

Towards the Full Promise of Liberty: A Comparative Approach to the Decriminalization of Male Homosexual Sex in Singapore

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INTRODUCTION

In Singapore, few issues are as contentious as the criminalization of male homosexual sex. This issue sits at the intersection of sociology, law, and philosophy, mobilizing polarized views as to the normative influence of Western ideals on post-colonial Singapore, the nature and meaning of equal protection, the limits of governmental power, the role of the judiciary vis-à-vis the legislature, and the legitimacy of morals legislation.

Part I of this Article first contextualizes the continued criminalization of male homosexual sex through Section 377A of the Singapore Penal Code (“Section 377A”).¹ It traces the genealogy of Section

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¹ SING. PENAL CODE, Cap. 224, § 377A (2008).

377A from its genesis as the Labouchere Amendment in colonial Britain through to the Singapore Parliament's conscious decision to retain but not enforce the provision in 2007. This historical inquiry sheds light on the evolving justifications for Section 377A. At present, Section 377A is understood and weaponized as a tool for Singapore to assert its moral and cultural independence from the West. Part I critically evaluates the Singapore Government's promise of non-proactive enforcement as an attempt to quell the tensions between those with competing visions of society. It submits that this political compromise is untenable. Insofar as it is motivated by a desire to be reactive rather than proactive on a sensitive moral issue, the Government's stance both sits uncomfortably with past action on other controversial issues and elides the impact of criminalization on public opinion. From a legal perspective, the Government's position sets a dangerous precedent of blurring institutional lines given that prosecutorial discretion is vested in the independent Attorney-General. The concomitant lack of clarity as to when a prosecution is justified in turn violates the rule of law's demands that laws be a stable basis for individual planning and engenders a scattergun and ill-disciplined approach to prosecution.

Having concluded that decriminalization is both justified and wanting, this Article engages in a comparative analysis of the efforts to decriminalize homosexual sex in the United States ("U.S.") and Singapore. The U.S. is selected from a host of countries that have decriminalized homosexual conduct for several reasons. For one, the U.S. and Singapore share a British colonial ancestry and their sodomy laws can be traced to its former colonial master.² Unlike Singapore however, the U.S. ceased to be a British colony in 1776, an extremely early time that explains the discomfort that attends grouping the U.S. with former British colonies in Asia. As the U.S. is consequently both within and without, a juxtaposition of the U.S. with Singapore highlights the extent to which post-colonial, neo-colonial, and libertarian narratives impact the effort to decriminalize homosexual conduct in Singapore. Additionally, the federal system in the U.S. has generated a rich body of jurisprudence that lends itself to critical and diverse analyses. The federal system has also facilitated both legislative and judicial approaches to the decriminalization of homosexual sex, providing an empirical slant to the question of the preferable approach.

In both countries, responses to legislative decisions to uphold laws criminalizing homosexual conduct have largely taken two forms – grassroots efforts to project a positive image of homosexuality in the hope of swaying public opinion and resorting to constitutional litigation as a bulwark against majoritarian preferences. Parts II and III adopt the structure of and develop this two-pronged approach. Part II examines the U.S.

² See Matthew M. Morrison, *Currents in the Stream: The Evolving Legal Status of Gay and Lesbian Persons in Kentucky*, 89 KY. L.J. 1159 at 1162.

sociological movement undergirding the decision in *Lawrence v. Texas*.³ Particular attention is given to grassroots activism in the wake of Stonewall, political efforts to repeal state legislation, and litigation under state constitutions. Bearing in mind salient cultural, institutional, and socio-political differences between the two countries, this Article distills the guidance that the U.S. experience provides to Singapore. Part III analyzes the recent Singaporean High Court and Court of Appeal decisions in *Lim Meng Suang v. Attorney-General* that Section 377A is compliant with both the right to life and personal liberty under Article 9 as well as the equal protection clause under Article 12 of the Singapore Constitution.⁴ Much ink has been spilled dissecting the doctrinal coherence of the High Court and Court of Appeal judgments. The literature is voluminous, spanning issues such as the nature of the presumption of constitutionality,⁵ the latitude to be accorded to the terms “life” and “personal liberty” under Article 9 of the Singapore Constitution,⁶ the appropriateness of a rationality standard in the context of equal protection,⁷ and the complexities associated with determining legislative purpose.⁸ Part III focuses on less traversed ground; Drawing on U.S. jurisprudence, it considers the propriety of assessing the legitimacy of a statutory object as an aspect of equal protection, concluding that there are no constitutional impediments to a court doing so. Subsequently, it analyzes the legitimacy of morality as a justification for legislation under a rationality standard of review, ultimately contending that naked morality is insufficient in itself to insulate a statute from constitutional challenge. On the assumption that revised conceptions of “personal liberty” and equal protection are both sufficient to invalidate Section 377A, this Article concludes with a brief consideration of the preferable approach of the two and whether judicial invalidation is preferable to legislative repeal, referring to the U.S. experience where relevant.

³ *Lawrence v. Texas*, 539 U.S. 558, 583 (2003).

⁴ *Lim Meng Suang v. Attorney-General*, [2013] 3 SLR 118; *Lim Meng Suang v. Attorney-General*, [2014] SGCA 5.

⁵ Jack Tsen-Ta Lee, *Equality and Singapore's First Constitutional Challenges to the Criminalization of Male Homosexual Conduct*, 16 ASIA-PAC. J. ON HUM. RTS. & L. 150 (2015).

⁶ See Jack Tsen-Ta Lee, *The Limits of Liberty: The Crime of Male Same-sex Conduct and the Rights to Life and Personal Liberty in Singapore*, 46(1) H.K. L.J. 49 (2016).

⁷ *Id.*; see also Jack Tsen-Ta Lee, *According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution*, 8 VIENNA J. ON INT'L CONST. L. 276 (2014).

⁸ Benjamin Joshua Ong, *New Approaches to the Constitutional Guarantee of Equality before the Law*, 28 SING. ACAD. L.J. 320 (2016).

I. SECTION 377A IN CONTEXT

A. *Genesis and Import*

Section 377A provides that “any male person who, in public or private, commits ... any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.”⁹ Judicial pronouncements have in turn clarified the wide ambit of this provision, holding that acts of “gross indecency” extend to masturbation,¹⁰ fellatio,¹¹ and anal intercourse.¹²

In criminalizing male homosexual conduct – even when consensual and private – Section 377A sits uncomfortably with the progressiveness of liberal Western jurisprudence. It is therefore somewhat ironic that the provision is a colonial vestige of the British Empire.¹³ An informed understanding of the historical roots of Section 377A is central to a nuanced appreciation of both its present-day justification and the complexities associated with decriminalization.

Hunter and Dorsett stress that the influence of Britain’s laws on its ex-colonies cannot be cast at too high a level of generality insofar as the construct of the “Crown” was “continuously adapted to the governance of settlers.”¹⁴

This Article consequently aspires to a more neutral and empirical account. From this perspective, three events were particularly monumental in shaping contemporary Singaporean law criminalizing homosexual behavior. First, the enactment of the Indian Penal Code (IPC) in 1862, the first comprehensive criminal code in the British Empire.¹⁵ The project was led by Thomas Macaulay, legal representative to the Governor General of India’s new Legislative Council in the 1830s,¹⁶ and had a multiplicity of

⁹ SING. PENAL CODE, Cap. 224, § 377A (2008).

¹⁰ Public Prosecutor v. Rahim bin Basron, [2010] 3 SLR 278.

¹¹ Public Prosecutor v. Lim Beng Cheok, [2003] SGHC 54.

¹² Public Prosecutor v. Tan Ah Kit, [2000] SGHC 254.

¹³ Douglas Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia*, 4 ASIAN J. COMP. L. 1 (2009). Indeed, in a cross-national study of countries, political scientists Victor Asal, Udi Sommer and Paul Harwood found that countries that inherited their legal systems from British common law were far more likely to have laws against homosexual behavior. See Victor Asal, Udi Sommer & Paul Harwood, *Original Sin: A Cross-National Study of the Legality of Homosexual Acts*, 4 COM. POL. STUD. 7 (2012).

¹⁴ LAW AND POLITICS IN BRITISH COLONIAL THOUGHT: TRANSPOSITIONS OF EMPIRE 1-8 (Shaunnaugh Dorsett & Ian Hunter eds., Palgrave Macmillan 2010).

¹⁵ Criminal law codification had not been realized in England despite its central place in nineteenth-century law reform. It still has not been completed today.

¹⁶ Barry Wright, *Macaulay’s Indian Penal Code: Historical Context and Originating Principles* in CODIFICATION, MACAULAY AND THE INDIAN PENAL CODE: THE LEGACIES AND MODERN CHALLENGES OF CRIMINAL LAW REFORM 22 (Wing-Cheong

goals, chief amongst which was to better regulate relations between the colonial masters and the colonized. The IPC was intended to replace a “patchwork of Muslim and Hindu laws overlaid with a mixture of transplanted English laws and East Indian Company regulations to ensure a singular standard of justice.”¹⁷ To this end, Macaulay was inspired by Benthamite ideals of precision and comprehensibility. He envisaged that the code should be “contain the entirety of the criminal law...[and] suppress crime with the least infliction of suffering,”¹⁸ values that continue to endure today. In addition, Macaulay sought a universal code that would inspire the entire British Empire given the inertia plaguing the English codification project.¹⁹

Despite its aspirational nature, the IPC was a “product of a particular time, culture and policy context.”²⁰ It was colored and constrained by extant cultural norms, which meant that it largely absorbed rather than modified prevailing English law. To the extent that sodomy remained a crime in England,²¹ it was unsurprising that the IPC criminalized such conduct in Section 377. Indeed, the wording and definition of the Section 377 offense – “whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal...”²² closely align with the English definition of buggery.²³ At this point, an astute reader might query – “what does the Indian Penal Code have to do with Singapore?” Crucially, the Straits Settlement Penal Code 1871 practically re-enacted the IPC and consequently introduced Section 377 in Singapore.²⁴

A second landmark event was the enactment of Section 11 of the Criminal Law Amendment Act 1885 in England. This was more famously known as the Labouchere Amendment after Henry Labouchere, the liberal Member of Parliament for Northampton who introduced the clause.²⁵ The

Chan, Barry Wright & Stanley Yeo eds., Routledge 2016).

¹⁷ *Id.* at 22.

¹⁸ *Id.* at 23.

¹⁹ *Id.*

²⁰ DORSETT AND HUNTER, *supra* note 14.

²¹ The Buggery Act of 1533 criminalized unnatural sexual acts against the will of God and man.

²² INDIAN PENAL CODE, § 377 (1860).

²³ *R v. Jacobs* (1817) Russ & Ry 331 defined such acts to include only anal penetration and bestiality. The Buggery Act 1533 was later repealed by section 1 of the Offences Against the Person Act 1828 but replaced by section 15 of the 1828 Act which provided that buggery would continue to be a capital offense. Indeed, the new Act lowered the threshold for conviction by providing that proof of completion (“emission of seed”) was no longer necessary – evidence of penetration sufficed.

²⁴ ORDINANCE NO. 4 of 1871 (Straits Settlements).

²⁵ *See* ROBERT ALDRICH & GARRY WOTHERSPOON, WHO’S WHO IN GAY &

Labouchere Amendment provided that “any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor”²⁶ and was significant for two reasons. One, it was the first time the legislature had explicitly targeted homosexual conduct in contradistinction to the sex-neutral crime of sodomy. Two, insofar as *R v. Jacobs* had defined sodomy narrowly to include only anal penetration and bestiality, the Amendment lowered the threshold for homosexual criminality by rendering all homosexual behavior short of anal intercourse a misdemeanor,²⁷ becoming the charter under which many men such as Oscar Wilde and Alan Turing were convicted.²⁸

The underlying justifications for the Labouchere Amendment are varied and competing. Jones suggests that the Amendment must be situated within the late nineteenth-century social purity movement which simultaneously entrenched and protested classic Victorian sexual morality.²⁹ On the one hand, the movement aimed to promote sex education, sexual health, and sexual welfare, ostensibly reflected in the increased age of consent for all girls to sixteen and increased powers for the police to prosecute streetwalkers in the 1885 Act.³⁰ On the other hand, the movement sought to subvert Victorian double standards of morality, which held women to a higher standard of sexual morality than men.³¹ In this regard, sex between men was viewed as the “sort of male sexual license and sexual excess that was at the heart of the double standard of morality.”³² A more cynical account proffered by Smith suggests that Labouchere introduced the clause with the intent of humiliating the Government and obstructing the passage of the legislation.³³ The best view anchors the Amendment within

LESBIAN HISTORY 298 (2d ed. 2002).

²⁶ Criminal Law Amendment Act, §11 (1885).

²⁷ *Id.*

²⁸ See generally RICHARD ELLMANN, OSCAR WILDE (1st ed. 1988).

²⁹ TIMOTHY W. JONES, *Moral Welfare and Social Well-Being: The Church of England and the Emergence of Modern Homosexuality* in MEN, MASCULINITIES AND RELIGIOUS CHANGE IN TWENTIETH-CENTURY BRITAIN (Lucy Delap & Sue Morgan eds., Palgrave MacMillan 2013).

³⁰ SEAN BRADY, MASCULINITY AND MALE HOMOSEXUALITY IN BRITAIN, 1861-1913 (2016) at 111.

³¹ JONES, *supra* note 29, at 200. Jones notes that the Contagious Diseases Acts of the 1860s aimed to curb the spread of venereal disease in the armed forces by authorizing the arrest and forced venereal inspection of women suspected of engaging in prostitution in designated naval and garrison towns while tolerating male sexual excess.

³² JONES, *supra* note 29, at 201.

³³ F. B. Smith, *Labouchere's Amendment to the Criminal Law Amendment Bill*, 17

prevailing notions of masculinity and class. In this spirit, Brady suggests that men who had sex with men “destabilized prevailing notions of what was considered necessary for an adult male to acquire masculine status, irrespective of class.”³⁴ Indeed, he goes so far so to suggest that the threat to the “fragile dominance of masculinity” underlies the State’s efforts to secure a not guilty verdict in the “Stella and Fanny” sodomy trial in 1871, since a guilty verdict would have posthumously stained the life of Lord Arthur Clinton.³⁵ Regardless of the underlying explanation, the Labouchere Amendment was monumental in specifically criminalizing male homosexual conduct.

The Labouchere Amendment was also the blueprint for the third critical event, the introduction of Section 377A into Singaporean law via the Penal Code Amendment Ordinance of 1938. It was acknowledged as much by Attorney-General Charles Howell who proclaimed that the provision was necessary to align the local law with English criminal law to enable stronger action to be taken against acts of “gross indecency” between men.³⁶ An alternative, though complementary, rationalization of the introduction of Section 377A into the Straits Colonies has been offered by Radics. Drawing upon theories of orientalism which suggest that British Orientalists saw Malayan men as feminine, Radics argues that Section 377A was intended to simultaneously “moderni[z]e the colonial, while staving off temptation for the coloni[z]er”, and “remind the European of self-control and vigilance against vice.”³⁷

As of 1938 therefore, the Singapore Penal Code contained both Section 377 and Section 377A. While both were indirect derivatives of English criminal law, only Section 377A explicitly targeted homosexual male conduct. Section 377 was couched in gender-neutral terms and criminalized non-procreative sex.

