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## HUMAN RIGHTS AND GLOBALIZATION: PUTTING THE RACE TO THE TOP IN PERSPECTIVE

*Holning Lau\**

David Law paints a heartening picture in his engaging article, *Globalization and the Future of Constitutional Rights*.<sup>1</sup> Globalization, he argues, promotes the protection of human rights. “As capital and skilled labor become increasingly mobile, countries will face a growing incentive to compete for both by offering bundles of human and economic rights that are attractive to investors and elite workers.”<sup>2</sup> Law predicts that this competition will resemble a “race to the top” of the rights terrain.<sup>3</sup>

While I generally agree with Law’s descriptive argument, I caution against the optimism behind a “race to the top” metaphor. My optimism is qualified because I question the strength and sustainability of human rights protections derived primarily from economic interests, as opposed to normative principles concerning human dignity.<sup>4</sup>

This Essay unfolds in three parts. In Part I, I draw from my experiences in Asia to support Law’s claim but also to put it in perspective by introducing the potential limitations of human rights protections derived from economic interests. Part II elaborates on the limited reach of rights reforms stimulated by states’ desire to enhance market competitiveness. This section extends Law’s metaphor to articulate three hypotheses. First, while some states are racing all the way to the top, most of the countries referenced by Law are not actually going the distance and are, instead, running a

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\* Associate Professor, Hofstra University School of Law. This Essay is based, in part, on research that I completed while serving as a Visiting Fellow at the University of Hong Kong’s Centre for Comparative and Public Law. I thank UCLA School of Law’s Williams Institute for generously funding that research. I thank Amy Baehr, Bennett Capers, Ron Colombo, Liz Glazer, Katy Kuh, David Law, Cliff Rosky, Roy Simon, Barbara Stark, Charles Strohm, and Mike Weinstein for helpful conversations regarding this Essay. I am also grateful for having had the opportunity to present a version of this Essay at Swansea University School of Law (Wales). Errors and omissions, of course, remain my own.

<sup>1</sup> David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. (forthcoming 2008) (manuscript on file with the NW. U. L. REV. COLLOQUY), available at <http://ssrn.com/abstract=975914> (link).

<sup>2</sup> *Id.* (manuscript at 6).

<sup>3</sup> *See id.* (manuscript at 6–7 & n.15).

<sup>4</sup> Professor Law addresses globalization’s effects on property rights and human rights, discussing both sets of rights separately. This Essay focuses on reining in the race metaphor as it applies specifically to human rights. Law already devoted a section of his article to reining in the metaphor as it applies to property rights. *See id.* (manuscript at 40–42) (discussing “practical limits on a ‘race to the top’ in property rights”).

truncated race—racing to provide a level of rights protections that leaves significant room for improvement. Second, among the competitors in the race to the top, losers have diminished incentives to finish the race. Third, states that complete the race to the top are at risk of swiftly slipping down the hill they just climbed. Finally, Part III restores optimism, explaining that human rights advocates can take measures to overcome the scenarios just described.

#### I. ECONOMIC COMPETITIVENESS AS BASIS FOR RIGHTS PROTECTIONS

While spending the spring of 2007 in Asia researching sexual orientation rights, I noticed what David Law now calls the “race to the top.” In April 2007, for example, Lee Kuan Yew—Singapore’s founding father, who remains a highly influential cabinet member—recommended gradually reforming the city-state’s criminalization of same-sex sexual relationships.<sup>5</sup> Lee’s reasoning was more economic than normative. He did not focus on the liberty, equality, or dignity of Singapore’s sexual orientation minorities. Rather, he focused on the fact that reforming Singapore’s staid image is necessary to attract foreign investment and educated immigrants who can further develop Singapore as a hub for science, technology, and financial services.<sup>6</sup>

For those who monitor human rights developments in Asia, Lee’s remarks should come as no surprise.<sup>7</sup> Government leaders in places like Singapore and Hong Kong have publicly donned their racing bibs for the race to the top. Both governments, for example, commissioned studies on how

<sup>5</sup> See Geert De Clercq & Sara Webb, *Singapore Considers Legalizing Homosexuality: Lee*, REUTERS, Apr. 24, 2007, <http://www.reuters.com/articlePrint?articleId=USSP5349120070424> (link (“Singapore, striving to cast off its staid image and overhaul its economy, might have to legalize homosexuality to become more cosmopolitan, but will preserve its core values, the city-state’s founder Lee Kuan Yew said.”). Gradual reform entails, first, not enforcing sodomy laws before repealing them. See Seth Mydans & Wayne Arnold, *Creator of Modern Singapore Is Ever Alert to Perils*, N.Y. TIMES, Sept. 2, 2007, § 1, at 8.

