulia, *supra* note 11, at 260.

123. In 2018, six representatives of U.N. Special Procedures called on the European Union and its Member States to "adopt a more thoughtful approach, and seek constructive, long-term, sustainable solutions, instead of adopting counterproductive and ineffective security policies which result in the criminalization and stigmatization of migrants." Working Grp. on Arbitrary Detention et al., Concerns Regarding Current Discussions on the Reform of the

the priority of the new Pact on Migration and Asylum—a set of new rules to manage migration in the European Union that the Council of the European Union adopted in May 2024[124]—is to curb migration and prevent the facilitation of unauthorized arrivals.[125] The E.U. Council originally adopted the Directive under Article 63(3) of the Treaty Establishing the European Community; however, under Article 79(2) of the amended and renamed Treaty on the Functioning of the European Union (TFEU), an amendment to the Directive would now have to be adopted jointly by the Council and the Parliament under the ordinary legislative procedure described in TFEU Article 294.[126] In 2018, Member of the European Parliament (MEP) Jean Lambert warned of the dangers of opening the discussion to reforming the Directive, particularly because of the risks that some States might wish to increase the criminal penalties, that there might not be a majority in the European Parliament to enact a change, and that some States might try to advance an anti-immigration agenda.[127] Despite the Parliament commissioning several studies on the subject and passing a resolution in 2018, it did not follow up.[128] As Federico Alagna underlines, "changes in the Parliament's composition and the progressive decline of those political groups with more liberal stances towards migration" have affected its earlier positive approach.[129] Anti-immigration political parties and movements are on the rise[130] and

European Migration and Asylum System, 4, U.N. Doc. OL OTH 64/2018 (Sept. 18, 2018).

124. *See* Eur. Comm'n, *Pact on Migration and Asylum*, EUR. UNION (May 21, 2024), https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en [https://perma.cc/TN6F-3Y77] (providing comprehensive information on the content and the adoption of the new Pact on Migration and Asylum).

125. Moreno-Lax, *Towards a Thousand Little Morias*, *supra* note 11, at 162.

126. *See* TFEU, *supra* note 24, art. 79(2) (providing that "the European Parliament and the Council, acting in accordance with the *ordinary legislative procedure*, shall adopt measures" governing "the conditions of entry and residence," the rights of third-country nationals, "illegal immigration and unauthorised residence," and "combating trafficking in persons") (emphasis added).

127. Fekete, *supra* note 42, at 72–73.

128. Federico Alagna, *So Much Promise, So Little Delivery: Evidence-Based Policy-Making in the EU Approach to Migrant Smuggling*, 45 J. EUR. INTEGRATION 309, 317 (2023). Alagna also explains that the Parliament is progressively changing its attitude, now "leaning towards the maintenance of the existing framework." *Id.* at 319.

129. *Id.* at 320.

130. *See* James Dennison & Andrew Geddes, *A Rising Tide? The Salience of Immigration and the Rise of Anti-Immigration Political Parties in Western Europe*, 90 POL. Q. 107, 108–10 (2019) (finding that anti-immigration parties gained

some States' MEPs are parti `cularly hostile towards any form of support or solidarity towards migrants.[131] For example, Hungary passed laws criminalizing activities in support of asylum applications, which the Court of Justice of the European Union (CJEU) found to be in violation of E.U. legislation.[132] In light of the current nationalist and authoritarian security discourse deployed in the governments of many Member States, revisiting the Facilitators Package might be akin to opening Pandora's box.

This may explain the European Commission's reluctance to redraft the Directive. In 2017, the Commission investigated concerns raised by relevant stakeholders[133] but concluded that no reform was required.[134] Though some considered this to be "a missed opportunity to bring E.U. legislation in line with international standards,"[135] the

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support in thirteen of fifteen European countries between 2005 and 2018 and noting that "the largest states of western Europe—Germany, France, the UK and Italy—have all at some point experienced a significant increase in support for anti-immigration parties").

131. *See, e.g.*, Fekete, *supra* note 42, at 73 ("And now we have a number of new governments with an extreme anti-immigration agenda, such as in Hungary and Poland.") (quoting MEP Jean Lambert).

132. *See* Case C-808/18, Eur. Comm'n v. Hungary, ECLI:EU:C:2020:1029, at 54 (Dec. 17, 2020) (declaring that Hungary failed to fulfill its obligations under three directives of the European Parliament and the Council relating to irregular immigration and international protection); Case C-821/19, Eur. Comm'n v. Hungary, ECLI:EU:2021:930, at 30 (Nov. 16, 2021) (declaring that Hungary failed to fulfill its obligations under two directives of the European Parliament and the Council by placing restrictions and limitations on asylum seekers and individuals engaged in acts of solidarity). As Hungary had failed to comply with the first judgment, the CJEU ordered Hungary to pay a lump sum and a penalty payment until it complies with the judgment. Case C-123/22, Eur. Comm'n v. Hungary, ECLI:EU:C:2024:493 (June 13, 2024). As of April 2025, Hungary had paid in excess of €500 million. Joakim Scheffer, *EU Commission's Migration Fines on Hungary Exceed €500M*, HUNGARIAN CONSERVATIVE (Apr. 23, 2025) https://www.hungarianconservative.com/articles/current/migration-fine-penalty-hungary-eu-commission-ecj-ruling/ [https://perma.cc/TN6H-FBTV].

133. *See* European Parliament Resolution 2018/2769(RSP) of 5 July 2018 on Guidelines for Member States to Prevent Humanitarian Assistance from Being Criminalised, pmbl., para. 4, 2020 O.J. (C 118) 130, 130 (noting that the European Commission conducted an evaluation of the Facilitators Package in 2017).

134. European Commission, *REFIT Evaluation of the EU Legal Framework Against Facilitation of Unauthorised Entry, Transit and Residence: The Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)*, at 35, COM (2017) 117 final (Mar. 22, 2017).

135. European Parliament, *Fit for Purpose*?, *supra* note 66, at 17; *see also* Mitsilegas, *supra* note 11, at 29 ("[T]he opportunity for law reform . . . has been markedly and spectacularly missed: in its evaluation, the Commission has come up defending resolutely the status quo.").

Commission might have actually been trying to avoid the risk of downgrading the content of the Directive.[136] Moreover, the Guidance that the E.U. Agency for Fundamental Rights called for in 2014[137] was eventually issued by the Commission in 2020[138]—published as part of the Commission's new Pact on Migration and Asylum.[139] The Guidance stressed that "[i]n view of the general spirit and objective of the Facilitation Directive, it is clear that it cannot be construed as a way to allow humanitarian activity that is mandated by law to be criminalised . . . regardless [of] how the Facilitation Directive is applied under national law."[140] Yet, it only "*invite[d]* Member States that have not already done so to use the [humanitarian exemption] provided for in Article 1(2) of the Facilitation Directive."[141] The Commission used similarly permissive language in a 2021 communication to several E.U. institutions.[142] As Moreno-Lax rightly points out, "[t]his means that a matter of EU legality . . . is left unresolved and relegated to an issue of

136. Note that in 2023, the Commission avowed that this evaluation had "pointed to the fact that it has not been effective in creating clarity and legal certainty about the distinction between facilitation of irregular migration and humanitarian assistance, due to the broad definition of the offence and the absence of exemptions." European Commission, *Proposal for a Directive Replacing the Facilitators Package*, *supra* note 63, at 3.

137. EUR. UNION AGENCY FOR FUNDAMENTAL RTS., CRIMINALISATION OF MIGRANTS IN AN IRREGULAR SITUATION AND OF PERSONS ENGAGING WITH THEM 16 (2014), http://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them [https://perma.cc/SPJ8-JL4R]. This call for guidance was echoed by NGOs such as Caritas. CARITAS EUROPA, *supra* note 29, at 9.

138. European Commission Guidance on EU Rules on Prevention of the Facilitation of Unauthorised Entry, *supra* note 69, at 5–6.

139. *See* Angelo Marletta, *The Commission 'Guidance' on Facilitation and Humanitarian Assistance to Migrants*, EU L. ANALYSIS (Sept. 29, 2020), https://eulawanalysis.blogspot.com/2020/09/the-commission-guidance-on-facilitation.html [https://perma.cc/W36M-B9F8] (explaining how the Guidance is part of the new Pact).

140. European Commission Guidance on EU Rules on Prevention of the Facilitation of Unauthorised Entry, *supra* note 69, at 5.

141. *Id.* at 6 (emphasis added).

142. The Commission clarified that "humanitarian assistance mandated by law . . . . can never be criminalised" and stated that its guidance in 2020 "invited Member States that have not already done so to use the possibility to distinguish between humanitarian assistance (not mandated by law) and activities that aim to facilitate irregular entry or transit, and allows for the exclusion of the former from criminalisation." European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Action Plan Against Migrant Smuggling (2021-2025)*, at 18, COM (2021) 591 final (Sept. 9, 2021).

domestic implementation and policy preference that may ultimately have to be settled by Member State ourts 'on a case-by-case basis.'"[143] This was probably the best the Commission could do given the circumstances at the time.[144] As Angelo Marletta concludes in his analysis of the Commission Guidance, the document "reflects the political sensitivity of the issue of humanitarian assistance to migrants, unfortunately, still perceived by some Member States and parts of the European public opinion as a crime deserving to be punished."[145] Accordingly, scholars have largely agreed that the Guidance was not enough to solve the criminalization problem and that a rewording of the Directive is required.[146]

Eventually, on November 28, 2023, the Commission stated that the Facilitators Package needed to be updated and modernized.[147] The proposed Package, which operationalizes the Commission President's State of the Union speech from September 2023,[148] contains three components: (1) a Directive "laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council

143. Moreno-Lax, *Towards a Thousand Little Morias*, *supra* note 11, at 176; *see also* MARTA GIONCO & JYOTHI KANICS, PLATFORM FOR INT'L COOP. ON UNDOCUMENTED MIGRANTS, RESILIENCE AND RESISTANCE: IN DEFIANCE OF THE CRIMINALISATION OF SOLIDARITY AGAINST EUROPE 21–22 (2022), https://picum.org/wp-content/uploads/2022/06/CriminalizationStudy_EN_web.pdf [https://perma.cc/YZ9K-Q2RV] (interpreting the use of the phrase "mandated by law" in the Guidance to mean that States may still be able to prosecute individuals for providing food, shelter, and information); Du Jardin, *supra* note 42, at 525 (stressing that the Guidance still leaves a discretionary power to States to punish assistance to migrants).

144. *See* Alagna, *supra* note 128, at 317–18, 320 (arguing that this was probably the best compromise and the least contentious way to effect some changes in the interpretation of the Directive).

145. Marletta, *supra* note 139.

146. *See id.* (concluding that the failure to adequately define criminally punishable conduct within the Directive represents "a structural flaw in the E.U. definition of the offence of facilitation that cannot be remedied at the level of the interpretation, but only through a legislative revision"); Jordana Santiago, *supra* note 63, at 184 (arguing that a "guidance note by the Commission will be not enough to solve the issues regarding fundamental rights" and concluding that "a rewording of the Directive is needed").

147. European Commission, *Proposal for a Directive Replacing the Facilitators Package*, *supra* note 63, at 2; *see also id.* at 15 ("To address evolving trends, and to further enhance the effectiveness of the Union framework to prevent and counter these offences, it is necessary to update the existing legal framework.").

148. *Id.* at 2.

Framework Decision 2002/946 JHA;"[149] (2) a Regulation[150] to enhance police cooperation and the powers of Europol;[151] and (3) a Call to Action on a Global Alliance to Counter Migrant Smuggling.[152] The proposed Directive goes a long way towards remedying some of the original flaws, notably by spelling out that "it is not the purpose of the Directive to criminalise . . . humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations."[153] With this view, Article 3 of the proposed Directive provides:

> Member States shall ensure that intentionally assisting a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence where:
>
> > a) the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit . . . .[154]

In other words, the proposed Directive expressly requires a link with an actual or promised financial or material benefit.[155] The Commission

149. *Id.* at 15.

150. European Commission, *Proposal for a Regulation of the European Parliament and of the Council on Enhancing Police Cooperation in Relation to the Prevention, Detection and Investigation of Migrant Smuggling and Trafficking in Human Beings, and on Enhancing Europol's Support to Preventing and Combating Such Crimes and Amending Regulation (EU) 2016/794*, at 13–29, COM (2023) 754 final (Nov. 28, 2023).

151. European Commission, *Proposal for a Directive Replacing the Facilitators Package*, *supra* note 63, at 2.

152. European Commission, *Call to Action on a Global Alliance to Counter Migrant Smuggling*, at 3–4 (Nov. 28, 2023), https://home-affairs.ec.europa.eu/system/files/2023-11/Call-to-action-global-alliance-to-counter-migrant-smuggling_en_1.pdf [https://perma.cc/9J24-V7TN].

153. European Commission, *Proposal for a Directive Replacing the Facilitators Package*, *supra* note 63, at 16; *see also id.* at 3 ("The proposal also clarifies that the purpose of the Directive is not to criminalise third-country nationals for the fact of being smuggled, assistance provided to family members, or humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations.").

154. *Id.* at 23.

155. *Id.* at 16. The Council of Europe appears to have welcomed this change. *See* COMM'R FOR HUM. RTS., PROTECTING THE DEFENDERS, *supra* note 16, at 15 ("A new proposal for an EU Directive to replace the existing Facilitators Package . . .

also highlighted that the proposal is in line with the Guidance,[156] implying that the proposal is hardening the soft law of the Guidance.

While the proposal for a revised Directive can (and should) be viewed as a credible solution to the criminalization of solidarity, three hurdles remain. First, the proposal will inevitably be subject to amendments by the Council and Parliament. After several rounds of comments by Member States in the Council, the Belgian Presidency circulated a version of the proposed Directive in May 2024 that suggests deleting Article 3(1)(a), and thus the reference to "financial and material benefit" for entry and transit across the territory of a Member State; however, the draft keeps the reference to "financial and material benefit" in relation to stay within the territory of a Member State.[157] To counterbalance such a deletion, the Presidency had previously proposed including a clear humanitarian exemption clause.[158] However, in the redraft circulated that same May, the Presidency watered down its proposal in response to further comments from Member States by suggesting two options: one that indicates that the criminal offense of facilitation does not include humanitarian action, and one that enjoins States to take necessary measures to ensure that humanitarian assistance is not criminalized.[159] Moreover, given that anti-E.U. right-wing populist parties made substantial

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link[s] criminal offences to financial or material gains . . . while also making more explicit that its purpose is not to criminalise humanitarian assistance or assistance provided by family members.").

156. European Commission, *Proposal for a Directive Replacing the Facilitators Package*, *supra* note 63, at 5.

157. *See* Council of the European Union Presidency Redraft 10569/24, Proposal for a Directive of the European Parliament and of the Council Laying Down Minimum Rules to Prevent and Counter the Facilitation of Unauthorised Entry, Transit and Stay in the Union, and Replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, at 4–5 (May 31, 2024) [hereinafter Council Presidency Redraft 10569/24], https://www.statewatch.org/media/4473/eu-council-facilitation-directive-presidency-redraft-10569-24.pdf [https://perma.cc/57HN-77TZ] (asserting that "the Presidency understood that there was no support for the inclusion of material and financial benefit for the three actions (facilitation to enter, transit across and stay)" and proposing a revision that deletes Article 3(1)(a)).

158. Council of the European Union Presidency Note 8775/24, Proposal for a Directive of the European Parliament and of the Council Laying Down Minimum Rules to Prevent and Counter the Facilitation of Unauthorised Entry, Transit and Stay in the Union, and Replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, at 4 (Apr. 17, 2024), https://www.statewatch.org/media/4372/eu-facilitation-directive-council-presidency-note-arts-1-11-8775-24.pdf [https://perma.cc/526V-7MFU].

159. Council Presidency Redraft 10569/24, *supra* note 157, at 5–6.

gains in the June 2024 elections,[160] any amendments suggested or adopted by the European Parliament may also reinforce an anti-immigration policy. The second hurdle to effectively revising the Directive is that the proposal might not be adopted, especially if the European Parliament is unsatisfied with the draft text.[161] And third, even if the revised Directive is adopted by the Council and Parliament, States might either fail to transpose it properly (willingly or not) into national law—as the experience of the 2002 Directive shows—or fail to implement it by the deadline.[162]

2. Using the Concept of Solidarity

An alternative solution to amending the Facilitation Directive is to invoke the concept of solidarity at the European level. After all, solidarity is often mentioned as an essential ingredient of European integration.[163] One would expect this reference to solidarity, a term that "usually refers to a social bond characterized by a sense of agreement and togetherness among those who form it,"[164] to play an important role in tempering the criminalization of solidarity. In the aftermath of World War II, Robert Schuman, as well as other founding fathers of the European Union, suggested that the creation of a truly unified Europe had to be based on the establishment of a "*de facto*

160. *See* Armida van Rij et al., *How Will Gains by the Far Right Affect the European Parliament and EU?,* CHATHAM HOUSE (June 11, 2024), https://www.chathamhouse.org/2024/06/how-will-gains-far-right-affect-european-parliament-and-eu [https://perma.cc/ZR3U-FT7Z] (discussing the effects of the results of the new elections on the European Parliament in relation to, notably, migration policies).

161. According to the ordinary legislative procedure that will be used to consider the Directive, the Parliament can reject the proposal at two separate stages: by an absolute majority in the second reading, TFEU art. 294, ¶ 7(a), *supra* note 24, 2016 O.J. (C 202) at 174, or by not approving the joint text adopted under the conciliation procedure, *id.* art. 294, ¶ 12, at 175. *See also id.* art. 289, ¶ 1, at 172 (establishing that "[t]he ordinary legislative procedure" for legal acts of the European Union is defined in Article 294).

162. Article 19 of the proposed Directive mandates States to bring into force laws, regulations, and administrative provisions necessary to abide by it no later than one year after its entry into force. European Commission, *Proposal for a Directive Replacing the Facilitators Package*, *supra* note 63, at 30.

163. *See, e.g.*, Dadomo, Quénivet, & Tava, *supra* note 28, at 313 (explaining the evolution of the concept of solidarity in reaction to European integration and providing multiple examples of its use in philosophical, sociological, and political discourses).

164. *Id.* at 316.

solidarity."[165] Since then, "[s]olidarity has acquired a prominent place in policy and legal debates about the European project,"[166] while scholars and politicians have variously described solidarity as a public virtue and a political desideratum, which can be conducive to higher levels of democratization and global justice.[167] The decision to rely on the very notion of solidarity in the attempt to decriminalize acts of humanitarian assistance is not new. The idea of solidarity lies at the foundation of the European Union and occupies a pivotal role in its legislation,[168] public discourse, and political agenda.[169]

Yet relying on the concept of solidarity at the E.U. level has so far not worked. "Several civil society groups have appropriated the frame of European values to justify their actions in solidarity with migrants and refugees, appealing . . . to a common sense of European citizenship,"[170] but without any discernable success. More broadly, solidarity is regularly invoked in the public discourse as a much-needed panacea every time new political and economic crises threaten

165. Robert Schuman, French Foreign Minister, Declaration of 9th May 1950 (May 9, 1950), *in* EUROPEAN ISSUE NO. 204 (May 10, 2011), https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf [https://perma.cc/8JQ8-UYPJ]; *see also* Francesca Martines, *Solidarity in the EU. Beyond EU Treaty Provisions on Solidarity*, *in* SOLIDARITY IN INTERNATIONAL LAW: CHALLENGES, OPPORTUNITIES AND THE ROLE OF REGIONAL ORGANIZATIONS 165, 169–72 (Leonardo Pasquali ed., 2023) (offering an overview of the concept of solidarity as a bond between E.U. Member States).

166. Thym & Tsourdi, *supra* note 12, at 606.

167. According to Brunkhorst, "in modern societies, solidarity coincides with the concept of democracy." HAUKE BRUNKHORST, SOLIDARITY: FROM CIVIC FRIENDSHIP TO A GLOBAL LEGAL COMMUNITY xxiii (Jeffrey Flynn trans., MIT Press 2005). Similarly, Gould aims to reconceptualize solidarity relations "as potentially contributing to the emergence of more democratic forms of transnational interaction within regional or more fully global frameworks of human rights." Carol C. Gould, *Transnational Solidarities*, 38 J. SOC. PHIL. 148, 148 (2007).

168. For examples of explicit affirmations of the importance of the principle of solidarity in E.U. law, see TEU pmbl., para 6, *supra* note 24, 2016 O.J. (C 202) at 15; *id.* art. 2, at 17; TFEU pmbl., para. 7, *supra* note 24, 2016 O.J. (C 202) at 49; Charter of Fundamental Rights of the European Union pmbl., para. 2, Oct. 26, 2012, 2012 O.J. (C 326) 391, 395 [hereinafter CFR]; *id.* tit. IV, at 401–02.

169. *See* Francesco Tava, *European Solidarity: Definitions, Challenges, and Perspectives*, *in* THE ROUTLEDGE HANDBOOK OF PHILOSOPHY AND EUROPE 211, 211–12 (Darian Meacham & Nicolas de Warren eds., 2021) (explaining how the concept of solidarity gradually built within the European integration process through public and political debate).

170. Allsopp, *supra* note 30, at 19.

to endanger life and weaken social cohesion—to no avail.[171] In reality, despite its frequent use as a rallying cry in the face of such serious challenges, solidarity as a concept has no real teeth.

Further, solidarity "is all-pervasive and permeates the European project in a structural way,"[172] but its understanding hinges upon the context in which it is used. As Eglė Dagilytė has shown, at least five types or aspects of solidarity have emerged in E.U. law: solidarity (1) among Union citizens, (2) between the Union and Member States, (3) between Member States, (4) between the Union Institutions, and (5) between the Union and third countries.[173] In the context of migration, the CJEU has so far only addressed and enforced solidarity between Member States,[174] not between individuals.[175] Yet, solidarity between individuals—specifically between migrants and citizens—is precisely what is required to solve the problem of criminalization and securitization.