B. *Retention and Compromise*

Singapore’s independence in 1965 severed the colonial umbilical cord and insulated the new nation from shifts in political and legal attitudes towards homosexuality that had taken root in Britain beginning in the 1950s. As such, the effects of the Wolfenden Report which concluded that “homosexuality cannot legitimately be regarded as a disease” and it was not

HISTORICAL STUD. 165 (1976).

³⁴ BRADY, *supra* note 30, at 103.

³⁵ *Id* at 103. See also NEIL MCKENNA, *FANNY AND STELLA: THE YOUNG MEN WHO SHOCKED VICTORIAN ENGLAND* (2013).

³⁶ JACLYN L. NEO, *CONSTITUTIONAL INTERPRETATION IN SINGAPORE: THEORY AND PRACTICE* 154 (1st ed. 2017).

³⁷ Radics, *Decolonizing Singapore’s Sex Laws: Tracing Section 377A of Singapore’s Penal Code*, 45 COLUM. HUM. RTS. L. REV. 57, 76 (2013).

the “function of the law to intervene in the private life of citizens,”³⁸ as well as the Sexual Offences Act 1967 which decriminalized private homosexual acts between two consenting men above the age of 21,³⁹ were decidedly limited. Instead, Singapore, like many of the former British colonies such as Hong Kong and India, was presented with the opportunity to evaluate, refine, and adapt the corpus of law it had inherited.

This process was a piecemeal one that depended on the needs and political mood of the country. In 1973, punishment for certain offenses, particularly drug use, were enhanced. For instance, the Misuse of Drugs Act 1973 provided for long terms of imprisonment, caning and capital punishment⁴⁰ as well as introduced a legal presumption of trafficking where an individual possessed a threshold amount of a controlled drug.⁴¹ Abdullah suggests that the establishment focused on activities such as drug use that was antithetical to productivity,⁴² an understandable concern in light of high unemployment and poverty rates at the time.⁴³ The 1984 and 1998 reviews were conducted in a similar spirit of enhancing discipline amongst the multicultural immigrant population, introducing mandatory minimum sentences for offenses such as robbery and rape, and enhancing punishments for others such as bodily offenses against foreign workers.⁴⁴ With greater economic prosperity and political stability however, ideas about the proper province of the State came to the fore of public consciousness and an extensive review of the Penal Code was undertaken by the Ministry of Home Affairs (MHA) in 2006 with the explicit aim of bringing it “up to date.”⁴⁵

During this review, the MHA recommended the repeal of Section 377,⁴⁶ drawing specific attention to the width of Section 377 – Section 377

³⁸ THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (New York: Stein & Day, 1963) at paragraph 14.

³⁹ Sexual Offences Act 1967. The age of consent was later reduced to 18 by the Criminal Justice and Public Order Act 1994.

⁴⁰ Misuse of Drugs Act 1973, § 33.

⁴¹ Misuse of Drugs Act 1973, § 17.

⁴² See generally TIM LINDSEY & PIP NICHOLSON, DRUGS LAW AND LEGAL PRACTICE IN SOUTHEAST ASIA: INDONESIA, SINGAPORE AND VIETNAM (1st ed. 2016).

⁴³ See generally Kalim Siddiqui, *The Political Economy of Development in Singapore*, 2 RESEARCH IN APPLIED ECON. 2, 6 (2010).

⁴⁴ IBP, INC., *Singapore Criminal Laws, REGULATIONS AND PROCEDURES HANDBOOK: STRATEGIC INFORMATION, REGULATIONS, PROCEDURES* (World Business & Investment Library) (1st ed., Int’l Business Publications USA, 2015).

⁴⁵ SINGAPORE MINISTRY OF HOME AFFAIRS, CONSULTATION PAPER ON THE PROPOSED PENAL CODE AMENDMENTS (Nov. 8, 2006).

⁴⁶ *Id.*

had been judicially interpreted as an “all-embracing provision”⁴⁷ that included “fellatio between a man and a woman,”⁴⁸ regardless of whether consent was obtained or if the act was performed in a public or private place.⁴⁹ In doing so, the MHA granted official voice to the argument that the provision conflicted with societal values, one that intensified in the wake of Annis bin Abdullah’s conviction for engaging in consensual oral sex.⁵⁰ This in turn moved the legislature to redraft Section 377 to target necrophilia.⁵¹

Though Section 377A similarly encompassed consensual, private sexual behavior, the fact that it regulated homosexual conduct meant that it fell outside the scope of the MHA’s initial review. Section 377 nevertheless had the unintended effect of igniting a public debate about the appropriateness of retaining Section 377A. Radics notes that in October 2007, “2,519 Singaporeans signed a petition in support of the Parliamentary Petition to urge the repeal of Penal Code Section 377A.”⁵² Among these were a “Singaporean living in Hong Kong” who “had his signed petition couriered to Singapore overnight,” and a “Eurasian woman, currently living in Johor Bahru” who “made her way through customs and immigration, just so she could make her submission”⁵³ calling upon Singaporeans to embrace diversity. The counter-mobilization effort was both louder – over 15, 560 Singaporeans signed a counter-petition⁵⁴ – and more vitriolic. Appointed Member of Parliament and National University of Singapore Law Professor Thio Li-Ann seared herself into local and international⁵⁵ consciousness with her pointed Parliamentary speech that explicitly characterized the repeal of Section 377A as a “radical, political agenda which will subvert social morality, the common good and undermine our liberties.”⁵⁶ She asserted

⁴⁷ Public Prosecutor v. Kwan Kwong Weng, [1997] 1 SLR 697, 700.

⁴⁸ Tan Eng Hong v. Attorney-General, [2012] 4 SLR 476.

⁴⁹ Annis bin Abdullah v. Public Prosecutor, [2003] SGDC 290.

⁵⁰ *Id.* See Tanya Fong & Glenys Sim, *Oral Sex Ruling Vexes Many*, STRAITS TIMES (Sing.), Nov. 8, 2003 at

⁵¹ PENAL CODE (Amendment) Act 2007 (No. 51 of 2007).

⁵² Radics, *Decolonizing Singapore’s Sex Laws: Tracing Section 377A of Singapore’s Penal Code*, 45 COLUM. HUM. RTS. L. REV. 57, 80 (2013).

⁵³ Sylvia Tan, *Singapore’s Repeal 377A Petition Tops 2,500 Signatures* (Oct. 18, 2007), <http://www.fridae.asia/gay-news/2007/10/18/1969.singapores-repeal-s377a-petition-tops-2500-signatures?n=sea&nm=377A+petition> (last visited Nov. 05, 2017).

⁵⁴ Radics, *supra* note 52.

⁵⁵ Richard L. Revesz, *Statement from Dean Richard L. Revesz of the New York University School of Law*, NEW YORK TIMES (Jul. 22, 2009), <http://www.nytimes.com/2009/07/23/nyregion/23nyu-text.html> (last visited Nov. 05, 2017).

⁵⁶ Thio Li-Ann, *Singapore Parliamentary Debates*, PENAL CODE REVISIONS, Oct. 22-23, 2007.

that “there are no ex-Blacks but there are ex-gays”, “homosexuality is a gender identity disorder” and most infamously that “anal-penetrative sex is inherently damaging to the body and a misuse of organs, like shoving a straw up your nose to drink.”⁵⁷

Professor Thio’s speech is nonetheless valuable in its vivid presentation of the “Re-Orientali[z]ation”⁵⁸ of Section 377A. The assimilation of Section 377A into Singaporean law precipitated a reflective process Dworkin termed “constructive interpretation” – where the local populace gradually adopted its own understanding of the purpose of the prohibition of homosexual conduct, constrained by the form the prohibition is taken to belong.⁵⁹ In this regard, Radics notes that whereas the British “implemented Section 377A to protect himself from the over-sexualized Asian,” the Singaporean chooses to preserve it to make himself immune to the “sexual libertine ethos of the wild wild West.”⁶⁰ To best understand this, one must appreciate that in “its postcolonial governance, Singapore adopted a hybridi[z]ed strategy that paradoxically embraced Western capitalistic economic growth while simultaneously rejecting some major liberal values such as governmental non-interference and privacy associated with capitalism.”⁶¹

Ultimately, the Singapore Parliament invoked this same ideal of conservative morality to justify its decision to retain Section 377A. Prime Minister Lee Hsien Loong referred to the need to “uphold a stable society with traditional, heterosexual family values,” further adding that it was better “to let the situation evolve gradually.”⁶² In a recent 2017 interview with the BBC, Prime Minister Lee reiterated that “it was not the Government’s role to lead society when it comes to changing social attitudes.”⁶³ Though this flies in the face of historic paternalism where the Singapore Government has led the charge on issues such as drug use⁶⁴ and

⁵⁷ *Id.*

⁵⁸ Radics, *supra* note 52.

⁵⁹ RONALD DWORIN, *LAW’S EMPIRE* (1st ed. 1986).

⁶⁰ Radics, *supra* note 52, at 77.

⁶¹ Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 B.U. INT’L L.J. 309 (2014).

⁶² Prime Minister Lee Hsien Loong, 83 REPORTS OF SINGAPORE PARLIAMENTARY DEBATES, 10-23-2007.

⁶³ Charissa Yong, *PM Lee on BBC’s Hardtalk: Most would back retaining Section 377A if a referendum was held*, STRAITS TIMES (Sing.) (Mar. 1, 2017), <http://www.straitstimes.com/singapore/pm-lee-on-bbcs-hardtalk-most-would-back-retaining-section-377a-if-a-referendum-was-held> (last visited Nov. 5, 2017).

⁶⁴ Home Affairs and Law Minister K Shanmugam recently claimed that calls “for a softer stance against drugs” are “reckless” and “will worsen the problem.” *See Death penalty is part of Singapore’s multi-pronged approach in fight against drugs*, CHINA NEWS ASIA (Oct. 26, 2017) <http://www.channelnewsasia.com/news/singapore/death-penalty-is->

capital punishment,⁶⁵ the Government has promised not to “proactively enforce Section 377A”⁶⁶ in its attempt to quell the tensions between those with competing visions of society. Audrey Yue terms this middle-ground “illiberal pragmatism,”⁶⁷ a practice Chang situates within the broader “ideological compromise by the postcolonial Singaporean Government that desired the benefits of Western models for economic growth, but was simultaneously suspicious of Western influence and globalization potentially diluting indigenous values and national identity.”⁶⁸ Thus understood, the compromise was symbolic not just for prevailing societal morality but as a bulwark against international pressures.

C. *An Untenable Position*

The Singapore Government’s decision to retain but not enforce Section 377A has been defended on several grounds. One suggests that the Government has chosen “the path of least resistance by...not expending additional political capital pushing for a minority interest.”⁶⁹ Another stresses the difficulty of maintaining harmony amongst a heterogeneous population, understanding the decision as a delicate compromise. Both conceptions fail to shield the Singapore Government’s stance from the criticism that it is replete with contradictions and problems.

The inconsistency which plagues the Government’s desire to be reactive rather than proactive in shaping public morality within this sphere has already been noted. To this it can be added that the Government’s stance is not a substantively neutral one insofar as the very act of criminalization distorts the symmetry of public opinion and discourse. Prime Minister Lee implicitly noted as much when he labeled Section 377A as a symbol “that homosexuals are not to actively... ‘set the tone’ for mainstream society.”⁷⁰

part-of-singapore-s-multi-progred-approach-in-9346188 (last visited Nov. 5, 2017).

⁶⁵ Prime Minister Lee Kuan Yew consistently stressed that the death penalty was a necessary deterrent to drug traffickers. See LEE KUAN YEW, *FROM THIRD WORLD TO FIRST: THE SINGAPORE STORY: 1965–2000* (1st ed. 2000). This was echoed by current Prime Minister Lee Hsien Loong. See Associated French Press, *He Will Hang: Singapore PM*, THE SYDNEY MORNING HERALD (Nov. 30, 2005), <http://www.smh.com.au/news/world/he-will-hang-singapore-pm/2005/11/30/1133311088705.html> (last visited Nov. 5, 2017).

⁶⁶ Prime Minister Lee Hsien Loong, 83 REPORTS OF SINGAPORE PARLIAMENTARY DEBATES, 10-23-2007.

⁶⁷ Audrey Yue, *Queer Singapore: A Critical Introduction, Introduction to Queer Singapore* in QUEER SINGAPORE: ILLIBERAL CITIZENSHIP AND MEDIATED CULTURES (Audrey Yue & Jun Zubillaga-Pow eds., 2012).

⁶⁸ Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 B.U. INT’L L.J. 309 (2014).

⁶⁹ *Id.* at 342-43.

⁷⁰ Michael Hor, *Enforcement of 377A: Entering the Twilight Zone*, in Queer Singapore: Illiberal Citizenship and Mediated Cultures (Audrey Yue & Jun Zubillaga-Pow

Although the exact relationship between law and public opinion is contested and greater attention has been focused on the extent to which law should incorporate public opinion,⁷¹ the relationship is best understood as a symbiotic, mutually-enforcing one. That public opinion forms in the shadow of the law was recognized by Hart who demonstrated that law, stripped of its moral content, carries normative force.⁷² In this respect, the very presence of Section 377A legitimizes prejudice, discrimination, and private homophobic violence because gay men are viewed as de facto members of a criminal class, a phenomenon Chang labels “circular interconnectedness.”⁷³ Indeed, in his ethnographic study of unenforced sodomy laws in South Africa, Goodman details the extent to which such laws heighten the “visibility of lesbians and gays as socially and legally constructed miscreants,”⁷⁴ and produces a regime that “disempower[s] lesbians and gays in a range of contexts [such as employment] far removed from their sexuality.”⁷⁵ The idea that the criminal law conflated gay identity with criminality and contributed to the political subversion of the LGBT community was also relied upon by the Delhi High Court in its landmark judgment of *Naz Foundation v. Government of NCT of Delhi* declaring that the criminalization of consensual homosexual sex between adults was inconsistent with the Indian Constitution.⁷⁶ The Delhi High Court noted that “even when the penal provisions are not enforced, they reduce gay men or women to... ‘unapprehended felons,’”⁷⁷ demonstrating a sensitivity to the lived experiences of the homosexual population. Thus understood, the Singapore Government’s proposed compromise is inconsistent with the Government’s own premises. It is no answer that the law is not enforced.

The legal dimension of this compromise is no less problematic. Former Attorney-General Walter Woon has suggested that it is premised on an unconstitutional state of affairs insofar as prosecutorial discretion is exclusively vested in the independent Attorney-General, not the executive.⁷⁸ He contends that the Government’s promise of non-

eds., 2012).

⁷¹ See generally ALBERT VENN DICEY, LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY (1905).

⁷² See generally H.L.A. HART, THE CONCEPT OF LAW (2d ed., OUP 1997).

⁷³ Stewart Chang, *Gay Liberation in the Illiberal State*, 24 WASH. INT’L L.J. 1, 27.