<sup>6</sup> See De Clercq & Webb, *supra* note 5. Commentators have noted that economic concerns are what drive Singapore’s increasing tolerance of homosexuality. See, e.g., Audrey Yue, *Creative Queer Singapore: The Illiberal Pragmatics of Cultural Production*, 3 GAY & LESBIAN ISSUES AND PSYCHOL. REV. 149, 158 (2007) (noting that Lee’s April 2007 speech was motivated by economic pragmatism); Kenneth Paul Tan & Gary Lee Jack Jin, *Imagining the Gay Community in Singapore*, 39 CRITICAL ASIAN STUD. 179, 183 (2007) (stating that liberalization in Singapore “is largely a function of strategic calculations to maximize power and . . . economic gain”). It should be noted, however, that Lee Kuan Yew has raised one non-economic factor in advocating tolerance of homosexuality; he has posited that tolerance makes sense because “homosexuals are mostly born that way.” See Berita Harian, *No Prying on Gays but No Marriage Either*, STRAITS TIMES, Jul. 2, 2007, available at 2007 WLNR 12431741 (quoting Lee).

<sup>7</sup> In 2004, Prime Minister Goh Chok Tong announced that Singapore would begin allowing sexual orientation minorities to be civil servants. Commentators have attributed the policy to Goh’s “generally uncritical and bureaucratic acceptance” of economic theories of global competition. Terence Lee, *Creative Shifts and Directions: Cultural Policy in Singapore*, 10 INT’L J. CULTURAL POL’Y 281, 292 (2004) (summarizing commentary on the policy reform).

their respective cities could better attract the global “creative class,” the mobile professionals who are essential to economic growth and have strong preferences for certain human rights protections, including sexual orientation rights.<sup>8</sup>

While policymakers in Asia were racing, human rights advocates were cheering from the sidelines. Many advocates have come to realize that economic arguments for human rights have cachet. Therefore, one can now read op-eds promoting sexual orientation rights that say nothing about the humanity of sexual orientation minorities, but focus instead on how law reform can enhance a jurisdiction’s “attractiveness as a tourist and investment destination.”<sup>9</sup> As some researchers on Singapore have noted: “The strategy of gay activists has been to pursue their goals by riding on official discourse and rhetoric,” which is grounded in concern for market competitiveness.<sup>10</sup>

Not all human rights proponents, however, were cheering from the sidelines. Some felt uneasy with the fact that lawmakers and advocates have increasingly raised market competitiveness as a justification for—as opposed to a secondary consequence of—protecting human rights.<sup>11</sup> When lawmakers and advocates raise economics as the reason for protecting human rights, they imply that, absent economic benefits, protections should not be extended. Legal protection becomes conditioned on economic interests.

This notion that human rights protections are conditional is troubling because of both its intangible and tangible consequences. Protections grounded in economic interests are insufficient because they demean human dignity. Human rights “derive from the inherent dignity of the human per-

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<sup>8</sup> See WORKGROUP ON CREATIVE INDUSTRIES, SINGAPORE MINISTRY OF TRADE AND INDUSTRY, ECONOMIC REVIEW COMMITTEE, CREATIVE INDUSTRIES DEVELOPMENT STRATEGY: PROPELLING SINGAPORE’S CREATIVE ECONOMY (2002); HOME AFFAIRS BUREAU, HONG KONG SPECIAL ADMINISTRATIVE REGION GOVERNMENT, A STUDY ON CREATIVITY INDEX (2005). One should note that courts in Hong Kong have recently protected sexual orientation rights and their reasoning was not apparently driven by economic concerns. See Holning Lau, *Sexual Orientation & Gender Identity: American Law in Light of East Asian Developments*, 31 HARV. J. L. & GENDER 67, 80–85 (2008) (link [hereinafter Lau, *Sexual Orientation & Gender Identity*]).

For background on the term “creative class” and the creative class’s preference for social tolerance, including tolerance of homosexuality, see generally RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE (2002) [hereinafter FLORIDA, RISE OF THE CREATIVE CLASS]; RICHARD FLORIDA, THE FLIGHT OF THE CREATIVE CLASS: THE NEW GLOBAL COMPETITION FOR TALENT (2005) [hereinafter FLORIDA, FLIGHT OF THE CREATIVE CLASS].

<sup>9</sup> See, e.g., Greg Barns, *A Draw for the Creative Class*, S. CHINA MORNING POST, Sept. 13, 2005, at 15 (drawing on creative class theories to advocate gay rights).

<sup>10</sup> Tan & Lee, *supra* note 6, at 200.

