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Sexual Orientation & Gender Identity: American Law in Light of East Asian Developments

Holning S. Lau
University of North Carolina School of Law, hslau@email.unc.edu

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HOLNING LAU†

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INTRODUCTION

Scholars and advocates often borrow from foreign law to make rights claims on behalf of sexual orientation and gender identity ("SOGI") minorities in the United States.[1] They tend to rely, however, almost exclusively on

†Associate Professor of Law, Hofstra University; Harvey S. Shipley Miller Teaching Fellow (2006-2007), UCLA School of Law; Visiting Fellow (Spring 2007), University of Hong Kong Centre for Comparative & Public Law. This Article benefited from generous research funding from the Williams Institute on Sexual Orientation Law & Public Policy at the UCLA School of Law. I am grateful for having had the opportunity to present a version of this Article at the Williams Institute's Works-in-Progress Series. I thank Liz Glazer, Karen Kong, Seung-hyun Lee, Kelley Loper, Dean Spade, Sam Winter, and Hyunah Yang for helpful conversations on this Article. For invaluable research assistance and substantive suggestions, I thank Orly Rachmilovitz, Frank Salamone, Michael Weinstein, and Jen Wilson. Of course, all shortcomings remain my own.

[1] Two comments on terminology: First, I use the terms "SOGI minorities" and "SOGI rights" instead of "LGBT" and "LGBT rights" because I believe the former terms are more inclusive. Some sexual orientation and gender identity minorities—often those from foreign countries—do not identify with the LGBT label because it is so cul-

legal developments in Western countries.[2] In this Article, I introduce two recent cases from East Asia that warrant attention from human rights scholars, advocates, and lawmakers around the world—particularly in the United States.[3]

Two landmark decisions on law and sexuality in 2006 came from Asian jurisdictions: Hong Kong and South Korea. In *Leung v. Secretary of Justice*, the Hong Kong Court of Appeal held that disparate age-of-consent laws regarding vaginal and anal intercourse violated Hong Kong's Basic Law and Bill of Rights.[4] The unanimous three-judge panel set new precedent by recognizing sexual orientation as a proscribed ground of discrimination, giving sexual orientation equal footing with other proscribed grounds of discrimination, such as sex and race.[5] In the case of *In re Change of Name and Cor-*

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turally loaded. *See infra* note 20 and accompanying text. Second, the terms "international" and "foreign" should not be conflated. "International" legal developments occur at the level of international institutions, such as the United Nations, and "foreign" legal developments occur within regional, national, or local institutions.

[2] *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE?: WHAT WE'VE LEARNED FROM THE EVIDENCE (2006) (supporting same-sex marriage in the United States by discussing developments in Northern Europe); Grace Ganz Blumberg, *Legal Recognition of Same-sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555 (2004) (using a study of Canadian law to argue for capacious legal recognition of same-sex partnerships); Laura Grenfell, *Embracing Law's Categories: Anti-Discrimination Laws and Transgenderism*, 15 YALE J.L. & FEMINISM 51 (2003) (comparing Canada, Europe, and the United States, and suggesting that the United States adopt Canada's protections against discrimination based on gender identity).

[3] I address the two cases within one article, even though one focuses on sexual orientation and the other on gender identity, because many advocates and commentators, myself included, consider sexual orientation and gender identity to be interrelated. *See, e.g.*, Shannon Minter, *Do Transsexuals Dream of Gay Rights? Getting Real about Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L. SCH. J. HUM. RTS. 589, 592 (2000) ("[H]omophobia and transphobia are tightly intertwined, and . . . anti-gay bias so often takes the form of violence and discrimination against those who are seen as transgressing gender norms.").

[4] Leung T.C. William Roy v. Secretary of Justice, [2006] 4 H.K.L.R.D. 211(C.A.) [hereinafter *Leung II*], *aff'g* [2005] 3 H.K.L.R.D. 657 (C.F.I) [hereinafter *Leung I*].

[5] *Leung II* ¶ 53 ("Where there is an apparent breach of rights based on race, sex or sexual orientation, the court will scrutinise with intensity."). The government of Hong Kong conceded, during lower court proceedings, that sexual orientation constitutes a protected status under Hong Kong's Basic Law and Bill of Rights; the courts accepted that concession in their decisions. *See also Leung I* ¶ 43–46; *Leung II* ¶ 46.

As this work was being finalized for publication, the Hong Kong Court of Final Appeal confirmed that sexual orientation is a classification analogous to race and sex. *See* Secretary for Justice v. Yau & Lee, FACC 12/2006 (July 17, 2007) (C.F.A.) ("Where one is concerned with differential treatment based on race, sex or sexual orientation, the court will scrutinize with intensity whether the difference in treatment is justified."). In *Yau & Lee*, two men were charged with violating Crimes Ordinance section 118(F)(1), which criminalized same-sex anal sex occurring "otherwise than in public," because they had sex in a parked car. *See Yau & Lee*, FACC 12/2006, ¶ 4. The court held that section 118(F)(1) contravened Hong Kong's Basic Law and Bill of Rights by treating differently same-sex and opposite-sex sexual conduct. *See Yau & Lee*, FACC 12/2006, ¶ 3–7, 90.

rection of Family Register ("*Family Register*"),[6] the Supreme Court of South Korea held that the country's statutory scheme, in conjunction with the country's constitution, requires the government to legally recognize certain transgender[7] persons for their current sex. In reaching its holding, the majority stated that "a transsexual has the right to enjoy the dignity and value of a human being, to seek happiness and to lead a humane life."[8]

This Article shows how these two cases should color one's view of American law. At the outset, I should note that this piece is agnostic on the highly contested question of whether American *courts* should cite foreign law.[9] It proceeds with the assumption that foreign legal developments can and should prompt critical self-reflection in the United States—if not in

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[6] In re Change of Name and Correction of Family Register, 2004 Seu 42 (S. Kor., June 22, 2006); *available at* http://library.scourt.go.kr/jsp/html/decision/2_67.2004seu42.htm. This Article is based on the South Korean Supreme Court's English translation of the Korean-language decision, available online at http://www.scourt.go.kr/scourt_en/crt_dcsns/crt_dcsns1/index.html. For confirmation purposes, an independent translation by Kristy Kim (M.A., Monterey Institute of International Studies) is on file at the Williams Institute on Sexual Orientation Law & Public Policy. The Korean-language version of the decision is available online at http://www.scourt.go.kr/news/NewsListAction.work?gubun=2.

Following Dean Spade, I use the term "current" sex, as opposed to "chosen" sex, which is also used in the legal literature. I opt for the former term because it is neutral on the question of whether transgender persons actually *choose* to be transgender. *See* Dean Spade, Consolidating the Gendered Citizen: Gender Reclassification Policies and the War on Terror (forthcoming) (unpublished manuscript, on file with author).

[7] This Article uses the term "transgender" as an umbrella term referring to all persons who do not identify with the gender assigned to them at birth. It uses the term "transsexual" to refer to all persons who identify with the term or are labeled as such by a court opinion; the term is commonly used to describe transgender persons who have undergone, or wish to undergo, medical procedures related to their gender identity. In *Family Register*, the Korean government used the term "transsexual" throughout its translation of the Supreme Court opinion. Note, however, that Korean language does not distinguish between "sex" and "gender"; instead, it refers to both as "성." A Korean transliteration of the word "gender" (젠더) is, however, increasingly used in academic circles. Interview with Hyunah Yang, Professor, Seoul National University College of Law, in Atlanta, Ga. (Sept. 7, 2007); email from Hyunah Yang (Nov. 22, 2007) (on file with author).

[8] *Family Register*, 2004 Seu 42 § 2.B.1.

[9] For a sample of the copious literature on this debate, see Roger P. Alford, *The United States Constitution and International Law: Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Taavi Annus, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, 14 DUKE J. COMP. & INT'L L. 301 (2003); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006); Vincent J. Samar, *Justifying the Use of International Human Rights Principles in American Constitutional Law*, 37 COLUM. HUM. RTS L. REV. 1 (2005); Jeremy Waldron, *Foreign Law and Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005); Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July-Aug. 2004, at 41.

courts of law, then in legislatures, law reviews, and legal discourse more generally.[10]

Accepting that foreign legal developments can be helpful, which foreign jurisdictions are worth considering? Hong Kong and South Korea are especially noteworthy because they fare well under two measures of persuasiveness. First, Hong Kong and South Korea are persuasive because they are the United States' peers, in that they are committed to human rights, the rule of law, and democracy or democratization.[11] Second, Hong Kong and South Korea are persuasive because they are not Western jurisdictions; foreign jurisdictions with cultural backdrops different from the United States' help to illuminate potentially flawed cultural biases in American law.[12] Jurisdictions such as Hong Kong and South Korea—those that are at once ideologically similar and culturally different—are uniquely useful for comparative purposes.[13]

The Hong Kong and South Korean cases should prompt critical discussions at two levels. At the macro level, both cases contribute to a broad normative critique of American law. Among the United States' peer jurisdictions, there is a strengthening norm of support for SOGI rights—a norm from which the United States deviates in some regards. At the micro level, the Hong Kong and South Korean cases offer insight on a variety of specific issues, ranging from the practicality of the United States' tiered equal protection analyses to empirical claims regarding the feasibility of altering a persons' legally recognized sex.

The remainder of this Article proceeds in three parts. Part I provides background on SOGI rights in international and foreign law and their implications for SOGI rights in the United States. Parts II and III discuss the insights that American comparativists can draw from the Hong Kong and South Korean cases, respectively.

I. Law and Sexuality beyond American Borders

Around the world, there is a growing chorus of claims for the right to sexual liberty and the right to live free from discrimination on the basis of one's sexual orientation and gender identity. Those claims have produced an

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[10] In writing on what he calls the "transnational legal process," Harold Hongju Koh has argued that judicial interpretation is only one channel though which international developments are domesticated. Executive, legislative, academic and other nongovernmental players all participate in a dialogic process that internalizes international legal developments. *See generally* Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. Rev. 623 (1998); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 Ind. L.J. 1397 (1999); Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int'l L. 43 (2004); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997).

[11] *See infra* notes 46 & 50 and accompanying text.

[12] *See infra* notes 48 & 49 and accompanying text.

[13] *See infra* notes 50 & 51 and accompanying text.

increasing number of legal protections for SOGI minorities. This Part provides background on mobilization around the world for SOGI rights, the legal protections resulting from that mobilization, and how developments abroad can inspire legal development in the United States.

A. Mobilization & Legal Protections Attained

Although scholars have documented a long-existing diversity in sexual orientation and gender identity that spans across borders and cultures, mobilization for SOGI rights is often traced back to the United States.[14] The American SOGI rights movement, galvanized by the historic Stonewall Riots, has inspired similar rights movements around the world that have adopted American strategies—even the now-ubiquitous Pride parades.[15] Indeed, some scholars have called the global SOGI rights movement an American "export."[16]

The American roots of foreign SOGI rights movements have sometimes been a liability. In some countries, SOGI rights advocates have been frustrated by their governments, which have mischaracterized American influences, asserting that SOGI rights, and even homosexuality, are products of American culture, and thus incompatible with local culture.[17]

In response, SOGI rights scholars and advocates in other countries—especially non-Western countries—are modifying the American SOGI rights movement and making it their own. Carl Stychin, a leading British scholar of law and sexuality, has remarked that SOGI advocates "have become able

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[14] On how sexual orientation and gender identity diversity transcend both time and cultural-geographical borders, see, for example, LOUIS CROMPTON, HOMOSEXUALITY & CIVILIZATION (2003) (discussing diversity of sexual orientation); SERENA NANDA, GENDER DIVERSITY: CROSSCULTURAL VARIATIONS (1999) (discussing diversity of gender identity). On tracing SOGI rights movements back to the United States, see Douglas Sanders, *Getting Lesbian and Gay Issues on the International Human Rights Agenda*, 18 HUM. RTS. Q. 67, 77 (1996) (tracing "the international 'gay liberation' movement" back to the 1969 Stonewall Riots in New York).