⁷⁴ Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics*, 89 CAL. L. REV. 643, 688 (2001).

⁷⁵ *Id.* at 650.

⁷⁶ *Naz Foundation v. Government of NCT of Delhi*, [2009] 160 DLT 277.

⁷⁷ *Id.*

⁷⁸ Section 35(8) of the Constitution of the Republic of Singapore provides – “The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or

enforcement sets “a very dangerous precedent” of blurring institutional lines.⁷⁹

Indeed, precisely due to this separation of powers, the Singapore Government’s undertaking of non-enforcement sounds solely in the political arena – there is no legal impediment to the Attorney-General taking a contrary approach. Just a few months after Prime Minister Lee made his Parliamentary promise, then Attorney-General Walter Woon was reported as saying, “as far as I am concerned, it is still against the law and we will prosecute if there’s a need,”⁸⁰ taking a qualitatively different stance that conceives Section 377A as an additional arrow in the prosecution’s quiver. This stance was reiterated by Yvonne Lee in her defense of the status quo – she argues that since a “non-proactive enforcement policy...does not mean [that Section] 377A will not be enforced,” it does not follow that the provision “lacks value or function.”⁸¹ Woon’s words and Lee’s argument proved prescient in the 2010 case of *Tan Eng Hong v. Attorney-General*⁸² where Tan was “charged in court for an offense under [Section]377A” for “engaging in oral sex with another male person in a public toilet.”⁸³ Though the prosecution later amended the charge to one of committing “an obscene act in a public place”⁸⁴ in light of Tan’s challenge to the constitutionality of Section 377A,⁸⁵ the case illustrates the non-legally binding nature of the executive’s promise, albeit that arguments based on equitable estoppel have yet to be ventilated in court. Assessed holistically, the current position clearly violates the rule of law’s demands that laws should be a stable and safe basis for individual planning.⁸⁶ To give an example, the potential that

discontinue any proceedings for any offense.

⁷⁹ Walter Sim, *Walter Woon, Tommy Koh differ on 377A anti-gay sex law at NUS forum*, STRAITS TIMES (Sep. 18, 2014), <http://www.straitstimes.com/singapore/walter-woon-tommy-koh-differ-on-377a-anti-gay-sex-law-at-nus-forum> (last visited Nov. 06, 2017).

⁸⁰ Michael Hor, *Enforcement of 377A: Entering the Twilight Zone*, in QUEER SINGAPORE: ILLIBERAL CITIZENSHIP AND MEDIATED CULTURES (Audrey Yue & Jun Zubillaga-Pow eds., 2012).

⁸¹ Yvonne Lee, *Don’t Ever Take a Fence Down Until You Know the Reason It Was Put Up*, SING. J. OF LEGAL STUD. 347, 381 (2008).

⁸² *Tan Eng Hong v. Attorney-General*, [2012] 4 SLR 476.

⁸³ *Tan Eng Hong v. Attorney-General*, Originating Summons No. 994 of 2010.

⁸⁴ SINGAPORE PENAL CODE, s294(a). *Tan Eng Hong v. Attorney-General*, [2012] 4 SLR 476 at 7.

⁸⁵ Tan contended that Section 377A was inconsistent with Articles 9, 12 and 14 of the Singapore Constitution which provide for liberty, equal protection, and freedom of association, respectively. *Tan Eng Hong v. Attorney-General*, [2012] 4 SLR 476 at 6 (2012).

⁸⁶ Joseph Raz, *The Rule of Law and its Virtue*, 93 L. Q. REV. 195 (1977).

investigations may reveal prior instances of male homosexual acts may deter victims of sexual or domestic assault from bringing forth a complaint. This is augmented by a consideration that the operative phrase of “proactively enforce” is “too vague for anyone who is trying to decide how to behave without incurring penal consequences.”⁸⁷ It begs the question – “What form may that enforcement take?”⁸⁸

Tan Eng Hong v. Attorney-General is illustrative of other problems. Its eventual resolution as a case involving public obscenity suggests that the Section 377A charge was wholly unnecessary to a satisfactory disposition of the case. The same practice of including a Section 377A charge where alternative bases for prosecution may be distilled with relative clarity is evidenced in another case. Radics found that in one of the first cases brought under Section 377A, “Lee Hock Chee was sentenced to fifteen months rigorous imprisonment for...molesting a Chinese boy who was sleeping in a five-foot passageway off Rochore Road.”⁸⁹ What is noteworthy, and in fact relied upon by Criminal District Court Judge Oldham in justifying the harsh punishment, is that the offense “was committed in public and one of the parties concerned was an unwilling minor.”⁹⁰ This compendious statement raises issues of public obscenity, consent, and underage sexual activity which in turn suggest that Section 377A was superfluous. More significantly, these problematic elements are insufficiently encapsulated by the Section 377A charge. Not only does this violate the ideal that a stigmatic criminal law conviction should reflect the distinct harm that was perpetrated by the accused, it encourages a scattergun and ill-disciplined approach to prosecution. It further engenders inequality in several respects. Chang powerfully juxtaposes the subsummation of public, coercive, and underage sodomy between men within the umbrella offense of Section 377A and the cautious disaggregation of these elements where illicit sexual conduct between people of the opposite sex is at issue,⁹¹ noting that the practice pathologizes homosexuality. Additionally, Hor powerfully contends that male homosexuals are “discriminated unfairly and unjustifiably when compared with another similar offender of heterosexual orientation against whom [Section] 377A is not an option.”⁹²

⁸⁷ Michael Hor, *Enforcement of 377A: Entering the Twilight Zone*, in QUEER SINGAPORE: ILLIBERAL CITIZENSHIP AND MEDIATED CULTURES (Audrey Yue & Jun Zubillaga-Pow eds., 2012).

⁸⁸ *Id.*

⁸⁹ Radics, *Decolonizing Singapore's Sex Laws: Tracing Section 377A of Singapore's Penal Code*, 45 COLUM. HUM. RTS. L. REV. 57, 68 (2013).

⁹⁰ *Id.*

⁹¹ Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 B.U. INT'L L.J. 309, 348 (2014).

⁹² Michael Hor, *Enforcement of 377A: Entering the Twilight Zone* in QUEER SINGAPORE: ILLIBERAL CITIZENSHIP AND MEDIATED CULTURES, 57 (Audrey Yue & Jun

Most fundamentally, the criminal law is insufficiently nuanced to deal with the issue at hand. Its strong emphasis on retribution is at odds with the recognition that sexual activity is “an entity itself that marks personal identity and is the foundation of self-worth and important emotional relationships.”⁹³ Its stigmatic nature short-circuits the very debate as to the role and function of the State in regulating morality and personal identity that the Singapore Government has suggested it would take guidance from. Judged in the round, the decriminalization of Section 377A is both justified and wanting.

II. DECRIMINALIZATION THROUGH LEGISLATIVE REPEAL

A. *Tracing the U.S. Sociological Movement*

Having submitted that the present Singaporean compromise is untenable, this section considers whether the U.S. experience in decriminalizing homosexual conduct is instructive for Singapore. This part analyzes the sociological movement that underpinned the historic U.S. Supreme Court decision in *Lawrence v. Texas* with a view to understanding its importance, importability, and limitations. Part III will subsequently consider doctrinal differences between American and Singaporean courts when adjudicating on the constitutionality of statutes that criminalize homosexual conduct through the lens of equal protection. Though a bifurcation between the sociological and legal is adopted for the purposes of this analysis, it is a mistake to view the two as watertight entities. The ability of the law to shape public opinion and the contours of civil society has been noted earlier. On the flip side of the coin, the capacity for cultural forces to animate substantive legal doctrine should not be understated.

It is tempting to limit the study of the U.S. social movement to destigmatize and decriminalize homosexuality to the period of 1986 to 2003 – years bookended by *Bowers v. Hardwick* and *Lawrence v. Texas*. Though convenient, this approach overlooks the foundation laid in earlier years by critical events and encourages the misconception that the effort is a historical, rather than an ongoing one. This Article accordingly surveys the U.S. gay rights movement through three broad but interlinked perspectives. First, the assertion of homosexual identity as distinct from conduct and the demedicalization of homosexuality in the wake of the Stonewall riots (henceforth “Stonewall”). Second, legislative repeal of sodomy laws following the American Law Institute’s Model Penal Code. Third, litigation concerning the constitutionality of sodomy statutes under state Constitutions after *Bowers v. Hardwick* had closed off the federal avenue.

Zubillaga-Pow eds., 2012).

⁹³ John D’Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915, 919 (1986).

At this juncture, it is worth bearing in mind that U.S. sodomy laws were not monolithic. A number of states such as Arkansas and Kansas “embarked on a path of specification exempting heterosexual sodomy from prosecution.”⁹⁴ In contrast, in most states, prohibitions against sodomy targeted general non-procreative sex by “either ma[king] no reference to the gender of the actors or expressly include[ing] heterosexual conduct.”⁹⁵ Neither form is fatal to an effective comparative study. The essence of gendered sodomy statutes – namely the proscription of homosexual conduct – renders them natural counterparts of Section 377A notwithstanding the fact that these statutes regulated female same-sex conduct and were, therefore, broader in scope. The comparative value of gender-neutral sodomy statutes is more contentious – the regulation of the heterosexual majority may mobilize a different set of assumptions as to the proper province of state regulation as well as dilute the counter-majoritarian element of judicial adjudication. Notwithstanding this, the tendency to equate sodomy with homosexual conduct and to prosecute the crime as if it exclusively regulated the private affairs of homosexuals⁹⁶ – most starkly illustrated by Justice White’s opinion in *Bowers v. Hardwick* where he characterizes the relevant issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy”⁹⁷ – brings facially neutral sodomy statutes in line with gendered ones and consequently, Section 377A.

⁹⁴ *Id.* For instance, KANSAS CRIMINAL CODE §21-3505 (Vernon 1992) provides that criminal sodomy is “sodomy between persons who are 16 or more years of age and members of the same sex or between a person and an animal.” See ARKANSAS CODE §5-14-122 (1987).

⁹⁵ Ellen Ann Anderson, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283 at 288 (2000). For instance, the NEW YORK PENAL LAW §130.38 (1965) criminalized “sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.” To similar effect is the Georgian statute – OFFICIAL CODE OF GEORGIA ANNOTATED (O.C.G.A.) Code §16-6-2 (1998) – contested in *Bowers v. Hardwick*, 478 US 186 (1986) which defined sodomy as “involving the sex organs of one person and the mouth or anus of another.”

⁹⁶ *Id.* Anderson notes that “although on the books, these laws were virtually never enforced against consenting adults in private, and virtually never within a marital relationship. Nonetheless, they served as the cornerstone for criminalizing homosexuality and legitimating discrimination against lesbian, gay, and bisexual people.”

⁹⁷ *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986). As noted by the dissentents, Justice White’s framing of the issue flies in the face of the broad and neutral language as well as the original intent of the sodomy statute. The conflation of sodomy with homosexual conduct draws a connection between “unnatural” sexual intercourse and “unnatural” sexual orientations, one augmented by the fact that heterosexual intercourse may not necessarily fall foul of sodomy.

B. *The Emergence and Demedicalization of Gay Identity in the Wake of Stonewall*

Any account of the U.S. gay rights movement that glosses over the Stonewall riots would be remiss. Such is its mythical status and centrality to gay liberation politics.⁹⁸ It is equally important, however, not to overstate its importance by erasing prior instances of activism. In the four years before Stonewall, for instance, homosexuals occupied Dewey's restaurant lunch counter in Philadelphia after restaurant staff denied them service on suspicion of homosexuality ("Janus Sit-in"),⁹⁹ as well as rallied in Los Angeles in response to violent raids at the "Black Cat" bar.¹⁰⁰ In contrast to the muted activism of existing LGBTQ organizations such as the Mattachine Society and the Daughters of Bilitis,¹⁰¹ which focused on access to legal services and freedom from harassment, such open defiance sought to challenge extant social institutions and is best understood as laying the fertile ground for the radicalism that took root in Stonewall.

The details of Stonewall, particularly the specific sequence of events and roles of certain individuals, remain contested to this day. What is clear is that the police raided the Stonewall Inn, a gay bar in New York City's Greenwich Village in the early hours of June 28, 1969.¹⁰² As Anderson notes, raids of establishments catering to lesbian, gay, and bisexual customers, though decreasing in frequency, were not uncommon and were usually conducted under the guise of liquor control.¹⁰³ What marked Stonewall as unique then was not the brutal actions of the police but the fact

⁹⁸ Stonewall is described as having acquired "mythical" status. *See further* CHRISTINA B. HANHARDT, *SAFE SPACE: GAY NEIGHBORHOOD HISTORY AND THE POLITICS OF VIOLENCE* (2003).

⁹⁹ It is now known as the "Janus Sit-In." *See* Meghan K. Nappo, *Not a Quiet Riot: Stonewall, and the Creation of Lesbian, Bisexual, Gay, and Transgender Community and Identity Through Public History Techniques* (2010). (Master's Thesis, University of North Carolina Wilmington)."

¹⁰⁰ *Id.*

¹⁰¹ The Mattachine's distributed flyers and combated inequalities like entrapment during a period when police openly discriminated against and jailed homosexuals. The Daughters of Bilitis provided lesbians with a space to socialize without prejudice. *See further* MARC STEIN, *RETHINKING THE GAY AND LESBIAN MOVEMENT* (1st ed., 2012); JOHN D'EMILLIO, *MAKING TROUBLE ESSAYS ON GAY HISTORY, POLITICS AND THE UNIVERSITY* (1992); MARCIA M. GALLO, *DIFFERENT DAUGHTERS: A HISTORY OF THE DAUGHTERS OF BILITIS AND THE RISE OF THE LESBIAN RIGHTS MOVEMENT* (2007).

¹⁰² Meghan K. Nappo, *Not a Quiet Riot: Stonewall, and the Creation of Lesbian, Bisexual, Gay, and Transgender Community and Identity Through Public History Techniques* (2010) (Master's Thesis, University of North Carolina Wilmington).

¹⁰³ Ellen Ann Anderson, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283, 294 (2000).

that the patrons fought back, forcing the policemen to lock themselves in the bar and sparking three nights of rioting.¹⁰⁴

Historian John D’Emilio suggests that the riot was “unplanned, impulsive and unrehearsed,” but rooted in a specific cultural context that crafted the perfect storm.¹⁰⁵ For one, the decreasing regularity with which bar raids were conducted in New York City meant that “bars had longer lifespans,” and patrons could “form stronger ties to one another.”¹⁰⁶ More significantly, the major social movements of the 1960s both “spoke to the condition of gays and lesbians” and normalized social disruption.¹⁰⁷ The civil rights movement presented visible proof that a disenfranchised population could overcome a deeply oppressive political system through aggregation. This was allied with the anti-war and feminist movements that challenged mainstream rhetoric and “emphasized being true to one’s self.”¹⁰⁸ Indeed, the cross-pollination between the various movements extended beyond ideas to include overlapping membership¹⁰⁹ and the co-opting of protest strategies.¹¹⁰

Key to the significance of Stonewall was its galvanizing effect. Within a few weeks, the radical Gay Liberation Front (“GLF”)¹¹¹ formed, an organizational mobilization which continued for the next few years. Within four years of Stonewall, the number of gay and lesbian movement groups increased from 50 to 1000.¹¹² These organizations disseminated information about homosexuality through fliers, newspapers and academia, sponsored speakers’ bureaus, and staffed crisis lines while engaging in other

¹⁰⁴ *Id.* at 294-95.

