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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

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¹ 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.

² 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 centrisn. 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, 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”), in which the South Korean Supreme Court held that transsexuals have the right to be recognized for their current sex. When I discuss that article with American 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, 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.

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4 Supreme 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.

5 I 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.

6 See id.

7 To 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.

8 It 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. 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. 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. 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.

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.

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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 influential\(^{15}\) 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


\(^{15}\) 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.\textsuperscript{18} Remarkably, the article provided no citation to support that overdrawn claim about Asia.

The example from the \textit{William and Mary Law Review} is particularly jarring because \textit{Lawrence v. Texas} concerned the invalidation of sodomy laws.\textsuperscript{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 \textit{Lawrence} in 2003, numerous Asian jurisdictions had already repealed sodomy laws.\textsuperscript{20} For example, Japan repealed its sodomy law in 1882.\textsuperscript{21} Thailand did so in 1956.\textsuperscript{22} Rights advocates in Hong Kong successfully lobbied for decriminalization of consensual sodomy in 1991.\textsuperscript{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.\textsuperscript{24} It is worth noting that, in some parts of Asia, sodomy laws have never been on the books.\textsuperscript{25} If we consider Asia and

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\textsuperscript{18} See Calabresi \& Zimdahl, supra note 14, at 804-05.

\textsuperscript{19} See Lawrence, 539 U.S. at 558.

\textsuperscript{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.” \textit{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.}


\textsuperscript{24} See Petersen, supra note 23, at 345-51.

\textsuperscript{25} See Jakob Pastoetter, \textit{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, we should also take note of Fiji, which amended its constitution in 1997 to proscribe sexual orientation discrimination explicitly. Contrary to the assertion in the *William and Mary Law Review*, gay rights were not “nonexistent” in Asia in 2003.

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.

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. 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

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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.*


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. 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. 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. 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.

Like the two cases that I discussed in my earlier article, 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. Meanwhile, the United States Congress has yet to enact any federal law to prohibit sexual orientation-based employment discrimination. Additionally, the Taiwan Ministry of Education recently announced that tolerance of gays and lesbians will soon be covered in elementary and secondary school textbooks.

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


\(^{41}\) *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.


\(^{43}\) 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. In addition to experiencing advances, advocates of sexual orientation and gender identity rights in Asia have experienced some setbacks. Indeed, sexual orientation and gender identity are still grounds for persecution in parts of Asia. In terms of substantive areas of law, legal recognition of same-sex partnerships has been particularly lacking. 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.”).


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. 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. Some commentators suggest that this assumption traces back to


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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{52} Other measures, however, challenge the reductionist claim that Chinese societies are more homophobic.\textsuperscript{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.\textsuperscript{54} Consider, also, differences in whether homosexuality is viewed as immoral. Comparable data from Hong Kong and from the

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

\textsuperscript{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).

\textsuperscript{51} See infra note 52 and accompanying text.

\textsuperscript{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).

\textsuperscript{53} See infra notes 54-57 and accompanying text.

\textsuperscript{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. A survey commissioned by the Hong Kong government in 2005 found that 38.9% of respondents thought homosexuality conflicted with community morals. Meanwhile, in the United States, the Pew Foundation found in 2006 that 50.0% of Americans believe that homosexuality is immoral.

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. 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. 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.


58 E.g., CHOU WAH-SHAN, TONGZHI: POLITICS OF SAME-SEXEROTICISM 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://wwwsshe.murdoch.edu.au/intersections/issue4/intersect_mceland.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 OutPolitics 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.
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.”

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. In the age of globalization, different strands of homophobia, like persons and ideas generally, have migrated across the globe. 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. 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); 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).

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

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 (“The 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.”).

See infra notes 74-75 and accompanying text.

See infra note 64 and accompanying text.

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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{67} They argue that protecting such rights would amount to importing Western norms.\textsuperscript{68}

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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.\(^9\) 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 Hirsch, 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 Hirsch, 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. 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. 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. 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. 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

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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.”).


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

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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).


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.” 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 reductivist 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. 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. In 790 University of California, Davis [Vol. 44:773

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. 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. He called for exploring ways to develop indigenous alternatives to the coming-out politics that originated in the West. 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 capacious 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 同性戀." 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 leshiyi.’").

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.”

As important germinal works on tongzhi organizing, Chou’s writings were highly influential. 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.

Chou’s writings rely on defining Chineseness in opposition to the West, reflecting and reifying the East-West binary that this Essay problematizes.

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.

What has resulted is not Western culture simply displacing Asian culture but a taking of strategies from the West and making them distinctly Asian. 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).

See infra notes 93-114 and accompanying text.

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. American media have typically focused on the masks as a pragmatic device for protecting the identity of individuals who wish to remain anonymous. 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.

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. 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. In Taiwan, however, culture is not similarly developed around dichotomous notions of public-private.

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 IDAH0 marches and pride parades are based on differences of degree.


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 reinflects the preoccupations of the closet away from private/public and toward shame/status, and away from enclosure/exposure and toward social enactment.”).
relatively “thin” provisionality for purposes of political organizing. 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. Indeed, some tongzhi who have disclosed their sexual orientation still don masks during rights marches to protest dramatically the politics of shame. 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. 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.

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.

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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 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.


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.

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. 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. 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. 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. Unfortunately, however, immigrant communities sometimes have fossilized notions of Asian norms, associating Asia with the cultures that existed there when their families immigrated. 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

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115 See sources cited supra note 93.
116 See supra Part I (examining stereotyped assumptions regarding Asian law and cultures).
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.\footnote{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.\footnote{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 \textit{Naz Foundation} to assert that Indians should be tolerant of homosexuality.\footnote{122} In this example, \textit{Naz Foundation} resonated in a way that \textit{Lawrence v. Texas}, by itself, could not because \textit{Naz Foundation} was decided in India.

Sound information on sexual orientation and gender identity rights in Asia also improves deliberation among Americans more generally.\footnote{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.\footnote{124} Americans cannot appreciate the growing cross-cultural support for sexual orientation and gender identity rights, however, if they are

\footnote{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).

\footnote{121}{See Lee, supra note 118, at 191-201.}

\footnote{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, \textit{SALGA Marches in 'Moment of Achievement,' 'India Abroad N.Y. Edit.}, Aug. 27, 2010, at A32.}

\footnote{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, \textit{East Asian Developments}, supra note 2, at 69 n.9.}

\footnote{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. 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. 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. The sensibilities believed to be “common” are, in actuality, not commonly shared throughout Asia. 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.

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125 See supra Part I.B.
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, one of the main criticisms of gay identity politics is that such politics undermine diversity and individual self-definition. In the past, the American gay rights movement presented a “thick” version of gay identity to the public, suggesting that their constituents share a unitary identity that is imbued with specific cultural meanings. 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. 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 oppose 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.


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 Hum. RTS. 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. To ameliorate these concerns, many of the major LGBT rights organizations now seek to represent diversity among gays and lesbians better, 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. There is a sense of community among self-identified gays around the world. 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. 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, 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).


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. 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. 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. 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.

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.

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.\(^\text{146}\)

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.”\(^\text{147}\) 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.