[15] During the Stonewall Riots of 1969, patrons of the Stonewall Inn, a bar frequented by SOGI minorities, resisted a police raid. For background on the Stonewall Riots and their role in galvanizing the American SOGI rights movement, see generally JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940–1970 232–39 (Univ. of Chicago Press 2d ed. 1998). For discussions on the role that the American SOGI rights movement played in shaping similar movements in other countries, see Hassan El Menyawi, *Activism from the Closet: Gay Rights Strategising in Egypt*, 7 MELB. J. INT'L L. 28 (2006); Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 98–101, 115 (2002); Sanders, *supra* note 14, at 77; Carl F. Stychin, *Same-Sex Sexualities and the Globalization of Human Rights Discourse*, 49 MCGILL L.J. 951, 954 (2004).

[16] *See, e.g.*, El Menyawi, *supra* note 15, at 30; Stychin, *supra* note 15, at 954.

[17] *See* El Menyawi, *supra* note 15, at 41–42 (discussing the Egyptian government's assertion that sexual orientation rights and homosexuality are American and incompatible with local culture); Katyal, *supra* note 15, at 123–25 (discussing similar dynamics in Zimbabwe).

to move seamlessly between discourses of the local and the global."[18] For example, while SOGI advocates in non-Western countries invoke cosmopolitan human rights, they simultaneously point out that same-sex attraction and diverse gender identity are indigenous to local culture, predating regulations—such as anti-sodomy laws—which were introduced, in many cases, by Western colonists.[19] Advocates have also adopted terminology and classification schemes that better reflect local understandings of sexuality. For example, in Nepal, where conceptions of sexual identity are much more nuanced than they are in the United States, the leading SOGI rights group describes itself as advocating on behalf of "sexual minorities including Meta, Dohori, Ta, Gay, Bisexual, Lesbian, Hijra, Singaru, Fulumulu, Kothi, Kotha, Strian, Maugia, Panthi and many more."[20]

The global movement for SOGI rights has attained significant successes, which this Article cannot comprehensively list. At the international level, numerous UN treaty bodies have interpreted their respective human rights treaties to protect sexual autonomy and proscribe sexual orientation discrimination. Although the treaty bodies' interpretations are not binding, many nations view them as highly persuasive.[21] In the 1994 landmark case of *Toonen v. Australia*, the Human Rights Committee ("HRC") stated that Tasmania's criminalization of sodomy violated privacy rights enshrined in the International Covenant on Civil and Political Rights ("ICCPR").[22] In *Toonen*, the HRC also stated that the ICCPR proscribes sexual orientation

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[18] Stychin, *supra* note 15, at 951. *See also id.* at 958–60 (describing strategies that SOGI rights advocates use to move between local and cosmopolitan discourses).

[19] *See id.* at 958. For a relevant case study, see Marc McLelland, *Interview with Samshasha, Hong Kong's First Gay Rights Activist and Author*, 4 INTERSECTIONS: GENDER, HIST. & CULTURE IN THE ASIAN CONTEXT (2004), *available at* http://wwwsshe.murdoch.edu.au/intersections/issue4/interview_mclelland.html (discussing the use of historical evidence to counter the argument that homosexuality is foreign to Chinese culture).

[20] Blue Diamond Society, Our Mission, http://www.bds.org.np/mission.php (last visited Nov. 8, 2007). The Nepalese terms of self-identification are more descriptive than the English terms "lesbian, gay, bisexual, and transgender," in that one Nepalese term can simultaneously convey the sex of one's sexual partners, whether he prefers the insertive or receptive role in sexual intercourse, and/or whether he otherwise conforms to mainstream gender expectations. For detailed explication of some Nepalese terms of sexual identity, see PAUL BOYCE & SUNIL PANT, FAMILY HEALTH INT'L, RAPID ETHNOGRAPHY OF MALE TO MALE SEXUALITY AND SEXUAL HEALTH (2001), *available at* http://www.fhi.org/en/HIVAIDS/pub/survreports/msmnepal.htm.

[21] *See* Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 87 n.56 (2003) (describing United Nations Human Rights Committee ("HRC") opinions as "highly persuasive"); Martin S. Flaherty, *Rights, Reality, and Utopia*, 72 FORDHAM L. REV. 1789, 1801 (2004) (describing the HRC as having "significant persuasive influence on states"); Eric Heinze, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural "Sensitivity"*, 22 MICH. J. INT'L L. 283, 293 (2001) (describing the HRC's views as "highly persuasive").

[22] Toonen v. Australia, Human Rights Comm., Comm. No. 488/1992, ¶¶ 8–9, U.N. Doc. CCPR/C/50/D/488/1992 (1994) (discussing the violation of privacy rights enshrined in the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 17 *juncto* art. 2, U.N. Doc 14668 (Dec. 16, 1966)).

discrimination.[23] Although the ICCPR does not explicitly refer to sexual orientation, the HRC stated that the treaty's explicit proscription of sex discrimination subsumes proscription of sexual orientation discrimination.[24] In two subsequent cases, the HRC reiterated that the ICCPR proscribes sexual orientation discrimination, finding that states violated equality protections when they treated unmarried opposite-sex couples and same-sex couples differently for the purposes of government pensions.[25]

Since *Toonen*, other UN human rights treaty bodies have interpreted their respective treaties to protect sexual orientation minorities.[26] For example, the UN Committee on Economic, Social, and Cultural Rights has stated that the International Covenant on Economic, Social, and Cultural Rights specifically protects against sexual orientation discrimination in areas such as the labor market and access to healthcare.[27] Similarly, the UN Committee on the Rights of the Child has stated that the Convention on the Rights of the Child specifically proscribes sexual orientation discrimination targeted at youth.[28]

Outside of the UN, regional, national, and local jurisdictions have taken legal steps to protect SOGI minorities. In Europe, for example, the European Court of Human Rights has issued decisions protecting the rights of individuals to serve in the armed forces regardless of sexual orientation,[29] the

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[23] *Toonen*, U.N.Doc. CCPR/C/50/D/488/1992 ¶ 8.7 (discussing the right to nondiscrimination enshrined in article 26 of the ICCPR).

[24] *Id.* For theoretical support for the relationship between sex discrimination and sexual orientation discrimination, see, for example, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994).

[25] X v. Colombia, Human Rights Comm., Comm. No. 1361/2005, ¶ 3.2, U.N. Doc. CCPR/C/89/D/1361/2005 (2007) ("[T]he Committee finds that the State party has violated article 26 of the Covenant by denying the author's right to his life partner's pension on the basis of his sexual orientation."); Young v. Australia, Human Rights Comm., Comm. No. 941/2000, ¶ 10.4, U.N. Doc. CCPR/C/78/D/941/2000 (2003) ("The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation. . . . The Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.").

[26] *See generally* Ignacio Saiz, *Bracketing Sexuality: Human Rights and Sexual Orientation—A Decade of Development and Denial at the UN*, 7 Health & Hum. Rts. 49 (2004).

[27] *See, e.g.*, U.N. Comm. on Econ., Soc., and Cultural Rights, *The Right to Work: General Comment No. 18*, ¶ 12(b)(1), U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006) (discussing the right to nondiscrimination in art. 2); U.N. Comm. on Econ., Soc., and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: General Comment No. 14*, ¶ 18, U.N. Doc. E/C. 12/2000/4 (Aug. 11, 2000).

[28] *See, e.g.*, Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention*: *Concluding Observations of the Committee on the Rights of the Child: (Isle of Man) United Kingdom of Great Britain and Northern Ireland*, ¶ 22, U.N. Doc. CRC/C/15/Add.134 (Oct. 16, 2000) (stating that disparate age-of-consent laws violated the Convention on the Rights of the Child's protection of equality in article 2).

[29] *See* Lustig-Prean & Beckett v. United Kingdom, 29 Eur. H.R. Rep. 548 (2000).

right of biological parents to nondiscrimination on the basis of sexual orientation during custody disputes,[30] the right to equal treatment between unmarried same-sex and opposite-sex couples,[31] and the rights of certain transgender individuals to be recognized for their current sex.[32] In addition, the European Union now requires its member states to prohibit discrimination on the basis of sexual orientation in employment contexts.[33]

Although Europe has been at the forefront of protecting SOGI rights, it is not alone. While it is outside the scope of this Article to catalogue a comprehensive list of SOGI rights worldwide, the following are some examples for illustrative purposes. Canada and South Africa both protect the right of same-sex couples to marry.[34] Jurisdictions within Argentina, Brazil, and Mexico allow same-sex couples to register for legal recognition and attain various marriage-like rights.[35] The constitutions of Ecuador, Fiji, and South Africa explicitly prohibit sexual orientation discrimination.[36] Places ranging from Mexico and Israel to New Zealand and New South Wales all prohibit sexual orientation discrimination in the workplace,[37] while countries ranging from Japan and Singapore to the United Kingdom have enacted legislation to legally recognize transgender persons' current sex.[38]

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[30] *See* Mouta v. Portugal, 31 Eur. H.R. Rep. 1055 (2001).

[31] *See* Karner v. Austria, 38 Eur. H.R. Rep. 528 (2003) (holding that unmarried same-sex couples had the same tenancy succession rights as unmarried opposite-sex couples).

[32] *See* Goodwin v. United Kingdom, 35 Eur. H.R. Rep. 447 (2002); I v. United Kingdom, 36 Eur. H.R. Rep. 967 (2003).

[33] *See generally* Travis J. Langenkamp, Comment, *Finding Fundamental Fairness: Protecting the Rights of Homosexuals under European Union Accession Law*, 4 San Diego J. Int'l L. 437 (2003).

[34] *See generally* Paula Ettelbrick, *A Global License to Marry*, L.A. Times, Dec. 6, 2006, at A21 (summarizing recent developments abroad in the legal recognition of same-sex partnerships). One should note that the HRC has held that the ICCPR does not require state parties to legally recognize same-sex marriages. *See* Joslin v. New Zealand, Human Rights Comm., Comm. No. 902/1999, ¶ 8.3, U.N. Doc. CCPR/C/75/D/902/1999 (2002); *see also* Quilter v. Attorney-General, [1998] 1 N.Z.L.R. 523 (C.A.) (upholding the New Zealand Marriage Act's exclusion of same-sex couples). In *Joslin*, however, two members of the HRC opined that, if state parties restrict marriage to same-sex couples, they must extend marriage-like rights and benefits to same-sex couples under a separate regime. *See Joslin* at Appendix (Lallah & Scheinin, concurring).

[35] *See* Ettelbrick, *supra* note 34.

[36] *See* Douglas Sanders, *Human Rights and Sexual Orientation in International Law*, 25 Int'l J. Pub. Admin. 13, 35–6 (2002) (discussing constitutional reform in South Africa, Fiji, and Ecuador).

[37] *See* Ley Federal para Prevenir y Eliminar la Discriminacion [L.R.P.E.D] [Federal Law to Prevent and Eliminate Discrimination], art. 4, Diario Oficial de la Federación (D.O.), 11 de junio 2006 (Mex.); Israel Equal Opportunities in Labor Act, 5748–1988, 42 LSI 31 (1987–88) (Isr.); New Zealand Human Rights Act 2003, 2003 S.N.Z. No. 82; New South Wales (Australia) Anti-Discrimination Act, 1977 amended 1982, Part 4C.

[38] The prerequisites for recognition vary by jurisdiction. For background on recognition in each of these jurisdictions, and others, see Robyn Emerton, *Time for Change: A Call for the Legal Recognition of Transsexual and Other Transgender Persons in Hong Kong*, 34 Hong Kong L.J. 515, 545–55 (2004).

B. Implications for the United States

Indeed, in many parts of the world, there are growing legal protections for SOGI rights. What should the United States make of these developments? Just as SOGI rights movements abroad were inspired by the American Stonewall experience, Americans can be inspired by legal developments abroad. None of the developments discussed above are binding sources of law for the United States, but they should prompt Americans to rethink their positions on SOGI issues.[39] The remainder of the section will explore the following questions: (1) Which foreign jurisdictions are persuasive? (2) What could the United States learn from looking abroad?

i. *Persuasive jurisdictions*

Before proceeding further, one should note that, despite the developments recounted above, many jurisdictions around the world still do not protect SOGI minorities from discrimination; some even actively discriminate against and torture individuals on the bases of sexual orientation and gender identity.[40] The United States is more protective of SOGI rights than many other countries,[41] and many SOGI minorities seek asylum in the United States to escape persecution in their native lands.[42] Since there are foreign jurisdictions that are both less and more protective of SOGI rights than the United States, an important threshold question arises: Which foreign jurisdictions should the United States consider persuasive?