¹⁰⁵ JOHN D’EMILIO, *MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY* 240 (1st ed., 1993).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 241.

¹⁰⁸ *Id.*

¹⁰⁹ Many of the lesbian and gay men mobilized in the aftermath of Stonewall had been active in the civil rights and new left movements of the 1960s. *See* Anderson, *supra* note 103.

¹¹⁰ For example, the “Janus Sit-in” drew directly from a political strategy made famous by the African American civil rights movement of the early 1960s. Susan Ferentinos, *Dewey’s Lunch Counter Sit-In*, *ENCYCLOPEDIA OF GREATER PHILADELPHIA* (Oct. 19, 2017), <http://philadelphiaencyclopedia.org/archive/deweys-lunch-counter-sit-in/> (last visited Nov. 11, 2017).

¹¹¹ D’Emilio understands the Gay Liberation Front as the queer version of the National Liberation Front in Vietnam, further highlighting the interrelated nature of social movements. D’EMILIO, *supra* note 105, at 242.

¹¹² D’EMILIO, *supra* note 105, at 164.

activities that weaved gay oppression into the fabric of institutionalized sexism.¹¹³

The grassroots efforts were directly relevant to the ultimate decriminalization of sodomy laws in two respects. First, it disaggregated gay identity from homosexual conduct and articulated what it meant to be gay.¹¹⁴ Hitherto, the idea that sexual activity could be divorced from personal identity had been gaining currency,¹¹⁵ albeit that it enjoyed clearer articulation in the 1980s. For instance, in the 1981 case of *Rich v. Secretary of the Army*,¹¹⁶ Judge Richard Matsch rejected the plaintiff's claim that homosexuality was "at the core of one's personality", opining that "a statement that a person is homosexual...refers not to physical characteristics, but...to conduct."¹¹⁷ Such reasoning contributed to the pathologization of homosexuality and framed homosexuality as a moral or cultural issue, not one relating to equal rights or participation within the political process.

The gay rights movement deconstructed this simplistic view. Central to this was the GLF's efforts to fashion a new language of homosexuality and imbue these concepts with cultural meaning. For example, Conrad and Schneider suggest that the shift in language from "homosexual" to "gay" connoted a transformation in self-understanding.¹¹⁸ "Gay" emphasized a relational and communal view of sexuality in contradistinction to the one-dimensional, medical connotations of "homosexual" "Coming out" was transformed from a quasi-private act of acknowledgment into a public act of proclaiming an identity consistent with all the things proper to gay culture.¹¹⁹ This was augmented by the work of academic groups such as the "Gay Academic Union" which involved documenting gay history and creating empowering historical narratives.¹²⁰ Enriching the corpus of

¹¹³ D'EMILIO, *supra* note 105, at 242.

¹¹⁴ See generally CRAIG RIMMERMAN, FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES (2002).

¹¹⁵ *Id.*

¹¹⁶ *Rich v. Secretary of the Army*, 516 F.Supp. 621 (D.Colo. 1981).

¹¹⁷ *Rich v. Secretary of the Army*, 516 F.Supp. 621, 628 (D.Colo. 1981). See also GARY LEHRING, OFFICIALLY GAY: THE POLITICAL CONSTRUCTION OF SEXUALITY (2003).

¹¹⁸ PETER CONRAD & JOSEPH W. SCHNEIDER, DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS 206 (1992).

¹¹⁹ JOHN D'EMILIO, MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY 244 (1st ed., 1993).

¹²⁰ Meghan K. Nappo, *Not a Quiet Riot: Stonewall, and the Creation of Lesbian, Bisexual, Gay, and Transgender Community and Identity Through Public History Techniques* (2010) (Master's Thesis, University of North Carolina Wilmington). Scholars included John D'Emilio, Jonathan Katz and Barbara Gittings. See JONATHAN KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE UNITED STATES (1976).

scholarship increased visibility of the gay community and legitimized “a people in their own eyes.”¹²¹ Critically, the emphasis on an articulation of identity exposed the naiveté that afflicted a conception of sexuality based on conduct alone and brought the lived experiences of the gay population to the fore. It culminated in a shift in understanding between *Bowers v. Hardwick* and *Lawrence v. Texas*. Whereas “homosexuals made only a shadowy appearance”¹²² and there was “almost obsessive focus on homosexual activity”¹²³ in *Bowers*, Justice O’Connor openly recognized that “Texas’ sodomy law [was] targeted at more than conduct. It [was] instead directed toward gay persons as a class.”¹²⁴ Even Justice Scalia conceded that homosexuals had as much right as “any other group” in “promoting their agenda through normal democratic means.”¹²⁵ By the time *Lawrence* was decided, the homosexual had clearly emerged “as a politicized, organized, expressive and sexual individual.”¹²⁶

The other pivotal contribution of gay activism to the eventual decriminalization of sodomy relates to the depathologization of homosexuality. Chiang details the uniformity with which the mental health profession had classified homosexuality as a psychological disorder before the 1960s.¹²⁷ While the pathology of homosexuality was generally accepted, its etiology was fiercely contested.¹²⁸ Stalinist ideology labeled homosexuality a “product of bourgeois decadence”,¹²⁹ Socarides was unyielding in his claim that homosexuality was an “error of psychosexual development” stemming from “a domineering, crushing mother...and an absent, weak or rejecting father”¹³⁰ while Lombroso viewed homosexuality

¹²¹ *Id.*

¹²² Nancy J. Knauer, *Lawrence v. Texas: When Profound and Deep Convictions Collide with Liberty Interests*, 10 CARDOZO WOMEN’S L.J. 325, 329 (2004).

¹²³ *Bowers v. Hardwick*, 478 U.S. 186, 200 (1986) (Blackmun, J., dissenting).

¹²⁴ *Lawrence v. Texas*, 539 U.S. 558, 583 (2003).

¹²⁵ *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

¹²⁶ Nancy J. Knauer, *Lawrence v. Texas: When Profound and Deep Convictions Collide with Liberty Interests*, 10 CARDOZO WOMEN’S L.J. 325, 332 (2004).

¹²⁷ Chiang, HHH, *Effecting Science, Affecting Medicine: Homosexuality, The Kinsey Reports, and the Contested Boundaries of Psychopathology in the United States, 1948-1965*, J HIST BEHAV SCI., 2008 Fall, 44(4): 300.

¹²⁸ The medical literature on homosexuality stretches back to the work of Johann Valentin Muller in the 1790s. See NICHOLAS C. EDSALL, *TOWARD STONEWALL: HOMOSEXUALITY AND SOCIETY IN THE MODERN WESTERN WORLD* (2006).

¹²⁹ David Thorstad, *Homosexuality and the American Left: The Impact of Stonewall* in 29 GAY MEN AND THE SEXUAL HISTORY OF THE POLITICAL LEFT 2-3 (Gert Hekma, Harry Oosterhuis & James Steakley eds., 1995).

¹³⁰ VERNON A. ROSARIO, *HOMOSEXUALITY AND SCIENCE: A GUIDE TO THE DEBATES* 151 (2002).

as a sign of genetic atavism that threatened to out-populate the fit.¹³¹ Such views were supported by psychiatrists who claimed success in “curing” homosexuals and were not delegitimized by claims of immutability – after all, many genetic diseases were treated.

Social activism in the wake and spirit of Stonewall emboldened psychiatrists and psychologists to publish research challenging the medicalization of homosexuality. In 1970, Dr. Edward Dreyfus pointed out the internal contradictions of Socarides’ claims, a position echoed by Dr. Martin Hoffman who denounced Socarides’ medical moralizing.¹³² Resistance to depathologization also abated as independent studies discredited theories attributing homosexuality to dysfunctional family dynamics or phobias. For instance, Marcel Saghir’s team “compared a group of 89 homosexual men to a group of 35 unmarried men approximately matched for age and socioeconomic status.” They found “little difference in the prevalence of psychopathology between the two groups” and viewed higher rates of depression as secondary to coping with homosexuality.¹³³ Dr. Rosen came to a similar conclusion in the context of lesbians.¹³⁴ Activism also took the forms of confrontation – activists demonstrated at successive American Psychological Association (APA) Conventions, gaining greater official space to ventilate their concerns every year¹³⁵ – and formal demands that homosexuality be removed from the “Diagnostic and Statistical Manual of Psychiatric Disorders” (DSM-II).¹³⁶ So effective were their methods of persuasion that the APA voted to delete homosexuality from the DSM-II in 1973, just three years after the 1970 APA Convention, thereby granting the gay rights movement an official imprimatur. In conjunction with the recognition that sexual orientation was an intrinsic aspect of personal identity, the depathologization of homosexuality animated heightened

¹³¹ PETER CONRAD & JOSEPH W. SCHNEIDER, *DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS* 218 (1992).

¹³² Meghan K. Nappo, *Not a Quiet Riot: Stonewall, and the Creation of Lesbian, Bisexual, Gay, and Transgender Community and Identity Through Public History Techniques* (2010) (Master’s Thesis, University of North Carolina Wilmington). Scholars included John D’Emilio, Jonathan Katz and Barbara Gittings. See JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE UNITED STATES* (1976).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* During the 1970 Convention, two panels – “Transsexualism vs Homosexuality: Distinct Entities?” and “Issues on Sexuality” were targeted by activists. The 1971 APA meeting included a panel of gay and lesbian activists for the first time and the 1972 panel brought together activists (Frank Kameny and Barbara Gittings) and sympathetic doctors (Robert Seidenberg) for the first time. All the speakers were highly critical of the profession’s hostility toward homosexuals and the ill effects it had on clients.

¹³⁶ *Id.*

judicial scrutiny of public health and morality justifications of sodomy statutes.

C. *Legislative Repeal Prompted by the Model Penal Code*

Anderson observes that it is tempting to ascribe the legislative repeal of sodomy statutes to the influence of the gay rights movement because decriminalization “followed so soon on the heels of Stonewall.”¹³⁷ Important as it was, grassroots organization did not cause a sea change in public opinion; public disapproval of homosexuality persisted through the 1980s, peaking at 75 percent in 1985.¹³⁸ Efforts to repeal state sodomy laws were consequently unable to leverage on public opinion as the enterprise was still an anti-majoritarian one.

Central to state legislative repeal then was the American Law Institute’s (ALI) 1951 Model Penal Code (MPC), designed to “standardi[z]e and simplify the myriad laws of the 50 states.”¹³⁹ While the MPC proposed reform beyond the law on sexual offenses, it was in the context of sodomy laws that it was most ground-breaking insofar as the MPC omitted sodomy from its list of crimes,¹⁴⁰ contrary to the prevailing laws of all fifty states.¹⁴¹ The Committee situated this intentional omission within a broader endeavor to decriminalize all “deviate sexual intercourse”¹⁴² performed in private by consenting adults,¹⁴³ justifying it in terms as progressive as its formal proposal. More specifically, the Committee rationalized “that crimes

¹³⁷ Ellen Ann Anderson, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283, 296.

¹³⁸ In a poll taken in 1970, 86 percent of respondents showed some type of disapproval of same-sex relations. Respondents who viewed same-sex relations as “always wrong” remained near 70 percent in the 1970s and peaked at 75 percent in 1987. Moreover, Texas legislators had argued “the only reason the APA had delisted homosexuality as a mental disorder is the relentless intimidation and political pressure applied to the APA by militant homosexual activists.” See JASON PIERCESON, *COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA* (2005).

¹³⁹ Ellen Ann Anderson, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283, 289.

¹⁴⁰ See MODEL PENAL CODE (Proposed Official Draft, May 1962). It was not without controversy.

¹⁴¹ See generally WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003* (2008). The first state to repeal its sodomy laws, Illinois, did so in 1961.

¹⁴² Deviate sexual intercourse is defined as “sexual intercourse per os or per anum between human beings who are not husband and wife, and any form of sexual intercourse with an animal.” MODEL PENAL CODE §213.0 (3) (Proposed Official Draft 1962).

¹⁴³ Critically, deviate sexual intercourse is not criminal unless it is procured by “force or imposition.” This demonstrates the shift in focus from the act itself to issues of coercion and consent. See MODEL PENAL CODE §213.2. (Proposed Official Draft 1962).

without victims were not really crimes”,¹⁴⁴ alluding to J.S. Mill’s harm-principle that the criminal law should only target conduct that creates tangible harm.¹⁴⁵ It followed that homosexual “practices performed in private by consenting adults fell under the provenance of spiritual rather than civil authorities.”¹⁴⁶

The MPC prompted reflection but not always state action in line with its recommendations.¹⁴⁷ Pierceson notes that Wisconsin, New Mexico, New York, Minnesota, Georgia and Kansas retained their sodomy laws while liberalizing other parts of the criminal law.¹⁴⁸ Nevertheless, as other “state legislatures went through a period of updating their criminal codes...many more or less adopted the text of the Model Penal Code wholesale.”¹⁴⁹ Illinois and Connecticut were the first two states to adopt the MPC with the sodomy law repeal in 1961 and 1971, respectively.¹⁵⁰ By 1983, only 24 states had operational sodomy laws.¹⁵¹ Haider-Markel and Meier have grounded the success of decriminalization in the breadth of the MPC,¹⁵² suggesting that legislative repeal of sodomy laws was not viewed through the myopic lens of sexual morality but was framed in terms of reinvigorating the law in the interests of all. A more cynical view questions whether legislators in some states knew that adoption of the MPC entailed the decriminalization of sodomy.¹⁵³

Regardless of the fortuitousness that attended legislative repeal, the effects of decriminalization transcended state lines. As an increasing

¹⁴⁴ SUE HYDE, COME OUT AND WIN: ORGANIZING YOURSELF, YOUR COMMUNITY, AND YOUR WORLD 34 (2007).

¹⁴⁵ JOHN STUART MILL, ON LIBERTY (1869).

¹⁴⁶ ELLEN ANN ANDERSON, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 20 (2006).

¹⁴⁷ Pierceson highlights the experience of Texas. In 1968, the Texas State Bar Committee on the Revision of the Penal Code specifically addressed the issue of same-sex sodomy. Drawing on the precedent of the MPC, the staff of the committee made the recommendation to decriminalize same-sex sodomy. The committee eventually decided to keep the criminal provision but reduce the offense to a misdemeanor. JASON PIERCESON, COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA (2005).

¹⁴⁸ *Id.*

¹⁴⁹ Ellen Ann Anderson, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283, 296.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Donald P. Haider-Markel & Kenneth J. Meier, *The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict*, 58 J. POL. 2, 332-49 (May 1996).

