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Grounding Conversations on Sexuality and Asian Law

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Grounding Conversations on Sexuality and Asian Law

*Holning Lau**

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INTRODUCTION

Two years ago, I published an article on the protection of sexual orientation and gender identity (“SOGI”)¹ rights in Asia.² I wrote on

* Associate Professor of Law, University of North Carolina School of Law. I thank Anupam Chander and the editors of the UC Davis Law Review for inviting me to participate in their 2010 symposium on “The Asian Century?,” where I first presented the ideas in this Essay. I am also grateful for having had the opportunity to present this Essay at the Hofstra Colloquium on Law & Sexuality and at a Summer Faculty Workshop at the University of North Carolina School of Law. For feedback on earlier drafts of this Essay, I thank Michael Boucai, Anupam Chander, Kareem Crayton, Barbara Fedders, Puja Kapai, Sonia Katyal, Kelley Loper, Fran Martin, Orly Rachmilovitz, Jeffrey Redding, Kathryn Sabbeth, and Charles Strohm.

¹ In this Essay, I sometimes choose to use the terms “SOGI minorities” and “SOGI rights” instead of “LGBT” and “LGBT rights” because the former terms are arguably more inclusive. Some sexual orientation and gender identity minorities do not identify with the LGBT label, contending that it is culturally loaded with Western centrism. Although I believe the term “LGBT” has become decentered from its Western origins, I still use “SOGI” in the interest of inclusiveness. Some international human rights organizations, such as the International Commission of Jurists, also use the acronym “SOGI.” See *Sexual Orientation and Gender Identity Project*, INT’L COMM’N OF JURISTS, <http://www.icj.org/default.asp?langage=1&nodeID=408> (last visited Dec. 19, 2010). For a discussion on the rejection of labels such as “LGBT” and “lesbigay,”

Leung v. Secretary for Justice,³ a case from Hong Kong that subjected sexual orientation discrimination to greater scrutiny than it typically receives in the United States, and *In re Change of Name and Correction of Family Register* (“*Family Register*”),⁴ in which the South Korean Supreme Court held that transsexuals⁵ have the right to be recognized for their current sex.⁶ When I discuss that article with American⁷ audiences, a recurring reaction is surprise at the two rulings’ progressive posture. That article challenged readers’ imagination of Asia as a region void of any protection of sexual orientation and gender identity rights. My American readers’ reaction to that article serves as the point of departure for this symposium Essay, in which I explore Americans’ flawed imagination of Asia,⁸ examine how that imagination undermines discussions about law reform, and highlight principles that help to ground future discussions in a more accurate view of sexuality and Asian law.

This Essay unfolds in four Parts. Part I describes how misperceptions of Asia have manifested in American legal discourse.

see *infra* notes 84-86 and accompanying text.

²The article that I refer to above is Holning Lau, *Sexual Orientation and Gender Identity: American Law in Light of East Asian Developments*, 31 HARV. J. L. & GENDER 61 (2008) [hereinafter, *East Asian Developments*]. For other examples of my writing on sexuality and Asian law, see Holning Lau, *Human Rights and Globalization: Putting the Race to the Top in Perspective*, 102 NW. U. L. REV. 2021 (2008); Holning Lau & Rebecca L. Stotzer, *Employment Discrimination Based on Sexual Orientation: A Hong Kong Study*, 23 EMP. RESPS. & RTS. J. 17 (2011).

³*Leung v. Sec’y for Justice*, [2006] 4 H.K.L.R.D. 211 (C.A.); [2005] 3 H.K.L.R.D. 657 (C.F.I.).

⁴Supreme Court [S. Ct.], 2004 Seu 42, June 22, 2006 (S. Kor.) (*In re Change of Name and Correction of Family Register*). This Essay is based on the South Korean Supreme Court’s English translation of the Korean-language decision, available online at http://library.scourt.go.kr/jsp/html/decision/2_67.2004seu42.htm.

⁵I use the term “transsexuals” here, as opposed to “transgender individuals,” because the South Korean Supreme Court used “transsexuals.” While “transgender” is an umbrella term referring to all persons who do not identify with the gender assigned to them at birth, the Court used the term “transsexuals” to refer specifically to transgender individuals who have undergone particular medical procedures related to gender identity. See Lau, *East Asian Developments*, *supra* note 2, at 94-96.

⁶See *id.*

⁷To be clear, this Essay uses the term “American” as a shorthand to describe people and things of, or pertaining to, the United States. The Essay does not use the term to speak about the American continents generally.

⁸It is worth emphasizing at the outset that this Essay is not a scientific study on the prevalence of the imagination that I describe. I use the phrase “Americans’ imagination of Asia” to refer to the perceptions of Asia that I have encountered repeatedly in the United States, but I do not mean to suggest that every American necessarily holds such perceptions.

This Part begins by showing that legal literature sometimes embodies the misbelief that Asia is void of any protection of sexual orientation and gender identity rights.⁹ It then examines how such misperceptions of law fit with flawed cultural assumptions that Asia is a monolithic region more hostile than the West is to sexual orientation and gender identity minorities.¹⁰ In this imagination, Asia is defined in opposition to the West in a sharply contrasted binary.

Americans' misperceptions of Asia have consequences for discussions regarding law reform both in Asia and in the United States. Part II considers the implications for discourse in Asia. Americans' imagination of a rigid East-West binary is congruent with, and therefore lends false legitimacy to, some Asian commentators' flawed accounts of binary East-West dynamics. Some Asian commentators rely on such binary notions to oppose sexual orientation and gender identity rights, claiming that rights must be rejected to preserve local Asian cultures.¹¹ In addition, the imagined East-West binary has cast a chilling effect on some proponents of sexual orientation and gender identity rights in Asia. Some proponents have sweepingly rejected advocacy strategies originating in the West, in hopes of developing indigenous forms of social resistance. These arguments, however, neglect the possibility and promise of cultural hybridity.¹²

Part III examines how erroneous views of Asia undermine discussions regarding law reform in the United States. It sheds light on how poor understandings of sociolegal developments in Asia compromise deliberation among Asian Americans, and among Americans generally, regarding the persuasiveness of SOGI rights claims. It also examines how better attention to Asian developments can help to inform discussions in the United States on how to improve advocacy for sexual orientation and gender identity rights.

The Conclusion provides directions for future discourse on sexuality and Asian law. Drawing from the preceding three sections, the Conclusion elaborates on how better attunement to facts, coupled with openness to learning from cross-cultural insights, can improve discourse.

⁹ See *infra* Part I.A.

¹⁰ See *infra* Part I.B.

¹¹ See *infra* Part II.A.

¹² See *infra* Part II.B.

I. THE INFORMATION DEFICIT

A flawed imagination of Asia has manifested not only in American readers' reactions to my article on Hong Kong and South Korea, but also in American discourse on law and sexuality more generally. This Part explores two dimensions of that imagination: misperceptions of law and misperceptions of culture. These misperceptions create an information deficit that undermines discourse on law reform.

A. *Misperceptions of Law*

There is a dearth of legal literature on law and sexuality in Asia. Although reams of American legal literature have been devoted to foreign developments in law and sexuality, the overwhelming majority of that writing concentrates on the Western world.¹³ Moreover, passing references to law and sexuality in Asia are sometimes factually incorrect. Consider *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*,¹⁴ an influential¹⁵ article published in a 2005 issue of the *William and Mary Law Review*.¹⁶ The article argued that Justice Kennedy chose not to cite Asian practices when writing the majority opinion in *Lawrence v. Texas*¹⁷ because "gay

¹³ For examples of this literature, see Lau, *East Asian Developments*, *supra* note 2, at 68 n.2 (listing examples). For exceptional articles that focus on non-Western parts of the world, see for example John Balzano, *Toward a Gay-Friendly China?: Legal Implications of Transition for Gays and Lesbians*, 16 L. & SEXUALITY 1 (2007); Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 98-101 (2002); Jeffrey A. Redding, *Human Rights and Homo-sexuals: The International Politics of Sexuality, Religion, and Law*, 4 NW. U. J. INT'L HUM. RTS. 436 (2006); Jennifer Rellis, "Please Write 'E' in This Box" *Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India*, 14 MICH. J. GENDER & L. 223 (2008).

¹⁴ Stephen 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).

¹⁵ According to a Westlaw search conducted on October 25, 2010, the article has been cited seventy-three times already.

¹⁶ Inaccuracies also exist in press coverage of sexuality and Asian law. For example, consider Joseph Galliano & Christopher Lisotta, *Worldwide Pride*, ADVOCATE, June 22, 2004, at 81, in which the authors stated that "gay sex" was not legal in Taiwan. In fact, gay sex has never been illegal in Taiwan. See Scott Simon, *From Hidden Kingdom to Rainbow Community: The Making of Gay and Lesbian Identity in Taiwan*, in THE MINOR ARTS OF DAILY LIFE: POPULAR CULTURE IN TAIWAN 67, 79 (David K. Jordan et al. eds., 2004) (explaining that "sodomy in the privacy of one's own home has never been illegal in Taiwan"). Published inaccuracies also extend beyond discussions of Asian law to discussions of Asian cultures; these depictions of Asian cultures are explored below in Part I.B.

¹⁷ 539 U.S. 558 (2003).

rights are nonexistent" in Asia.¹⁸ Remarkably, the article provided no citation to support that overdrawn claim about Asia.

The example from the *William and Mary Law Review* is particularly jarring because *Lawrence v. Texas* concerned the invalidation of sodomy laws.¹⁹ One can reason that, when the authors spoke of "gay rights," they meant to include a right to be free from criminal prosecution for consensual sodomy. By the time the Court decided *Lawrence* in 2003, numerous Asian jurisdictions had already repealed sodomy laws.²⁰ For example, Japan repealed its sodomy law in 1882.²¹ Thailand did so in 1956.²² Rights advocates in Hong Kong successfully lobbied for decriminalization of consensual sodomy in 1991.²³ Arguably, decriminalization of sodomy in Asia has not always been framed as a rights development; however, in certain jurisdictions such as Hong Kong, rights discourse was indisputably a driving force for decriminalization.²⁴ It is worth noting that, in some parts of Asia, sodomy laws have never been on the books.²⁵ If we consider Asia and

¹⁸ See Calabresi & Zimdahl, *supra* note 14, at 804-05.

¹⁹ See *Lawrence*, 539 U.S. at 558.

