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GAY LIBERATION IN THE ILLIBERAL STATE

Stewart L. Chang[†]

Abstract: A comparative analysis of incrementalist approaches to gay rights as they are deployed in the United States and Singapore demonstrates that seeking gay rights in a full democracy is actually no better than seeking them in an authoritarian regime. Incrementalism ultimately promotes sexual normativity by dividing the gay community into “good gays,” who deserve equal protections, and “bad queers,” who are further marginalized. Incrementalism in the United States began with decriminalization of sodomy and terminated with the recognition of gay marriage but did so by imagining gay sexuality within the context of committed relationships. The gay rights movement in Singapore is currently challenging the constitutionality of the country’s anti-sodomy statute, but has also encountered problems with bifurcating good gays from bad queers. Singaporean gay rights advocacy has adopted an approach that looks similar to incrementalism in the United States, but is actually adapted as a strategy of survival within the authoritarian structures of its illiberal democratic government. Dissecting these similarities shows how gay rights in the United States has acquiesced to a similar, but more hidden, disciplinary regime of social control that venerates marriage as an imagined ideal and suppresses other forms of sexual expression. The recent decision by the Singapore judiciary to reject the good gay and bad queer dichotomy and treat the two similarly, however, has forced gay rights advocacy to adapt and imagine a different and more unified strategy than in the United States.

I. INTRODUCTION

Although the decisions in *United States v. Windsor*¹ and *Hollingsworth v. Perry*² were generally regarded as victories for equal gay rights in the United States, some commentators have met the decisions with more guarded optimism.³ In both cases, the United States Supreme Court

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¹ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

² *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

³ See Daniel J. Crooks III, *Toward “Liberty”: How the Marriage of Substantive Due Process and Equal Protection in Lawrence and Windsor Sets the Stage for the Inevitable Loving of Our Time*, 8 CHARLESTON L. REV. 223, 224–25 (2013) (“Reasonable minds disagree over what exact legal basis or bases Justice Kennedy employed to arrive at the result in *Windsor*, with some law professors declaring the *Windsor* opinion to be a clarification of ‘rational basis with bite’; others focused more on Justice Kennedy’s employment of federalism principles; and still others convinced that, without explicitly saying as much, Justice Kennedy relied most heavily on substantive due process arguments.”); Darren Lenard Hutchinson, *“Not Without Political Power”: Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 977 (2014) (“Because the Court issued minimalist rulings in *Hollingsworth* and *Windsor*,

comes short of granting sexual orientation the protections of heightened scrutiny as a matter of equal protection, for which many hoped.⁴ However, some interpreters have read *Windsor* and *Hollingsworth* as reflecting a positive incremental shift in public attitudes towards gays in the United States.⁵ The question remains, though, whether such incremental shifts towards a final goal of equality, as represented in the marriage equality movement in the United States, is completely positive. Rather, incrementalism could represent a culmination of the heteronormative consequences feared by some gay rights scholars following *Lawrence v. Texas*.⁶ In striking down the Texas statute on substantive due process grounds⁷ rather than prohibiting government sanction of homosexual

the doctrinal status of sexual orientation in equal protection case law remains unsettled and undertheorized.”); see also Susannah W. Pollvogt, *Windsor, Animus, and the Future of Equality*, 113 COLUM. L. REV. SIDEBAR 204 (2013).

⁴ See William D. Araiza, *After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367 (2014); see also Heather K. Gerken, *Larry and Lawrence*, 42 TULSA L. REV. 843, 849 (2007) (“I believe that equal protection is the right frame for most future questions [after *Lawrence*]—not the formal and cramped sort of equal protection analysis we see in Justice O’Connor’s opinion, but a robust form of equal protection that recognizes the possibility of stigma even when people are nominally being treated the same.”); Hutchinson, *supra* note 3; Adam Lamparello, *Why Justice Kennedy’s Opinion in Windsor Shortchanged Same-Sex Couples*, 46 CONN. L. REV. ONLINE 27 (2014), available at http://connecticutlawreview.org/files/2014/01/Lamparello.JusticeKennedysOpinioninWindsor.Final_.pdf.

⁵ See Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative that Gays and Lesbians are Harmful to Children*, 21 DUKE J. GENDER L. & POL’Y 125 (2013); Maxwell L. Stearns, *Grains of Sand or Butterfly Effect: Standing, the Legitimacy of Precedent, and Reflections on Hollingsworth and Windsor*, 65 ALA. L. REV. 349, 397 (2013); see also Crooks, *supra* note 3.

⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003); see NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 83-109 (2008); David B. Cruz, *Spinning Lawrence, or Lawrence v. Texas and the Promotion of Heterosexuality*, 11 WIDENER L. REV. 249 (2005); Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535 (1993); Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615 (2004); see also Marc Spindelman, *Homosexuality’s Horizon*, 54 EMORY L.J. 1361, 1389 (2005) (“[W]hat to many people, including lesbians and gay men and a number of our heterosexual allies, looks like increasingly good news—the movement from *Hardwick*’s anti-gay moral disapproval of homosexuality to *Lawrence*’s reversal of it, along with its own assimilation of homosexuality to a heterosexualized marriage norm, to Goodridge’s recent perfection of the assimilationism—is to others, chiefly those concerned with stopping sexuality’s abuse, a decidedly mixed bag.”).

⁷ *Lawrence*, 539 U.S. at 572 (“[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”); see also Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1148 (2004) (“[T]he *Lawrence* Court took a law that focused on homosexuals alone and used it to strike down laws that banned both homosexual and heterosexual sodomy Instead of relying on a narrow equal protection rationale to strike down laws of the four states that targeted gay sex, the Court dramatically and unexpectedly revived substantive due process to strike down the laws of all thirteen states with sodomy laws.”). But see Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speaking Its Name*, 117 HARV. L. REV. 1893, 1902–16 (2004) (suggesting that the *Lawrence* decision represents a blend of substantive due process and equal protection).

conduct or identity,⁸ the *Lawrence* Court situated gay sex underneath the larger constitutional umbrella of sexual privacy, which until then was characterized by consensual heterosexual sex.⁹ The Court did not guarantee the rights of gay persons to not be discriminated against; instead, it affirmed a broader right to intimacy for all people, but only in certain contexts.¹⁰ The *Lawrence* decision did not state there is nothing wrong with gay sex, but that gay sex is acceptable in the exact same contexts that heterosexual sex is acceptable.¹¹ The Court simply marked the private sphere of consensual sexual relationships, whether heterosexual or gay, as inviolate.¹² In *Lawrence*, Justice Kennedy's contextualization of sex within a "personal bond that is more enduring"¹³ pointed towards a privileging of marriage as the ideal framework for these protections. *Windsor* continued the legacy of *Lawrence* in furthering the right of all individuals to enjoy intimacy in certain contexts, but further venerated and entrenched marriage as the definitive context for intimacy.¹⁴ Writing for the *Windsor* majority, Justice

⁸ See Sonia Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429, 1435 (2006) ("Yet *Lawrence*, by focusing on privacy and liberty, instead, has quietly and subtly reoriented this project along a different and more convergent continuum that emphasizes the need for protection through the lens of autonomy, privacy, and liberty, rather than the trope of expressive identity."); Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1089 (2004) ("By choosing the doctrinal road it did, the Court effectively extended heterosexuality's right to sexual privacy and sexual autonomy to gay men and lesbian women. The question is not whether same-sex sexual expression should be subject to special prohibitions (it should not), but whether heterosexuality's substantively sex-unequal rules should be extended rather than challenged and changed.").

