
THE POSTCOLONIAL PROBLEM FOR GLOBAL GAY RIGHTS

Stewart Chang*

ABSTRACT	309
INTRODUCTION	310
I. FRAMING GLOBAL GAY RIGHTS IN THE POSTCOLONIAL STATE: DECOLONIZATION, ILLIBERAL PRAGMATISM, AND SINGAPORE'S AMBIVALENT RELATIONSHIP WITH NEOLIBERALISM	317
II. THE LEGAL HISTORY OF 377A AND THE WESTERNIZED CONSTITUTIONAL CHALLENGE	324
III. THE LIM MENG SUANG DECISION: READING ANTI-NEOLIBERAL INTENT INTO THE 2007 PARLIAMENTARY DEBATES	328
IV. THE EMPIRE STRIKES BACK: THE AFTERIMAGES OF IMPERIALISM IN THE ANTI-NEOCOLONIAL RETENTION OF 377A	336
V. REVISITING TRADITIONAL VALUES IN THE 2007 PARLIAMENTARY DEBATES: A NEW HOPE?	344

ABSTRACT

As the United States and Europe have progressed to the issue of same-sex marriage, countries that are still working through antecedent issues, such as the decriminalization of anti-sodomy laws, are regarded by international gay rights advocates as lagging behind the times. This often leads to pressures from the Western-dominated international community for reform. This Article contributes to the ongoing scholarly debate between international human rights activists who desire to advance gay rights by utilizing the same rights-based models that prevail in the United States and Europe and critics of this approach who deem the universal imposition of Western standards for gay rights upon non-Western countries as constituting a new type of imperialism and subordination. This Article analyzes, for the first

* Assistant Professor of Law, Whittier Law School. I am grateful to Erez Aloni, Cheow Thia Chan, Lynette Chua, Bill Eskridge, Sonia Katyal, Holning Lau, Eng-Beng Lim, Sheldon Lyke, Manoj Mate, Kaipo Matsumura, Julie Nice, Jeff Redding, Natsu Taylor Saito, and Seval Yildirim for their helpful conversation, feedback, and comments.

time, the question of neocolonialism within the global gay rights movement from a postcolonial Asian perspective, focusing on the recent legal dispute regarding Singapore's anti-sodomy statute, Penal Code Section 377A, as a case study.

This Article challenges the one-size-fits-all model for gay rights advocacy often presumed by Western human rights activists, particularly in light of the colonial histories of many Eastern Hemisphere nations. For its postcolonial governance, Singapore adopted a hybridized strategy that paradoxically embraced Western capitalistic economic growth while simultaneously rejecting some major liberal values associated with capitalism. In particular, concepts such as government noninterference and individual privacy, which are core tenets of Western gay rights discourse, have proved problematic in Singapore. During decolonization, Singapore purposely designed some of its laws to recover and reflect indigenous Asian values, which eventually developed into a form of cultural nationalism that distinguished it from a perceived moral indulgency of the West. This Article explores how this postcolonial tension played a crucial role in the choice by the Singaporean Parliament to uphold 377A during the reforms to the Penal Code in 2007, but was largely ignored in the subsequent constitutional challenge against 377A in the courts. The constitutional challenge was premised on a Western liberal model of individual negative rights, which the Author of this Article argues led to its failure as a neocolonial venture because it threatened to discount and subordinate the will of the indigenous Asian culture. Instead, the Author proposes applying intersectional analysis from Critical Race Theory to find a method for advancing gay rights in postcolonial Asian nations, such as Singapore, that is sensitive to not only the cultural nuances, but also the postcolonial sensibilities of local indigenous populations. The ultimate goal of this Article is to prevent gay rights from becoming another neocolonial enterprise that imposes yet another form of subordination on non-Western foreign governments and populations. Through intersectional analysis, the Author suggests ways in which gay rights can potentially create bridges of mutual empowerment that address, accommodate, and alleviate residual layers of subordination left in the wake of Western imperialism.

INTRODUCTION

Following the favorable rulings in support of gay marriage by the United States Supreme Court in *United States v. Windsor*¹ and *Hollingsworth v. Perry*,² Representative Susan Davis of California declared, "Today the court moved us into the 21st Century where future genera-

¹ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

² *Hollingsworth v. Perry*, 570 U.S. ____ (2013).

tions can be proud of who they are.”³ Congresswoman Davis’ statement illustrates the ways in which the recognition of gay rights has often been framed as an issue of modernity and progress.⁴ Just as it had done when citing *Dudgeon v. United Kingdom*⁵ for the decriminalization of homosexual activity in *Lawrence v. Texas*,⁶ the United States followed the precedent of Europe in “modernizing” with respect to gay marriage.⁷ As has been the case with other “modern” human rights, the shift in European and American policy tacitly becomes a cue for the remaining parts of the globe to catch up.⁸ Indeed, in recent years, gay rights have increasingly

³ Press Release, Susan Davis, Statement on Supreme Court Rulings on DOMA and Prop. 8, (June 26, 2013), <http://www.house.gov/susandavis/press2013/pr062613.shtml>.

⁴ Concerning a new lawsuit filed by the American Civil Liberties Union (“ACLU”) for marriage equality in Pennsylvania, Pennsylvania ACLU Legal Director Witold Walczak said, “What we’re looking for is for the court to say: Here we are in the 21st century, and you cannot prohibit somebody from participating in this wonderful institution we call marriage.” Rich Lord & Monica Disare, *Federal Lawsuit Seeks to Legalize Gay Marriage in Pennsylvania*, PITTSBURGH POST-GAZETTE, July 9, 2013, http://www.post-gazette.com/stories/0/hp_breaking/federal-lawsuit-seeks-to-legalize-gay-marriage-in-pennsylvania-694787. Former U.S. President Bill Clinton, for example, issued a statement to the Human Rights Campaign where he reversed his previous position on prohibiting gay marriage and said, “For more than a century, our Statue of Liberty has welcomed all kinds of people from all over the world yearning to be free. In the 21st century, I believe New York’s welcome must include marriage equality.” *Bill Clinton Supports Marriage Equality in New York*, HRC BLOG (Aug. 2, 2013, 11:44 AM), <http://www.hrc.org/blog/entry/bill-clinton-supports-marriage-equality-in-new-york>.

⁵ *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981).

⁶ *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (endorsing the prevailing international standard for gay rights as significant authority, noting that the European Court of Human Rights case *Dudgeon v. United Kingdom* was “[a]uthoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), [which] is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization”).

⁷ Since 2001, several European nations have legalized same-sex marriage: the Netherlands (2001), Belgium (2003), Spain (2005), Norway (2008), Sweden (2009), Iceland (2010), Portugal (2010), and Denmark (2012). Some other Western countries outside of Europe have also legalized gay marriage: Canada (2005), South Africa (2006), Argentina (2010), and Mexico (2010). Ian Curry-Sumner, *A Patchwork of Partnerships: Comparative Overview of Registration Schemes in Europe*, in *LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE: NATIONAL, CROSS-BORDER AND EUROPEAN PERSPECTIVES* 71, 72 (Katharina Boele-Woelki & Angelika Fuchs eds., 2d ed. 2012).

⁸ BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* 248 (2003) (critiquing the way human rights in developing countries are constructed as playing “catch-up with the West”); see also AIHWA ONG, *FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY* 29 (1999) (“When I was a child growing up in

become an issue of international human rights.⁹ Within the discourse of modernity and progress that is commonly evoked in human rights debates, those countries that recognize the rights of sexual minorities are considered modern, which by implication casts those countries that do not recognize such rights as un-modern or pre-modern.¹⁰ Often in this discourse, the West is configured as the archetype of inevitable progress, while the East is “Orientalized”¹¹ as a backwards and undeveloped wilderness for gay rights.¹² Yet such a framing of gay rights employs the

Malaysia, it seemed as though we were always trying to catch up with the West, which was represented first by Great Britain and later by the United States.”); Keith Aoki, *Space Invaders: Critical Geography, the “Third World” in International Law and Critical Race Theory*, 45 VILL. L. REV. 913, 925 (2000) (describing how the Third World has been popularly characterized by “irrational local fundamentalism . . . technological ‘backwardness,’ or simply lack of modernity”).

⁹ See Human Rights Council, Human Subcomm, Follow-up and Implementation of the Vienna Declaration and Programme of Action, Agenda Item 8 on its 17th Sess., *Sexual Orientation and Gender Identity*, U.N. Doc A/HRC/17/L.9/Rev.1 (15 June 2011); U.N. High Comm’r for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011); see also YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY (2007).

¹⁰ See Katherine Franke, *Dating the State: The Moral Hazards of Winning Gay Rights*, 44 COLUM. HUM. RTS. L. REV. 1, 5 (2012) (“Modern states are expected to recognize a sexual minority within the national body and grant that minority rights-based protections. Pre-modern states do not. Once recognized as modern, the state’s treatment of homosexuals offers cover for other sorts of human rights shortcomings.”).

¹¹ EDWARD W. SAID, *ORIENTALISM* (1979) (using the term “Orientalism” to critique the construction and marginalization of the East as an “Other” culture against which Western culture defines and legitimates itself as an archetypical standard); see also EDWARD W. SAID, *CULTURE AND IMPERIALISM* xi, xvii (1993).

¹² Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 804-05 (2005) (“Both *Reynolds* and *Lawrence* involved the hot-button social issues of their day and both cases resolved those issues by referring to the beliefs and practices of the peoples of northern and western Europe. Both cases decidedly rejected appeal to the practices of peoples in Africa, Asia, and the Islamic world where polygamy is legal, contrary to *Reynolds*, and where gay rights are nonexistent, contrary to *Lawrence*.”) (citation omitted); Holning Lau, *Grounding Conversations on Sexuality and Asian Law*, 44 U.C. DAVIS L. REV. 773, 776-78 (2011) (“The article argued that Justice Kennedy chose not to cite Asian practices when writing the majority opinion in *Lawrence v. Texas* because ‘gay rights are nonexistent’ in Asia. Remarkably, the article provided no citation to support that overdrawn claim about Asia. The example from the William and Mary Law Review is particularly jarring because *Lawrence v. Texas* concerned the invalidation of sodomy laws. One can reason that, when the authors spoke of ‘gay rights,’ they meant to include a right to be free from criminal prosecution for

same rhetoric that was previously deployed in colonialism.¹³ Though the push towards modernity under the European vision of universal gay rights proved successful in influencing the United States in the *Lawrence* decision,¹⁴ which the Supreme Court subsequently relied on in *United States v. Windsor*,¹⁵ there should not be a presumption that the same model should apply everywhere. Rather, in order to more effectively reach non-Western nations throughout the world – especially those with colonial pasts – the gay rights movement must consider and overcome the potential neocolonialism within the current universalist approach to global gay rights, and become more cognizant of the particular historical and cultural contexts of each nation.

As Katherine Franke recently remarked, there has been a “centrality and manipulation of sexuality and sexual rights in struggles for and against the civilizing mission that lies at the heart of key aspects of globalization.”¹⁶ In her essay, *Dating the State: The Moral Hazards of Winning Gay Rights*, Franke described the current polarization between “human rights groups and activists who seek to secure human rights protections for subordinated, oppressed, tortured, and murdered sexual minorities around the globe.” She also discussed Joseph Massad who “derides the work of LGBT human rights actors and organizations for a kind of missionary zeal to universalize Western, sexualized identities that have little or no fit with the ways in which sexuality – or, for that matter, identity – takes form in settings outside the West.”¹⁷ Franke sought to position herself outside the debate as she illuminates the coopting of the gay rights movement by liberal states to legitimize themselves and deflect attention

consensual sodomy. By the time the Court decided *Lawrence* in 2003, numerous Asian jurisdictions had already repealed sodomy laws. For example, Japan repealed its sodomy law in 1882. Thailand did so in 1956. Rights advocates in Hong Kong successfully lobbied for decriminalization of consensual sodomy in 1991. Arguably, decriminalization of sodomy in Asia has not always been framed as a rights development; however, in certain jurisdictions such as Hong Kong, rights discourse was indisputably a driving force for decriminalization. It is worth noting that, in some parts of Asia, sodomy laws have never been on the books. If we consider Asia and the Pacific islands together as a region, we should also take note of Fiji, which amended its constitution in 1997 to proscribe sexual orientation discrimination explicitly. Contrary to the assertion in the *William and Mary Law Review*, gay rights were not ‘nonexistent’ in Asia in 2003.” (citations omitted); see also Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002) (critiquing the Orientalizing of China as “lacking law”).

¹³ See *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (phrasing its support of the European standard using the language of “civilization”).

¹⁴ *Id.*

¹⁵ *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

¹⁶ Franke, *supra* note 10, at 2.

¹⁷ *Id.* at 3.

away from other human rights violations they may commit.¹⁸ This in turn functions as a form of Western exceptionalism.¹⁹

The Author of this Article further unpacks Franke's argument by considering it within Massad's point that the global gay rights movement is a neocolonial enterprise,²⁰ which the Author proposes also promotes Western exceptionalism through propagating an amnesia of the colonial past. The use of global gay rights to legitimize the Western liberal state not only deflects attention from other human rights violations,²¹ but often redirects censure against indigenous subjectivities for which Western colonialism is actually in part responsible. The goal of this Article is not to simply critique and reject global gay rights,²² but to recollect and revisit the memory of colonialism as a crucial element of national subjectivity that must be considered in any effective strategy when advocating for gay rights in non-Western countries with colonial histories. Whereas much of the debate surrounding Massad's views has focused on the Middle East, Central Europe, and Northern Africa, which are constructed

¹⁸ *Id.* at 42; see also Arnaldo Cruz-Malavé & Martin F. Manalansan IV, *Dissident Sexualities/Alternative Globalisms, Introduction* to QUEER GLOBALIZATIONS: CITIZENSHIP AND THE AFTERLIFE OF COLONIALISM 5 (Arnaldo Cruz-Malavé and Martin F. Manalansan IV, eds., 2002) ("Another trope of globalization discourses is perhaps potentially more sinister: the appropriation and deployment of queer subjectivities, cultures, and political agendas for the legitimation of hegemonic institutions presently in discursive crisis, institutions such as the nation-state or U.S. imperial hegemony.").

¹⁹ Natsu Taylor Saito, *Human Rights, American Exceptionalism, and the Stories We Tell*, 23 EMORY INT'L L. REV. 41, 42 (2009) (defining "exceptionalism" as the "practice of unilaterally exempting itself from participation in international organizations and human rights treaties while simultaneously insisting that the rest of the world comply with international norms."); see also DONALD E. PEASE, THE NEW AMERICAN EXCEPTIONALISM 7 (2009) ("American exceptionalism includes a complex assemblage of theological and secular assumptions out of which Americans have developed the lasting belief in America as the fulfillment of the national ideal to which other nations aspire."); JASBIR K. PUAR, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES 3 (2007) ("[E]xceptionalism paradoxically signals a distinction from (to be unlike, dissimilar) as well as excellence (imminence, superiority), suggesting a departure from yet mastery of linear teleologies of progress.").

²⁰ See Joseph Massad, *Re-Orienting Desire: The Gay International and the Arab World*, 14 PUB. CULTURE 361, 361-62 (2002) (coining the term "Gay International" to describe international gay advocacy organizations who seek to impose a Westernized conception of gay rights onto non-Western nations without taking into consideration possible incompatibilities with their paradigms of sexuality).

²¹ See Franke, *supra* note 10, at 5.