<sup>11</sup> Cf., e.g., Terence Lee, *Gestural Politics: Civil Society in “New” Singapore*, 20 SOJOURN: J. SOC. ISSUES S.E. ASIA 132 (2005) (describing Singapore’s reforms as “gestural” and lacking substance); Lee, *supra* note 7, at 292 (warning that Singapore’s reforms are “not about gay rights per se” and that the trend towards tolerance may be reversed if it becomes economically advantageous to do so).

son.”<sup>12</sup> Therefore, one has human rights—at least in the abstract, as moral rights—simply because one is human; no conditions apply.<sup>13</sup> A government that respects human rights should, accordingly, protect human rights simply because it respects human dignity.<sup>14</sup> By conditioning human rights protections on economic factors—or any other factors—a government signals that it doesn’t take the rights-holders’ dignity seriously.<sup>15</sup>

As a practical matter, this demeaning of human dignity may seem like a small intangible cost. For example, an imprisoned political dissident’s primary desire is probably to be released and granted the freedom to speak her mind. If her government frees her but does so only for economic reasons (e.g., to avoid economic sanctions), the government is still denying the dissident’s inherent dignity. With that said, the dissident may likely view her release as an overwhelming victory.

In the long run, however, the tangible shortcomings of economics-based arguments for human rights protections become starker. When lawmakers and advocates focus on the economic bases for rights protections, they entrench the notion that rights are conditional. Over time, the costs of such discourse amount to more than an abstract denial of human dignity. Winning human rights protection through economic reasoning can be akin to winning a battle but losing the war. For example, in the short term, using economic arguments to advocate the decriminalization of same-sex sodomy may result in a victory. However, setting the precedent of tying rights to economic conditions raises a hurdle, establishing economic benefits as a condition for other rights protection, such as a sexual orientation antidiscrimination law.

This dilemma over choice of discourse is not novel. Choosing how to frame rights movements has often posed difficult questions. For example, some commentators have lamented the use of identity politics to advance human rights.<sup>16</sup> These commentators fear that, even though identity politics may reap short-term benefits, such politics reconstitute socially constructed

<sup>12</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Preamble, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) *available at* [http://www.unhcr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhcr.ch/html/menu3/b/a_ccpr.htm) (link); International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), Preamble, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), *available at* [http://www.unhcr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhcr.ch/html/menu3/b/a_ceschr.htm) (link).

<sup>13</sup> See JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 10–11 (2d ed. 2003) (“Human rights are, literally, the rights that one has simply because one is a human being. . . . Human rights traditionally have been thought of as moral rights of the highest order.”).

<sup>14</sup> See MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS 33–36 (2007) (discussing “the relationship of the morality of human rights to the law of human rights”).

<sup>15</sup> *Cf. id.* at 34 (asserting that the failure to protect victims of human rights violations amounts to “existentially denying that they have inherent dignity”).

<sup>16</sup> See generally Mary Bernstein, *Identity Politics*, 31 ANN. REV. SOC. 47, 56 (2005) (summarizing criticisms against identity politics, including the charge that “activism in the name of [identity] categories will not alleviate inequality but will reify those categories, which will increase the use of those categories to regulate and dominate subordinate status groups”).

categories that undermine more comprehensive legal reform. For example, some human rights advocates bemoan the use of gay identity politics, fearing that such politics reinforce the social salience of sexual orientation rather than reducing the relevance of sexual orientation.<sup>17</sup> The question of how to engage economic arguments in advancing human rights poses a similar challenge. There is a risk that using economic arguments to fight for rights protections will reinforce the idea that protections are conditioned on economics.

But perhaps making economic interests a condition for rights protections does not compromise the sustainability of law reform. Might globalization instead continue to fuel market competition in a way that promotes robust and sustainable proliferation of human rights protections? Some theorists have used game theory to refute the claim that self-interest can produce the same results as can normative concern for human dignity.<sup>18</sup> In more concrete terms, other commentators have questioned whether economic carrots and sticks, such as European Union membership and United Nations economic sanctions, can produce strong and sustainable human rights protections.<sup>19</sup> In the next section, I focus specifically on the economic carrots produced by globalization. The economic incentives produced by globalization cannot, by themselves, generate strong and sustainable human rights reforms.

## II. EXTENDING THE METAPHOR OF THE RACE TO THE TOP

This section offers three hypothesized reasons for why reforms based on concern for global market competitiveness are significantly limited. Extending David Law's metaphor of the race to the top helps to conceive of these limitations. First, even though the race to the top is a long race—let's say, a marathon—most states are only interested in running a half-marathon. This is because globalization's movers and shakers—investors and the creative class<sup>20</sup>—are generally demanding human rights protections represented by this short distance. Second, although states have limited incentives to run the full race, from a purely economic standpoint, these incentives will diminish for race losers. States that are not the first to enact certain cutting-edge rights reforms will reap fewer economic benefits from

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<sup>17</sup> Many advocates hope to reduce people's tendency to categorize and judge others based on sexual orientation labels such as "gay" and "straight"; however, advocates' language of "gay identity" and "gay rights" often reinforces rather than removes labels. *See id.* at 56–57.

<sup>18</sup> *See, e.g.*, CARLOS SANTIAGO NINO, *THE ETHICS OF HUMAN RIGHTS* 46–50 (1991).