This question regarding jurisdictions' relative persuasiveness has garnered much attention. At one extreme, commentators such as Chief Justice

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[39] The introduction argued that a variety of actors should engage in comparative legal analyses, not just members of the judiciary. *See supra* note 10. It is worth noting, however, that the American judiciary has, in fact, a history of consulting foreign laws. *See* 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 (2005) (discussing the Supreme Court's use of foreign law); *infra* note 204 (collecting American court opinions that have cited foreign law on transgender rights).

[40] *See, e.g.*, El Menyawi, *supra* note 15 (discussing sexual orientation persecution in Egypt); Katyal, *supra* note 15, at 123–25 (discussing sexual orientation persecution in Zimbabwe).

[41] Moreover, within the United States, some states are much more respecting of SOGI rights than others. For example, contrast California (which has a SOGI antidiscrimination law, a SOGI hate crime law, and a domestic partnership law that offers registered same-sex couples all of the state-level rights enjoyed by married couples) with Alabama (which has no SOGI antidiscrimination law, no SOGI hate crime law, and no legal recognition of same-sex couples). For a state-by-state summary of laws, see generally Human Rights Campaign, *HRC in Your Community*, http://www.hrc.org/your_community/index.htm (last visited Dec. 2, 2007).

[42] For background on SOGI asylum claims, see Immigration Equality, *Asylum Law Basics—Brief History of Lesbian, Gay, Bisexual, Transgender and HIV (LGBT/H Asylum) Law*, LGBT/HIV ASYLUM MANUAL (2006), http://immigrationequality.org/manual_template.php?id=1064#D_1.

John Roberts have suggested that there is no way to distinguish among foreign jurisdictions, and thus citing foreign law is an arbitrary practice.[43] Under such logic, those who favor expanding American protection of SOGI rights will invoke foreign jurisdictions that are more protective of SOGI rights and those who favor the status quo will look elsewhere, and neither side is more justified in turning to its respective foreign sources.

Other commentators, however, have eschewed this belief that foreign jurisdictions are indistinguishable.[44] Although the literature on how to select persuasive jurisdictions is still nascent, two factors affecting persuasiveness are recurring.[45] While these two factors seem to stand in opposition, they can actually be complementary.

First, numerous commentators have argued that peer status is a measure of persuasiveness. That is to say, other jurisdictions that share the United States' commitment to human rights, rule of law, and democracy should have persuasive value.[46] Because they share the United States' goals, such peers might provide useful insights on how to realize those goals. Put simply, this first measure of persuasiveness is a measure of ideological sameness.[47]

Second, some commentators have suggested that cross-cultural convergence on a particular position regarding human rights means that the position is not merely a peculiar product of cultural biases, but is instead likely to be an appropriate understanding of universal human rights; meanwhile, deviation from that position might be motivated by cultural biases.[48] In

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[43] During his Senate confirmation hearings, Chief Justice John Roberts criticized the consideration of foreign law, stating that "looking at foreign law for support is like looking out over a crowd and picking out your friends." *See* Mark Tushnet, *When is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1275 (2006) (quoting Chief Justice Roberts). This reasoning suggests that all foreign laws are equally persuasive and, therefore, the process of selecting which foreign law to cite is arbitrary.

[44] *See infra* notes 46–48.

[45] *Cf.* Tushnet, *supra* note 43, at 1282 n.22 (supporting comparative analysis, but noting that "more work needs to be done" by commentators on the question of how to evaluate persuasiveness of foreign jurisdictions).

[46] *See, e.g.*, *id.* ("[R]eferences to the law of nations that can fairly be described as reasonably well-functioning democracies are more appropriate than references to the law of other nations."); Rex D. Glensy, *Quasi-Global Social Norms*, 38 CONN. L. REV. 79, 107 (2005) ("[T]he sources of persuasive authority on which U.S. courts will rely will not come from all nations, nor should they. . . . [T]his country need only concern itself with societies [that] are based on a fundamental respect for human rights."); Jackson, *supra* note 9, at 125 ("[P]ractices of countries with commitments to human rights, democracy, and the rule of law roughly comparable to ours are likely to have more positive persuasive value . . . .").

[47] Although he does not focus on ideological commitments to human rights, rule of law, and democracy, Youngjae Lee has written insightfully on the relevance of sameness in comparative legal analyses. *See* Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 101, 138 (2007) ("We all have experiences of consulting members of various groups we belong to in order to test our intuitions about one matter or another . . . . [I]t explains why the mere existence of consensus [among peers] can sometimes powerfully guide one's moral deliberation").

[48] *See id.* at 139–40 (summarizing existing literature on cross-cultural convergence as an indication of bias having been eliminated); Posner & Sunstein, *supra* note 9, at 153

other words, foreign jurisdictions are particularly persuasive if, together, they reach cross-cultural convergence on an understanding of rights.[49] This second measure of persuasiveness is a measure of difference: a rights norm is more persuasive if it is shared by jurisdictions of differing cultural backgrounds.

These two factors seem to stand in opposition—one grounded in sameness, the other in difference. They can, however, work together. There are cultural differences among the United States' ideological peers. Accordingly, while peer jurisdictions are persuasive on their own, they are even more persuasive if, taken together, they demonstrate a cross-cultural position on rights.

In light of this dynamic, the recent Hong Kong and South Korean cases are noteworthy. Hong Kong and South Korea are the United States' peers, in that they share a commitment to human rights, the rule of law, and democracy or democratization.[50] Although it is difficult to articulate the requisite

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("As long as the societies allow free debate, the very fact that very different societies come to the same conclusions increases one's confidence that the norms are genuinely universal and transcend merely historical or institutional differences."). The philosophy of John Rawls further supports the notion that norms of justice should be stripped of cultural biases. The purpose of Rawls' "veil of ignorance" is to eliminate biases from the process through which principles of justice are determined. *See generally* John Rawls, A THEORY OF JUSTICE (rev. ed. 1999).

[49] Notably, in *Roper v. Simmons*, the Supreme Court invoked cross-cultural norms to "confirm" its holding that the juvenile death penalty was unconstitutional. 543 U.S. 551, 577–78 (2005). While this Article emphasizes the particular persuasiveness of cross-cultural convergence among the United States' peers, the *Roper* majority found convergence among foreign jurisdictions more generally.

[50] The United States Department of State has recognized both Hong Kong and South Korea for their commitments to human rights and rule of law. *See, e.g.*, BUREAU OF EAST ASIAN AND PACIFIC AFFAIRS, U.S. DEP'T OF STATE, U.S.-HONG KONG POLICY ACT REPORT (2005), http://www.state.gov/p/eap/rls/rpt/44543.htm ("Hong Kong residents enjoy strong respect for the rule of law and civil liberties. . . . Freedoms of speech, press, religion, assembly, association, and other basic human rights remained respected and defended in Hong Kong.") [hereinafter U.S.-HONG KONG REPORT]; Interview by Jim Jung, KBS News with Condoleezza Rice, U.S. Secretary of State, in Seoul, South Korea, (Oct. 20, 2006) (transcript available at 2006 WLNR 18231514) (quoting Rice calling South Korea "a vibrant democracy where critical voices are heard" and praising South Korea for the fact that "the South Korean people enjoy freedoms and prosperity") [hereinafter *KBS News*]; Media Note, U.S. Dep't of State, U.S.-South Korea Relationship Enters New Era, State Says, (Jan. 20, 2006), http://usinfo.state.gov/eap/Archive/2006/Jan/20-573902.html (reporting that the United States and South Korea signed a joint statement that acknowledged the two countries' "common values rooted in shared respect for democracy, human rights and the rule of law"). *See generally* BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, 2006 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, http://www.state.gov/g/drl/rls/hrrpt/2006/. Meanwhile, Hong Kong is only in the process of democratization (i.e., only half of Hong Kong's legislature is popularly elected and its Chief Executive is elected by a small group of electors). Hong Kong's Basic Law requires, and the majority of Hong Kong citizens support, democratization; however, democratization has been slow in large part because of Beijing's efforts to stave off democratization in Hong Kong. For background on Hong Kong's democratization and Hong Kong-Beijing relations, see Michael C. Davis, *The Basic Law and Democratization in Hong Kong*, 3 LOY. U. CHI. INT'L L. REV. 165 (2006). *See also* Keith Bradsher, *Hong Kong Leader Wins Re-election by an Expected Wide Margin*, N.Y. TIMES,

degree of commitment to the United States' ideological goals for peer status, the United States government has itself suggested that Hong Kong and South Korea satisfy peer status.[51] While Hong Kong and South Korea are the United States' peers, they are also Asian jurisdictions.[52] As such, they provide evidence of growing cross-cultural convergence among peers on questions of SOGI rights. This convergence is often overlooked by American scholars because, as noted above, American comparativist literature on the growth of SOGI rights has heretofore maintained a Eurocentric focus.[53]

ii. *Insights from abroad*

Comparative studies of law and sexuality prompt useful self-reflection at two levels.[54] First, developments in the United States' peer jurisdictions offer normative critiques of American law concerning broad topics, such as SOGI discrimination generally. The United States should not blindly follow norms that emerge among its peers; however, if the United States falls out of line with its peers, that deviation should be cause for critical questioning. As suggested above, divergence from a cross-cultural norm should be a particularly strong impetus for self-reflection. When the United States deviates from its peers, Americans should question whether there is a legitimate reason for the deviation, or whether the deviation is motivated by unjustified biases, which might be entrenched in ossified legal reasoning. This sort of self-reflection is often referred to as the "dialogical" approach to comparative law.[55]

Mar. 25, 2007, at A1 (discussing Hong Kong's democratization and noting that sixty percent of the Hong Kong public desires further democratization). Even though Hong Kong is not a full democracy, I consider it to be the United States' peer because the United States Department of State considers Hong Kong a peer. *See, e.g.*, U.S.-HONG KONG REPORT ("Hong Kong people share many values and interests with Americans and have worked to make Hong Kong a model of what can be achieved in a society based on rule of law and respect for civil liberties. Hong Kong remains an open and largely tolerant society.").

[51] *See supra* note 50.

[52] Despite its history as a British colony, Hong Kong maintained a distinctively Asian culture. *See* Wong Siu-lum, *Modernization and Chinese Culture in Hong Kong*, 106 CHINA Q. 306, 325 (1986) (noting that, even though Hong Kong modernized under British rule, it "modern[ized] with distinctive Chinese characteristics").

[53] For a sample of this literature, see sources cited *supra* note 2.

[54] Recall that this Article remains agnostic as to whether courts should directly cite international and foreign law. This Article assumes that, at the very least, comparative analyses can influence broad discourse on American law, outside of traditional courthouses and inside the larger courts of public and scholarly opinion. *See supra* notes 9-10 and accompanying text.

[55] Of course, self-reflection may very well lead the United States to affirm its divergent normative position. Discussing dialogical comparative law specifically in constitutional interpretation, Sujit Choudhry wrote in his seminal article:

> [T]he study of comparative law 'encourages the student to be more critical about the functions and purposes of the rules he is studying and to learn not to accept their validity purely because they belong to his own system of law.' . . . [C]omparative jurisprudence can be an important stimulus to legal self-reflection.

Second, comparative studies shed light on more specific questions. For example, comparative analysis can help Americans understand the strengths and weaknesses of particular legal tests.[56] Over time, legal tests may or may not prove to be useful in their administrative feasibility, predictive value, ability to foster policy goals, etc. For example, over time, the United States' tier-based legal tests for equal protection claims have drawn criticism from judges and legal commentators.[57] Looking abroad for inspiration—to Hong Kong, for example—may provide American jurists with ideas on how to improve the United States' judge-created legal tests for equal protection claims.