¹⁵³ See generally RANDY SHILTS, CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE US MILITARY 170 (1993).

number of states repealed their sodomy laws, the normative force of the law contributed to a sharp fall in public disapprobation of homosexuality between the 1970s and the 1990s.¹⁵⁴ Pressure was also exerted on states that had retained or specified their sodomy laws. Direct pressure was applied through the judicial process as increasing decriminalization subverted the moral consensus justification for sodomy laws.¹⁵⁵ Almost all of the state level sodomy decisions quote similar decisions in other states, with the “Tennessee court mak[ing] particular reference to the decision of ‘our neighbouring state’ of Kentucky”¹⁵⁶. At the federal level of *Lawrence v. Texas*, Justice Kennedy explicitly drew upon the fact that “states with same-sex prohibitions have moved towards abolishing them” to discredit the monolithic “historical premises”¹⁵⁷ relied upon by the Supreme Court in *Bowers v. Hardwick*. Indirect pressure grew out of the fact that the experience of states following the repeal of their sodomy laws exhibited none of the untrammelled debauchery that critics had portended.¹⁵⁸

D. *The Final Frontier: Judicial Challenge Under State Constitutions*

The doctrinal substance of *Bowers v. Hardwick* will be examined in Part III. For present purposes, it is sufficient to note three important facts. First, when *Bowers v. Hardwick* was decided before the U.S. Supreme Court in 1986, fewer than half of the states continued to criminalize homosexual conduct, either specifically or under the umbrella offense of sodomy.¹⁵⁹ Second, in *Bowers*, the U.S. Supreme Court rejected claims that sodomy laws were inconsistent with the due process and/or equal protection clauses of the Fourteenth Amendment.¹⁶⁰ In so ruling, the Supreme Court dashed hopes of federal judicial intervention that had been fostered by two prior and contrary state court decisions,¹⁶¹ and eliminated the possibility of

¹⁵⁴ ANDERSON, *supra* note 149. The percentage of survey respondents who viewed same-sex relations as “always wrong” fell off sharply in the 1990s to the mid-50 percent range.

¹⁵⁵ This was relied upon by Professor Tribe, Hardwick’s counsel, in *Bowers v. Hardwick*. See Nelius Carey, *Lawrence v. Texas: Homosexuals Approach Liberty*, D.U.L.J. 2004, 26, 32.

¹⁵⁶ JASON PIERCESON, *COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA* 100-01 (2005).

¹⁵⁷ *Lawrence v. Texas*, 539 U.S. 558, 571, 2480 (2003).

¹⁵⁸ Consider that the Supreme Court’s decision in *Bowers v. Hardwick* was motivated by “majority sentiments about the morality of homosexuality.” *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

¹⁵⁹ Ellen Ann Anderson, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283.

¹⁶⁰ *Bowers v. Hardwick*, 478 U.S. 186 192-97 (1986).

¹⁶¹ See *People v. Onofre*, 51 N.Y.2d 476 (N.Y. 1980); *Baker v. Wade*, 553 F.Supp

federal constitutional challenge for the foreseeable future. Third, political appetite for legislative repeal was waning due to the backlash against *Roe v. Wade* and privacy-related arguments,¹⁶² as well as the AIDS crisis that had been conflated with homosexuality.¹⁶³

Set against this backdrop, activists sought to circumvent *Bowers* by resorting to constitutional litigation under state Constitutions, building the bridge between *Bowers* and the landmark case of *Lawrence v. Texas*. In 1992, Kentucky became the first post-*Bowers* state to judicially invalidate its sodomy law.¹⁶⁴ In *Commonwealth v. Wasson*, the Kentucky Supreme Court rejected the contention that *Bowers v. Hardwick* was dispositive and held that the Kentucky Constitution afforded more extensive protections than the U.S. Constitution.¹⁶⁵ This thicker conception of privacy demanded that “immorality in private which does ‘not operate to the detriment of others,’ is placed beyond the reach of state action.”¹⁶⁶ The Kentucky Supreme Court further found that the consensual sodomy statute violated the equal protection clause of the state Constitution.¹⁶⁷ There was no rational basis for “sing[ling] out homosexual sodomy for criminalization”¹⁶⁸ given that the statute was both under and over-inclusive. Its failure to include heterosexual anal sex and inclusion of oral sex undermined the Commonwealth’s contention that anal sodomy spread infectious disease.¹⁶⁹ In the final analysis, the Kentucky Supreme Court found that majoritarian preference did “not provide a rational basis for criminalizing the sexual preference of homosexuals.”¹⁷⁰

The significance of *Wasson* was not limited to the fact that it was the first post-*Bowers* judicial decision to strike down a sodomy law. At the time, it was also the only judicial decision to invalidate a gendered sodomy statute,¹⁷¹ providing forceful reasoning against the rationality of

1121 (N.D. Tex. 1982).

¹⁶² *Roe v. Wade*, 410 U.S. 113 (1973) decided that the right to privacy under the Due Process Clause of the Fourteenth Amendment articulated by *Griswold v. Connecticut* 381 U.S. 479 (1965) provided a qualified right to have an abortion.

¹⁶³ See Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695 (1993).

¹⁶⁴ *Kentucky v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

¹⁶⁵ *Id.* at 491.

¹⁶⁶ *Id.* at 496.

¹⁶⁷ KY. CONST. §3; *Kentucky v. Wasson* 842 S.W.2d 487, 518-19 (Ky. 1992).

¹⁶⁸ Matthew M. Morrison, *Currents in the Stream: The Evolving Legal Status of Gay and Lesbian Persons in Kentucky*, 89 KY. L.J. 1159, 1169 (2001).

¹⁶⁹ *Kentucky v. Wasson*, 842 S.W.2d 487, 501 (Ky. 1992).

¹⁷⁰ *Id.* at 502.

¹⁷¹ *People v. Onofre*, 51 N.Y.2d 476 (N.Y.1980) involved a gender-neutral statute. N.Y. Penal Law §130.38 provided that “a person is guilty of consensual sodomy when he

specification. The logic of *Wasson* was followed in Tennessee,¹⁷² Montana¹⁷³ and Georgia¹⁷⁴ where the Georgia Supreme Court invalidated the very law at issue in *Bowers*. The various decisions placed differing emphases on privacy and equal protection but common themes included the inextricable link between private, adult sexual activity and freedom from governmental intrusion¹⁷⁵ and the inability of public morality to overcome constitutional bulwarks.¹⁷⁶ Though the cases did not all go one way,¹⁷⁷ state-level litigation narrowed the number of jurisdictions that continued to criminalize homosexual conduct. It also ventilated innovative arguments, for instance neo-Kantian arguments advocating for a positive conception of autonomy and personhood¹⁷⁸ and arguments focusing on the collateral, rather than direct harms engendered by sodomy statutes.¹⁷⁹ In *Gryczan v. State* for example, “the plaintiffs argued that even though none of them had ever been arrested under Montana's sodomy statute, they were injured by its

engages in deviate sexual intercourse with another person.” Though *Baker v. Wade*, 553 F.Supp 1121 (N.D. Tex. 1982) involved a gendered sodomy statute (TEXAS PENAL CODE § 21.06), it was reversed by the Fifth Circuit Court of Appeals in 1985. See *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985).

¹⁷² *Campbell v. Sundquist*, 926 S.W.2d 250, 76 (Tenn. Ct. App. 1996). See JASON PIERCESON, *COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA* (2005). Pierceson notes that unlike the Kentucky court, the Tennessee court relied exclusively on the right to privacy. Although the court recognized that no explicit right to privacy existed in the Tennessee Constitution, it declared that this right is to be inferred from several provisions of the Tennessee Constitution such as freedom of worship, speech provisions and provisions prohibiting unreasonable searches.

¹⁷³ *Gryczan v. State*, 942 P.2d 112 (Mont. 1997).

¹⁷⁴ *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

¹⁷⁵ See *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998) – “consensual, private, adult sexual activity...is at the heart of the Georgia Constitution’s protection of the right of privacy.”

¹⁷⁶ See *Campbell v. Sundquist*, 926 S.W.2d 250, 264 (Tenn. Ct. App. 1996) – “We recognize that many of the laws of this State reflect ‘moral choices’ regarding the standard of conduct by which the citizens of this State must conduct themselves. However, we also recognize that when these ‘moral choices’ are transformed into law, they have constitutional limits.” See also *Gryczan v. State*, 942 P.2d 112, 125 (Mont. 1997).

¹⁷⁷ The Louisiana Supreme Court upheld its state’s sodomy law in *State v. Smith*, 766 So. 2d 501 (La. 2000). The court in *Smith* specifically distinguished *Wasson* by noting that Louisiana Constitution was couched in a different language from the Kentucky Constitution.

¹⁷⁸ JASON PIERCESON, *COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA* (2005) 84-85 (2005). Pierceson notes that brief in *Gryczan* used a definition of dignity that requires each individual to “be permitted to participate equally in the honor and opportunities available in society”, thereby grounding the opposition to sodomy laws in a richer notion of personhood.

¹⁷⁹ *Id.*

very existence...[b]ecause they engage in conduct classified as a felony, they fear they could lose their professional licenses.”¹⁸⁰ This bears a striking resemblance to Justice O’Connor’s invocation of the consequential harms of a sodomy conviction in *Lawrence v. Texas*,¹⁸¹ underscoring the extent to which state-level litigation generated a rich, foundational jurisprudence that undergirded *Lawrence v. Texas*.

E. Any Comparative Value?

Is there any guidance that Singapore can distill from the complex history of decriminalizing sodomy laws in the U.S.? A fatalistic view rejects this idea altogether, positing that all events are outcomes of factors beyond human control. This approach views Stonewall as nothing more than a confluence of impeccable location and timing, attributing weight to factors as tangential as the memorial service for cultural icon Judy Garland which took place earlier in the day.¹⁸² In the same spirit, legislative repeal may be attributed to the sheer fortuitousness that states were updating their criminal codes shortly after the promulgation of the MPC. This view overly discounts human agency and capacity to create change within a contextualized environment. The prior survey has provided numerous examples of such human capacity, including but not limited to public education, the shaping of official discourse on homosexuality, the removal of homosexuality from the APA’s DSM-II, resorting to state level litigation in the wake of Bowers, and the crafting of novel legal arguments that avoid “the...standing problems that have plagued previous sodomy challenges.”¹⁸³

More plausible opposition points to the institutional and cultural differences between the U.S. and Singapore, contending that these dissimilarities are so significant as to hinder a comparative exercise. In this vein, Fredman notes that “posing the same questions does not necessarily entail that different jurisdictions should give the same answers.”¹⁸⁴ The difference in scope between Section 377A and U.S. sodomy laws, whether gender-neutral or specific, has been noted and addressed.

¹⁸⁰ *Gryczan v. State*, 942 P.2d 112, 117 (Mont. 1997).

¹⁸¹ *Lawrence v. Texas*, 539 U.S. 558, 581 2486 (2003) – “It appears that petitioners’ convictions, if upheld, would disqualify them from or restrict their ability to engage in a variety of professions, including medicine, athletic training, and interior design.”

¹⁸² JOHN D’EMILIO, *MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY* 240 (1st ed., 1993).

¹⁸³ See further Ellen Ann Anderson, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283, 312.

¹⁸⁴ Sandra Fredman, *Foreign fads or fashions? The role of comparativism in human rights law*, 64 INT’L & COMP. L.Q. 631, 633 (2015).

Another pertinent difference relates to federalism. The federal structure of the U.S. has been instrumental to the decriminalization effort by encouraging interstate comparison and debate and providing a channel for constitutional litigation following *Bowers*. The absence of a similar political structure in Singapore grants singular authoritative voice to the nation's legislature and the judiciary and a sense of finality to their decisions to uphold Section 377A. Further, demonstrations and protests that were a cornerstone of the U.S. movement are highly circumscribed in Singapore. Constitutional rights to "freedom of speech" and peaceful assembly¹⁸⁵ have been restricted in "the interest of the security of Singapore."¹⁸⁶ For instance, the Public Order Act broadly stipulates that a public assembly shall not take place without official authorization,¹⁸⁷ in line with the nation's "cultural prioritization of communitarianism over the Western presumption of universal rights."¹⁸⁸ The presence of anti-neocolonial sentiment which perceives the "imposition of Western standards for gay rights upon non-Western countries as... a new type of imperialism"¹⁸⁹ and the "intersectional struggles" of Asian subjects in Singapore¹⁹⁰ further complicate the analysis.

It is tempting but wrong to view differences in legal, socio-political and cultural frameworks between the U.S. and Singapore as fatal to a comparative exercise. These differences are inherent in any comparative study. Accordingly, this objection is best understood as cautioning against a one-size-fits-all approach; the methods and goals of social organization must adapt and be sensitive to the environment within which it operates. Moreover, once it is recognized that a comparative approach is a deliberative rather than a binding resource,¹⁹¹ the force of this criticism is blunted. Taking this into consideration, it is submitted that the U.S. experience is instructive for Singapore in several respects.

For one, efforts by the GLF and related groups underscore the influence of crafting narratives congruent with prevailing cultural sensibilities. The articulation and emphasis on gay identity (as divorced from conduct) fit seamlessly with the identity-centric politics of the 1960s. The civil rights and feminist movements had already utilized racial and gender identity as the dominant mode of understanding discrimination. The

¹⁸⁵ Article 14(1) of the Singapore Constitution provides that "every citizen of Singapore has the right to freedom of speech and expression" and "all citizens of Singapore have the right to assemble peaceably and without arms."

¹⁸⁶ SINGAPORE CONSTITUTION, art.14(2).

¹⁸⁷ Public Order Act, Chapter 257A (Revised Edition 2012).

¹⁸⁸ Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 B.U. INT'L L.J. 309, 321 (2014).

¹⁸⁹ *Id.* at 309.

¹⁹⁰ *Id.* at 323.

¹⁹¹ Fredman, *supra* note 185, at 635, 648.

idea that gay identity similarly marked the homosexual population as a distinct social group consequently leveraged on extant intuitions and blunted the degree of cognitive dissonance experienced by the majority.

In a similar vein, Singaporean activists should attempt to situate gay rights within existing cultural thought rather than “oppose cultural morality as the polar antithesis to gay rights.”¹⁹² To frame the decriminalization of Section 377A in terms of a negative freedom from governmental intervention grates against widespread communitarian instinct¹⁹³ and the “prevalence of...multigenerational households, which inhibit notions of...privacy.”¹⁹⁴ Chang suggests that this provides a partial explanation of the gay community’s unwillingness to support Tan Eng Hong’s constitutional challenge of Section 377. As Tan had based his challenge on both equal protection and individual liberty grounds, his challenge was “more libertarian in nature” and “represented...radical activism that did not resonate with the majority of Singaporeans.”¹⁹⁵ This focus on individualism further lacks the nuance necessary to address anti-neocolonial sentiment common amongst the “historically subordinated...post[-]colonial population”¹⁹⁶ and the intersection of Asian and gay identity. These two dimensions combine to set up Asian “foundational values” of family, filial piety, and procreation¹⁹⁷ as a defense against both Western ideology and neo-colonial subjugation of the East,¹⁹⁸ a position augmented by the “domino effect” of decriminalization whereby decriminalization preceded other normative developments like same-sex marriage and adoption.¹⁹⁹ Set

¹⁹² Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 B.U. INT’L L.J. 309, 351 (2014).