<sup>19</sup> *See, e.g.*, Susan Hannah Allen, *The Determinants of Economic Sanctions Success and Failure*, 31 INT'L INTERACTIONS 117, 119, 130–135 (2005) (on UN sanctions); Jeffrey T. Checkel, *Why Comply? Social Learning and European Identity Change*, 55 INT'L ORG. 553 (2001) (on EU membership).

<sup>20</sup> Going forward, I will use the term "mobile elites" when referring to these individuals—the investors and the skilled professionals—collectively. I use the term "elites" because of the influence they yield. I do not mean to suggest that this class necessarily possesses the pride or sense of entitlement associated with the term "elitism."

reforming than the first-mover did. Third, even race winners are at risk of swiftly slipping down the hill they just climbed. Research shows that, after successfully attracting global elites, states typically face a new set of human rights complications that jeopardizes states' human rights records.

#### A. *How high?*

The race to the top exists because mobile elites prefer certain human rights protections. The specific protections that satisfy these actors, however, remain unclear. It is likely that an unduly limited bundle of rights satisfies many of these actors.<sup>21</sup> With regard to nondiscrimination rights, for example, these actors may be satisfied with legal protection against discrimination based on race, sex, and religion. Mobile elites likely view these protections as requisites for any location in which they choose to invest or reside. Because a critical mass of jurisdictions already protect against such discrimination, elites have grown accustomed to expecting these protections and, therefore, demand them from places where they are absent.

Compared to antidiscrimination laws covering race, sex, and religion, laws covering disability (especially mental disability) and sexual orientation are less common—despite the moral claim for these “second wave” human rights protections.<sup>22</sup> It is at best unclear whether, in deciding where to invest and reside, mobile elites care as much about second-wave protections as they do about first-wave protections.<sup>23</sup> Research on “endowment effects” suggests that mobile elites react more negatively to the absence of first-wave protections than of second-wave protections.<sup>24</sup> Accordingly, globalization is likely prompting a growing number of states to run in the direction of human rights protections, but many states will stop before reaching the top because mobile elites will generally be satisfied with the rights symbolized by a shorter distance.<sup>25</sup> Put differently, globalization is mostly

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<sup>21</sup> As discussed below, commentators have noted that mobile elites have little concern for certain social and economic rights. See *infra* Part II.C.

<sup>22</sup> Elizabeth Glazer refers to these laws as protecting “second-wave” rights; she discusses the underdevelopment of second-wave rights in *When Obscenity Discriminates*, 102 NW. U. L. REV. (forthcoming 2008) (manuscript at 33–38) (manuscript on file with the NW. U. L. REV. COLLOQUY), available at <http://ssrn.com/abstract=1016215> (link). Notably, David Law relies on Freedom House for data on human rights; Freedom House includes nondiscrimination on the bases of sexual orientation and disability as human rights. See *infra* notes 27–30 and accompanying text.

<sup>23</sup> On how the situation in Singapore does not answer this question, see *infra* notes 29–30 and accompanying text.

<sup>24</sup> See Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1318–19 (1998) (“People react more negatively to being deprived of something that they have had than to being denied something that they have never had. Behavioral economists and cognitive psychologists refer to this phenomenon as the ‘endowment effect.’”) (citation omitted). Because mobile elites are likely to have some experience with possessing first-wave protections, their relocating to a jurisdiction lacking first-wave protections would amount to a rights deprivation that they view particularly negatively.

<sup>25</sup> This is not to suggest that states do not have any incentive to run all the way to the top; the limited incentives to do so are discussed in Part II.B, *infra*.

producing a horizontal spread of very basic rights protections rather than raising the bar vertically.

In his article, Law draws on data from Freedom House to show that there has been a worldwide increase in human rights protections correlating with increased globalization.<sup>26</sup> The Freedom House data, however, only suggest that there has been a horizontal spread of protections. According to the data, a growing number of states have achieved Freedom House's highest rating for protection of civil rights. In 2006, 53 states achieved the highest rating of 1 on a scale from 1 to 7, whereas only 18 states did a decade earlier.<sup>27</sup> Notably, the data do not convey the varying degree of rights protections among states that have already achieved the highest rating.<sup>28</sup>

Certainly, there is evidence showing that elites—and lawmakers catering to their tastes—are concerned about second-wave issues, such as sexual orientation rights. Even with respect to sexual orientation rights, however, it is unclear whether a race-to-the-top metaphor is apt. After all, Lee Kuan Yew invoked the creative class only to support gradual decriminalization of same-sex sodomy.<sup>29</sup> Through decriminalization, Singapore would catch up with most of its economic peers somewhere partway to the full realization of sexual orientation equality, but Singapore clearly is not racing all the way to the top.<sup>30</sup>

A closer look at Richard Florida's oft-cited research on the creative class is also telling.<sup>31</sup> Florida found that the size of cities' gay populations is a strong predictor of cities' ability to attract the creative class; from this, he suggests that the creative class prefers social tolerance of sexual diversity, among other forms of diversity.<sup>32</sup> Notably, Florida's research—which focused on gay demographics as opposed to gay rights—leaves unclear the levels of rights protections that effectively attract gay communities, signaling tolerance and attracting the creative class.<sup>33</sup>

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<sup>26</sup> Law, *supra* note 1 (manuscript at 34–36) (discussing Freedom House's "civil rights" index and noting that the "[civil rights] scores correlate heavily with other popular empirical measures of human rights protection and tend to yield comparable findings when subjected to statistical analysis.").