Fundamentally, as Daniel Thym and Evangelia Tsourdi explain, solidarity "can be difficult to grasp from a legal perspective,

171. For example, the outbreak of the COVID-19 pandemic led to a call for mutual solidarity. Barbara Prainsack, *Solidarity in Times of Pandemic*, 7 DEMOCRATIC THEORY 124, 124 (2020).

172. Moreno-Lax, *Solidarity's Reach*, *supra* note 12, at 761. The concept appears in an array of provisions of the Treaties. TEU art. 2, *supra* note 24, 2016 O.J. (C 202) at 17; *id.* art. 3, ¶¶ 3, 5; *id.* art. 21, ¶ 1, at 28; *id.* art. 24, ¶¶ 2–3, at 30–31; *id.* art. 31, ¶ 1, at 33; *id.* art. 32, at 34; TFEU art. 67, ¶ 2, *supra* note 24, 2016 O.J. (C 202) at 73; *id.* art. 80, at 78; *id.* art. 122, ¶ 1, at 97; *id.* art. 194, ¶ 1, at 134; *id.* art. 222, ¶¶ 1, 3, at 148.

173. Eglė Dagilytė, *Solidarity: A General Principle of EU Law? Two Variations on the Solidarity Theme*, *in* SOLIDARITY IN EU LAW 61, 63 (Andrea Biondi, Eglė Dagilytė, & Esin Küçük eds., 2018). In her review of scholarly writings on the topic, Martines suggests that there are five types, all focusing on the actors involved and their relations. Martines, *supra* note 165, at 167–68.

174. *See* Joined Cases C-643 & C-647/15, Slovak Republic & Hungary v. Council of the Eur. Union, ECLI:EU:C:2017:631, ¶ 291 (Sept. 6, 2017) (dismissing the actions brought by the Slovak Republic and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers); *see also* Daniela Obradovic, *Cases C-643 and C-647/15: Enforcing Solidarity in EU Migration Policy*, EUR. L. BLOG (Oct. 2, 2017), https://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/ [https://perma.cc/38W3-5BA5] (discussing and criticizing the definition of solidarity amongst Members States adopted by the CJEU).

175. Thym and Tsourdi note that the concept of solidarity refers to Member States in the Area of Freedom, Security and Justice (the E.U. policy domain that deals with issues concerning home affairs, migration, justice and human rights), while the discourse concerning the place of individuals is framed in terms of protection under human rights law and refugee law. Thym & Tsourdi, *supra* note 12, at 608.

since the concept of solidarity semantically suggests more than hard legal obligations . . . ."[176] In fact, the principle of solidarity, enshrined in Article 2 of the Treaty on European Union (TEU) as a core E.U. value, was elevated by the CJEU to the top of the hierarchy of legal sources.[177] In spite of this purported legal importance, at no point has the CJEU used the principle to pinpoint the unlawfulness of national or E.U. legislation.[178] For this reason, scholars often refer to solidarity as a principle that resonates within theoretical debates but has yet to be operationalized.[179] Further, the European Union itself has stated at the international level that the concept of international solidarity is "an important moral principle and a political commitment" but that it "fail[s] to meet all the requirements of a legal concept, and more specifically a human right."[180] In other words, the European Union denies any *legal* value to the concept of solidarity, at least on the international level. Overall, although the U.N. Independent Expert on Human Rights and International Solidarity claims that "[t]he meaning of the proposed right is . . . specific and clear enough" when applied "to protect those who are criminalized or suppressed for coming to the aid of undocumented migrants,"[181] this concept remains too

176. *Id.* at 607.

177. Joined Cases C-402 & C-415/05 P, Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Council of the Eur. Union & Comm'n of the Eur. Communities, ECLI:EU:C:2008:461, ¶ 304 (Sept. 3, 2008); *see also* Moreno-Lax, *Solidarity's Reach*, *supra* note 12, at 746–49 (explaining that solidarity is a founding value and a general principle of E.U. law).

178. *See* Henry Labayle, *Solidarity Is Not a Value: Provisional Relocation of Asylum-Seekers Confirmed by the Court of Justice (6 September 2017, Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council)*, EU MIGRATION L. BLOG (Sep. 11, 2017), https://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council/ [https://perma.cc/D7BR-RVWL] (arguing that the CJEU has missed an opportunity to use the principle of solidarity as a value of E.U. Law to counteract the anti-migration policies of some E.U. Member States).

179. Thym & Tsourdi, *supra* note 12, at 607.

180. Press Release, Hum. Rts. Council, Council Discusses Human Rights and International Solidarity and Promotion of an Equitable International Order (Sept. 12, 2012), https://www.ohchr.org/en/press-releases/2012/09/council-discusses-human-rights-and-international-solidarity-and-promotion [https://perma.cc/J7FV-7YS7].

181. *Report of the Independent Expert on Human Rights and International Solidarity, Obiora Chinedu Okafor: Revised Draft Declaration on Human Rights and International Solidarity*, ¶ 21, U.N. Doc. A/HRC/53/32 (May 2, 2023).

controversial[182] to effectively curb such criminalization at the E.U. level and in E.U. law.

In reality, Member States are fighting against manifestations of solidarity despite Article 2 of the TEU, which purports to be "a clear message to political parties and foundations in Europe that reactionary populism in their objectives and activities would not be tolerated by the European Union."[183] As Martina Tazzioli and William Walters explain, "on an EU level the notion of solidarity has been fundamentally mobilised according to a state-based logic and not directly towards migrants."[184] Some Member States have clearly rejected the application of the concept of solidarity in a migration context. For example, the Visegrad Group, an alliance between four Central European States (the Czech Republic, Hungary, Poland and Slovakia),[185] fought vehemently against the European Union's relocation policy[186] that was based on the principle of solidarity.[187] Ironically, through such alliances, some Members States have shown solidarity against solidarity towards migrants. As the U.N. Independent Expert on Human Rights and International Solidarity highlights, these Member States form a "troubling 'solidarity of sorts,'"

182. Gerardo Martino, *The Dynamics Between Interest and Solidarity as the Functional Basis of Current International Law*, *in* SOLIDARITY IN INTERNATIONAL LAW, *supra* note 165, at 107, 116.

183. *Report of the Independent Expert on Human Rights and International Solidarity, Obiora Chinedu Okafor: Human Rights and International Solidarity*, ¶ 52, U.N. Doc. A/75/180 (July 20, 2020) [hereinafter *Independent Expert Report 2020: Human Rights and International Solidarity*].

184. Tazzioli & Walters, *supra* note 37, at 176.

185. VISEGRAD GROUP, https://www.visegradgroup.eu/ [https://perma.cc/GN3E-Q2WM].

186. *See* Joined Cases C-643 & C-647/15, Slovak Republic & Hungary v. Council of the Eur. Union, ECLI:EU:C:2017:631, ¶ 345 (Sept. 6, 2017) (recording that Hungary and the Slovak Republic challenged the Council decision before the CJEU but lost).

187. *See* TFEU art. 80, *supra* note 24, 2016 O.J. (C 202) at 78 (stating that the European Union's policies on border checks, asylum, and immigration—and their implementation—shall be governed by the principle of solidarity). Council Decision (EU) 2015/1601 refers to solidarity between Members States in relation to migration, stating: "[T]he policies of the Union in the area of border checks, asylum and immigration and their implementation are to be governed by the principle of solidarity and fair sharing of responsibility between the Member States." Council Decision 2015/1601, pmbl., 2015 O.J. (L 248) 80, 80 (EU); *see also Slovak Republic & Hungary*, ECLI:EU:C:2017:631, ¶¶ 252, 329 (stressing that the relocation decision was a concrete expression of the principle of solidarity).

a "solidarity against humanitarianism."[188] The reaction to the June 2022 Solidarity Declaration that establishes a solidarity mechanism[189] illustrates the problem well.[190] Despite being explicitly framed as a political and temporary arrangement solely focused on migration across the Mediterranean and Atlantic Seas, the Declaration was endorsed by the ministers in charge of migration matters of only eighteen E.U. Member States.[191] Six Member States—Hungary, Poland, Slovakia, Austria, Latvia, and Denmark—rejected it flatly.[192]

Overall, it seems difficult to undo the criminalization of migrant solidarity using solutions rooted at the E.U. level or in E.U. law. The Commission's November 2023 proposal to amend the Directive is certainly an important step towards ensuring that solidarity towards migrants is not criminalized. Yet in the current political climate, the proposed Directive would likely be watered down to pander to the security and nationalist discourse that prevails in many States. Even if Member States adopted it, they would likely fail to properly implement it into their national legislation.

B. Solutions at the National Level

The Authors do not oppose a holistic approach to the decriminalization of solidarity that involves action at the E.U. level; however, due to the obstacles around solutions at the E.U. level, this Article follows a different route in unearthing the potential of solidarity at the national level to challenge the criminalization of citizens aiding migrants. This approach is firmly grounded not only in

188. *Independent Expert Report 2019: Human Rights and International Solidarity*, *supra* note 61, ¶ 25.

189. French Presidency of the Council of the Eur. Union, *First Step in the Gradual Implementation of the European Pact on Migration and Asylum: Modus Operandi of a Voluntary Solidarity Mechanism*, EUR. UNION (June 22, 2022), https://home-affairs.ec.europa.eu/system/files/2023-05/Declaration%20on%20solidarity_en.pdf [https://perma.cc/59HJ-HFMH].

190. For commentary on the reaction to the June 2022 Solidarity Declaration, see SERGIO CARRERA & ROBERTO CORTINOVIS, CTR. FOR EUR. POL'Y STUD., THE DECLARATION ON A VOLUNTARY SOLIDARITY MECHANISM AND EU ASYLUM POLICY: ONE STEP FORWARD, THREE STEPS BACK ON EQUAL SOLIDARITY 1 (2022), https://www.ceps.eu/wp-content/uploads/2022/10/CEPS-In-depth-analysis-2022-04_Voluntary-Solidarity.pdf [https://perma.cc/98TK-DTUH].

191. *Id.*

192. *ECRE Editorial: End Game of French Presidency – Passing on a Partial Reform*, EUR. COUNCIL ON REFUGEES & EXILES (June 24, 2022), https://ecre.org/ecre-editorial-end-game-of-french-presidency-passing-on-a-partial-reform/ [https://perma.cc/57PR-5UAV].

law, but also in a conceptual and historical viewpoint that focuses on the notions of legitimacy and democracy.[193]

Fundamentally, the problem to be addressed inheres in criminal law, which is a national (rather than an E.U. or international) competence. Thus, there are two primary methods that could be used to decriminalize solidarity at the national level. The first method entails removing, or at least amending, the criminalizing law(s) to prevent the prosecution of individuals for solidarity practices. For example, the Council of Europe in 2024 recommended ensuring that national laws do not lead to the criminalization of the work carried out by human rights defenders and that criminal and administrative laws and requirements be reformed to prevent the criminalization of these activities.[194] More specifically, Caritas suggested in 2019 that Member States implement the E.U. Facilitation Package to prevent the criminalization of humanitarian assistance by enforcing the humanitarian exemption,[195] a proposal also supported by scholars such as Stefano Zirulia.[196] The second method is to make the law inapplicable or soften its application by recourse to other laws, a task that national courts can undertake.

The first method calls for the involvement of an array of institutions and representative bodies linked to the legislative process. This would mean launching a political campaign to persuade members of national assemblies and parliaments of the need to withdraw or change the law. As shown, such an attempt is, to some extent, in progress in various States, as citizens, often supported by NGOs, contest the law. To date, these efforts have produced no useful results. One explanation for this may be that, as the latest European Parliament's elections have shown, large portions of E.U. Member States' populations harbor anti-migrant feelings. The public opinion's mood is illustrated by the failure of the European Citizens' Initiative called "We Are a Welcoming Europe" to gather enough signatures to be

193. The legitimacy of criminal law lies in the ability of the State to show that the law reflects societal normative expectations. Haddeland & Franko, *supra* note 105, at 554; Rabe & Haddeland, *supra* note 106, at 1642. Thus, the growing use of criminal law for political purposes "undermines public faith in liberal democracy." Allsopp, Vosyliūtė, & Smialowski, *supra* note 12, at 81.

194. COMM'R FOR HUM. RTS., PROTECTING THE DEFENDERS, *supra* note 16, at 25.

195. CARITAS EUROPA, *supra* note 29, at 10.

196. Zirulia, *supra* note 11, at 256.

considered by the Commission.[197] As the U.N. Special Rapporteur on the Human Rights of Migrants explained in 2020:

> In the past several years, a toxic narrative around the role of civil society organizations that dispense humanitarian assistance or other services to migrants has taken root in many countries, propelled, amongst others, by nationalist politicians and far-right groups and media, stating that these organizations act as a pull factor for undocumented migrants.[198]

It would thus be very difficult to persuade members of Parliament to remove or soften the harshness of the legislation that is used to criminalize solidarity towards migrants. Moreover, in some E.U. Member States, such as Hungary and Poland, anti-immigrant populism has become a driving force in domestic politics.[199] In these cases, "it is futile to expect that populist regimes would cure or mitigate the social tensions that they themselves have created and, in all too many cases, profited from politically."[200] Moreover, even if the law is changed, as Galya Ben-Arieh and Volker Heins stress, "[d]isagreements . . . cannot be resolved simply by appealing to the text of the law, which is always open to interpretation and does not automatically instill a feeling of obligation on the part of the public."[201]

Thus, this Article proposes adopting the second solution of turning to national courts, which are independent and thus less likely

197. *See We Are a Welcoming Europe*, MIGRATION POL'Y GRP., https://www.migpolgroup.com/index.php/portfolio-item/welcoming-europe/ [https://perma.cc/B45M-BULL] (presenting the key elements of the European Citizens' Initiative, which included ending criminalization of solidarity and increasing migrants' access to justice).

198. *Special Rapporteur Report: The Right to Freedom of Association of Migrants and Their Defenders*, *supra* note 29, ¶ 66. The Special Rapporteur also noted "pervasive anti-migration discourse in the official sphere" during an official visit to Hungary in 2020. *Report of the Special Rapporteur on the Human Rights of Migrants: Visit to Hungary*, ¶ 70, U.N. Doc. A/HRC/44/42/Add.1 (May 11, 2020) [hereinafter *Special Rapporteur Report: Visit to Hungary*].

199. *See* Clea Caulcutt et al., *Poland, Hungary Force EU Leaders to Drop Migration from Granada Declaration,* POLITICO (Oct. 6, 2023), https://www.politico.eu/article/poland-hungary-force-eu-leaders-drop-migration-granada-summit-declaration/ [https://perma.cc/HC3D-3XPK] (reporting that Poland and Hungary forced delegates to drop a passage summing up E.U. countries' views on migration from a declaration that diplomats had been working for weeks because of domestic political considerations in Poland and Hungary).

200. *Independent Expert Report 2020: Human Rights and International Solidarity*, *supra* note 183, ¶ 49.

201. Ben-Arieh & Heins, *supra* note 44, at 202.

to sway to popular opinion.[202] National courts, after all, are the arena where the government and those aiding migrants meet to discuss and contest the law.[203] Scholars such as Moreno-Lax posit that "[i]t will only be in the Courts that their activities, as humanitarian actors and human rights defenders, may eventually be de-criminalised."[204]

In national courts, individuals seize the opportunity to claim that the law does not comply with their society's higher, shared, fundamental values, pointing out that criminal law, which is an expression of society's values, makes little to no sense when it penalizes a behavior that is respectful of the values of the State. Such values are anchored in the constitution of a State[205] and, thus, not only ingrained in, but also well respected by, various State organs and citizens alike.[206] As Neomi Rao maintains, "[m]odern constitutional law serves as more than just a political compact; it identifies and establishes the core values of the social order."[207] The "constitution . . . establishes a link between law and morality"[208] and is more than an arrangement of powers and competences. Moreover, as a constitution is the highest law in the hierarchy of national legal norms, these values are transformed into constitutional principles, which underpin all national legislation

202. *See, e.g.*, CFR art. 47, *supra* note 168, 2012 O.J. (C 326) at 405 ("Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.").

203. Louisuea, *supra* note 110, at 1.

204. Moreno-Lax, *Towards a Thousand Little Morias*, *supra* note 11, at 176; *see also* Corte di Cassazione sezione penale (Cass. pen.) [court of last appeal on issues of law in criminal matters], sez. terza, 16 Gennaio 2020, n. 6626/20, Giust. pen. (copia non ufficiale) (2020), ¶¶ 10–15 (It.), https://www.giurisprudenzapenale.com/wp-content/uploads/2020/02/Cass-6626-2020.pdf [https://perma.cc/4796-FMUX] (dismissing an appeal by the prosecution to punish the captain of the Sea Watch 3 ship for disembarking migrants who were rescued after being shipwrecked in the Mediterranean Sea).

205. "[C]onstitutional values are moral and legal guidelines that are written in constitutions or having the form of constitutional legal norms." Irina Krylatova, *Human Dignity from Inherent to Constitutional Value*, 134 SHS WEB CONFS. 00061, 1, 4 (2022).

206. That this constitutional route is most suitable could be further justified by the fact that the European Union must pay heed to the legal and constitutional traditions of its Member States. TEU art. 4, ¶ 2, *supra* note 24, at 2016 O.J. (C 202) at 18.

207. Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 221 (2008).

208. Pierre Brunet, *La constitutionnalisation des valeurs par le droit*, *in* LES DROITS DE L'HOMME ONT-ILS «CONSTITUTIONNALISE LE MONDE»? 257, 264 (S. Hennette-Vauchez & J.M. Sorel eds., 2011) (Fr.).

and guide all State acts.[209] In other words, all State organs must follow these principles.[210] Should they not do so, their acts can be reinterpreted in light of constitutional principles or simply declared in violation of constitutional law.[211] In many States, such a decision is left in the hands of a constitutional court which has been "trusted with articulating and applying constitutional values."[212] As a result, legislation that contravenes constitutional principles must be abrogated, amended, or interpreted in such a way that it complies with those principles.[213] Applied in the context of the criminalization of solidarity, undoing such criminalization would necessitate a declaration by a constitutional court that the criminalizing law violates a constitutional principle. This Article will argue that amongst the cluster of concepts that can be traced back to a general idea of solidarity, and which are most likely to be useful in this *legal* context, are the principles of fraternity (unique to the French constitution), human dignity (foundational to human rights), and solidarity

209. Rao, *supra* note 207, at 222–23; *see also* Brunet, *supra* note 208, at 264 (explaining that, as the constitution is viewed as a body of principles placed at the top of the legal order, its content is propagated to the entire legal order and so all laws must comply with it); Edward J. Eberle, *Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview*, 33 LIVERPOOL L. REV. 201, 204 (2012) (discussing how Germany's value-oriented constitution has formed part of the "blueprint for society").

210. *See* Brunet, *supra* note 208, at 262 (explaining that the constitution constrains the legislature and bodies that apply the law); Francisco Fernández Segado, *La dignité de la personne en tant que valeur suprême de l'ordre juridique espagnol et en tant que source de tous les droits*, 67 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 451, 468 (2006) (Fr.) (discussing how the principle of human dignity within the Spanish constitution acts as a supreme guiding principle for legal order).

211. Guillaume Tusseau, *Le Conseil constitutionnel et le « délit de solidarité ». De la consécration activiste d'une norme constitutionnelle sous-appliquée à la révélation d'une stratégie contrainte de communication juridictionnelle?*, 1 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 35, 50–56 (2019) (Fr.).

212. Rao, *supra* note 207, at 219.

213. *See, e.g.*, 1958 CONST. art. 62 (Fr.), *translated in* CONSEIL CONSTITUTIONNEL, CONSTITUTION OF OCTOBER 4, 1958, at 25–26 (2009) [hereinafter CONSEIL CONSTITUTIONNEL, CONSTITUTION OF 1958], https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf [https://perma.cc/J6CX-MW7X] ("A provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented. A provision declared unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision . . . .").

(contained within the Greek,[214] Italian,[215] Latvian,[216] Polish,[217] and Romanian[218] constitutions).

Using national, and specifically constitutional, law would conform with E.U. law, given that national courts are obliged to interpret national law in light of E.U. law.[219] Both the TEU and the European Charter of Fundamental Rights—which can be viewed as constituting the "*bloc de constitutionnalité*" (constitutional block) of the EU—explicitly refer to the principles of human dignity[220] and solidarity.[221] In the *Omega* case, the CJEU declared that "the [Union] legal order undeniably strives to ensure respect for human dignity,"[222] making it so that national courts must ensure that in interpreting national legislation relating to aid to migrants, it does not breach these principles.[223] If national law cannot be read in a way that conforms with E.U. law, it must be set aside.[224] It should be noted that some national courts of E.U. Member States have already declared national

214. 1975 SYNTAGMA [SYN.] [CONSTITUTION OF GREECE] art. 25(4) (Greece).

215. COSTITUZIONE [CONSTITUTION OF THE ITALIAN REPUBLIC] art. 2 (It.).

216. LATVIJAS REPUBLIKAS SATVERSME [CONSTITUTION OF THE REPUBLIC OF LATVIA] Feb. 15, 1922, pmbl (Latv.).

217. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION OF THE REPUBLIC OF POLAND], Apr. 2, 1997, pmbl (Pol.).

218. CONSTITUTIA ROMANIEI [CONSTITUTION OF ROMANIA] Nov. 21, 1991, art. 4 (Rom.).

219. Case C-14/83, Sabine von Colson & Elisabeth Kamann v. Land Nordrhein-Westfalen, ECLI:EU:C:1984:153, ¶ 28 (Apr. 10, 1984); *see also* CHRISTIAN DADOMO & NOËLLE QUÉNIVET, EUROPEAN UNION LAW 80–82 (3d ed. 2020) (explaining how under this and subsequent jurisprudence national courts of E.U. Member States must interpret national law in light of E.U. Law).