¹⁹³ See Thio Li-Ann, *An ‘i’ for an ‘T’?: Singapore’s Communitarian Model of Constitutional Adjudication*, 27 H.K. L.J. 152 (1997).

¹⁹⁴ Dinusha Panditaratne, *Decriminalizing Same Sex Relations in Asia: Socio-Cultural Factors Impeding Legal Reform*, 31 AM. U. INT’L L. REV. 171, 182 (2016). Panditaratne notes that 85% of adults aged sixty years and older reside with at least one adult child in Singapore. In economic terms, families in Singapore have not used their higher incomes to “purchase” more privacy.

¹⁹⁵ Lim Meng Suang and Kenneth Chee had initially mounted their case purely on equal protection grounds. After the Singaporean Court of Appeal consolidated the appeals of both Tan Eng Hong and Lim Meng Suang, Lim and Chee’s attorney framed the Article 9 liberty issue as one of privacy. See Stewart Chang, *Gay Liberation in the Illiberal State*, 24 WASH. INT’L L.J. 1, 16-17 (2015).

¹⁹⁶ Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 B.U. INT’L L.J. 309, 322 (2004).

¹⁹⁷ *Id.* at 351.

¹⁹⁸ See *Lim Meng Suang v. Attorney-General*, [2013] SGHC 73. At [133], High Court Judge Quentin Loh stressed that “Singapore is an independent nation with its own unique history, geography, society and economy. What is adopted in other parts of the world may not be suitable for adoption in Singapore.”

¹⁹⁹ Indeed, Singaporean Prime Minister Lee Hsien Loong has repeatedly raised

against this backdrop, the uncritical transposition of “Western” narratives espousing privacy and individualism can only be counter-productive. The contextualized experience of the U.S. suggests that greater success may lie in an intersectional approach addressing not just sexuality, but also ethnicity, culture and post-colonial status.²⁰⁰ In this regard, there is value in Chang’s suggestion of working with the assumption that the Western insistence on individual rights is antithetical to traditional Asian values and “resituating gay rights discourse as part of traditional Asian values.”²⁰¹ A more moving message might stress that greater acceptance of sexual identity guards against the alienation of homosexual youth, strengthens the intergenerational family unit and contributes to social stability. This bears some resemblance to the “Pink Dot” movement which is modeled “after characteristically Singaporean cultural tenets of non-confrontation, social stability and abiding by the laws.”²⁰²

The downsides to this incremental approach must nevertheless be highlighted. In seeking to work within rather than challenge the extant legal and cultural framework, the proposed model validates prevailing yardsticks for acceptability. It mirrors the shift in U.S. advocacy where the radicalism of Stonewall and the GLF has “given way to accommodationist strategies,”²⁰³ focusing on parity with the heterosexual, monogamous couple. While the cultural forces animating incrementalism differ between both countries, they equally lead to the domestication of gay identity, delineating when and where gay conduct is permissible.²⁰⁴ Under this view, homosexuals “deserve equal rights not so much because of their gay identities, but because of their identity as a normative couple.”²⁰⁵

A second takeaway relates to the importance of correcting toxic misconceptions about homosexuality. The U.S. experience demonstrates that this is integral to a more enlightened political debate and renders it more

the contentiousness of same-sex marriage in the context of decriminalising Section 377A, most recently in his 2017 interview with the BBC. *See also* Yvonne Lee, *Don’t Ever Take a Fence Down Until You Know the Reason It Was Put Up*, SINGAPORE J. OF LEGAL STUD. 347, 351 (2008). Lee identifies repealing Section 377A as “the first step in the political strategy of radical activists seeking a social revolution through reforming both criminal and civil laws relating to sexual relationships, housing, insurance, inheritance, education, marriage and child adoption.”

²⁰⁰ Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 B.U. INT’L L.J. 309, 350 (2014).

²⁰¹ *Id.* at 353.

²⁰² Stewart Chang, *Gay Liberation in the Illiberal State*, 24 WASH. INT’L L.J. 1, 13 (2015).

²⁰³ *Id.* at 16.

²⁰⁴ Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004).

²⁰⁵ Chang, *supra* note 202, at 34.

difficult to maintain “that discrimination on the basis of sexual orientation is a product of morality and not animus.”²⁰⁶ Three misconceptions continue to inhibit public discourse in Singapore. First, the assumption that Section 377A is unenforced or that “there is already de facto decriminalization of same sex relations” tempers any will to repeal it. As detailed in Part I, the legal status of the Government’s promise of non-enforcement is at best unclear. Subsequent cases have suggested that the prosecution conceives non-enforcement in narrower terms, reserving the right to bring a Section 377A charge where conduct is not entirely consensual and private. Addressing this misleading assumption will throw the constitutional conundrum and the collateral harms suffered by the gay community into sharper relief. Second, the conflation of HIV/AIDS with homosexuality. Goh convincingly notes that “word choices, emphasis on particular information, and sources quoted” in the nation’s main broadsheet *The Straits Times* perpetuates the “stereotype of homosexuals as...responsible for the rise in HIV/AIDS infections in Singapore.”²⁰⁷ Although the majority of HIV patients in Singapore are heterosexuals, news articles from as old as 2005²⁰⁸ and as recent as 2016²⁰⁹ focus on the rise in HIV amongst the homosexual population, characterizing their behavior as deviant, promiscuous and knowingly risky. For instance, one article details how “after a few drinks and with hormones pumping,” homosexual men at a party “slip away to hotel rooms or their homes for sex.”²¹⁰ Such irresponsible fuels the myth that heterosexuals are less susceptible to HIV and inhibits fair discourse concerning the desirability of decriminalizing Section 377A.

Third and finally, that homosexuality is an “ideology” or a “lifestyle choice.”²¹¹ This view has been proffered by the prominent pastor Lawrence Khong and is also implicit in Professor Thio Li-Ann’s statement that “there are no ex-Blacks but there are ex-gays.” Both statements betray a shallow understanding of sexuality at odds with the modern recognition of sexuality

²⁰⁶ Ellen Ann Anderson, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283, 315 (1997).

²⁰⁷ Debbie Goh, *It's the Gays' Fault: News and HIV as Weapons Against Homosexuality in Singapore*, 32 J. COMM. INQUIRY 4, 383-99 (2008).

²⁰⁸ See generally Khalik, S., *S'pore Facing AIDS Epidemic*, STRAITS TIMES (Nov. 11, 2005).

²⁰⁹ See generally Aleysa John, *New HIV/Aids cases among gays highest in seven years*, THE STRAITS TIMES (June 3, 2016).

²¹⁰ Ng, S., *What Happened At Sentosa Gay Parties*, STRAITS TIMES (Mar. 13, 2005).

²¹¹ *Wear White will push-back Pink Dot*, Lawrence Khong, INDEPENDENT (May 22, 2017) <http://www.theindependent.sg/wear-white-will-push-back-pink-dot-lawrence-khong/> (last visited Nov. 17, 2017).

as a complex, fluid phenomenon.²¹² The fact that there are “ex-gays” is not attributable to the fact that sexuality is a choice, but to the complexity that accompanies the development and acceptance of sexual identity. Once this is appreciated, the decriminalization of Section 377A takes on a stronger equal rights element.

The U.S. movement further suggests that public opinion is unlikely to change in the absence of institutional imprimaturs. It suggests that there is value in lobbying official institutions to discard antiquated notions of sexuality. There has been progress in line with this recommendation; the Singapore Health Promotion Board controversially but justifiably updated its “Frequently Asked Questions (FAQs) on Sexuality” with the help of professional counselors.²¹³ This new FAQ depathologizes homosexuality, presenting it as different rather than deviant. Another potential avenue for advocacy pertains to the Singapore military’s medical designation for homosexual recruits. At present, openly gay recruits are categorized under code “302”, a status adopted from the “International Statistical Classification Diseases and Related Health Problems”, “a list of known human diseases and medical disorders that the World Health Organization publishes.”²¹⁴ Most problematically, Tan notes that military policy-makers utilize the 1977 version of the ICD (ICD-9) rather than the latest revision which does not list homosexuality as a disorder (ICD-10) to formulate policies towards gay recruits.²¹⁵ Independent of the Singapore military’s responses to the vexed questions of the impact of homosexual soldiers on unit cohesion or the ability to deploy homosexual soldiers, its reliance on an anachronistic diagnostic tool is plainly out of kilter with the institution’s pride in modernization.

Finally, legislative repeal in the U.S. suggests that in the absence of majority support, decriminalization is paradoxically more likely to occur when less attention is cast on sexual minorities.²¹⁶ “Much of the legislative repeal of sodomy laws came as a result of more comprehensive criminal law reforms” inspired by the MPC and “were not just about sexual morality.”²¹⁷ Though Singaporean activists could not adopt a similar

²¹² See generally JOSEPH BRISTOW, *SEXUALITY* (2d ed. 2011).

²¹³ See <https://www.hpb.gov.sg/article/faqs-on-sexuality>. See also Hoe Pei Shan, *Health board tackles gay issues in FAQs*, STRAITS TIMES (Feb. 5, 2014), <http://www.straitstimes.com/singapore/health-board-tackles-gay-issues-in-faqs> (last visited Nov. 17, 2017).

²¹⁴ Chris K. K. Tan, *Oi, Recruit! Wake Up Your Idea!: Homosexuality and Cultural Citizenship in the Singaporean Military*, in *QUEER SINGAPORE: ILLIBERAL CITIZENSHIP AND MEDIATED CULTURES* (Audrey Yue & Jun Zubillaga-Pow eds., 2012).

²¹⁵ *Id.*

²¹⁶ Donald P. Haider-Markel & Kenneth J. Meier, *The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict*, 58 J. OF POL. 2, 332-49 (May 1996).

²¹⁷ JASON PIERCESON, *COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND*

strategy in 2007 given the complete omission of Section 377A from the MHA's Penal Code review, the U.S. experience suggests that "less may be more" should another broad review of criminal laws occur in the future.

III. DECRIMINALIZATION THROUGH CONSTITUTIONAL LITIGATION

A. *Constitutional Litigation in Singapore*

An alternative response to the Singapore legislature's decision to retain Section 377A is adjudication, praying in aid of the judiciary as a neutral guardian of constitutional rights. This has indeed occurred, albeit unsuccessfully, in Singapore through two intertwined cases. It should be recalled that in *Tan Eng Hong v. Attorney-General*, Tan challenged the compatibility of Section 377A with Articles 9 and 12 of the Singapore Constitution which respectively provide for liberty and equal protection after he was charged under Section 377A for engaging in oral sex with another man in a public toilet. Although the Attorney-General later amended the charge to one of public indecency, the Singaporean Court of Appeal held in landmark ruling that the "very existence of an allegedly unconstitutional law in the statute books" or "a real and credible threat of prosecution under an allegedly unconstitutional law" was sufficient to establish standing.²¹⁸ Insofar as standing requirements must be understood within the context of the separation of powers,²¹⁹ the Singaporean Court of Appeal's new and expansive approach to standing demonstrated its readiness to defend rights guaranteed in the Constitution. This in turn paved the way for both a hearing of the substantive issues by the High Court and a separate but similar constitutional challenge to Section 377A by gay couple Lim Meng Suang and Kenneth Chee Mun-Leon. Arguments based on liberty and equal protection were rejected by Loh J (sitting in the Singaporean High Court) first in *Lim Meng Suang v. Attorney-General*²²⁰ and subsequently *Tan Eng Hong v. Attorney-General*.²²¹ Both judgments were upheld by the Court of Appeal in a joint hearing.²²²

B. *Article 12(1) and the Legitimacy of a Statutory Object*

Article 12(1) of the Singapore Constitution provides: "All persons are equal before the law and entitled to equal protection of the law." To the

POLITICS IN THE UNITED STATES AND CANADA 70 (2005).

²¹⁸ *Tan Eng Hong v. Attorney-General*, [2012] 4 SLR 476, 86.

²¹⁹ See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

²²⁰ *Lim Meng Suang v. Attorney-General*, [2013] 3 SLR 118.

²²¹ *Tan Eng Hong v. Attorney-General*, [2013] SGHC 199.

²²² *Lim Meng Suang v. Attorney-General*, [2014] SGCA 5.

extent that Article 12(1) embodies formal rather than substantive equality, a differentiating measure prescribed by legislation is deemed compliant with Article 12(1) if “the classification was founded on an intelligible differentia” and “the differentia bore a rational relation to the object sought to be achieved by the law in question.”²²³ The intelligible differentia limb demands a “consistent means of identifying the persons discriminated against, for example, gender, age, race”²²⁴ and is a relatively easy hurdle to surmount.²²⁵

The second limb of the Article 12(1) test examines the degree of coincidence between the classification and the statutory object. Notwithstanding the near identical wording of Article 12(1) and the Equal Protection Clause of the U.S. Constitution,²²⁶ the second limb of the Article 12(1) test exhibits none of the granular calibration characteristic of U.S. equal protection jurisprudence. Whereas an intermediate level of scrutiny applies where the U.S. Government has invoked “quasi-suspect” classifications such as sex²²⁷ and a strict standard applies where classifications offend fundamental rights in the Constitution or results from “prejudice against discrete and insular minorities,”²²⁸ Art 12(1) has been judicially interpreted to embody a single standard of rationality. This merely requires that the “prescribed classification...broadly fit the object of the law”²²⁹ and entails toleration of under and over-inclusiveness in the legislature’s classifications. Although criticized as rendering judicial scrutiny virtually non-existent in fact,²³⁰ the low threshold of rationality has been justified by considerations of relative institutional expertise and democratic credentials.²³¹ Indeed, in the recent case of *Jeyaretnam Kenneth*

²²³ Tan Eng Hong v. Attorney-General, [2012] SGCA 45, 124.

²²⁴ Taw Cheng Kong v. Public Prosecutor, [1998] 1 SLR 943, 958.

²²⁵ Lee writes that it is “quite hard to think of a truly unintelligible differentia, but perhaps physical attractiveness might be an example.” Jack Tsen-Ta Lee, *Equality and Singapore’s First Constitutional Challenges to the Criminalization of Male Homosexual Conduct*, 16 ASIA-PAC. J. ON HUM. RTS. & L. 150 (2015).

²²⁶ Section 1 of the 14th Amendment to the U.S. Constitution provides that “No State shall...deny to any person within its jurisdiction the equal protection of the laws.”

²²⁷ See *Craig v. Boren* 429 U.S. 190 (1976). The intermediate level of scrutiny demands that the challenged law furthers an important government interest and does so by means that are substantially related to that interest. It applies where “quasi-suspect” classifications such as gender or legitimacy of birth are at issue.

²²⁸ *United States v. Carolene Products*, 304 U.S. 144 (1938).

²²⁹ *Lim Meng Suang v. Attorney-General*, [2013] 3 SLR 118, 96.

²³⁰ Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: Constitutional Adjudication and the Promotion of Human Rights: A Model for a Newer Equal Protection*, 15 HARV. C.R.-C.L. REV. 1 (1972).