Similarly, comparative analyses can provide empirical evidence regarding specific factual questions. For example, in the case of *Washington v. Glucksberg*, the Supreme Court looked to Dutch experience for empirical evidence regarding the implications of decriminalizing euthanasia.[58] In the realm of law and sexuality, American scholars have already looked to the European experience in recognizing same-sex partnerships, to refute the claim by American opponents of same-sex marriage that legal recognition of same-sex partnerships will have undesirable consequences on opposite-sex marriage and birth rates.[59] The South Korean experience with sex-change recognition may eventually provide empirical data to support (or undermine) claims about the administrative feasibility of sex-change recognition.

> The mode of comparative constitutional interpretation that these scholars point to is 'dialogical,' because courts that take this interpretive approach engage in a dialogue with comparative jurisprudence in order to better understand their own constitutional systems and jurisprudence.

Choudhry, *supra* note 9, at 835–36 (quoting PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 18 (1995)).

[56] The macro and micro level insights that I discuss are sometimes entwined. For example, critique of a specific legal test might be part of a broader normative critique. *See* Annus, *supra* note 9, at 312–13 (noting that adopting what "might seem to be a rather technical application of a legal test . . . actually requires the adoption of a normative position").

[57] For background on the United States' tiered approach to equal protection, see generally WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 1016–19 (3d ed. 2003). For criticisms, see, for example, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) (criticizing tiered analysis); Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring); James E. Fleming, *"There's Only One Equal Protection Clause": An Appreciation of Justice Stevens' Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301 (2006); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004).

[58] 521 U.S. 702, 734–35 (1997).

[59] *See, e.g.*, ESKRIDGE & SPEDALE, *supra* note 2; M.V. Lee Badgett, *Prenuptial Jitters: Did Gay Marriage Destroy Heterosexual Marriage in Scandinavia*?, SLATE, May 20, 2004, http://www.slate.com/id/2100884/.

II. Hong Kong & *Leung*: Scrutinizing Sexual Orientation Discrimination

This Part begins by painting the legal backdrop of *Leung v. Secretary of Justice* and discussing the reasoning of both the lower court and the Court of Appeal. It then considers how the Hong Kong experience could be a consideration in domestic discussions regarding sexual orientation discrimination, equal protection doctrine, and disparate impact claims. Hong Kong jurisprudence alone does not provide easy answers to American legal questions; however, observing Hong Kong's experience—together with experiences in other peer jurisdictions—can enrich the discussions we have at home. This section explores how those discussions can be enriched.

A. The Backdrop

In 1997 the British transferred sovereignty of Hong Kong to the People's Republic of China ("PRC" or "Mainland China"). Since then Hong Kong has existed as a Special Administrative Region ("SAR") of the PRC. As an SAR, Hong Kong maintains a high degree of autonomy, except in certain legal domains, such as foreign affairs and defense.[60]

Under colonial rule, there were virtually no enforceable legal protections of human rights in Hong Kong.[61] However, in the years leading up to the handover, the colonial government secured Hong Kong's post-handover autonomy through a joint declaration with the PRC and implemented a series of explicit human rights protections.[62] Those protections were largely prompted by demands from local Hong Kong residents who feared rights incursions under PRC rule. The pressure from local activists escalated dramatically in the wake of the 1989 Tiananmen Incident, in which the PRC government killed and injured many pro-democracy protesters on the Mainland.[63] Hong Kong's Basic Law (often referred to as Hong Kong's "mini-constitution") and Bill of Rights Ordinance now both protect individuals

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[60] For background on the historic handover and the current relationship between Hong Kong and the PRC, see generally Albert H.Y. Chen, *Constitutional Adjudication in Post-1997 Hong Kong*, 15 Pac. Rim L. & Pol'y J. 627, 632 (2006).

[61] The colonial government protected civil liberties by maintaining an independent judiciary that abided by procedural rules and respected the right to jury trials for serious criminal offenses. It also promoted social, economic, and cultural rights through programs such as public education and government housing. The colonial government, however, offered no enforceable protection of other human rights, such as equality or freedom of expression. *See* Carole J. Petersen, *From British Colony to Special Administrative Region of China*, *in* Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions, France and the USA 226 (Randall Peerenboom et al. eds., 2006).

[62] *See* Michael C. Davis, *Human Rights and the Founding of the Hong Kong Special Administrative Region*, 34 Colum. J. Transnat'l L. 301, 312 (1996).

[63] *See id.* at 307–18.

from human rights infringements in the public sector.[64] The Bill of Rights was enacted in 1991.[65] The Basic Law was promulgated in 1990 and entered into force in 1997.[66]

The Hong Kong legislature has enacted antidiscrimination ordinances that extend equality protections to the private sector. The existing ordinances—which cover discrimination based on sex, disability, and family status—do not cover discrimination based on sexual orientation or gender identity.[67] Sodomy between men, however, was decriminalized in 1991.[68] In addition, the executive branch of government has issued aspirational, nonbinding declarations against sexual orientation discrimination in the workplace.[69] It has also established a commission to educate the public on the importance of equality for SOGI minorities and to study and mediate complaints of discrimination based on sexual orientation and gender identity.[70]

In terms of gender identity rights, the Hong Kong government allows certain transgender persons to change their Hong Kong identity cards and passports to reflect their current sex.[71] Their current sex is also recognized for incarceration purposes.[72] Transgender persons, however, have no legal right to change the sex designation on their birth certificates, which determines one's sex for most legal purposes, such as marriage and sex-specific criminal laws.[73] Unlike the government of the United States, the Hong Kong government subsidizes surgical expenses for transgender individuals who are prescribed surgical procedures by their doctors.[74]

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[64] *Id.* at 313–21.

[65] *Id.* at 310.

[66] *See* Lorenz Langer, *The Elusive Aim of Universal Suffrage: Constitutional Developments in Hong Kong*, 5 INT'L J. CONST. L. 419, 431 (2007). For background on the first ten years of adjudication under the Basic Law, see Po-Jen Yap, *10 Years of the Basic Law: The Rise, Retreat and Resurgence of Judicial Power in Hong Kong*, 36 COMMON L. WORLD REV. 166 (2007).

[67] Sex Discrimination Ordinance, (1995) Cap. 480 (H.K.); Disability Discrimination Ordinance, (1995) Cap. 489 (H.K.); Family Status Discrimination Ordinance, (1997) Cap. 527 (H.K.). *See also* Carole J. Petersen, *The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong*, 32 HONG KONG L.J. 103 (2002) (evaluating the three ordinances); Carole J. Petersen, *Hong Kong's First Anti-Discrimination Laws and their Potential Impact on the Employment Market*, 27 HONG KONG L.J. 324 (1997).

[68] Hong Kong Crimes Ordinance, (1991) Cap. 200, 118 §§ M–N (H.K.).

[69] *See* Hong Kong Home Affairs Bureau, *Equal Opportunities: Sexual Orientation*, and *Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation*, http://www.hab.gov.hk/en/policy_responsibilities/the_rights_of_the_individuals/sexual.htm (last visited Nov. 29, 2007).

[70] *See* Hong Kong Home Affairs Bureau, *Gender Identity and Sexual Orientation Unit*, *at* http://www.cmab.gov.hk/en/issues/equal_gender.htm (last visited Nov. 8, 2007).

[71] Such recognition is generally limited to persons who have undergone surgeries related to sex change. *See* Robyn Emerton, *Neither Here nor There: The Current Status of Transsexual and Other Transgender Persons Under Hong Kong Law*, 34 HONG KONG L.J. 245, 254 (2004).

[72] *Id.*

[73] *Id.*

[74] On Hong Kong, see *id.* at 250. In contrast, both private and public health insurance in the United States usually do not cover medical procedures relating to transgender health. *See* Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social*

Leung built on this existing landscape of SOGI rights in Hong Kong. The case, which was the first dispute on sexual orientation rights to reach the Court of Appeal, was monumental for setting legal precedent interpreting the Basic Law and Bill of Rights to protect sexual orientation rights.

B. Case Details

In 2004, William Roy Leung, a twenty-year-old gay man—or *tongzhi*, as Chinese gay men often refer to themselves[75]—challenged four provisions of the Hong Kong Crimes Ordinance for violating privacy and equality protections enshrined in the Basic Law and Bill of Rights.[76] The first two impugned provisions created disparate regulation of sexual conduct involving more than two people. Crimes Ordinance section 118(F)(2)(a) criminalized "buggery" (anal sex) between men in the presence of more than two persons; however, no comparable section criminalized vaginal intercourse or opposite-sex buggery in the presence of more than two persons.[77] Similarly, section 118(J)(2)(a) made it criminal for a man to commit gross indecency with another man in any context involving more than two persons (even in private settings); meanwhile, there were no similar laws to regulate gross indecency in opposite-sex and female-female contexts.[78]

The second two impugned provisions stipulated ages of consent. Crimes Ordinance section 118(H) criminalized gross indecency between men whenever one partner is under twenty-one; meanwhile, no comparable provision existed for gross indecency between opposite-sex partners or two

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and Legal Conceptualization of Gender that is More Inclusive of Transgender People, 11 MICH. J. GENDER & LAW 253, 269 nn.54–55 (2004–05). *But see* Pinneke v. Preisser, 623 F.2d 546 (8th Cir. 1980) (extending Medicaid coverage to the patients' sex change procedures).

[75] *Tongzhi* translates literally as "same will" and is commonly used as the translation for "comrade." For more background on the term, see Institute for Tongzhi Studies, http://www.tongzhistudies.org/about/aboutTongzhi.htm (last visited Dec. 3, 2007).

[76] *Leung I* ¶¶ 21–33 (describing the challenged provisions of the Crimes Ordinance). Interestingly, William Roy Leung was an ethnic Chinese man who was from a blue-collar family and educated in Hong Kong's local schools. Leung's attorney remarked that Leung's local upbringing made his case more compelling. If Leung had been educated abroad, for instance, opponents might have painted his sexual orientation as a form of Western decadence. *See* Ho Lai-Kit, *Solicitor Michael Vidler on Billy Leung and Hong Kong's Age of Consent Ruling*, FRIDAE, Sept. 26, 2006, *available at* http://www.fridae.com/newsfeatures/article.php?articleid=1763&viewarticle=1 (interview of Leung's attorney).

[77] *See Leung I* ¶¶ 32–33 (referencing Crimes Ordinance, (1991) Cap. 200, § 118(F)(2)(a). (H.K)).

[78] *See id.* ¶¶ 26–27. The Crimes Ordinance does not define "gross indecency." *See* Crimes Ordinance, (1991) Cap. 200, § 118(J)(2)(a). (H.K). According to *Leung I*, the term "covers sexual conduct with or towards another person that is offensive to common propriety, each case being judged in the context of its own time, place and circumstance. . . . [It includes] intimacy . . . that falls short of sexual intercourse." *Leung I* ¶ 16.

female partners.[79] Finally, section 118(C) set the age of consent for buggery between men at twenty-one and made offenders punishable with life imprisonment.[80] Although a parallel provision similarly criminalized buggery between opposite-sex partners with a female under twenty-one, the age of consent for vaginal sex was set at age sixteen and punishable with only five years of imprisonment.[81]

Leung argued, and both the Court of First Instance and Court of Appeal agreed,[82] that all four provisions violated Articles 25 and 39 of the Basic Law and Articles 1, 14, and 22 in Section 8 of the Hong Kong Bill of Rights.[83] The Basic Law's Article 25 guarantees that "All Hong Kong residents shall be equal before the law."[84] Article 39 explicitly incorporates international human rights treaties into Hong Kong law.[85] Articles 1 and 22 of the Bill of Rights protect equality and Article 14 protects privacy.[86]

Most of the litigation was not very contentious. The Hong Kong government conceded that, so long as the applicant had standing, all the contested criminal provisions were unsustainable except for section 118(C), which stipulated the age of consent for buggery.[87] The first three provisions were disputed only on procedural grounds.[88] On appeal, the Hong Kong government only challenged the lower court's decision regarding the age of consent for buggery.[89]

The Court of Appeal focused its analysis on equality. Writing for the unanimous three-judge panel, Judge Geoffrey Ma acknowledged that, "[o]f course, homosexual acts committed in private between consenting men are an aspect of privacy so that, for example, the existence of legislation prohibiting such acts may constitute an infringement of the right to privacy."[90] He reasoned, however, that the unequal age-of-consent regulations primarily created a question of equality.[91]

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[79] *See Leung I* ¶¶ 22–25 (referencing Crimes Ordinance, (1991) Cap.200, § 118(H) (H.K.)).