²⁰ See *infra* notes 21-24 and accompanying text. In 1983, the Law Reform Commission of Hong Kong surveyed nine Asian jurisdictions (Japan, India, Mainland China, Pakistan, the Philippines, Malaysia, Singapore, South Korea, and Taiwan) and concluded that "more countries in the region tolerate consensual homosexual conduct by adults in private than penalize it, and that characteristically their legal systems only intervene where the homosexual activity involves some additional elements of force, abuse of the young, oppression, fraud, absence of consent, exploitation or occurrence in public." LAW REFORM COMMISSION OF HONG KONG, LAWS GOVERNING HOMOSEXUAL CONDUCT (TOPIC 2), at 67-68 (1983), available at <http://www.hkreform.gov.hk/en/publications/rhomosexual.htm>.

²¹ See Helmut Graupner, *Sexual Consent: The Criminal Law in Europe and Outside of Europe*, in ADOLESCENCE, SEXUALITY & THE CRIMINAL LAW 145, 148 (Helmut Graupner & Vern L. Bullough eds., 2005) (stating that Japan only criminalized homosexual acts from 1873 until Japan's Penal Code of 1880 went into force); DANIEL OTTOSSON, INT'L LESBIAN & GAY ASS'N, STATE-SPONSORED HOMOPHOBIA — A WORLD SURVEY OF LAWS PROHIBITING SAME-SEX ACTIVITY BETWEEN CONSENTING ADULTS 45 (2008), available at http://old.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf (stating that Japan's Penal Code of 1880 went into force in 1882).

²² See DAVID E. NEWTON, GAY AND LESBIAN RIGHTS 86 (2009); Peter Jackson, *Performative Genders, Perverse Desires: A Bio-History of Thailand's Same-Sex and Transgender Cultures*, INTERSECTIONS: GENDER, HIST. & CULTURE IN THE ASIAN CONTEXT, Issue 9, Aug. 2003, at para. 6, <http://intersections.anu.edu.au/issue9/jackson.html>.

²³ See Carole J. Petersen, *Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong*, 19 LOY. L.A. INT'L & COMP. L.J. 337, 345-51 (1997).

²⁴ See Petersen, *supra* note 23, at 345-51.

²⁵ See Jakob Pastoetter, *Vietnam*, in THE CONTINUUM COMPLETE INTERNATIONAL ENCYCLOPEDIA OF SEXUALITY 1337, 1350 (Robert T. Francoeur et al. eds.) (2004),

the Pacific islands together as a region,²⁶ we should also take note of Fiji, which amended its constitution in 1997 to proscribe sexual orientation discrimination explicitly.²⁷ Contrary to the assertion in the *William and Mary Law Review*, gay rights were not “nonexistent” in Asia in 2003.²⁸

In light of the limited, and sometimes inaccurate, coverage of sexuality and Asian law in American legal literature, it is perhaps understandable that my readers were surprised to learn about progressive developments in Asian law. Hopefully, as general interest in Asian law grows, coverage of sexuality and Asian law in American legal literature will improve both quantitatively and qualitatively.²⁹ There certainly have been a number of recent developments in Asia that continue to expand protection of sexual orientation and gender identity rights, providing fodder for commentary.³⁰ Before proceeding to the following section, it is worth pausing to highlight some of those developments.

Consider the situation in Hong Kong. Since I wrote on the Hong Kong case of *William Leung* in my earlier article, Hong Kong courts

available at <http://www.kinseyinstitute.org/ccies/vn.php> (noting that “neither homosexual identity nor behaviors had ever been explicitly illegal in Vietnam,” but that modern Vietnamese law includes provision that criminalizes “undermining public morality,” which might be invoked to prosecute homosexual conduct); Simon, *supra* note 16, at 79 (“Gays have never been legally oppressed in Taiwan to the extent that they were in the United States and former British colonies, all of which had sodomy laws inspired by biblical precedents. . . . [S]odomy in the privacy of one’s own home has never been illegal in Taiwan.”).

²⁶ Legal discourse often considers Asia and the Pacific islands in conjunction. For example, many law journals are devoted to the topic of Asian-Pacific law. See, e.g., ASIA-PACIFIC J. HUM. RTS.; ASIA-PACIFIC L. & POL’Y J.; ASIA PACIFIC L. REV.

²⁷ See Douglas Sanders, *Human Rights and Sexual Orientation in International Law*, 25 INT’L J. PUB. ADMIN. 13, 35-36 (2002) (discussing constitutional reform in South Africa, Fiji, and Ecuador). The 1997 Constitution of Fiji was revoked in April 2009, for reasons other than its provision on sexual orientation; a new constitution has not yet been implemented. See *Fiji: Constitution Revoked*, N.Y. TIMES, Apr. 11, 2009, at A6.

²⁸ Remarkably, the *William & Mary Law Review* article made the assertion about nonexistent gay rights while discussing *Lawrence*. In *Lawrence*, however, Justice Kennedy cited an amicus brief filed by human rights organizations and that brief cited the Fijian constitution for support. See *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003) (citing Brief for Mary Robinson et al. as Amici Curiae Supporting Petitioners at 28, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164151 (noting that Fiji “adopted language that effectively bars sexual orientation discrimination in [its] equal protection clause[]”).

²⁹ The UC Davis Law Review symposium on “The Asian Century?,” for which I have written this Essay, is a testament to the growing American interest in Asian law generally.

³⁰ See *infra* notes 32-43 and accompanying text.

have issued two more opinions protecting against sexual orientation discrimination.³¹ In *Secretary for Justice v. Yau*, Hong Kong's Court of Final Appeal built on the reasoning in *Leung* to hold that a public indecency law's disparate treatment of same-sex and different-sex couples violated Hong Kong's Basic Law and Bill of Rights Ordinance.³² In *Cho v. Broadcasting Authority*, the High Court's Court of First Instance held that the government broadcasting authority was impermissibly biased when it objected to a television documentary on same-sex couples.³³ Beyond the judiciary, sexual orientation rights have grown through legislative means. In December 2009, Hong Kong's Legislative Council expanded Hong Kong's domestic violence law to protect cohabiting same-sex partners.³⁴

Like the two cases that I discussed in my earlier article,³⁵ other recent developments in Asia arguably go beyond American law to protect sexual orientation and gender identity rights. For example, in 2008, Taiwan amended its employment discrimination law to include sexual orientation as a protected category.³⁶ Meanwhile, the United States Congress has yet to enact any federal law to prohibit sexual orientation-based employment discrimination.³⁷ Additionally, the Taiwan Ministry of Education recently announced that tolerance of gays and lesbians will soon be covered in elementary and secondary school textbooks.³⁸ Meanwhile, abstinence-only curricula in many parts of the United States continue to send discriminatory messages regarding gays and lesbians.³⁹ In another notable example, the

³¹ For background on my earlier article, in which I discuss the *Leung* case, see *supra* notes 2-6 and accompanying text.

³² *Sec'y for Justice v. Yau Yuk Lung Zigo and Another*, [2007] 10 H.K.C.F.A.R. 335 (C.F.A.).

³³ *Cho Man Kit v. Broad. Auth.*, [2008] H.K.E.C. 783 (C.F.I.), available at http://www.hklii.org/hk/jud/eng/hkcfi/2008/HCAL000069_2007-61024.html.

³⁴ Fanny W. Y. Fung, *Violence Law Covers Gay Partners*, S. CHINA MORNING POST, Dec. 17, 2009, at 3.

³⁵ For information on this earlier article, see *supra* notes 2-6 and accompanying text.

³⁶ Gender Equality in Employment Act arts. 7-11 (Taiwan) (as amended in 2008), available at <http://law.moj.gov.tw/eng/LawClass/LawAll.aspx?PCode=N0030014>.

³⁷ Only twenty-one states and the District of Columbia ban employment discrimination based on sexual orientation. See HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS & POLICIES (2010), available at http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf.

³⁸ The Ministry of Education made its announcement in March 2010. See *Gay Students Should Be Allowed to Develop 'Naturally'*, CHINA POST, Mar. 21, 2010, 2010 WLNR 5885551.

³⁹ See Leah J. Tulin, *Can International Human Rights Law Countenance Federal Funding of Abstinence-Only Education?*, 97 GEO. L.J. 1979, 1982 n.6 (2007).

Pakistani Supreme Court issued a series of judgments in 2009 holding that intersex and transgender *hijras* have the right to be recognized as a third sex in government documents and also have rights to be free from government discrimination, including police harassment.⁴⁰ Meanwhile, there has been no United States Supreme Court case to recognize sex classifications beyond the rigid male and female categories.

A final development that I will highlight is *Naz Foundation v. Government of NCT of Delhi and Others* (“*Naz Foundation*”), in which the Delhi High Court held that the Indian Penal Code’s criminalization of sodomy violated the Indian constitution’s protections of life, liberty, and equality.⁴¹ Commentators have commended the decision for its reasoning.⁴² For the purposes of this Essay, another aspect of *Naz Foundation* is worth emphasizing: the Delhi High Court cited law from Hong Kong, Fiji, and Nepal as persuasive authority.⁴³ This cross-

⁴⁰ See Khalid Aziz, *SC Directs Govt to Support Eunuchs Financially*, NATION (Pakistan), July 14, 2009, 2009 WLNR 13624992; Mark Magnier, *A Ray of Hope for Transgender Pakistanis*, L.A. TIMES, Mar. 3, 2010, at 1.

⁴¹ *Naz Found. v. Gov’t of NCT of Delhi and Others*, (2009) WP(C) No.7455/2001, July 2, 2009 (holding that section 377A of Indian Penal Code violated sections 14, 15, and 21 of Indian constitution). As I write this Essay, review of the *Naz Foundation* case is pending before the Indian Supreme Court. See Maneesh Chhibber, *Govt Sets Ball Rolling on Repeal of Gay Sex Law*, INDIAN EXPRESS, Mar. 20, 2010, 2010 WLNR 5876229.

⁴² See Sonia Katyal, *The Dissident Citizen*, 57 UCLA L. REV. 1415, 1461-64 (2010) (commending *Naz Foundation* for being more comprehensive in its reasoning than *Lawrence*); Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for All Minorities*, 2 N.U.J.S. L. REV. 419, 419-22 (2009) (lauding *Naz Foundation* for its contribution to Indian jurisprudence on equality); see also Pritam Baruah, *Logic and Coherence in Naz Foundation: The Arguments of Nondiscrimination, Privacy, and Dignity*, 2 N.U.J.S. L. REV. 505, 505 (2009) (agreeing with *Naz Foundation’s* outcome, but offering suggestions on how to improve upon *Naz Foundation’s* reasoning).