220. TEU art. 2, *supra* note 24, 2016 O.J. (C 202) at 17; CFR pmbl., art. 1, *supra* note 168, 2012 O.J. (C 326) at 395–96; *see also* Nika Bačić Selanec & Davor Petrić, *Migrating with Dignity: Conceptualising Human Dignity Through EU Migration Law*, 17 EUR. CONST. L. REV. 498, 500–02 (2021) (explaining how the concept of human dignity is woven into the E.U. legal framework).

221. TEU art. 2, *supra* note 24, 2016 O.J. (C 202) at 17; CFR pmbl., *supra* note 168, 2012 O.J. (C 326) at 395.

222. Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, ECLI:EU:C:2004:614, ¶ 43 (Oct. 14, 2004); *see also* Selanec & Petrić, *supra* note 220, at 502–07 (elaborating on the CJEU's jurisprudence on the principle of human dignity as applied to migrants).

223. Under E.U. law, there are two ways to ensure the compatibility of national law with E.U. law: through enforcement actions by the Commission against Member States under Articles 258 to 260 TFEU, *supra* note 24, 2016 O.J. (C 202) at 160–61, and through preliminary questions on interpretation of E.U. law from national courts to the CJEU under Article 267 TFEU, *id.* at 164.

224. Case C-106/77, Amministrazione delle Finanze v. Simmenthal, ECLI:EU:C:1978:49, ¶ 24 (Mar. 9, 1978).

law incompatible with E.U. law on the basis that the former infringed the principle of human dignity as understood under Article 1 of the European Charter of Fundamental Rights.[225] It would thus be logical for national courts to examine national law that criminalizes solidarity towards migrants in light of the principle of human dignity.

Moreover, in 2017, the European Commission stated that "Member States are . . . bound by [TEU Article 6] when implementing the Facilitators Package"[226]—an article specifying that the Charter has the same legal value as the Treaties[227]—and concluded that "[t]herefore, the implementation of the migrant smuggling legislation must comply with fundamental rights such as the right to . . . human dignity . . . ."[228] While the Authors acknowledge that "the criminalistic approach to migration and its persistent perception as a security issue is a test for the rights affirmed in its Charters and in Member States' Constitutions,"[229] this Article still argues that amongst all presented options, the best one is found at the national level. Such a solution is not only legally sound, but it is also underpinned by a desire to support the principles of democracy, legitimacy, subsidiarity, and the rule of law. The underpinning argument is twofold.

First, dealing with national solidarities rather than a generic notion of pan-European transnational solidarity allows us to identify a more solid, democratic, and context-based foundation. Reference to principles that are pivotal in national constitutions (such as fraternity in France and human dignity in Germany, Italy, *et cetera*) helps reinforce the popular legitimacy of solidarity and thus overcome the limits of top-down versions of European solidarity like those proposed by E.U. institutions, which are often perceived as abstract and not fully functional. In the words of Apostolos Tzitzikostas, President of the European Committee of the Regions:

> [W]e will not deliver these shared goals [among which is "the strengthening of the European Union's solidarity"] by taking a top-down approach. The EU must respond to the real needs of people in the places

225. *See, e.g.*, Vrhovno sodišče Republike Slovenije [VSRS] [Supreme Court of the Republic of Slovenia] Apr. 4, 2018, VSRS Judgment I UP 10/2018, ¶¶ 35–39 (Slovn.) (declaring that a Slovenian law incompatible with Article 1 of the Charter should be set aside, i.e., not applied in the given case).

226. European Commission, *REFIT Evaluation of the Facilitators Package*, *supra* note 134, at 30.

227. TEU art. 6, *supra* note 24, 2016 O.J. (C 202) at 19.

228. European Commission, *REFIT Evaluation of the Facilitators Package*, *supra* note 134, at 30.

229. Mentasti, *supra* note 11, at 525.

> where they live and work. Only by applying a bottom-up approach Europe can succeed and re-build citizens' support in their hearts and minds.[230]

This indeed would align with the principle of subsidiarity.[231]

Second, referring to nation-based, democratically and legally enforced solidarities makes it possible to dispel the false assumption that national solidarities are equal to nationalistic variants of this notion. This Article maintains that it is possible to identify and reinforce the national and constitutional roots of European solidarities without lapsing into nationalistic rhetoric. As the U.N. Special Rapporteur on the Situation of Human Rights Defenders explained, "[t]he protection of the rights of people on the move can be an expression of core national values, a demonstration of solidarity with allies and a response to counter destructive extremist politics."[232] Many individuals who aid migrants rely on national values and principles to defend their actions,[233] so building interconnected narratives of national European solidarities can be a useful way to counter dangerous misappropriations of this principle and shed new light on the local, grassroot manifestations of solidarity practices.

While there are limitations to this national approach—notably that constitutions can be amended, judges can make decisions that are in line with the government's views, and that, in more radical situations, judges who do not comply with such views can be dismissed and replaced by more "obedient" judges—on balance, it still seems more viable than E.U.-level solutions. Therefore, this Article focuses on France and its principle of *fraternité* (which is often associated with

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230. Press Release, Eur. Comm. of the Regions, State of the European Union: Top-Down Approach Will Stop Europe Delivering on Its Promises and Not Bring It Closer to People (Sept. 15, 2021), https://cor.europa.eu/en/news/Pages/SOTEU-2021.aspx [https://perma.cc/9YYH-6CXL].

231. The principle of subsidiarity, as set forth in Article 5, paragraph 3 of the TEU, *supra* note 24, 2016 O.J. (C 202) at 18, is applicable in this case because migration falls under the "area of freedom, security and justice," which is a shared competence under Article 4, paragraph 2(j) of the TFEU, *supra* note 24, 2016 O.J. (C 202) at 51–52. "[S]ubsidiarity is a concept that relates to the level of governance—EU, national, regional or local—at which action should be taken, the aim being that decisions are taken as closely as possible to the citizens of the EU." DADOMO & QUÉNIVET, *supra* note 219, at 37.

232. *Special Rapporteur Report 2018*, *supra* note 5, ¶ 30.

233. *See* Lendaro, *supra* note 106, at 174–80 (showing how acts of disobedience have highlighted the fact that public authorities in France did not comply with the law that is meant to guarantee fundamental rights and how, in doing so, individuals have stressed the legitimacy of their acts deemed illegal by State power).

the concept of solidarity) and the principle of human dignity found in several constitutions of E.U. Member States as the forerunners in the decriminalization of solidarity in E.U. Member States using constitutional law.

III. USING THE CONCEPT OF FRATERNITY IN THE FRENCH CONTEXT

As Moreno-Lax observes, "[t]he idea of solidarity as an ordering principle of legal relations (distinct from charity, empathy or compassion) has a long pedigree"[234] that goes back to the concept of fraternity in the civil law system of post-revolutionary France.[235] The principles of solidarity and fraternity are undoubtedly intertwined, as shown by an overview of French history and theory. In law, although originally underutilized compared to liberty and equality, the principle of fraternity has now been declared to be of constitutional value.[236] What is more, it was a decision relating to the criminalization of solidarity—the *Herrou* case—that led the French Constitutional Court to promote the principle of fraternity to a principle of constitutional value.[237] While the principle of fraternity contains great value for the conceptualization of solidarity at both the regional and international level, it must be stressed that it is in some respect limited to French domestic law.

A. The Principles of Solidarity and Fraternity

This Article argues that, for both conceptual and historical reasons, the principles of solidarity and fraternity can be brought under the umbrella term of "solidaristic principles"—a cluster of ideas and ideals which can help people and institutions unite in order to achieve a common goal while shouldering the burdens that such activity might entail. To understand how and to what extent solidaristic principles can be employed at the national level to challenge the criminalization of solidarity, one first needs to clarify what these principles are, how they differ from one another, and how they can be triggered and maintained over time. This Part focuses on the relationship between solidarity and fraternity.

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234. Moreno-Lax, *Solidarity's Reach*, *supra* note 12, at 744.

235. *Id.*

236. *See infra* Section III.A.2 (offering an overview of the constitutional principles under French law).

237. *See infra* Section III.A.2 (explaining how the French Constitutional Court has promoted the principle of fraternity to one of constitutional value).

1. Solidarity and Fraternity: Conceptual Framework

Fraternity and solidarity are similar concepts in that they both allow for the creation of strong interpersonal bonds—bonds which typically form to enhance social cohesion, defend the most vulnerable parties in the relationship, and strive towards a common ideal to overcome situations of perceived injustice.[238] Both terms acquired their contemporary meaning in a specific historical context: the French Revolution.[239] In particular, the principle of *fraternité* became a pivotal notion for the revolutionaries fighting the *ancien régime*.[240] This interpersonal bond was in no way conservative; it was not meant to preserve the status quo, but rather to trigger social change and, in certain cases, political revolution.[241] The main difference between fraternity and solidarity regards the kind of group they can form. As the word suggests, the fraternity group is characterized by tighter bonds that recall a form of consanguinity, whether it be real or symbolic.[242]

One may argue that the gradual shift from the notion of fraternity to that of solidarity, in the aftermath of the French Revolution, corresponds to an attempt by political and social theorists to avoid the risk involved in what philosopher Jean-Paul Sartre called

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238. *See* SALLY J. SCHOLZ, POLITICAL SOLIDARITY 21–38 (2008) (providing a useful categorization of the different versions of social, civic, and political solidarity).

239. Karl H. Metz, *Solidarity and History. Institutions and Social Concepts of Solidarity in 19th Century Western Europe*, *in* SOLIDARITY 191, 191 (Kurt Bayertz ed., 1999).

240. *Id.* at 191–92.

241. *See* DAVID FEATHERSTONE, SOLIDARITY: HIDDEN HISTORIES AND GEOGRAPHIES OF INTERNATIONALISM 15–38 (2012) (discussing the politically performative aspect of solidarity).

242. Sartre discussed at length the power and potential risk of this relationship with special reference to the role it played during the French revolution. In moments of great danger, the people can form what Sartre calls a "*groupe en fusion*" (fused group). JEAN-PAUL SARTRE, CRITIQUE OF DIALECTICAL REASON 828 (Jonathan Rée ed., Alan Sheridan-Smith trans., Verso 2004) (1960). In that circumstance, the individuals involved merge into a highly cohesive social object, which acquires great power to the point that it can successfully respond to any incumbent danger. *Id.* at 350. Sartre explains the dramatic passage from the early stages of the revolution to its terror phase as the pathological course of a group in fusion. *Id.* at 358. Such is the level of fusion of its members that their individual freedom disappears, with all the harmful consequences that this can entail. *Id.*; *see also* Maria Russo & Francesco Tava, *Fraternity-without-Terror: A Sartrean Account of Political Solidarity*, 54 J. BRIT. SOC'Y PHENOMENOLOGY 234, 245–46 (2023) (analyzing Sartre's notion of fused group in the context of contemporary solidarity studies).

"*groupe en fusion*."[243] The solution to this concern demands a principle that similarly allows for strong interpersonal bonds while preserving the personal freedom for its adherents—a solution that is more open and less reliant on blood-like bonds than fraternity. Accordingly, such a principle should promote the formation of human relationships not on the basis of people's consanguinity (i.e., their birth identity), but rather on people's agency—on their willingness to embark in potentially risky endeavors to pursue a shared ideal. As Jacques Le Goff pointed out, "whereas fraternity plays on similarities between 'similar' people,'" solidarity—which he defines as "the moral and political dynamics of caring for others, helping them, and acting together to achieve justice"—"is perfectly suited to the interplay of differences."[244]

The evolution from fraternity to solidarity is therefore essential as it defines what is currently meant by the latter. Originally an economic notion, "solidarity" acquired its current pro-social meaning following the French Revolution. In a paper discussing this subject, Karl Metz highlighted that during that time, there emerged a novel stance marked by solidarity that significantly reshaped the vocabulary concerning poverty and assistance for the impoverished.[245] Unlike in the past, this approach was horizontal in nature.[246] It established connections of mutual support and collaboration among equals, rather than relying on vertical arrangements where individuals of higher social and economic standing charitably offered aid to those in poverty.[247] People sharing the same social condition were able to unite and fight for a general improvement of their situation and that of their descendants. This also marks the distinction between fraternity and solidarity, since no fraternal bond—be it blood, language, nationality, or religion—is needed to share a social condition. The main vector of transnational political solidarity in the nineteenth century (i.e., the workers' movement[248]) demonstrates this link based solely on shared political ideals and agendas rather than on

243. Russo & Tava, *supra* note 242, at 239.

244. Jacques Le Goff, *Le droit à la fraternité n'existe pas*, 329 REV. PROJET 14, 15–16 (2012) (Fr.).

245. Metz, *supra* note 239, at 191.

246. *Id.*

247. *Id.*

248. *See id.* at 197–98 (discussing the development of the concept of "solidarity" and concluding that "[t]he meaning remained vague, but pointed in the direction of group solidarity, of cohesion within the labor force in their battle against the industrialists, a meaning such as that generally possessed by the term for labor organizations since the middle of the century").

any identitarian principle. The practical efforts of the workers' movement to concretize forms of political solidarity (e.g., the First International from 1864 to 1876[249]) corresponded to theoretical attempts by social theorists to better frame and analyze this concept (e.g., the publication of Émile Durkheim's *Division of Labour in Society* in 1893[250]). Once again, France was the main site for these theoretical efforts.[251]

Solidarity was seen as a tool to reduce the social injustice, inequality, and harm that had been created by political liberalism and a capitalist, individualist, and productivist view of society—importantly, though, without questioning the sources of inequality and injustice.[252] However, the introduction of the notion of solidarity did not eclipse the idea of fraternity, but rather it contributed to fraternity's transformation into a broader and universalistic notion that was later cemented in the French social and legal framework. While the concept of solidarity derived from the principle of fraternity (both historically and conceptually), as Theodoros Rakopoulos

249. *See* Fabrice Bensimon, *The International Working Men's Association (1864–1876/7)*, *in* THE CAMBRIDGE HISTORY OF SOCIALISM, VOLUME I, 232, 232 (Marcel van der Linden ed., 2022) (describing the International Working Men's Association—often known as the "First International"—as "the first truly international working-class organization" and noting that it favored "various forms of solidarity among workers").

250. *See* Lewis Coser, *Introduction* to ÉMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY, at xiii–xiv (W.D. Halls trans., Macmillan Press 1984) ("[T]o clarify the dialectical relations between social solidarity in the modern industrial world and personal autonomy, or, as he called it, the 'cult of the individual,' Durkheim attempted systematically to distinguish the type of solidarity prevalent in relatively simple societies with that to be found in the modern world.").

251. Drawing upon the work of Chanial, Lavile, and Musso (among others), Gianni argues that utopian-socialist thinkers (such as Saint-Simon, Renouvier, and Proudhon) "shared the urge to improve the normative assumptions of fraternity in order to generate a more egalitarian economic vision." Robert Gianni, *The Democratization of Solidarity Through Science (in Europe and Beyond)*, *in* EUROPEAN SOLIDARITY, *supra* note 28, at 235, 239. This urge resulted in the formation of the modern concept of solidarity. *Id.*; *see also* Philippe Chanial & Jean-Louis Laville, *Économie sociale et solidaire: le modèle français*, OBSERVATOIRE EUROPEEN DE L'ÉCONOMIE SOCIALE 1, 1 (2001) (Fr.), https://ess-europe.eu/sites/default/files/publications/files/chercheurs-laville-chanial.pdf [https://perma.cc/2ERW-6PWK] (overviewing the historical development of the terms "solidarity economy" and "social economy" in French public discourse); Pierre Musso, *La solidarité: généalogie d'un concept sociologique*, *in* LA SOLIDARITE. ENQUÊTE SUR UN PRINCIPE JURIDIQUE 93, 93–107 (Alain Supiot ed., 2015) (Fr.) (tracing the "genealogy" of the concept of solidarity beginning the nineteenth century).

252. Bruno Mattéi, *Envisager la fraternité*, 330 REV. PROJET 66, 71 (2012) (Fr.).

contends, fraternity "was the original conception of political modernity . . . before 'solidarity' took its place."[253] Following the enriching intermingling with various theocratizations of this concept, solidarity acquired a new and more profound meaning.[254] This idea of "broadened fraternity" resonates in France, which "claim[s] itself as the land of hospitality and asylum (as *La France hospitalière* and *France terre d'asile*) as well as the *patrie* (home) of human rights."[255] Under this approach, the concept of fraternity extends to all humankind rather than being limited to a small group of blood relatives. As Abigail Taylor explains, the French Republican idea of fraternity is in fact a version of universalism.[256]

What follows shows how these ideas regarding fraternity and solidarity informed French law, and how this legal concept can help fight the criminalization of solidarity.

2. The Principle of Fraternity in French Law

The motto of the French Republic, "Liberty, Equality, Fraternity," is firmly anchored in the fourth sentence of Article 2 of the 1958 French Constitution.[257] The Constitution's preamble, as well as Article 72-3, further make reference to the "common ideal of liberty, equality and fraternity."[258]

Scholars have propounded varied views on the legal value of the principle of fraternity.[259] For many, it is the poor brother of the

253. Theodoros Rakopoulos, *Solidarity: The Egalitarian Tensions of a Bridge-Concept*, 24 SOC. ANTHROPOLOGY 142, 146 (2016).

254. *Id.*

255. Taylor, *Domopolitics, Citizenship and Dissent*, *supra* note 42, at 505.

256. Taylor, *'Crimes of Solidarity'*, *supra* note 8, at 45–47.

257. 1958 CONST. art. 2 (Fr.). While liberty and equality have always appeared in rules and principles of constitutional value, the word "fraternity" appeared for the first time in the French constitution of 1848. *See* 1848 CONST. pmbl., ¶ IV, (Fr.), *translated in* RÉPUBLIQUE FRANÇAISE – CONSTITUTION – 1848, at 11 (P. Arpin ed., 1848) ("[The French Republic's] principles are liberty, equality, fraternity. Its basis is family, labor, property, public order."). It then re-appeared in Article 2 of the 1946 Constitution. *See* 1946 CONST. art. 2 (Fr.) ("The motto of the Republic shall be 'Liberty, Equality, Fraternity.' Its principle shall be: government of the people, for the people, and by the people.").

258. 1958 CONST. pmbl., art. 72-3 (Fr.).

259. Le Goff rejects the idea that the right to fraternity exists. Le Goff, *supra* note 244, at 14. Bedjaoui regards it as an empty legal concept. Mohammed Bedjaoui, *Introduction générale: La « fraternité », concept moral ou principe juridique?*, *in* ACTES DU 3EME CONGRES DES COURS CONSTITUTIONNELLES FRANCOPHONES: LA FRATERNITE, 11, 16–17 (Association des Cours Constitutionnelles Francophones 2003) (Fr.), https://accf-

principles of liberty and equality.[260] Until recently, most French legal commentators saw the principle of fraternity as a "sympathetic reference,"[261] having either little[262] or no legal value, notably because it is difficult to translate it into a language of rights.[263] It was acknowledged as a wish, a moral duty, or an injunction, but not really

francophonie.org/publication/actes-du-3eme-congres/#iintroduction-generale [https://perma.cc/T6WV-M82Y]. In contrast, the majority of scholars recognize the constitutional value of this principle. *See, e.g.*, Mattéi, *supra* note 252, at 68–69 (discussing the philosophical exploration of fraternity and its deeper implications, including the encounter with the "other" and the ambiguities of humanity); Guy Canivet, *La fraternité dans le droit constitutionnel français*, *in* RESPONSABILITÉ, FRATERNITÉ ET DÉVELOPPEMENT DURABLE EN DROIT 1, 1–4, 7–12 (2012) (Fr.) (analyzing the constitutional concept of fraternity through four key ideas: incredulity, positivity, fertility, and subversiveness); Michel Borgetto, *Sur le principe constitutionnel de fraternité*, 14 REVUE DES DROITS ET LIBERTÉS FONDAMENTAUX (2018) (Fr.) [hereinafter Borgetto, *Sur le principe constitutionnel de fraternité*], https://revuedlf.com/droit-constitutionnel/sur-le-principe-constitutionnel-de-fraternite/ [https://perma.cc/JM6A-6BSZ] (examining the constitutional value of fraternity and its minimal legal content); Eva Gbandama, *Commentaire de la décision n°2018-717/718 QPC du 6 juillet 2018,* 15 LE COMMENTAIRE, LA REVUE DU CENTRE MICHEL DE L'HOSPITAL 71, 71–76 (2018) (Fr.) (discussing the humanitarian implications of the constitutional principle of fraternity in the context of aiding undocumented migrants); Jérôme Roux, *Le Conseil constitutionnel et le bon Samaritain: Noblesse et limites du principe constitutionnel de fraternité (note sous CC n° 2018-717/718 QPC du 6 juillet 2018, Herrou),* 31 ACTUALITE JURIDIQUE-DROIT ADMINISTRATIF 1781, 1782–83 (2018) (Fr.) (discussing the "bold constitutionalization" of the principle of fraternity); Jean-Éric Schoettl, *Fraternité et Constitution – Fraternité et souveraineté*, 5 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 959, 961 (2018) (noting that the Constitutional Court had recently affirmed the constitutional value of the principle of fraternity); Claire Saas, *Le délit de solidarité est mort, vive le délit de solidarité*, 34 RECUEIL DALLOZ 1894,1894–95 (2018) (Fr.) (discussing the Constitutional court's use of the principle of fraternity); Tusseau, *supra* note 211, at 40–41 (exploring the legal saga of the "offence of solidarity" and the recognition of fraternity's constitutional value); Marc Cottereau, *Le principe juridique de fraternité comme* principe robuste de solidarité. *De la redistribution des richesses dans un système libéral*, 85 REVUE INTERDISCIPLINAIRE D'ÉTUDES JURIDIQUES 25, 27–30 (2020) (Fr.) (arguing for fraternity as a robust principle of solidarity tied to wealth redistribution and the protection of individual rights); Loiseau, *supra* note 110, at 5 (analyzing the role of civil society in challenging the constitutionality of the "offence of solidarity" and its implications for migrant aid).