²² See Amr Shalakany, *On a Certain Queer Discomfort with Orientalism*, 101 AM. SOC'Y INT'L L. PROC. 125, 128 (2007) (arguing that the protections advocated for by the global gay rights movement are still important for the oppressed Egyptian bottom).

and Orientalized as Islamic regions dichotomous from the West, this Article focuses on Asia. Postcolonial and anti-neoliberal reaction has not been as extreme in Asia, which has facilitated attempts by some governments in the region to explore hybridized models of Western capitalization and liberalization that still retain Eastern cultural integrity and communitarianism.²³

As a case study, this Article analyzes recent developments in Singapore's anti-sodomy statute – Section 377A of the Penal Code (“377A”). Recent legislative and legal challenges to the statute not only demonstrate the problems of applying Westernized models of gay rights to Asian countries, but also illustrate the particular complications of gay rights advocacy in a distinctly postcolonial context.²⁴ The political and legal struggle in Singapore over 377A (consisting of the political mobilization for and against its repeal), the Parliamentary debate and eventual decision to retain 377A, and the subsequent constitutional challenge and decision are all consistent with the position of compromise taken by the Singaporean government when it comes to its local gay community.²⁵ This position is neither one of proactive support nor of vigorous condemnation.²⁶ Audrey Yue describes this intermediate position as “illiberal pragmatics . . . characterized by the ambivalence between non-liberalism and neoliberalism, rationalism and irrationalism.”²⁷ Yue defines the position as the deliberate ambivalent strategy that Singapore assumed regarding its relationship to the West for its governance as a postcolonial state – neither a strategy of active embrace nor of absolute rejection.²⁸ Illiberal pragmatism represents an ideological compromise by the postcolonial Singaporean government that desired the benefits of Western models for economic growth,²⁹ but was simultaneously suspicious of Western influ-

²³ See Aihwa Ong & Li Zhang, *Introduction* to *PRIVATIZING CHINA: SOCIALISM FROM AFAR 1-20* (Aihwa Ong & Li Zhang, eds., 2008).

²⁴ See JON BINNIE, *THE GLOBALIZATION OF SEXUALITY* 9 (2004) (suggesting that the postcolonial queer position is caught between “the universalist tendencies within lesbian and gay politics and the heteronormativity of post-colonial criticism”).

²⁵ Audrey Yue, *Queer Singapore: A Critical Introduction*, *Introduction* to *QUEER SINGAPORE: ILLIBERAL CITIZENSHIP AND MEDIATED CULTURES* 17 (Audrey Yue & Jun Zubillaga-Pow eds., 2012).

²⁶ SINGAPORE PARLIAMENT REPORTS vol. 83 at cols. 2469-2472 (23 October 2007).

²⁷ *Id.* at 17; see also MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., 1958) (employing the binary typologies of rationalism and irrationalism in order to argue how, in the era of decolonization, the irrationalism attributed to cultural beliefs in developing countries was an impediment to economic development).

²⁸ Yue, *supra* note 25, at 15.

²⁹ See generally Kenneth Chan, *Gay Sexuality in Singaporean Chinese Popular Culture: Where Have All the Boys Gone?* 22.2 *CHINA INFORMATION* 305, 310 (2008) (assessing media portrayals, or the lack thereof due to censorship, of gay culture in Singapore as caught between Singapore's desire to present itself as a culturally open

ence and globalization potentially diluting indigenous values and national identity.³⁰

Under illiberal pragmatism the Singaporean government, as a matter of official policy, engaged in institutionalized sexual-orientation discrimination and repression to signal its independent morality apart from Western influence while, at the same time, unofficially tolerating a growing gay scene.³¹ This tension was central to the compromise reached during the Parliamentary debates of 2007. The debates led to the retention of 377A but also an unofficial policy of non-enforcement against private sexual conduct.³² However, this tension was largely ignored in the subsequent constitutional challenge to 377A in the courts, which was premised instead on a Western liberal model of individual negative rights. The Author of this Article argues that this inevitably led to the failure of the repeal movement in its refusal to address the tensions of postcolonial Singaporean subjectivity. Instead, this Article proposes a modified intersectional strategy for gay rights in Singapore to address the historically-complex ethnic, cultural, and postcolonial inter-dynamics of the Singaporean government and its people.³³

This Article analyzes, for the first time, the problem of neocolonialism within the global gay rights movement from a postcolonial Asian perspective – focusing on Singapore as a case study – and looks for an alternative strategy by utilizing an intersectional analysis. Part I analyzes the difficulty of imposing the same liberal approach to gay rights (as set forth in *Dudgeon* and relied on in *Lawrence*) on postcolonial Asian countries like Singapore. Singapore specifically adopted a strategy of illiberal pragmatism for decolonization that paradoxically embraces Western capitalism while simultaneously rejecting certain liberal values associated with capitalism. Part II recounts the legal history of 377A in Singapore up to the present day, including its colonial origins, the failed political movement to repeal it in October 2007, and the subsequent constitutional challenge that was decided in April 2013. Part II then frames the judicial and Parliamentary decisions to uphold 377A within two simultaneous, yet competing, perspectives. The two perspectives ultimately reveal the complex and conflicted nature of current Singaporean cultural attitudes surround-

and vibrant society in its bid to be part of the global capitalist network, while continuing to hold onto its archaic anti-sodomy laws inherited from the British).

³⁰ Stewart Chang, 'Flexible Citizenship' in Wena Poon's *Short Stories: Writing at the Interstices of Asia and America*, 50 SOUTHEAST ASIAN REV. OF ENG. 47, 52 (2011) (exploring the "nervous ambivalence concerning the role Western [capitalization] and consumerism has played in Singapore's development, especially in relation to an eroding sense of national identity," particularly among the older generation of Singaporeans who lived during the colonial era).

³¹ Yue, *supra* note 25, at 5.

³² SINGAPORE PARLIAMENT REPORTS vol. 83 at col. 2402 (23 October 2007).

³³ Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

ing gay rights. Part III discusses this nature as a deliberately anti-neocolonial statement that affirms the indigenous values of its postcolonial population. Part IV discusses this nature as a specter of colonial domination. This Article argues that by upholding a colonial law, the government actually subsumes native culture within a residual colonial structure, which deflects attention away from the problematic colonial law and instead allows for a new form of neocolonial discipline by the international rights community. In this way, this Article frames the gay rights debate in Singapore as a continuing problem of colonialism rather than a culture war. Part V proposes applying intersectional approaches to gay rights in Singapore to envision conduits of congruence. These methods deal with the multi-faceted nature of current Singaporean subjectivity,³⁴ which may enable more effective strategies that are not based on neocolonial rights-based ideologies opposed by the Singaporean government and its people.³⁵ The Author's ultimate goal is to prevent gay rights from becoming another neocolonial enterprise that imposes yet another form of subordination on non-Western foreign governments and populations, and to investigate ways in which gay rights can instead create bridges of mutual empowerment that address, accommodate, and alleviate residual layers of subordination left in the wake of Western imperialism.

I. FRAMING GLOBAL GAY RIGHTS IN THE POSTCOLONIAL STATE:
DECOLONIZATION, ILLIBERAL PRAGMATISM, AND
SINGAPORE'S AMBIVALENT RELATIONSHIP WITH
NEOLIBERALISM

Following decolonization, Singapore's public policy has largely embraced neoliberalism for the sake of pragmatic economic development.³⁶ The relatively recent willingness of the Singapore government to at least address gay rights has been regarded as a neoliberal move to

³⁴ Yue, *supra* note 25, at 15.

³⁵ See e.g., Yvonne C.L. Lee, "Don't Ever Take a Fence Down Until You Know the Reason It Was Put Up" – Singapore Communitarianism and the Case for Conserving 377A, 2008 SING. J. LEGAL STUD. 347, 349-50 (2008) ("In the most comprehensive statement of governmental policy towards the homosexual agenda, PM Lee maintained that 377A would be retained; while homosexuals would be accommodated and have space to lead quiet lives, the Singapore government would not 'allow or encourage activists to champion gay rights as they did in the West.'").

³⁶ CHUA BENG HUAT, COMMUNITARIAN IDEOLOGY AND DEMOCRACY IN SINGAPORE 59 (1995) (describing how pragmatism emerged as the dominant conceptual framework for postcolonial governance, which embraces "vigorous economic development orientation that emphasises [sic] science and technology and centralised [sic] rational public administration as the fundamental basis for industrialisation [sic] within a capitalist system, financed largely by multinational capital").

become more Western-friendly in the interest of attracting international business and labor.³⁷ The extension of global gay rights discourse into Singaporean politics as a matter of economic interests, however, has been criticized by some as operating within neocolonial capitalist expansionism.³⁸ This critique is consistent with Dennis Altman's claim that globalization pressures nations to "inevitably mirror the dominant ideological strength of rich countries."³⁹ Indeed, the gay rights movement, even in the United States, has arguably been advanced in good measure by affluence and the global movement of capital.⁴⁰ Nations that desire to enter the global market are expected to "Westernize"⁴¹ and follow Western-influenced international standards.⁴² These standards are expressed in

³⁷ Meredith L. Weiss, *Diversity, Rights, and Rigidity in Singapore*, 36 N.C. J. INT'L L. & COM. REG. 625, 638 (2011) ("The government's efforts to shift its stance toward gays and lesbians – the better to lure the creative class – ultimately sparked rights claims in two directions: first, from or on behalf of LGBT Singaporeans, and second, from Christians (and to a less vocal extent, Muslims) demanding the state maintain standards of morality and 'family values.'").

³⁸ Eng-Beng Lim, *Glocalqueering in New Asia: The Politics of Performing Gay in Singapore*, 57 NO. 3 THEATRE J. 383, 383 (2005) ("The global propagation of Western gay culture is generally perceived as a progressive development that is liberating sexual minorities in third world countries. Called 'global queering' by some theorists, this neoliberal model of free market transmission, by which an emancipatory and often glamorized Western gay culture is transforming the rest of the world, presumes a primarily North American and secondarily European standard constituting what we think of as 'modern homosexuality.'"); see also Mindy J. Roseman & Alice M. Miller, *Normalizing Sex and its Discontents: Establishing Sexual Rights in International Law*, 34 HARV. J. L. & GENDER 313, 360-61 (2011) ("The Organization of the Islamic Conference ("OIC"), operating in the mode of 'political Islam,' expresses its anxiety about claims for sexual rights and gender equality by labeling the movement neocolonial, exported and imposed on Africa, Asia, and the Arab world by the decadent west. The United States, for its part, has also consistently exported its sexual and social anxieties through its foreign policy, placing sex-normative conditions on receipt of U.S. government assistance.") (citations omitted).

³⁹ DENNIS ALTMAN, *GLOBAL SEX* 63-64 (2001).

⁴⁰ Robert J. Delahunty & Antonio F. Perez, *Moral Communities or a Market State: The Supreme Court's Vision of the Police Power in the Age of Globalization*, 42 HOUS. L. REV. 637, 694 (2005-2006) (suggesting that *Lawrence* was partially motivated by global economic interests); see also Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 408 (1994) (linking advances in the American gay rights movement with affluence in the gay community).

⁴¹ See Holning Lau, *The Language of Westernization in Legal Commentary*, 61 AM. J. COMP. L. 507 (2013).

⁴² Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 458-59 (2002) ("In the midst of a growing international and domestic uproar, President Bill Clinton asked the Singapore government to suspend the punishment and the United States threatened to block Singapore's bid to host an international trade meeting. Although the diplomatic

the *Dudgeon* and *Lawrence* cases. This places Singapore squarely in the gay rights quandary that Massad analyzed with regard to the Middle East and Northern Africa.⁴³

Yet, in several previous instances, Singapore repeatedly resisted pressure from the West to alter its laws, which often have been cast by Western countries as barbaric, draconian, and primitive.⁴⁴ The most infamous example was perhaps the case of Michael Fay, the American teenager sentenced to caning for vandalism, which caused the Western international community to question Singapore's retention of corporal punishment in its Penal Code.⁴⁵ Singapore has long held to the position that it will not relax its standards even when other countries hold to more lenient and indulgent norms.⁴⁶ Former Singapore Deputy Prime Minister and Member of Parliament, Professor Shunmugam Jayakumar,⁴⁷ asserts that despite pressure from the international community, "the integrity of our legal system and the standing of our judiciary are among the hard-earned assets of the Singapore brand name. We do not jettison them for

dispute gradually abated, the event triggered a period in which the United States treated Singapore as *persona non grata*." (citation omitted).

⁴³ See Massad, *supra* note 20.

⁴⁴ See Melanie Chew, *Human Rights in Singapore: Perceptions and Problems*, 34 *ASIAN SURVEY* 933, 942 (1994) ("A detailed condemnation of the country's human rights record, published by Asia Watch, included a long list of alleged violations, including the use of preventive detention; imprisonment without trial; restrictions on freedom of movement, association, and speech; physical and psychological mistreatment of detainees; coercion and re-arrest of those complaining of mistreatment; limits placed on judicial review; intimidation and harassment of opposition or potential opposition politicians; restrictions on, or banning of media, student, labor, and professional organizations; limitation of parliamentary debate; and intervention in the judiciary.").

⁴⁵ See Firouzeh Bahrapour, *The Caning of Michael Fay: Can Singapore's Punishment Withstand the Scrutiny of International Law?*, 10 *AM. U. INT'L L.* 1075 (1995).

⁴⁶ Jothie Rajah, *Punishing Bodies, Securing the Nation: How Rule of Law Can Legitimate the Urbane Authoritarian State*, 36 *LAW & SOC. INQUIRY* 945, 959 ("The Fay case launched a state-scripted version of events in which vandalism became symbolic of the decline of the West and corporal punishment a protective, disciplinary mechanism conveying the corrective to Western moral decay."); see also JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* (2012).

⁴⁷ Professor Jayakumar also served as Senior Minister in the Cabinet, Minister for National Security, Minister of Law, Minister of Foreign Affairs, Minister for Home Affairs, and Minister of Labour. During the 2007 Parliamentary debates over the repeal of 377A, he was Minister of Law. Shunmugam Jayakumar - Academic Profiles, National University of Singapore, http://law.nus.edu.sg/about_us/faculty/staff/profileview.asp?UserID=lawsjaya (last visited Jan. 28, 2014).

transient political convenience.”⁴⁸ Such policy decisions cast Singapore in a seemingly incongruous position where it has largely embraced some aspects of Western capitalism, even while keeping liberal ideologies associated with capitalism – such as government noninterference and individual privacy – at arm’s length.⁴⁹

The evolution of postcolonial Singaporean law similarly appears dichotomous and contradictory, but embodies illiberal pragmatism in seeking the most efficient path towards growth and development. Commercial law in Singapore retained its format under British colonialism for the sake of economic development.⁵⁰ In the areas of criminal law, constitutional law, and administrative law, on the other hand, Singapore sought to design its laws with a focus on recovering indigenous Asian values and returning to Confucian roots for the purpose of population control and public order.⁵¹ This neo-Confucian system unapologetically prioritizes communitarianism over individual rights.⁵² The Singaporean government believes that efficient economic development is dependent on good public order, which is manifested in state-imposed morality often perceived as totalitarian and repressive.⁵³ Singaporean citizens are often willing to forgo individual negative rights against the government for what they perceive as the common good, demonstrating the extension of illiberal

⁴⁸ SHUNMUGAM JAYAKUMAR, *DIPLOMACY: A SINGAPORE EXPERIENCE* 153 (2011) (referencing the international pressures for clemency in the Michael Fay case, as well as the case of Johannes van Damme, a Dutch national convicted and hanged for drug trafficking).

⁴⁹ CHUA BENG HUAT, *LIFE IS NOT COMPLETE WITHOUT SHOPPING: CONSUMPTION CULTURE IN SINGAPORE* 24 (2003) (“The modernity [and multiculturalism] of the people is discounted in this abstract attribution of ‘traditions’ and, instead, reinvented ‘traditional’ Asian values and attitudes are inscribed on them. Thus, a ‘traditional’ Singapore deemed to be essentially ‘Asian’ emerges discursively, suppressing and denying Singapore’s very modernity, which is displaced as a ‘Western’ cultural influence.”).

⁵⁰ See CHUA BENG HUAT, *supra* note 36, at 59.

⁵¹ Li-ann Thio, *Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore*, 20 UCLA PAC. BASIN L. J. 1, 8, 10-11 (2002).