⁴³ See *Naz Found.*, WP(C) No. 7455, (Delhi H.C. 2009), at para. 58, available at http://www.nazindia.org/judgement_377.pdf. With regard to Hong Kong, the Delhi High Court cited the case of *Leung v. Sec’y for Justice*, [2006] 4 H.K.L.R.D. 211 (C.A.); [2005] 3 H.K.L.R.D. 657 (C.F.I.). Regarding Fiji, the Delhi High Court cited *Dhirendra Nandan & Another v. State*, Criminal Appeal Case No. HAA 85 & 86, August 26, 2005 (Fiji), which relied on the 1997 Constitution of Fiji to overturn a sodomy conviction. Regarding Nepal, the Delhi High Court cited *Pant et al. v. Nepal*, Writ No. 917, Dec. 21, 2007 (Nepal), which embodied a directive to Parliament, based on Nepal’s interim constitution, to amend all laws so that sexual orientation and gender identity minorities can exercise equal rights. Among other things, the directive called for government recognition of a third sex for individuals who identify as neither male nor female. As of April 2009, the Nepalese government formed, pursuant to the directive, a seven-member panel studying same-sex marriage laws in other countries to make recommendations for law reform. See Benjamin Cohen, *Gay Nepalese MP Looks Towards Greater Acceptance of Gays and Lesbians*, PINK NEWS, Apr. 22, 2009,

fertilization of Asian jurisprudence on sexual orientation law illustrates the fact that sexual orientation rights and Asia are, indeed, not contradictory terms.

I highlight these advancements of sexual orientation and gender identity rights to illuminate the inadequacy of American legal literature on sexuality and Asian law. To be clear, I am certainly not suggesting that Asian law is uniformly progressive. Asia is a large, diverse region with degrees of rights protection varying across the land — just as there is variance in protections across the United States.⁴⁴ In addition to experiencing advances, advocates of sexual orientation and gender identity rights in Asia have experienced some setbacks.⁴⁵ Indeed, sexual orientation and gender identity are still grounds for persecution in parts of Asia.⁴⁶ In terms of substantive areas of law, legal recognition of same-sex partnerships has been particularly lacking.⁴⁷ Progressive legal developments are also not necessarily good

<http://www.pinknews.co.uk/news/articles/2005-12106.html>; see also Mridu Khullar Relph, *Businesses Look at India as a Destination for Gay Tourists*, INT'L HERALD TRIB., June 1, 2010, at 14 ("India's neighbor to the north, Nepal, has started to sell itself as an international gay tourist destination after that country's Supreme Court legalized same-sex marriage in December 2007 and directed its government to formulate laws accordingly."); Jeremy Page, *Everest Set to Become New Brokeback Mountain*, TIMES (U.K.), Apr. 21, 2010, 2010 WLNR 8213196 ("[T]his Himalayan nation [Nepal] is not only about to become the first in Asia to allow same-sex marriages: it is promoting gay weddings on Everest in an attempt to become the continent's top gay tourism destination.").

⁴⁴ For a collection of maps that visually depict how SOGI rights protections differ across the United States, see *Maps of State Laws & Policies*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/about_us/state_laws.asp (last visited Dec. 19, 2010).

⁴⁵ In recent years, the most highly publicized defeat was perhaps when the Singaporean Parliament decided in 2007 to retain criminalization of same-sex sodomy, while decriminalizing different-sex sodomy. See Oh Boon Ping, *Gay Sex Law Will Not Be Strictly Enforced*, BUSINESS TIMES (Singapore), Oct. 24, 2007, 2007 WLNR 20843877. Although the Singaporean Parliament's preserving of the sodomy law was a loss for SOGI rights advocates, the Singaporean government has publicly pledged to refrain from enforcing the provision. See *id.* Sodomy laws are still enforced in some parts of Asia. The pending trial against Former Prime Minister Anwar Ibrahim in Malaysia is a case in point. See *Malaysia's Opposition Leader on Trial: Sodomy, the Sequel*, ECONOMIST, May 15, 2010, at 8.

⁴⁶ Variance among laws and norms in Asia is highlighted by the fact that sexual orientation and gender identity minorities sometimes migrate from one part of Asia to another to flee persecution. For discussion of a recent example involving a Pakistani man who sought asylum in South Korea to flee persecution based on his sexual orientation, see Ri Yoo, *International Legal Update: East Asia*, 17 HUM. RTS. BRIEF 49, 49-50 (2010).

⁴⁷ According to some accounts, Nepal is poised to become the first Asian nation to legally recognize same-sex marriages. See Page, *supra* note 43. Political and legal uncertainty looms over Nepal, however, as rival parties negotiate the country's new

proxies for public attitudes because the law sometimes changes more quickly than do public prejudices.⁴⁸ At the very least, however, Americans who believe that sexual orientation and gender identity rights are “nonexistent” in Asia bring skewed expectations to discussions on sexuality and Asian law. Ameliorating the information deficit on sexuality and Asian law would improve the foundation upon which such conversations are built.

B. Misperceptions of Culture

To understand the imagined Asia that is void of SOGI rights, it is helpful to look at American assumptions about East-West cultural dynamics. Numerous writers have noted the stereotyped notion that Asia is a monolithic region inherently more homophobic than the West.⁴⁹ Some commentators suggest that this assumption traces back

constitution. See Kiran Chapagain & Jim Yardley, *Nepal Avoids Political Crisis with Broad Deal to Extend Parliament*, N.Y. TIMES, May 29, 2010, at A10.

⁴⁸ There are familiar examples from the United States in which legal change served as a poor barometer of public prejudice. For instance, in 1967, the Supreme Court held in *Loving v. Virginia*, 388 U.S. 1 (1967), that anti-miscegenation laws are unconstitutional. In a Gallup poll the following year, seventy-three percent of Americans disapproved of marriages between blacks and whites. See Joseph Carroll, *Most Americans Approve of Interracial Marriages*, Aug. 16, 2007, <http://www.gallup.com/poll/28417/most-americans-approve-interracial-marriages.aspx> (reporting on changes in public opinion regarding interracial marriages); see also *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 450 (Conn. 2008) (Kaye, C.J., dissenting) (quoting *Hernandez v. Robles*, 855 N.E.2d 1, 28 (2006)) (arguing that enactments of remedial legislation to address discrimination “acknowledge rather than mark the end of a history of purposeful discrimination”).

⁴⁹ See, e.g., Christy Chung et al., *In Our Own Way: A Roundtable Discussion, in ASIAN AMERICAN SEXUALITIES: DIMENSIONS OF THE GAY & LESBIAN EXPERIENCE* 96 (Russell Leong ed., 1996) (noting stereotypes); Gayatri Gopinath, *On Fire*, 4 GLQ: J. LESBIAN & GAY STUD. 631, 632-33 (1998) (same); Chong-suk Han, *Chopsticks Don’t Make It Culturally Competent: Addressing Larger Issues for HIV Prevention Among Gay, Bisexual, and Queer Asian Pacific Islander Men*, 34 HEALTH & SOC. WORK 273, 277 (2009) (same); Jeeyun Lee, *Toward a Queer Korean American Diasporic History, in Q & A: QUEER IN ASIAN AMERICA* 196 (David Eng & Alice Hom eds., 1997) (same).

For an example of sweeping claims about Asian culture being more homophobic, see Anthony R. Reeves, *Sexual Identity as a Fundamental Right*, 15 BUFF. HUM. RTS. L. REV. 215, 225, 234 (2009) (“Africa, Asia, and parts of Latin America are arguably today’s strongholds of heteronormative patriarchy. . . . The non-Western world remains largely under the control of patriarchal heteronormativity. Several important factors make Asia and Africa especially prone to retaining this oppressive regime, including the traditional way of life, the slow progress of women’s rights, and the stubborn, lingering influence of European colonialization.”). But see Peter A. Jackson, *Tolerant but Unaccepting: The Myth of a Thai “Gay” Paradise, in GENDER AND SEXUALITIES IN MODERN THAILAND* 226 (Peter A. Jackson & Nerida M. Cook eds., 2003)

to colonial ideas of Asia needing to be saved by enlightened Western culture's civilizing force, which is allegedly embodied today in the West's growing tolerance of sexual diversity.⁵⁰

This assumption that the East is universally more homophobic than the West is an oversimplification at best. Because Asia is a culturally diverse region, it is impossible to characterize Asian culture with sweeping generalizations. For the purposes of this Essay, I will highlight one case study — that of ethnic Chinese societies generally, and Hong Kong specifically — to problematize comparisons that pit Asia and the West in a simple more-versus-less dichotomy.

It is overly reductionist to characterize Chinese cultures as being more or less homophobic than Western cultures. Rather, homophobia manifests itself quite differently. Based on some measures, homophobia appears to be more widespread in Chinese contexts.⁵¹ For example, data from the World Values Survey suggests that individuals in Chinese societies are less likely than Americans are to believe that homosexuality is "justifiable."⁵² Other measures, however, challenge the reductionist claim that Chinese societies are more homophobic.⁵³

For example, consider differences in virulence of homophobia. One study found that homosexual interviewees in Beijing and Shanghai reported experiences with maltreatment that were generally less violent than the hate and harassment reported in places like the United States.⁵⁴ Consider, also, differences in whether homosexuality is viewed as immoral. Comparable data from Hong Kong and from the

(arguing that some Westerners have mythical views of Thailand as gay paradise).

⁵⁰ See, e.g., Gopinath, *supra* note 49, at 623-33 (linking Western perceptions of sexism and homophobia in India to colonial constructions of India). Note, however, that there also existed a counter colonial narrative that depicts some Asian societies as hyper-civilized and effeminate, therefore needing the masculine influence of Western forces. See Teemu Ruskola, *Raping Like a State*, 57 UCLA L. REV. 1477, 1516-17 (2010) (describing colonial constructions of Chinese society as effeminate).

⁵¹ See *infra* note 52 and accompanying text.

⁵² The World Values Survey asked respondents in the United States (2006), Hong Kong (2007), China (2005), and Taiwan (2006) whether they thought homosexuality was "justifiable" using a scale from 1 ("never justifiable") to 10 ("always justifiable"). The percentages of respondents who responded with 1 were as follows: thirty-three in the United States, forty in Taiwan, thirty-nine in Hong Kong, and seventy-eight in China. See *Values Survey Databank*, WORLD VALUES SURVEY, <http://www.wvsevsdb.com/wvs/WVSanalyze.jsp> (last visited Dec. 19, 2010). The data came from nationally representative samples. *Introduction to the World Values Survey*, WORLD VALUES SURVEY, http://www.worldvaluessurvey.org/wvs/articles/folder_published/article_base_46 (last visited Dec. 9, 2010).

⁵³ See *infra* notes 54-57 and accompanying text.

⁵⁴ Kyna Rubin, *How To Be Gay in Beijing*, 103 GAY & LESBIAN REV. WORLDWIDE 29, 29-30 (2003).