260. Le Goff, *supra* note 244, at 14; Oriana Philippe, *L'arme juridique en action aux confins de la France et de l'Italie*, 36 REVUE EUROPEENNE DES MIGRATIONS INTERNATIONALES 95, 101 (2020) (Fr.).

261. Le Goff, *supra* note 244, at 14.

262. *Id.*

263. *Id.*

a principle driving policies.[264] On the other hand, scholars such as Michel Borgetto, Guy Canivet, and Jean-Claude Colliard,[265] have advocated for the principle to be fully recognized in constitutional jurisprudence.[266] According to Borgetto specifically, fraternity should be regarded as a constitutional principle for the simple reason that it is mentioned in the French motto and enshrined expressly in provisions of the 1958 Constitution.[267]

For the French Constitutional Court, the principle of fraternity has a dual dimension: a collective one based on solidarity, often expressed through State policies—and an individual one based on tolerance and respect for the other because of a shared humanity.[268] In the context of the criminalization of solidarity in France, the latter dimension forms the core of this Article's inquiry into whether it is possible to use the principle of fraternity to decriminalize solidarity towards migrants. As Le Goff explains, the principle of fraternity obligates one "to show respect to a foreign national, to declare oneself

264. *Id.*

265. As cited in the commentary by the Constitutional Court services. *Commentaire: Décision no. 2018-717/718 QPC du 6 juillet 2018, M. Cédric H. et autre*, CONSEIL CONSTITUTIONNEL, 18, 18 nn.55–57 (Sept. 12, 2022) (Fr.), https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2018717qpc/2018717_718qpc_ccc.pdf [https://perma.cc/D4Q8-R8HW]; Borgetto, *Sur le principe constitutionnel de fraternité*, *supra* note 259; Canivet, *supra* note 259, at 8–9; Jean-Claude Colliard, *Liberté, égalité, fraternité*, *in* L'ÉTAT DE DROIT: MELANGES EN L'HONNEUR DE GUY BRAIBANT 691, 692 (Dalloz 1996).

266. *See* Serge Slama, *«Délit de solidarité» : le Conseil constitutionnel étend l'immunité de l'article L. 622-4 du CESEDA au nom du principe de fraternité*, 754 LA LETTRE JURIDIQUE (2018) [hereinafter Slama, *Conseil constitutionnel étend l'immunité*] (Fr.), https://www.lexbase.fr/article-juridique/47889262-cite-dans-la-rubrique-bdroit-des-etrangers-b-titre-nbsp-i-delit-de-solidarite-le-conseil-constitutio [https://perma.cc/D38Y-VAW7] (providing an overview of legal opinions of French scholars examining the concept of fraternity).

267. Le Goff, *supra* note 244, at 20; *see also* Borgetto, *Sur le principe constitutionnel de fraternité*, *supra* note 259 (arguing that the principle of fraternity occupies a strategic position within the French legal order based on its historical importance and enshrinement within modern institutions). This analysis seems to have been confirmed by the French Constitutional Court. *See* Michel Borgetto, *Rapport du Conseil Constitutionnel Français*, *in* ACTES DU 3ÈME CONGRÈS DES COURS CONSTITUTIONNELLES FRANCOPHONES, *supra* note 259, at 251, 259 [hereinafter Borgetto, *Rapport du Conseil Constitutionnel*], https://accf-francophonie.org/publication/actes-du-3eme-congres/#rapport-du-conseil-constitutionnel-francais [https://perma.cc/6HMA-KY6D] (emphasizing that fraternity is a part of French constitutional norms due to the express references made to the principle in the preamble and Article 2 of the 1958 Constitution).

268. Borgetto, *Rapport du Conseil Constitutionnel*, *supra* note 267, at 293.

close to humankind."[269] The French National Consultative Commission on Human Rights[270] adopted a similar—albeit slightly different—position. By looking at the principle of fraternity from a fundamental rights approach, the Commission explains that fraternity covers the right of individuals to benefit from the protection of the State on the one hand and the right of all people to provide aid and support to a person in a situation of vulnerability on the other.[271] It is the latter that was at stake in the *Herrou* case.[272]

In relation to migration issues generally, and the criminalization of solidarity more specifically, both the French National Consultative Commission on Human Rights and academics recognized the potential significance of the principle of fraternity towards the end of the 2010s. In 2017, the Commission warned that "to consider, de facto, solidarity as a crime is to reinforce the risk of social fractures, to jeopardize seriously the cohesion of society and to forget that fraternity is a founding value of the Republic."[273] A year later, the Commission was even more specific, encouraging the government and parliamentarians to implement the principle of fraternity with a view to stopping prosecutions based on the criminalization of solidarity found in Article L.622-1 of the Code on the Entry and Residence of Foreign Nationals and on the Right to Asylum (CESEDA).[274] Scholars,

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269. Le Goff, *supra* note 244, at 20.

270. Created in 1947, this Commission is the French national institution for the promotion and protection of human rights. *Historique*, COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L'HOMME, https://www.cncdh.fr/presentation/historique [https://perma.cc/Y3QP-JJZX].

271. COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L'HOMME, OBSERVATIONS SUR LES QUESTIONS PRIORITAIRES DE CONSTITUTIONNALITE 2018-717 ET 2018-718, DEPOSEES LE 11 MAI, RELATIVES AUX ARTICLES DU CESEDA RELATIFS ENCADRANT LE DELIT DE SOLIDARITE 6 (2018), https://www.documentation-administrative.gouv.fr/adm-01858784/document [https://perma.cc/F6B6-SQDJ].

272. *See infra* Section III.B (explaining the concept of fraternity in the *Herrou* case).

273. Commission Nationale Consultative des Droits de l'Homme, *Avis: mettre fin au délit de solidarité*, 0131 J.O. ¶ 8 (June 4, 2017), https://www.legifrance.gouv.fr/download/pdf?id=z8qL8iDWUxKD6bfpxxr8XOfw3L27WEQV8JHq8FWJ6m0= [https://perma.cc/TC8W-7WKX].

274. COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L'HOMME, AVIS SUR LE PROJET DE LOI 'POUR UNE IMMIGRATION MAITRISEE ET UN DROIT D'ASILE EFFECTIF' 56 (2018) (Fr.) [hereinafter CNCDH, AVIS SUR LE PROJECT DE LOI], https://www.cncdh.fr/sites/default/files/2021-04/180502_Avis%20PJL%20Asile%20et%20Immigration%20pour%20impression_0.pdf [https://perma.cc/BL99-Q2KC]; *see also* CODE DE L'ENTREE ET DU SEJOUR DES ÉTRANGERS ET DU DROIT D'ASILE [CESEDA] [CODE ON THE ENTRY AND RESIDENCE

such as Lazerges, also recommended the abrogation of some provisions of CESEDA on the basis that they contradicted the values of the French Republic—including, notably, the principle of fraternity.[275]

B. Using the Principle of Fraternity to Combat the Crime of Solidarity

Eventually, the principle of fraternity was given full constitutional value and force in relation to the so-called "crime of solidarity" in the 2018 decision *Herrou and Another* (*Herrou et autre)*.[276] This case was based on a preliminary referral from the French Court of Cassation[277] to the Constitutional Court on an issue of constitutionality ("*question prioritaire de constitutionnalité*")[278] of two CESEDA provisions.

Cédric Herrou was a French farmer who helped migrants cross the French-Italian border and created an association to bring together

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OF FOREIGN NATIONALS AND ON THE RIGHT TO ASYLUM] art. L622-1 (repealed 2020) (Fr.) (providing criminal penalties for anyone found to have facilitated or attempted to facilitate the illegal entry, movement, or stay of a foreigner in France).

275. Lazerges, *supra* note 120, at 274.

276. In France, the "crime of solidarity" is commonly referred to by the media and associations as a "délit de solidarité" (solidarity offence). *See, e.g.*, Slama, *Délit de solidarité*, *supra* note 84 (recounting the history of the crime of solidarity in France). An alternative, though less used, expression in French is "délit d'hospitalité" (hospitality offence). *See, e.g.*, *Ce que Jacques Derrida pensait du « délit d'hospitalité » en 1996*, LE MONDE (Jan. 19, 2018) (Fr.), https://www.lemonde.fr/idees/article/2018/01/19/ce-que-jacques-derrida-pensait-du-delit-d-hospitalite-en-1996_5243797_3232.html [https://perma.cc/55P8-W7RZ] (discussing the cultural and linguistic implications of the "délit d'hospitalité").

277. *See* M. Cédric H. et autre, Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-717/718QPC, July 6, 2018, 0155 J.O. text no. 107/160 (Fr.) (noting that the case was referred to the Constitutional Court from the Court of Cassation on May 11, 2018).

278. Under French law, if a party claims during proceedings before a judicial or administrative court that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the "Conseil d'Etat" or the Court of Cassation (the highest administrative and judicial courts, respectively) to the Constitutional Court. 1958 CONST. art. 61-1 (Fr.). This is known as a "*question prioritaire de constitutionnalité*." Service-Public.Fr, *Qu'est-ce qu'une question prioritaire de constitutionnalité (QPC)?*, REPUBLIQUE FRANÇAISE (Mar. 13, 2024) (Fr.), https://www.service-public.fr/particuliers/vosdroits/F21088 [https://perma.cc/JP9N-HV2N]. This course of action was introduced in the French constitution through Article 29 of the revision of the Constitution of July 23, 2008. *See* Loi constitutionnelle 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République [Constitutional Law 2008-724 of July 23, 2008 on the Modernization of the Institutions of the 5th Republic], July 24, 2008, 0171 J.O. text no. 2/149, art. 29 (Fr.) (modifying Article 61-1 of the French Constitution).

those who wanted to help migrants, which led to his arrest for the "facilitation of irregular entry."[279] A university researcher, Pierre-Alain Mannoni, was charged in the same case for having transported Eritreans in his car.[280] Fundamentally, by aiding migrants at the border, Herrou asserted he was attempting "to revive and recover a vanishing dimension of French values, namely solidarity and fraternity."[281] Herrou insisted that he was acting according to French values. As Benjamin Boudou explains, "[t]he solidarity offense speaks to the very nature of French political identity. The often-repeated motto '*France, terre d'accueil*' (France, land of welcome) is contested and disputed in these trials."[282]

Herrou contended that CESEDA provisions breached the principle of fraternity.[283] The first paragraph of Article L.622-1 of CESEDA criminalized facilitating the illegal or unauthorized entry, movement, or residence of a foreign national in France.[284] However, Article L.622-4 provided for a number of exemptions—i.e., situations when such assistance was not criminalized[285]—which precluded applying the criminal penalties envisioned by Article L.622-1.[286] Under Article L.622-4, paragraph 3°, assisting the illegal residence of a foreign national cannot give rise to criminal prosecution on the basis of Articles L.622-1 to L.622-3, when it is provided by:

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279. Press Release, Amnesty Int'l, France: Acquittal of Farmer Who Helped Asylum Seekers Show That Solidarity Is Not a Crime (May 13, 2020), https://www.amnesty.org/en/latest/news/2020/05/france-acquittal-of-farmer-who-helped-asylum-seekers-shows-that-solidarity-is-not-a-crime/ [https://perma.cc/5CLD-7T85].

280. *French Court Acquits Researcher Who Helped Illegal Migrants Find Shelter*, FRANCE 24 (Jan. 6, 2017), https://www.france24.com/en/20170106-french-court-acquits-researcher-mannoni-illegal-migrants-nice-roya-valley [https://perma.cc/B4UD-MZHE].

281. Taylor, *'Crimes of Solidarity'*, *supra* note 8, at 50.

282. Boudou, *supra* note 52.

283. M. Cédric H. et autre, Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-717/718QPC, July 6, 2018, 0155 J.O. text no. 107/160, ¶ 5 (Fr.).

284. *See* CESEDA art. L622-1 (repealed 2020), *translated in* Conseil constitutionnel, *Decision no. 2018-717/718 QPC of 6 July 2018*, ¶ 3 [hereinafter CC, *Decision no. 2018-717/718 QPC*], https://www.conseil-constitutionnel.fr/en/decision/2018/2018717_718QPC.htm [https://perma.cc/S5DA-3T8M] ("[A]ny person who has, by direct or indirect action, facilitated or attempted to facilitate the illegal entry, movement, or residence of a foreign national in France is liable to five year's imprisonment and a 30,000 euro fine.").

285. *Id.* art. L622-4 (repealed 2020).

286. *See id.* art. L622-1 (providing that the criminal liability is "[s]ubject to the exemptions established in Article L.622-4").

> 3° Any natural or legal person, when the offending act did not give rise to any direct or indirect compensation and consisted in providing legal advice or providing food, shelter or medical care . . . aimed at ensuring humane and decent living conditions [for the foreign national], or any other assistance aimed at preserving the dignity or physical integrity of this individual.[287]

Herrou and Mannoni contended that the above provisions breached the principle of fraternity on two grounds: first, that the exemption from criminal prosecution provided for in the third subparagraph of Article L.622-4 only applies to cases of assistance regarding illegal residence—not to assistance relating to the entry and movement of an illegal immigrant within the French territory; and second, that the law offered no immunity in the case of assistance of illegal residence even if it was provided for purely humanitarian reasons and without direct or indirect compensation.[288]

On July 6, 2018, the Constitutional Court ruled that the words "*au séjour irrégulier*" ("to the illegal residence") in Article L.622-4 CESEDA were in breach of the constitutional principle of fraternity.[289] In identifying this breach, the Court referred to the motto enshrined in Article 2[290] and the "common ideal of liberty, equality and fraternity" enshrined in both the Preamble[291] and Article 72-3 of the French Constitution.[292] It used these provisions to find that fraternity is a

287. *Id.* art. L622-4.

288. M. Cédric H. et autre, CC decision No. 2018-717/718QPC, July 6, 2018, 0155 J.O. ¶ 5. Further, they contended that those provisions were also incompatible with the principles of (1) necessity and proportionality of offenses and punishment, (2) legality of offenses and punishment since they are not sufficiently precise, and (3) equality before the law since only assistance to illegal residence and not to entry and movement within the French territory was exempted from criminal prosecution. *Id.*

289. *Id.* ¶ 13.

290. *See* 1958 CONST. art. 2 (Fr.), *translated in* CONSEIL CONSTITUTIONNEL, CONSTITUTION OF 1958, *supra* note 213, at 4 ("The maxim of the Republic shall be 'Liberty, Equality, Fraternity.'").

291. *See id.* pmbl., *translated in* CONSEIL CONSTITUTIONNEL, CONSTITUTION OF 1958, *supra* note 213, at 4 ("By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development.").

292. *See id.* art. 72-3, *translated in* CONSEIL CONSTITUTIONNEL, CONSTITUTION OF 1958, *supra* note 213, at 34 ("The Republic shall recognize the overseas populations within the French people in a common ideal of liberty, equality and fraternity.").

constitutional principle which protects the freedom to assist others for humanitarian reasons without consideration as to whether the assisted person is legally residing within the French territory.[293]

Notwithstanding, the Court recalled that, according to its settled case law, no principle or rule of constitutional value guarantees that foreign nationals have general and absolute rights of entry and residence within French territory.[294] It further opined that the objective of combatting irregular immigration contributes to the protection of public order, which is itself an objective of constitutional value.[295] According to the Court's analysis of the first paragraph of Article L.622-1, read jointly with the first paragraph of Article L.622-4, any individual assisting or attempting to assist the illegal entry, movement, or residence of a foreign national in France would be liable for criminal punishment, regardless of the nature and the purpose of this assistance.[296] The Court observed that, unlike the assistance given at entry, assistance that is aimed at facilitating the free movement of a foreign national does not necessarily create an illegal situation.[297] Therefore, the Court concluded that, by criminalizing any aid to the free movement of an irregular migrant (including when such aid is accessory to the assistance to residence and given for humanitarian reasons), the legislature had failed to properly balance the principle of fraternity and the protection of public order.[298] As a result, the Court ruled that the words "to the illegal residence," which are contained in the first paragraph of Article L.622-4, are unconstitutional.[299] Consequently, the humanitarian clause in CESEDA Article L.622-4—previously limited to assistance provided in relation to the stay of migrants—was extended to "movement" ("*circulation*" in French).[300]

By ruling that fraternity is a constitutional principle[301] that safeguards the freedom to assist others for humanitarian reasons

293. M. Cédric H. et autre, CC decision No. 2018-717/718QPC, July 6, 2018, 0155 J.O. ¶¶ 7–8.

294. *Id.* ¶ 9.

295. *Id.*

296. *Id.* ¶ 12.

297. *Id.*

298. *Id.* ¶ 13.

299. *Id.*

300. *Id.*

301. While the very substance of the principle of fraternity is not specifically defined in the French Constitution—regarding what it entails or opposes—this did not stop the Constitutional Court from using a constructive interpretation of fraternity. After all, the Court has relied on such constructive interpretation before. *See, e.g.*, Loi relative au respect du corps humain et autre, Conseil constitutionnel

without consideration as to whether the assisted person is legally residing within the French territory,[302] the Constitutional Court not only stressed the humanitarian dimension of acts of assistance but also provided the freedom to assist with a general scope, irrespective of whether the assisted person has a legal right to reside in France. As the U.N. Special Rapporteur on the Human Rights of Migrants explained, "'[f]acilitating' irregular stay has been constitutionally reinforced."[303]

Furthermore, the Court observed that immunity from criminal prosecution was available only in three situations: (1) where assistance to illegal residence provided without direct or indirect compensation by someone other than a family member of the foreign national consists of providing legal advice; (2) where assistance provided in the form of food, shelter or medical care is aimed at ensuring humane and decent living conditions for the foreign national; and (3) where assistance is aimed at preserving a migrant's dignity or physical integrity.[304] The Court concluded that the provisions of Article L.622-4 must be interpreted in light of the principle of fraternity as being also applicable to any act of assistance provided on humanitarian

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[CC] [Constitutional Court] decision No. 94-343-344DC, July 27, 1994, 0174 J.O. 11024, 11024–26 (Fr.) (applying a constructive interpretation of the constitutionally enshrined right to life and guaranteed protection of health to hold a challenged law constitutional). As the Court neatly observed in its report to the *Actes du 3ème congrès des cours constitutionnelles francophones* (ACCF) in Ottawa, it is sufficient that the "(constitutional) judge agrees to carry out preliminary work of construction on the basis of which he will be able to identify what fraternity entails or at the very least prohibits to do." Borgetto, *Rapport du Conseil Constitutionnel*, *supra* note 267, at 258–59. As Borgetto has suggested, the Court only drew the logical consequence of its statement made in 2003 in Ottawa. Borgetto, *Sur le principe constitutionnel de fraternité*, *supra* note 259, at 8. Indeed, "[i]t would be difficult to understand how one could consider that the fact of punishing someone who helps a foreigner in an illegal situation is not contrary to the principle of fraternity, whereas the fact, for the community, of granting him asylum or providing care would only be a legal manifestation of this same principle . . . ." *Id.*

302. M. Cédric H. et autre, CC decision No. 2018-717/718QPC, July 6, 2018, 0155 J.O. ¶¶ 7–8.

303. *Report of the Special Rapporteur on the Human Rights of Migrants: Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea*, ¶ 88, U.N. Doc. A/HRC/47/30 (May 12, 2021) [hereinafter *Special Rapporteur Report: Pushbacks of Migrants*].

304. M. Cédric H. et autre, CC decision No. 2018-717/718QPC, July 6, 2018, 0155 J.O. ¶ 11.

grounds,[305] thus expanding the scope of the article that referred only to legal advice, food, shelter and medical assistance.

The Constitutional Court's decision had instant and long-term positive consequences. First, the law was changed within eight weeks of the ruling.[306] Originally, a "*nota*" explaining the decision was added to the text of the 2012 version of CESEDA Article L.622-4.[307] Then, Act 2018-778 for Controlled Immigration, an Effective Right of Asylum and Successful Integration, was passed on September 10, 2018[308] to amend that legal provision.[309] This quick pace of change can be explained by Parliament's active consideration of an immigration bill.[310] The Constitutional Court was in fact shaping the larger political discussion and providing guidelines as to which amendments the pending bill required.[311] Second, the text of an amendment to former Article L.622-4 incorporated the word "humanitarian" in CESEDA for the first time, as was used in the decision of the Constitutional Court. The new CESEDA Article L.823-9 exempts acts from criminalization that consist of providing legal, linguistic, or social advice, or any other aid for an exclusively humanitarian purpose.[312] Third, as the Court gave

305. *Id.* ¶ 14; *see also* Véronique Champeil-Desplats, *Le principe constitutionnel de fraternité : entretien avec Patrice Spinosi et Nicolas Hervieu*, 15 LA REVUE DES DROITS DE L'HOMME ¶ 19 (2019), https://journals.openedition.org/revdh/5881 [https://perma.cc/6GKM-ZBM7] (explaining that the list of acts falling within the purview of the exemption had to be interpreted as applying to any act of a humanitarian nature); Tusseau, *supra* note 211, at 49 (stressing that the Court expressly stated that, read in light of the principle of fraternity, humanitarian assistance cannot be limited to the instances specified in the law).

306. As Spinosi and Hervieu explain, "the evolution of the law in September 2018 was a direct consequence of the decision of the Constitutional Court." Champeil-Desplats, *supra* note 305, ¶ 24.

307. CESEDA art. L.622-4 (repealed 2020).

308. Loi 2018-778 du 10 septembre 2018 pour une immigration maîtrisée, un droit d'asile effectif et une intégration réussie [Act 2018-778 of September 10, 2018 for Controlled Immigration, an Effective Right to Asylum and Successful Integration], Sept. 11, 2018, 0209 J.O. text no. 1/105 (Fr.).