<sup>27</sup> Freedom House, *Freedom in the World Country Rankings, 1973–2006* (data spreadsheet containing historical rankings data), available at <http://www.freedomhouse.org/template.cfm?page=15> (link) (follow "Comparative scores for all countries from 1973 to 2006" link to open the data spreadsheet).

<sup>28</sup> See Freedom House, *Methodology* (2007), [http://www.freedomhouse.org/template.cfm?page=351&ana\\_page=333&year=2007](http://www.freedomhouse.org/template.cfm?page=351&ana_page=333&year=2007) (link).

<sup>29</sup> Recall that this gradual process has, thus far, resulted only in the non-enforcement of Singapore's criminal law on same-sex sodomy. See *supra* note 5 and accompanying text.

<sup>30</sup> For the purposes of this Essay, is it worth noting that Freedom House includes sexual orientation equality as a human right, but it does not specify what constitutes sexual orientation equality. See Freedom House, *Methodology*, *supra* note 28.

<sup>31</sup> See FLORIDA, *RISE OF THE CREATIVE CLASS*, *supra* note 8, at 255–58.

<sup>32</sup> See *id.*

<sup>33</sup> Florida has hypothesized that a state could attract gays by legalizing same-sex marriage; the growing presence of gays would then attract other members of the creative class. More empirical data is necessary before one can ascertain the strength of this hypothesis. See Richard Florida & Gary Gates,



Of course, the likely fact that most states are not running a full race to the top is not all bad news. Even if globalization primarily promotes the horizontal spread of human rights protections, rather than vertically raising the standard of protections, this is still progress to be celebrated. If this is the case, however, commentators and advocates should be mindful not to overstate the virtues of globalization.

*B. Why should losers finish?*

The preceding section hypothesized that mobile elites' human rights preferences, as a general matter, correspond to a partway point on the marathon to the top. Accepting that hypothesis, it is still possible that a subgroup of mobile elites are attracted to the full panoply of rights represented by the marathon's finish line. Some states may choose to race all the way to the top to attract this subgroup; however, this section posits that incentives to do so diminish for race losers that lag behind.

Continuing to use sexual orientation rights as a case study clarifies this theory. One can imagine that most mobile elites already consider a city to be highly desirable if it is located in an American state with a sexual orientation antidiscrimination law and a domestic partnership registry. It is unclear how much value mobile elites would place on the state going one step further, fully legalizing same-sex marriage. The preceding section inferred that this extra step would have limited effects on mobile elites, generally.<sup>34</sup>

With that said, a subgroup of the mobile population—gays and gay-allies who are particularly invested in the issue of same-sex marriage—may be attracted to a state because it recognizes same-sex marriage. In the United States, commentators have suggested that states have an economic incentive to become the first-mover offering marriage rights to same-sex couples, including those couples who reside outside of the state.<sup>35</sup>

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*Gay Rights Could Pay Big Dividends*, N.Y. DAILY NEWS, Nov. 26, 2006, available at <http://www.law.ucla.edu/williamsinstitute/press/GayRightsCouldPayBigDividends.html> (link).

<sup>34</sup> See *supra* Part II.A. Lawmakers have not been persuaded to affirmatively recognize same-sex marriage in order to attract the creative class, despite economic arguments for doing so. See Florida & Gates, *supra* note 33. Indeed, no state has yet legalized same-sex marriage without being prompted to do so by the judiciary. Massachusetts, the only state to extend marriage rights same-sex couples, began doing so as a result of *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Interestingly, however, reports suggest that lawmakers in at least one state—Indiana—rejected a proposed constitutional amendment barring recognition of same-sex partnerships, in part because the amendment would make the state appear intolerant and would impede in-state businesses' ability to recruit talent. See, e.g., Bill Ruthhart, *Same-sex Marriage Ban Collapses*, INDIANAPOLIS STAR, Apr. 4, 2007, at A1, available at <http://www.indystar.com/apps/pbcs.dll/article?AID=/20070404/LOCAL190112/704040427> (link).

<sup>35</sup> See, e.g., M.V. Lee Badgett et al., *Supporting Families, Saving Funds: An Economic Analysis of Equality for Same-sex Couples in New Jersey*, 4 RUTGERS J. L. & PUB. POL'Y 8, 9–14 (2006) (link); Jennifer Gerarda Brown, *Competitive Federalism and Legislative Incentives to Recognize Same-sex Marriage*, 68 S. CAL. L. REV. 745, 747–48 (1995).