United States suggest that Americans' objections to homosexuality are more likely to take the form of moral disapproval.⁵⁵ A survey commissioned by the Hong Kong government in 2005 found that 38.9% of respondents thought homosexuality conflicted with community morals.⁵⁶ Meanwhile, in the United States, the Pew Foundation found in 2006 that 50.0% of Americans believe that homosexuality is immoral.⁵⁷

Some commentators on Chinese culture have explained that homophobia is less virulent in Chinese societies due, in large part, to the fact that homophobia is not as deeply rooted in religious notions of morality.⁵⁸ Instead of stemming primarily from religion, homophobia in Chinese societies derives more significantly from the perception that same-sex relationships are incongruent with good reputation because same-sex relationships are viewed as a challenge to traditional Chinese notions of family integrity.⁵⁹ As Liu and Ding have

⁵⁵ See *infra* notes 56-57 and accompanying text. Commentators believe that objections based on religion and other forms of morality tend to produce more virulent forms of discrimination. See *infra* notes 58-60 and accompanying text.

⁵⁶ See HONG KONG HOME AFFAIRS BUREAU, *Government Survey of Attitudes Towards Homosexuals* 8 (2006), available at <http://www.legco.gov.hk/yr05-06/english/panels/ha/papers/ha0310cb2-public-homosexuals-e.pdf>. The survey was administered by telephone to over 2000 people in Hong Kong. See *id.* at 4.

⁵⁷ See PEW RESEARCH CENTER, *A BAROMETER OF MODERN VALUES: SEX, DRUGS, AND THE 1040*, at 1 (2006), available at <http://pewresearch.org/assets/social/pdf/Morality.pdf>; see also PEW RESEARCH CENTER, *REPUBLICANS UNIFIED, DEMOCRATS SPLIT ON GAY MARRIAGE: RELIGIOUS BELIEFS UNDERPIN OPPOSITION TO HOMOSEXUALITY* 6 (2003), available at <http://people-press.org/reports/pdf/197.pdf> (finding that fifty-five percent of Americans believed engaging in homosexual activity is considered sinful). Both surveys were administered by telephone to large nationally representative samples. See PEW RESEARCH CENTER, *A BAROMETER OF MODERN VALUES: SEX, DRUGS, AND THE 1040*, *supra*, at 5; PEW RESEARCH CENTER, *REPUBLICANS UNIFIED, DEMOCRATS SPLIT ON GAY MARRIAGE: RELIGIOUS BELIEFS UNDERPIN OPPOSITION TO HOMOSEXUALITY*, *supra*, at 20.

⁵⁸ E.g., CHOU WAH-SHAN, TONGZHI: POLITICS OF SAME-SEX EROTICISM IN CHINESE SOCIETIES 19 (2000); Marc McLelland, *Interview with Samshasha, Hong Kong's First Gay Rights Activist and Author*, 4 INTERSECTIONS: GENDER, HIST. & CULTURE ASIAN CONTEXT, para. 72 (2004), available at http://www.sshe.murdoch.edu.au/intersections/issue4/interview_mcllelland.html; Rubin, *supra* note 54, at 29; Simon, *supra* note 16, at 73; see also Day Wong, *Rethinking the Coming Home Alternative: Hybridization and Coming Out Politics in Hong Kong's Anti-homophobia Parades*, 8 INTER-ASIA CULTURAL STUD. 600, 605 (2007) (noting that rights advocates in Hong Kong have argued that homophobia derives mainly from Western cultural sources, such as Christianity).

Commentators have also offered other factors to explain the relatively less virulent discrimination in Chinese societies. For example, Kyna Rubin notes Chinese culture's "over-arching norm of restraint in personal relations." See Rubin, *supra* note 54, at 29.

⁵⁹ See Rubin, *supra* note 54, at 29-30; Simon, *supra* note 16, at 73; Chou Wah-Shan, *Homosexuality and the Cultural Politics of Tongzhi in Chinese Societies*, 40 J.

suggested: "Homosexuals and queers in present-day Taiwan [and other Chinese settings] do not have less, but rather differently, difficult lives because homophobic forces do not operate as overtly and violently but rather to protect everyone else's face."⁶⁰

Understanding the different roots of homophobia in Chinese and in Western societies challenges the reductionist view that Eastern sensibilities are simply more homophobic, but even such an understanding is incomplete. The East and the West have been permeable entities.⁶¹ In the age of globalization, different strands of homophobia, like persons and ideas generally, have migrated across the globe.⁶² As a result, homophobia in many contemporary Chinese societies cannot be traced exclusively to indigenous cultural roots. With that said, it is not necessary to analyze fully the causes of homophobia to recognize that reductionist comparisons of homophobia are misleading.

In addition to recognizing that homophobia can be measured in different ways that produce disparate comparative insights, it is important to be mindful that homophobia in a particular place varies based on numerous factors such as situational context.⁶³ For example, the Hong Kong government's study found that an overwhelming majority of Hongkongers expressed acceptance of homosexual coworkers (eighty percent) and homosexual neighbors (seventy-eight percent);⁶⁴ sadly, however, only a minority expressed approval of

HOMOSEXUALITY 27, 30 (2001); Chi-yan Wong & Catherine So-kum Tang, *Coming Out Experiences and Psychological Distress of Chinese Homosexual Men in Hong Kong*, 33 ARCHIVES SEXUAL BEHAVIOR 149, 151 (2004).

⁶⁰ Jen-Pen Liu & Naifei Ding, *Reticent Poetics, Queer Politics*, 6 INTER-ASIA CULTURAL STUD. 30, 36 (2005).

⁶¹ See Ruth Vanita, *Preface to SAME-SEX LOVE IN INDIA: READINGS FROM LITERATURE AND HISTORY* at xxiii (Saleem Kidwai & Ruth Vanita eds., 2000) ("Neither 'Western' nor 'Eastern' influence is pure or unmixed and neither has fixed value; more important is what one selects and what one aims to accomplish."); Wong, *supra* note 58, at 606 ("[T]he quest for authentic [Chinese] originariness is not possible when there has been so much contact between China and the West from the 19th century onwards.").

⁶² See *infra* notes 74-75 and accompanying text.

⁶³ See *infra* note 64 and accompanying text.

⁶⁴ Eighty percent stated that having a homosexual coworker is "strongly acceptable" or "acceptable"; seven percent stated that it is either "strongly unacceptable" or "unacceptable"; and thirteen percent stated that they were either neutral, did not know, or had no comment. HONG KONG HOME AFFAIRS BUREAU, *supra* note 55, at 49. Seventy-eight percent stated that having a homosexual coworker is "strongly acceptable" or "acceptable"; eight percent stated that it is either "strongly unacceptable" or "unacceptable"; and fourteen percent stated that they were either neutral, did not know, or had no comment. *Id.* at 50.

homosexual family members (forty percent).⁶⁵ Such context-specificity defies the reductionist notions of the East and the West that exist in the American imagination.

II. EFFECTS ON DELIBERATION: ASIA

Americans' flawed imagination of Asia, embedded in legal discourse, has repercussions on discussions regarding law reform both in the United States and in Asia.⁶⁶ Before Part III examines the repercussions in the United States, this Part considers the repercussions in Asia.

Because discourse produced in the United States has a global audience, it has ramifications that spread as far as Asia. American discourse that simplistically defines Asia in opposition to the West lends false legitimacy to problematic arguments that have been made by some Asian commentators whose contentions rely on notions of an East-West binary. This Part elaborates on these flawed claims.

A. *Confronting Claims of Cultural Preservation*

Opponents of sexual orientation and gender identity rights in Asia have sometimes employed nationalist narratives, arguing that protection of sexual orientation and gender identity rights in Asia pollutes local Asian cultures.⁶⁷ They argue that protecting such rights would amount to importing Western norms.⁶⁸

⁶⁵ Forty percent stated that having a homosexual family member is "strongly acceptable" or "acceptable"; fifty-one percent stated that it is "strongly unacceptable" or "unacceptable"; and nine percent stated that they were either neutral, did not know, or had no comment. *Id.* at 54.

⁶⁶ While the influence of legal literature is contested, this Essay assumes that, at a minimum, legal literature affects discussions within the global legal academy. Moreover, this Essay assumes that ideas in legal literature seep out of the legal academy to influence discussions more generally because readers of legal literature often shape public discourse in their capacities as teachers, commentators in the media, experts in government hearings, and other types of public intellectuals.

⁶⁷ See Eric Heinze, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural "Sensitivity,"* 22 MICH. J. INT'L L. 283, 306-07 (2001) (discussing how some non-Western political leaders oppose sexual orientation rights by calling them "un-Asian"); McLelland, *supra* note 58, at paras. 2, 7 (discussing arguments that decriminalizing sodomy in Hong Kong would pollute Chinese culture); Vanita, *supra* note 61, at xxiii (noting arguments that homosexuality in India resulted from imported Western decadence).

⁶⁸ See sources cited *supra* note 67. Although this Essay focuses on sexual orientation and gender identity rights specifically, it is worth noting that "Asian values" have been invoked to reject implementation of other human rights protections as well. For background on the invocation of "Asian values" to reject rights claims, see Yash Ghai, *Understanding Human Rights in Asia*, in HUMAN RIGHTS: SOUTHERN VOICES

Scholars and advocates have mitigated the deleterious effects of these nationalist narratives through various arguments, which can be clustered into two broad categories. First, some advocates in Asia have contested the idea that there are no indigenous cultural grounds for developing greater acceptance of sexual orientation and gender identity rights. For example, to confront claims that homosexuality is inherently at odds with Chinese culture, scholars have drawn from historic texts to show that, at various times during the imperial period, society in China was actually rather tolerant of homosexual conduct.⁶⁹ That tolerance did not manifest in notions of gay identity or gay rights, and it is important not to over-romanticize indigenous Chinese culture's treatment of sexual diversity.⁷⁰ Nonetheless, the historical record demonstrates that indigenous Chinese cultural acceptance of same-sex attraction has fluctuated over time, including periods of notable tolerance.⁷¹ This historical research problematizes cultural preservation claims that suggest Chinese culture is static and

120, 123 (William Twining ed., 2009) (describing invocations of "Asian values" and expressing "war[iness] of approaches to rights that seek, as the claim about Asian values does, to lock us into polarities [such as] western versus eastern").