⁹ See *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁰ *Lawrence*, 539 U.S. at 578 ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.").

¹¹ *Id.* at 573–74 ("The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.").

¹² *Id.* at 578 ("Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'" (quoting *Planned Parenthood of Se. Pa.*, 505 U.S. at 874)).

¹³ *Id.* at 567; see Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309, 314 (2005) ("They do so by addressing homosexuality in terms of 'coupled' behavior, rather than specific acts of sodomy, thereby constructing a homosexual identity more parallel to incentivized heterosexual family norms.").

¹⁴ *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013) ("[S]ome States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other Slowly at first and then in rapid course, the laws

Kennedy specifically connected marriage to the “more enduring” bond that he alluded to in *Lawrence*.¹⁵

The progression from *Lawrence* to *Windsor* confirms the prediction of some prominent scholars that the incremental fight for gay rights in the United States begins with decriminalization of anti-sodomy and terminates with the recognition of gay marriage.¹⁶ Yet this road to the legitimization of gay rights also entrenches a hierarchized dichotomy of the “good gay” over the “bad queer,” where the assimilated good gay becomes the figure of acceptable gay identity in mainstream heterosexual society, and the bad queer is further marginalized.¹⁷ *Windsor* essentially affirms the sexually normative sentiment of *Lawrence*, which has now perhaps become difficult to counteract. As the Ninth Circuit ruled in *Perry v. Brown*—the underlying case to *Hollingsworth*—the legitimization of gay marriage is a one-way ratchet, and once realized there is no turning back.¹⁸ Indeed, it is now virtually impossible to go back to *Lawrence* and reconsider the distinctions of treating anti-sodomy as a matter of “we are not being treated equally to heterosexuals” versus “we are not doing anything wrong.”

of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.”)

¹⁵ *Id.* at 2692 (“The States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form ‘but one element in a personal bond that is more enduring.’”) (citing *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)); *see also id.* at 2694 (“The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . . and whose relationship the State has sought to dignify.”).

¹⁶ Jeremiah A. Ho, *Weather Permitting: Incrementalism, Animus, and the Art of Forecasting Marriage Equality After U.S. v. Windsor*, 62 CLEV. ST. L. REV. 1, 7 (2014) (“By consensus, [William] Eskridge, [Yuval] Merin, and [Kees] Waaldijk all prescribe those steps in the following sequence: (1) the decriminalization of consensual same-sex intimacy occurs first; (2) then anti-discrimination against sexual minorities is furthered; and (3) lastly, the relationships of same-sex couples are then legally recognized. Once a state has crossed these three steps, the conditions for marriage equality will then be most evident.”).

¹⁷ *See* CARL STYCHIN, A NATION BY RIGHTS: NATIONAL CULTURES, SEXUAL IDENTITY POLITICS, AND THE DISCOURSE OF RIGHTS 200 (1998) (“[L]esbians and gays seeking rights may embrace the ideal of ‘respectability,’ a construction that then perpetuates a division between ‘good gays’ and (disreputable) ‘bad queers.’”); Jade McGleughlin & Sue Hyde, *Can a Diamond Ever Be Gay?*, 9 STUD. GENDER & SEXUALITY 184, 192 (2008) (“We do not want to be the good gays cast against the ever more marginalized group that chooses (or has no choice about) other ways to live and love.”).

¹⁸ *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012) (“By using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection Clause.”); Eric Berger, *Lawrence’s Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 788 (2013) (“The Ninth Circuit’s reasoning was narrow, relying primarily on *Romer* to hold unconstitutional the revocation of marriage rights in a state that had once offered such rights and still offers domestic partnership. Should the Supreme Court choose to avoid the momentous substantive question of whether the U.S. Constitution categorically forbids states from banning same-sex marriage, it could instead resolve *Perry* on standing grounds.”) (internal citations omitted).

Thus, it is useful to examine a country that is currently at this “*Lawrence* moment” in terms of its own anti-sodomy statute. The Singapore Court of Appeals recently consolidated two cases challenging the constitutionality of its anti-sodomy statute, Section 377A of its Penal Code.¹⁹ The statute reads:

Any male person who, in public or private, commits, or abets 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 punished with imprisonment for a term which may extend to 2 years.²⁰

The two cases, one by a committed gay couple of over 15 years,²¹ and the other by a man arrested for having oral sex in a shopping mall restroom,²² represent not only the nuances of the “we are not being treated equally” and the “we are not doing anything wrong” arguments, but also the two poles of the good gay and bad queer dichotomy. The Singapore Court of Appeal’s decision to treat the two cases together, despite protestations from some gay activists to recognize them separately, illuminates and can potentially subvert the false dichotomy between good gays and bad queers.

The divergent strategies for seeking gay rights in Singapore also illustrate the peculiarities of advocacy in Singapore’s hybridized form of government, which is described by some scholars as an “illiberal democracy” for its adherence to an authoritarian rule of law despite the structural veneer of free elections and an embrace of free market capitalism.²³ Some critics have denounced the illiberal democracy of Singapore as breeding a population disciplined to follow the rules, leading to an incomplete or stunted citizenry when compared to its counterparts in Western democracies.²⁴ Arguably, seeking gay rights in a full democracy is

¹⁹ Selina Lum, *Appeals of Two Section 377A Challenges Will Be Heard Together*, STRAITS TIMES (Oct. 10, 2013), <http://www.straitstimes.com/breaking-news/singapore/story/appeals-two-section-377a-challenges-will-be-heard-together-20131010> (last visited Nov. 15, 2014).

²⁰ Penal Code (Cap 224, 1985 Rev Ed) s 337(A).

²¹ *Lim Meng Suang and Kenneth Chee Mun-Leon v. Attorney General (Lim Meng Suang I)* [2013] SGHC 73, at para. 2.

²² *Tan Eng Hong v. Attorney General (Tan Eng Hong II)* [2013] SGHC 199, at para. 4.

²³ See DANIEL BELL, DAVID BROWN, KANISHKA JAYASURIYA, & DAVID MARTIN JONES, *TOWARD ILLIBERAL DEMOCRACY IN PACIFIC ASIA* (1995); see also KEVIN HEWISON, RICHARD ROBISON, & GARRY RODAN, *SOUTHEAST ASIA IN THE 1990S: AUTHORITARIANISM, DEMOCRACY, AND CAPITALISM* (1993).

²⁴ See CHRISTOPHER LINGLE, *SINGAPORE’S AUTHORITARIAN CAPITALISM: ASIAN VALUES, FREE MARKET ILLUSIONS, AND POLITICAL DEPENDENCY* (1996); Hussin Mutalib, *Illiberal Democracy and the Future of Opposition in Singapore*, 21 *THIRD WORLD Q.* 313, 325–26 (2000) (“The Republic’s traditional immigrant and clan mentality, which continues to influence the psyche of the majority Chinese populace

actually no better than seeking them in an authoritarian regime, and ultimately produces similar results. By taking an approach that enables the good gay and bad queer dichotomy and promotes sexual normativity, gay rights in the United States has acquiesced to a similar disciplinary model of social control as Singapore.²⁵ Although some scholars have suggested that *Lawrence* and *Windsor* are potentially libertarian decisions,²⁶ the two cases are actually illiberal decisions. Rather than liberate, they confine gay rights to a restrictive time, place, and manner, in much the same way that Singapore does, albeit in a more unapologetic fashion.