[80] Crimes Ordinance, (1991) Cap. 200, § 118(C). (H.K).

[81] *Leung I* ¶¶ 28–33. Interestingly, the parallel provision on heterosexual buggery did not stipulate any age of consent for the male partner. *See id.*

[82] Decisions from both the Court of First Instance and Court of Appeal have precedential value. The Court of Appeal is the second highest court in Hong Kong. The government chose not to appeal *Leung* to the highest court, the Court of Final Appeal. *See* Polly Hui, *The Rights Stuff*, S. China Morning Post, Oct. 16, 2006, at 20 (noting the deadline for a final appeal). On the hierarchy of courts in Hong Kong, see Hong Kong Judiciary, *Structure of the Courts*, *available at* http://www.judiciary.gov.hk/en/organization/courtchart.htm.

[83] *Leung I* ¶¶ 34–42; *Leung II* ¶¶ 41, 56.

[84] Hong Kong Basic Law, art. 25.

[85] *Id.* art. 39.

[86] Hong Kong Bill of Rights, No. 59, (1991) 1 O.H.K. § 1, 14, 22.

[87] *See Leung I* ¶¶ 99–100.

[88] *See id.*

[89] *See Leung II* ¶ 15.

[90] *See id.* ¶ 42.

[91] *See id.* ("We are in these proceedings not so much concerned with the right to privacy as that of equality.").

The government conceded that sexual orientation is a protected status under Hong Kong's Basic Law and Bill of Rights, even though the two laws do not explicitly mention "sexual orientation."[92] The courts agreed.[93] The lower court noted that Hong Kong's human rights jurisprudence is meant to protect "historically disadvantaged . . . group[s] marked by stereotyped capacities," such as groups based on sexual orientation.[94] In rendering sexual orientation protected grounds, the lower court also cited "[p]ersuasive jurisprudence" from the UNHRC and the European Court of Human Rights.[95]

Regarding the disputed age-of-consent provision, the government asserted two main lines of defense.[96] First, even though Hong Kong's laws proscribe sexual orientation discrimination, the disputed provision did not discriminate on the basis of sexual orientation because age-of-consent laws for buggery were facially neutral;[97] Hong Kong law set ages of consent for both same-sex and opposite-sex buggery at twenty-one and made both crimes punishable with life imprisonment.[98] Second, even if the laws did discriminate, discrimination was justified by countervailing government interests.[99]

Judge Ma rejected both of the government's defenses. He announced that Hong Kong's Basic Law and Bill of Rights do not protect only against direct discrimination, but also against laws that discriminate indirectly through disparate impact.[100] Judge Ma agreed with the lower court that "for gay couples the only form of sexual intercourse available to them is anal intercourse," and that "[d]enying persons of a minority class the right to sexual expression in the only way available to them, even if that way is

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[92] *See id.* ¶ 46.

[93] *See Leung I* ¶¶ 44–46; *see also Leung II* ¶ 46.

[94] *Leung I* ¶ 44; *see also Leung II* ¶ 46 (agreeing with the lower court).

[95] *See Leung I* ¶¶ 45–46; *see also Leung II* ¶ 46 (agreeing with the lower court). Had the court cited the UNHRC and the European Court of Human Rights as *binding*, *Leung* arguably would not be evidence of cross-cultural convergence, but perhaps would be evidence of foreign domination. However, because the court was simply *persuaded* by international and foreign developments and their compatibility with Hong Kong's laws, the court's decision should be read as convergence among legal systems rather than one blindly following another. *Cf.* Hong Kong Basic Law, art. 84 (stipulating that Hong Kong courts "may" cite other common law jurisdictions, but not obligating the courts to do so).

[96] The government also suggested a third argument, that buggery is not comparable to vaginal intercourse and, thus, men who commit buggery are not similarly situated to heterosexuals who engage in vaginal sex. *See Leung II* ¶ 46. The government itself, however, did not seem committed to this argument. *See id.* ¶ 47(6) (noting that the government "was not really pushing [this point] with any great vigour").

[97] *See id.* ¶ 48.

[98] *See id.* ¶¶ 28–33; *see also supra* text accompanying note 81.

[99] *See Leung II* ¶ 51.

[100] *See id.* ¶ 48 (stating that the law was objectionable because it "significantly affects homosexual men in an adverse way compared with heterosexuals. The impact on the former group is significantly greater than on the latter").

denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them."[101]

To determine whether the discrimination could be justified, Judge Ma applied Hong Kong's proportionality test: "Any restriction on a constitutional right can only be justified if: (a) it is rationally connected to a legitimate purpose; and (b) the means used to restrict that right must be no more than is necessary to accomplish the legitimate purpose in question."[102] Invoking an old adage, Ma explained that the state must show "that a sledgehammer has not been used to crack a nut."[103]

Ma found no justification for the discrimination. He suggested that the government had a legitimate interest in protecting citizens' medical health, but stated that the age-of-consent regulations were not grounded in medical reason.[104] During legislative debates, some council members suggested that the age-of-consent regulations would prevent young men from blackmailing older partners who did not want to disclose their relationship or sexual orientation.[105] Ma rejected that argument, noting the lack of evidence that lowering the age of consent to sixteen would increase the risk of blackmail beyond that which also exists between heterosexual partners.[106]

C. Coloring the View of American Law

What can Americans take away from *Leung*? Certainly, Americans should not blindly follow Hong Kong or any other foreign jurisdiction. Hong Kong is, however, another data point to consider when jurists reflect on American law. At the macro level, *Leung* contributes to an existing normative critique of American protection against sexual orientation discrimination. *Leung* also contributes to an existing critique of American resistance to disparate impact theory. At the micro level, *Leung* offers support to commentators who have criticized the practicality of specific legal tests in the United States' equal protection jurisprudence.

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[101] *Id.* A shortcoming of the court's language is that it oversimplifies human sexuality. One could note that many same-sex male couples engage in very meaningful forms of sexual expression aside from buggery—for example, oral sex.

[102] *Id.* ¶ 44.

[103] *Id.* ¶ 50.

[104] *See id.* ¶ 51(2).

[105] *See, e.g.*, H. K. Security Bureau, *Written Response to the LegCo Panel on Home Affairs Subcomm.*, H. K. Legis. Council Paper No. CB(2)2000/00-01(01), ¶ 5 (2001) ("The rationale of making a man under 21 who commits consensual buggery with another man criminally liable was to guard against the possibility of blackmail against the other partner.").

[106] *See Leung II* ¶ 51(5). Notably, the Hong Kong Equal Opportunities Commission had previously spoken out against the blackmail-prevention justification. *See* H. K. Equal Opportunities Comm'n, *Comments by EOC to the Response of the Administration to LegCo Panel on Home Affairs Subcomm.*, Paper No. CB(2)2185/00-01(01), ¶¶ 46 (2001).

The *Leung* case contributes to an ever-growing normative view that individuals have the right to live free from discrimination on the ground of sexual orientation. Legal institutions in peer jurisdictions, representing diverse cultural backgrounds, have wrestled with sexual orientation discrimination and determined that—like race and sex—discrimination on the basis of sexual orientation is rarely justified.[107] Hong Kong has now joined in, stating that "[w]here there is an apparent breach of rights based on race, sex or sexual orientation, court[s] will scrutinize with intensity the reasons said to constitute justification."[108]

The United States has also taken important steps to fight sexual orientation discrimination,[109] but its commitment to doing so is unclear. To date, the Supreme Court and almost all other federal and state courts only review cases of sexual orientation discrimination under "rational basis review."[110] Rational basis review is far less demanding than the level of scrutiny applied to sexual orientation discrimination in Hong Kong and other peer jurisdictions.[111] *Leung*, coupled with similar cases from around the world, should

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[107] *See supra* notes 29–37 and accompanying text.

[108] *Leung II* ¶ 53 (internal quotation omitted).

[109] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (holding that Texas's criminalization of private, consensual, same-sex sodomy violated constitutionally protected liberty interests); Romer v. Evans, 517 U.S. 620 (1996) (invalidating an amendment to the Colorado Constitution that banned antidiscrimination laws that protect sexual orientation minorities).

[110] Under traditional rational basis review, courts uphold any law that is "rationally related" to a "legitimate government interest" and defer greatly to the legislature in defining those terms. Rational basis review does not require any proportionality between intended ends and the means used to achieve those ends. *See generally* MURPHY ET AL., *supra* note 57, at 1016–19 (summarizing judicial and academic criticism of the tiered Equal Protection model). Sometimes, under rational basis review, the Court has scrutinized laws to see if they were driven purely by animus. Commentators have differentiated this type of review from traditional rational basis review, calling it rational basis "with bite." *See id.* Even rational basis with bite, however, requires less scrutiny than Hong Kong's proportionality test because, so long as a law is not purely motivated by animus, the law is valid regardless of whether the means are proportionate to the ends sought. Consider *Anderson v. King County*, 138 P.3d 963 (Wash. 2006), in which the Washington Supreme Court upheld the state's ban on same-sex marriage. The court stated, "[t]urning first to the plaintiffs' claim that [the marriage ban] was motivated by animus, we cannot agree that the only reason the legislation was enacted was because of anti-gay sentiment." *Id.* at 980–81. It then proceeded to employ a very deferential standard of review:

> The statute is presumed constitutional . . . . [T]he court may assume the existence of any conceivable state of facts that could provide a rational basis for the classification . . . . In fact, the rational basis standard may be satisfied where the legislative choice . . . is based on rational speculation unsupported by evidence or empirical data. In addition, within limits, a statute generally does not fail rational basis review on the grounds of over- or under-inclusiveness; a classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequity.

Id. at 980 (internal citations omitted).

[111] On Hong Kong's proportionality test, see *supra* notes 99–103 and accompanying text. Like Hong Kong, jurisdictions such as the European Court of Human Rights, Canada, and South Africa all subject sexual orientation discrimination to a proportionality

prompt Americans to question the normative posture of the United States' sexual orientation jurisprudence.[112]

The normative critique of American equal protection jurisprudence is intertwined with a functional critique of the United States' tiered approach to equal protection. Under its tiered approach, the United States assigns forms of discrimination to tiers that correspond to different standards of review: strict scrutiny (for discrimination based on race, national origin, and alienage), intermediate scrutiny (sex and legitimacy), and rational basis review (everything else).[113]

Numerous commentators—including Justices Marshall and Stevens—have criticized the tiered system for being too rigid.[114] As cases concerning new grounds of discrimination arise, the Court has had difficulty fitting the cases neatly into its tiered framework.[115] Commentators claim that the Supreme Court has generated confusion by saying one thing while doing another; the Court says that it maintains a three-tier framework for equal protection, but its actions suggest otherwise.[116] James Fleming has argued

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test that requires greater scrutiny than does rational basis review. *See, e.g.*, L & V v. Austria, App. Nos. 39392/98 and 39829/98, 36 Eur. H.R. Rep. 1022, at 1033-35 (2003) (Commission report) (using a proportionality test to review a constitutional challenge against sexual orientation discrimination); Vriend v. Alberta, [1998] 1 S.C.R. 493, at 557–62 (Can.) (same); *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC) at 30-31 (S. Afr.) (same).

[112] For other foreign cases that, like *Leung*, subjected sexual orientation discrimination to review more stringent than rational basis review, see *supra* note 111 (citing cases from the European Court of Human Rights, the Supreme Court of Canada, and Constitutional Court of South Africa). While foreign developments are not necessary to legitimize questioning of American sexual orientation jurisprudence, these developments support such inquiries, making them all the more pressing. In the United States, advocates and commentators have argued that sexual orientation should be a "suspect" classification reviewed under strict or intermediate scrutiny; however, such arguments have repeatedly failed. For background on the doctrine of "suspect classifications" and an argument that sexual orientation be deemed one, see Watkins v. U.S. Army, 875 F.2d 699, 723-28 (9th Cir. 1989) (Norris, J., concurring).