⁶⁹ See, e.g., BRET HINSCH, *PASSIONS OF THE CUT SLEEVE: THE MALE HOMOSEXUAL TRADITION IN CHINA* 4, 162 (1990) (arguing that, in pre-Qing dynasty China, "homosexuality was relatively open and tolerated"); Chou, *supra* note 59, 29-30 (discussing China's "long historical cultural tolerance of same-sex eroticism"); see also MATTHEW H. SOMMER, *SEX, LAW AND SOCIETY IN LATE IMPERIAL CHINA* 114-65 (2000) (discussing how regulation of same-sex sodomy changed over time in imperial China); McLelland, *supra* note 58, at paras. 1-3, 58-59 (discussing history-based arguments used in sexual orientation rights advocacy in Hong Kong). Scholars have similarly documented historical tolerance in India. See Vanita, *supra* note 61 (collecting texts from over 2000 years of Indian literature to show existence, and relative tolerance, of same-sex love in various periods of Indian history). For discussions on how some authors have overstated their claims regarding cultural histories of homosexuality, see discussion *infra* note 70.

⁷⁰ For example, some scholars have argued that, even though Chinese society has had historical periods of tolerance of homosexual conduct, the degree and continuity of that tolerance has been overstated by other writers. E.g., Wong, *supra* note 58, at 605-06; Charlotte Furth, Book Review, 50 J. ASIAN STUD. 911, 912 (1991) (reviewing HINSCH, *supra* note 69); Matthew Sommer, Book Review, 64 J. ASIAN STUD. 1017, 1019 (2004) (reviewing WU CUNCUN, *HOMOEROTIC SENSIBILITIES IN LATE IMPERIAL CHINA* (2004)). Moreover, such tolerance should not be idealized because protection of SOGI rights requires more than mere tolerance; it requires respect for SOGI minorities' human dignity. For a discussion on how some SOGI rights, such as recognition of same-sex relationships, amount to more than tolerance, see Carlos A. Ball, *Moral Foundations for a Discourse on Same-sex Marriage: Looking Beyond Political Liberalism*, 15 GEO. L.J. 1871, 1875 (1997). See also Liu & Ding, *supra* note 60, at 30-33 (arguing that silent tolerance of homosexuality in Chinese cultures can manifest in oppressive ways).

⁷¹ See *supra* notes 69-70 and accompanying text.

inherently requires condemnation of homosexuality.⁷² Rather, Chinese culture evolves. Chinese societies can even draw inspiration from indigenous historical moments to develop legal protections for conduct, relationships, and identities that stem from same-sex attraction.

Secondly, not only are Asian cultures dynamic, Asian cultures have long been permeable to Western influences. The idea that there are pure Asian cultures to preserve is a nationalist fiction.⁷³ It is worth noting that Western influences have contributed to cultures of homophobia and transphobia in Asia. Indeed, the Delhi High Court recently noted that oppressive legal practices, such as the criminalization of sodomy, were actually imports that colonists brought to Asia.⁷⁴ Moreover, nongovernmental organizations from North America such as Exodus International and Focus on the Family sometimes encourage and help to finance current campaigns against sexual orientation and gender identity rights in Asia.⁷⁵ These facts undermine suggestions that Asian culture must be preserved by resisting Western influences. Asian perspectives on sexuality have been dynamic to begin with and Western influences have contributed to both sides of the debate on sexual orientation and gender identity rights.

Despite these facts that undermine notions of an East-West binary, some commentators in Asia still invoke such binary notions to oppose sexual orientation rights. For example, in a 2008 article in the *Singapore Journal of Legal Studies*, Yvonne Lee suggests that decriminalizing same-sex sodomy would “impose foreign western

⁷² Cf. Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 519, 555 (2001) (arguing against “a view of culture as bounded and containing a singular ‘authentic’ meaning that needs to be preserved against change”).

⁷³ See Vanita, *supra* note 61, at xxiii (“Neither ‘Western’ nor ‘Eastern’ influence is pure or unmixed and neither has fixed value; more important is what one selects and what one aims to accomplish.”).

⁷⁴ See *Naz Found. v. Gov’t of NCT of Delhi and Others*, (2009) WP(C) No.7455/2001, July 2, 2009, at paras. 2-3; Douglas E. Sanders, 377 *and the Unnatural Afterlife of British Colonialism in Asia*, 4 ASIAN J. COMP. L., art. 7. (2009).

⁷⁵ See Josephine Ho, *Global Queers*, 14 GLQ: J. LESBIAN & GAY STUD. 457, 463-67 (2008) (discussing how groups opposing sexual orientation and gender identity rights in Asia are often conservative Christian groups that are very small in Asia, but draw enormous support from global networks); Mathew Mathews, *Christianity in Singapore: The Voice of Moral Conscience to the State*, 24 J. CONTEMP. RELIGION 53, 55-56 (2009) (discussing work of NGOs such as Focus on the Family and Exodus International in Singapore); Simon, *supra* note 16, at 87 (noting that opponents of sexual orientation rights in Taiwan are “embedded in a global ethnoscape that includes ties to American Christian organizations”).

liberal or libertine values on Singaporeans" and that decriminalization conflicts with Singaporeans' communitarian ethos.⁷⁶

In at least three regards, Lee's suggestion relies on an overly reductionist contrast between East and West. First, Lee does not stop to consider that decriminalization can be viewed as resuscitating tolerance that existed in Asia prior to the colonial era, as opposed to absorbing "western liberal or libertine values."⁷⁷ Second, in a caricatured fashion, Lee equates support for gay rights in the West with "liberal or libertine values." In doing so, she fails to acknowledge that many influential supporters of gay rights in the West subscribe to communitarian ethos bearing resemblance to the communitarianism that she ascribes to Asia generally and Singapore specifically.⁷⁸ Third, Lee reduces liberalism to the West, obscuring existing cross-cultural support for liberalism.⁷⁹ As noted in Part I, numerous Asian jurisdictions have invoked liberal principles to protect sexual orientation and gender identity rights.⁸⁰ Adopting liberal principles has not made these jurisdictions inauthentically Asian.⁸¹ Instead, these

⁷⁶ See Yvonne C.L. Lee, "Don't Ever Take a Fence Down Until You Know the Reason It Was Put up" – Singapore Communitarianism and the Case for Conserving 377A, 2008 SING. J. LEGAL STUD. 347, 391.

⁷⁷ See *supra* notes 69-72 and accompanying text (describing arguments that, in various periods of Chinese history, indigenous Chinese culture has been tolerant of same-sex sexual behaviors).

⁷⁸ For instance, numerous influential writers in the United States have made communitarian arguments for same-sex marriage. E.g., CARLOS A. BALL, *THE MORALITY OF GAY RIGHTS* 139-70 (2003); WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003*, at 372-76 (2008); WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 161-77 (2002); JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 80-103 (2004); Ball, *supra* note 70, at 1883 n.47; Dale Carpenter, *A Traditionalist Case for Gay Marriage*, 50 S. TEX. L. REV. 93, 98-101 (2008); Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 177-78 (2005); Jonathan Rauch, *Not Whether but How: Gay Marriage and the Revival of Burkean Conservatism*, 50 S. TEX. L. REV. 1, 3-5 (2008); Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 325 (2000). The commentators mentioned in this footnote focus on the common good in a way that comports with Yvonne Lee's definition of communitarianism. See Lee, *supra* note 76, at 351, 372-73 (defining communitarianism).

⁷⁹ See Lee, *supra* note 76, at 391 (discussing "western liberal or libertine values" without acknowledging that support for liberalism exists among Asian jurisdictions).

⁸⁰ Liberal principles such as privacy, equality, and dignity have informed the court decisions from Fiji, Hong Kong, India, Nepal, and South Korea discussed above in Part I.A.

⁸¹ Cf. FRAN MARTIN, *SITUATING SEXUALITIES: QUEER REPRESENTATION IN TAIWANESE FICTION, FILM AND PUBLIC CULTURE* 5 (2003) (citing HOMI BHABHA, *THE LOCATION OF*

Asian jurisdictions' support for liberalism problematizes Lee's conflation of liberalism with the West in her reference to "western liberal or libertine values."⁸² In light of cross-cultural support for liberal principles, one can view liberalism as a set of values that is transcendent of cultural labels. Lee, however, ignores such ways in which East and West overlap.

American legal literature has generally failed to take commentators like Lee to task for relying on polarized notions of East and West. Instead, American legal literature lends false legitimacy to Lee's reductionist reasoning because, as described in Part I, American discourse tends to reify flawed notions of an East-West binary. Commentators in Asia read American writing. Indeed, Lee's article contains numerous citations to scholarship produced in the United States.⁸³ If American legal commentary in the future were to paint a more accurate picture of East-West dynamics, such commentary could help to inspire more-nuanced discussions regarding legal reform in Asia.

B. *Reconceiving Strategies of Western Origin*

Interestingly, those who fear Western cultural imperialism include not only opponents of sexual orientation and gender identity rights, but also supporters of sexual diversity who resist adopting advocacy strategies that originated in the West. Consider the work of Chou Wah-Shan, a Hong Kong-based scholar who has published influential works on promoting *tongzhi* politics — *tongzhi* being a Chinese term that refers to sexual orientation and gender identity minorities.⁸⁴ In

CULTURE 85-92 (1994) ("[T]he reappearance of [cultural] signs in contexts outside those of their initial production can effect the dislocation of the original signification of the sign."); Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69, 96 (2000) (quoting Gayatri Gopinath, *Funny Boys and Girls: Notes on a Queer South Asian Planet*, in ASIAN AMERICAN SEXUALITIES: DIMENSIONS OF THE GAY & LESBIAN EXPERIENCE 19, 124 (Russell Leong ed., 1996) (arguing that, when non-Western countries adopt so-called "Western" ideas, it is wrong to assume that such adoption results merely from "imperialism" or "mimicry" of Western societies; rather, adoption of such ideas outside of Western contexts can "resignify" those very ideas).

⁸² Cf. sources cited *supra* note 81.

⁸³ Although Lee does not directly cite American literature for her claim that legalizing same-sex sodomy would impose "western liberal or libertine values" on Singapore, she cites American discourse in other parts of her article. See, e.g., Lee, *supra* note 76, at 354-55 nn.55, 62 (discussing liberalism and citing scholarship published in United States by Ronald Dworkin and by Bruce Ackerman).

⁸⁴ See Martin, *supra* note 81, at 23 ("Etymologically meaning 'same will', *tongzhi* is the common translation of 'comrade' . . . and is appropriated to mean something like 'lesbian/gay'."); TONGZHI COMMUNITY JOINT MEETING, <http://tcjm.org/> (last visited Dec.

some of his writings, Chou demonstrates acute concern about Western cultural imperialism.⁸⁵ Accordingly, he called on the *tongzhi* community to reject, rather sweepingly, coming-out politics, which include notions of gay identity and strategies such as pride parades.⁸⁶ He called for exploring ways to develop indigenous alternatives to the coming-out politics that originated in the West.⁸⁷ In her critique of

19, 2010) (“Tongzhi . . . is a Chinese word, often translated as ‘comrade’, which refers to people of different sexual orientations and gender identities in the Chinese-speaking world.”). Some commentators define *tongzhi* capaciously to include allies of SOGI minority communities. See CHOU, *supra* note 58, at 285 (describing that “*tongzhi* has a range of meanings, from narrowly referring to self-identified homosexuals to broadly referring to everyone who identifies with the struggle against heterosexism”).