309. Subparagraph 3 of the updated provision, which entered into force on May 21, 2021, provides that "[a]ssistance to the illegal movement or residence of a foreign national" cannot give rise to criminal prosecution when it is provided "[b]y any natural or legal person when the offending act did not give rise to any direct or indirect compensation and consisted in providing legal, linguistic or social advice or support, or any other assistance provided for an exclusively humanitarian purpose." CESEDA art. L823-9(3°).

310. Tusseau, *supra* note 211, at 53.

311. *Id.*

312. CESEDA art. L823-9.

constitutional value to the principle of fraternity, it can now be invoked, before and after legislation is passed, to ensure that all posterior and subsequent laws comply with it. Fourth, these events demonstrate that a decision of a constitutional court can lead to relatively rapid legislative changes. Indeed, this case illustrates how the power of a constitutional court can be used to prevent the adoption of anti-solidaristic laws. Fifth, although several cases were still being adjudicated following the *Herrou* decision, such cases were based on court proceedings initiated under the previous version of CESEDA; accordingly, the overwhelming majority of those charged were released[313] because of the new, broader interpretation of the concept of humanitarian assistance.[314] This trend is reflected in the fact that reports by organizations monitoring instances of criminalization of solidarity in Europe no longer refer to court proceedings against individuals in France—though they still include harassment and intimidation.[315] As former U.N. Independent Expert on International Solidarity, Obiora Okafor, stated, the *Herrou* case "can help to catalyze change in how state and society alike in major destination countries tend to deal with those who stand with and express solidarity towards those who seek refuge in those lands."[316]

However, the *Herrou* decision also has its limitations. First, while the Constitutional Court referred to movement and residence, it did not extend its rationale to humanitarian facilitation of entry. It did not take the opportunity to declare the criminalization of providing

313. This statement is based on a thorough search on the GISTI website. *La répression du délit de solidarité en France depuis 2015* [*The repression of the crime of solidarity in France since 2015*], GRP. FOR INFO. & SUPPORT OF IMMIGRANTS [hereinafter *GISTI Database on Solidarity Prosecutions*], http://www.gisti.org/spip.php?article6591 [https://perma.cc/X2CD-MGZ3] (drawing on data found on the page as updated on July 4, 2024). This page listed all cases in French courts that had come to the attention of Gisti, a French NGO dealing with migrants and refugees. *Id.*

314. Slama, *Conseil constitutionnel étend l'immunité*, *supra* note 266.

315. *See, e.g.*, GIONCO & KANICS, *supra* note 143, at 24, 28 (reporting on the introduction of curfews, harassment and intimidation of volunteers providing humanitarian assistance, and evictions, but not on prosecutions); PICUM, PEOPLE CRIMINALISED FOR ACTING IN SOLIDARITY WITH MIGRANTS, *supra* note 73, at 7, 9 nn.1, 10 nn.17–18 & 24, 11 nn.38–39, 12 nn.54 & 66, 13 nn.71, 72 & 81–84 (reporting two case studies from France involving a case of non-judicial harassment and a local ban on food distribution and including only a few cases of judicial prosecutions in France in the endnotes).

316. *Report of the Independent Expert on Human Rights and International Solidarity: Human Rights and International Solidarity*, ¶ 7, U.N. Doc. A/74/185 (July 17, 2019).

humanitarian assistance irrespective of entry, transit, or residence as unconstitutional. Rather, the Constitutional Court reiterated that it was unlawful to provide such assistance in relation to entry.[317] A lower court relied on this limitation to the application of the principle of fraternity by rejecting the legal argument that the Constitutional Court ruling applied to cases of entry.[318] Of the few cases that have been investigated and adjudicated following *Herrou*, all concern assisting entry.[319] One of those cases involves Loïc Le Dall, President of *Emmaüs La Roya* (one of the two humanitarian associations targeted by authorities), who was arrested in January 2018 while transporting an Ethiopian national into France in his car.[320] Although he was released from custody,[321] Le Dall was later given a suspended fine for having "by direct or indirect aid, facilitated the unlawful entry into the national territory of a foreign national."[322] Following the annulment of the Court of Appeal's judgment by the Court of Cassation in 2020,[323] the same Court of Appeal found Le Dall guilty on November 3, 2021.[324] The Court of Cassation confirmed this judgment on January 25, 2023.[325]

The Constitutional Court has clearly explained that the reason for this distinction is that assistance of entry leads to the creation of an unlawful situation,[326] an argument reiterated by the Court of

317. M. Cédric H. et autre, Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-717/718QPC, July 6, 2018, 0155 J.O. text no. 107/160, ¶ 12 (Fr.).

318. Théo et autres, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Gap, Chambre des délibérés, Dec. 13, 2018, 803/2018, at 32–34 (Fr.) (on file with the *Columbia Human Rights Law Review*).

319. *See GISTI Database on Solidarity Prosecutions*, *supra* note 313 (listing the cases).

320. Le Dall v. France, App. No. 21655/23, ¶¶ 2–4 (Sept. 12, 2024) (on file with *Columbia Human Rights Law Review*).

321. Le Dall, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nice, Chambre des Comparutions Immédiates, Mar. 14, 2018, 805/18, at 4 (Fr.) (on file with the *Columbia Human Rights Law Review*).

322. Le Dall, Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, Chambre correctionnelle 5–4, Apr. 1, 2019, 2019/231, at 5 (Fr.) (on file with the *Columbia Human Rights Law Review*).

323. Le Dall, Cour de cassation [Cass.] [Supreme Court for Judicial Matters], crim., Oct. 14, 2020, 19-83.247 (Fr.) (on file with the *Columbia Human Rights Law Review*).

324. *Le Dall*, App. No. 21655/23, ¶ 10.

325. Le Dall, Cour de cassation [Cass.] [Supreme Court for Judicial Matters], crim., Jan. 25, 2023, 21-86.839, Bull. crim., No. 1, ¶ 22 (Fr.).

326. M. Cédric H. et autre, Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-717/718QPC, July 6, 2018, 0155 J.O. text no. 107/160, ¶ 12 (Fr.).

Cassation in 2023.[327] As expressed by Serge Slama, the Constitutional Court limited the scope of this principle in the name of public order and the need to fight illegal immigration.[328] Indeed, as any other constitutional right or freedom, the freedom to assist others ("*la liberté d'aider autrui*"[329]) must be balanced with other constitutional principles.[330] As the Constitutional Court put it, "no principle or rule of constitutional value gives foreign nationals general and absolute rights of entry and residence in the national territory. Further, the objective of combating illegal immigration partakes in the safeguarding of public order, which is an objective of constitutional value."[331] A few months after the decision was released, a group of Members of the French Senate (one of the two legislative chambers) went to the Constitutional Court,[332] claiming that the 2018 Act for a Controlled Immigration, an Effective Right of Asylum and a Successful

327. Le Dall, Cass., crim., Jan. 25, 2023, 21-86.839, Bull. crim., No. 1, ¶ 20.

328. Slama, *Conseil constitutionnel étend l'immunité*, *supra* note 266; *see also* Mitsilegas, *supra* note 11, at 33 (observing that the outcome of balancing the two principles led to limiting the criminalization in relation to facilitating irregular movement but not irregular entry).

329. M. Cédric H. et autre, CC decision No. 2018-717/718QPC, July 6, 2018, 0155 J.O. ¶ 8, *translated in* CC, *Decision no. 2018-717/718 QPC*, *supra* note 284 ("It follows from the principle of fraternity the freedom to help others, for humanitarian purposes, without consideration of the legality of their residence on the national territory.").

330. Champeil-Desplats, *supra* note 305, ¶ 16.

331. M. Cédric H. et autre, CC decision No. 2018-717/718QPC, July 6, 2018, 0155 J.O. ¶ 9, *translated in* CC, *Decision no. 2018-717/718 QPC*, *supra* note 284. While the Constitutional Court does not formally recognize any hierarchy between fundamental rights, the principle of fraternity might appear as a "second-rank right" as suggested by its other decisions. *See, e.g.*, Union de défense active des forains et autres, Conseil constitutionnel [CC] [Constitutional Court] decision No. 2019-805QPC, Sept. 27, 2019, 0226 J.O. text no. 72/113, ¶¶ 16–17 (Fr.) (dismissing a complaint alleging unconstitutional violations of the freedom of movement and the principle of fraternity because it found that the legislature balanced the freedom of movement with the need to safeguard public order—effectively treating fraternity as a secondary consideration). This is why some might argue that, despite its highly symbolic value, this decision might not lead to a fertile line of jurisprudence. LOUIS FAVOREU & LOÏC PHILIP, LES GRANDES DECISIONS DU CONSEIL CONSTITUTIONNEL 921 (20th ed. 2022).

332. The second paragraph of Article 61 of the French Constitution states: "Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators." 1958 CONST. art. 61, *translated in* CONSEIL CONSTITUTIONNEL, CONSTITUTION OF 1958, *supra* note 213 at 25 (2009).

Integration[333] did not include the humanitarian exemption to the facilitation of entry, and therefore, the Act violated the principle of fraternity.[334] The Court answered that it is up to the legislature to reconcile the principle of fraternity with that of safeguarding public order when adopting new legislation.[335] In this instance, the Court considered that there was a balanced reconciliation of the two principles.[336] Seemingly to temper the harshness of this decision,[337] the Court reminded State bodies that, under the Criminal Code, an individual cannot be held criminally liable for performing an act necessary to protect someone who is facing a present or imminent danger, unless there is a disproportion between the means employed and the seriousness of the threat.[338]

Patrice Spinosi and Nicolas Hervieu question the artificial distinction between assistance to transit and assistance to entry, stressing that "the help provided to others in the name of the principle of fraternity—which implies the common belonging of all people to the same humanity—cannot take into account border considerations,

333. Loi 2018-778 du 10 septembre 2018 pour une immigration maîtrisée, un droit d'asile effectif et une intégration réussie [Act 2018-778 of September 10, 2018 for a Controlled Immigration, an Effective Right to Asylum and a Successful Integration], J.O., Sept. 11, 2018, text no. 1/105 (Fr.).

334. Loi pour une immigration maîtrisée, un droit d'asile effectif et une intégration réussie, Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-770DC, Sept. 6, 2018, 0209 J.O. text no. 2/105, ¶ 102 (Fr.).

335. *Id.* ¶ 87. In a decision on September 27, 2019, the Court ruled that the Law of 5 July 2000 on the Reception and Accommodation of Travelers (*loi relative à l'acceuil et à l'habitat des gens du voyages*) did not breach the principle of fraternity on the basis that the Law represented a balanced reconciliation of the two principles. Union de défense active des forains et autres, CC decision No. 2019-805QPC, Sept. 27, 2019, 0226 J.O. ¶ 17. The Law provides that communes and public bodies of intercommunal cooperation, which have complied with their duties to receive and accommodate travelers in dedicated areas in their territories, might prohibit the irregular settlement of travelers in non-dedicated areas and proceed with their forced expulsion. *Id.* ¶¶ 10–11.

336. Loi pour une immigration maîtrisée, un droit d'asile effectif et une intégration réussie, CC decision No. 2018-770DC, Sept. 6, 2018, 0209 J.O. ¶ 108.

337. Champeil-Desplats, *supra* note 305, ¶ 22.

338. Loi pour une immigration maîtrisée, un droit d'asile effectif et une intégration réussie, CC decision No. 2018-770DC, Sept. 6, 2018, 0209 J.O. ¶ 107. The Conseil d'Etat (the highest administrative court) had already stated in 2010 that this immunity, based on Article L.122-7 of the Criminal Code, could be used when the exemptions mentioned in Article L.622-4 CESEDA were not applicable. Conseil d'État [CE] [highest administrative court], Jan. 15, 2010, 334879 (unreported) (Fr.), https://www.legifrance.gouv.fr/ceta/id/CETATEXT000021764742/ [https://perma.cc/7PCC-5SV7].

especially when these are the internal borders of the European Union."[339] The Constitutional Court seems to have legitimized an "exclusionary border regime,"[340] thus accentuating the physical and moral significance of the border. The principle of fraternity has therefore found its moral and geographical limits. As Kelly Loiseau observed, the securitization logic and discourse espoused by the government make it impossible to envisage a legalization of assistance to entry.[341]

The second limitation of the *Herrou* decision is that the legislature added a requirement not mentioned by the Constitutional Court to the new version of CESEDA. Indeed, the third paragraph of Article L.823-9 spells out that any help and support must be given for an exclusively humanitarian purpose.[342] The Court's decision never mentions the term "exclusively"; rather, it refers to "any other act of assistance provided for humanitarian purposes."[343] This leads Spinosi and Hervieu to query whether the legislature has betrayed the decision of the Constitutional Court.[344] Some scholars claim that the introduction of this adverb could be used to condemn individuals characterized as having a militant-activist objective.[345] For example,

339. Champeil-Desplats, *supra* note 305, ¶ 21.

340. Aris Escarcena, *supra* note 59, at 5248.

341. Loiseau, *supra* note 110, at 6.

342. *See* CESEDA, art. L823-9(3°) (providing that assisting the illegal movement of a foreigner cannot give rise to criminal proceedings when that assistance did not give rise to any direct or indirect compensation and consisted of providing legal, linguistic, or social support or any other assistance provided for an exclusively humanitarian purpose).

343. M. Cédric H. et autre, Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-717/718QPC, July 6, 2018, 0155 J.O. text no. 107/160 ¶ 14 (Fr.), *translated in* CC, *Decision no. 2018-717/718 QPC*, *supra* note 284; *see also id.* ¶¶ 20, 24 (emphasizing that the criminal immunity in paragraph 14 should apply to "any assistance for residence provided for humanitarian purposes" and ordering that said immunity must also apply to acts that facilitate movement "when these actions are carried out for humanitarian purposes" without ever explicitly or implicitly providing that this immunity will apply "exclusively" to humanitarian acts); Slama, *Conseil constitutionnel étend l'immunité*, *supra* note 266 (arguing that the Court never indicated that the humanitarian purpose had to be exclusive and that such understanding was an erroneous interpretation of the Court's decision by the legislator).

344. Champeil-Desplats, *supra* note 305, ¶ 26.

345. Nathalie Birchem, *Le « délit de solidarité » est toujours sanctionné*, LA CROIX (Jan. 15, 2020) (Fr.), https://www.la-croix.com/France/Exclusion/Le-delit-solidarite-toujours-sanctionne-2020-01-15-1201072000 [https://perma.cc/Q2QA-LD8Z]; Grégoire Hervet, *Le délit de solidarité : la « dépénalisation » progressive de l'aide apportée à la circulation et au séjour d'un étranger en France*, BLOG DES

the Court of Appeal of Aix-en-Provence deemed Herrou's militancy-activism ("*militantisme*") as falling outside the scope of the humanitarian clause.[346] The Court of Cassation nonetheless rejected this approach in the 2020 case of *Faye-Prio*, in which it asserted that acts considered exclusively humanitarian are not limited to acts that are purely individual and personal; the Court stated that this category does not exclude actions exercised as a member of an association as long as they are not spontaneous and of a militant nature.[347] Yet, the Court of Cassation concluded that, if the purpose of the act is knowingly ("*sciemment*") removing a foreign national from immigration control, then the humanitarian exemption cannot apply.[348] It thus seems that, regrettably, the Court of Cassation stopped short of totally removing the link between humanitarian aims and militancy in the *Faye-Prio* case.[349]

Loiseau argues that rather than focusing only on what has changed, it might also be useful to examine what has not changed.[350] For example, the humanitarian exemption only applies to acts for which no direct or indirect compensatory benefit is received.[351] Two points need to be made here. First, France has not adopted the "financial gain" expression found in the 2002 Directive in relation to assistance to migrants residing within the territory of an E.U. Member State.[352] In fact, in 2018 the French National Consultative Commission

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AVOCATS (Apr. 7, 2020) (Fr.), https://consultation.avocat.fr/blog/gregoire-hervet/article-33745-le-delit-de-solidarite-la-depenalisation-progressive-de-l-aide-apportee-a-la-circulation-et-au-sejour-d-un-etranger-en-france.html [https://perma.cc/X7YX-HWH3]; Loiseau, *supra* note 110, at 6; Champeil-Desplats, *supra* note 305, ¶ 27.

346. Herrou, Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, 13ème chambre des appels correctionnels, Aug. 8, 2017, 2017/568, at 8 (Fr.) (on file with the *Columbia Human Rights Law Review*).

347. Faye-Prio, Cour de cassation [Cass.] [Supreme Court for Judicial Matters], crim., Feb. 26, 2020, 19-81.561, Bull. crim. No. 33, ¶ 15 (Fr.); *see* Hervet, *supra* note 345 (providing a comprehensive analysis of the case decided by the Court of Cassation).

348. Faye-Prio, Cass., crim., Feb. 26, 2020, 19-81.561, Bull. crim. No. 33, ¶ 16.

349. *Id.*; Chloé Liévaux, *Délit de solidarité, précisions des contours de l'exemption tirée du but humanitaire : pas plus de conditions que nécessaire !*, DALLOZ ACTU ETUDIANT (Apr. 22, 2020) (Fr.), https://actu.dalloz-etudiant.fr/a-la-une/article/delit-de-solidarite-precisions-des-contours-de-lexemption-tiree-du-but-humanitaire-pas-plu/h/72dc16e867086f71d0f068fe34077eff.html [https://perma.cc/M22W-JN87].

350. Loiseau, *supra* note 110, at 6.

351. CESEDA art. L823-9(3°).

352. Indeed, under Article 1(1)(b) of the Directive, "any person who, for financial gain, intentionally assists a person who is not a national of a Member

on Human Rights recommended rewording CESEDA Article L-622-1 so that criminal sanctions would *only* apply if assistance was provided for profit.[353] Others have noted that this lack of reference to financial gain is problematic, since, as Marc Provera stresses, if "'financial gain' is an element of the proscribed behaviour, humanitarian behaviour would normally be regarded as outside sanction."[354] That being said, as Zirulia notes, "[t]he request for money or other advantage does not automatically entail that the 'service' offered is devoid of any humanitarian purpose."[355] Indeed, based on a field study in Ventimiglia, Vergnano demonstrates how genuine acts of solidarity are not necessarily without any financial or material benefit.[356] Some facilitators whose economic situation does not allow them to offer solidarity for free do get paid, but the compensation is minimal in comparison to the financial costs and the risks incurred.[357] The second point is that, arguably, fraternity is essentially based on reciprocity, and so acts based on fraternity will have some form of direct or indirect compensatory benefit ("*contrepartie directe ou indirecte*").[358] Solidarity is not purely altruistic[359] but is rather a form of contractual relation between equals—individuals or groups who, on the basis of shared goals and ideals, and despite the risks involved, decide to form a shared community of interest.

The French Constitutional Court's *Herrou* judgment has received acclaim from a wide range of U.N. experts for leading the way towards the decriminalization of solidarity. It is cited as an example of how "some courts and constitutional councils have begun to push back against this wave of criminalization"[360] and as an indication of "a growing realization even within Governments of the anti-human rights

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State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens" can be subject to appropriate sanctions by the Member State. Facilitation Directive art. 1, ¶ 1(b), *supra* note 25, 2002 O.J. (L 328) at 17.

353. CNCDH, AVIS SUR LE PROJET DE LOI, *supra* note 274, at 57 (Recommendation n°35).

354. PROVERA, *supra* note 50, at 13.

355. Zirulia, *supra* note 11, at 258.

356. Vergnano, *supra* note 1, at 754–55.

357. *Id.*

358. CESEDA art. L823-9(3°).

359. Darian Meacham & Francesco Tava, *The Algorithmic Disruption of Workplace Solidarity: Phenomenology and the Future of Work Question*, 65 PHIL. TODAY 571, 581 (2021).

360. *Special Rapporteur Report: Visit to Hungary*, *supra* note 198, ¶ 73; *see* also Tusseau, *supra* note 211, at 63 (arguing that the Court sent an international message and launched a "jurisdictional paradiplomatic initiative").

nature of such edicts."[361] As former U.N. Independent Expert Okafor argued, "the example that France has set in the celebrated *Cedric Herrou* case is worthy of widespread emulation and replication."[362] Yet, those within the United Nations have also acknowledged the decision's shortfalls. For example, the U.N. Special Rapporteur on the Human Rights of Migrants noted the decision's limitations—specifically the Constitutional Court's refusal to exempt support to migrants at the border in the same way as in-country support.[363]

These various U.N. experts, however, fail to acknowledge that the concept of fraternity finds its basis in the French constitution and is unmistakably idiosyncratic to French law, and thus not readily transposable to other jurisdictions. That being said, the *Herrou* case is not totally devoid of significance for other jurisdictions, notably because the Constitutional Court indirectly referred to the concept of human dignity that is found in the constitutions of other European States. Indeed, the Court explained that immunity is given to acts that aim to preserve the dignity or the physical integrity of the foreign national;[364] however, this language stems from the wording of CESEDA and is not related to the distinct constitutional principle of the safeguard of the dignity of human beings ("*principe de sauvegarde de la dignité de la personne humaine*")[365] that the Constitutional Court consecrated in its July 27, 1994 decision.[366]

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361. *Independent Expert Report 2019: Human Rights and International Solidarity*, *supra* note 61, ¶ 48.

362. Obiora Chinedu Okafor, *On the Legality Under International Law of the Criminalization or Suppression of the Expression of Solidarity to Refugees*, 114 ASIL PROC. ANN. MEETING 102, 112 (2020).

363. *Special Rapporteur Report: Pushbacks of Migrants*, *supra* note 303, ¶ 88.

364. M. Cédric H. et autre, Conseil constitutionnel [CC] [Constitutional Court] decision No. 2018-717/718QPC, July 6, 2018, 0155 J.O. text no. 107/160, ¶ 14 (Fr.).

365. For a contrary opinion, see Fernanda Figueira Tonetto Braga & Sidney Guerra, *La protection de la dignité humaine comme point de convergence entre la constitutionnalisation et l'internationalisation du droit*, 21 REVISTA DE DIREITOS E GARANTIAS FUNDAMENTAIS 119, 132 (2020) (Fr.) ("La cour constitutionnelle française a utilisé le principe de la fraternité pour interpréter le droit pénal et le but humanitaire de l'acte, *en partant du concept de dignité humaine*." ["The French constitutional court used the principle of fraternity to interpret criminal law and the humanitarian purpose of the act, *starting from the concept of human dignity*."]) (emphasis added).