[113] *See generally* MURPHY ET AL., *supra* note 57, at 1016–19. In the United States, courts typically review religious discrimination pursuant to the First Amendment's Free Exercise Clause instead of equal protection's tiered framework. *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask Don't Tell"*, 108 YALE L.J. 485, 495 n.33 (1998); Robin Charlow, *The Elusive Meaning of Religious Equality*, 83 WASH. U. L.Q. 1529, 1565 n.146 (2005).

[114] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) ("To begin, I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis."); Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring) ("I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases.").

[115] *See* Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1146 (1987) ("As the range and complexity of equal protection challenges grows, the utility of the static categories of minimum rationality, heightened scrutiny, and strict scrutiny for analyzing legislative or administrative classifications diminishes.").

[116] *See, e.g.*, *id.*; *see also* Fleming, *supra* note 57.

that, despite the Court's rhetoric of maintaining a three-tier framework, it has arguably created a six-tier framework that continues to grow more tiers.[117]

For example, "rational basis review" traditionally required deference to the legislative branch.[118] In *Romer v. Evans*, however, the Court *said* it applied rational basis review to invalidate a Colorado constitutional amendment that banned sexual orientation antidiscrimination laws within the state; however, the Court did not defer to Colorado's legislature and instead scrutinized legislative objectives for animus that the Court deemed illegitimate.[119] It seems that the Court was normatively committed to protecting sexual orientation minorities and decided to stretch the meaning of rational basis review to do so, in effect creating an implicit new tier that commentators have called "rational basis with bite."[120]

In its equal protection jurisprudence, the Supreme Court has left lower courts with unclear doctrine that is difficult to follow.[121] Even though commentators such as James Fleming have argued that the Supreme Court has implicitly moved away from its rigid three-tier framework, lower courts continue a strict application of the three-tier framework.[122] For example, lower courts often review sexual orientation discrimination under traditional rational basis review, and not rational basis with bite.[123]

To remedy doctrinal obfuscation, the Court can do away with its tiered framework and adopt a single standard of review for equal protection cases, as advocated by Justice Stevens.[124] Hong Kong's proportionality test is a

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[117] *See* Fleming, *supra* note 57, at 2304–10. For additional support of Fleming's argument, see also William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 29 TUL. L. REV. 519, 584 (2005) (noting "the erosion, over the last twenty years, of the Court's three-tiered scrutiny structure").

[118] *See* Lawrence Friedman, *Ordinary and Enhanced Rational Basis Review in the Massachusetts Supreme Judicial Court: A Preliminary Investigation*, 69 ALB. L. REV. 415, 416 (2005) ("[r]ational basis scrutiny as ordinarily understood as exceedingly deferential to the political branches of government"); Goldberg, *supra* note 57, at 489 (explaining that rational basis review is a "deferential approach to the law- and policymaking branches"); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Recognize Its Application of Heightened Scrutiny to Classes Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2773 (2005) (describing rational basis review as "extremely deferential to any proffered government interest").

[119] *See* Romer v. Evans, 517 U.S. 620, 630–32 (1996).

[120] *See* MURPHY ET. AL, *supra* note 57, at 1016–19 (discussing rational basis with bite; arguably, the Court also applied rational basis with bite to *City of Cleburne v. Cleburne Living Ctr., Inc*., 473 U.S. 432 (1985) and *Plyer v. Doe*, 457 U.S. 202 (1982)).

[121] *See* Smith, *supra* note 118 (arguing that while the Supreme Court has applied rational basis with bite to sexual orientation discrimination, it has not done so explicitly and thus left lower courts confused; many courts still only apply traditional rational basis review to sexual orientation cases).

[122] *See* Fleming, *supra* note 57.

[123] *See* Smith, *supra* note 118, at 2785–95 (summarizing cases in which courts applied traditional rational basis review to sexual orientation discrimination).

[124] Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.").

potential source of inspiration for a single standard. Hong Kong applies the same proportionality test to equal protection cases regardless of the classification involved: race, sex, sexual orientation, etc.[125] Other peer jurisdictions—including Canada, the European Court of Human Rights, and South Africa—also employ a single proportionality test.[126] While it is outside the scope of this Article to analyze comprehensively the pros and cons of adopting a singular proportionality test, this discussion highlights the fact that the United States could benefit from greater dialogue on the potential benefits of proportionality doctrines developed in peer jurisdictions.[127] Not only would a singular proportionality test remedy doctrinal obfuscation, it might also foster desirable transparency, objectivity, and determinacy in legal analysis.[128]

Finally, *Leung* furthers an existing normative critique of the United States' posture on disparate impact claims. Recall that, in *Leung*, both the lower court and the Court of Appeal stated that the Basic Law and Bill of Rights protect against indirect discrimination through disparate impact.[129] While the Basic Law and Bill of Rights govern only state actions, numerous Hong Kong statutes that prohibit discrimination in the private sector also remedy indirect discrimination.[130] Hong Kong joins many other peer jurisdictions in taking a firm stance against disparate impact discrimination.[131]

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[125] *See supra* notes 102–103 and accompanying text.

[126] *See supra* note 111.

[127] Vicki Jackson has begun this conversation, encouraging Americans to discuss the possibility of adopting other jurisdictions' proportionality tests in numerous areas of constitutional adjudication, including equal protection. *See* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 606–34 (1999); *see also* Vicki C. Jackson, *Being Proportional about Proportionality*, 21 CONST. COMMENT. 803 (2003).

[128] After studying proportionality tests in a variety of jurisdictions around the world, David Beatty has argued that proportionality tests generally foster transparency, objectivity, and determinacy; reviewing Beatty's work, however, Vicki Jackson has argued that Beatty's arguments are helpful but not conclusive. *See* Jackson, *Being Proportional about Proportionality*, *supra* note 127.

[129] *See supra* note 100 and accompanying text.

[130] Hong Kong's Sex Discrimination Ordinance, Disability Discrimination Ordinance, and Family Status Discrimination Ordinance all protect against indirect discrimination. *See* Petersen, *Hong Kong's First Anti-Discrimination Laws*, *supra* note 67, at 337–49 (discussing indirect discrimination under the three ordinances). Hong Kong's pending race discrimination bill also protects against indirect discrimination. *See* Hong Kong Home Affairs Bureau, Race Discrimination Bill, § 4(1)(b), *available at* http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/race/RaceDiscriminationBill_e.pdf.

[131] *See, e.g.*, Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMP. & LAB. L. 108, 115–24 (1998) (discussing the significant incorporation of disparate impact theory into international human rights treaties and jurisprudence in the European Court of Justice, the United Kingdom, Australia, New Zealand, and Canada).

The United States, meanwhile, stands in contrast. In the United States, federal statutes protect against indirect discrimination.[132] In its equal protection jurisprudence, however, the Supreme Court has stated that the Constitution does not protect against indirect discrimination the way it protects against direct discrimination, except in rare cases where the plaintiff can show that the disparate impact was caused by a "discriminatory motive." In other words, proving an unequal impact does not suffice and the plaintiff must prove invidious intent.[133] The requirement of proving intent has essentially precluded legal challenges to certain government policies such as racial profiling, because proving intent in such cases of disparate impact discrimination is virtually impossible.[134]

The United States deviates from peer jurisdictions that have more broadly incorporated protections against indirect discrimination into their laws.[135] Many American commentators have condemned the narrow reach

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[132] *See id.* at 126-27. Those two statutes are Title VII of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981 (2000), and the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101–12213.

[133] *See Washington v. Davis*, 426 U.S. 229, 236–44 (1976) (rejecting arguments that the Equal Protection clause treats direct and indirect discrimination similarly). Title VII and the ADA do not require a showing of discriminatory motive. *See supra* note 132.

[134] *See* Kevin R. Johnson, *Racial Profiling after September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67, 72–74 (2004) (summarizing equal protection case law on racial profiling, including disparate impact claims).

[135] *See, e.g.*, Chief Justice Arthur Chaskalson, Brown v. Board of Education*: Fifty Years Later*, 36 COLUM. HUM. RTS. L. REV. 503, 510–11 (2005):

> In the United States, proof of an intention to discriminate is an essential requirement of claims for indirect discrimination under the Equal Protection clause. In South Africa, proof of intention to discriminate is not a requirement of the claim. In reaching this conclusion, the South African Constitutional Court referred to decisions of the Canadian Supreme Court, and the European Court of Justice, and chose to follow their approach to this issue, rather than that of the majority of the United States Supreme Court in *Washington v. Davis*.

See also Hunter & Shoben, *supra* note 131, at 131–36 (examining disparate impact jurisprudence in the European Court of Justice, the United Kingdom, Australia, New Zealand, Canada, and UN treaty bodies, and asserting that "[t]he limitations imposed on the application of disparate impact analysis in the United States have not been reflected in international jurisdictions").

Somewhat surprisingly, the status of indirect discrimination claims at the European Court of Human Rights is unclear. Virtually all of the court's equality cases have concerned direct discrimination. Recently, however, the court held that the Czech government had not violated the equality rights of Roma minority simply because it disproportionately placed Roma children in schools for students with learning disabilities. *See* D.H. & Others v. Czech Republic, App. No. 57325/00, 43 Eur. H.R. Rep. 923 (2006). The holding was very fact-specific, noting, *inter alia*, that many Roma parents requested that their children attend the special schools and that the school assignments were based on expert-created tests implemented to best serve children with disabilities. *See id.* at 925 ¶ 10, 935–36 ¶¶ 46–49, 938 ¶ O–I5 (Costa, J., concurring). The court left open a door for indirect discrimination claims, but did not clearly articulate the required elements for a successful claim:

> [T]he Court observes that, if a policy or general measure has disproportionately prejudicial effects on a group of people, the possibility of its being considered discriminatory cannot be ruled out even if it is not specifically aimed or directed

of disparate impact theory in the United States.[136] Those domestic critics can derive normative support from experiences in peer jurisdictions, including Hong Kong. To some degree, developments abroad also provide potential doctrinal models for regulating indirect discrimination in the United States and curb fears that remedying indirect discrimination more broadly would open the floodgates to litigation.[137]

III. South Korea & *Family Register*: A Significant Development for Gender Identity Rights

This Part begins by providing background on the socio-legal dynamics leading to *Family Register* and details regarding the case. It then discusses how *Family Register*, coupled with other foreign legal developments, could enrich discussions on gender identity rights in the United States.

A. The Backdrop

For much of its history, South Korea was a military dictatorship commonly viewed as having a poor human rights record.[138] The situation began to change in the late 1980s, when the country embarked on its democratization process.[139] Between then and now, South Korea has ratified major international human rights treaties, elected four presidents through democratic elections, passed constitutional amendments and statutory laws to protect human rights, developed an independent judiciary to enforce those rights, and established an independent National Human Rights Commission to study the country's human rights conditions and recommend change.[140]

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at that group. However, statistics are not by themselves sufficient to disclose a practice which could be classified as discriminatory.

Id. at 935, ¶ 46.

[136] *See* Olatunde C.A. Johnson, *Disparity Rules*, 107 Colum. L. Rev. 374, 375 n.5 (2007) (listing law review articles that have criticized the limited cognizability of disparate impact claims in the United States).

[137] I offer this observation as a cursory generalization. Cultural factors, such as the United States' litigious culture, may limit comparative insights (i.e., the floodgates concern may be uniquely American).

[138] *See* Chaihark Hahm, *Human Rights in Korea*, *in* Human Rights in Asia, *supra* note 61, at 265.

[139] *See id.*

[140] *See generally id.*; Cho Hyo-Je, *Human Rights in Korea at the Crossroads: A Critical Overview*, 42 Korea J. 204 (2002). For clarification purposes, I should note that South Korea has two national courts of final appeal, the Supreme Court and the Constitutional Court. Both courts have jurisdiction over constitutional questions, but in different contexts. For background on the two courts, see generally Hahm Chaihark, *Rule of Law in South Korea*, *in* Asian Discourses of Rule of Law 385, 388-90 (Randall Peerenboom, ed. 2004).