Part I of this article discusses how gay rights advocacy in Singapore evolved to accommodate its hybridized form of government but ultimately adopted a modified strategy of incrementalism seen in Western democracies. Controversies within the gay community as a result of the two different constitutional challenges to Section 377A demonstrate the pitfalls of adopting Western incrementalism as a model, namely the propensity to fall into the good gay and bad queer dichotomy.

Part II analyzes how the Singaporean High Court decisions upholding Section 377A further demonstrate the insufficiencies of incrementalist equal protection approaches. It then looks at the ways in which pushing gay rights as a liberty interest issue reveals the normative structures at play not only in Singapore, but also in the West. Part III discusses how the impetus in the West to treat gay rights as a matter of equal treatment of gays to heterosexuals rather than an overall liberty interest for all, merely produces another version of restrictive heteronormativity that is no different from the limitations on gay expression that currently exist in Singapore. Because the Singaporean Court of Appeals has rejected this bifurcation and the distinction between good gays and bad queers, the Singaporean government is forcing gay rights advocacy to adapt and imagine a different and potentially more unified strategy than in the United States.

(whose emphasis on financial and material pursuits is universally known), and the lack of a developed competitive political tradition given the Republic's short period of nationhood, has created a generation of Singaporeans who do not know, let alone are capable of fathoming, some other style of governance than the PAP.".) *But see* Simon S.C. Tay, *Human Rights, Culture, and the Singapore Example*, 41 MCGILL L. J. 743, 745 (1996).

²⁵ See Dean Spade, *Under the Cover of Gay Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 79 (2013).

²⁶ See Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, CATO SUP. CT. REV. 21 (2003); Randy E. Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582 (2005); John R. Dorocak, *Is the Constitution Only Libertarian and Not Socially Conservative? U.S. v. Windsor and the Unconstitutionality of DOMA's Definition of Marriage to Exclude Same-Sex Couples—Requiem for a Heavyweight*, 24 GEO. MASON U. C.R. L.J. 263 (2014). *But see* Carpenter, *supra* note 7.

II. SEX IN THE LION CITY

A. *Singapore as an Illiberal Democracy*

Singapore is a nation of interesting paradoxes that create an unexpected forum for exploring, critiquing, and possibly resolving divisions in the politics of gay advocacy. Singapore is a hybridized form of democracy: it partially embraces Western democratic principles in order to promote accelerated economic expansion, yet imposes heavy restrictions on individual civil liberties in order to maintain social stability.²⁷ Ruled as a British colony since 1826, Singapore gained independence first as a member of the Federation of Malaysia in 1963 and then as a separate nation in 1965.²⁸ At the time it separated from Malaysia, Singapore was in a precarious economic condition. Under the leadership of Lee Kuan Yew and the People's Action Party (PAP), the government rejected socialism and embraced capitalism in the midst of the Cold War to attract foreign investment, resulting in rapid economic growth.²⁹ Believing that this economic growth depended on social stability, the PAP government enacted authoritarian policies, which essentially consolidated control for the ruling party and justified them with the discourse of pragmatism and survival.³⁰ For example, Singapore placed significant restrictions on free speech,³¹ the press,³² and free association,³³ rationalizing that criticism of the government

²⁷ LYNETTE J. CHUA, MOBILIZING GAY SINGAPORE: RIGHTS AND RESISTANCE IN AN AUTHORITARIAN STATE 29 (2014) [hereinafter "MOBILIZING GAY SINGAPORE"] ("The PAP constantly reminds Singaporeans of their nation's tumultuous conception and touts social harmony as essential to economic survival, framing the two together as paramount to the nation's security.").

²⁸ See Michael Haas, *The Political History*, in THE SINGAPORE PUZZLE 15–22 (Michael Haas ed., 2d ed. 2014).

²⁹ *Id.* at 23 ("When it became clear that Singapore leaders had totally abandoned socialism, direct foreign investment poured into the country, and the country decreasingly depended on its role in entrepot trade. What followed as spectacular economic growth, which enhanced the international reputation of its prime minister, Lee Kuan Yew.").

³⁰ See BENG-HUAT CHUA, COMMUNITARIAN IDEOLOGY AND DEMOCRACY IN SINGAPORE 19 (1995) [hereinafter "COMMUNITARIAN IDEOLOGY AND DEMOCRACY"] ("Since the necessity of economic growth had been ideologically raised to the 'only reality,' any process that contributed to economic growth was therefore 'practical,' indeed 'necessary' for the survival of the nation. 'Pragmatism became the term used to gloss over economic instrumental rationality The state has over the years thoroughly penetrated and controlled society in the name of ensuring economic growth"); Kenneth Paul Tan, *New Politics for a Renaissance City?*, in RENAISSANCE SINGAPORE?: ECONOMY, CULTURE, AND POLITICS 17 (Kenneth Paul Tan ed., 2007) ("Old politics in Singapore has mainly been about shaping the public imagination with national narratives of permanent vulnerability and fragile success.").

³¹ Sedition Act (Cap 290, 2013 Rev Ed) s 2–4; see also Constitution of the Republic of Singapore (1965), Art 14.

³² Newspaper and Printing Presses Act (Cap 206, 2002 Rev Ed).

³³ Public Order Act (Cap 257A, 2009 Rev Ed) s 5.

upsets social stability.³⁴ The government also enacted the Internal Security Act to suspend the liberty interests of individuals suspected of dissidence in the name of national security.³⁵ Political theorists classify Singapore as an illiberal democracy, defined by three distinguishing characteristics: “first, a non-neutral understanding of the state; second, the evolution of a rationalistic and legalistic technocracy that manages the developing state as a corporate enterprise; finally, the development of a managed rather than a critical public space and civil society.”³⁶ Western political scientists often criticize Singapore as incomplete in comparison to the Western democracies for its restrictions on individual civil liberties and management of its citizens in contrast to Western democracies.³⁷ However, the citizenry by and large has accepted, or been disciplined into accepting,³⁸ this mode of government.³⁹ In this respect, Singapore epitomizes the disciplinary power of state “governmentality.”⁴⁰ Michel Foucault defines governmentality as the exercise of power over a population through “political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument.”⁴¹ Through these mechanisms of control, Singapore has

³⁴ See generally Derek Davies, *The Press*, in *THE SINGAPORE PUZZLE* 91 (Michael Haas ed., 2d ed. 2014).

³⁵ Internal Security Act (Cap 143, 1985 Rev Ed); see also *COMMUNITARIAN IDEOLOGY AND DEMOCRACY*, *supra* note 30, at 31.

³⁶ BELL et. al., *supra* note 23, at 163.

³⁷ See Clark D. Neher, *The Case for Singapore*, in *THE SINGAPORE PUZZLE* 46 (Michael Haas ed., 2d ed. 2014) (“[Singapore’s] political system, controlled as it is by the People’s Action Party (PAP), is more authoritarian than Americans would find acceptable, and its emphasis on law and order, rules, and conformity have given the island state an antiseptic quality very much at odds with the more open American culture.”); see also JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* 8 (2012) (“[I]ndividual rights are at the heart of liberal conceptions of the ‘rule of law’ . . . the Singapore state neither adheres to the pre-liberal constraints on government, nor regards individual rights as inviolable.”).

³⁸ See Tan, *supra* note 30, at 17, 22 (“Through a thoroughly rationalized system of regimentation, training, bureaucratic administration, surveillance, material incentives, and affluence (classic features of Herbert Marcuse’s (1964) ‘one-dimensional’ advanced industrial society), members of this class have been, and continue to be, socialized as individuals who are affirmative, conservative, fearful of both change as well as difference, and materialistic and consumerist in orientation. The system produces individuals who fit the authoritarian personality associated with vulgar accounts of Confucianism.”); see also Mutalib, *supra* note 24, at 326.