In at least some parts of Greater China, individuals who identify as *tongzhi* tend also to identify with other descriptors of sexual orientation and gender identity. For example, in a survey that my colleague Rebecca Stotzer and I conducted in 2008, we found that, among 202 sexual orientation minorities in Hong Kong who identified as “*tongzhi* (同志),” ninety-seven percent also identified as “gay,” “lesbian,” “homosexual (同性戀),” and/or “bisexual (雙性戀).” For background on our survey sample, see Lau & Stotzer, *supra* note 2, at 24-26. For reasons discussed below, it is important to keep in mind that words such as “gay” take on different socially constructed meanings based on locational context. See *infra* notes 137-139 and accompanying text.

As Terri He notes, “the usage of *tongzhi*, queer, gay, and lesbian [are] becoming interchangeable, with *tongzhi* being the ultimate all-inclusive term.” Terri He, *Why (not) Queer?: Ambivalence About Politics and Queer Identification in an Online Community in Taiwan*, in QUEER POPULAR CULTURE: LITERATURE, FILM, MEDIA, AND TELEVISION 197, 203 (Thomas Peele ed., 2007). Some commentators such as Chou, however, purposefully distinguish between “*tongzhi*” and terms such as “gay” to emphasize differences between Chinese societies and the West. See Chou, *supra* note 58, at 7-8. In deference to the sources cited in this Essay, the remainder of this Part uses the term “*tongzhi*” when it discusses or draws from sources that use that term. Likewise, this Part uses the term “gay” when the relevant cited source uses that term.

⁸⁵ See Chou, *supra* note 58, at 6-7 (expressing wariness about “universalizing of the Anglo-American experience and its imposition upon other cultures”).

⁸⁶ See *id.* at 7-9 (describing “the strong need to develop indigenous *tongzhi* perspectives and strategies,” highlighting “(ir)relevance of confrontational identity politics” in Chinese communities, and “problematizing the notions of ‘coming out,’ ‘the closet,’ and ‘being lesbigay.’”).

⁸⁷ See *id.* For example, Chou has argued that instead of coming out, *tongzhis* should introduce their same-sex partners to their families as good friends who gradually become integrated into their kinship network, all while avoiding explicit discussion of homosexuality. According to Chou, the goal is to integrate the partner into one’s kinship network because Chinese notions of identity center around kinship systems; in Chinese culture, which allegedly places less value on individual self-expression, explicitly acknowledging the sexual nature of the relationship is not a priority. Chou called this a politics of “coming home,” as opposed to coming out. See *id.* at 32-35. Numerous scholars have since criticized Chou’s coming home strategy for essentializing Chinese and Western cultures as polar opposites and being complicit in

Chou's writing, Day Wong aptly noted: "In Chou's work, Western culture is treated as a fixed and disparate entity, a vehicle for imperialism that is to be opposed by traditional, local Chinese culture."⁸⁸

As important germinal works on *tongzhi* organizing, Chou's writings were highly influential.⁸⁹ Despite stimulating important discussions, Chou's works also discouraged the full exploration of potential advocacy strategies because they implied that persons influenced by Western coming-out politics are somehow inadequately Chinese.⁹⁰ Chou's writings rely on defining Chineseness in opposition to the West, reflecting and reifying the East-West binary that this Essay problematizes.⁹¹

Chou's writings do not give Asian advocates and Asian communities enough credit. Rather than importing wholesale Western identity politics, advocates in Greater China have generally been informed consumers of Western concepts, picking and choosing strategically, and modifying the concepts when necessary to suit local sensibilities.⁹² What has resulted is not Western culture simply displacing Asian culture but a taking of strategies from the West and making them distinctly Asian.⁹³ In this regard, players in Asian society exercise

reproducing oppressive cultural norms that force silence upon sexual orientation minorities in Chinese societies. See Wong, *supra* note 58, at 605 (summarizing criticisms lodged by commentators including Nafei Ding, Jen-Peng Liu, Fran Martin, and Tze-lan Sang).

⁸⁸ Wong, *supra* note 58, at 601.

⁸⁹ See MARTIN, *supra* note 81, at 32 (noting Chou's influence); Liu & Ding, *supra* note 60, at 31 (describing one of Chou's books as "influential"); Wong, *supra* note 58, at 603 (noting that Chou's idea of "coming home," discussed above in note 87, has been "popularized").

⁹⁰ Fran Martin, *Surface Tensions: Reading Productions of Tongzhi in Contemporary Taiwan*, 6 GLQ: J. LESBIAN & GAYSTUD. 61, 71 (2000) (arguing that Chou Wah-Shan's and Bret Hinsch's scholarship indict persons who engage in transnational politics as "inadequately Chinese").

⁹¹ Chou occasionally acknowledges that advocacy strategies can be cultural hybrids, rather than entirely Western or Chinese. See, e.g., CHOU, *supra* note 58, at 141 (acknowledging that Taiwanese advocates have indigenized Western strategies, giving them Chinese characteristics). By and large, however, Chou reduces Chinese and Western culture to discrete and binary entities. See MARTIN, *supra* note 81, at 32 (describing Chou's work as "breath-takingly reductive"); Wong, *supra* note 58, at 601-06 (criticizing Chou's work for "relying on a binary opposition between the West and the non-West").

⁹² See *infra* notes 93-114 and accompanying text.

⁹³ See MARTIN, *supra* note 81, at 24 ("[T]he politics and practice of sexual dissidence in Taiwan actively draw on and transform local as well as global knowledges. In doing so, they produce fundamentally new formations of culture and sexuality."); Wong, *supra* note 58, at 602 ("Cultural flows always involve

agency, rewriting advocacy strategies appropriated from the West, rather than existing as colonized subjects. As a result, what it means to be gay in the United States is not the same as what it means to be gay in Hong Kong or Taiwan.⁹⁴ Similarly, rights marches in Hong Kong and Taiwan are distinguishable from American pride parades.⁹⁵

Indeed, rights marches in Hong Kong and Taiwan provide glimpses into how Western pride parades have been reconceived in Asia. Day Wong has written on how Hong Kong's International Day Against Homophobia ("IDAHO") marches reflect Hong Kong's local culture, merging East and West.⁹⁶ Like Wong, I myself have been struck by contrasts that I observed between Hong Kong's IDAHO marches and marches in Europe and North America. In 2005, community organizers in Hong Kong chose to organize IDAHO marches instead of pride parades (which now also exist in Hong Kong).⁹⁷ Hong Kong's IDAHO marches have been more solemn in tone and have channeled the primacy of family life in Chinese culture.⁹⁸ As Wong put it, "organizers in Hong Kong have . . . been preoccupied with the integration of family values and coming out politics."⁹⁹ Prominent slogans from IDAHO marches have included, "gays and lesbians are your sons and daughters," "hate is not a family value,"¹⁰⁰ and "don't be prejudiced against your children."¹⁰¹ Compared to Western pride parades, the IDAHO marches have more strongly emphasized familial obligations.¹⁰² This emphasis on family has infused the IDAHO

interpretation, translation, adaptation, and indigenization as the receiving culture brings its own cultural resources to bear upon cultural imports."); *cf. also* Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 29-35 (2004) (arguing that legal ideas often undergo transformation when they are transferred across borders from one legal system to another).

⁹⁴ See Wong, *supra* note 58, at 600 (summarizing works of scholars who argue that "what 'gay' means in Taiwan, Hong Kong, or Korea may not be the same as what it means in New York").

⁹⁵ See *infra* notes 96-112 and accompanying text.

⁹⁶ See Wong, *supra* note 58, at 606-13.

⁹⁷ See *id.* See also Austin Chiu, *We Won't Take Discrimination Lying Down: Gay Activists March for Equality*, S. CHINA MORNING POST, May 18, 2009, at 4 (noting that Hong Kong had its first pride parade in December 2008 and then continued its tradition of IDAHO marches, having one in May 2009).

⁹⁸ See Wong, *supra* note 58, at 611-12.

⁹⁹ See *id.* at 612.

¹⁰⁰ These are slogans that I witnessed at Hong Kong's 2007 IDAHO march. The slogan "hate is not a family value" is also documented in Chiu, *supra* note 97, at 4.

¹⁰¹ Day Wong documented this slogan from Hong Kong's 2006 IDAHO in Wong, *supra* note 70, at 612.

¹⁰² See CHOU, *supra* note 58, at 241 (describing Western Pride parades as being

marches with a localized sense of urgency, suggesting that SOGI rights are not only compatible with, but necessitated by, local culture.

For another case study on cultural hybridity, consider Taiwanese pride marches. At pride parades in Taiwan, especially parades from earlier years, some marchers have concealed their faces with masks.¹⁰³ American media have typically focused on the masks as a pragmatic device for protecting the identity of individuals who wish to remain anonymous.¹⁰⁴ Fran Martin has argued, however, that wearing masks serves not only this pragmatic function; rather, the practice of donning masks is more culturally nuanced, appealing to Taiwanese sensibilities.¹⁰⁵ The metaphor of masks is more culturally legible than the trope of the closet because it appeals to Chinese notions of shame and (saving) face.¹⁰⁶ In the West, the closet is understood as a private space enclosing the gay or lesbian self, who can emerge by proclaiming pride; upon outing herself, the individual inhabits a knowable public identity.¹⁰⁷ In Taiwan, however, culture is not similarly developed around dichotomous notions of public-private.¹⁰⁸ Compared to Western notions of gay identity, which have historically entrenched cultural meaning, *tongzhi* identity in Greater China is a

grounded in principles of individualism and liberation). In my view, family values have also played important roles in American pride parades. Recent focus on same-sex marriage and parties marching behind the banner of PFLAG (Parents, Families and Friends of Lesbians and Gays) are examples of the role that family has played in American pride parades. I have also observed slogans such as “hate is not a family value” at American pride parades. It is worth emphasizing that the above comparisons between IDAHO marches and pride parades are based on differences of degree.

¹⁰³ See Galliano & Lisotta, *supra* note 16, at 81 (noting masks at Taiwan’s 2003 pride march); *Photo*, DAYLIFE, <http://www.daylife.com/photo/06Kf66g6R6f2i> (last visited Dec. 29, 2010) (photograph of masked participants in Taiwan’s 2009 pride parade).