366. Loi relative au respect du corps humain et autre, Conseil constitutionnel [CC] [Constitutional Court] decision No. 94-343-344DC, July 27, 1994, 0174 J.O. 11024, 11024–25 (Fr.).

On a more theoretical level, the principles of fraternity and human dignity are intimately related.[367] Fraternity, conceived as a form of mutual aid amongst brothers, implies that one recognizes the human dignity of others. As Lazerges explains, "to penalise solidarity and fraternity when they are attempting to safeguard human dignity is in radical contradiction with the principle of equal dignity of human beings."[368] Going a step further, Paul Mathonnet, a lawyer representing the associations intervening in the *Herrou* case, argued that "[m]utual aid is not limited to relief, fraternity goes beyond the protection of human dignity."[369]

IV. USING THE CONCEPT OF HUMAN DIGNITY IN THE EUROPEAN CONTEXT

As the above shows, it is possible for the principle of fraternity to serve as a foundational and fundamental tool within French law to challenge the criminalization of solidarity at the national level. Part III described how the principles of fraternity and solidarity are tightly interlinked with other moral principles, which recur in the national legislation of other E.U. Member States. By comparison, the relationship between solidarity and human dignity is perhaps less evident, and yet worthy of consideration given the role of solidarity in the conceptual and legal development of human rights.

This Part argues that the provision of humanitarian assistance to migrants relies on the practice of human dignity—on the appeal to a common shared dignity as human beings. As discussed below, this consideration is relevant to the discussion on solidarity as a universal

367. *See* Herrou, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Nice, Chambre Correctionnelle No. 6, Feb. 10, 2017, 534/17, at 16 (Fr.) (on file with the *Columbia Human Rights Law Review*) (referring to "*état d'indignité*" [the state of indignity]). Further, that court observed that the defendant acted for the purpose of *protecting the dignity and integrity* of the migrants. *Id*. at 18. Similarly, in the case of *P.A.*, the Criminal Chamber of the Tribunal de Grande Instance of Nice stated that the individuals transported by P.A. clearly lived in conditions unworthy of them, making it impossible to ensure their safety despite being described as sick and weakened. P.A., Tribunal de Grande Instance [TGI] [ordinary court of original jurisdiction] Nice, Chambre Correctionnelle No. 7, Jan. 1, 2017, 85/17, at 7 (Fr.) (on file with the *Columbia Human Rights Law Review*). The same Chamber further ruled that P.A. acted for the purpose of *preserving the dignity and integrity of the three migrants*, using all means to assist and notably facilitating their exit from an unsuitable place by bringing them to safety in his apartment. *Id.* at 8.

368. Lazerges, *supra* note 120, at 273.

369. Mathonnet, Pleading on Behalf of Intervenors, *supra* note 94, at 3.

principle that overcomes sectorial divisions based on consanguinity and kinship. Moreover, speaking about human dignity allows one to draw a useful line between solidarity and human rights—another foundational pillar of the European Union.

A. Solidarity and Human Dignity

Numerous theorists have attempted to envision solidarity beyond the identitarian dimension that often characterizes this notion, and that is still apparent in the very etymology of the concept of fraternity (bond among blood brothers).[370] American philosopher Richard Rorty has highlighted the need for a revised conception of "human solidarity" in which narrower interpersonal relationships are overcome by gradually broadening the "we"-perspective.[371] Hannah Arendt, meanwhile, has argued that solidarity typically stems from human suffering, as well as the conversion of such suffering into renewed political action.[372] These arguments suggest that respect for human dignity, more than any traditional similarities based on notions like nationality or religion, is the foundation of a functional version of human solidarity.

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370. Fraternity comes from the Latin word 'frater,' which means brother. *Fraternity: Etymology*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/fraternity_n?tab=etymology#3650896 [https://perma.cc/GGK3-HZ6W]. Fraternity thus connotes a group of individuals who are brothers or at least part of the same family. *Fraternity: Meaning & Use*, OXFORD ENGLISH DICTIONARY (on file with the *Columbia Human Rights Law Review*).

371. As Rorty explains, in order to create human solidarity, one needs "to extend our sense of 'we' to people whom we have previously thought of as 'they.'" RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 192 (1989).

372. HANNAH ARENDT, ON REVOLUTION 88 (1990); *see also* Ken Reshaur, *Concepts of Solidarity in the Political Theory of Hannah Arendt*, 25 CAN. J. POL. SCI. 723, 723–36 (1992) (discussing Arendt's notion of solidarity). Although Arendt emphasizes the connection between solidarity and human suffering, she critiques conceptions of dignity and rights that are solely based on bare humanness. Francesco Tava, *Justice, Emotions, and Solidarity*, 26 CRITICAL REV. INT'L SOC. & POL. PHIL. 1, 8 (2021). In her account, access to political life is deemed a crucial condition for acquiring dignity and rights, as opposed to merely being alive. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 299 (Harcourt Brace & Co. 1973) [hereinafter ARENDT, ORIGINS OF TOTALITARIANISM]. Arendt argues that individuals devoid of a political life are rendered rightless, consequently being stripped (among other things) of their dignity. *Id.* Therefore, she posits that the right to have a political life serves as a safeguard for human dignity. Tava, *supra*, at 8–9.

This view acquired momentum in the aftermath of World War II. Facing the dramatic events of the 1930s and 1940s, the people of Europe had to contend with the consequences of traditional political ideologies, which had given rise to exaggerated confrontations based on membership in certain national or ethnic groups.[373] In that context, the very experience of war offered the opportunity to craft a new form of solidarity. Survivors' shared sense of shock and subsequent vulnerability following the war led to the formation of a new moral imperative to unite and support each other: to ensure that what happened during WWII never happens again, and that human dignity (of any human being, regardless of their nationality, religion, *et cetera*) is no longer trampled upon. Written in the aftermath of these events, the Preamble of the U.N. Charter perfectly encapsulates this feeling:

> WE THE PEOPLES OF THE UNITED NATIONS DETERMINED
>
> to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
>
> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . .[374]

The Charter frames human dignity as the essential starting point for creating new interpersonal bonds that would allow people to peacefully coexist while also supporting each other in a solidaristic manner. This idea of human dignity "embraces a recognition that the individual self is a part of larger collectivities and that they, too, must be considered in the meaning of the inherent dignity of the person."[375]

During that post-war era, the identical focus on the importance of human dignity as a prerequisite for human coexistence and

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373. These "pre-modern forms of solidarity," as Habermas labelled them—namely, all those forms of mere fellowship and followership of which the Nazi Führerprinzip is the most well-known and probably the deadliest example—had to be superseded by a broader and more humane form of solidarity. Jürgen Habermas, *Justice and Solidarity: On the Discussion Concerning 'Stage 6', in* THE MORAL DOMAIN: ESSAYS IN THE ONGOING DISCUSSION BETWEEN PHILOSOPHY AND THE SOCIAL SCIENCES 224, 244–45 (Thomas E. Wren ed., 1990); *see also* Gent Carrabregu, *Habermas on Solidarity: An Immanent Critique*, 23 CONSTELLATIONS 507, 509–13 (2016) (offering a thorough account of Habermas' understanding of solidarity).

374. U.N. Charter pmbl.

375. Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L. L. 848, 851 (1983).

solidarity was also evident in political and legal frameworks, particularly in the Universal Declaration of Human Rights of 1948 (UDHR).[376] Article 1 of the Declaration is, in this sense, particularly noteworthy: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[377] The UDHR was the first international legal instrument to introduce the moral notion of human dignity in strong conjunction with human rights.[378] Further, the subsequent introduction of human dignity in the post-war constitutions of various countries such as Germany[379] and Italy[380]—both countries whose previous regimes were involved with Nazi-fascist policies—marks, in a way, an attempt to legally ratify the new moral imperative.[381]

Another noteworthy aspect of Article 1 of the UDHR, which is particularly relevant to the discussion in this Article, is the connection it establishes between human dignity and brotherhood. Human dignity is not a mere possession, subject to presence or absence. Rather, it embodies a normative core, compelling individuals blessed with conscience and reason to safeguard this dignity "in a spirit of brotherhood."[382] By brotherhood, here, the UDHR clearly means a

376. *See, e.g.*, Rao, *supra* note 207, at 202 ("In the wake of the horrors of World War II, the international community, settled on 'human dignity' as the focal point for human rights and constitutional protections.").

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

378. For example, neither the U.S. Declaration of Independence of 1776 nor the Declaration of the Rights of Man and of the Citizen of 1789 draws such a parallelism. THE DECLARATION OF INDEPENDENCE (U.S. 1776); DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (Fr. 1789). Further, as Habermas has noted, "there is a striking temporal dislocation between the history of human rights dating back to the seventeenth century and the relatively recent currency of the concept of human dignity in codifications of national and international law, and in the administration of justice, over the past half century." Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, 41 METAPHILOSOPHY 464, 466 (2010).

379. Grundgesetz [GG] [Basic Law] art. 1, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html [https://perma.cc/3LPD-P4ND].

380. COSTITUZIONE [CONSTITUTION OF THE ITALIAN REPUBLIC] art. 3 (It.).

381. *See* Segado, *supra* note 210, at 453 (stressing that the inclusion of human rights in the Italian constitution is a distinctive marker of the "new" State after World War II from the totalitarian State created by fascism).

382. UDHR pmbl., *supra* note 377.

sense of universal connection based on the reality that all human beings are equal in dignity and rights.[383]

While "brotherhood" is not expressly referred to in other legal instruments, it is the concept of equality of all humans that supports the ideal of a shared humanity. Because all members of the human community are endowed with the same dignity, all must be treated equally.[384] The Preamble to the 1945 U.N. Charter,[385] as well as a wide range of human rights instruments, link human dignity and equality. The International Covenant on Political and Civil Rights (ICCPR), for example, mentions "the equal and inalienable rights of all members of the human family,"[386] while the Convention Against Torture spells out that the "equal and inalienable rights of all members of the human family . . . derive from the inherent dignity of the human person."[387]

Such a link is also announced at the regional level in the European Union. Article 2 of the TEU identifies human dignity and equality as values upon which the European Union is founded, then states that "[t]hese values are common to the Member States in a society in which . . . solidarity . . . prevail[s]."[388] As Sergio Carrera and Roberto Cortinovis argue, "Article 2 [of the] TEU seems in this way to posit legal principles such as human rights, rule of law and democracy as preconditions for solidarity to prevail."[389] A similar, albeit different, phrasing is used in the Preamble of the E.U. Charter of Fundamental Rights, which affirms that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity . . . ."[390] As Rao explains, "[a]s a baseline for recognizing our shared humanity, equal human dignity has a ringing appeal."[391] More fundamentally, human dignity is the right to belong to humanity, "the right to belong to a political community and never to be reduced to the

383. *See id.* ("To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . .").

384. Philippe Cossalter, *La dignité humaine en droit public français: l'ultime recours*, 4 REVUE GENERALE DU DROIT 1, 8 (2014) (Fr.), https://www.revuegeneraledudroit.eu/blog/2014/11/06/la-dignite-humaine-en-droit-public-francais-lultime-recours/ [https://perma.cc/ZKX8-HQTS].

385. U.N. Charter pmbl.

386. ICCPR pmbl., *supra* note 1, 999 U.N.T.S. at 172.

387. UNCAT pmbl., *supra* note 1, 1465 U.N.T.S. at 113.

388. TEU art. 2, *supra* note 24, 2016 O.J. (C 202) at 17.

389. CARRERA & CORTINOVIS, *supra* note 190, at 9.

390. CFR pmbl., *supra* note 168, 2012 O.J. (C 326) at 395.

391. Rao, *supra* note 207, at 208.

status of stateless animality."[392] Human dignity can only be acknowledged in that specific context; the human person being a member of a group that shares the same humanity. By treating other humans with dignity, one recognizes and projects one's own humanity onto them.[393]

This Article argues that this form of universal brotherhood, of shared humanity where all humans are equal, is the conceptual tool that can be used to challenge the current phenomenon of criminalization of solidarity.

B. The Principle of Human Dignity in National (Constitutional) Law and the Criminalization of Solidarity

The usefulness of the concept of human dignity as a *legal* principle in court proceedings is often questioned in law.[394] While some view it as a concept that does not belong to the realm of law,[395] and that is of limited usefulness,[396] others take the view that it has enough coherent content to be deployed in legal arguments.[397] This Article contends that the concept is best deployed as a constitutional principle and read in relation to human rights. Following an explanation of this approach, this Part highlights its advantages when used in the specific context of the criminalization of solidarity while acknowledging its limitations and caveats.

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392. JOHN DOUGLAS MACREADY, HANNAH ARENDT AND THE FRAGILITY OF HUMAN DIGNITY 109 (2018).

393. Catherine Dupré, *Human Dignity in Europe: A Foundational Constitutional Principle*, 19 EUR. PUB. L. 319, 329 (2013) [hereinafter Dupré, *Human Dignity in Europe*].

394. CATHERINE DUPRÉ, THE AGE OF DIGNITY: HUMAN RIGHTS AND CONSTITUTIONALISM IN EUROPE 85 (2015) [hereinafter DUPRÉ, AGE OF DIGNITY].

395. For examples of authors holding the opinion that human dignity is "by definition a-legal" ("*par définition a-juridique*"), see the works cited in Jacques Fierens, *La dignité humaine comme concept juridique*, 121 JOURNAL DES TRIBUNAUX 577, 581 n.51 (2002) (Fr.).

396. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 713 (2008); Ruth Macklin, *Dignity Is a Useless Concept*, 327 BRIT. MED. J. 1419, 1419 (2003).

397. ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 7 (updated ed. 2021); DUPRÉ, AGE OF DIGNITY, *supra* note 394, at 85; Hanna-Maria Niemi, *The Use of Human Dignity in Legal Argumentation: An Analysis of the Case Law of the Supreme Courts of Finland*, 39 NORDIC J. HUM. RTS. 280, 281 (2021); Eberle, *supra* note 209, at 202.

1. Human Dignity as a Constitutional Principle Related to Human Rights

The principle of human dignity is the foundation of human rights. As mentioned in Section IV.A, it features in a plethora of international human rights instruments.[398] Within Europe specifically, the E.U. Charter of Fundamental Rights affirms that "[h]uman dignity is inviolable. It must be respected and protected."[399] Even though it is not mentioned in the text of the European Convention on Human Rights, its Court has declared that "[t]he very essence of the Convention is respect for human dignity and human freedom,"[400] and it is widely accepted that human dignity is an underlying value of the Convention.[401] There is no doubt that the concept of human dignity is firmly anchored in human rights instruments at the international and regional level.[402] Moreover, it is viewed as a guiding principle, either appearing in the text of legal instruments—often in the preamble or

398. *See, e.g.*, U.N. Charter pmbl. ("[R]eaffirm[ing] faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small[.]"); UDHR art. 1, *supra* note 377 ("All human beings are born free and equal in dignity and rights."); ICCPR pmbl., *supra* note 1, 999 U.N.T.S. at 172 (recognizing "the inherent dignity and . . . the equal and inalienable rights of all members of the human family"); *id.* art. 10, ¶ 1, at 176 (declaring that all States Parties accept that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"); International Covenant on Economic, Social and Cultural Rights pmbl., *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976) ("Recognizing that these rights derive from the inherent dignity of the human person . . . ."); *id.* art. 3 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."). In *Bouyid*, the European Court of Human Rights lists all international and regional legal instruments that refer to human dignity. Bouyid v. Belgium, App. No. 23380/09, ¶¶ 45–47 (Sept. 28, 2015), https://hudoc.echr.coe.int/eng?i=001-157670.

399. CFR art. 1, *supra* note 168, 2012 O.J. (C 326) at 396.

400. Pretty v. the United Kingdom, App. No. 2346/02, ¶ 65 (Apr. 29, 2002), https://hudoc.echr.coe.int/fre?i=001-60448. The Court repeated this conclusion verbatim in a subsequent case. Svinarenko & Slyadnev v. Russia, App. Nos. 32541/08 & 43441/08, ¶ 118 (July 17, 2014), https://hudoc.echr.coe.int/?i=001-145817.

401. AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHTS 54 (Daniel Kayros trans., 2015).

402. *See* discussion *supra* Section IV.A (listing legal instruments that refer to human dignity).

first paragraphs, which articulate their fundamental values—or, as in the case of the European Convention, serving as their "essence."[403]

The concept of human dignity also features prominently in the national constitutions of E.U. Member States.[404] Reference to the concept has become a hallmark of constitutions crafted after World War II.[405] Such a "reinforcement of a constitutionalism of values"[406] results from the confluence of two movements. At the national level, the significance of the concept of human dignity has been increasingly recognized, as it has been acknowledged that a State's guarantee of freedoms is not sufficient to ensure the well-being and dignity of individuals.[407] At the international level, World War II pushed States to embrace human dignity as a fundamental value that was anchored in the U.N. Charter and the UDHR.[408] Undoubtedly, the adoption of the Charter of the United Nations and the UDHR acted as "an important signal and catalyst"[409] for the inclusion of human dignity at the constitutional level.

A worldwide quantitative and qualitative analysis carried out by Doron Shulztiner and Guy Carmi on 193 countries shows that human dignity is anchored in three different ways in national constitutions.[410] First, many constitutions include the concept of human dignity as a fundamental value or principle.[411] As a value, it

403. See legal instruments mentioned in *supra* note 398 (using the concept of human dignity in their preamble or substantive provisions).

404. Dupré, *Human Dignity in Europe*, *supra* note 393, at 320.

405. Segado, *supra* note 210, at 451.

406. Tonetto Braga & Guerra, *supra* note 365, at 130; *see also* Rao, *supra* note 207, at 204 (noting that "many countries have adopted values-based constitutionalism").

407. Tonetto Braga & Guerra, *supra* note 365, at 129–30.

408. *See* discussion *supra* Section IV.A (offering a brief overview of the history of the concept of human dignity post-WWII).

409. Doron Shulztiner & Guy Carmi, *Human Dignity in National Constitutions: Functions, Promises and Dangers*, 62 AM. J. COMPAR. L. 461, 462–63 (2014).

410. *Id.* at 476–83. It is interesting to note that at the E.U. level, human dignity is mentioned in the "common provisions" of the TEU Article 2, TEU art. 2, *supra* note 24, 2016 O.J. (C 202) at 17, and features several times in the Charter of Fundamental Rights of the European Union, CFR pmbl., *supra* note 168, 2012 O.J. (C 326) at 395; *id.* art. 1, at 396; *id.* art. 25, at 400; *id.* art. 31, at 401.

411. Shulztiner & Carmi, *supra* note 409, at 473. A situation not described by Shultziner and Carmi is when constitutions refer to the principle of human dignity indirectly in the preamble. For example, the 1958 French Constitution mentions explicitly the first recital of its preamble to the 1946 Constitution that refers to the concept of human dignity. 1958 CONST. pmbl. (Fr.) (citing 1946 CONST. pmbl.). The principle of human dignity is therefore part of the constitutional block ("*bloc de*

serves "as *a priori* bedrock-truth justification . . . for the entire constitution" and reflects "the identity of the political community members, as well as their shared history or narrative, and the common goals that they strive to achieve."[412] As a principle, it is mentioned along other, often competing principles, "creat[ing] a hierarchy of norms between the basic norms of society on the one hand, and the derived procedural directives on the other."[413] In this manner, the principle of human dignity comprehensively affects not only the constitution, as it "defines the obligations that run from the state to its citizens,"[414] but also all legislation that must comply with it. Second, human dignity is viewed in national constitutions as a guideline for the implementation of specific rights, and is thus endowed with a more operative, concrete meaning.[415] It often features in a section on fundamental rights.[416] Third, a rarer phenomenon, is that human dignity is viewed as a right itself.[417]

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constitutionnalité"). *See* Tonetto Braga & Guerra, *supra* note 365, at 131–32 (explaining that although the French Constitution of 1958 does not expressly refer to the principle of human dignity, its reference to the preamble of the Constitution of 1946 was used by courts to elevate the principle to a constitutional norm). The French Constitutional Court confirmed this in its decisions of 1994 and 1995 declaring that the safeguard of human dignity is a principle of constitutional value. Loi relative au respect du corps humain et autre, Conseil constitutionnel [CC] [Constitutional Court] decision No. 94-343-344DC, July 27, 1994, 0174 J.O. 11024, 11024 (Fr.); Loi relative à la diversité de l'habitat, Conseil constitutionnel [CC] [Constitutional Court] decision No. 94-359DC, Jan. 19, 1995, 0018 J.O. 1166, 1167 (Fr.).

412. Shulztiner & Carmi, *supra* note 409, at 473; *see also* Dupré, *Human Dignity in Europe*, *supra* note 393, at 323 ("The foundational role of dignity can be seen in the fact that this principle forms part of the defining characteristics of the new constitutional orders where it appears. Dignity generally is featured at the very start of constitutions, in the preambles and/or in the opening 'general principles.'").

413. Shulztiner & Carmi, *supra* note 409, at 473–74.

414. Rao, *supra* note 207, at 212; *see* also Dupré, *Human Dignity in Europe*, *supra* note 393, at 323 (noting that as a constitutional principle, the principle of human dignity is "a strong commitment to the respect and protection of humanity").

415. Shulztiner & Carmi, *supra* note 409, at 474–75.

416. *Id.* at 474.