³⁹ *COMMUNITARIAN IDEOLOGY AND DEMOCRACY*, *supra* note 30, at 19 (“[T]he independent state is also an interventionist state that reduces the power of the civil society, reducing the government/people relationship to a bargain: extensive political and social administration for improved material life.”); see also Neher, *supra* note 37, at 58 (“In fact, many Singaporeans do not covet Western-style democracy, fearing that it could jeopardize their stability and threaten their affluent living standards.”).

⁴⁰ See generally RAJAH, *supra* note 37, at 55–64.

⁴¹ MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION* 108 (Michel Senellart et al. eds., Graham Burchell trans., 2007).

successfully disciplined a population characterized by self-policing and working within the rules in the interest of the nation.⁴²

B. The Illiberal Pragmatics of the Gay Rights Movement in Singapore

The nuances of Singapore's history as an illiberal democracy has shaped its local gay rights movement.⁴³ Audrey Yue describes gay identity in Singapore as functioning within "illiberal pragmatism," which is "characterized by the ambivalence between non-liberalism and neoliberalism, rationalism and irrationalism that governs the illegality of homosexuality in Singapore."⁴⁴ The stance that the Singapore government eventually adopted in respect to its growing gay population utilized the same rhetoric of pragmatism previously deployed in its justification of other authoritarian restrictions.⁴⁵ Singapore retains Section 377A of the Penal Code, the colonial anti-sodomy statute it had inherited from the British,⁴⁶ but selectively enforces it. The government typically reserves enforcement only for cases involving force, coercion, or public indecency.⁴⁷ However, so long as Section 377A continues to be in effect, it could be invoked at any time, and there have been periodic seasons of impromptu increased police

⁴² See Geraldine Heng & Janadas Devan, *State Fatherhood: The Politics of Nationalism, Sexuality, and Race in Singapore*, in NATIONALISMS AND SEXUALITIES 343 (Andrew Parker et al. eds., 1992) ("[B]y repeatedly focusing anxiety on the fragility of the new nation, its ostensible vulnerability to every kind of exigency, the state's originating agency is periodically reinvoked and ratified, its access to wide-ranging instruments of power in the service of national protection continually consolidated. It is a post-Foucauldian truism that they who successfully define and superintend a crisis, furnishing its lexicon and discursive parameters, successfully confirm themselves the owners of power, the administration of crisis operating to revitalize ownership of the instruments of power even as it vindicates the necessity of their use.").

⁴³ See COMMUNITARIAN IDEOLOGY AND DEMOCRACY, *supra* note 30; see also Lynette J. Chua, *Pragmatic Resistance, Law, and Social Movements in Authoritarian States: The Case of Gay Collective Action in Singapore*, 46 LAW & SOC'Y REV. 713 (2012).

⁴⁴ Audrey Yue, *Queer Singapore: A Critical Introduction*, in QUEER SINGAPORE: ILLIBERAL CITIZENSHIP AND MEDIATED CULTURES 2 (Audrey Yue & Jun Zubillaga-Pow eds., 2012).

⁴⁵ *Lim Meng Suang I*, SGHC 73, at paras. 84, 86 ("[D]uring the October 2007 Parliamentary Debates and submitted that in view of the reasons put forward for the retention of [Section] 377A, the purpose of the provision was now this: since neither the pro-[Section] 377A side nor the anti-[Section] 377A side would be able to convince the other of its point of view, and since pushing the issue would polarise and divide our society, we should live and let live, and it was best that we do nothing and leave [Section] 377A as it stood . . . it was a practical reason why, amongst other more basic reasons, [Section] 377A should be retained.").

⁴⁶ See ANDREW PHANG & CHAN WING CHEONG, THE DEVELOPMENT OF CRIMINAL LAW AND CRIMINAL JUSTICE IN SINGAPORE (2001).

⁴⁷ *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2175 ("Police have not been proactively enforcing the provision and will continue to take this stance. But this does not mean that the section is purely symbolic and thus redundant. There have been convictions over the years involving cases where minors were exploited and abused or where male adults committed the offence in a public place such as a public toilet or back-lane."); *id.* ("Moreover, it has not been invoked in respect of consensual sex since 1993. So this law is rarely applied or, if applied, it applies to minors or acts in public.").

involvement against the gay community.⁴⁸ The gay community also struggles with ambivalence and uncertainty with other illiberal regulations, such as limitations on expression of gay identity.⁴⁹ Unsystematic enforcement of Section 377A over the years has partially contributed to a culture of vigilance and self-policing within the gay community.⁵⁰ Section 377A, therefore, demonstrates the disciplinary power of the state over the gay community in Singapore,⁵¹ and illustrates Foucault's principle of the panopticon.⁵² The fight for civil liberties is often regarded as criticism of the government and potentially a sign of punishable disloyalty.⁵³ Thus, the gay community has progressed cautiously for fear that Section 377A or other laws could be deployed at any time as a means of quashing activism.⁵⁴ As a result of the authoritarian regime's conditioning, the gay movement in Singapore has deemed itself fragile and needs to work within the illiberal system as a strategy for survival.⁵⁵ This approach ironically mirrors the same pragmatism that justifies the illiberalism of the state.⁵⁶

⁴⁸ See COMMUNITARIAN IDEOLOGY AND DEMOCRACY, *supra* note 30, at 53 ("Despite the first openings for the [gay] movement, followed by its first escalation, expansion, and diversification, the early 1990s proved to be a hostile time to be gay in Singapore. The police frequently raided gay businesses and entrapped gay men at popular cruising grounds.").

⁴⁹ See Mariko Oi, *Is Singapore's Stance on Homosexuality Changing?*, BBC (Apr. 22, 2013), <http://www.bbc.com/news/world-asia-22088852> (last visited Nov. 15, 2014) ("But not only is sex between men illegal, there are also censorship guidelines in Singapore which ban media outlets from promoting homosexual acts. 'Exactly what is prohibited is grey but the familiar line is that you are not supposed to portray homosexuality in a positive or normal way,' says [Professor Lynette J.] Chua from the National University of Singapore. 'So is an interview of a celebrity who is in a same-sex relationship considered the promotion of homosexuality? Apparently yes, because the broadcaster has been fined before.'").

⁵⁰ See Simon Obendorf, *Both Contagion and Cure: Queer Politics in the Global City-State*, in QUEER SINGAPORE: ILLIBERAL CITIZENSHIP AND MEDIATED CULTURES 97, 97 (Audrey Yue & Jun Zubillaga-Pow eds., 2012) (describing the dilemma for gay activists in Singapore "of attempting to extrapolate from official pronouncements the range of queer identities, spaces and behaviours that will be tolerated by Singaporean state managers.").

⁵¹ See *id.* ("[T]he regulatory and policing powers of the Singaporean government give it a unique capacity to coerce, surveil and intervene in varied aspects of queer life."); see also Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643, 688–89 (2001) (describing the role of anti-sodomy statutes in producing an atmosphere where "many lesbian and gay individuals regularly feel themselves under the eye of power.").

⁵² MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 201 (Alan Sheridan trans., 1979) (describing how the panopticon, a central watchtower in a prison, is deployed to produce self-policing subjects by "creating and sustaining a power relation independent of the person who exercises it; in short, that inmates should be caught up in a power situation of which they are themselves the bearers . . . the inmate must never know whether he is being looked at any one moment; but he must be sure that he may always be so.").