As I write this Essay, California is poised to become that first-mover.<sup>36</sup> (Massachusetts already grants marriage licenses to same-sex couples, but only to those who satisfy a residency requirement.)<sup>37</sup> If those commentators who suggest an economic incentive for the first-mover are correct, California will benefit from an economic boom. It will capture a monopoly on the same-sex marriage industry, related tourism, and other economic benefits flowing from investment and residency decisions made by the subgroup of elites who highly value same-sex marriage.

With regard to full races to the top however, a non-first-mover generally has less incentive to finish the race than the first-mover did, all else being equal. In the case of same-sex marriage, California will capture a significant market share of the same-sex marriage industry and a significant portion of the elite subgroup consisting of individuals who highly value same-sex marriage rights.<sup>38</sup> Therefore, other states will no longer have the incentive of securing a previously untapped market. Moreover, other states will not be able to brand themselves as human rights trailblazers—thereby appealing to mobile elites—the way that California now can.<sup>39</sup> With each additional state that legalizes same-sex marriage, economic incentives to finish the race will likely continue to diminish until a critical mass of states extends marriage rights to same-sex couples.<sup>40</sup> At that point, same-sex marriage rights will become a factor in more elites' investment and residency decisions because of their changed expectations.<sup>41</sup> While economic incentives to complete the race diminish, normative arguments will be increasingly necessary to stimulate reform. After the tipping point, states will have renewed economic incentives to legalize same-sex marriage to compete for mobile elites more generally, rather than the much smaller subgroup of elites for whom same-sex marriage was highly valued prior to the tipping

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<sup>36</sup> On May 16, 2008, the California Supreme Court held that reserving the designation of marriage for opposite-sex couples violates California's constitution. See *In re Marriage Cases* (CA), 2008 WL 2051892 (Cal. May 15, 2008). The judgment is expected to take effect after thirty days. See Lisa Leff, Associated Press, *State Court: Same-sex Couples Can Wed*, LONG BEACH PRESS TELEGRAM, May 16, 2008, at 1A, available at [http://www.presselegram.com/search/ci\\_9277013?IADID=Search-www.presselegram.com-www.presselegram.com](http://www.presselegram.com/search/ci_9277013?IADID=Search-www.presselegram.com-www.presselegram.com) (link).

<sup>37</sup> See *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623 (Mass. 2006) (holding that same-sex couples from states prohibiting same-sex marriage cannot marry in Massachusetts).

<sup>38</sup> See Brown, *supra* note 35, at 817 ("The history of competitive federalism suggests that first movers often generate disproportionate and long-lived benefits . . .").

<sup>39</sup> See *id.* at 818 (discussing "loyalty" to first movers).

<sup>40</sup> But see *infra* note 43 and accompanying text.

<sup>41</sup> Constructivist theorists argue that when there is sufficient norm-affirming activity—e.g., when a critical mass of states adopt a norm—there is a tipping point, after which other states rapidly adopt that norm. See Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 124 (2008) (link) ("norm-affirming events eventually reach a tipping point beyond which a preference for rule-compliant behavior predominates"); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 901 (1998) (discussing how "tipping points" lead to "norm cascades" among states). It likely follows that a similar tipping point for individuals exists, after which mobile elites' expectations rapidly change to demand compliance with a norm.

point.<sup>42</sup> Interestingly, however, due to the large size of its population, California might prove to be a first-mover that by itself generates a tipping point.<sup>43</sup>

### C. *The top is slippery?*

Finally, the race to the top metaphor is also limited in its descriptive power because it fails to explain what happens to states after they make it to the top. Literature on the creative class suggests that the race to the top is likely to be followed by states slipping from the top.

Law's "race to the top" thesis is premised largely on the fact that the creative class holds preferences for human rights protections. Florida has acknowledged that the creative class's preferences, while generally supportive of liberal tolerance,<sup>44</sup> have a darker side: the creative class's consumption habits fuel socioeconomic inequality.<sup>45</sup> The class demands low-pay services, such as food preparation, housekeeping, laundry, and pet care services.<sup>46</sup> Their consumption habits, therefore, generate an underclass of low-wage laborers.<sup>47</sup>

Income polarization in globalizing cities can lead to circumstances that should worry human rights advocates. For example, income polarization can lead to the deterioration of children's right to public education. As commentators have noted, members of the creative class often send their children to private or elite public schools; persuading this class to pay increased taxes to support the education of others' children is a "tough sell."<sup>48</sup> Other policies intended to help to mitigate socioeconomic division, such as minimum wages and unionization, are also in tension with the goal of cultivating the creative class.<sup>49</sup>

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<sup>42</sup> Put differently, after a tipping point, same-sex marriage will become an expectation among mobile elites, causing same-sex marriage to spread horizontally in the way that first-wave rights protections are already spreading horizontally. See *supra* Part II.A. As noted above, however, normative reasoning is likely necessary to stimulate rights-reforms until such a tipping point is reached.