⁵² LI-ANN THIO, *THE WHITE PAPER ON SHARED VALUES* 1 (1991) (“These core values include placing society above self, upholding the family as the basic building block of society, resolving major issues through consensus instead of contention, and stressing racial and religious tolerance and harmony.”); see also Li-ann Thio, *An ‘i’ for an ‘I’?: Singapore’s Communitarian Model of Constitutional Adjudication*, 27 H. K. L. J. 152, 154 (1997); Rafael X. Zahralddin-Aravena, *Chile and Singapore: The Individual and the Collective: A Comparison*, 12 EMORY INT’L L. REV. 739 (1998).

⁵³ See Gordon Silverstein, *Singapore: The Exception that Proves Rules Matter, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 73, 78-83 (Tom Ginsburg & Tamir Moustafa eds., 2008).

pragmatics to individual citizen subjects.⁵⁴ The criminal investigation of Dr. Christopher Lingle for defamation⁵⁵ and the prosecution of Michael Fay for vandalism are instances where Singapore distinguished its cultural prioritization of communitarianism over the Western presumption of universal rights for the individual.⁵⁶

Critics of the 2007 movement to repeal Singapore's anti-sodomy statute contended that the same importation of Western liberal values was occurring.⁵⁷ This individual rights-based approach by the global gay rights movement instigated a strong backlash⁵⁸ by the local population that manifested in the retention of 377A by Parliament,⁵⁹ and a rejection of an

⁵⁴ Ong, *supra* note 8, at 208 ("Rather than focusing on individual liberties, the rational Singaporean subject holds the government accountable for universal home ownership, high-quality education, and unending economic expansion.").

⁵⁵ Michael Haas, *A Political History*, in THE SINGAPORE PUZZLE 15, 32 (Michael Haas ed., 1999); *see also* Christopher Lingle, *Singapore and 'Asian Values'*, 12 POLICY 19-23 (1996); William Glaberson, *Paper to Pay \$214,285 in Singapore Libel Case*, NEW YORK TIMES, Nov. 29, 1995, <http://www.nytimes.com/1995/11/29/world/paper-to-pay-214285-in-singapore-libel-case.html>.

⁵⁶ Bilahari Kausikan, *An East Asian Approach to Human Rights*, 89 AM. SOC'Y INT'L L. PROC. 146, 151 (1995) ("The universality and individuality of rights is deeply ingrained in western political culture and the western definition of its own identity. It is only to be expected that anything that is regarded as even mildly questioning these 'idols of the tribe' would provoke a strong reaction."); *see also* MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (suggesting that universalist applications of American rights discourse deleteriously promotes individualism at the expense of community norms).

⁵⁷ SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (22 October 2007), vol. 83 at col. 2242 (22 October 2007) ("The 'liberal' camp wants section 377A repealed. They offer an 'argument from consent', 'Government should not police the private sexual behaviour of consenting adults.' They opine that this violates their liberty or 'privacy.' They ask, 'Why criminalise something which does not 'harm' anyone; if homosexuals are born that way, isn't it unkind to 'discriminate' against their sexual practices? . . . we have no need of foreign or neo-colonial moral imperialism in matters of fundamental morality."); *see also* Yvonne C.L. Lee, "Don't Ever Take a Fence Down Until You Know the Reason It Was Put Up"—Singapore Communitarianism and the Case for Conserving 377A, 2008 SING. J. LEGAL STUD. 347, 349 (2008).

⁵⁸ William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 277, 278, 310 (2013) (noting that progressive constitutional rights cases in the United States, such as *Brown v. Board* and *Roe v. Wade*, created strong backlash anti-racial rights and anti-abortion reactions because the general population was not ready to assume those positions).

⁵⁹ *See generally* Jianlin Chen, *Singapore's Culture War Over Section 377A: Through the Lens of Public Choice and Multilingual Research*, 38 LAW & SOC. INQUIRY 106 (2003). *See also* Lynette J. Chua, *Pragmatic Resistance, Law, and Social Movements in Authoritarian States: The Case of Gay Collective Action in Singapore*, 46 LAW & SOC'Y REV. 713, 736 (2012); Weiss, *supra* note 37, at 636-639.

equal protection constitutional challenge by the High Court.⁶⁰ The expectation of global gay rights activists, both inside and outside of Singapore, was that the nation-state would follow the example of Europe and the United States in striking down its anti-sodomy statute.⁶¹ The actual outcome, however, illustrates the problems of universally applying the *Dudgeon* and *Lawrence* standards in the international, postcolonial context.⁶² The resistance in Singapore to a universalist rights-based approach to gay rights demonstrates not only the complexities of the indigenous populations that Massad describes, but also the particularities of populations all too aware of their postcolonial position.⁶³

In its efforts to raise the profile of an underrepresented minority, the global gay rights movement often shows its unawareness to the historically subordinated position of the majority postcolonial population. As Franke suggests,

Once we recognize that the normative homosexuality that undergirds human rights discourse is not merely a 'fact' in the world, but more of a complex value, it becomes easier to see how the state's embrace of the sexual citizenship of these new human rights holders risks rendering more vulnerable a range of identities and policies that have refused to conform to state-endorsed normative homo- or heterosexuality.⁶⁴

In some ways, the Singaporean High Court opinion upholding 377A directly addresses this myopia by contradicting the *Lawrence* Court's reasoning that legislation of majoritarian views of morality is an illegitimate state interest.⁶⁵ Just because a population may be in the majority does not necessarily mean that it is in a position of power. Rather, the view of the court as a guardian of minority interests is a concept that most Western liberal governments can afford to take because they were never in the

⁶⁰ *Lim Meng Suang v. Attorney General* [2013] SGHC 73.

⁶¹ *Court Ruling Deals Blow to Gay Rights in Singapore*, AFP (France), April 10, 2013, available at www.globalpost.com/dispatch/news/afp/130410/court-ruling-deals-blow-gay-rights-singapore.

⁶² JASBIR K. PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* 46 (2007) ("[T]he overturning of sodomy regulations through the *Lawrence* and *Gardner v. Texas* ruling (2003) all function as directives regarding suitable and acceptable kinship, affiliative, and consumption patterns, consolidating a deracialized queer liberal constituency that makes it less easy to draw delineations between assimilated gay or lesbian identities and ever-so-vigilant and -resistant queer identities.").

⁶³ Massad, *supra* note 20, at 363.

⁶⁴ Franke, *supra* note 10, at 40.

⁶⁵ *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (Stevens, J., dissenting) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986))).

position of a colonized majority who had laws imposed upon them by a smaller colonizing minority.⁶⁶

The fight over 377A in Singapore also reveals the intersectional struggles of postcolonial gay subjects. Under the universalist approach to gay rights, other facets of identity, such as cultural and indigenous identity, are often expected to accede to gay identity, which is regarded as primary.⁶⁷ As Lisa Rofel put it, "Asianness, or a reputed claim to Asianness, can never be more than a distraction, a power move, or a distortion from the originary truth of gayness."⁶⁸ The implicit hierarchization of gay identity over cultural identity becomes itself neocolonial. Cultural integrity is thought of as illegitimate and must defer to prioritized negative rights tied to individual identity, which are values that are generally associated with Western liberalism. As Sonia Katyal warned, "Despite marked differences in the social meaning of same-sex sexual conduct across cultures, a substitutive model of identity and conduct has become increasingly touted as the singular 'cure-all' formula for gay liberation."⁶⁹ The Asian values of the indigenous population are oftentimes demonized as homogeneous, static, and monolithic problems that must be overcome through enlightenment into Western liberal values.⁷⁰

The added complexity of the anti-sodomy debate in Singapore, however, is that cultural integrity is not solely represented by native Confucian values, but rather by a hybrid value system related historically to the imposition of colonial sexual mores. The postcolonial status of Singapore is a fact that has been generally ignored by the global gay rights movement and the associated constitutional challenge to 377A. However, it actually constituted an integral and determinative factor for the judicial decision on the constitutional challenge and the 2007 Parliamentary debates that the decision relies upon.⁷¹ This Article additionally explores how the native culture assumes a colonial voice as cultural identity, and, more importantly, how it is deployed to continue the demonization and marginalization of the same native culture in the international

⁶⁶ See James D. Willets, *From Divergence to Convergence? A Comparative and International Law Analysis of LGBTI Rights in the Context of Race and Post-Colonialism*, 21 DUKE J. COMP. & INT'L L. 631, 634 (2011).

⁶⁷ LISA ROFEL, *DESIRING CHINA: EXPERIMENTS IN NEOLIBERALISM, SEXUALITY, AND PUBLIC CULTURE* 91 (2007) ("Gay men in Asia can be either universal or Asian but not both, even as their Asianness continues to leave them in the place of otherness to global gayness.").

⁶⁸ *Id.*

⁶⁹ Sonia Katyal, *Exporting Identity*, 14 YALE J. L. & FEMINISM 97, 122 (2002).

⁷⁰ See J.J. CLARKE, *ORIENTAL ENLIGHTENMENT: THE ENCOUNTER BETWEEN ASIAN AND WESTERN THOUGHT* 4, 5 (1997).

⁷¹ Lim Meng Suang at para. 133 ("First and foremost, Singapore is an independent nation with its own unique history, geography, society and economy. What is adopted in other parts of the world may not be suitable for adoption in Singapore."); see also Lee, *supra* note 57, at 391.

context. This Article does not advocate for rejection of the colonial past or colonial identity, since that would be discounting nearly a century of ingrained identity politics, but rather advocates for the recognition and remembrance of colonialism as another intersectional facet of identity in Singapore. In order to become more relevant and effective in the local political and social culture, the gay movement in Singapore must move beyond the strategies promoted by the neoliberal expansion of *Dudgeon* and *Lawrence* across the globe, and address the complicated intersections and interrelations between gay, Asian, and postcolonial subjectivities.⁷²

II. THE LEGAL HISTORY OF 377A AND THE WESTERNIZED CONSTITUTIONAL CHALLENGE

Section 377A is an extension of Section 377 (“377”), Britain’s colonial anti-sodomy law based on the Buggery Act of 1533.⁷³ Section 377 was first introduced to the colonies in the Indian Penal Code of 1860.⁷⁴ Using the Indian Penal Code as its model, Britain enacted 377 in all of its colonial holdings.⁷⁵ Section 377 was codified in Singapore with the Penal Code of the Straits Settlement in 1871.⁷⁶ Section 377 reads:

Whoever has carnal intercourse against the order of nature with any man, woman or animals, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.

Explanation — Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.⁷⁷

“Carnal intercourse” originally meant anal intercourse, but was expanded through judicial decisions to include oral sex, attempts, conspir-

⁷² See Shafiqah Ahmadi, *Islam and Homosexuality: Religious Dogma, Colonial Rule, and the Quest for Belonging*, 26 J. CIV. RTS. & ECON. DEV. 537, 539 (2012); see also Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195 (2000); Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship, or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409 (1998).

⁷³ 25 Hen. VIII c. 6 (1533) (Eng.) (making “the detestable and abominable vice of buggery committed with mankind or beast” a felony punishable by hanging); see also WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861-2003*, at 16 (2008).

⁷⁴ Douglas E. Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia*, 4 ASIAN J. COMP. L. 1, 8 (2009).

⁷⁵ *Id.* at 9.

⁷⁶ Lynette J. Chua, *Saying No: Sections 377 and 377A of the Penal Code*, 2003 SING. J. LEGAL STUD. 209, 215 (2003).

⁷⁷ Penal Code (Cap. 224, 1985 Rev. Ed. Sing.).

acies, and solicitation.⁷⁸ Section 377 did not, however, focus on the gender or sexual orientation of the offenders.⁷⁹

Following a reform of Singaporean law in 1938, the anti-sodomy portion of the criminal code was amended to include 377A, which focused on same-gender sexual acts between men.⁸⁰ Section 377A reads:

Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.⁸¹

During the decolonization period, both sections were legislated into the Singapore Penal Code by Singapore's Legislative Council in 1955.⁸² Both laws remained in the Penal Code for decades, though enforcement was usually reserved for cases involving force, coercion, or public indecency.⁸³ In 2006, the Singaporean Parliament announced that it would comprehensively reform the Singapore Penal Code and solicited public feedback over the next year.⁸⁴ The proposed reforms included eliminating 377 and replacing it with several provisions criminalizing nonconsensual sexual acts.⁸⁵ The Singapore Parliament's reasoning was that societal

⁷⁸ Sanders, *supra* note 74, at 16.

⁷⁹ Penal Code (Cap. 224, 1985 Rev. Ed. Sing.).

⁸⁰ Sanders, *supra* note 74, at 16.

⁸¹ Penal Code (Cap. 224, 1985 Rev. Ed. Sing.).

⁸² CHAN WING CHEONG & ANDREW PHANG, *THE DEVELOPMENT OF CRIMINAL LAW AND CRIMINAL JUSTICE IN SINGAPORE* (2001).

⁸³ SINGAPORE PARLIAMENT REPORTS vol. 83 at col. 2175 (22 October 2007) ("Police has not been proactively enforcing the provision and will continue to take this stance. But this does not mean that the section is purely symbolic and thus redundant. There have been convictions over the years involving cases where minors were exploited and abused or where male adults committed the offence in a public place such as a public toilet or back-lane."); *id.* at col. 2175 ("Through a 15-year period, ie, 1988 to 2003, there were only eight convictions under section 377A involving seven incidents. Two convictions were for the same incident. Moreover, it has not been invoked in respect of consensual sex since 1993. So this law is rarely applied or, if applied, it applies to minors or acts in public.").

⁸⁴ Press Release, Ministry of Home Affairs, Public Consultation on Proposed Amendments to the Penal Code (Nov. 8, 2006) available at http://www.mha.gov.sg/news_details.aspx?nid=MzA1-%2FR2z9%2FIhuzg%3D.

⁸⁵ SINGAPORE PARLIAMENT REPORTS vol. 83 at col. 2175 ("Next, Sir, we will be removing the use of the archaic term, 'Carnal Intercourse Against the Order of Nature' from the Penal Code. By repealing section 377, any sexual act including oral and anal sex, between a consenting heterosexual couple, 16 years of age and above, will no longer be criminalised when done in private Sir, offences such as section 376 on sexual assault by penetration will be enacted to cover non-consensual oral and anal sex. Some of the acts that were previously covered within the scope of the existing section 377 will now be included within new sections 376 – Sexual assault by

values had changed regarding consensual oral and anal sex between heterosexual adults.⁸⁶

The initial proposed reform measures did not, however, contain a provision to repeal 377A. During the public feedback period, gay activists in Singapore filed a Parliamentary petition for the repeal of 377A, which was brought before Parliament by Nominated Member of Parliament Siew Kum Hong.⁸⁷ The move to repeal 377A subsequently sparked public opposition, which in turn led to significant Parliamentary debate.⁸⁸ In the end, the Singapore Parliament removed 377 from the Penal Code but retained 377A. The question then remained whether homosexuals were being unequally targeted with the continued existence of 377A.⁸⁹ In his speech before Parliament during the debates, Prime Minister Lee Hsien Loong attempted to allay concerns and reach a middle ground by offering the unofficial position that although 377A would remain the law, the government would not proactively enforce it against private consensual sexual conduct.⁹⁰

However, less than a year after the Prime Minister's assurance of non-enforcement, the worry of prosecution for gay men reignited as the Singaporean government once again began enforcement measures against public sexual conduct between gay men under 377A.⁹¹ In March 2010, Tan Eng Hong was arrested for engaging in oral sex with another man in a public toilet in a shopping complex and later criminally charged with violating 377A.⁹² Tan filed an application challenging the constitutional-

penetration, 376A – Sexual penetration of minor under 16, 376B – Commercial sex with minor under 18, 376F – Procurement of sexual activity with person with mental disability, 376G – Incest and 377B – Sexual penetration with living animal. New offences will be introduced to clearly define unnatural sexual acts that will be criminalised[criminalized], that is, bestiality (sexual acts with an animal) and necrophilia (sexual acts with a corpse).”).