⁵³ See Jothie Rajah & Arun K. Thiruvengadam, *Of Absences, Masks, and Exceptions: Cause Lawyering in Singapore*, 31 WIS. INT'L L.J. 646 (2013).

⁵⁴ See COMMUNITARIAN IDEOLOGY AND DEMOCRACY, *supra* note 30, at 45 ("Faced with external threats from the state and media, [Singaporean gay activists] adjusted tactics to fight for the movement's survival.").

⁵⁵ *Id.* at 146 ("Deploying pragmatic resistance to advance their movement without jeopardizing its survival, gay activists interact with formal law, political norms and shifts in these forces to push the

Lynette Chua describes this strategy for the gay movement in Singapore as “pragmatic resistance.” She views pragmatic resistance as an alternative strategy

to represent homosexuality positively through whatever cracks they can find or pry open formal law and advocating for decriminalization and acceptance of homosexuality [in order to] further defy the symbolism of Section 377A and regulations that inherently treat homosexuality as wrong or deviant.⁵⁷

Although Chua defines this strategy of “pragmatic resistance” in contrast to earlier Western models of gay liberation,⁵⁸ the Singaporean approach to gay rights actually more closely resembles later strategies of incrementalism that eventually became successful in the United States and Europe.⁵⁹ Under the incremental approach, decriminalization of sodomy is the first step.⁶⁰ Through the 1990s and 2000s, the gay community in Singapore engaged in progressive, yet cautious mobilization that eventually led to the “Repeal 377A” movement in 2007, when the issue of possibly removing Section 377A came before Parliament during its reform of the Penal Code.⁶¹ The repeal movement, however, spurred a backlash from a small yet vocal religious minority⁶² that cited the traditional Asian values of the ethnically Chinese majority population as needing protection against neocolonial pressures from the morally over-permissive West.⁶³ The Singaporean

boundaries of political norms at the same time that they toe the line.”). See also Chua, *supra* note 43, at 719 (“To ensure survival, activists often avoid antagonizing the authoritarian state.”).

⁵⁶ COMMUNITARIAN IDEOLOGY AND DEMOCRACY, *supra* note 30, at 19 (“[T]he idea of a ‘crisis of survival’ is periodically constructed in order to revive the legitimacy for repressive interventions.”).

⁵⁷ MOBILIZING GAY SINGAPORE, *supra* note 27, at 154.

⁵⁸ *Id.* at 146 (“Whereas the strategy and tactics of Stonewall and gay liberation drew from a decade of civil rights protests, black militancy, campus demonstrations, and the rise of the New Left in the United States, the pragmatic resistance of Singapore’s gay movement was born of strategic adaption to almost fifty years of single-party, authoritarian rule in the postcolonial state.”).

⁵⁹ See generally WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002); see also Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437–68 (Robert Wintemute & Mads Andens eds., 2001); Ho, *supra* note 16, at 6–9.

⁶⁰ See Ho, *supra* note 16, at 7 (“[T]he decriminalization of consensual same-sex intimacy occurs first.”).

⁶¹ See Chua, *supra* note 43, at 735 (2012); see generally COMMUNITARIAN IDEOLOGY AND DEMOCRACY, *supra* note 30.

⁶² See Jianlin Chen, *Singapore’s Culture War Over Section 377A: Through the Lens of Public Choice and Multilingual Research* 38 LAW & SOC. INQUIRY 106 (2013); see also Chua, *supra* note 43, at 736.

⁶³ See Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 B.U. INT’L L.J. 309, 344–45 (2014).

government reacted with its typical stance of illiberal pragmatism for the sake of social stability. This resulted in a limited compromise where the Prime Minister stipulated to allowing Section 377A to officially remain the law while indicating that the Singaporean government would not be proactive in enforcement against private gay conduct.⁶⁴ On the one hand, the Singaporean government was being sensitive to the role of gay rights in promoting a tolerant atmosphere to attract Western business and investment.⁶⁵ On the other hand, the Singaporean government did not want to disturb the social stability of the status quo,⁶⁶ which led to the pragmatic decision to retain Section 377A. In the interest of stability and continued economic growth, the government tried to allay both sides.⁶⁷

Following the 2007 decision by Parliament to retain Section 377A, the gay community began to strategize on how to formally challenge the law.⁶⁸ The process evolved into a two-prong approach that eventually coincided and further resembled Western incrementalist strategies. Gay rights advocates started thinking about a formal legal challenge in the courts of law.⁶⁹ Yet, realizing that the vast majority of Singaporeans did not support homosexuality,⁷⁰ the gay community began a public relations campaign to

⁶⁴ *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2469–72.

⁶⁵ Holning Lau, *Human Rights and Globalization: Putting the Race to the Top in Perspective*, 102 NW. U. L. REV. 319, 320 (2008) (“In April 2007, for example, Lee Kuan Yew—Singapore’s founding father, who remains a highly influential cabinet member—recommended gradually reforming the city-state’s criminalization of same-sex sexual relationships. Lee’s reasoning was more economic than normative. He did not focus on the liberty, equality, or dignity of Singapore’s sexual orientation minorities. Rather, he focused on the fact that reforming Singapore’s staid image is necessary to attract foreign investment and educated immigrants who can further develop Singapore as a hub for science, technology, and financial services.”).

⁶⁶ See e.g., Tessa Wong, *Singapore Dilemma: When Diversity Policy Meets Local Law*, BBC (June 14, 2014), <http://www.bbc.com/news/world-asia-27584565> (last visited Nov. 15, 2014) (“News of [an event at Goldman Sachs to recruit LGBT employees] caused enough handwringing that Minister for Social and Family Development Chan Chun Sing publicly expressed concern. While discrimination had ‘no place in our society’, foreign companies should ‘respect local culture and context’ and ‘not venture into public advocacy for causes that sow discord among Singaporeans,’ he said.”).

⁶⁷ See Meredith L. Weiss, *Diversity, Rights, and Rigidity in Singapore*, 36 N.C. J. INT’L L. & COM. REG. 625, 638 (2011) (“The government’s efforts to shift its stance toward gays and lesbians—the better to lure the creative class—ultimately sparked rights claims in two directions: first, from or on behalf of LGBT Singaporeans, and second, from Christians (and to a less vocal extent, Muslims) demanding the state maintain standards of morality and ‘family values.’”); see also Meredith L. Weiss, *Rejection as Freedom? HIV/AIDS Organizations and Identity*, 4 PERS. ON POLS. 671, 675 (2006) (“Singapore will find homophobic repression increasingly at odds with cultivating a hip, metropolitan image as well as inconvenient for public health purposes. Regardless, the still-powerful government is reluctant to loosen an anxiously heteronormative order over much (not least for practical reasons like fear of declining birthrates) and most Singaporeans remain chary of nudging ill-defined ‘OB’ (out-of-bounds) markers.”).

⁶⁸ See MOBILIZING GAY SINGAPORE, *supra* note 27, at 118–19.