¹⁰⁴ See, e.g., Galliano & Lisotta, *supra* note 16, at 81 (reporting that “many marchers wore masks to protect their identity”).

¹⁰⁵ See Martin, *supra* note 90, at 61. To be clear, for many masked participants in the parades, the conscious decision to don masks is prompted primarily by interests in anonymity; the cultural significance of masks provides a secondary logic for wearing the masks. Some participants, however, choose to wear the masks because of their symbolism even though they are otherwise “out” in their lives. See *infra* note 112 and accompanying text.

¹⁰⁶ See Martin, *supra* note 90, at 67-68 (describing dynamics among masks, politics of shame, and saving face).

¹⁰⁷ See *id.* at 66-68 (contrasting homosexual identity in Western societies and in Taiwan).

¹⁰⁸ See *id.* at 72 (“I have suggested that the mask reflects the preoccupations of the closet away from private/public and toward shame/status, and away from enclosure/exposure and toward social enactment.”).

relatively “thin”¹⁰⁹ provisional identity for purposes of political organizing.¹¹⁰ Therefore, for many masked marchers, the pride parade functions less as a vehicle for expressing a sense of self as it is a vehicle for drawing attention to, and protesting, the shame thrust upon *tongzhi* — shame that the masks symbolize.¹¹¹ Indeed, some *tongzhi* who have disclosed their sexual orientation still don masks during rights marches to protest dramatically the politics of shame.¹¹² This Taiwanese practice of masking is an example of how Asian communities can strategically appropriate a useful vehicle for political organizing — pride parades in this instance — and reformulate the vehicle as a cultural hybrid. In recent years, the strategy of donning masks at pride parades has waned in Taiwan.¹¹³ Nonetheless, masks are still an important symbol in Taiwanese discourse on sexual politics. For example, a 2010 gay rights rally at National Taiwan University featured a skit depicting heterosexual students forcing masks upon gay students as school officials watched without intervening.¹¹⁴

In treating Chinese and Western societies as discrete entities, Chou’s works obscured ways in which East and West can interact to produce cultural hybrids such as the marches in Taiwan and Hong Kong.

¹⁰⁹ Daniel Ortiz explained that a “thin” conception of gay identity views gay people as “simply those who experience same-sex desire — no more and no less”; in contrast, a “thick” conception “describes gay people primarily in terms of their social roles and their relationship to other features of social life.” Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1845 (1993).

¹¹⁰ See Martin, *supra* note 90, at 64 (arguing that *tongzhi* identity is “self-consciously opaque”); see also Wong, *supra* note 58, at 611 (describing *tongzhi* identity in Hong Kong as “a provisional political identity”).

¹¹¹ See Martin, *supra* note 90, at 67-68.

¹¹² See *id.* at 68 (acknowledging “the already ‘out’ *tongzhi* who nonetheless wear the mask when demonstrating in public, [making] reference to the shame they are supposed to feel”). The trope of the mask is also used in contexts beyond pride parades to protest politics of shame. For example, sex workers protesting for rights in Taiwan have appropriated the practice of wearing masks. See *id.* at 70.

¹¹³ Photographs of Taiwan’s most recent pride parades illustrate that most marchers do not wear masks. E.g., Choo Lip Sin, *Taiwan Pride Parade Sets New Asian Record*, FRIDAE, Nov. 1, 2009, <http://www.fridae.com/newsfeatures/2009/11/01/9317.taiwan-pride-parade-sets-new-asian-record>.

It is beyond the scope of this Essay to explore in detail explanations for why the practice of wearing masks at pride parades is waning. One explanation is that, due to increasing acceptance of sexual diversity in Taiwanese society, parade marchers feel less pressure to conceal their identities, and a tone that better balances protest with celebration has become fitting.

¹¹⁴ See Loa Iok-sin, *NTU Students Rally for Gay Rights*, TAIPEI TIMES, May 3, 2010, at 2.

When non-Western societies adopt so-called “Western” ideas, it often is not because of cultural imperialism or simple cultural copying. Instead, by interpreting and reworking ideas of Western origin, non-Western societies give those ideas new meanings, decentering those ideas from their Western origins.¹¹⁵ By entrenching the notion that East and West exist in a sharply contrasted binary, the American imagination of Asia described in Part I, like Chou’s writings, stymies exploration of such cultural hybridity.

III. EFFECTS ON DELIBERATION: THE UNITED STATES

The preceding section examined how the imagination of Asia, as a region defined oppositionally against the West and void of SOGI rights, distorts discussions regarding law reform in Asia. This Part returns to the United States. Adherence to stereotyped preconceptions of Asia risks blinding Americans to progressive sociolegal developments in Asia.¹¹⁶ Attention to these developments, however, ought to inform conversations in the United States — both within Asian-American communities and among Americans more generally.

Many Asian Americans maintain a diasporic connection to their families’ places of origin in Asia.¹¹⁷ For these Asian Americans, deliberation on whether to support sexual orientation and gender identity rights involves evaluating the compatibility of those rights with their diasporic fidelity to Asian cultures.¹¹⁸ Unfortunately, however, immigrant communities sometimes have fossilized notions of Asian norms, associating Asia with the cultures that existed there when their families immigrated.¹¹⁹ Informing Asian-American communities that parts of Asia have evolved to protect sexual orientation and gender identity rights would help to combat fossilized notions of Asia, reminding Asian-American communities that Asian societies are dynamic. In this regard, it is important to keep Asian-American communities abreast of sociolegal developments in Asia. Doing so provides Asian-American communities with information that

¹¹⁵ See sources cited *supra* note 93.

¹¹⁶ See *supra* Part I (examining stereotyped assumptions regarding Asian law and cultures).

¹¹⁷ For background on diasporas, including Asian diasporas, see Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1005-27 (2001).

¹¹⁸ See JeeYeun Lee, *Toward a Queer Korean American Diasporic History*, in Q&A: QUEER IN ASIAN AMERICA 191-201 (David L. Eng & Alice Y. Hom eds., 1998).

¹¹⁹ See, e.g., Nayan Shah, *Sexuality, Identity, and the Uses of History*, in Q&A: QUEER IN ASIAN AMERICA, *supra* note 118, at 146 (describing South Asian immigrants’ notions of culture as “a fossil — solid and petrified”).

is relevant to their deliberation on whether to support sexual orientation and gender identity rights.¹²⁰

Information on progressive developments in Asia concerning sexual orientation and gender identity can be particularly meaningful to LGBT Asian Americans. Such developments can help LGBT Asian Americans to reconcile their sense of diasporic identity with their sexuality.¹²¹ A recent example of how LGBT Asian Americans draw inspiration from legal developments in Asia occurred when the South Asian Lesbian and Gay Association (“SALGA”) protested their exclusion from the 2009 India Day parade in New York by issuing a press statement invoking *Naz Foundation* to assert that Indians should be tolerant of homosexuality.¹²² In this example, *Naz Foundation* resonated in a way that *Lawrence v. Texas*, by itself, could not because *Naz Foundation* was decided in India.

Sound information on sexual orientation and gender identity rights in Asia also improves deliberation among Americans more generally.¹²³ In my 2008 article on Asia, I discussed two ways in which Asian developments can inform policy discussions in the United States. It is worth reviewing those two reasons here.

First, according to one prominent school of thought, human rights norms are most persuasive if they are supported by cross-cultural consensus — especially cross-cultural consensus among states that have solid records of respecting human rights and the rule of law.¹²⁴ Americans cannot appreciate the growing cross-cultural support for sexual orientation and gender identity rights, however, if they are

¹²⁰ I am grateful for having had the opportunity to discuss the ideas in this paragraph with Karin Wang, Vice President of Programs at the Asian Pacific American Legal Center, who shared my belief in the importance of keeping Americans, and Asian Americans specifically, informed of SOGI rights developments in Asia. Conversation with Karin Wang, Vice President, Programs, Asian Pacific American Legal Center, at “The Global Arc of Justice: Sexual Orientation Law Around the World” (conference), in L.A., Cal., (Mar. 14, 2009).

¹²¹ See Lee, *supra* note 118, at 191-201.

¹²² See Katyal, *supra* note 42, at 1425 (describing SALGA’s press statement). It is worth noting that the India Day parade organizers allowed SALGA to march in the parade in 2010. See George Joseph, *SALGA Marches in ‘Moment of Achievement,’* INDIA ABROAD N.Y. EDIT., Aug. 27, 2010, at A32.

¹²³ Note here that I am referring to deliberation in a variety of contexts, for example, in legislative houses, law school classrooms, and the media. For the purposes of this Essay, I am agnostic on the controversial question of whether courts should concern themselves with legal developments from abroad. For examples of the literature on whether courts should cite foreign developments as persuasive authority, see Lau, *East Asian Developments*, *supra* note 2, at 69 n.9.

¹²⁴ See *id.* at 76-77.

blinded by stereotyped impressions of Asia. As discussed in Part I, Americans sometimes fail to look beyond stereotypes of Asia as socially unenlightened to see progressive legal developments in Asia.¹²⁵ Improved attention to developments in Asia would help Americans to deliberate on SOGI rights because it would help Americans to assess the strength of cross-cultural support for SOGI rights.

Second, a better understanding of legal developments in Asia can help to illuminate questionable cultural biases in the United States, thereby enhancing policy deliberations. Consider, for example, Asian laws that go beyond American laws in legally recognizing transgender individuals' current sex and Asian court decisions that support legal recognition of a third sex.¹²⁶ This body of law challenges the "common sense" assumption, held by many Americans, that individuals fit naturally into one of two sex categories in a manner that is fixed at birth.¹²⁷ The sensibilities believed to be "common" are, in actuality, not commonly shared throughout Asia.¹²⁸ This realization should prompt greater critical inquiry into whether sex classification policies in the United States — for example, those that regulate sex designations on birth certificates — are animated by common-sense facts of nature or by culturally specific moral biases. Arguably, at least, the latter would contravene the admonishment of moral relativism embodied in cases such as *Lawrence v. Texas*.¹²⁹

¹²⁵ See *supra* Part I.B.

¹²⁶ The high courts of Nepal and Pakistan have called for recognition of a third sex. See *Pant v. Nepal*, 2 NAT'L JUD. ACAD. L.J. 262, 265 (2008) (on Nepal); Aziz, *supra* note 40 (on Pakistan). In my 2008 article on Asia, I discussed how laws in Singapore, Japan, and South Korea provide legal recognition of certain transgender individuals' current sex. See Lau, *East Asian Developments*, *supra* note 2, at 74, 94-99.