South Korea's human rights record still has significant room for improvement,[141] but South Korea's overall record now garners significant praise.[142]

Rights movements among minority groups—including SOGI minorities—are relatively new to the agenda of South Korea's human rights advocates.[143] Mobilization for SOGI rights did not take shape until the mid-1990s.[144] Legal reform on SOGI issues has been modest but significant, considering the recency of the movement. As Oh Ga Ram, an official of the Korean Gay Men's Human Rights Group has remarked, "We feel that the last 10 years is the equivalent of a hundred years because so many [positive] changes occurred in such a short period."[145]

Same-sex relationships have not been criminalized in South Korea, except in the military.[146] There are no statutes or significant case law that protect against sexual orientation discrimination. Nonetheless, the National Human Rights Commission ("Commission") considers sexual orientation to be a prohibited basis for discrimination.[147] Although the Commission's reports and opinions are not binding, they have significant persuasive power on the rest of the South Korean government. For example, in 2003, the Commission played a significant role in convincing the government censorship bureau to remove depictions of homosexuality from its definition of "obscene."[148] The Commission is now in the process of developing recommendations for a nationwide sexual orientation antidiscrimination law.[149]

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[141] For example, human rights monitors often criticize South Korea's controversial National Security Law. Although the law is rarely invoked by the government, it still gives the government arguably objectionable discretion to define and restrict subversive activity. *See* Cho, *supra* note 140, at 208–11; Hahm, *supra* note 138, at 276–83.

[142] *See supra* note 50 (listing publications in which the United States has praised South Korea for its human rights record).

[143] *See* Cho, *supra* note 140, at 218–19.

[144] *See id.*

[145] Norimitsu Onishi, *Gay-Themed Film Gives Closet Door a Tug*, N.Y. Times, Mar. 31, 2006, at A4 (quoting Oh).

[146] *See* Military Penal Code, art. 92 (S. Kor. 2001) (criminalizing same-sex sexual activity); Hyung-Ki Choi et al., *South Korea*, *in* The Continuum Complete International Encyclopedia of Sexuality, 949 (Kinsey Institute ed., 2004), *available at* http://www.kinseyinstitute.org/ccies/kr.php ("Korea has no sodomy laws proscribing oral or anal intercourse, except a military law against homosexual relationships in the army.").

[147] Korean National Human Rights Commission Act, arts. 30(2), 31 (S. Kor. 2001).

[148] *See* Douglas Sanders, *Health and Rights in Asia*, Pukaar, Jan. 2007, at 1, 3, *available at* http://www.nfi.net/NFI%20Publications/Pukaar/2007/JanPukaar07new.pdf; Int'l Gay and Lesbian Human Rights Comm'n, *Republic of Korea: Homosexuality Removed from Classification of "Harmful and Obscene" in Youth Protection Law* (Apr. 22, 2003), *available at* http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=421; Onishi, *supra* note 145.

[149] *See* Sanders, *supra* note 148. As this Article goes to press, it is unclear whether the Korean government will embrace the Commission's recommendations. In October 2007, the Korean Justice Ministry announced that it would propose an antidiscrimination bill that included numerous protected statuses, including sexual orientation. A month later, the Justice Ministry responded to criticism from conservative Christian groups by removing sexual orientation from its draft; it now faces mounting pressure to reinsert sexual orientation as a protected status. *See* Associated Press, *Critics Blast South Korean*

The removal of homosexuality from the definition of obscenity has given sexual orientation minorities a new visibility. For example, in 2006, *King and the Clown*, a film positively depicting romantic relationships between men, broke the box office record for most popular film in South Korea—viewed by one in four residents.[150] Although homosexuality remains very taboo among Koreans, new visibility for sexual orientation minorities has opened the door to constructive discourse.[151]

In some regards, transgender persons have been even more prominently visible in South Korean society than sexual orientation minorities. Harisu, a well-received male-to-female ("MTF") singer, actress, and model in South Korea, has been at the forefront of both pop culture and legal reform.[152] By petitioning a district court, Harisu changed her legally recognized sex in 2002 and married her male partner in May 2007.[153] Harisu's legal journey was broadly covered by the Korean media.[154] Other transgender persons in the public eye include the pop music group, Lady, featuring three MTF singers.[155]

Despite Harisu's legal success, district courts had been inconsistent in deciding whether South Koreans have a right to change their legally recognized sex. That inconsistency prompted *Family Register,* which was the second Supreme Court case on transgender recognition.[156] In the first case, decided in 1996, the Supreme Court stated that a post-operative[157] MTF could not be recognized as a woman for the purposes of Korea's sex-specific rape laws.[158] *Family Register* turned the legal tide, marking a significant development for gender identity rights.

Nondiscrimination Bill for Excluding Gays, Lesbians, INT'L HERALD TRIB., Nov. 8, 2007, *available at* http://www.iht.com/articles/ap/2007/11/08/asia/AS-GEN-SKorea-Gays.php.

[150] *See* Onishi, *supra* note 145 (discussing the film's success); Shim Sun-ah, *Korea in Dilemma Over Transgenders' Right to Choose*, KOREA TIMES (Seoul), May, 23, 2006 (on file with author).

[151] *See* Onishi, *supra* note 145.

[152] *See* Shim, *supra* note 150; Kim Tae-jong, *Singer Harisu to Get Married in May*, KOREA TIMES (Seoul), Feb. 22, 2007 (on file with author).

[153] *See* Kim, *supra* note 152; *S. Korea Transsexual Ties the Knot*, REUTERS, May 19, 2007, *available at* http://in.news.yahoo.com/070519/137/6fzn4.html

[154] *See* Kim, *supra* note 152.

[155] *See* Elizabeth Davies, *Asia Falls for a Girl Band of Former Boys*, INDEPENDENT (U.K.), Oct. 22, 2005, at 33.

[156] *In re Change of Name and Correction of Family Register*, 2004 Seu 42 (S. Kor. June 22, 2006), *available at* http://library.scourt.go.kr/jsp/html/decision/2_67.2004seu42.htm.

[157] It is worth clarifying that, as they are commonly used, the terms "sex-reassignment surgery" and "post-operative" are generalizations. The range of surgical procedures that transsexuals undergo varies from one individual to another. Thus, there is no universal form of "sex-reassignment surgery" and there is no clear definition of what it means to be "post-operative." In *Family Register*, however, the Supreme Court specified the types of surgery individuals must undergo before they have the right to change their legally recognized sex. *See infra* notes 171–173 and accompanying text.

[158] Korea's rape laws only protect women from men. Because the complainant in the 1996 case was not recognized as a female, her attacker was only convicted of harassment, receiving a lighter sentence than that usually received for rape. *See* Email from Seung-

B. Case Details

Family Register addressed the issue of whether, under the Family Register Act ("Act"),[159] post-operative transsexuals have the right to attain legal recognition of their current sex.[160] The family register contains public records of Korean citizens' familial relationships.[161] Article 120 of the Act stipulates that interested parties shall apply to correct the family register if they recognize an impermissible or incorrect record.[162] Meanwhile, the complementary provision, Article 22, stipulates that if a record is incorrect or void, local governments must correct the records.[163] The Act, however, does not specify the scope of corrections that are permitted.[164]

Korean citizens' sex is captured in the register at time of birth and is deemed their sex for all legal purposes.[165] Because the Act does not explicitly speak to the correction of one's listed sex, the Court needed to decide whether changing a transsexual's listed sex amounted to a "correction."[166] In doing so, the majority stated that the legislative purpose of Article 120 "is to correct what is recorded on the family register if it is obviously not legitimate or against the truth."[167]

The applicant in *Family Register* was recorded as a woman at birth; at the time of the case, he self-identified as a man.[168] He asserted that he began living as a man in his twenties.[169] The court noted that the applicant worked in the masculine field of construction work.[170] At the age of forty-one, in 1992, he was diagnosed "as transsexual," and had his breasts, uterus, and vagina removed; afterwards, he had an operation to receive artificial testicles and a penis.[171] Since then, the applicant has received male hormones and now has the "body and appearance of a man."[172] According to the court, the

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hyun Lee, Founding & Steering Member of the Korean Transgender Human Rights Alliance (Feb. 6, 2007, 04:42) (on file with author). *See also* Kim Rahn, *Transsexual Ruling to Bring Changes*, KOREA TIMES (Seoul), June 24, 2006, *available at* 2006 WLNR 22025946.

[159] In re *Change of Name and Correction of Family Register, 2004 Seu 42 (June 22, 2006) (S. Kor.).*

[160] *Id.*

[161] *Id.* § 2(A).

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *See id.* § 2(B). *See also What Flows From Transsexuals Changing Legal Sex?*, CHOSUN ILBO (English Edition), June 22, 2006, *available at* http://english.chosun.com/w21data/html/news/200606/200606220033.html (explaining that transsexuals who register their current sex will be able to marry members of their former sex); Interview with Prof. Hyunah Yang, *supra* note 6.

[166] *Family Register*, 2004 Seu 42 § 2(B)(3).

[167] *Id.*

[168] *Id.* § 3.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

applicant "is recognized as a man in individual and social life," and lived with a female partner who was aware of his history.[173] Finally, the majority noted that the applicant had no criminal record or financial difficulties that would lead one to question the applicant's motive for sex change.[174]

The ten-justice majority held that the applicant could change his sex designation in the register and also change his name to reflect his sex.[175] To support its conclusion, the Court made two main points. First, relying on medical research, the Court stated that one's sex is determined by more than just biological factors.[176] Thus, the sex recorded at one's birth, which is determined by biology alone, can be incorrect because it does not take into consideration emotional and social factors.[177] Second, the Court stated that transsexuals' human dignity is protected by the Korean Constitution and that maintaining transsexuals' original sex designation in the register compromises that right to dignity.[178]

In its opinion, the Court defined the class of persons who are legally recognized transsexuals with the right to change their sex and name. The Court listed a series of criteria that can be organized into two broad categories: medical and social. In terms of medical criteria, the applicant must undergo psychiatric treatment, hormone therapy, and surgical operations to obtain the sex organs and other physical features of the opposite sex.[179] In order to undergo these processes, a doctor must have first diagnosed the applicant with transsexualism, which requires the patient to feel that she was born into the wrong body.[180] In terms of social criteria, the applicant must prove that she "plays the role" of the post-operative sex in personal and social relationships, and receives social recognition for her post-operative sex, causing no negative impact on existing relationships or on public policy generally.[181]

Justice Kim Ji-hyung wrote a supplementary (concurring) opinion. He stressed that the court should interpret statutes in ways that give effect to constitutional rights.[182] He also cited foreign developments in Europe, Japan, and individual states in the United States as persuasive evidence that transsexuals should have a right to legal recognition of their post-operative sex and that allowing Korean transsexuals to change their registry records would be administratively feasible.[183]

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[173] *Id.*
[174] *Id.*
[175] *Id.* § 2(C).
[176] *Id.* § 1.
[177] *See id.* §§ 1, 2(B)(2)–(3).
[178] *Id.* § 2(B)(1) (citing S. Korea Const. arts. 10, 34–1, 37–2).
[179] *Id.* § 1(C).
[180] *See id.* §§ 1(B)–(C).
[181] *Id.* § 1(C).
[182] *See id.* § 6(A) (Kim, J., concurring).
[183] *See id.* § 6(G).