⁸⁶ *Id.* (“As the Penal Code reflects social norms and values, deleting section 377 is the right thing to do as Singaporeans by and large do not find oral and anal sex between two consenting male and female in private offensive or unacceptable. This is clear from the public reaction to the case of *PP v Anis Abdullah* in 2004 and confirmed through the feedback received in the course of this Penal Code review consultation.”).

⁸⁷ Chua, *supra* note 59, at 735.

⁸⁸ *Id.* at 736.

⁸⁹ SINGAPORE PARLIAMENT REPORTS vol. 83 at col. 2121 (22 October 2007) (“Sir, the material allegations contained in the Petition concern the unconstitutionality of section 377A of the Penal Code. If and when the Penal Code (Amendment) Bill is passed, private consensual anal and oral sex between heterosexual adults will be permitted, but the same private and consensual acts between men will remain criminalised, due to the retention of section 377A.”).

⁹⁰ *Id.* at cols. 2469-72.

⁹¹ Public Prosecutor v. Chan Mun Chiong [2008] SGDC 189.

⁹² Tan Eng Hong, at paras. 4-5.

ity of 377A, at which point the prosecution dropped the 377A charge and instead charged Tan under § 294(a) for committing an obscene act in a public place.⁹³ The prosecution then moved to strike Tan's application on the grounds that he lacked standing.⁹⁴ In August 2012, the Court of Appeals ruled that Tan indeed had standing to challenge the constitutionality of 377A as a matter of equal protection because he faced a realistic threat of prosecution.⁹⁵ The Court of Appeals also set forth a two-prong test to determine whether 377A violated Equal Protection under Article 12 of the Singapore Constitution,⁹⁶ which it left for the later court to decide.⁹⁷

In November 2012 Lim Meng Suang and Kenneth Chee Mun-Leon brought a separate action challenging the constitutionality of 377A as a matter of equal protection,⁹⁸ despite never being charged under 377A.⁹⁹ They were permitted standing to sue because they too faced a realistic threat of prosecution as a gay couple.¹⁰⁰ Article 12(1) of the Singapore Constitution reads: "All persons are equal before the law and entitled to the equal protection of the law," which they argued extends to sexual orientation.¹⁰¹ In addition to the Article 12(1) claim, Lim and Chee also lodged international law arguments for non-discrimination on account of sexual orientation.¹⁰² The High Court of Singapore issued its decision, written by Judge Quentin Loh, on the Lim Meng Suang case in April 2013, in which Judge Loh rejected Lim and Chee's equal protection challenge.¹⁰³

⁹³ *Id.* at paras. 6-7.

⁹⁴ *Id.* at para. 8.

⁹⁵ *Id.* (finding that the real and credible threat gave Tan standing to sue under Article 12(1) of the Singapore Constitution but not under Article 9, which protects from unlawful incarceration and detention, since he was no longer incarcerated under 377A).

⁹⁶ *Id.* at para. 185.

⁹⁷ The High Court of Singapore ultimately ruled against Tan Eng Hong in October 2013. *Tan Eng Hong v Attorney-General* [2013] SGHC 199.

⁹⁸ *Lim Meng Suang* at para. 19.

⁹⁹ *Id.* at para. 8.

¹⁰⁰ *Id.* at paras. 7-12, 19.

¹⁰¹ Plaintiffs' Written Submissions, Originating Summons 1135/2012 (contending that: (1) equal protection extends to prevent discrimination on account of sexual orientation; (2) 377A fails the two-stage test under Article 12(1) by disclosing no intelligible differentia, and the differentia bears no rational relation to the object of law in question; and (3) 377A is so absurd, arbitrary, and unreasonable that it cannot be good law under Article 12(1)).

¹⁰² *Id.* at paras. 178-207

¹⁰³ *Lim Meng Suang*, at para. 147.

III. THE LIM MENG SUANG DECISION: READING ANTI-NEOLIBERAL INTENT INTO THE 2007 PARLIAMENTARY DEBATES

The primary contention in the Lim Meng Suang case was that 377A was a violation of equal protection under Article 12(1) of the Singapore Constitution, which Lim and Chee argued should be interpreted as “protecting against discrimination on the basis of sexual orientation.”¹⁰⁴ They also heavily referenced and cited international standards and instruments as their authorities to justify why the Singaporean court should strike down the anti-sodomy statute.¹⁰⁵ In denying their claim, Judge Loh focused on the local usage of equal protection and interpreted that “[i]t is implicit from Art 12 itself that Art 12(1) does not prohibit classification *in toto* because it is immediately followed by two other clauses, Art 12(2) and Art 12(3), which set out, respectively, prohibited and permitted kinds of discriminatory classification.”¹⁰⁶ Although Lim and Chee attempted to persuade the Court otherwise,¹⁰⁷ Judge Loh relied on the principle of

¹⁰⁴ *Id.* at para. 38.

¹⁰⁵ *Id.* at paras. 43-44. (“The government itself has admitted in international fora that Article 12 (1) of the Constitution is broad enough to encompass equal protection with respect to sexual orientation. . . The Report of the Government to the CEDAW [Committee on the Elimination of Discrimination against Women] at [31] states: “31. Please comment on reports with regard to prevalent and systematic discrimination against women based on sexual orientation and gender identity in the social, cultural, political and economic spheres in the State party. What measures are being undertaken to address these problems, especially with a view to destigmatizing and promoting tolerance to that end. 31.1 The principle of equality of all persons before the law is enshrined in the Constitution of the Republic of Singapore, regardless of gender, sexual orientation and gender identity. All persons in Singapore are entitled to the equal protection of the law, and have equal access to basic resources such as education, housing and healthcare. Like heterosexuals, homosexuals are free to lead their lives and pursue their social activities. Gay groups have held public discussions and published websites, and there are films and plays on gay themes and gay bars and clubs in Singapore”).

¹⁰⁶ Lim Meng Suang, at para. 41. Article 12(2) and 12(3) state:

(2) Except as expressly authorised [authorized] by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) This Article does not invalidate or prohibit —

(a) any provision regulating personal law; or

(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion.

CONSTITUTION OF THE REPUBLIC OF SINGAPORE, ART. 12(2) - (3).

¹⁰⁷ The Court has considered several cases implicating Article 12(1), even though none of the cases fell into the non-discrimination categories described in Article 12(2). *See, e.g., Ong Ah Chuan v PP* [1980-1981] SLR 48; *Nguyen Tuong Van v Public*

statutory interpretation *expressio unius est exclusion alterius*: “to state one thing is to exclude the other.”¹⁰⁸ The principle of *expressio unius* relies heavily on legislative intent,¹⁰⁹ which Judge Loh reinforced by stating, “Parliament, in dealing with the issues arising within and without the country, is entitled to pass laws that deal with, inter alia, the myriad of problems that arise from the inherent inequality and differences pervading society.”¹¹⁰ Judge Loh concluded, “[E]quality before the law and equal protection of the law under Art 12(1) does not mean that all persons are to be treated equally, but that all persons in like situations are to be treated alike.”¹¹¹

In his overall assessment of Article 12(1), Judge Loh gave broad deference to the intention of Parliament. The intent of Parliament became especially controlling as Judge Loh applied the two-prong test set forth by the Court of Appeals in the Tan Eng Hong case, which assesses “whether s 377A violates Art 12 in terms of: (a) whether the classification is founded on an intelligible differentia; and (b) whether the differentia bears a rational relation to the object sought to be achieved by s 377A.”¹¹² Judge Loh quickly dispensed with the first prong on a literalist

Prosecutor [2005] 1 SLR(R) 103; *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 (including an Article 12(1) challenge to provisions of the Misuse of Drugs Act); *Public Prosecutor v Taw Cheng Kong* [1998] 1 SLR(R) 78; *Taw Cheng Kong CA* [1998] 2 SLR(R) 489 (considering an Article 12(1) challenge to provisions of the Prevention of Corruption Act that differentiated between citizens and non-citizens). In their written submissions, Plaintiffs noted that the Court had never pronounced that Article 12(2) imposed a limitation on Article 12(1). Plaintiff’s Written Submissions, *supra* note 101, at para. 42.

¹⁰⁸ See M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373, 4146 (1985).

¹⁰⁹ Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 TUL. L. REV. 431, 459 (2001) (noting that some courts held that “if a legislature takes the time to create a statutory list, the courts have no authority to add to it”).

¹¹⁰ *Lim Meng Suang* at para. 44.

¹¹¹ *Id.* (noting that the understanding of equality is consistent with a broader Asian cultural understanding of equality that was influenced by Buddhism); see also Kyoko Inoue, *From Individual Dignity to Respect for Jinkaku: Continuity and Change in the Concept of Individual and Society, in MODERN JAPAN, in TRANSNATIONAL LEGAL PROCESSES: GLOBALIZATION AND POWER DISPARITIES* 295-315, at 297 (Michael Likosky ed., 2002) (“The US creed reflected American individualistic values. In contrast, before the Second World War (and even today to a significant degree), the Japanese derived their sense of who they were largely from their membership of the family and other social groups Moreover, most groups were characterized by unequal, hierarchical relationships, and there was no assumption that individuals were equal in the sense of having equal rights. Yet a person could have a measure of self-respect by performing his or her role well.”).

¹¹² *Tan Eng Hong* at para. 185.

level.¹¹³ In contrast, Judge Loh spent more careful attention to the second prong, which ultimately brought him to the question, “[w]hat is the object of s 377A?”¹¹⁴ In answering the question, Judge Loh focused on the original intent of the colonial legislators, the reform of 1938, and, most importantly, the Parliamentary debate of 2007.¹¹⁵ Judge Loh rejected Plaintiff’s interpretations of possible purposes for retention, which conceivably might have failed the second prong of the Tan Eng Hong test.¹¹⁶ Instead, Judge Loh articulated that the purpose for the retention of 377A “was that Singapore was a conservative society where the majority did not accept homosexuality.”¹¹⁷ Judge Loh then highlighted and reemphasized how Singapore is a conservative Asian society that should be able to legislate apart from Western influence.¹¹⁸

¹¹³ Lim Meng Suang at paras. 47-48. (“The First Limb requires that the classification prescribed by the impugned legislation must be based on an intelligible differentia. ‘Intelligible’ means something that may be understood or is capable of being apprehended by the intellect or understanding, as opposed to by the senses. ‘Differentia’ is used in the sense of a distinguishing mark or character, some attribute or feature by which one is distinguished from all others Applying this to the present case, it is quite clear that the classification prescribed by s 377A – viz, male homosexuals or bisexual males who perform acts of ‘gross indecency’ on another male – is based on an intelligible differentia. It is also clear from the differentia in s 377A that the section excludes male-female acts and female-female acts.”).

¹¹⁴ *Id.* at para. 62.

¹¹⁵ *Id.* at paras. 63-87.

¹¹⁶ *Id.* at paras. 84, 86 (“Counsel for the Plaintiffs, Mr Low, pointed to the later portions of the speech by Prime Minister Lee Hsien Loong . . . during the October 2007 Parliamentary Debates and submitted that in view of the reasons put forward for the retention of s 377A, the purpose of the provision was now this: since neither the pro-s 377A side nor the anti-s 377A side would be able to convince the other of its point of view, and since pushing the issue would [polarisepolarize] and divide our society, we should live and let live, and it was best that we do nothing and leave s 377A as it stood. That, Mr Low submitted, could not be a legitimate purpose for legislation. With respect, I cannot disagree more. First and foremost, the purpose submitted by Mr Low was not, on any reading of the official record of the October 2007 Parliamentary Debates, put forward as the purpose of s 377A. Instead, it was a practical reason why, amongst other more basic reasons, s 377A should be retained The Plaintiffs contended that as one of the purposes of s 377A was to preserve the ‘family’ (as described at [84(b)] above) as the basic building block of our society, s 377A was discriminatory as the [behaviourbehavior] of lesbians and those who had extra-marital sex would also undermine this ‘purpose’, but such groups were not targeted as criminals. In my view, this contention is incorrect. [84(b)] above does not set out the purpose of s 377A. Instead, it states a value shared by Singapore society, and s 377A by itself does not bring about this value or ensure its continuity.”).

¹¹⁷ *Id.* at para. 85.

¹¹⁸ *Id.*

Judge Loh then dismissed the international law argument – which was a significant lynchpin in the *Lawrence*¹¹⁹ – in one paragraph:

The Plaintiffs have also made numerous references to the decriminalisation of male homosexual conduct in other jurisdictions as well as to the position taken on this issue by various international and regional organisations. With respect, I find these submissions to be of no weight. First and foremost, Singapore is an independent nation with its own unique history, geography, society and economy. What is adopted in other parts of the world may not be suitable for adoption in Singapore.¹²⁰

Judge Loh raised what Gary Jacobsohn has discussed as the “cultural objection” to universalist assumptions of constitutionalism, which posits that foreign legal norms not only interfere with but also potentially undermine the cultural particularities of indigenous populations.¹²¹ Judge Loh emphasized Singapore’s singularity and distinctiveness, in that it should not bend to the will of standards in “other parts of the world” – which he tacitly suggested is the West.¹²² In contrast, Judge Loh specifically pointed to jurisdictions in Southeast Asia that have retained or increased the severity of their anti-sodomy statutes.¹²³

¹¹⁹ *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (“The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, § 1. Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today’s case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) & ¶ 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.”).

¹²⁰ Lim Meng Suang at para. 133.

¹²¹ Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1814 (2004).

¹²² Lim Meng Suang at para. 133.

¹²³ *Id.* (“Secondly, postulating examples of how the world is changing without more is unhelpful as such examples can be countered by examples of areas where there are shifts in the opposite direction. Furthermore, it can be seen that a number of former British colonies, such as Botswana, Malaysia, Sri Lanka, Sudan, Tanzania, Yemen and the Solomon Islands, have [criminalized] *female* homosexual conduct

Judge Loh concluded by again granting strong deference to Parliament, summarizing his point that “[t]he short – and only relevant – answer to this point is that our Parliament has debated the removal of s 377A and has decided against it.”¹²⁴ Judge Loh’s justification for Singapore’s retention of 377A functions within the debate over Asian values in law, which advocates the validity of culturally Asian traditions and conceptions of rights and duties, against those of Western liberalism.¹²⁵ In upholding its anti-sodomy statute, Singapore self-consciously set itself up in opposition to Western liberal values,¹²⁶ with an implied repudiation of the *Lawrence* Court’s position that the moral values of the majority do not constitute a valid state interest. For Judge Loh, the moral values of the majority culture, a distinctively conservative Asian culture, do indeed constitute a contravening state interest.¹²⁷ According to Judge Loh, this purpose was set forth clearly by Parliament in 2007.¹²⁸

During the 2007 Parliamentary debates, Prime Minister Lee suggested that as a law presumably without teeth, 377A would serve a purely symbolic function for the sake of its majority domestic population.¹²⁹ Indeed,

while retaining their respective equivalents of s 377A. The death penalty for male homosexual conduct is still retained in a few countries. An apt illustration of such differences held by different societies was brought up by the Prime Minister during the October 2007 Parliamentary Debates when he highlighted the fact that even within the Anglican or Church of England community, the Asian and the African Anglican Churches had threatened to split from the American and the English Anglican Churches over the ordination of gay bishops.”).

¹²⁴ *Id.*

¹²⁵ See generally Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT’L L. & POL. 291 (2000); WM. THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE* (1998).

¹²⁶ Teemu Ruskola, *Where is Asia? When is Asia? Theorizing Comparative Law and International Law*, 44 U.C. DAVIS L. REV. 879, 889 (2011) (“The Asian Values debate revolves around a conceptual opposition between universal human rights and particular cultural values. As I have suggested, Asian Values have been constructed in self-conscious opposition to certain Western liberal values. As such, they can be viewed as a kind of self-Orientalizing response, insisting both on Asia’s difference and asserting that Asia, too, is located in law and law in Asia, and that Asia’s time, too, is now. Hence, Asia already inhabits modernity, albeit an alternative one.”).