⁶⁹ *Id.*

⁷⁰ A recent official survey confirmed the long-held understanding that the majority of Singaporeans did not approve of homosexuality. See Chun Han Wong, *Is Some Talk Too Gay For Singapore?*, WALL ST. J. (Feb. 6 2014), <http://blogs.wsj.com/searealtime/2014/02/06/sexuality-faqs-spark-gay-debate-in->

positively change public opinion. Since the culturally conservative majority was cited as the reason for retaining the law,⁷¹ advocates adopted an incrementalist approach of increasing positive visibility of the gay population in hope of securing greater acceptance from the majority population.⁷² The gay community embraced nationalism and modeled their movement after characteristically Singaporean cultural tenets of non-confrontation, social stability, and abiding by the laws.⁷³

The public relations campaign culminated in the creation of an annual event called Pink Dot.⁷⁴ The event represents gay activism within the rules of the illiberal state. In 2000, the Singaporean government designated an area in a public space, Hong Lim Park, as exempt from typical licensing requirements for public speeches and assembly. Individuals desiring to utilize the space in Hong Lim Park under the exemption needed only to register in advance with the police and agree to limit their speech to avoid “caus[ing] feelings of enmity, hatred, ill-will or hostility between different racial or religious groups in Singapore.”⁷⁵ In 2008, the government renewed and extended this exemption to include performances and exhibitions. This allowed the gay community to organize its first Pink Dot gathering as a sanctioned event in May 2009.⁷⁶ The event drew around 2,500 participants, and helped promote the image of Singaporean gays as law-abiding and community-oriented.⁷⁷

singapore/ (last visited Nov. 15, 2014) (“A survey completed in April of 2013 by Singapore’s Institute of Policy Studies showed that 78% of 4,131 respondents (mostly citizens) felt that sexual relations between two adults of the same sex is ‘always wrong/almost always wrong,’ compared to only 11% who felt that it is ‘not wrong most of the time/not wrong at all.’”).

⁷¹ Tan, *supra* note 30, at 78 (“[I]t is the government that hails Singaporeans as a conservative majority forming the bedrock of national identity, which is presented nearly always as unstable and threatened by the ineluctable forces of globalization. By constructing the conservative majority as an unquestionable—even valuable—given, the government claims its moral authority to continue exercising power in a paternalistic, perfectionist, and thoroughly persuasive manner, all performed in their name.”).

⁷² See ESKRIDGE, *supra* note 59, at 148 (“A process that is incremental and persuades people or their representatives of the acceptability or even desirability of minority rights is much more likely to stick. The incremental process will take a lot longer, but it will be more lasting.”); see also William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275 (2013).

⁷³ See Chua, *supra* note 43, at 726–28.

⁷⁴ See *id.* at 737–38.

⁷⁵ MOBILIZING GAY SINGAPORE, *supra* note 27, at 80.

⁷⁶ Sharanjit Leyl, *Singapore Gays in First Public Rally*, BBC (May 17, 2009), <http://news.bbc.co.uk/2/hi/asia-pacific/8054402.stm> (last visited Nov. 15, 2015) (Pink Dot became possible “after Singapore loosened law on public gatherings last year. Currently any gathering can be held that does not touch on topics of race or religion.”).

⁷⁷ See *id.* (“According to Jack Soh, [one of the organizers of Pink Dot,] there was no overt political message being sent to the government. It was not a protest or a political rally. The event was for Singaporeans in general—to affirm our respect for diversity and the freedom to love, regardless of sexual

C. *The Constitutional Challenges to Section 377A*

Not long after the first Pink Dot, an incident emerged that provided the possibility of a constitutional challenge of Section 377A in the courts, but eventually created potential internal tensions for the gay movement in Singapore. In March 2010, Tan Eng Hong was arrested for having oral sex with another man in a public restroom stall in a shopping mall and charged under Section 377A. Tan hired activist attorney M. Ravi to challenge the constitutionality of Section 377A.⁷⁸ The gay community reacted with mixed feelings. Some looked forward to finally challenging a patently offensive law that Parliament had tacitly assured would not be enforced.⁷⁹ Yet others reacted with more apprehension given the circumstances of Tan's arrest.⁸⁰ For example, upon news of Tan's constitutional challenge, People Like Us, one of the pioneering gay advocacy groups in Singapore,⁸¹ issued this statement:

People Like Us do[es] not condone sex in public spaces where conflict with other members of society can occur. At no time do we say that these should not be prosecutable offences. We have however long held the view that should the State wish to prosecute, it should do so using gender-neutral laws, so that whether the specifics are same-sex or opposite-sex, there is parity in treatment.⁸²

With this statement, People Like Us attempted to distance gay identity from the moral implications of the Tan Eng Hong incident. By doing so, however, People Like Us was also legitimizing the rule of law so long as

orientation. 'We recognise that many Singaporeans are conservative . . . so we planned an inclusive event that would reach all Singaporeans, straight and gay,' Mr. Soh says.')

⁷⁸ Rajah & Thiruvengadam, *supra* note 53, at 668.

⁷⁹ See MOBILIZING GAY SINGAPORE, *supra* note 27, at 135.

⁸⁰ See George Baylon Radics, *Decolonizing Singapore's Sex Laws: Tracing Section 377A of Singapore's Penal Code*, 45 COLUM. HUM. RTS. L. REV. 57, 93 (2013) ("The local gay community, popular bloggers, and leaders all criticized Ivan [Tan Eng Hong's English name] and his lawyer for pushing forward, and the other man who was caught in the toilet stall with Ivan dropped the case. Ivan continued, despite the criticism and pressure he faced from his friends, family and community and never claimed that he was pursuing the case for anyone but himself. He harbors some resentment over the way the system treated him and believes that things can improve.").

⁸¹ See Russell Heng, *Tiptoe Out of the Closet: The Before and After of the Increasingly Visible Gay Community in Singapore*, 40 J. HOMOSEXUALITY 81 (2001).

⁸² *On the Prosecution of Mr. Tan Eng Hong Under Section 377A and the Challenge to the Law's Constitutionality*, PEOPLE LIKE US (Sept. 27, 2010), <http://www.plu.sg/society/?p=169> (last visited Nov. 15, 2014).

there was equal application of the law.⁸³ For some Singaporean gay activists who had been endeavoring to challenge the stereotypes of gays as sexual deviants with campaigns like Pink Dot, Tan Eng Hong represented the bad queer image they were seeking to avoid.⁸⁴

Tan Eng Hong's constitutional challenge occurred over two stages: first as a matter of standing, and later on the substantive merits. In October 2010, the Attorney General dropped the Section 377A charge against Tan, charged him instead under the public obscenity statute, and moved to dismiss the constitutional challenge to Section 377A due to lack of standing.⁸⁵ The trial court granted the Attorney General's motion to dismiss, and the Singaporean High Court affirmed the trial court decision on appeal.⁸⁶ However, in August 2012, the Singaporean Court of Appeal overturned the decision, ruling that Tan had standing to sue based on the "real and credible threat of prosecution under an allegedly unconstitutional law."⁸⁷ The Court of Appeal remanded the case to the High Court to decide the merits of the equal protection and liberty challenges,⁸⁸ and set forth a two-prong test to determine the equal protection issue.⁸⁹

Tan Eng Hong's challenge paved the way for incrementalist activists to mount their own challenge.⁹⁰ As a result of the ruling on standing, the Singaporean gay community was able to mobilize and offer another case to challenge Section 377A, even without an arrest or prosecution. Gary Lim Meng Suang and Kenneth Chee, a committed gay couple who had been together for over 15 years, filed their case in November 2012.⁹¹ They primarily argued that Section 377A was a violation of equal protection. Compared to Tan Eng Hong's more unseemly criminal case, Lim and Chee's constitutional challenge represented a more media-friendly test case

⁸³ *Id.* (saying that "People Like Us do not condone sex in public spaces" but calling for "gender-neutral laws" and "parity in treatment").