417. *Id.* at 481; *see, e.g.*, MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, art. II, *translated in* MINISTRY OF JUST., THE FUNDAMENTAL LAW OF HUNGARY 8 (2021), https://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178 [https://perma.cc/2PPB-2Q4D] ("Every human being shall have the right to . . . human dignity."); ÚSTAVA SLOVENSKEJ REPUBLIKY [CONSTITUTION OF THE SLOVAK REPUBLIC], Sept. 3, 1992, art. 19(1), *translated in* CONSTITUTION OF THE SLOVAK REPUBLIC, https://www.prezident.sk/upload-

In this Article, the concept of human dignity is understood and used not only as a constitutional principle but also, as explained earlier, a principle related to human rights.[418] This remains the case when dignity is included in the preamble of a constitution, a section on fundamental principles, or a section on human rights. After scrutinizing the constitutions of all E.U. Member States to ascertain whether the concept of dignity is included in any of these three parts, the Authors identified and shaped their arguments using the following constitutions: Bulgaria,[419] Czech Republic,[420] Estonia,[421] Finland,[422] France,[423] Germany,[424] Hungary,[425] Ireland,[426] Italy,[427] Latvia,[428]

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files/46422.pdf [https://perma.cc/WV4B-73Z6] ("Everyone shall have the right to maintain and protect his or her dignity . . . ."); USTAVA REPUBLIKE SLOVENIJE [CONSTITUTION OF SLOVENIA] Dec. 23, 1991, art. 34, *translated in* Miro Cerar et al., *Constitution – Unofficial Consolidated Text*, DRŽAVNI ZBOR REPUBLIKA SLOVENIJA [NATIONAL ASSEMBLY REPUBLIC OF SLOVENIA] (June 2021), https://www.dz-rs.si/wps/portal/en/Home/AboutNA/PoliticalSystem/Constitution/ [https://perma.cc/86M8-M7GC] ("Everyone has the right to personal dignity . . . ."). While not clearly enunciated as a right in the German constitution, the jurisprudence of the German Constitutional Court has read human dignity into a right. *See e.g.*, Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, ECLI:EU:C:2004:614, ¶ 34 (Oct. 14, 2004) ("[I]n Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.").

418. *See, e.g.*, Shulztiner & Carmi, *supra* note 409, at 489–90 (distinguishing between human dignity as it relates to human rights and as a principle enshrined in domestic constitutions).

419. KONSTITUTSIYA NA REPUBLIKA BĂLGARIYA [CONSTITUTION OF BULGARIA] July 12, 1991, pmbl., arts. 4(2), 6(1) (Bulg.).

420. ÚSTAVNÍ ZÁKON Č. 1/1993 SB., ÚSTAVA ČESKÉ REPUBLIKY [CONSTITUTION OF THE CZECH REPUBLIC], pmbl. (Czech).

421. EESTI VABARIIGI PÕHISEADUS [CONSTITUTION OF THE REPUBLIC OF ESTONIA] June 28, 1992, art. 10 (Est.).

422. SUOMEN PERUSTUSLAKI [CONSTITUTION OF FINLAND] June 11, 1999, § 1 (Fin.).

423. *See* discussion *supra* note 411 (noting that the principle of dignity has been read into the 1958 French Constitution through its preambular reference to the preamble of the 1946 Constitution).

424. GRUNDGESETZ [GG] [BASIC LAW] art. 1 (Ger.), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html [https://perma.cc/3LPD-P4ND].

425. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, pmbl. (Hung.).

426. CONSTITUTION OF IRELAND 1937 pmbl. (Ir.), http://www.irishstatutebook.ie/eli/cons/en/html [https://perma.cc/74VM-6C7U].

427. COSTITUZIONE [CONSTITUTION OF THE ITALIAN REPUBLIC] art. 3 (It.).

428. LATVIJAS REPUBLIKAS SATVERSME [CONSTITUTION OF THE REPUBLIC OF LATVIA] Feb. 15, 1922, pmbl. (Lat.).

Poland,[429] Portugal,[430] Romania,[431] Slovak Republic,[432] Spain,[433] and Sweden.[434]

2. The Principle of Human Dignity and Criminalization of Solidarity

This Article argues that the combination of these two understandings of the concept of human dignity (i.e., as a constitutional principle and as a principle related to human rights) can be deployed by national and, in particular, constitutional courts to neutralize or lessen the effects of the criminalization of solidarity, in the same way that the French Constitutional Court used the principle of fraternity in the *Herrou* case.[435] This Section outlines the benefits of national courts using human dignity as a constitutional value or principle linked to human rights.

First, courts can use the constitutional principle of human dignity as a higher norm to strike down incompatible legislation.[436] According to Jacques Fierens, although other scholars maintain that the principle of human dignity is often deployed when there is no alternative concrete legal basis,[437] courts also recognize that it can

429. KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION OF THE REPUBLIC OF POLAND] Apr. 2, 1997, pmbl., art. 30 (Pol.).

430. CONSTITUIÇÃO DA REPUBLICA PORTUGUESA [C.R.P.] arts. 1, 13 (Port.), English translation available at https://diariodarepublica.pt/dr/geral/en/relevant-legislation/constitution-of-the-portuguese-republic [https://perma.cc/5KXA-WYNY].

431. CONSTITUTIA ROMANIEI [CONSTITUTION OF ROMANIA] Nov. 21, 1991, art. 1(3) (Rom.).

432. ÚSTAVA SLOVENSKEJ REPUBLIKY [CONSTITUTION OF THE SLOVAK REPUBLIC] Sept. 3, 1992, art. 12(1) (Slovk.).

433. CONSTITUCIÓN ESPAÑOLA [CONSTITUTION OF SPAIN] [C.E.], art. 10(1), B.O.E. n. 311, Dec. 29, 1978, at 4 (Spain).

434. REGERINGSFORMEN [RF] [CONSTITUTION] 1:2 (Swed.).

435. This Article does not deal with the specific constitutional and procedural arrangements of all E.U. Member States and how individuals can raise constitutional principles and rights in their national courts.

436. A caveat (though concerning a non-E.U. member state) is that the United Kingdom's constitutional order does not allow courts to strike down any principal Act of Parliament even if the Act is incompatible with human dignity because of the principle of parliamentary sovereignty. MARK ELLIOT & ROBERT THOMAS, PUBLIC LAW 349 (Oxford Univ. Press 2020). However, a court can make a declaration of incompatibility under Section 4 of the Human Rights Act, thus stating that a national law provision does not comply with the European Convention on Human Rights. Human Rights Act 1998, c. 42 (UK).

437. Fierens, *supra* note 395, at 579. As Rao explains, "[t]his raises the question of whether dignity can be anything more than a rhetorical gloss on a

become a general principle of law, a higher norm.[438] Being enshrined in a constitution—the supreme law of a country—and acknowledged as a principle of constitutional value signifies that constitutional courts can conduct judicial review of the constitutionality of legislation in light of the principle of dignity.[439] Therefore, much like James Munby, this Article contends that it is not "simply a piece of rhetoric, an empty slogan"; rather, it is capable of doing the heavy lifting by being a guiding principle,[440] and is thus useful in tackling the criminalization of solidarity.

Second, the use of the principle of human dignity rather than specific human rights means that one can move away from the usually highly individualized approach adopted in classic human rights law. According to Edward Eberle, "[d]ignity is not merely a focus on individuality."[441] For Catherine Dupré, the constitutional concept of humanity is in Europe understood in its relational dimension—that is, "the fact that human beings live together and are in constant and complex interaction."[442] For example, Eberle explains that if the principle of human dignity permeates the constitution and so imposes obligations upon the State and its organs, it takes on a communitarian approach: "by requiring respect for others' claims to dignity, vindication for the human dignity of all is better assured, and a community of mutual cooperation and solidarity is fostered."[443] After all, the German Constitutional Court has on several occasions referred to the individual as one that is "related and bound by the community."[444] This, combined with the recognition of the equality of humankind, means that the criminalization of solidarity could be eliminated by referring to the notion of a shared dignity, under which an individual is a member of a larger (human) community.

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judicial decision that rests on other legal and political factors." Rao, *supra* note 207, at 208.

438. Fierens, *supra* note 395, at 579.

439. Tusseau, *supra* note 211, at 47.

440. James Munby, *Why Do We Ignore Dignity?: Some Comments*, 2 EUR. HUM. RTS. L. REV. 119, 125 (2019).

441. Eberle, *supra* note 209, at 206.

442. Dupré, *Human Dignity in Europe*, *supra* note 393, at 326.

443. Eberle, *supra* note 209, at 206.

444. Life Imprisonment Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 45 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 187, 227 (1977) (Ger.). Several comments were made in the Investment Aid Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 4 BVERFGE 7, 15–16 (1954) (Ger.), and the Klass Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 30 BVERFGE 1, 20 (1970) (Ger.).

Third, the principle of human dignity bridges the divide between first- and second-generation rights and presents a more well-rounded view of an individual's predicament.[445] The concept of human dignity stresses the indivisible nature of human rights and enables us to view individuals holistically. The CJEU imparted this type of broadly encompassing view in the *Haqbin* case, referring to both the physical and mental well-being of migrants.[446] All the needs of human beings must be accounted for; "[e]conomic and social arrangements cannot therefore be excluded from a consideration of the demands of dignity."[447] In constitutional law, the principle of dignity has been referred to in relation to both generations of rights.[448] The array of types of aid to migrants—such as providing legal services, recharging phones, buying a train ticket, feeding, clothing, offering shelter and transportation, *et cetera*—shows that the rights involved belong to both the first and second generations of human rights, with assistance for both often provided concurrently. Humanitarian assistance is often viewed by those providing it as "embod[ying] more than life and health and includ[ing] support that enable[s] safety and *dignity*,"[449] the

445. The concept of generations of human rights stems from Karel Vasak, *A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, 30 UNESCO COURIER 29, 29 (1977). While first-generation rights cover civil and political rights, second-generation rights include economic, social, and cultural rights. *Id.*

446. Case C-233/18, Zubair Haqbin v. Federaal Agentschap voor de opvang van asielzoekers, ECLI:EU:C:2019:956, ¶ 46 (Nov. 12, 2019); *see also* Selanec & Petrić, *supra* note 220, at 507 (stating that the CJEU's approach "represents a holistic view of a person that does not distinguish between their physical and mental wellbeing").

447. Schachter, *supra* note 375, at 851.

448. Both first- and second-generation rights are mentioned in the "Fundamental Rights" section of several constitutions. *See, e.g.*, EESTI VABARIIGI PÕHISEADUS [CONSTITUTION OF THE REPUBLIC OF ESTONIA] June 28, 1992, arts. 16, 20, 28, 29, 37 (Est.) (guaranteeing the first-generation rights to life (Article 16) and freedom and security of person (Article 2), as well as the second-generation rights to health (Article 28), work (Article 29), and education (Article 37)); SUOMEN PERUSTUSLAKI [CONSTITUTION OF FINLAND] June 11, 1999, §§ 7, 9, 16, 18, 19 (Fin.) (guaranteeing the first-generation rights to life (Section 7) and freedom of movement (Section 9) as well as the second-generation rights to education (Section 16), work (Section 18), and social security (Section 19)). All rights within these sections are explicitly tied to concept of dignity. *See* discussion *supra* notes 419–434 and accompanying text (referring to the provisions relating to human dignity in national constitutions).

449. This statement is based on twenty interviews carried out by Rabe and Haddeland with individuals who had supported Afghan nationals whose applications for asylum had been rejected. Rabe & Haddeland, *supra* note 106, at 1640.

concept of dignity being a recurring theme in their discourse.[450] Using the principle of human dignity eliminates the need to specify which rights are engaged in each act of assistance and offers a better recognition of migrants' needs.

Fourth, by taking a human rights approach to the concept of human dignity, the principle is endowed with a more concrete substance. At the core of human dignity is the right to have rights:[451] it is "a principle that justifies and generates norms."[452] Indeed, all human rights are derived from it.[453] For example, the Preamble to the ICCPR "[r]ecogniz[es] that these rights derive from the inherent dignity of the human person,"[454] and the official commentary to the E.U. Charter of Fundamental Rights explains that "[t]he dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights."[455] More specifically, universal and regional human rights monitoring and enforcement bodies (as well as national courts) have linked the concept of human dignity to the following rights: the right to life,[456] the prohibition on torture, inhuman

450. Vergnano, *supra* note 1, at 753–54.

451. The theory of the "right to have rights" belongs to Hannah Arendt, who first outlined it in her highly influential work *The Origins of Totalitarianism*. ARENDT, ORIGINS OF TOTALITARIANISM, *supra* note 372, at 296. For Arendt, the productive political condition provided by the right to have rights is what confers on individuals the political agency to claim rights. *Id.* at 296–97. In other words, the primary connection of individuals to this shared world is the *basis* of the right to have rights. *See also* Selanec & Petrić, *supra* note 220, at 510–14 (offering a legal and political reading of human dignity as the "right to have rights" in E.U. Law).

452. Marcus Düwell, *Refugee and Migration Policy on the Basis of Human Dignity*, *in* COSMOPOLITAN NORMS AND EUROPEAN VALUES 139, 141 (Marie Göbel & Andreas Niederberger eds., 2023); *see also* Eberle, *supra* note 209, at 206 (explaining that in relation to the German Constitution "[a] core aspect of human dignity is the guarantee of human rights").

453. Düwell explains that "[h]uman rights requirements are concretisations of this respect for human dignity." Düwell, *supra* note 452, at 141. As Schachter points out, this statement is, however, historically flawed: "[T]he idea of dignity reflects sociohistorical conceptions of basic rights and freedoms, not that it generated them." Schachter, *supra* note 375, at 853.

454. ICCPR pmbl., *supra* note 1, 999 U.N.T.S. at 172.

455. *Explanations Relating to the Charter of Fundamental Rights,* 2007 O.J. (C 303) 17, 17.

456. Aviation Security Act Case, Bundesverfassunsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 357/05, Feb. 15, 2006, ¶ 120 (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/02/rs20060215_1bvr035705en.html [https://perma.cc/9GH5-G2ZZ].

or degrading treatment,[457] the right to respect for private and family life,[458] the right to an adequate standard of living,[459] the right to healthcare,[460] the right to work,[461] and the right to social security.[462] That being said, the detailed substance of specific human rights is irrelevant here, as the principle of human dignity is understood as an overarching guiding principle.

Further, unlike referring to specific human rights, using the concept of human dignity would avoid focusing solely on each right allegedly violated. It would also avoid courts getting caught up in determining whether these rights are justiciable and whether they have been violated. First-generation rights, which from the State's point of view are obligations of result, are very well accepted.[463] By contrast, second-generation rights, which from the State's perspective are obligations of means, are less so[464] because they often require

457. Tyrer v. United Kingdom, App. No. 5856/72, ¶ 33 (Apr. 25, 1978); Bouyid v. Belgium, App. No. 23380/09, ¶ 81 (Sept. 28, 2015), https://hudoc.echr.coe.int/eng?i=001-157670.

458. Goodwin v. United Kingdom, App. No. 28957/95, ¶ 90 (July 11, 2002), https://hudoc.echr.coe.int/eng?i=001-60596; *see also* Nicola Braganza, *Human Dignity: A Lesser Right for Refugees?*, EUR. HUM. RTS. L. REV. 144, 145 (2019) (noting that the European Court of Human Rights has expressly tied the right to private and family life to the notion of human dignity because that dignity "protects the core value of the quality of life").

459. *Report of the Independent Expert on Human Rights and International Solidarity: Human Rights and International Solidarity*, ¶ 1, U.N. Doc. A/76/176 (July 19, 2021) [hereinafter *Independent Expert Report 2021: Human Rights and International Solidarity*].

460. *See* Lopes de Sousa Fernandes v. Portugal, App. No. 56080/13, ¶ 24 (Dec. 19, 2017) (Pinto de Albuquerque, J., dissenting in part, concurring in part), https://hudoc.echr.coe.int/eng?i=001-179556 (quoting the European Committee of Social Rights for the assertion that "human dignity is the fundamental value and indeed the core of positive European human rights law").

461. *Independent Expert Report 2021: Human Rights and International Solidarity, supra* note 459, ¶ 1.

462. UDHR art. 22, *supra* note 377.

463. Comm. on Econ., Soc. & Cultural Rts., Rep. on the Seventh Session, U.N. Doc. E/1993/22-E/C.12/1992/2, supp. no. 2, annex III, ¶ 5 (1993).

464. In 2006, the U.N. Commissioner for Human Rights stated that "in spite of the inclusion of economic, social and cultural rights in legally binding treaties, legal protection of these rights in practice is considerably weaker than in the case of other rights and should be strengthened." U.N. Econ. & Soc. Council, Report of the United Nations Commissioner for Human Rights, ¶ 3, U.N. Doc. E/2006/86 (June 21, 2006). The Commissioner thus concluded that, "[d]espite constant political reaffirmation of the interdependence of all human rights, particularly since the 1993 Vienna Declaration and Programme of Action, efforts to protect economic, social and cultural rights are weaker than for other human rights." *Id.*; *see also* Nigel Rodley,

States to set up institutions to ensure a minimum standard (i.e., minimum core obligation) is reached and sustained.[465] The justiciability of second-generation human rights is frequently contested.[466] A related issue is whether the threshold of violation has been reached. For example, freedom from inhuman treatment is a right that the State must guarantee immediately; yet, whether the threshold of inhuman (rather than degrading) treatment has been reached is highly contested both in the jurisprudence and the literature.[467] Second-generation human rights—such as the right to food,[468] shelter, and water—offer specific minimum standards a State must follow, and, again, there are uncertainties concerning the level of support a State is meant to provide. Using the principle of human dignity renders such discussions redundant. The national courts do not need to see or find that a specific right or threshold thereof has been violated; they can use the more flexible concept of human dignity to put an end to the overall criminalization of solidarity.

Fifth, the concept of human dignity, especially when taking a human rights approach, enables us to refer to the negative and positive obligations of States.[469] The distinguishing features of European constitutionalism, as Dupré stresses, are the duty to respect *and*

International Human Rights Law, *in* INTERNATIONAL LAW 775, 783 (Malcolm D. Evans ed., 5th ed. 2018) (pointing out the financial cost of implementing economic, social, and cultural rights).

465. While Article 2 of the International Covenant on Economic, Social and Cultural Rights obliges States to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant (obligation of means or conduct), this "obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights" (obligation of result). U.N. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 3: The Nature of State Parties' Obligations (Art. 2, Para 1, of the Covenant), ¶ 9, U.N. Doc. E/1991/23 (Dec. 14, 1990).

466. Tusseau, *supra* note 211, at 44–45.

467. Smith explains that there is a "hierarchy of treatment." RHONA SMITH, INTERNATIONAL HUMAN RIGHTS LAW 237–38 (8th ed. 2018). The European Court of Human Rights discussed in detail the minimum level of severity required for inhuman versus degrading treatment in *Bouyid*. Bouyid v. Belgium, App. No. 23380/09, ¶¶ 86–87 (Sept. 28, 2015), https://hudoc.echr.coe.int/eng?i=001-157670.

468. U.N. Comm. on Econ., Soci. & Cultural Rts., General Comment No. 12: The Right to Adequate Food (Art. 11), ¶ 17, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

469. *See* Aviation Security Act Case, Bundesverfassunsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 357/05, Feb. 15, 2006, ¶ 120 (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/02/rs20060215_1bvr035705en.html [https://perma.cc/9GH5-G2ZZ] (discussing the positive and negative obligations in relation to the right to life and human dignity).

protect dignity.[470] States are "obliged to respect, protect and promote the conditions that enable life in society, in a framework where the minimal dignity of the human being is respected."[471] Negative obligations are often couched in terms of respect for the individual—that is, the State refraining from acting against the human dignity of an individual.[472] In contrast, positive obligations refer to the State's obligations to act and thus provide some form of services to prevent the deprivation of an individual's human dignity; such obligations require States to provide some form of public engagement and support.[473] If a State is not offering such services, then it is under the "positive obligation to seek and facilitate humanitarian action (through an act of delegation) and a negative obligation not to prevent it."[474] In other words, States have a duty not to prohibit or prevent access to humanitarian services. As the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions clearly states, "[a]cts prohibiting or otherwise impeding humanitarian services violate the obligation of States to respect the right to life. Any death linked to such prohibition would constitute an arbitrary deprivation of life."[475] By stressing the State's obligation to preserve the human dignity of migrants through assistance, a national court can strike down legislation that criminalizes aid to migrants.

A concrete example of such an act in the context of the criminalization of solidarity is the ban on the distribution of food to migrants ordered by the mayor of Calais, France. In 2017, the administrative court of Lille struck down the mayor's ban on the ground that "by frustrating migrants' vital basic needs, the mayor of [Calais] has committed a serious and manifestly unlawful violation . . . of the right not to be subjected to inhuman and degrading treatment enshrined in article 3 of the European Convention on Human

470. Dupré, *Human Dignity in Europe*, *supra* note 393, at 336.

471. Tonetto Braga & Guerra, *supra* note 365, at 134.

472. "[S]tates have a negative obligation not to take any measures that result in a violation of a given right. They should not consciously violate rights . . . . This obligation not to interfere with rights is perhaps the most classical one." Frédéric Mégret, *Nature of Obligations, in* INTERNATIONAL HUMAN RIGHTS LAW 96, 102 (Daniel Moeckli et al. eds., 2018).

473. Dupré, *Human Dignity in Europe*, *supra* note 393, at 337–38.

474. *Special Rapporteur Report: Saving Lives Is Not a Crime*, *supra* note 51, ¶ 29.

475. *Id.* ¶ 27.