In their dissenting opinion, Justices Son Ji-yol and Justice Park Jae-yoon "agree[d] . . . that the legal and institutional system needs to be complemented so that transsexuals can enjoy the right to have dignity and value that is guaranteed by the Constitution."[184] However, they dissented because they believed those rights need to be protected through new legislation, as opposed to the Family Register Act. They stated that what transsexuals undergo is a "change" and not a "correction" that can trigger Article 120 of the Act.[185] They also thought that legal determination of sex change requires a more complicated administrative assessment than what Article 120 of the Act allows.[186]

C. Reflecting on American Law

As with the Hong Kong case, *Family Register* contributes to a normative critique of American law. South Korea joins a growing number of jurisdictions that legally recognize transsexuals' post-operative sex. Notably, those jurisdictions represent both East and West. For example, the European Court of Human Rights has held that transsexuals have a right to legal recognition of their post-operative sex.[187] Meanwhile, among Asian jurisdictions, Japan, Singapore, and now South Korea all have laws that grant transsexuals some legal recognition of their post-operative sex.[188]

Again, most parts of the world still do not protect transsexuals' right to such recognition. However, the fact that jurisdictions with respectable human rights records, from divergent cultural backgrounds, are converging in moral opinion on gender identity rights should prompt the United States to reconsider its position on transgender issues.[189]

Currently in the United States, the majority of states offer options for transsexuals who have undergone surgical procedures to change the sex designation on their birth certificates, drivers' licenses, and other documents.[190] Those options, however, carry very limited practical significance. Generally, even though one administrative agency (for example, the agency that issues drivers licenses or birth certificates) may change a transsexual's sex designation on a particular identification document, courts and other govern-

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[184] *Id.* § 5(A) (Son, J. & Park, J., dissenting).

[185] *See id.* § 5(C)–(D).

[186] *See id.*

[187] Goodwin v. United Kingdom, 35 Eur. Ct. H.R. 18 (2002); I v. United Kingdom, 36 Eur. Ct. H. R. (2002).

[188] *See* Emerton, *supra* note 38, at 545–55. As this piece was being finalized for publication, the Supreme Court (First Division) of the Philippines held that transgender individuals who have undergone sex reassignment surgery cannot legally change the sex designation on their birth certificates; in doing so, the court reversed a lower court decision. *See* Sylverio v. Philippines, G.R. No. 174689 (S.C. Oct. 22, 2007), *available at* http://web.hku.hk/~sjwinter/TransgenderASIA/FilsSCfulldecision.pdf.

[189] *See supra* note 49 and accompanying text (discussing factors affecting the persuasiveness of foreign law).

[190] *See generally* Dean Spade, *supra* note 7.

mental institutions often will not recognize that document change as having legal force.[191] For example, in *In re Marriage of Simmons*, Illinois courts refused to recognize a female-to-male ("FTM") as legally male for marriage purposes, even though his birth certificate—issued and amended in Illinois—identified him as male.[192] Changes in one particular state's documents are also often disregarded by other state governments and by the federal government.[193] In short, in the United States, changing one's sex in identification documents has symbolic value and some limited practical value,[194] but dubious legal value.

Developments in South Korea and other peer jurisdictions should prompt Americans, especially American lawmakers, to challenge their own assumptions. Many Americans hold a "common sense" belief that individuals' sex designations fit neatly into male/female binary categories that are fixed at birth,[195] despite the fact that medical opinion already challenges that assumption.[196] Now, developments abroad, such as *Family Register*, challenge that assumption by officially recognizing that one's sex can change. The sensibilities that some Americans believe are "common," therefore, are not commonly held by policymakers and judges in the United States' peer jurisdictions.

As time passes, the practical effects of the South Korean case will become evident. Eventually scholars, legislators, and judges in the United States will be able to look to South Korea, among other places, for empirical evidence on administrative consequences of sex change recognition. Opponents of allowing changes to one's legal sex often invoke doomsday predictions. For example, in a 2004 case concerning an FTM, the attorney opposing sex change recognition remarked: "If Michael can be a male because Michael thinks he is a male, and because of some surgery, your

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[191] *See generally id.*

[192] In re Marriage of Simmons, 825 N.E.2d 303 (Ill. App. Ct. 2005), *review denied*, 839 N.E.2d 1037 (Ill. 2005).

[193] *See, e.g.*, Kantaras v. Kantaras, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004), *cert. denied*, 898 So. 2d 80 (Fla. 2005) (holding that a transsexual was a male at the time of marriage despite the change of sex on the MTF's Ohio birth certificate); Spade, *supra* note 7 (discussing the frequency with which transgender people must rely on medical evidence of their gender identity even if they have appropriate legal documents).

[194] Updated documentation can have practical effects in everyday life. *See* Spade, *supra* note 7, at 2 ("Changing the gender marker on [identification] documents from [transgender individuals'] birth-assigned gender to their current gender is an essential step in making these documents work for all the things we need them for, from buying alcohol to entering federal buildings to riding on airplanes to applying for jobs.").

[195] *See* Paisley Currah, *Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363, 1371 (1999) (describing views on sex designation that have been labeled "common sense").

[196] *See* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 267, 278–92 (1999) (explaining that "the law typically has operated under the assumption that the terms 'male' and 'female' are fixed and unambiguous despite medical literature demonstrating that these assumptions are not true").

Honor, then we're headed for big trouble. . . . It will create utter chaos."[197] As evidence of such chaos, opponents often predict that "men in dresses" will begin preying on women in restrooms.[198] Although observers need to consider the United States' unique cultural context, the manner in which the situations in South Korea and similar jurisdictions play out will shed some light on whether such doomsday predictions have any empirical support.

Many advocates of gender identity rights in South Korea see *Family Register* as an important step forward for gender identity rights, but not as a cure-all.[199] Advocates in the United States are likely to share those sentiments. Two criticisms of the case are particularly noteworthy. First, the decision over-relied on the medical model of transgenderism.[200] The medical model posits that a "true" transgender person, who deserves legal protection, identifies with certain psychological scripts (e.g., "I was born in the wrong body") and has desired or received medical treatment for that condition.[201] This narrow definition of transgenderism excludes many transgender persons from protection, including those who desire but cannot afford medical treatment.[202] Second, by requiring transgender persons to perform culturally coded gender roles in order to prove that they have "successfully" transitioned, the *Family Register* court reified objectionable, binary sex stereotypes.[203]

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[197] Matt Bean, *Lawyers Have Last Words in Transsexual Custody Battle*, COURT TV NEWS, Feb. 2, 2002, http://www.courttv.com/trials/kantaras/020802_ctv.html.

[198] *See* PAISLEY CURRAH & SHANNON MINTER, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 58–59 (2002), *available at* http://thetaskforce.org/reports_and_research/trans_equality.

[199] E-mail from Seung-hyun Lee, *supra* note 158.

[200] Indeed, the majority suggested that the criteria they listed for changing one's sex designation derived from "medical studies." *See Family Register*, 2004 Seu 42 § 2(B)(2).

[201] *See* Franklin H. Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713 (2005); Spade, *supra* note 190.

[202] Unlike Hong Kong, the Korean government does not subsidize sex-reassignment surgery for those to whom it has been prescribed. *See* E-mail from Seung-hyun Lee, *supra* note 158.

[203] This requirement relates back to the medical model because medical doctors usually look to stereotypical gender-role performance as a measure of transgenderism. *See* Spade, *supra* note 7, at 25–29. For a discussion of how the Supreme Court has generally treated sex stereotyping as objectionable, see Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447 (2000).

The Korean court suggested that its criteria for sex change recognition—including the requirement that transsexuals first be socially recognized by the community for fulfilling conventions associated with their current sex—derived from medical literature. *See Family Register*, 2004 Seu 42 § 2(B)(2) (referencing "medical studies"). Incidentally, the Korean Supreme Court's approach seems to comport with a more communitarian approach to rights, which is arguably more compatible with Confucian Korean culture, instead of an approach grounded purely in individual autonomy. The court essentially held that individuals have the right to receive legal recognition of sex change; however, the court situated that right within community conventions. In a sense, the court was reacting to community norms; it suggested that the community already recognizes certain

Despite these criticisms, however, South Korea still comports more with many of the United States' peer jurisdictions than it does with the United States. Also, while *Family Register* is arguably under-protective of gender identity rights, it is more protective than the legal situation in the United States. As such, the case should elicit attention from Americans, inspiring us to question the "common sense" assumptions we make when analyzing transgender issues. Looking abroad would not be unprecedented; a considerable number of cases concerning gender identity rights have already cited foreign law.[204]

Conclusion

Leung v. Secretary for Justice[205] and *In re Change of Name and Correction of Family Register*,[206] two recent court decisions from East Asia, offer further evidence that a growing number of the United States' peer jurisdictions—both Western and Eastern—legally protect SOGI rights in ways that surpass legal protections in the United States. The fact that culturally divergent jurisdictions have reached such overlapping judgments leads one to think that protecting SOGI rights is not a culturally specific phenomenon, but rather reflects an appropriate cross-cultural understanding of human rights.

To the extent that the United States deviates from such prevailing views on SOGI issues, that deviation should prompt Americans to think critically about whether that deviation is justified or is simply a product of flawed cultural biases that may be entrenched in legal reasoning.[207] For example,

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transsexuals for their current sex, so the law should, too. This negotiation between the community and the individual is reflected in other Korean Supreme Court cases. *See, e.g.*, Chaihark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 Colum. J. Asian L. 253, 278-79 (2003) (using a Korean Supreme Court case (case no. 96Da52670) on housing contracts between family members to illustrate how the community's norms can trump an individual's rights—in this case, the right to enforce contracts). On Confucianism in Korea, *see generally* Hahm, *supra* note 138.

[204] The courts have used foreign developments in various ways—sometimes choosing to follow foreign jurisdictions, sometimes not; sometimes recognizing post-operative transsexuals' rights to legal recognition, sometimes not. *See* M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (discussing case law from United Kingdom; legally recognizing sex change); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999) (discussing New Zealand and United Kingdom; not recognizing sex change); In re Estate of Gardiner, 22 P.3d 1086 (Kan. Ct. App. 2001) (discussing the United Kingdom case law; not recognizing sex change); In re Heilig, 816 A.2d 68 (Md. 2003) (citing specific laws and court decisions from Australia, the European Court of Human Rights, the United Kingdom, and a report on 20 European countries; recognizing sex change).

[205] [2006] 4 H.K.L.R.D. 211 (C.A.); [2005] 3 H.K.L.R.D. 657 (C.F.I.).

[206] 2004 Seu 42 (S. Kor. June 22, 2006), *available at* http://library.scourt.go.kr/jsp/html/decision/2_67.2004seu42.htm.

[207] Recall that cultural bias cannot sustain a law, even against rational basis review of substantive due process and equal protection claims. *See supra* note 110 and accompanying text; *see also* Lawrence v. Texas, 539 U.S. 558, 577–78 (2003) (stating that enforcing morality defined by majoritarian culture does not constitute a legitimate government interest in substantive due process analysis); *id.* at 583–84 (O'Connor, J., concurring) (stat-

rational basis review for sexual orientation discrimination is less stringent than the standards of review in Hong Kong and other peer jurisdictions. Even though "rational basis with bite" requires courts to review sexual orientation discrimination claims for illegitimate animus, developments abroad prompt one to wonder whether the fact that sexual orientation claims only receive rational basis review in the first place might, ironically, be a product of cultural biases entrenched in the United States' tiered approach to equal protection.[208]

Aside from offering broad normative critiques, the two cases discussed in this Article offer potential insights into specific empirical claims and the usefulness of particular American legal tests. For example, *Family Register* paves the way for potential empirical evidence regarding the feasibility of legally recognizing sex changes. Meanwhile, *Leung's* doctrinal formulation can inform the development of a substitute to the oft-criticized tiered approach to equal protection claims in the United States.

In many regards, this Article is only the start to a larger conversation. While this Article has shown how foreign developments should prompt critical self-reflection in the United States, that process of self-scrutiny needs to be continued in subsequent scholarship. Furthermore, this Article has sought to broaden the American literature on comparative approaches to law and sexuality beyond the confines of the West. The cases of *Leung* and *Family Register* highlight the insights that can be derived by a broader approach, but they are merely highlights. This Article encourages scholars of law and sexuality to continue being attentive to developments that occur abroad in a range of cultural settings.

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ing that moral disapproval does not constitute a legitimate government interest in equal protection analysis); Romer v. Evans, 517 U.S. 620, 632–33 (1996) (stating that culturally driven animus cannot form the legitimate government interest needed to sustain laws against rational basis review in equal protection cases).

[208] As noted above, foreign developments are not necessary to legitimize such inquiries; however, foreign developments raise suspicions regarding the justifications offered for certain American laws and legal doctrines, rendering such inquiries all the more pressing.