⁸⁴ Radics, *supra* note 80, at 97.

⁸⁵ *Tan Eng Hong II*, SGHC 199, at paras. 6–7.

⁸⁶ *Id.* at para. 8.

⁸⁷ *Tan Eng Hong v. Attorney General (Tan Eng Hong I)* [2012] S.G.C.A. 45, at para. 115.

⁸⁸ The Court of Appeal, however, dismissed the Article 14 Freedom of Association challenge. *See id.* at para. 130 ("Section 377A does not violate any of the three limbs of Art 14(1). Even if any Art 14(1) rights are engaged by [Section] 377A, these rights are expressly stated to be subject to the need to preserve (inter alia) public order (see Art 14(2)(a)–14(2)(c)). In so far as [Section] 377A criminalises 'gross indecency' between males in public, the public order rationale applies. The same rationale applies to preserve the constitutionality of [Section] 294(a), which criminalises 'any obscene act in any public place.' In so far as [Section] 377A also criminalises 'gross indecency' between male homosexuals in private but does not criminalise the same between female homosexuals, this is more properly dealt with under Art 12 rather than under Art 14.").

⁸⁹ *Id.* at para. 185.

⁹⁰ *Lim Meng Suang I*, SGHC 73, at para. 10.

⁹¹ *Lim Meng Suang I*, SGHC 73.

that better fit the careful and deliberate strategy of pragmatic resistance employed by the gay community in Singapore. Despite the ostracization of Tan Eng Hong by incrementalists, Lim and Chee's challenge would not have been possible without Tan's lawsuit on the issue of standing.

The emergence of two separate cases with two distinct strategies reveals the rift in Singaporean gay advocacy across the good gay and bad queer dichotomy. Gary Lim and Kenneth Chee employed a strategy that scaled back on the legal arguments made by Tan Eng Hong.⁹² Tan based his challenge against Section 377A on both equal protection and individual liberty interests.⁹³ Tan's case included libertarian principles that contest state repression of gay conduct as infringements on individual liberty.⁹⁴ Lim and Chee, however, mounted their case purely on equal protection grounds and adopted a more accommodationist strategy of portraying gay couples as similar to and wanting the same treatment as other law-abiding heterosexual citizens.⁹⁵ The two cases also revealed a segregated hierarchy within the gay community in Singapore in terms of shaping public perception of gays in the illiberal state. Whereas Tan's challenge experienced very little support and at times opposition from the community, Lim and Chee's case was met with overwhelming public support and media attention.⁹⁶

Tan's marginalization was likely caused by multiple intersecting issues that reflect the challenges of gay advocacy within Singapore's illiberal democracy. First, he was appealing a criminal case, which not only perpetuated the image of the bad queer but also offended the rule of law sensibilities of the general populace who are structurally conditioned to not

⁹² Tan Eng Hong's challenge contained both an Article 9 liberty and an Article 12 equal protection arguments, while Lim and Chee's challenge contained focused on the Article 12 equal protection argument. *See Tan Eng Hong II*, SGHC 199, at para. 19-20; *Lim Meng Suang I*, SGHC 73, at para.19. It should be noted, however, that the personal liberty interest was less directly at stake in the Lim and Chee case because there was no actual arrest made and thus no outstanding habeas corpus issue. *See id.* at para. 7.

⁹³ *See Tan Eng Hong II*, S.G.C.A. 45, at para. 6 (arguing that 377A not only violated Article 12(1), but also Articles 9 and 14 of the Singapore Constitution, which provide for liberty and freedom of association). *See also* Constitution of the Republic of Singapore (1965) Art 12(1) ("All persons are equal before the law and entitled to the equal protection of the law."); *id.* at Art 9(1) ("No person shall be deprived of his life or personal liberty save in accordance with law."); *id.* at Art 14(1) (providing that "(a) every citizen of Singapore has the right to freedom of speech and expression; (b) all citizens of Singapore have the right to assemble peaceably and without arms; and (c) all citizens of Singapore have the right to form associations.").

⁹⁴ *See Tan Eng Hong II*, SGHC 199, at para. 21.

⁹⁵ *See Lim Meng Suang I*, SGHC 73, at para. 1 (arguing that 377A violated of Article 12(1) of the Singapore Constitution, which provides for equal protection).

⁹⁶ Radics, *supra* note 80, at 95 ("At a recent book launch, Ravi described Tan's case as even more difficult than challenging the death penalty because of a lack of public support. In contrast, Singapore responded to Lim and Chee's case with overwhelming support. Lim and Chee have successfully solicited online donations for their legal costs and have received technical support to create a seven-minute video that outlines their case.").

question the legitimacy of the rules.⁹⁷ His challenge was more libertarian in nature—which, by definition, is critical of government interference—and thus represented more drastic and radical activism that did not resonate with the majority of Singaporeans.⁹⁸ Up to that point, gay activists had adopted the cultural norm of working within the system.⁹⁹ In contrast, Tan Eng Hong’s attorney, M. Ravi, was prominently known as an activist with a record of confronting the government on controversial issues.¹⁰⁰ There may have been concern that the association of gay rights with such a figure risked drawing the attention of an illiberal government known for quickly quashing voices of dissent.¹⁰¹ In this regard, Tan Eng Hong’s case may have been seen as counteracting the deliberately slow and careful strategy of pragmatic resistance that Professor Lynette Chua describes as “seek[ing] to advance the movement while ensuring that it survives the scrutiny and potential retaliation of authoritarian rulers.”¹⁰²

Hoping that his case would not be overshadowed and subsumed by the more sympathetic challenge brought by Lim and Chee, Tan attempted to have the two cases treated together.¹⁰³ The High Court, however, did not comply. The High Court’s decision in *Lim Meng Suang v. Attorney General* came first. In April 2013, Judge Quentin Loh issued a decision upholding Section 377A as not violating equal protection.¹⁰⁴ In August 2013, still awaiting a decision, Tan Eng Hong applied with the Court to join

⁹⁷ See Mutalib, *supra* note 24, at 313, 325 (describing a system of illiberal governmental control in Singapore that includes “regulation of all key institutions of the state apparatus such as the bureaucracy, grass roots organisations, trade unions and mass media, and co-opting leaders to oversee these institutions”; “periodic changes to the Constitution which radically transform the Republic’s electoral and parliamentary systems, such as the introduction of the NCMPS, NMPS, EP and GRCS”; “punitive actions against opposition and public dissent in general which has resulted in the perceived ‘climate of fear’ that haunts the citizenry and the concomitant ‘subject’ political culture in Singapore”).

⁹⁸ *Id.* at 325–26 (“The Republic’s traditional immigrant and clan mentality, which continues to influence the psyche of the majority Chinese populace (whose emphasis on financial and material pursuits is universally known), and the lack of a developed competitive political tradition given the Republic’s short period of nationhood, has created a generation of Singaporeans who do not know, let alone are capable of fathoming, some other style of governance than the PAP.”).

⁹⁹ COMMUNITARIAN IDEOLOGY AND DEMOCRACY, *supra* note 30, at 150 (“From the movement’s timorous beginnings to its coming out, activists continued to interact with formal law and the political norm of legal legitimacy as important factors that shape their tactics.”).

¹⁰⁰ Rajah & Thiruvengadam, *supra* note 53, at 661–69.

¹⁰¹ See Mutalib, *supra* note 24, at 325.

¹⁰² See MOBILIZING GAY SINGAPORE, *supra* note 27.