<sup>43</sup> See Leff, *supra* note 36 (noting that 38 million out of 302 million Americans—more than twelve percent of the national population—live in California). See also *id.* (quoting Gavin Newsom, mayor of San Francisco, for remarking that "[a]s California goes, so goes the rest of the nation").

<sup>44</sup> See FLORIDA, RISE OF THE CREATIVE CLASS, *supra* note 8, at 249–58.

<sup>45</sup> See *id.* at 189–91.

<sup>46</sup> See Mary Donegan & Nichola Lowe, *Inequality in the Creative City: Is There Still a Place for "Old-Fashioned" Institutions?*, 22 ECON. DEV. Q. 46, 47 (2008).

<sup>47</sup> See *id.* at 47–48.

<sup>48</sup> See Jamie Peck, *Struggling with the Creative Class*, 29 INT'L J. URB. REG. RES. 740, 758 (2005) (quoting Richard Florida, *The New American Dream*, WASH. MONTHLY, Mar. 2003, at 26–33). See also FLORIDA, RISE OF THE CREATIVE CLASS, *supra* note 8, at 315–16 (acknowledging that many of the creative class are overly "me-oriented").

<sup>49</sup> See Donegan & Lowe, *supra* note 46, at 47 (summarizing Richard Florida's position). *But see id.* at 58 (recommending that governments balance "creative class strategy" with public policies including minimum wages and enhancements to labor bargaining power).

To be sure, David Law notes in his article that globalization promotes certain “first generation” human rights, but not second generation rights, such as rights to public education, healthcare, affordable housing, and other social and economic rights.<sup>50</sup> The race to the top metaphor, however, elides this dynamic. While states are racing to the top on matters such as free expression and nondiscrimination, they become susceptible to slipping on other matters that the human rights community takes seriously if they simply cater to the tastes of the creative class.<sup>51</sup>

Richard Florida notes that remedying socioeconomic stratification will require reforming norms among the creative class.<sup>52</sup> This shift means approaching human rights as not only means to economic growth, but as a normative end in and of itself.<sup>53</sup> As other commentators note, protecting the social and economic rights of the underclass may require institutionalizing policies that contravene the current preferences of the creative class.<sup>54</sup>

### III. RACING’S TRANSFORMATIVE POTENTIAL

After putting the race to the top in perspective, one sees that globalization produces economic incentives to protect human rights, but those incentives are limited. The virtues of globalization should not be overstated, and economic arguments for human rights should be employed cautiously. As noted in Part I, it is easy for advocates to ride on the wave of economic discourse and to understate or altogether ignore normative arguments for human rights protections. This section serves as a reminder that it is imperative that the human rights community employ *both* economic and normative discourse to further the development of human rights protections.

Certainly, economic arguments should not be abandoned. They can bring about valuable tangible change. Moreover, economics-driven legal reform should be viewed as a transformative process that opens up discursive spaces for asserting normative bases for rights. To some extent, that process is already underway in places like Singapore, which originally relaxed its regulation of sexuality out of economic concerns. Relaxed surveillance has opened new spaces for discourse. In the arts, for example, there has been an increase in works produced by and depicting sexual orientation minorities.<sup>55</sup> With increased freedom of self-expression, sexual orientation

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<sup>50</sup> See Law, *supra* note 1, at 7, 25.

<sup>51</sup> Social and economic rights are enshrined in the International Covenant on Social, Economic, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

<sup>52</sup> See FLORIDA, RISE OF THE CREATIVE CLASS, *supra* note 8, at 320–21.

<sup>53</sup> *But see* Donegan & Lowe, *supra* note 46, at 48 (acknowledging that long-term income inequality may contribute to economic instability, giving rise to economic reasons for remedying inequality).

<sup>54</sup> See *id.* at 47–48.

<sup>55</sup> See Yue, *supra* note 6, at 149–50; see also Tan & Lee, *supra* note 6, at 183 (noting that Singapore’s reform has “encouraged gay communities to emerge from the underground, forging alliances with gay-friendly media and civil society actors, and speaking more confidently, articulately, intelligently,

minorities can press for greater awareness of their communities as not just means to economic ends, but as bearers of human dignity and, therefore, human rights. In this sense, freedom of expression is a gateway legal right. Similarly, a legal right to nondiscrimination can be a gateway right by empowering sexual orientation minorities to live uncloseted lives; by living openly, a gay man prompts others to confront his humanity as a gay man. Fostering respect for his humanity plants seeds for protection of his human dignity.<sup>56</sup>

Using economics-based arguments to open discursive spaces is potentially a powerful bottom-up approach to legal reform. Localized discussions of human dignity and identity strengthen the grounds for rights protections. For example, sexual orientation rights in Asia can be fragile if local communities view homosexuality as a Western phenomenon.<sup>57</sup> Once Western members of the mobile elite no longer need to be wooed, these rights are in jeopardy of being rescinded. In Singapore, however, increasing self-expression has prompted the visibility of local sexual orientation minorities and an “indigenous queer culture” that draws from experiences specific to sexual orientation minorities in Singapore and Asia.<sup>58</sup> This new discourse reminds people that sexual orientation rights are not a top-down imposition of foreign norms, but rights that derive from the inherent dignity of persons both near and far.