¹²⁷ 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 American views on sex designation that have been called "common sense").

¹²⁸ This so-called "common sense" view also contravenes the view of many medical experts. See Lau, *East Asian Developments*, *supra* note 2, at 97 (describing medical opinions on gender identity).

To be clear, the fact that sex reclassification and the third sex have been legally recognized in various Asian jurisdictions does not mean that they are socially accepted within those jurisdictions. As noted earlier, legal developments sometimes are more progressive than social norms. For example, *hijras* have long been socially recognized as a stigmatized third sex in Pakistan. As reporter Mark Magnier noted, "Although nascent legal status is a first step [to improving the situation for Pakistan's hijras], social acceptance is likely to take far longer." See Magnier, *supra* note 40, at 1.

¹²⁹ In some constitutional cases, the Supreme Court has held that laws based on culturally relative moral biases cannot withstand rational basis review. For example, in *Lawrence v. Texas*, the majority stated that enforcing majoritarian culture's moral

Finally, developments in Asia can inform ongoing debates in the United States on the strengths and weaknesses of identity politics. While commentators acknowledge that gay identity politics have fostered important community-building that effectuates social change,¹³⁰ one of the main criticisms of gay identity politics is that such politics undermine diversity and individual self-definition.¹³¹ In the past, the American gay rights movement presented a “thick”¹³² version of gay identity to the public, suggesting that their constituents share a unitary identity that is imbued with specific cultural meanings.¹³³ Critics have argued that this gay identity has been socially constructed as white, middle-class, and urbane, with particular tastes regarding the arts and consumerism.¹³⁴ Therefore, by proclaiming oneself to be gay, one subjects oneself to these social expectations. Such rigid notions of gay identity are stifling because they elide diversity among individuals who experience same-sex desire. They also burden individuals with social expectations that they

opposition to same-sex sodomy did not constitute a legitimate government interest for the purposes of its substantive due process analysis. *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003). In her concurring opinion, Justice O’Connor stated that moral disapproval did not constitute a legitimate government interest for the purposes of her equal protection analysis. *Id.* at 583-84 (O’Connor, J., concurring). Similarly, in *Romer v. Evans*, 517 U.S. 620, 632-33 (1996), the majority stated that culturally driven animus cannot constitute the legitimate government interest needed for laws to survive rational basis.

¹³⁰ See, e.g., Joshua Gamson, *Must Identity Movements Self-Destruct?: A Queer Dilemma*, in *QUEER THEORY: SOCIOLOGY 396* (Steven Seidman, ed., 1997) (noting effectiveness of gay identity politics); see also STEVEN SEIDMAN, *DIFFERENCE TROUBLES: QUEERING SOCIAL THEORY AND SEXUAL POLITICS 114-20* (1997) (describing gay identity politics’ growth).

¹³¹ See SEIDMAN, *supra* note 130, at 120 (noting discontent of gays and lesbians “whose experiences and interests were not represented in the dominant gay and lesbian identity constructions”); Gamson, *supra* note 130, at 399 (explaining criticism that gay identity politics represented only one point of view, eliding differences among gays and lesbians).

To be clear, there are additional criticisms of identity politics on which this Essay does not focus. For example, gay identity politics have been criticized for being assimilationist (i.e., seeking inclusion in mainstream institutions as opposed to challenging those institutions) and isolationist (i.e., failing to forge coalitions with other rights-oriented movements). See, e.g., R.J. Thompson, *Human Rights: The Key to Progressive Cross-movement Building in the United States*, 16 No. 1 HUMAN RIGHTS BRIEF 11, 12 (2008) (criticizing “assimilationist” and “isolationist” tendencies of identity-based gay rights advocacy).

¹³² On the differentiation between “thick” and “thin” conceptions of identity, see *supra* note 109 and accompanying text.

¹³³ See SEIDMAN, *supra* note 130, at 114-20; Gamson, *supra* note 130, at 398-99.

¹³⁴ SEIDMAN, *supra* note 130, at 120-21; Gamson, *supra* note 130, at 399, 404.

must heed if they choose to come out as gay.¹³⁵ To ameliorate these concerns, many of the major LGBT rights organizations now seek to represent diversity among gays and lesbians better,¹³⁶ creating a thinner social construction of gay identity while maintaining political solidarity within the group.

Raising awareness about developments in Asia might help to foster this balance between maintaining a sense of solidarity among gays and lesbians, on one hand, and recognizing that diversity exists among gays and lesbians, on the other. It is helpful to realize that various interpretations of gay identity have emerged around the world including in Asia.¹³⁷ There is a sense of community among self-identified gays around the world.¹³⁸ While this global network shares certain collective interests, it also consists of internal differences. Being gay has taken on different cultural meanings in places like Mumbai, Hong Kong, Seoul, and Taipei.¹³⁹ Raising consciousness of this dynamic might help transform Americans' understandings of gay identity from notions of a thick unitary identity to a thinner identity with internal diversity,¹⁴⁰ thereby ameliorating some of the criticisms

¹³⁵ For additional information on how individuals are burdened by identities that are defined by rigid social scripts, see KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 74-110 (2007) (describing how gays and lesbians face social pressure to mute traits associated with gay and lesbian identities); Holning Lau, *Identity Scripts and Deliberative Democracy*, 94 MINN. L. REV. 897, 902-10 (2010) (describing burdens that individuals face in negotiating identity scripts).

¹³⁶ For example, numerous LGBT rights organizations have implemented diversity programs to address the interests of LGBT persons who belong to communities of color and/or low-income communities. See, e.g., *Equality Forward*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/equalityforward.asp> (last visited Dec. 29, 2010) (Human Rights Campaign's "Equality Forward" program, which seeks to "better understand what's important to LGBT persons of color"); *Racial and Economic Justice*, NAT'L GAY & LESBIAN TASKFORCE, http://www.thetaskforce.org/issues/racial_and_economic_justice (last visited Dec. 19, 2010) (National Gay and Lesbian Taskforce's "Racial & Economic Justice" program). For criticism regarding such diversity initiatives' limitations, see, for example, Jane Ward, *White Normativity: The Cultural Dimensions of Whiteness in a Racially Diverse LGBT Organization*, 51 SOC. PERSP. 563 (2008), which uses the Los Angeles LGBT Center as a case study.

¹³⁷ See Wong, *supra* note 58, at 600-01 (describing variations in social construction of gay identity).

¹³⁸ See *infra* note 140 and accompanying text.

¹³⁹ See Wong, *supra* note 58, at 600-01 (describing contentions that "what 'gay' means in Taiwan, Hong Kong, or Korea may not be the same as what it means in New York").

¹⁴⁰ Sonia Katyal uses the analytical framework of "queer diaspora" to explain how sexual orientation minorities around the world share "a sense of collective interest," yet also represent a "contestation of a unitary GLBT identity." Katyal, *supra* note 42, at 1492 (quoting political theorist Simon Watney and discussing his perspective).

of American identity politics.¹⁴¹ Certainly, it is beyond the scope of this Essay to discuss comprehensively how community-building among those who identify as gay or lesbian ought to be balanced with recognition of differences within the community. This Essay serves as a reminder that awareness of how gay identity politics manifest globally can help to inform ongoing discussions about gay identity politics in the United States.

CONCLUSION: GROUNDING FUTURE DISCUSSIONS

The preceding sections illuminated some of the inadequacies of discourse on sexuality and Asian law. In this section, I conclude by proposing a set of three directives that I believe will help to improve discussions on sexuality and Asian law.

First, exercise heightened awareness of misinformation. Flawed information inherently undermines productive deliberation. Unfortunately, legal information and cultural assumptions on Asia are all too often incorrect.¹⁴² To ensure that sound information forms the basis for discussions on sexuality and Asian law, those of us engaged in deliberation on these matters must vigilantly ground our discussions in fact.

Second, think beyond reductionist East-West binaries. These binaries, which pit East and West against each other in sharp contrast, do not adequately describe East-West dynamics.¹⁴³ Thinking in terms of East-West binaries also risks blinding us to policy proposals and advocacy strategies that merge East and West, exploiting the promise of cultural hybridity.¹⁴⁴

Third, adopt a dialogical approach to engagement. Ideas that originate on one side of the Pacific ought not to be imposed on the other in an imperialist fashion. Nor should ideas be replicated blindly. After all, uncritical replication of ideas risks perpetuating bad ideas. Moreover, ideas that are good in one context may not suit local circumstances elsewhere. In a dialogical approach, parties in the East and in the West engage in dialogue to examine and improve upon each other's ideas.¹⁴⁵ Kim Dae Jung, the former President of South

¹⁴¹ For background on these criticisms, see *supra* notes 131-135 and accompanying text.

¹⁴² See *supra* Part I.

¹⁴³ See *supra* Part I.B.

¹⁴⁴ See *supra* Part II.B.

¹⁴⁵ Cf. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 835-38 (1999) (discussing dialogical approaches to comparative constitutional law); Sunder, *supra* note 80, at 76

Korea, captured this dialogical spirit when he criticized former Prime Minister Lee Kuan Yew of Singapore:

Singapore's Lee Kuan Yew has suggested that the "Western concepts" of democracy and human rights will not work in Asia. This is false: Asia has its own venerable traditions of democracy, the rule of law, and respect for the people. Asia's destiny is to improve Western concepts, not ignore them.¹⁴⁶

President Kim correctly contended that Asia should neither ignore nor passively absorb ideas that originate in the West; Asia can selectively appropriate and improve upon those ideas. Similarly, the United States can use recent legal developments in Asia, for example, recognition of the third sex in South Asia, to advance its own discourse and to explore how ideas from Asian jurisprudence can be improved.

I wrote this Essay for a symposium that asked "how the rise of Asia might bolster or hamper efforts to expand human capabilities . . . [including efforts in the context of] gay rights."¹⁴⁷ The answer, I believe, depends in large part on how we in the United States choose to engage Asia. Global, cross-cultural deliberation on matters of sexual orientation and gender identity rights will be most productive if we ensure that those conversations are grounded in fact, in an appreciation of nuance instead of reductionist East-West binaries, and in fidelity to a principle of dialogical engagement.

(endorsing "a dialogic, or speech approach" to cultural change, in which "interactions renew culture by continuously subjecting it to new interpretations").

¹⁴⁶Dae Jung Kim, *Is Culture Destiny? The Myth of Asia's Anti-Democratic Values*, FOREIGN AFF., Nov./Dec. 1994, at 1.

¹⁴⁷See 2010 Symposium: *The Asian Century?*, UC DAVIS L REV, <http://lawreview.law.ucdavis.edu/symposia/2010/home.php?page=index&group=symposia> (last visited Dec. 19, 2010).