¹²⁷ Lim Meng Suang at para. 138.

¹²⁸ *Id.*

¹²⁹ Chua Beng-Huat, *Singapore in 2007: High Wage Ministers and the Management of Gays and Elderly*, 48.1 ASIAN SURVEY 55, 60 (2008) (“No one believed that Section 377A would be repealed, certainly not the gay community itself. For gay Singaporeans, the victory was having their presence in society recognized openly in Parliament, for the first time in Singapore’s in- dependent history. The government’s retention of the law is no more than a symbolic gesture in concession to the conservative majority; officials promised that they will change their stance as public opinion shifts. The episode was therefore purely symbolic politics.”).

during the Parliamentary debate, the symbolic effect of retention or repeal was a significant topic of discussion.¹³⁰ However, in retaining 377A, Singapore was also taking a symbolic stand against international standards and pressures in the same way that it had done in the Michael Fay case. Although Prime Minister Lee was, to a certain degree, acquiescing to the desires of the perceived conservative majority, he was specifically juxtaposing Singapore against the West, which was most apparent at the conclusion of his statement regarding his support of the retention of 377A:

Singapore is basically a conservative society. The family is the basic building block of our society. It has been so and, by policy, we have reinforced this and we want to keep it so. And by 'family' in Singapore, we mean one man one woman, marrying, having children and bringing up children within that framework of a stable family unit. If we look at the way our Housing and Development Board flats are, our [neighbourhoods], our new towns, they are, by and large, the way Singaporeans live. It is not so in other countries, particularly in the West, anymore, but it is here.¹³¹

In the same tradition of the Michael Fay, Dr. Christopher Lingle, and Johannes Van Damme cases,¹³² the Singaporean government was demon-

¹³⁰ Senior Minister of State for Home Affairs Ho suggested, "Sir, whilst homosexuals have a place in society and, in recent years, more social space, repealing section 377A will be very contentious and may send a wrong signal that Government is encouraging and endorsing the homosexual lifestyle as part of our mainstream way of life." SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (22 October 2007), vol. 83 at col. 2175 (Ho Peng Kee, Senior Minister of State for Home Affairs). In response, Nominated Member of Parliament Siew Kum Hong cited a letter he received from a Singaporean graduate student in the United States, imploring that "[t]he repeal of section 377A will make a clear statement on how, in Singapore, we will always have to find ways to live harmoniously with people who are not like us." Later, Nominated Member of Parliament Siew continued:

Sir, I ask again, "What price, this effort to 'signpost' the views of the majority? [sic] Even if we want to signal the majority's disapproval of homosexuality, we do not need to retain 377A. It can be done through other means. Repealing 377A does not mean that society endorses or approves of homosexuality. Let us learn from the example of the Censorship Review Committee. Its 2003 report noted the distinction between 'allowing' and 'endorsing', [sic] stating that allowing certain content is quite different from, and should not misinterpreted as [sic], an endorsement. The same reasoning applies here.

Id. at col. 2242 (Siew Kum Hong, Nominated Member).

¹³¹ *Id.* at cols. 2397-98 (Lee Hsieng Loong, Prime Minister and Minister for Finance).

¹³² More recently, the Singaporean government rejected international pressure to reconsider capital punishment as a penalty for drug trafficking. In January 2007, the President of Nigeria requested that Singapore review the sentence for Iwuchukwu Amara Tochi, a Nigerian citizen who was convicted of drug trafficking and sentenced to death. Jeremy Leong, *Singapore: Review of Major Policy Statements*, 11 S.Y.B.I. L.

strating its commitment to its own culture value system despite pressure from the rest of the world to change.

Although Prime Minister Lee was more nuanced in his depiction of the West by acknowledging the ongoing divisions among constituents even in countries where gay rights have been advanced,¹³³ the West was otherwise almost defined monolithically during much of the Parliamentary debates. For many members of the Singapore Parliament, Western individualistic rights were regarded as trespassing upon native values of communitarianism. Parliament Member Cynthia Phua, quoting Professor Shunmugam Jayakumar, juxtaposed the Singaporean emphasis on family against the Western emphasis of individuality:

‘Asian societies like Singapore generally give greater importance to the larger interests of the community in arriving at this balance. In western societies, the tilt is towards more emphasis on the rights of the individual.’ In Singapore, we must continue to protect and uphold the traditional core family structure and values.¹³⁴

The symbolic retention of 377A served as a statement not only to its domestic population, but also tacitly to the international community that Singapore is different as a conservative society that holds to its cultural emphasis on the nuclear family unit.¹³⁵ It also served as a statement regarding Singapore’s sovereign prerogative to uphold laws unpopular with international public opinion, which is generally dominated by Western values.¹³⁶ In some ways, Prime Minister Lee was continuing the legacy of cultural recovery started by his father and predecessor, Prime Minister Lee Kuan Yew, who heavily promoted a Confucian revival in Singapore following decolonization as a reaction to the dilution of ethnic culture during the colonial period and the continuing incursion of West-

277, 307 (2007). In 2005, an Australian national, Nguyen Tuong Van, was executed following his conviction for drug trafficking despite requests from the Australian government for clemency. *Australian Executed in Singapore*, BBC NEWS, (Dec. 2, 2005), <http://news.bbc.co.uk/2/hi/asia-pacific/4487366.stm>.

¹³³ SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (23 October 2007), vol. 83 at col. 2403 (Lee Hsieng Loong, Prime Minister and Minister for Finance).

¹³⁴ *Id.* at vol. 83 at cols. 2387-88 (Cynthia Phua, Member of Parliament).

¹³⁵ Simon Obendorf, *Both Contagion and Cure: Queer Politics in the Global City-State*, in *QUEER SINGAPORE: ILLIBERAL CITIZENSHIP AND MEDIATED CULTURES* 97, 108-09 (Audrey Yue & Jun Zubillaga-Pow eds., 2012) (“In his 30-minute Parliamentary speech on these issues, Lee spent much of his time addressing the provision of queer rights in Europe and America, which he argued had led to a moral decline within Western societies. For Lee, queer politics and visibility in the West had caused social cohesion to weaken and spurred socio-political conflict. Singapore, he suggested, was right to have chosen a different developmental path.”).

¹³⁶ Li-ann Thio, *Implementing Human Rights in ASEAN Countries: “Promises to Keep and Miles to Go Before I Sleep”*, 2 *YALE HUM. RTS. & DEV. L.J.* 1, 15 (1999) (“The acceptance of cultural diversity is presented as a facet of respect for the sovereign equality of states.”).

ern individualism during Singapore's industrialization.¹³⁷ During this period of re-Sinification, Confucianism became the basis for a deeply imbedded cultural nationalism propagated by the Singaporean government during the 1990s, which continued to indoctrinate the value of Asian communitarianism and family over Western individualism as vital to national success.¹³⁸

Other countries have also used cultural integrity as a defense and response to international human rights doctrine, particularly in respect to gender and sexuality.¹³⁹ Again, as Joseph Massad and others have argued, many international human rights movements for the advancement of sexual rights constitute modern day imperialism.¹⁴⁰ For the modern decolonized world, international human rights takes the place of colonial criminal law as a resurrected form of colonialism in the era of global capitalism. International human rights sanctions and interventions become new instruments of ethnic and cultural disaffection¹⁴¹ that force countries to adopt Western-conceived notions of proper behavior, which mirror the coercive mechanisms of the past through colonial criminal punishment of the nonconforming native body.¹⁴² Gender and sexual

¹³⁷ Arif Dirlik, *Critical Reflections on "Chinese Capitalism" as Paradigm*, 3.3 IDENTITIES 303, 306 (1997) ("[I]n the late seventies, a movement got under way under the direction of then Prime Minister Lee Kuan Yew to 're-Sinify' Singapore society . . . an Institute of East Asian Philosophies was established in Singapore to promote research on Confucianism. Singapore . . . quickly emerged as a promoter of Confucianism, and Chinese values generally, in East Asia, the United States, and China."); see also Arif Dirlik, *Confucius in the Borderlands*, 22 BOUNDARY 2 229, 239 (1995).

¹³⁸ Chua Beng-Huat, *Culture, Multiracialism, and National Identity in Singapore*, in TRAJECTORIES: INTER-ASIA CULTURAL STUDIES 186, 197 (Kuan-Hsing Chen et al. eds., 1998); see also ONG, *supra* note 8, at 69.

¹³⁹ See, e.g., Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 167 (Julie Peters & Andrea Wolper eds., 1995).

¹⁴⁰ Massad, *supra* note 20; see also Inderpal Grewal, *TRANSNATIONAL AMERICA: FEMINISMS, DIASPORAS, NEOLIBERALISMS* 123 (2005) ("[A]s Gayatri Spivak has pointed out, human rights left out the rural subaltern and recuperated a colonial relationship with the colonizing West, thus reviving the notion of 'white man's burden'. . .").

¹⁴¹ See Karen Engle, "Calling in the Troops": *The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention*, 20 HARV. HUM. RTS. J. 189, 206 (2007); see generally Inderpal Grewal, *TRANSNATIONAL AMERICA: FEMINISMS, DIASPORAS, NEOLIBERALISMS* (2005).

¹⁴² See Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49, 75 (1993) ("Western colonialists often prohibited indigenous cultural practices, calling them 'subversive' or 'barbaric.'"); see also Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 676 (1990).

rights in particular have become sites of scrutiny and judgment of Asian value systems under Western eyes.¹⁴³ Traditional Asian values are often demonized as repressive and backwards, leading to pressures from the international front to change.¹⁴⁴ In the discourse of neoliberal development, as Massad suggests, the East is frequently configured as temporally behind the modernity of the West.¹⁴⁵

The Singapore government's choice to go backwards in time and reinstate old cultural values during its period of decolonization challenges this hierarchy. In the cases of Michael Fay, Dr. Christopher Lingle, Johannes Van Damme, and now Lim Meng Suang, the government and judiciary have continually upheld Singapore's deliberate, postcolonial decision to reinstitute cultural norms that were regulated and disciplined during colonial rule, and in resistance to current neocolonial international pressures to adopt more Westernized values.¹⁴⁶ The decision to recover lost roots and re-Sinify as an expression of nationalism acts a reminder of the coercive de-ethnicizing that occurred in the colonial past. The current decision to stand behind the conservative ethnic values carved out during the era of decolonization can serve as a critique of the coercive, neocolonial nature of modern international human rights community in attempting to discipline and regulate cultures that it deems aberrant and inferior.

IV. THE EMPIRE STRIKES BACK: THE AFTERIMAGES OF IMPERIALISM IN THE ANTI-NEOCOLONIAL RETENTION OF 377A

The irony of the decision to retain 377A, however, is that Singapore was symbolically fighting neocolonialism with an appropriated colonial

¹⁴³ See Homi K. Bhabha, *Liberalism's Sacred Cow*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 9 (Joshua Cohen, Matthew Howard & Martha C. Nussbaum eds., 1999).

¹⁴⁴ See, e.g., Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 *HARV. INT'L L.J.* 201, 216 (2001).

¹⁴⁵ JOSEPH A. MASSAD, *DESIRING ARABS* 27 (2007) ("The reasons why Europe 'modernized' are found in an immanent cultural realm, as are the reasons for why the Arabs 'have not.' What we discern in the above examples is a central temporal schema whereby the Arabs are currently 'late,' 'delayed,' and 'behind.'").

¹⁴⁶ Thio, *supra* note 136, at 15 ("The cultural strain of the 'Asian values' school operates along two tracks. On the one hand, 'culture' is invoked defensively and negatively as a shield against the neo-imperialistic imposition of 'alien' Western liberal values On the other, 'Asian values' are invoked offensively and positively as a distinctive approach to human development and state-community-individual relations that is superior to the individualistic, rights-oriented Western liberal democracies, typified by moral decay, social dysfunction, and disrespect for public authority.").

law.¹⁴⁷ Section 377A was not a product of the re-Sinification of Singapore in the era of decolonization, but rather was a direct transplant from the colonial code.¹⁴⁸ In the *Lim Meng Suang* decision, Judge Loh ultimately cited the 2007 Parliamentary decision to retain 377A with the original colonial purpose of 377A, saying, “It is clear from the speeches made during the October 2007 Parliamentary Debates that the purpose of s 377A has not changed from the purpose articulated by AG [Attorney General] Howell in 1938.”¹⁴⁹ Judge Loh regarded the traditional Asian values purpose determined during the 2007 Parliamentary debate and the original colonial purpose as equivalent.¹⁵⁰ This elision, however, problematizes the anti-neocolonial reading of the Parliamentary decision to retain 377A, and raises the question of whether the conservative morals supposedly being protected actually reflects Confucian values of the people or the standards of the old colonial masters.

On the one hand, there may be a romanticized impulse to recover pre-colonial culture. Several scholars have contended that homosexuality as an identity category was not innate to Asia, but a Western concept that was brought into Asia.¹⁵¹ Furthermore, this conception of sexuality facilitated colonial hierarchies.¹⁵² Undisciplined and wild sexuality was

¹⁴⁷ See, e.g., SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (23 October 2007), vol. 83 at col. 2402 (Lee Hsieng Loong, Prime Minister and Minister for Finance).

¹⁴⁸ *Id.*

¹⁴⁹ *Lim Meng Suang* at para. 84. Judge Loh determined that the original purpose of the legal reforms instituted by Attorney General Howell in 1938 was so “[a]cts of ‘gross indecency’ between males, whether in private or in public and whether or not there was consent, constituted criminal behaviour, and it was a criminal offence to indulge in such acts.” *Id.* at para. 69.

¹⁵⁰ *Id.* at para. 84.

¹⁵¹ See generally Adrian Carton, *Desire and Same-Sex Intimacies in Asia*, in *GAY LIFE AND CULTURE: A WORLD HISTORY* 303 (Robert Aldrich ed., 2006); see also CHOU WAH-SHAN, *TONGZHI: POLITICS OF SAME-SEX EROTICISM IN CHINESE SOCIETIES* 42 (2000).

¹⁵² Michel Foucault compares Eastern *ars erotica*, a more fluid approach to sexuality, with Western *scientia sexualis*, which is obsessed with identifying, categorizing, and disciplining sexuality. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY VOLUME 1: AN INTRODUCTION* 57-58 (Robert Hurley trans., 1978) (“In the erotic art, truth is drawn from pleasure itself, understood as a practice and accumulated as experience; pleasure is not considered in relation to an absolute law of the permitted and the forbidden, nor by reference to a criterion of utility, but first and foremost in relation to itself; it is experienced as pleasure, evaluated in terms of its intensity, its specific quality, its duration, its reverberations in the body and the soul [O]ur civilization possesses no *ars erotica*. In return, it is undoubtedly the only civilization to practice a *scientia sexualis*; or rather, the only civilization to have developed over the centuries procedures for telling the truth of sex which are geared to a form of knowledge-power strictly opposed to the art of initiations and the masterful secret”).

deemed to invite the civilizing force of the colonizer, and subsequently warranted the appropriation of land and the imposition of colonial laws to regulate the colonized bodies living upon it.¹⁵³ The sex, sexuality, and sexual practices of the indigenous population were made into sites of spectacle and censure.¹⁵⁴ Native homosexuality, now categorized, studied, and judged as an identity, became a moral justifier for Western colonial domination with respect to Asia.¹⁵⁵ Asian homosexuality, in particular, needed to be regulated for fear that otherwise heterosexual white colonizers might be tempted into the exoticized vice.¹⁵⁶ The native body was disciplined into conformity through criminal, educational, and religious institutions.¹⁵⁷ The early 20th century saw the introduction of Western sexology into Chinese culture that at the time had been semi-colonized by the British, which marked the categorization of same-sex love as a psychological condition and gender identity.¹⁵⁸ Since Britain

¹⁵³ Uday Chandra, *Liberalism and Its Other: The Politics of Primitivism in Colonial and Postcolonial Indian Law*, 47 *LAW & SOC'Y REV.* 135, 138 (2013) ("Primitivism is a type of liberal imperial ideology of rule that has justified the subjugation of populations and places described as wild, savage or, simply, primitive. Primitive populations were, paradoxically, subjects of both *improvement* and *protection* in colonized societies. Much like children need to be nurtured and protected yet improved and guided toward adult capacities of reason and self-governance, primitive peoples, too, were deemed to be exceptional in their need for both improvement and protection via a regime of direct colonial rule."); see also Rudyard Kipling, *The White Man's Burden*, *MCCLURE'S MAG.*, Feb. 1899 (writing on the occasion of the American colonization of the Philippines, which depicts colonial rule of natives as an exercise in white benevolence).