Rights."[476] It is thus logical to argue that the "[c]riminalization of acts of solidarity and compassion constitute violations of the State's obligation under the right to life."[477] Even if such criminalization does not engage the right to life, it is at minimum a violation of the human dignity of the migrants. As Erin Daly observes, some aspects of human dignity require a "positive claim to government actions that ensure equality or overcome difficult conditions, whatever their causes."[478]

Also, as explained earlier, individuals who have provided support[479] have been prosecuted.[480] In a case where a clergy member offered shelter to individuals without lawful residence in France, the court exclaimed:

> Whereas, it being a matter of a fundamental freedom, the State, if it does not have the means to satisfy a request of a homeless person for shelter, must delegate this duty to provide emergency shelter to any other legal or natural person having the capacity to accommodate homeless people . . . . Whereas it is therefore paradoxical that the State continues today to prosecute [Father Riffard] for having done what it should have done itself . . . .[481]

The U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has asserted that "States should exempt humanitarian assistance from laws prohibiting 'assisted stay' on the basis that simply providing the basics of human existence—food, water, shelter,

476. Association l'Auberge des migrants et autres, Tribunal administratif [TA] [regional administrative courts of first instance] Lille, Mar. 13, 2017, 1702397, ¶ 11 (Fr.) (on file with the *Columbia Human Rights Law Review*).

477. *Special Rapporteur Report: Saving Lives Is Not a Crime*, *supra* note 51, ¶ 12.

478. DALY, *supra* note 397, at 127.

479. *See* Abigail Taylor & Alexandre Lefebvre, *Three Reasons for Hospitality: Care for Others, Care for the World, and Care of the Self*, 20 PERSPS. ON POL. 139, 144 (2022) (explaining why and how citizens offer assistance to undocumented migrants).

480. Loic Le Dall explains that "*une réaction solidaire est punissable alors que les entraves multiples aux droits et les atteintes à l'intégrité des personnes aux frontières par l'administration française deviennent choses acceptables*" ["a united reaction is punishable whereas multiple obstructions to rights and attacks on the integrity of individuals at the borders by the French administration become acceptable"]. Press Release, Association nationale d'assistance aux frontières pour les étrangers, La CEDH saisie pour mettre fin aux « délits de solidarité » ["ECHR Seized to Put an End to "Solidarity Crimes"] (June 22, 2024) (Fr.), http://www.anafe.org/spip.php?article681 [https://perma.cc/CHA5-3CLS].

481. *Special Rapporteur Report: Saving Lives Is Not a Crime*, *supra* note 51, ¶ 29.

sanitation and clothing—should not be criminalized."[482] There is thus little doubt that the criminalization of solidarity is a violation of the principle of human dignity.

Sixth, using the concept of human dignity enables us to bring the protection of vulnerable groups to the foreground by recognizing their inherent human dignity. As explained in the Introduction, solidarity is about defending those most vulnerable in society. In law, human dignity is often used to protect the rights of people belonging to vulnerable minority groups. Dupré underlines that the power relationship between individuals and the State, and its (re)balancing in favor of human beings, is a recurring issue in dignity case law.[483] More poignantly, Nicola Braganza explains that the protection offered by human dignity "extends to all, especially the marginalized and easily forgotten,"[484] and that "[h]uman dignity is about valuing an individual and recognizing their self-worth."[485] Vulnerable groups are defined as individuals who have historically been disadvantaged,[486] who are often viewed as inferior, and/or whose sense of self has been undermined. Asylum-seekers have been viewed in the jurisprudence of the European Court of Human Rights as "a particularly underprivileged and vulnerable population group in need of special protection."[487] The Court has adopted this position based on "a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the [U.N. High Commissioner for Refugees] and the standards set out in the Reception Directive."[488]

Thus, it can be argued that the criminalization of solidarity towards migrants goes against the principle of human dignity. This means that individuals brought to trial for assisting migrants under their national legal order ought to raise the issue of the incompatibility of the law criminalizing such assistance with the concept of human dignity as enshrined in the constitution.

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482. *Id.* ¶ 68.

483. DUPRÉ, AGE OF DIGNITY, *supra* note 394, at 102–03.

484. Braganza, *supra* note 458, at 151.

485. *Id.*

486. Oršuš v. Croatia, App. No. 15766/03, ¶ 147 (Mar. 16, 2011), https://hudoc.echr.coe.int/eng?i=001-97689.

487. M.S.S. v. Belgium, App. No. 30696/09, ¶ 251 (Jan. 21, 2011), https://hudoc.echr.coe.int/fre?i=001-103050.

488. *Id.*

3. Caveats and Limitations to the Proposal

Using the concept of human dignity to end the criminalization of solidarity towards migrants is unfortunately not without flaws. Two points ought to be noted. First, the principle of "human dignity" can be interpreted narrowly. Second, because national courts must balance the principle of human dignity with other principles of constitutional value, the balance might not always favor the principle of human dignity.

The concept of "human dignity" is indisputably ambiguous; "both those who support the use of the term and those who critique it acknowledge that the term is vague and thus open to broad interpretation."[489] Human dignity is closely linked to public morality and "often serves as an open-ended legal term that can be filled with prevailing moral preferences."[490] As Shulztiner and Carmi remind us, "human dignity was originally and intentionally used in the UDHR precisely for its open-ended nature and indeterminacy, and because it could appeal to people of various ideological backgrounds, without forcing them to compromise basic principles."[491] In addition, Rao highlights that "[i]f constitutional rights are understood to be shaped by values that are defined by social and political forces, then it is hard to maintain a separation between constitutional rights and other political imperatives."[492] Human dignity is thus understood in light of political and ethical imperatives. Whereas the concept of human dignity is associated with the respect, protection, and promotion of human rights in democratic countries,[493] it can become a tool used to undermine human rights,[494] notably in countries marred by intergroup tensions or facing external or internal security threats.[495]

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489. Shulztiner & Carmi, *supra* note 409, at 462; *see also* Fierens, *supra* note 395, at 581 (stating that few commentators do not criticize the notion of human dignity and that common criticisms include vagueness, lack of legal value, and susceptibility to manipulation).

490. Rao, *supra* note 207, at 208; *see also* Paolo Carozza, *Human Dignity in Constitutional Adjudication*, *in* RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW 459, 465 (Tom Ginsburg & Rosalind Dixon eds., 2011) (providing examples of differing approaches to human dignity by courts in various nations which reflect differences in the specific political, social, and cultural contexts of those nations).

491. Shulztiner & Carmi, *supra* note 409, at 471–72.

492. Rao, *supra* note 207, at 226.

493. Shulztiner & Carmi, *supra* note 409, at 483.

494. *Id.* at 490.

495. *Id.* at 484.

An analysis by Veronika Fikfak and Lora Izvorova reveals "a great variety of understandings of the concept [of human dignity] throughout the Council of Europe."[496] Yet such understandings chiefly fall into two conceptions of human dignity. One focuses on "the position occupied by [a person] within public life," while the second concerns "the special position of [a person] within the cosmos."[497] Dignity is relative according to the first conception, but absolute according to the second.[498] Under the first interpretation, human dignity is only afforded to certain groups or individuals and denied to others. It depends "on the status, conduct, or beliefs of individuals."[499] Accordingly, this interpretation does not account for shared humanity based on the concept of human dignity. For example, the Constitutional Court of Hungary ruled that "according to the Fundamental Law, human dignity is the dignity of an individual *living in a society and bearing the responsibility of social co-existence*."[500] In other words, human dignity can be taken away from individuals that are not deemed deserving. As Nóra Chronowski and Gábor Halmai stress, "[v]ulnerable groups—people living in deep poverty, homeless people, refugees—cannot rely on the protection of their dignity."[501] Such an interpretation repudiates the idea that *all* humans are endowed with human dignity and that there is a minimum core of human dignity that must be respected and protected. Chronowski and Halmai argue that "[t]he recent case law of the Hungarian Constitutional Court reaffirms the initial concerns, that solidarity supported by human dignity got lost in illiberal transition."[502] In other words, a constitutional court can, using the principle of human dignity, draw conclusions that are in contravention of the principle of solidarity. However, it should be emphasized that such interpretations are unlikely in States with strong democratic traditions.

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496. Veronika Fikfak & Lora Izvorova, *Language and Persuasion: Human Dignity at the European Court of Human Rights*, 22 HUM. RTS. L. REV. 18, 23 (2022) (disagreeing with the idea that there is a common conception of dignity throughout the Council of Europe but rather a variety of understandings of dignity).

497. Paolo Becchi, *Human Dignity in Europe: Introduction*, *in* HANDBOOK OF HUMAN DIGNITY IN EUROPE 1, 2 (Paolo Becchi & Klaus Mathis eds., 2019).

498. Selanec & Petrić, *supra* note 220, at 507.

499. Fikfak & Izvorova, *supra* note 496, at 24.

500. Nóra Chronowski & Gábor Halmai, *Human Dignity for Good Hungarians Only: The Constitutional Court's Decision on the Criminalization of Homelessness*, VERFASSUNGSBLOG (June 11, 2019), https://verfassungsblog.de/human-dignity-for-good-hungarians-only/ [https://perma.cc/3M3C-X4KT].

501. *Id.*

502. *Id.*

Another difficulty with using the principle of human dignity as a solution is that, as seen in the *Herrou* case, it must be balanced against other principles of constitutional value.[503] Indeed, constitutional principles have the same value, and no hierarchy is established between them. It is thus left to a constitutional court (or a similar court) to carry out this weighing exercise and decide whether the legislature has undertaken a proper balancing act. Schulztiner and Carmi argue that even when using the formulation that "human dignity is inviolable," it is still a difficult theoretical undertaking to balance injuries to the principle against other rights, principles, and public interests more generally.[504] For example, the German Constitution rejects "any balancing with the inviolable value of human dignity; hence any right, value, or public interests that conflict . . . must yield to dignity or the conflict must be framed as an internal conflict within the general bounds of dignity so as to not violate this basic value."[505] "[D]ignity is the highest legal value in Germany" and "its guarantee is the essence of the German social order."[506] In the *Aviation Security Act* case, the German Constitutional Court indicated that "[h]uman life is the vital basis of human dignity as the essential constitutive principle, and as the supreme value, of the constitution."[507] Similarly, on October 16, 1997, the Constitutional Court of Romania stated that the principle of human dignity is a supreme value of the Romanian rule of law.[508] Such an approach means that other constitutional principles cannot push aside the principle of human dignity and thus support the criminalization of solidarity. The German and Romanian constitutional examples clearly show that the principle of human dignity is an irreducible core that cannot be tampered with.[509] This core is spelled out in *abstract terms* by the German

503. Brunet, *supra* note 208, at 263.

504. Shulztiner & Carmi, *supra* note 409, at 470.

505. *Id.*

506. EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VALUES IN GERMANY AND THE UNITED STATES 42 (2002); *see also* Segado, *supra* note 210, at 454–60 (offering an in-depth analysis of the concept of human dignity in the German Constitution and legal order).

507. Aviation Security Act Case, Bundesverfassunsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 357/05, Feb. 15, 2006, ¶ 119 (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/02/rs20060215_1bvr035705en.html [https://perma.cc/9GH5-G2ZZ].

508. Fierens, *supra* note 395, at 580.

509. *See* Segado, *supra* note 210, at 466 (discussing this notion in relation to constitutional jurisprudence in Spain).

Constitutional Court[510] and in *concrete terms* by the Court of Justice of the European Union,[511] which read the principle of human dignity into the Reception Directive.[512]

The balance a constitutional court must strike is between this interpretation of the principle of human dignity and the principles of individual liberty,[513] secularism ("*laïcité*"),[514] protection of public order, public interest, rule of law, proportionality, legality, and constitutional identity, among others. In *Herrou,* the French Constitutional Court indeed brandished the principle of protection of public order against the principle of fraternity and agreed that while the latter prevailed regarding assistance with migrant transit, the former prevailed regarding aid for the entry of migrants. Whether the balance has been struck correctly between those principles is debated amongst French scholars, as discussed in Section III.B. States wield the protection of sovereignty as a shield against migrants, thus arguing that allowing individuals to aid migrants is a threat to the State's sovereignty. In balancing the principles of human dignity and State sovereignty, the latter seems to irremediably win in certain countries. For example, the Constitutional Court of Hungary used the principle of sovereignty and constitutional identity to deny human dignity to migrants. The Court asserted that the "Stop Soros" Law "was a necessary response to the

510. *See* Aviation Security Act Case, BVerfG, 1 BvR 357/05, Feb. 15, 2006, ¶ 121 (recalling that public authorities are absolutely prohibited from treating human beings in a manner that questions their quality as a subject, their status as a legal entity, and disrespects the value due to every human being).

511. *See* Case C-233/18, Zubair Haqbin v. Federaal Agentschap voor de opvang van asielzoekers, ECLI:EU:C:2019:956, ¶ 46 (Nov. 12, 2019) (concluding that "respect for human dignity" within the meaning of Article 1 of the Charter of Fundamental Rights requires that people are not subjected to "extreme material poverty that does not allow that person to meet his or her most basic needs . . . and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity . . . ."); *see also* Case C-163/17, Abubacarr Jawo v. Bundesrepublik Deutschland, ECLI:EU:C:2019:218, ¶ 92 (Mar. 19, 2019), (finding that extreme material poverty is incompatible with human dignity); M.S.S. v. Belgium, App. No. 30696/09, ¶¶ 252–63 (Jan. 21, 2011), https://hudoc.echr.coe.int/fre?i=001-103050 (finding that under European human rights law, extreme material poverty is incompatible with human dignity).

512. Directive 2013/33, of the European Parliament and of the Council of 26 June 2013 on Laying down Standards for the Reception of Applicants for International Protection, 2013 O.J. (L 180) 96–97, 99.

513. 1958 CONST. art. 66 (Fr.).

514. *Id.* art. 1.

challenges to border protection presented by the massive and uncontrolled influx of immigrants since 2015."[515]

Marta Minetti notes that when "combining the narrative of the populist leader embodying 'the true people's will' with the protection of national interests and State sovereignty, any measure that opposed the supposed 'peoples' [sic] will', would be taken to violate State sovereignty."[516] A court, in such circumstances, is likely to yield to the people's will. In 2019, Viktor Kazai argued that the Hungarian Constitutional Court in the *Stop Soros Law* decision "tried to find a fair compromise between avoiding direct confrontation with the governing majority and offering constitutional protection to human rights NGOs."[517] Yet, a couple of years later, he accepted that "the Constitutional Court is not only extremely deferential to the political branches in sensitive cases, but it also proactively helps the government to achieve its aims."[518] Again, courts of States with strong democratic and rule of law traditions are unlikely to bow to populist views that disregard long-held constitutional principles and values.

As demonstrated, there are undoubtedly flaws with the proposal to use human dignity as a principle of constitutional value informed by human rights in order to put an end to the criminalization of solidarity in E.U. Member States. Yet it remains the most viable and effective solution.

CONCLUSION

The criminalization of solidarity has been a long-standing problem in Member States of the European Union. It is not a new

515. Viktor Z. Kazai, *Stop Soros Law Left on the Books – The Return of the "Red Tail"?*, VERFASSUNGSBLOG (Mar. 5, 2019), https://verfassungsblog.de/stop-soros-law-left-on-the-books-the-return-of-the-red-tail/ [https://perma.cc/YM89-LJCZ]; *see* Gábor Halmai & Nóra Chronowski, *The Decline of Human Dignity and Solidarity Through the Misuse of Constitutional Identity: The Case of Hungary Since 2010*, *in* HUMAN DIGNITY AND DEMOCRACY IN EUROPE 177, 188–89 (Daniel Bedford et al. eds., 2022) ("According to Justice Minister László Trócsányi migration threatens the 'self-identity' of Hungarians [under] the Seventh Amendment [which] supplement[s] the preamble of the constitution . . . .").

516. Marta Minetti, *International Legal Principles, Penal Populism and Criminalisation of 'Unwanted Migration': An Italian Cautionary Tale*, 24 INT'L CMTY. L. REV. 358, 375 (2022).

517. Kazai, *supra* note 515.

518. Viktor Z. Kazai, *Constitutional Complaint as Orbán's Tool: Judicial Assistance for the Reinforcement of the Government's Interests*, VERFASSUNGSBLOG (Mar. 1, 2022), https://verfassungsblog.de/constitutional-complaint-as-orbans-tool/ [https://perma.cc/4XZ6-36YW].

phenomenon, but the 2015 migrant crisis combined with a reemergence of nationalist and populist tendencies has undoubtedly emboldened many States to pass laws that criminalize solidarity towards migrants.[519] This trend is becoming increasingly worrying as States like Hungary are actively and shamelessly suppressing support for migrants—in law and in practice—in flagrant violation of international and European law and in breach of the values at the foundation of the European Union.[520]

The criminalization of solidarity towards migration reveals a much deeper issue in E.U. Member States, namely, the treatment of "others." Fundamentally, this treatment questions the worth of individuals and their human dignity. But because growing anti-migrant rhetoric is poorly countered at the E.U. level—especially as an increasing number of individuals in these States fall prey to nationalist discourses—even States that are keen on acting in pursuance of E.U. and international law find it difficult to advance a more nuanced view within the European Union. In this light, it is unlikely that a solution will be found at the E.U. level alone, given that the Council represents the States and the European Parliament comprises many right-wing groups.

Accordingly, this Article argues that the solution to the criminalization of solidarity towards migrants lies at the national level and, more specifically, in national courts that offer a progressive approach to combat laws against solidarity towards migrants. In the French courts, the principle of fraternity was successfully deployed to prevent the prosecution of individuals who supported migrants.[521] The *Herrou* decision was widely and internationally acclaimed as leading the way to a more compassionate approach towards migrants and those assisting them.[522] Yet, despite this initial positive reaction, it is a difficult judgment to emulate as it relied on the principle of fraternity, which is unique to French constitutional law.

To address this challenge, this Article conducted a conceptual analysis that clearly establishes the interconnectedness of the concept

519. *See supra* Introduction (tracing the evolution of the criminalization process of solidarity).

520. *See supra* Sections II.A.1, II.A.2 (explaining how E.U. Member States have created an anti-migration environment in breach of E.U. values).

521. *See supra* Section III.B (focusing on the case of *Herrou* which was the first case that elevated fraternity to a constitutional principle and led to a change in the French law on the prosecution of those helping migrants).

522. *Id.* (providing examples of scholars and United Nations experts supporting the *Herrou* case).

of human dignity with those of fraternity and solidarity, both in terms of historical development and conceptual relevance. Unlike fraternity, the significance of human dignity extends beyond France and holds a prominent place in the constitutional frameworks of various European States, which either explicitly incorporate the principle or recognize its constitutional significance.

This Article proposes a pragmatic solution—one that simply consists of encouraging national courts to recognize that they can rely on the principle of human dignity enshrined in constitutional law to strike down legislation and measures criminalizing assistance to irregular migrants.[523] Specifically, this Article contends that this principle serves as a valuable tool for national courts to adopt when adjudicating such cases, ensuring that States adhere to both E.U. and human rights legal standards. After all, it must be remembered that Europe is known as "the birthplace of dignity as a philosophical and constitutional concept," underlining the region's historical and intellectual roots in shaping the discourse on human dignity.[524] More concretely, this means that when individuals are brought to court for "unlawful" assistance to migrants, they ought to question the validity of the relevant legislation or measure it in light of the principle of human dignity. Courts should then adopt a human rights approach to the concept of human dignity to provide the fullest protection to those supporting migrants.

While one can take a pessimistic view by focusing on the plethora of problems that the European Union faces in relation to migration and nationalism, one can also remember that the European Union is formed by many States that comply with human rights law and that the rule of law is fundamental to their good functioning.[525] It

523. *See supra* Section IV.B.2 (explaining how the principle of human dignity can be used by national courts with a view towards decriminalizing solidarity towards migrants).

524. Dupré, *Human Dignity in Europe*, *supra* note 393, at 319.

525. Article 2 of the TEU states that "the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including [minority] rights of persons . . . . are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." TEU art. 2, *supra* note 24, 2016 O.J. (C 202) at 17. Moreover, the Commission has produced an annual report since 2010 on the application of the Charter of Fundamental Rights in the European Union. European Commission, *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, at 12–13, COM (2010) 573 final (Oct. 19, 2010). Since 2020, it has also produced a report on the Rule of Law. European Commission, *Strengthening the Rule of Law Within the Union: A Blueprint for*

is thus unlikely that the forces that are driving some European States towards right-wing governments will be able to change the political, legal, and judicial landscape to entirely reinforce the criminalization of solidarity at both the national and the European level. In fact, the hard-right-leaning national-conservative Law and Justice Party (PiS) in Poland lost their majority in Parliament in the October 2023 elections[526] and the Rassemblement National, a right-wing populist and nationalist party in France, failed to gather a majority in the June–July 2024 general elections.[527] Moreover, the constitutional and institutional mechanisms in place in the vast majority of E.U. Member States are powerful enough to ensure that courts remain independent in their interpretation and application of the law. Accordingly, this Article argues that the solution to the criminalization of solidarity might lie in the use of the powerful concept of human dignity that was created after World War II to prevent a resurgence of attitudes and conduct that led to the atrocities committed during that war. Revitalizing this concept in the present context, amid new conflicts and atrocities, presents a significant opportunity to cultivate pro-social behavior and fight hideous phenomena such as crimmigration. Doing so lays the foundation for a renewed sense of solidarity and togetherness, emphasizing the collective responsibility to address contemporary challenges.

Action, at 11, COM (2019) 343 final (July 17, 2019). Whilst the Commission highlights issues with the application of human rights and the rule of law, it generally casts a positive picture of the situation in E.U. Member States. *See* Laurent Pech, *The Rule of Law as a Well-Established and Well-Defined Principle of EU Law*, 14 HAGUE J. ON RULE L. 107, 109 (2022) (explaining that there is evidence of strong and widespread support for the rule of law in E.U. Member States).

526. STEFANO FELLA, POLAND: 2023 PARLIAMENTARY ELECTIONS AND NEW GOVERNMENT, 5 (2024), https://researchbriefings.files.parliament.uk/documents/CBP-9951/CBP-9951.pdf [https://perma.cc/RZ3L-AMR7].

527. Hanne Cokelaere & Victor Goury-Laffont, *France Election Results 2024: Who Won Across the Country*, POLITICO (July 7, 2024), https://www.politico.eu/article/france-election-results-2024-map-constituencies-emmanuel-macron-marine-le-pen-live-new-popular-front-national-rally/ [https://perma.cc/V9YU-RBEY].