²³¹ See Lord Irvine, *Judges and Decision Makers: The Theory and Practice of*

Andrew v. Attorney-General, the Singaporean Court of Appeal endorsed a “green-light” model of administrative law which prioritizes encouraging good administrative practices over stopping bad ones.²³² This Article proceeds independently of calls for more intense scrutiny of legislation; it interrogates the compatibility of Section 377A with Article 12(1) taking rationality as prevailing law.

Applying the framework set out, both the Singaporean High Court and Court of Appeal have deemed Section 377A compliant with Article 12(1). The application of the intelligible differentia limb is uncontroversial – Section 377A clearly targets homosexual or bisexual males who perform acts of “gross indecency” with other men to the exclusion of others. Determining the object of Section 377A was more contentious, with both courts having to trace the origins of Section 377A as well as grapple with difficult questions concerning the permissible range of materials to survey²³³ and the potential for legislative object to evolve.²³⁴ However, once the purpose underlying Section 377A was determined to be the criminalization of “male homosexual conduct,”²³⁵ it followed that there was “complete coincidence” between the differentia and the legislative object.²³⁶

The circularity that plagues this analysis is immediately apparent. Ong draws a helpful analogy to the intention-motive distinction in the criminal law context; if legislative object is equated with the intended legal effects of a statute, rather than the motives animating its promulgation, then it will “invariably relate rationally to the differentia.”²³⁷ Professor Tribe puts the point in another way. He correctly notes that it would be “if the means chosen burdens one group and benefits another, then the means perfectly fit the end of burdening just those whom the law disadvantages and benefitting just those whom it assists.”²³⁸ Consider a law that forbids women from driving. It is clear that only women fall within this legal net, thereby satisfying the intelligible differentia test. Further, and applying the logic of *Lim Meng Suang*, if the object of the law is to prevent women from driving, then there is again “complete coincidence” between the differentia and the object, suggesting that the law passes constitutional muster. This simple

Wednesbury Review, Public Law 59 (1996).

²³² Jeyaretnam Kenneth Andrew v. Attorney-General, [2013] SGCA 56, 48.

²³³ Lim Meng Suang v. Attorney-General, [2013] 3 SLR 118, 72-88.

²³⁴ Lim Meng Suang v. Attorney-General, [2014] SGCA 53, 116-52.

²³⁵ Lim Meng Suang v. Attorney-General, [2013] 3 SLR 118, 67, affirmed by Lim Meng Suang v. Attorney-General, [2014] SGCA 53, 116-52.

²³⁶ Lim Meng Suang v. Attorney-General, [2014] SGCA 53, 153.

²³⁷ Benjamin Joshua Ong, *New Approaches to the Constitutional Guarantee of Equality before the Law*, 28 SING. ACAD. L.J. 320 (2016); *Lim Meng Suang v. Attorney-General*, [2013] 3 SLR 118, 114.

²³⁸ LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, Volume 1 (1978).

example illustrates the weakness of the basic test beyond the categories of “religion, race, descent or place of birth,” which are specifically protected by Article 12(2) of the Singapore Constitution.²³⁹

Both the High Court and Court of Appeal were keenly aware of this problem and the consequent need for an additional filter that “would reserve to the courts a real power to identify and strike down the most objectionable laws.”²⁴⁰ The High Court held that an independent assessment of the legitimacy of legislative motive was justified, drawing upon the U.S. case of *Takahashi v. Fish & Game Commission* where a Californian law prohibiting the issuance of commercial fishing licenses to Japanese aliens was at issue.²⁴¹ On the two-pronged analysis posited earlier, the legislation “should have been upheld” – its purpose of “protect[ing] Californian citizens engaged in commercial fishing from competition from Japanese aliens” was completely coincident with the targeting of Japanese aliens.²⁴² The fact that it was nevertheless struck down by the U.S. Supreme Court was therefore interpreted by Loh J to stand for the broader proposition that the object of the legislation must itself be legitimate.²⁴³ Though Loh J’s conclusion accurately reflects prevailing U.S. law, it is worth noting that “traditional articulations of the rational basis test [by the U.S. courts] referred to the purposes of statutes without mentioning legitimacy.”²⁴⁴ For instance, in the seminal case of *Railway Express Agency, Inc. v. New York*, the Supreme Court simply held that a classification must have “relation to the purpose for which it is made” without reference to notions of legitimacy.²⁴⁵ It was only in subsequent cases that the Supreme Court firmly established that the judicial task did entail scrutinizing the legitimacy of government purposes, describing its task as determining whether the Texas system of funding public education bore “some rational relationship to a legitimate state purpose” in *San Antonio Independent School District v. Rodriguez*.²⁴⁶ To the extent that the import of legitimacy is itself a judicial

²³⁹ Article 12(2) of the Singapore Constitution continues – “Except as expressly authorised by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law...”

²⁴⁰ Benjamin Joshua Ong, *New Approaches to the Constitutional Guarantee of Equality before the Law*, 28 SING. ACAD. L.J. 320, 321 (2016).

²⁴¹ *Takahashi v. Fish & Game Commissioner*, 334 U.S. 410 (1948). See *Lim Meng Suang v. Attorney-General*, [2013] 3 SLR 118, 115.

²⁴² *Lim Meng Suang v. Attorney-General*, [2013] 3 SLR 118, 115.

²⁴³ *Id.* Loh J suggests that the object of the law in *Takahashi* was illegitimate since it “discriminated against the targeted group based on racial grounds.”

²⁴⁴ Don D. Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 83 (1993).

²⁴⁵ *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949).

²⁴⁶ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). See

development, the U.S. experience holds comparative value for Singaporean courts.

For the Court of Appeal however, assessing the legitimacy of legislative purpose was itself illegitimate. It preferred expanding the notion of “intelligible differentia” such that a distinction has to be both understandable and justifiable.²⁴⁷ Phang JA reasoned that an independent test of legitimacy would “confer on the court a license to usurp the legislative function in the course of becoming...a ‘mini-legislature,’”²⁴⁸ echoing academic criticism of *San Antonio Independent School District v. Rodriguez*. Bice, for instance, argued that rationality analysis was silent on permissible goals,²⁴⁹ alluding to Westen’s “empty idea of equality.”²⁵⁰ Gunther suggested that such a development risked judicial overreach.²⁵¹ It is difficult, however, to locate the Court of Appeal’s underlying normative objection to Loh J’s suggestion. On one level, Phang JA draws a distinction between interpreting and amending a statute. He suggests that judicial annulment of legislation on the basis of an illegitimate purpose encroaches on the legislature’s exclusive power to amend its legislation.²⁵² With respect, this is unconvincing. While it is surely correct that literal amendment falls within the province of the legislature, the distinction between interpretation and amendment is blurred. The very process of interpretation imbues and alters the substantive content of a statute. Consider the interpretation of Schedule 1 paragraph 2 of the Rent Act 1977, which provided survivorship rights to “a person...living with the original tenant as his or her wife or husband” in the British case *Ghaidan v. Godin-Mendoza*.²⁵³ In *Fitzpatrick v. Sterling Housing Ass’n Ltd*, the British Court of Appeal adopted an ordinary reading of this paragraph, holding that survivorship rights were limited to a cohabiting heterosexual couple.²⁵⁴ The House of Lords in *Ghaidan* disagreed with this. In line with its duty to interpret legislation compatibly with rights enshrined in the European

also *Lawrence v. Texas*, 539 U.S. 558 (2003) (O’Connor, J., concurring).

²⁴⁷ *Lim Meng Suang v. Attorney-General*, [2014] SGCA 53, 84.

²⁴⁸ *Id.* at 82.

²⁴⁹ Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980).

²⁵⁰ Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

²⁵¹ Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

²⁵² *Lim Meng Suang v. Attorney-General*, [2014] SGCA 53, 82 – 83.

²⁵³ *Ghaidan v. Godin-Mendoza*, 2 A.C. 557 (2004).

²⁵⁴ This interpretation was adopted by the Court of Appeal in *Fitzpatrick v. Sterling Housing Association*, 2 W.L.R. 225 (1998).

Convention on Human Rights “so far as it is possible to do so”,²⁵⁵ it held that protection extended to cohabiting same-sex couples. It is uncontroversial that interpretation, rather than literal amendment, was at issue in *Ghaidan*. Yet the substantive effect of the House of Lords’ interpretative choice, namely to broaden the ambit of the Rent Act 1977, mirrors the outcome of legislative amendment. Further, if invalidating an unconstitutional statute amounts to amending or modifying it, Phang JA’s logic would appear to preclude any form of judicial review.

On a deeper level, Phang JA appears concerned that the judiciary will strike down legislation “based on its own personal preference or fiat.”²⁵⁶ This view gains modest support from the wide range of legislative objectives that U.S. courts have declared to be illegitimate. In this respect, Welch notes that the granting of contracts for political reasons, the enforcement of a view of the proper fashion for personal dress and the regulation of the legal education of students in other states²⁵⁷ have all fallen afoul of the legitimacy hurdle in the U.S., underlining the inherent subjectivity of “legitimacy.” While Phang JA’s concern is understandable in view of the judicial tenets of neutrality and reason, it ultimately overlooks the discipline imparted by a principled model of assessing legitimacy. Such a model will likely incorporate a burden of proof favorable to the legislature guided by the presumption of constitutionality and considerations of relative institutional expertise. In this vein, Loh J set the threshold for legitimacy of purpose at a “Wednesbury unreasonableness” level.²⁵⁸ Moreover, the inquiry can be qualified to accommodate the difficulty of ascertaining legislative purpose and the elasticity with which legislative purpose may be framed. For example, in the absence of a suspect classification, the U.S., courts do not narrowly consider whether the actual, intended purpose is legitimate but examine if “there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”²⁵⁹ In other words, “the identified purpose need not have been the goal of the legislation as long as it could have been its goal.”²⁶⁰ Similar nuanced presumptions can and should be adopted in Singapore to guard against arbitrariness.

²⁵⁵ Human Rights Act 1998, c. 42, § 3 (Eng.).

²⁵⁶ *Lim Meng Suang v. Attorney-General*, [2014] SGCA 53, 81.

²⁵⁷ Don D. Welch, *Legitimate Government Purposes and State Enforcement of Morality*, U. ILL. L. REV. 67, 77-78 (1993).

²⁵⁸ *Lim Meng Suang v. Attorney-General*, [2013] 3 SLR 118, 116.

²⁵⁹ *Heller v. Doe*, 509 U.S. 312, 320 (1993).

²⁶⁰ Don D. Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 82 (1993). Though note that the principle is sometimes applied inconsistently. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

Judged in the whole then, the objections raised by Phang JA to Loh J's test do not hold water. The question remains whether the Court of Appeal's preferred solution of expanding the notion of "intelligible differentia" to examine the legitimacy of the classification is a satisfactory substitute. The Court of Appeal answered this in the affirmative, suggesting that its formulation is robust enough to invalidate a law prohibiting all women from driving since the "differentia embodied in that law might, arguably, be illogical and/or incoherent."²⁶¹ With respect, it is submitted that Loh J's test is doctrinally preferable. The fatal flaw in the Court of Appeal's solution is that the justifiability of a classification does not exist in the abstract. Divorced of other considerations, classifications are entirely neutral. The Court of Appeal's conclusion that the differentia embodied by a law prohibiting all women from driving is illogical only makes sense when the purpose of the legislation is brought to bear upon the classification. Yet once this is done, there is no daylight between an expanded notion of "intelligible differentia" and Loh J's test which has the merit of conceptual coherence. Further, Ong notes that the "Court of Appeal's test is potentially equally or even more far-reaching."²⁶² It is simply unclear when the simple application of different laws to different categories can be "illogical and/or incoherent."²⁶³

Two thoughts serve to contextualize and conclude this section. One, "the rationality standard would be meaningless without a requirement of a legitimate public purpose because every means is perfectly related to some purpose."²⁶⁴ Two, once the assessment of legitimacy is layered with burdens of proof and nuanced presumptions, objections based on arbitrariness and judicial overreach dissipate. Indeed, the concern in the U.S. has been less with judicial overreach than judicial under-reach. As Zimmerman notes, "Supreme Court precedent is replete with strong language suggesting that it is almost entirely impossible for a plaintiff to prevail on equal protection grounds under the rational basis standard."²⁶⁵

C. *The Legitimacy of Morality*

On the assumption that the legitimacy of a legislative object can be assessed on a "Wednesbury" standard of reasonableness, does Section 377A

²⁶¹ Lim Meng Suang v. Attorney-General, [2014] SGCA 53, 114.

²⁶² Benjamin Joshua Ong, *New Approaches to the Constitutional Guarantee of Equality before the Law*, 28 SING. ACAD. L.J. 320, 340 (2016).

²⁶³ Lim Meng Suang v. Attorney-General, [2014] SGCA 53, 62.

²⁶⁴ Don D. Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 82 (1993).

²⁶⁵ Shoshana Zimmerman, *Pushing the Boundaries?: Equal Protection, Rational Basis, And Rational Decision Making by District Courts in Cases Challenging Legislative Classifications on the Basis of Sexual Orientation*, 21 S. CAL. INTERDISC. L.J. 727, 733 (2011).

pass constitutional muster? Both the High Court and Court of Appeal ascertained the motive underlying Section 377A to be the bare enforcement of “societal morality.”²⁶⁶ Whether a State can weaponize the law to enforce solely moral judgments has been the subject of prolonged and intense debate.²⁶⁷ As a comprehensive account of the debate, spanning issues such as the nature of harm and the yardsticks of morality,²⁶⁸ would be a mammoth endeavor, this section provides a brief overview of the contrasting academic and judicial perspectives. This brief survey distills the key arguments and throws the polarization of learned opinion into sharp relief. It nevertheless fails to elucidate a clear solution to this seemingly intractable conundrum. Accordingly, this section turns to first principles, suggesting that the counter-majoritarian nature of equal protection demands that naked morality cannot legitimize differential legal burdens.

The modern academic debate aptly arose in response to the Wolfenden Report’s recommendation to decriminalize homosexual sex. For Devlin, this was an unjustified and unnecessary development. Devlin’s central thesis was that the criminal law was not solely for the protection of individual interests but also the “institutions and the community of ideas, political and moral, without which people cannot live together.”²⁶⁹ The behavior of citizens can therefore be legitimately regulated without demonstrating separate and tangible harm. Hart attacked Devlin’s claim that society had a right to enforce morality as an aspect of its right to preserve itself on several libertarian bases. He invoked Mill’s “harm principle” that the “only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others.”²⁷⁰ This was coupled with a rich notion of individualism that “respect[ed] the autonomy and self-fulfillment of the individual.”²⁷¹ According to Hart, Devlin’s brand of moral populism failed to distinguish “the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power...must never be resisted.”²⁷² It risked justifying “legal enforcement

²⁶⁶ *Lim Meng Suang v. Attorney-General*, [2014] SGCA 53, 138 (2014); *Lim Meng Suang v. Attorney-General*, [2013] 3 SLR 118, 117.