¹⁵⁴ See SADIHAH QURESHI, *PEOPLES ON PARADE: EXHIBITIONS, EMPIRE AND ANTHROPOLOGY IN NINETEENTH-CENTURY BRITAIN* (2011) (analyzing the imperialist ramifications of freakshows as ethnographic spectacles for European audiences); see also Sadiha Qureshi, *Displaying Sara Baartman, the 'Hottentot Venus,'* 42 *HIST. SCI.* 233 (2004) (describing the sexual exoticization of Baartman's body, especially her enlarged buttocks and elongated labia).

¹⁵⁵ BRET HINSCH, *PASSIONS OF THE CUT SLEEVE: THE MALE HOMOSEXUAL TRADITION IN CHINA* 4 (1990) ("Europeans exalted their own hostilities [against homosexuality] as examples of moral purity while viewing tolerance of homosexuality as evidence of Oriental moral degeneracy. Thus homosexuality became a focal point of division between China and the West.").

¹⁵⁶ ROBERT ALDRICH, *COLONIALISM AND HOMOSEXUALITY* 31 (2003).

¹⁵⁷ MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 26 (Alan Sheridan trans., 1979).

¹⁵⁸ WENQING KANG, *OBSESSION: MALE SAME-SEX RELATIONS IN CHINA, 1900-1950*, at 39 (2009) ("In the first half of the twentieth century, indigenous Chinese thought on male same-sex relations . . . provided a condition for the spread of modern Western sexology which, under the conditions of an unequal power relationship between China and the West, eventually acquired its legitimacy under the name of science.").

spread its standards to all its colonial holdings, these categories also were the foundation and basis of American law.¹⁵⁹

The era of decolonization following World War II saw a shift from public morality to privacy as an individual human right in the British Commonwealth.¹⁶⁰ Following the recommendation of the Wolfenden Committee, whose 1957 Report distinguished private sexual conduct from public order,¹⁶¹ the British Parliament decriminalized private homosexual activity between consenting adults in 1967.¹⁶² Individual privacy also became the driving force behind the *Dudgeon* decision. By the end of the 20th century, all of the former colonial powers in Europe had shifted their stance to recognize gay rights as a private individual human right.¹⁶³ In this respect, Europe was viewed as the site where the gay rights movement could begin.¹⁶⁴ As international law became increasingly Eurocentric and the United States finally decriminalized sodomy in *Lawrence*, those nations that did not follow suit in recognizing individual rights to sexual privacy were stigmatized as lagging culturally behind.¹⁶⁵

¹⁵⁹ Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons is to End Prisons: A Response to Russell Robinson's "Masculinity as Prison,"* 3 CAL. L. REV. CIRCUIT 184, 188 (2012) ("From the beginning, racialized and gendered statuses and norms were essential to the colonization and slavery that produced the United States and its legal systems."); see also Scott Lauria Morgensen, *Settler Homonationalism: Theorizing Settler Colonialism Within Queer Modernities*, 16 GLQ: J. LESBIAN & GAY STUD. 105, 116 (2010).

¹⁶⁰ Jeremy Black, *Overview: Britain from 1945 onwards*, BBC, http://www.bbc.co.uk/history/british/modern/overview_1945_present_01.shtml (last updated Mar. 3, 2011).

¹⁶¹ Committee on Homosexual Offences and Prostitution, *THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION 23-24* (Stein and Day eds. 1963) ("[The law's function] is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behavior."); see also Sanders, *supra* note 74, at 25.

¹⁶² Sexual Offences Act, 1967, c. 60 (Eng.).

¹⁶³ Britain was the last major European colonial power to retain criminal anti-sodomy statutes, as France, the Netherlands, Belgium, Spain, Italy and Portugal had dropped them in the 19th century. However, France still criminalized sodomy in its colonies, including Benin, Cameroon, and Senegal. Sanders, *supra* note 74, at 1.

¹⁶⁴ Haider Ala Hamoudi, *Religious Minorities and Shari'a in Iraqi Courts*, 31 B.U. INT'L L.J. 387, 404 (2013) ("[T]he decriminalization of sodomy is only the beginning of any gay rights movement").

¹⁶⁵ Aziza Ahmed, *When Men are Harmed: Feminism, Queer Theory, and Torture at Abu Ghraib*, 11 UCLA J. ISLAMIC & NEAR E. L. 1, 18 (2012) ("Freedom is co-opted for the cause of 'sexual progress' – and sexual freedom has become an indicator of a more civilized people. Jasbir Puar coins the term 'homonationalism' as a way to explore 'sexual exceptionalism, queer as regulatory, and the ascendancy of whiteness'

The pressure to conform to international protections against sexual orientation discrimination was also highly contested in cases from other former British colonial holdings in Asia, such as India¹⁶⁶ and Hong Kong.¹⁶⁷ However, as some commentators have observed, international human rights have come to replace colonial law as the new policing mechanism of the West to monitor and discipline the East.¹⁶⁸

Though likely unintentional, the controversy surrounding 377A in Singapore became a reminder that repressive mechanisms over sexuality, which are presently ostracized as savage and backwards from the liberal perspective, have origins in Western law. The irony of Singapore's vehement defense of the colonially-imposed 377A as an expression of postcolonial self-determination wonderfully illustrates Aeyal Gross' quandary; "how should human rights violations be addressed, without imposing the Western model of sexuality on one hand, but without ignor-

in the [War on Terror]."); see Jasbir K. Puar, *Queer Times, Queer Assemblages*, 23 SOC. TEXT 121 (2005); see also MASSAD, *supra* note 20, at 27.

¹⁶⁶ Suresh Kumar Koushal and Another v. Naz Found. & Others, at para. 52 (2013) SLP (C) No.15436/2009, Dec. 11, 2013 (Sup. Ct. Ind.) (overturning Naz Found. v. Gov't of NCT of Delhi & Others, (2009) WP(C) No.7455/2001, July 2, 2009 (Del. H.C.), which had originally struck down 377 in India. The case was brought by an international human rights organization whose argument relied heavily on global trends towards decriminalization of homosexual activity); see also Sujit Choudhry, *Living Originalism in India? "Our Law" and Comparative Constitutional Law*, 25 YALE J.L. & HUMAN. 1, 12 (2013) ("Comparative constitutional law played a central role in the case, and illustrates another way in which a living originalism can be comparatively inflected. The background to *Naz Foundation* is that in a growing number of constitutional systems, courts have condemned discrimination on the basis of sexual orientation, and interpreted constitutional guarantees of liberty and/or privacy in a non-discriminatory manner to encompass sexual intimacy between same-sex partners. These comparative materials were at the center of the legal submissions to the court in *Naz Foundation*, which should be understood as part of a global legal-political strategy to advance the cause of same-sex rights through public interest litigation."); see also Sujit Choudhry, *How To Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights, and Dialogical Interpretation*, in COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA 45 (Sunil Khilnani, Vikram Raghavan & Arun K. Thiruvengadam eds., 2012).

¹⁶⁷ In *Leung T. C. William Roy v. Sec'y for Justice*, [2005] 3 H.K.L.R.D 657, 695 (C.F.I.) (striking down Hong Kong's anti-sodomy statute as unconstitutional, the court invoked international legal standards regarding sexuality); see also Carole J. Petersen, *Sexual Orientation and Gender Identity in Hong Kong: A Case for the Strategic Use of Human Rights Treaties and the International Reporting Process*, 14 ASIAN-PAC. L. & POL'Y J. 28, 51 (2013) ("The judgment also used comparative jurisprudence to interpret the right to privacy, contained in both the ICCPR and the Hong Kong Bill of Rights Ordinance.").

¹⁶⁸ See, e.g., Petersen, *supra* note 167, at 28; see also Massad, *supra* note 20, at 375 ("While the premodern West attacked the Muslim world's alleged sexual licentiousness, the modern West attacks its alleged repression of sexual freedoms.").

ing the fact that globalization has already exported it and that the construction of sexuality outside the 'West' is already a postcolonial one?"¹⁶⁹ In the modern era of global gay rights, which is now popularly presumed to have originated in the West, scrutiny and accountability often shifts onto indigenous cultures in nonconforming states, even when those views are not necessarily indigenous, as in the case of many postcolonial Asian countries. In this way, the repressive norms regarding sexuality are deflected onto the Asian "Other" and away from the Western colonizer.

Furthermore, postcolonial Asian subjects have been so historically disciplined into upholding colonial norms¹⁷⁰ they unconsciously mimic and affirm those standards as culturally their own even in their efforts to decolonize. This proved especially true in Nominated Member of Parliament Li-ann Thio's anti-neocolonial speech, which mimics and adopts the language and rhetoric of colonial domination, as she spoke from the position of order and civility against an "Other" culture that she censured as wild and undisciplined.¹⁷¹ As journalist Janadas Devan has also observed, Member of Parliament Thio specifically adopts the language of the American Christian right in her speech.¹⁷² Her speech, therefore, also reflects the initial role of Western religion in colonial domination and its continued involvement in postcolonial subjectivity.

During the 2007 Parliamentary debates, Member of Parliament Baey Yam Keng offered a hypothetical scenario that envisions a romanticized pre-colonial Singapore:

Let us look at this issue in a hypothetical scenario. Singapore was never a British colony and we did not inherit section 377A. Today's debate then becomes one of justifying the introduction of a new piece of legislation which states that, 'It is an offence for any male person, who in public or private, commits an act of gross indecency with another male person.'¹⁷³

¹⁶⁹ Aeyal Gross, *Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation?*, 101 AM. SOC'Y INT'L L. PROC. 129, 132 (2007).

¹⁷⁰ Aaron K. H. Ho, *How to Bring Singaporeans Up Straight (1960s-1990s)*, in QUEER SINGAPORE: ILLIBERAL CITIZENSHIP AND MEDIATED CULTURES 29, 35 (Audrey Yue & Jun Zubillaga-Pow eds., 2012) ("Singapore's laws have inherited the religious, self-righteousness and prudishness of the Victorian policy, and like Foucault's prisoners, Singaporeans have tamed themselves to think like Victorians.").

¹⁷¹ SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (22 October 2007), vol. 83 at col. 2242 (Thio Li-ann, Nominated Member) ("First, to say a law is archaic is merely chronological snobbery. Second, you cannot say a law is 'regressive' unless you first identify your ultimate goal. If we seek to shape the sexual libertine ethos of the wild wild West, then repealing section 377A is progressive.").

¹⁷² Janadas Devan, *377A Debate and the Rewriting of Pluralism*, STRAITS TIMES (Singapore), Oct. 27, 2007, available at 2007 WLNR 21145463.

¹⁷³ SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (23 October 2007), vol. 83 at col. 2363 (Baey Yam Keng, Member of Parliament).

In response, Prime Minister Lee rejected the urge to romanticize the pre-colonial past, and instead offered this pragmatic resolution:

We are not starting from a blank slate, trying to design an ideal arrangement; neither are we proposing new laws against homosexuality. We have what we have inherited and what we have adapted to our circumstances. And as Mr [sic] Hri Kumar pointed out, we inherited section 377A from the British, imported from English Victorian law – Victorian from the period of Queen Victoria in the 19th century – via the Indian Penal Code, via the Straits Settlements Penal Code, into Singapore law. Asian societies do not have such laws, not in Japan, China and Taiwan. But it is part of our landscape. We have retained it over the years. So, the question is: what do we want to do about it now? Do we want to do anything about it now? If we retain it, we are not enforcing it proactively. Nobody has argued for it to be enforced very vigorously in this House. If we abolish it, we may be sending the wrong signal that our stance has changed, and the rules have shifted.¹⁷⁴

On the one hand, Prime Minister Lee acknowledged Member of Parliament Baey's point about colonialism.¹⁷⁵ The fact that Prime Minister Lee specifically mentioned China and Taiwan – both Sinophone and Confucian-based societies – in addition to Japan as countries that have not criminalized sodomy, casts doubt as to whether the distaste for homosexuality is originally a traditionally Asian value at all.¹⁷⁶

On the other hand, Prime Minister Lee's refusal to imagine Singapore as a blank slate free from colonial interference also reveals the ways in which 377A is not simply a transplanted colonial law that can be overturned simply by erasing it from national consciousness and memory.¹⁷⁷ Rather, Singapore's retention of 377A "over the years" adapted and evolved to reflect hybridized values of the nation over a complex history of colonization, decolonization, and industrialization.¹⁷⁸ Prime Minister Lee's proposal to retain but not enforce 377A appears to be another illiberal pragmatic move by a government caught between its international and domestic interests, choosing the path of least resistance by maintaining the status quo and not expending additional political capital pushing

¹⁷⁴ *Id.* at col. 2402 (Lee Hsieng Loong, Prime Minister and Minister for Finance).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See Sheldon Bernard Lyke, *Brown Abroad: An Empirical Analysis of Foreign Judicial Citation and the Metaphor of Cosmopolitan Conversation*, 45 VAND. J. TRANSNAT'L L. 83, 131 (2012).

¹⁷⁸ See SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (23 October 2007), vol. 83 at col. 2402 (Lee Hsieng Loong, Prime Minister and Minister for Finance).

for a minority interest.¹⁷⁹ Yet illiberal pragmatics represents a hybrid of Singapore's attitude towards the West, both in terms of the colonialism of the past and the neocolonialism of the present. Rather than taking a polarized position of rigid acceptance or rejection, the Singaporean government engages in a combination of both.¹⁸⁰

In this way, Prime Minister Lee's comments reveal the latent tensions within postcolonial Singaporeans and, more specifically, the majority who are ethnically Chinese,¹⁸¹ regarding their complexly-developed attitudes towards sexuality. Although there exists an extreme cultural investment in procreation and the furtherance of the family unit that causes disapproval towards homosexuality, there is ambiguity as to whether these are the norms held innately by the culture, or whether they have been overly influenced by colonial norms. Prime Minister Lee resists the urge to determine the source of morality. His question "what do we want to do about it now?"¹⁸² is concerned less with recovering a more "authentically" Asian moral attitude toward homosexuality, but rather looks to the realities of how those morals have evolved and been adapted for the current population today.

Prime Minister Lee's identification of the colonial aspect of 377A, that "it is part of our landscape . . . [w]e have retained it for years,"¹⁸³ is also recognition of the continuing postcolonial subjectivity of the Singaporean people. Some critics have noted that the initial resistance movement against the repeal of 377A may have been spurred by a small Christian

¹⁷⁹ Chua, *supra* note 59, at 718 ("Where civil-political rights are concerned, however, the Singaporean state remains reluctant to change at the pace of international human rights discourse or under the ostensible pressure of transnational advocacy. The state and ruling party do covet international legitimacy, but they do not pursue it at what they perceive may be the expense of social stability and economic progress Look no further than the retention of Section 377A. PAP leaders are sympathetic to the problem, and may recognize that it costs Singapore some international legitimacy. Yet, the need to retain domestic hegemony prevails, and hence the compromising position that the provision would be retained to reflect their perception of majority's values, but not enforced in private, consensual cases.").