Similarly, human rights reforms might be most sustainable if they are understood to comport not only with economic interests or foreign understandings of human dignity, but also with local understanding of human

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and strategically in the public sphere”). I should note that, despite the overall increase in freedom of expression, Singapore still occasionally censors materials for their depictions of homosexuality. See Yue, *supra* note 6, at 158 (citing examples from year 2007). The current, relaxed standard for censorship seems vague. Cf. BBC News, *Singapore Censor Passes Brokeback*, available at <http://news.bbc.co.uk/1/hi/entertainment/4716610.stm> (link) (quoting a Singaporean official for explaining that censors passed the American gay-themed film, *Brokeback Mountain*, because it did not “promote or glamorize the [homosexual] lifestyle”).

<sup>56</sup> For example, common heterosexual prejudices against homosexuals “generally decrease when members of the majority group knowingly have contact with minority group members.” See Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AMER. PSYCHOL. 607, 617 (2006); see also Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1277–79 (2006) (positing that increased visibility of same-sex couples would improve the public perception of same-sex couples).

On how the arts—specifically literature—can “depict the special circumstances of groups with whom we live and whom we want to understand,” cultivating respect for their humanity, see MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 93 (1995).

<sup>57</sup> See Lau, *Sexual Orientation & Gender Identity*, *supra* note 8, at 71. Readers may recall that President Ahmadinejad of Iran stated last year, in a speech at Columbia University, that “[w]e don’t have homosexuals like in your country.” Editorial, *Mr. Ahmadinejad Speaks*, N.Y. TIMES, Sept. 25, 2007, at A30 (quoting Ahmadinejad), available at [http://www.nytimes.com/2007/09/25/opinion/25tues3.html?\\_r=1&scp=1&sq=Mr.+Ahmadinejad+Speaks&st=nyt&oref=slogin](http://www.nytimes.com/2007/09/25/opinion/25tues3.html?_r=1&scp=1&sq=Mr.+Ahmadinejad+Speaks&st=nyt&oref=slogin) (link).

<sup>58</sup> See Audrey Yue, *Hawking in the Creative City: Rice Rhapsody, Sexuality and the Cultural Politics of New Asia in Singapore*, 7 FEMINIST MEDIA STUD. 365, 368 (2007); Yue, *supra* note 6, at 149.

dignity. In Confucian societies, for example, advocates can strengthen human rights protections by discussing how the protections are not only compatible with economic interests but are also compatible with Confucian understandings of dignity. These advocates can draw, for example, from the works of Tu Wei-ming, a Confucian scholar who has written extensively on the compatibility of human rights and Confucianism.<sup>59</sup> Likewise, advocates in Muslim societies can draw from the works of Abdullahi An-Na'im, who has written on the compatibility of human rights and Islam.<sup>60</sup> Protecting freedom of expression allows these discussions to ensue, regardless of whether such protection derived initially from economic interests.

As discussed in Part II, human rights reforms that derive purely from economic interests are limited in their reach. That does not mean, however, that economics-derived rights reforms should be lamented. By opening discursive spaces for development of normative principles, these reforms can plant the seeds for more sustainable rights reform. Ultimately, robust and sustainable rights reforms will require respect for human dignity. It is therefore incumbent upon human rights advocates not to allow normative discourse to fall by the wayside and to assert normative arguments in concert with economic arguments and remind the public that there are non-economic reasons to protect human rights when government officials simply invoke economics to justify reform.

#### CONCLUSION

In his important contribution to human rights literature, David Law eloquently suggests that there is a mutually reinforcing relationship between globalization and human rights protection. Law's article has certainly shed light on an area of legal development that is worthy of monitoring and ongoing discussion. Although the arguments he offers are heartening, this Essay serves as a reminder that the mutually reinforcing relationship is likely limited in numerous ways.

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<sup>59</sup> See, e.g., Tu Weiming, *Epilogue: Human Rights as a Confucian Moral Discourse*, in *CONFUCIANISM AND HUMAN RIGHTS* 297 (Wm. Theodore de Bary & Tu Weiming eds., 1998); see also Albert H.Y. Chen, *Conclusion: Comparative Reflections on Human Rights in Asia*, in *HUMAN RIGHTS IN ASIA* 508–10 (Randall Peerenboom et al. eds., 2006) (arguing that human rights are compatible with "Asian values").

<sup>60</sup> See, e.g., Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-political Conditions and Scriptural Imperatives*, 3 *HARV. HUM. RTS. J.* 13, 15 (1990).