²⁶⁷ The modern debate focuses on the exchange between Patrick Devlin and Herbert Hart. However, the same ideas were ventilated in the earlier works of John Stuart Mill and James Fitzjames Stephen. See JOHN S. MILL, *ON LIBERTY* (1869); JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (1873).

²⁶⁸ See Peter Cane, *Taking Law Seriously: Starting Points of the Hart/Devlin Debate*, 10 J. ETHICS 21 (2006).

²⁶⁹ PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 179-81 (1965).

²⁷⁰ JOHN S. MILL, *ON LIBERTY* (1869).

²⁷¹ JASON PIERCESON, *COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA* (2005).

²⁷² Hart appreciated the “suppression of sexual impulses [unlike the resistance to

of moral values, regardless of their content, simply because they were widely held.”²⁷³

The same disagreement characterizes equal protection jurisprudence in Singapore and the U.S. In Singapore, the judiciary has aligned itself with Devlin. Though Loh J’s views are slightly opaque, he opines that judicial review of legislation should be “tilted in favor of persons who are elected and entrusted with the task of representing the people’s interests” where “issues of social morality are concerned,”²⁷⁴ concluding that the enforcement of societal morality is legitimate. In a similar vein, the Court of Appeal saw “much force” in the argument that “the legislature is an elected body and...has the mandate from the electorate to promulgate laws which reflect as well as preserve societal morality.”²⁷⁵ The picture in the U.S. is more mixed as “support exists in Supreme Court jurisprudence for both constitutional populism and the contrary position of constitutional restraint.”²⁷⁶ Support for the former can be gleaned from *Barnes v. Glen Theatre, Inc.*, where Chief Justice Rehnquist defined the police power of the states as “the authority to provide for the public health, safety, and morals”²⁷⁷ and relied upon this power to uphold an Indiana statute that required dancers to wear at least pasties and a G-string. Justice White’s well-known proclamation that the law “is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy”²⁷⁸ in *Bowers v. Hardwick* falls into the same camp. On the other hand, Justice Blackmun’s dissent in *Bowers* is clearly of the Hartian tradition. He demanded that the state “show an actual connection between the forbidden acts and the ill effects it seeks to prevent.”²⁷⁹ This was echoed by Justice O’Connor’s determination that “moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause.”²⁸⁰

While the brief survey of academic and judicial opinion highlights the degree of polarization within learned circles on the permissibility of

commit ordinary crime] generally is, something which affects the development or balance of the individual’s emotional life.” See H. L. A. HART, *LAW, LIBERTY AND MORALITY* 22 (1963) at 79.

²⁷³ *Id.* at 23.

²⁷⁴ *Lim Meng Suang v. Attorney-General*, [2013] 3 SLR 118, 110.

²⁷⁵ *Lim Meng Suang v. Attorney-General*, [2014] SGCA 53, 171.

²⁷⁶ Don D. Welch, *Legitimate Government Purposes and State Enforcement of Morality*, U. ILL. L. REV. 67, 87 (1993).

²⁷⁷ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

²⁷⁸ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

²⁷⁹ *Bowers v. Hardwick*, 478 U.S. 186, 209 n.3. (1986).

²⁸⁰ *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O’Connor, J., concurring).

morals legislation, it appears to be of limited utility in resolving the question. The arguments proffered by Devlin and Hart intertwine with subjective political views on the desirable width of State powers, perhaps explaining why both judicial camps appear to assert the (im)permissibility of enforcing public morality in a conclusory, question-begging manner.

Set against this backdrop, it is suggested that guidance can be gleaned from first principles, namely the *raison d'être* and nature of equal protection. Taking each in turn, equal protection is best understood as a principle that places a prima facie burden on the legislature to justify its differentiating measures. It does so in recognition of the injustice that accompanies the arbitrary treatment of similarly situated subjects.²⁸¹ This is coupled with its status as a counter-majoritarian constitutional right which, by definition, removes naked majoritarian preference from the scope of permissible State justifications. Indeed, if an acceptable reason for a differentiating measure is that the majority desires such discrimination, the justificatory burden imposed by and the protective function of equal protection would be hollowed of all content. This instinct arguably animates Justice O'Connor's conclusion that "moral disapproval...like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review."²⁸² It also underlies the heightened standard of scrutiny where quasi-suspect and suspect classifications are at issue in the U.S. and the special protections afforded to "religion, race, descent or place of birth" in Article 12(2) of the Singapore Constitution. In the absence of specific protection, Devlin's stance compels the uncomfortable conclusion that laws reflecting racial or gender discrimination are to be upheld under the equal protection clause, assuming that such views are held amongst the majority of a populace. This cannot be correct.

The potential breadth of the position outlined may cause concern. It may be objected that the counter-majoritarian element of equal protection relied upon may open the floodgates by implying that every minority group, however defined, has a strong constitutional claim if they are treated unfavorably as a class. This concern is overstated. For one, it should be borne in mind that equal protection analysis is only relevant when social groups are treated differently in law. It leaves untouched the operation of morality at a purely sociological level. Moreover, the rejection of popular morality as a legitimate legislative object does not cripple the legislature from enacting justified differentiating measures where public morality is allied with additional justifications such as public health or safety. Yet should these twin criteria be met, as where legislation prohibits all blue-eyed persons from receiving State benefits because popular morality characterizes such persons as lazy, constitutional challenge to a

²⁸¹ See H.L.A. HART, *THE CONCEPT OF LAW* 206 (2d ed. 1997). Hart argues that "we have, in the bare notion of applying a general rule of law, the germ at least of justice."

²⁸² *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring).

discriminating legislation should remain open to every clearly defined minority group.

At its core, equal protection forbids a legislature from “creating a classification of persons undertaken for its own sake.”²⁸³ If equal protection is to mean anything, doing harm to a politically unpopular group is simply not a permissible basis for legislation.²⁸⁴ Dworkin eloquently puts the point in another way. Commenting on Devlin’s position, he opined that “what is shocking and wrong is not his idea that the community’s morality counts, but his idea of what counts as the community’s morality.”²⁸⁵ Dworkin’s point is that “we expect moral judgments to be supported by...reasons that do not simply represent prejudices, rationalizations, matters or personal aversion or taste, or arbitrary choices.”²⁸⁶ Equal protection demands equally robust reasoning and suggests there is ample ground for the Singapore judiciary to declare Section 377A unconstitutional.

D. *Equal Protection vis-à-vis Personal Liberty*

In the interest of brevity, this Article has focused on equal protection to the exclusion of “personal liberty” as codified in Article 9 of the Singapore Constitution. There is nevertheless value in considering whether judicial invalidation of Section 377A through the muscular conception of equal protection posited is preferable to an analysis premised on “personal liberty.” It is suggested that this is indeed the case.

As noted in Part II, rich notions of “personal liberty” and privacy grate against the communitarian tradition in Singapore. To this it can be added that the contours of “personal liberty” are nebulous. In the U.S., for example, “liberty” has been the lodestar for the judicial development of highly controversial rights to abortion²⁸⁷ and same-sex marriage.²⁸⁸ The narrower equal protection analysis avoids the difficult question of scope.

Equal protection has the additional merit of addressing the harms engendered by Section 377A in a more direct and intuitive manner. In contrast to the libertarian culture of the U.S., personal freedoms are expected to be sacrificed at the altar of the common good when the two come into conflict in Singapore. The criminalization of consensual, private

²⁸³ *Id.*

²⁸⁴ Don D. Welch, *Legitimate Government Purposes and State Enforcement of Morality*, U. ILL. L. REV. 67, 94 (1993).

²⁸⁵ Ronald M. Dworkin, *Lord Devlin and the Enforcement of Morals* (1966) (Yale Law School Faculty Scholarship Series, Paper 3611).

²⁸⁶ Don D. Welch, *Legitimate Government Purposes and State Enforcement of Morality*, U. ILL. L. REV. 67, 95 (1993).

²⁸⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁸⁸ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

homosexual conduct is accordingly understood less in terms of unwarranted governmental intrusion into the bedroom than unequal treatment of homosexuals. Finally, it appears that a significant drawback of Justice O'Connor's equal protection analysis in *Lawrence v. Texas* is of limited relevance to the Singaporean context. As Leslie explains, Justice O'Connor's approach "would have allowed the nine gender-neutral sodomy laws [in the U.S.] to survive because gender-neutral laws do not facially discriminate against gay individuals."²⁸⁹ In a perverse sense then, the legislature's decision to repeal Section 377 in 2007 liberates equal protection analysis in Singapore. It also renders the risk of recriminalizing heterosexual sodomy low.

E. *Judicial Annulment vis-à-vis Legislative Repeal*

A comparison of judicial annulment with legislative repeal is apposite to draw the threads of Parts II and III together. A popular view is that the legislature, rather than the judiciary, is the more appropriate forum to repeal Section 377A. In *Lim Meng Suang*, Loh J concluded his judgment by observing that "defining moral issues need time to evolve and are best left to the legislature to resolve."²⁹⁰ The Court of Appeal similarly alluded to the benefits of legislative repeal, noting that the legislature could more effectively deal with "extra-legal arguments" relating to the nature of harm, public health and the immutability of homosexuality.²⁹¹ It added that the legislature can "effect solutions which are clearly beyond the powers of the court", for instance by "delet[ing] the words 'or private' in [Section] 377A."²⁹² These are two distinct arguments that should be teased apart. The first is best understood as an argument based on relative institutional expertise and democratic credentials – the legislature enjoys a panoramic view of competing interests as well as a democratic mandate that better equip it to deal with polycentric issues. The second relates to the remedial ability of the legislature. The legislature is able to craft tailored and innovative responses not open to the judiciary. Moreover, judicial decision-making is "gradual and ad hoc with courts as passive players relying on litigation brought to them."²⁹³ This is compounded by the fact that "the people, unlike judges, need not carry things to their logical conclusion."²⁹⁴

²⁸⁹ Christopher R. Leslie, *Lawrence v. Texas as the Perfect Storm*, 38 U.C. DAVIS L. REV. 509, 527 (2004).

²⁹⁰ *Lim Meng Suang v. Attorney-General*, [2013] 3 SLR 118, 142.

²⁹¹ *Lim Meng Suang v. Attorney-General*, [2014] SGCA 53, 155-80.

²⁹² *Id.* at 180.

²⁹³ JASON PIERCESON, *COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA* (2005).

²⁹⁴ *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J. dissenting).

This Article justifies the opposing view from two perspectives. From a pragmatic point of view, clear judicial repeal has generally resulted in much less political controversy.²⁹⁵ In the U.S., the venomous political pushback to legislative repeal can be contrasted with more muted responses to judicial repeal. In Rhode Island for instance, opponents of legislative repeal “viewed the issue as diminished morality and cast the repeal law as the equivalent of changing Providence’s name to Sodom.”²⁹⁶ In Arizona, conservative leaders mounted an intense grassroots campaign and exerted intense pressure “on Governor Hull to veto the repeal.”²⁹⁷ One possible explanation is that purely legislative repeal “expand[s] the scope of the conflict,”²⁹⁸ a corollary of the wider range of arguments that can be canvassed in the legislative forum. Account should also be taken of the normative authority of the judicial institution. Courts are viewed as fair, neutral and logical arbiters of disagreements. Their decisions are accorded a degree of respect – reflected in the general commitment to obey the law – regardless of the substantive merits of a decision. From a doctrinal perspective, it is conceded that issues requiring detailed and nuanced regulation are better addressed by the legislature. For instance, it would be implausible to maintain that generalist judges should promulgate a governing tax code for the country. Yet the issue at hand, involving the decriminalization of particular conduct, is not of this variety. The judicial exercise “ought not to be seen as an incursion into the executive and legislative domains,” but as fulfilling the court’s constitutional task of ensuring that the Government has “struck an appropriate balance between protecting fundamental liberties and pursuing other public interests.”²⁹⁹ Set against the fusion of the executive and the legislature, the Constitution gives the judiciary a specific and wholly democratic mandate to defend these liberties independent of majoritarian instincts. This task of ensuring that the branches of Government act within legal limits is in fact uniquely suited to the judiciary.

IV. CONCLUSION

In *Lim Meng Suang*, Loh J commented that Singapore is a “society in the midst of change,”³⁰⁰ referring to gradual shifts in public opinion as

²⁹⁵ JASON PIERCESON, *COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA* (2005).

²⁹⁶ *Id.* at 97.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ Jack Tsen-Ta Lee, *The Limits of Liberty: The Crime of Male Same-sex Conduct and the Rights to Life and Personal Liberty in Singapore*, 46(1) H.K. L. J. 49 (2016).

³⁰⁰ *Lim Meng Suang v. Attorney-General*, [2013] 3 SLR 118, 139.

debate about the appropriateness of criminalizing private, consensual homosexual conduct becomes more robust. Loh J's statement can, however, be interpreted in a second manner, namely that Singapore is a country coming to terms with its own stance on criminalizing homosexual conduct amidst competing normative developments elsewhere in the world. Whereas the U.S. and Western Europe have generally taken the further step of legalizing same-sex marriage and adoption, "a number of former British colonies, such as Botswana, Malaysia, Sri Lanka, Sudan, Tanzania, Yemen and the Solomon Islands, have criminalized female homosexual conduct while retaining their respective equivalents of [Section] 377A."³⁰¹ Yet a recognition that the retention of Section 377A is untenable involves no contradiction with the propositions that "Singapore is an independent nation with its own unique history" or "what is adopted in other parts of the world may not be suitable for adoption in Singapore."³⁰² Decriminalizing Section 377A does not amount to uncritical adherence to Western ideals but upholding Singapore's own commitment to equal protection.

This Article has outlined two possible paths to decriminalization – galvanizing public opinion as a stepping stone towards legislative repeal and constitutional litigation. It has expressed a preference for judicial annulment premised on equal protection analysis, suggesting that this can be viewed as a reconceptualization of Singapore's constitutional architecture. In implementing greater checks and balances, the more muscular Article 12 inquiry envisages the three branches of Government and the wider public as engaged in a collaborative, dialogic endeavor. Not only do the court's rulings provide greater checks and balances, they precipitate a dialogue between the various stakeholders in the hope of achieving equilibrium.³⁰³

To conclude, it is apt to bear in mind Justice Kennedy's reminder in *Obergefell v. Hodges* that "outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."³⁰⁴ To the extent that the "regulation of same-sex desire...is one of overlapping and mutually reinforcing prohibitions,"³⁰⁵ the decriminalization of Section 377A marks the start, and not the end, of progress.

³⁰¹ *Id.* at 133.

³⁰² *Id.*

³⁰³ Jack Tsen-Ta Lee, *Equality and Singapore's First Constitutional Challenges to the Criminalization of Male Homosexual Conduct*, 16 ASIA-PAC. J. ON HUM. RTS. & L. 1-2, 150 (2015).

³⁰⁴ *Obergefell v. Hodges*, 135 S.Ct. 2584, 2600 (2015).

³⁰⁵ Nancy J. Knauer, *Lawrence v. Texas: When Profound and Deep Convictions Collide with Liberty Interests*, 10 CARDOZO WOMEN'S L.J. 325, 329 (2010).