¹⁸⁰ Some scholars contend that Western liberal rights discourse can still provide useful precedents for non-Western nations to consider, but only when construed in light of particular cultural contexts of individual nations. See, e.g., Sujit Choudhry, *Globalization in Search of a Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L.J.* 819, 829 (1999); Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 *BERKELEY J. INT'L L.* 216, 218 (2010).

¹⁸¹ *Country Profile: Singapore*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html> (last updated Jan. 7, 2014) (listing the percentage of the Singaporean population recorded as ethnically Chinese to be 76.8%).

¹⁸² SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (23 October 2007), vol. 83 at col. 2402 (Lee Hsieng Loong, Prime Minister and Minister for Finance).

¹⁸³ *Id.*

minority.¹⁸⁴ This may serve as a reminder of the persistent influence and relevance of colonially-introduced religion in present Singaporean culture.¹⁸⁵ Most importantly, Parliament ultimately attributed conservative values to the entire ethnic majority.¹⁸⁶ Prime Minister Lee's statements before Parliament imply that despite the attempt to recover a pre-colonial cultural identity through neo-Confucianism, Singapore can never truly escape its colonial past.¹⁸⁷ As revealed by the elision in Judge Loh's opinion and by aspects of the 2007 Parliamentary debate, the retention of 377A functions perhaps equally as an affirmation of a conservative anti-neocolonial populace as much as an affirmation of Western colonially imposed norms on sexuality. In modern Singapore, the two are inexorably connected.¹⁸⁸

V. REVISITING TRADITIONAL VALUES IN THE 2007 PARLIAMENTARY DEBATES: A NEW HOPE?

During the 2007 debates, many members of Parliament were chiefly concerned with the interests of the silent majority,¹⁸⁹ which in Singapore

¹⁸⁴ See generally Chen, *supra* note 59, at 111; Chua, *supra* note 59, at 736.

¹⁸⁵ The temporary takeover of a feminist organization in Singapore, the Association of Women for Action and Research ("AWARE"), in 2009 by a minority faction of Chinese Christian women reignited the idea that majoritarian politics was being driven by minority religious interests. The unsuccessful takeover by the minority Christian faction, popularly known as the AWARE saga, was initiated in reaction to the organization's support of repealing 377A. See Terence Chong, *Introduction to THE AWARE SAGA: CIVIL SOCIETY AND PUBLIC MORALITY IN SINGAPORE 1* (Terence Chong ed., 2011).

¹⁸⁶ SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (23 October 2007), vol. 83 at col. 2397 (Lee Hsieng Loong, Prime Minister and Minister for Finance).

¹⁸⁷ *Id.* at col. 2402.

¹⁸⁸ ONG, *supra* note 8, at 81 (using Singapore as an example, Aihwa Ong suggests that "narratives of Asian modernity contain many of the elements in Western discourses because they are informed by and are continually produced by negotiating against Western domination in the world.").

¹⁸⁹ In vocalizing his own reflections on 377A before Parliament, Member of Parliament Alvin Yeo advised, "one has to take account of not just the minority views but the majority views as well, to not just listen to the vocal, the articulate, the high profile spokesmen for their various causes, but to try and discern the views of the vast and silent segments of the population whose views and feelings run just as strong. It is generally accepted that a large portion of the population remains uncomfortable with, even troubled, by homosexual [behaviourbehavior]. The *Straits Times* ran a poll where something like 70% expressed discomfort with these views." SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (22 October 2007), vol. 83 at col. 2242 (Alvin Yeo, Member of Parliament). Member of Parliament Ong Kian Min also referred to his constituents as "the hitherto silent majority." *Id.* at col. 2376 (Ong Kian Min, Member of Parliament).

is overwhelmingly ethnic Chinese.¹⁹⁰ Ultimately, Prime Minister Lee spoke on behalf of this perceived silent majority, and interpreted their silence as approval of the status quo.¹⁹¹ Thus, he attributed silence as a mandate for the continued middle ground proposed to Parliament – that the law should not be changed as to reflect the conservatism of the society, but should not be enforced as to reflect the overall tenet in the ethnic Chinese tradition of Singaporean culture to “live and let live.”¹⁹² In this way, Prime Minister Lee echoed and endorsed Senior Minister of State for Home Affairs Ho Peng Kee’s “live and let live” position as a continuation of illiberal pragmatics for the majority population.¹⁹³

As Jianlin Chen points out, however, the polarized debate over 377A occurred largely among the English-speaking population, with the Chinese-speaking majority actually being neutral, but remaining silent.¹⁹⁴

¹⁹⁰ In 2007, the ethnic composition of the resident population in Singapore was 74.8% Chinese. DEPARTMENT OF STATISTICS, MINISTRY OF TRADE & INDUSTRY, REPUBLIC OF SINGAPORE, POPULATION TRENDS 2007, at 4 (2007).

¹⁹¹ This blind support for the status quo is even acknowledged by Parliament Member Baey Yam Keng, one of the more vocal advocates for repeal of 377A. SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (23 October 2007), vol. 83 at cols. 2369-70 (Baey Yam Keng, Member of Parliament) (“However, whether the perceived majority holding the status quo view has enough knowledge and understanding of the subject matter to make an informed opinion, is another question. I suspect a significant segment of our society does not really care and some are just uncomfortable with this topic and choose the convenient way to stick with the *status quo* without knowing what the Act exactly is and does. Last week, a resident came to my meet-the-people session and said that she is happy that the Government is retaining section 377A. I asked her, ‘Do you know what section 377A is about?’ She said, ‘I don’t ‘know.’”).

¹⁹² *Id.* at col. 2401 (Lee Hsieng Loong, Prime Minister and Minister for Finance).

¹⁹³ *Id.* at col. 2175 (Ho Peng Kee, Senior Minister of State for Home Affairs) (“Next, Sir, section 377A which criminalises acts of gross indecency between two male adults will be retained. Public feedback on this issue has been emotional, divided and strongly expressed with the majority calling for its retention. Sir, Singaporeans are still a largely conservative society. The majority find homosexual behaviour offensive and unacceptable. Neither side is going to persuade or convince the other of their position. We should live and let live, and let the situation evolve, in tandem with the values of our society. This approach is a pragmatic one that maintains Singapore’s social cohesion.”).

¹⁹⁴ Chen, *supra* note 59, at 120 (“The survey and analysis of the Chinese and Malay newspapers confirmed that the Chinese-speaking and Malay community were not actively engaged in the debate. The moderate attitude reflected in the Chinese newspapers also echoed the Chinese historical cultural ambivalence toward homosexuality. Taken together, the government’s final decision to retain the law while stripping most of its moral content did actually reflect the true majority’s position that neither approved of nor condemned homosexuality. The Section 377A debate in Singapore is a classic example of two minority interest groups staking out extreme positions on either end with a moderate majority occupying the center.”);

Chen suggests that although neutrality was perceived by the Prime Minister to constitute resistance to changing the law, the actual attitude of the Chinese population was likely more akin to tolerance rather than condemnation of homosexuality.¹⁹⁵ Chen's thesis is consistent with scholarship on the tolerance of male homosexuality in Chinese history.¹⁹⁶ Matthew Sommer, for example, argues that Chinese culture did not condemn sex between men, but rather stigmatized the male who was penetrated.¹⁹⁷ Being penetrated culturally signified assuming the feminine position within the sexual hierarchy, which indicates the gender biases of a paternalistic culture more than a disapproval of homosexual behavior.¹⁹⁸ Moreover, homosexuality was not initially conceived of in Chinese culture as a sexual identity, but rather conduct.¹⁹⁹ Male same-sex inti-

SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (23 October 2007), vol. 83 at cols. 2401-02 (Lee Hsieng Loong, Prime Minister and Minister for Finance) ("For the majority of Singaporeans – this is something that they are aware of but it is not the top [sic] of their consciousness – including, I would say, amongst them a significant number of gays themselves. But, also, I would say, amongst the Chinese-speaking community in Singapore. The Chinese-speaking Singaporeans are not strongly engaged, either for removing section 377A or against removing section 377A. Their attitude is: live and let live. So, even in this debate in these two days, Members would have noticed that there have been very few speeches made in Parliament in Mandarin on this subject. I know Mr Baey Yam Keng made one this afternoon, but Mr Low Thia Khiang did not. It reflects the focus of the Chinese-speaking ground and their mindsets. So, for the majority of Singaporeans, their attitude is a pragmatic one. We live and let live.").

¹⁹⁵ Chen, *supra* note 59, at 117.

¹⁹⁶ See GIOVANNI VITIELLO, *THE LIBERTINE'S FRIEND: HOMOSEXUALITY AND MASCULINITY IN LATE IMPERIAL CHINA* 3, 5 (2011) (pointing to evidence of male homoerotic literature to argue that homosexuality was widely accepted as a means for men to fulfill their sexual desires); see also CHOU WAH-SHAN, *supra* note 151, at 13-58. However, as Holning Lau cautions, "That tolerance did not manifest in notions of gay identity or gay rights, and it is important not to over-romanticize indigenous Chinese culture's treatment of sexual diversity. Nonetheless, the historical record demonstrates that indigenous Chinese cultural acceptance of same-sex attraction has fluctuated over time, including periods of notable tolerance. This historical research problematizes cultural preservation claims that suggest Chinese culture is static and inherently requires condemnation of homosexuality." Lau, *supra* note 12, at 787-88.

¹⁹⁷ MATTHEW H. SOMMER, *SEX, LAW, AND SOCIETY IN LATE IMPERIAL CHINA* 118-65 (2000) (suggesting that rather than a general stigmatization of sodomy, there was only a stigmatization of the penetrated male, and that the legal prohibitions against sodomy during the Qing dynasty were akin to rape laws).

¹⁹⁸ See Tim Carrigan et al., *Toward a New Sociology of Masculinity*, 14 *THEORY & SOC'Y* 551, 587 (1985) ("It is particular groups of men, not men in general, who are oppressed within patriarchal sexual relations, and whose situations are related in different ways to the overall logic of the subordination of women to men.").

¹⁹⁹ SONG HWEE LIM, *CELLULOID COMRADES: REPRESENTATIONS OF MALE HOMOSEXUALITY IN CONTEMPORARY CHINESE CINEMAS* 9 (2006) ("[T]he distinction between sexual acts and sexual identities is not so much that the former is 'what one

macy was comparable to filial intimacy,²⁰⁰ and a man who had sex with other men could still fulfill obligations of reproduction. In pre-modern Chinese culture, male sexual intimacy was not necessarily inconsistent with the cultural value of marriage and procreation.²⁰¹

This history was absent in the discussion leading to the final Parliamentary decision to retain 377A, and was only implied in the “live and let live” position that Prime Minister Lee attributed to the ethnically Chinese majority. Instead, what is left in the decision to retain 377A is the self-policing gaze of a residual colonial eye that ever remains vigilant of the sexual conduct and mores of the once colonized.²⁰² Thus, the specter of colonial authority remains persistent in the postcolonial Asian state.²⁰³ As discussed, not even a year after the Prime Minister’s assurance of non-enforcement against private action, the Singaporean government demonstrated that it would still prosecute public action under 377A in the case of Chan Mun Chiong.²⁰⁴ Chan was arrested and prosecuted because he allegedly had oral sex with a sixteen-year-old male in a public toilet in a shopping center, and after the teenager refused to engage in anal sex, Chan stalked him throughout the shopping center until the teenager sought the help of a security guard who subsequently arrested Chan.²⁰⁵ Chan later tested HIV-positive and was charged under the Infectious Disease Act for not disclosing his condition to his sexual partner as well as under 377A.²⁰⁶

does’ and the latter is ‘what one is’ (to borrow Hirsch’s phrases); rather, the very concepts of act and identity must be seen as the *effects* of sexual discourses that not only distinguish one from the other, but also, by mobilizing this distinction, impose an arbitrary marker that separates the two concepts as mutually exclusive.”).

²⁰⁰ HINSCH, *supra* note 155, at 13.

²⁰¹ CHOU WAH-SHAN, *supra* note 151, at 20.

²⁰² Sandra Lee Bartky, *Foucault, Femininity, and the Modernization of Patriarchal Power*, in *THEORIZING FEMINISMS* 277, 288 (Elizabeth Hackett & Sally Haslanger eds., 2006) (“The gaze which is inscribed in the very structure of the disciplinary institution is internalized by the inmate; modern technologies of behavior are thus oriented toward the production of isolated and self-policing subjects.”); *see generally* FOUCAULT, *supra* note 157, at 201.

²⁰³ *See also* Stewart Chang, *Sex, Rice, and Videotape: Popular Media, Transnational Asian/American Masculinity, and a Crisis of Privacy Law in the Edison Chen Sex Scandal*, 37 *AMERASIA J.* 28, 45 (2011) (finding that the criminal application of the Control of Obscene and Indecent Articles Ordinance, a remnant British colonial law in Hong Kong, was a similar exercise in self-policing).

²⁰⁴ *Public Prosecutor v. Chan Mun Chiong* [2008] SGDC 189.

²⁰⁵ *Id.*

²⁰⁶ Michael Hor, *Enforcement of 377A: Entering the Twilight Zone*, in *QUEER SINGAPORE: ILLIBERAL CITIZENSHIP AND MEDIATED CULTURES* 45, 49 (Audrey Yue & Jun Zubillaga-Pow eds., 2012).

When pressed about Prime Minister Lee's previous assurance of non-proactive prosecution, Minister of Home Affairs Wong Kan Sung made the distinction between private and public conduct:

As to why he was charged under section 377A, our basic approach remains, as stated by the Prime Minister during the debate on the Penal Code amendments in October last year, which is that the Police does not take active enforcement measures to seek out homosexual activities between consenting adults that take place in a private place with a view to prosecution. Mr[.] Chan Mun Chiong's case, however, is not such a case. It is not the result of active enforcement against him in a private place.²⁰⁷

Michael Hor, who teaches criminal law at National University of Singapore, argues that prosecution of Chan under 377A was unnecessary, since he was already being charged under the Infectious Disease Act for not disclosing his HIV-positive status.²⁰⁸ Hor posits that if the government was truly concerned with public decency, he could have been charged under § 20 of the Miscellaneous Offenses (Public Order and Nuisance) Act which punishes "indecent behavior in any public road or in any public place or place of public amusement or resort, or in the immediate vicinity of, or in, any court, public office, police station, or place of worship."²⁰⁹ By prosecuting only the most heinous of situations under 377A rather than § 20, thereby making it a public spectacle associated more with a law regulating homosexuality, rather than public indecency, the government perpetuated the public perception of homosexuality as deviant. When private actions of gay couples in committed relationships such as Lim Meng Suang and Kenneth Chee are not prosecuted, they remain invisible.

The decision to prosecute under 377A only for public, rather than private, violations perpetuates the residual colonial impulse to categorize sexuality. Coercive, predatory, and underage sodomy between men become public spectacles of deviance that, when prosecuted under an umbrella statute prohibiting homosexual conduct generally, categorically associates all homosexual conduct with those types of pathological conduct, which is then juxtaposed against normative heterosexuality and traditional families. On the other hand, coercive, predatory, and underage sodomy between people of the opposite sex, when prosecuted under statutes that specifically prohibit those types of conduct, rather than heterosexuality generally, only vilifies those specific types of conduct. The problem with the government policy regarding non-enforcement of pri-

²⁰⁷ SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (21 July 2008), vol. 84 at col. 2923 (Wong Kan Seng, Deputy Prime Minister and Minister for Home Affairs).

²⁰⁸ Hor, *supra* note 206, at 49-51.

²⁰⁹ *Id.* at 51, 56.

vate homosexual conduct is that it keeps the truly private invisible and absent from public opinion since it is never prosecuted and made public.

The relationship between privacy and individualism becomes the central problem for applying Western concepts of gay rights in Singapore. The global gay rights movement unrelentingly preaches, as a universal principle, the enforcement of a private individual right, i.e., the right ultimately to be left alone by the government.²¹⁰ This fundamentally liberal argument, in the context of gay rights, comes very close to advocating for the right to sodomy that was refuted by the U.S. Supreme Court in *Bowers* because majoritarian morality was against it.²¹¹ Although the U.S. Supreme Court eventually repudiated this position in *Lawrence*, this sentiment from *Bowers* survives in Singapore. Because the cultural Asian values of the local majority in Singapore are tied to the *Bowers* reasoning that has been overruled by *Lawrence*, they are similarly dismissed as outdated and illegitimate, as a matter of law, and also must be rejected by any modern gay subject. It is at this crux where the gay subject in a postcolonial Asian country like Singapore often becomes self-divided. The modern Asian gay male is constructed within a binary opposition, where as Lisa Rofel puts it, "Gay men in Asia can be either universal or Asian but not both, even as their Asianness continues to leave them in a place of otherness to global gayness."²¹² Many times for the gay Asian subject, to embrace gay identity means to reject his people and his nation.²¹³ Such fracturing suggests that for gay Singaporean subjects, the

²¹⁰ See generally David John Frank & Elizabeth H. McEaney, *The Individualization of Society and the Liberalization of State Policies on Same-Sex Sexual Relations, 1984-1995*, 77 SOC. FORCES 911 (1999).

²¹¹ *Bowers v. Hardwick*, 478 U.S. 186, 193-94, 196 (1986).

²¹² LISA ROFEL, *DESIRING CHINA: EXPERIMENTS IN NEOLIBERALISM, SEXUALITY, AND PUBLIC CULTURE* 91 (2007).

²¹³ This tension is illustrated by an anecdote told by Nominated Member of Parliament Siew Kum Hong about a gay Singaporean man who expatriated to Europe. SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (22 October 2007), vol. 83 at col. 2242 (Siew Kum Hong, Nominated Member of Parliament) ("Mr[.] Alex Liang . . . is a former Singaporean who has renounced his citizenship and is now a UK citizen. By all objective measures, Mr[.] Liang is someone who would have served the country very well. We had invested heavily in him. He received a sports award for three years running, and was also a humanities scholar. He represented the country in gymnastics, receiving generous training allowances. He speaks eight languages and had excellent academic results. But the moment he completed National Service, he left for Europe and he stayed there. He had long decided to leave Singapore, as he did not see a viable future for himself in Singapore as a gay man.").

notion of a unitary gay identity may perhaps be more harmful than beneficial.²¹⁴

To potentially resolve this tension for gay rights and identity in Singapore, the Author of this Article turns to Kimberle Crenshaw's theory of intersectionality.²¹⁵ Intersectionality resists the notion that a person's identity is monolithic and posits instead that the different facets of a person's identity – such as race, gender, religion, ethnicity, and sexual orientation – intersect and overlap to create layered levels of experience and subordination that are often overlooked when considered separately.²¹⁶ In advocating for gay rights in Singapore, the intersections that must be addressed do not only cover ethnic culture and sexuality, but also postcolonial status, which all lie at the heart of the reasoning behind the decision to retain 377A. Again, Singapore is a unique postcolonial state that has a love-hate relationship with Western capitalism, as articulated in its illiberal pragmatic approach to law and governance. The reaffirmation of ethnic culture seeks to address the needs of an ethnically Chinese majority population that has been increasingly marginalized and culturally diluted largely as a result of Westernized economic expansion in the country,²¹⁷ which becomes a system of re-experiencing colonialism.

However, whereas traditionally intersectional theory proposes looking outside the confines of mainstream structures, this Article proposes looking for a solution from an insider's perspective because of the particular postcolonial nuances of the Singaporean population. The Western liberal approach to gay rights, as exemplified in *Lawrence*, that was implicitly singled out by Judge Loh,²¹⁸ seeks to silence and delegitimize the moral voice of the majority. On the other hand, on behalf of this majority, Judge Loh and Prime Minister Lee both send the clear, opposite message that their cultural morals are not only relevant, but determinative.²¹⁹ In Singapore, the moral position of the majority is directly associated with a revival of cultural values that were suppressed during colonization. The

²¹⁴ Sonia K. Katyal, *The Dissident Citizen*, 57 UCLA L. REV. 1415, 1426 (2010) (“[T]he very space of an LGBT diaspora is marked by a dynamic hybridity between nations, sexualities, and loyalties that often elides simple classifications.”).

²¹⁵ Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

²¹⁶ *Id.* at 1242-45.

²¹⁷ Chang, *supra* note 30, at 56 (2011) (“Singaporean distinctiveness exhibited by the heartlanders [a term used by former Prime Minister Goh Chok Tong to describe the working-class, ethnically Chinese majority in Singapore] is declining in the face of continued international economic developments in the region that destabilize local identity in favor of more flexible, transnational subjectivity motivated by economic attainment . . .”).

²¹⁸ Lim Meng Suang at para. 140.

²¹⁹ See *e.g.*, *id.*; SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (23 October 2007), vol. 83 at col. 2402 (Lee Hsieng Loong, Prime Minister and Minister for Finance).

decisions to uphold 377A from all branches of the Singaporean government indicate that the rule of majority morality is not going to change. Thus, challenging the rule is perhaps not the right solution. Rather than work against the rule and oppose cultural morality as the polar antithesis to gay rights, a modified version of intersectionality theory facilitates a better strategy of uncovering what is truly behind the morality of the majority, bridging the gaps, and working within the rules to create a solution.

Applying an intersectional approach in this way would suggest listening to and understanding the voice of cultural morality rather than simply dismissing it. From the 2007 Parliamentary debates and Judge Loh's decision, one thing is abundantly clear: family and procreation are foundational values in Asian culture.²²⁰ The unfortunate reality is that homosexuality is popularly conceived of in Singapore as the binary opposite of family, and rather than dismiss this thought as ignorant, misunderstood, or even a false colonial consciousness as suggested above, it is useful to address it as a reality. As Prime Minister Lee stated in his address supporting retention of 377A, the history of colonialism is a reality in Singapore.²²¹ In terms of the interrelationship between colonialism, culture, and sexuality, it is useful to recognize the contribution of a colonially imposed binary understanding of homosexuality versus heterosexuality to this misperception, which is itself just another layer of subordination within Singaporean identity that the ethnic majority is reacting against.

Presented another way, homosexuality, especially in connection to the global gay rights movement, becomes linked with Westernization. For the Singaporean subject, that is perceived to unappealingly prioritize individual rights above community and family. This type of individuality is seen as threatening to the family and Asian morality, and homosexuality is simply an extreme and conspicuous expression of this type of individuality. The symptoms of this in Singapore, as described above, involve a fracturing of identity for gay Asian subjects, of making a binary choice between gay identity (aligned with the West) and cultural identity (linked to the East). When forced with the binary choice, too many choose the West and do not look back.²²² The choice to affirm a homosexual iden-

²²⁰ Lim Meng Suang at para. 140.

²²¹ SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (23 October 2007), vol. 83 at col. 2402 (Lee Hsieng Loong, Prime Minister and Minister for Finance).

²²² Eric Wat, who was born in Hong Kong but now lives in the United States, talked about this tension when sharing his own family story: "My parents' paradox – they hate queers, but they love me, even though I am gay – can be achieved by separating my gayness from my other identities, familial and cultural . . . Tragically, the perceived conservatism of the Asian communities has often led queer Asians to turn their backs on their ethnic and cultural identities. The separation is hereby complete, and the paradox preserved. The paradox survives when we refuse to talk

tity, which is often expressed in the predominantly Western individualistic process of “coming out,”²²³ is perceived within this simple binary as choosing the West and thus abandoning the East and the East’s emphasis on culture, community, and family. Homosexuality and gay rights, when they are aligned with the neocolonial Western individual rights agenda, are therefore seen as threatening to the traditional Asian family unit.

Historically, ethnic aversion to homosexual behavior was not so much a judgment on sexuality as it was on those who do not value procreation.²²⁴ This view is not inconsistent with the current morality of the ethnic majority in Singapore. The only speech before Parliament that was delivered in Mandarin Chinese, and thus purposefully directed towards the Sinophone majority, was by Member of Parliament Baey and he specifically addressed the issue of procreation.²²⁵ In Member of Parliament

about being Asian and being gay at the same time, when one is abandoned for the sake of another.” Eric C. Wat, *Preserving the Paradox: Stories from a Gay-Loh*, in *ASIAN AMERICAN SEXUALITIES: DIMENSIONS OF THE GAY AND LESBIAN EXPERIENCE* 71, 76-77 (Russell Leong ed., 1996).

²²³ See Martin F. Manalansan IV, *GLOBAL DIVAS: FILIPINO GAY MEN IN THE DIASPORA* 27-35 (2003) (examining the “practice of coming out as a particularly American idea and behavior”); see also Alice Y. Hom, *Stories from the Homefront: Perspectives of Asian American Parents with Lesbian Daughters and Gay Sons*, in *ASIAN AMERICAN SEXUALITIES: DIMENSIONS OF THE GAY AND LESBIAN EXPERIENCE* 37, 39 (Russell Leong ed., 1996) (“[T]he parents interviewed recounted incidents of being aware of lesbians and or gays while they were growing up and did not blame assimilation and Anglo American culture for their children’s sexual orientation. One quote by Lucy Nguyen, a fifty-three year old Vietnamese immigrant who has two gay sons, does, however, imply that the environment and attitudes of the United States allowed for her sons to express their gay identity.”).

²²⁴ HINSCH, *supra* note 155, at 171 (“[T]o most Chinese homosexuality seems evil because it disrupts the accepted life cycle. They see the self-identified homosexual, who forgoes heterosexual marriage and the raising of children, as a grave enemy of the family structure, which still forms the foundation of Chinese society.”); see also FRANK DIKÖTTER, *SEX, CULTURE AND MODERNITY IN CHINA: MEDICAL SCIENCE AND THE CONSTRUCTION OF SEXUAL IDENTITIES IN THE EARLY REPUBLICAN PERIOD* 137 (1995); Vivien Ng, *Homosexuality and the State in Late Imperial China*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 76, 88 (Martin Duberman et al., eds., 1989).

²²⁵ SINGAPORE PARLIAMENTARY DEBATES, OFFICIAL REPORT (23 October 2007), vol. 83 at col. 2367-2465 (Bae Yam Keng, Member of Parliament) (“Sir, I will now continue my speech in Mandarin. (*In Mandarin*): As the Chinese saying goes, 不孝有三，无后为大 (Bu Xiao You San, Wu Hou Wei Da) which means, ‘There are three unfilial acts, the greatest is not to have a son.’ This is an important concept in a traditional and oriental society like ours. Parents are hoping that their sons will have wives and their daughters will be married, and the children also understand that it is an obligation for them to get married and have children. Nevertheless many people choose to marry late, not to get married, or not to have children, and for some it remains solely a personal choice. There are many reasons, but one reason is that they

Baey's address, he spoke of gay constituents who did not know how to tell their parents that they were gay because of the fear of disappointing them regarding the possibility of never having grandchildren.²²⁶ In one particularly tragic example, he spoke about one son who never told his father about his sexuality during his lifetime, and was only able to confess at his father's grave.²²⁷ In addition, the decision to keep sexual identity secret from parents often derives from a sense of filial piety – of not wanting to place parents in positions of potential public shame and scorn since homosexuality is still looked down upon in Singaporean society.²²⁸ For many gay Singaporeans, to be gay is to be unfilial, and they view gay rights advocacy, as it has been presented in the international front, as the impossible choice between being true to themselves and breaking their parents' hearts.

Ultimately, this modified use of intersectionality theory suggests that perhaps gay rights in Singapore should not be about convincing the judiciary, Parliament, or the ethnic majority that they are wrong, but about bridging the gaps. It involves recognizing that the tenets in *Dudgeon* and *Lawrence* – that the individual right to sexual privacy overrides the moral concerns of the majority population – does not necessarily apply universally, especially in postcolonial Asia. William Eskridge proffers that legal victories are less important than persuading one's neighbors in "Lessons for Gay Rights Liberals," where he recognizes, generally, the role played by traditional communitarianism in shaping social reform in terms of sexual-orientation equality.²²⁹ He argues that the courts are really a sounding board for prevalent attitudes of the population, and that the more effective route to achieving equality perhaps is not gained through the courts and enforcement of rights, but through bridging gaps in public perception and attitudes.²³⁰

Given the intersectional complexities of Singapore, the gay rights agenda may be better served by reevaluating the impetus behind the traditional "Asian values defense" of 377A as grounded in procreation and family integrity, and resituating gay rights discourse as part of traditional Asian values rather than in opposition to it. In Singapore it may not be as simple as convincing the population that homosexuality is not

are homosexuals More often than not, parents are the last to know. Especially for those who are male homosexuals, the gays, they will not be able to have children and they do not know how to live up to their parents' expectations.").

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See, e.g., *id.*; see also Wat, *supra* note 222, at 71, 77.

²²⁹ WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAW IN AMERICA 1861-2003*, at 378 (2008).

²³⁰ *Id.*

necessarily the antithesis of family,²³¹ but working with their assumptions that perhaps the Western insistence on individual rights is that antithesis. This attitude has been an integral aspect of the Pink Dot movement in Singapore.²³² Rather than contest the freedoms of speech and assembly as absolute inviolate rights, Pink Dot constructs its space for gay activism within the rules of Singapore, even though those rules seem restrictive to Western observers.²³³ Rather than judging the system as illegitimate and the majority as blindly and unreasonably docile,²³⁴ which appears to have characterized the litigational rights-based strategy of the global gay rights movement in Singapore, an intersectional strategy moves beyond the presumptions of a “one-size-fits-all” approach to gay advocacy and acknowledges the complexities of a highly-developed, post-colonial Asian nation that has consciously chosen to test a delicate balance between global expansion and local integrity.

²³¹ Eskridge suggests that there has been less of an anti-gay backlash reaction to *Lawrence* because of the shift in public opinion, which made the issue overripe. Eskridge also notes how the erosion of the stereotypical binary opposition of gays and the nuclear family in the public imagination contributed to this change. Eskridge, *supra* note 58, at 314 (“Anti-gay prejudice is deeply founded upon the stereotype that ‘homosexuals’ are selfish, predatory, and promiscuous, precisely the opposite of ‘married’ heterosexuals. In the 1990s most Americans did not take ‘gay marriage’ seriously because they did not believe ‘homosexuals’ were interested in lifelong committed relationships and in rearing children. Although this was patently false in the 1990s, it is only in the new millennium, with marriage equality spreading swiftly through the country, that the connection between LGBT people and family has sunk in for many Americans.”).

²³² Chua, *supra* note 59, at 738 (“[T]hey play to the norm of social stability to deflect negative reactions from the state and the counter movement. Neither portraying Pink Dot as a demonstration, nor using it as a platform to demand for rights, they toe the line by minimizing perceptions of outright confrontation. Further, they carefully craft a publicity campaign to convey the message that acceptance of diverse sexualities strengthens rather than polarizes society, and to avoid potential accusations by opponents that they impose Western values.”).

²³³ The Singaporean government regulates the ability to assemble by requiring organizations to register under the Societies Act, and the government holds broad power to deny registration that is largely free from judicial review. See Eng-Beng Lim, *Glocalqueer Pink Activism*, in *PERFORMANCE, POLITICS AND ACTIVISM* 154, 154 (Peter Lichtenfels & John Rouse eds., 2013); Michael H. Posner & Candy Whittome, *The Status of Human Rights NGOs*, 25 *COLUM. HUM. RTS. L. REV.* 269, 277 (1994).

²³⁴ See Geraldine Heng & Janadas Devan, *State Fatherhood: The Politics of Nationalism, Sexuality, and Race in Singapore*, in *NATIONALISMS AND SEXUALITIES* 343 (Andrew Parker et al., eds., 1992) (arguing that the Singaporean government takes the role of a paternalistic father in relation to a population that is feminized and infantilized).