¹⁰³ See Radics, *supra* note 80, at 90 (“Initially, there was some concern that his case would be dismissed given the pending constitutional challenge by Lim and Chee . . . [G]iven the similarity of the two challenges, Tan respectfully asked the High Court to issue both opinions at the same time.”).

¹⁰⁴ See *Lim Meng Suang I*, SGHC 73.

the Lim and Chee appeal as an interested party.¹⁰⁵ Lim and Chee objected to Tan joining their case, which further emphasized their divide, both philosophically and personally. Tan eventually acquiesced to Lim and Chee and dropped his motion to join when the Court assured him that his case would be decided.¹⁰⁶ Tan Eng Hong awaited the decision in his case over the summer. That summer, gay activists' attentions were split simultaneously between mustering an appeal to Judge Loh's decision in *Lim Meng Suang* and organizing the fifth annual Pink Dot event, which had been steadily growing and garnering support over the years. Since many of the organizers of Pink Dot were the same activists garnering support for the Lim and Chee appeal, it is no surprise that the two actions converged into a concerted effort. To increase public visibility of the constitutional challenge, the Pink Dot organizers set Gary Lim and Kenneth Chee as their flag bearers for the event in 2013.¹⁰⁷

In contrast, the Pink Dot organizers purposefully distanced their event from Tan Eng Hong, even though the High Court decision on his constitutional challenge was imminent.¹⁰⁸ His exclusion from Pink Dot created a small controversy within the local gay community, with some critics condemning the discrimination that was occurring within the gay community itself.¹⁰⁹ Critics argued that the gay community was diverse and reflected a multiplicity of identities across the good gay and bad queer spectrum.¹¹⁰ For them, the face of gay Singapore was being misrepresented for the sake of mainstream acceptance.¹¹¹ Gay individuals who were more like Tan Eng Hong than Gary Lim and Kenneth Chee experienced further marginalization—even their own community treated them as invisible. This further perpetuated the growing governmental and public stance that some forms of gay expression were unacceptable. Pink Dot and its incrementalist brand of gay sensibility, in contrast, steadily saw increasing acceptability among Singaporeans, growing to a 21,000 attendance in 2013, and 26,000 in

¹⁰⁵ Andrea Ong, *Man in Gay-Sex Law Challenge Applies to Join Separate Appeal*, STRAITS TIMES (Aug. 14, 2013), <http://www.straitstimes.com/breaking-news/singapore/story/man-gay-sex-law-challenge-applies-join-separate-appeal-20130814> (last visited Nov. 15, 2014).

¹⁰⁶ See Selena Lum, *Gay-Sex Law Case: Man Drops Bid to Intervene*, STRAITS TIMES (Sept. 8, 2013), <http://news.asiaone.com/news/singapore/gay-sex-law-case-man-drops-bid-intervene> (last visited Nov. 15, 2014).

¹⁰⁷ See Radics, *supra* note 80, at 96.

¹⁰⁸ See *id.* at 96–97.

¹⁰⁹ See *id.* at 97.

¹¹⁰ See, e.g., Nicholas Leow, *Why I would liked to have worn pink but couldn't*, Online Citizen (July 3, 2013), <http://www.s3raph.com/2013/07/03/why-i-would-like-to-have-worn-pink-but-couldnt/> (last visited Nov. 15, 2014).

¹¹¹ See, e.g., *id.*

2014.¹¹² This represents a tenfold increase in just five years since inception. Pink Dot has not only gained growing community support over the years, but it has also attracted sponsorship from multinational corporations as well.¹¹³

Judge Loh finally ruled on the Tan Eng Hong case in October 2013 with a decision, unsurprisingly, to uphold the constitutionality of Section 377A. After the ruling, Tan Eng Hong applied again to have his case consolidated with the Lim and Chee appeal.¹¹⁴ Days later, despite the objections of the Attorney General and the attorney for Lim and Chee, Deborah Barker, the Court of Appeal ruled that it would consolidate the appeals and treat them together.¹¹⁵ After consolidation, Lim and Chee's attorney framed the Article 9 liberty issue as one of privacy, which "include[s] a right of personal autonomy allowing a person to enjoy and express affection and love towards another human being."¹¹⁶ By characterizing the liberty interest as one of privacy and intimacy, she differentiated her clients as good gays in comparison to Tan Eng Hong as the bad queer.

The Court of Appeal's decision to consolidate the cases created a situation where Singapore became positioned to accomplish what *Lawrence* did not: acknowledge that good gays and bad queers are cut of the same cloth and should not be segregated differently in society. The Court of Appeal issued its decision on the consolidated case in October 2014, and upheld Section 377A.¹¹⁷ The Court initially recognized that Lim and Chee were making a different liberty argument than Tan Eng Hong,¹¹⁸ yet in the

¹¹² Dominique Mosbergen, *Refusing to Be Silenced, Thousands Come Out for Singapore's 'Pink Dot' LGBT Rights Rally*, HUFFINGTON POST (June 28, 2014), http://www.huffingtonpost.com/2014/06/28/singapore-pink-dot_n_5539810.html.

¹¹³ See Wong, *supra* note 66 ("[M]ore multinational companies are stepping up to publicly support Singapore's annual gay rights event, Pink Dot, happening on 28 June [2014]. Gay sex is banned in Singapore, but companies including Google, Barclays, J P Morgan, Goldman Sachs and BP are on board as corporate supporters for what has become the city-state's biggest annual gathering organised by civil society.").

¹¹⁴ See Terry Xu, *S377A—Tan Eng Hong Will Have His Day in Court*, ONLINE CITIZEN (Oct. 10, 2013), <http://www.theonlinecitizen.com/2013/10/s377a-tan-eng-hong-will-have-his-day-in-court/>.

¹¹⁵ Amanda Lee, *Appeals Against S377A Ruling to Be Heard Together*, STRAITS TIMES (Oct. 10, 2013), <http://www.straitstimes.com/breaking-news/singapore/story/appeals-two-section-377a-challenges-will-be-heard-together-20131010?page=2#sthash.QXH1W3rF.dpuf>; see also Lum, *supra* note 19.

¹¹⁶ *Lim Meng Suang and Kenneth Chee Mun-Leon v. Attorney General (Lim Meng Suang II)* [2014] S.G.C.A. 53, at para. 29.

¹¹⁷ See *Lim Meng Suang II*, S.G.C.A. 53.

¹¹⁸ *Id.* at para. 43 ("The arguments raised by Mr. Ravi and by Ms. Barker on Art 9 in the present appeals are different. Ms Barker argues that the right to life and personal liberty under Art 9(1) should include a limited right to privacy and personal autonomy allowing a person to enjoy and express affection and love towards another human being. Mr. Ravi, on the other hand, contends that [Section] 377A is vague, arbitrary and absurd.").

end combined them into one and the same.¹¹⁹ The Court rejected the liberty argument on both fronts, and maintained that the true question “brings us back (in substance at least) to the issue of whether or not s 377A ought to enforce broader societal morality.”¹²⁰

More importantly, the Court of Appeal rejected Lim and Chee’s attempt to characterize the original purpose of Section 377A as punishing bad queers, specifically male prostitutes, and therefore inapplicable to a private consensual relationship such as their own. Deborah Barker, counsel for Lim and Chee, argued that the primary purpose of Section 377A was “to combat the problem of male prostitution...[and] applying [Section] 377A to categories outside the narrow category just mentioned (viz., male prostitution) would be over-inclusive and, hence, unconstitutional.”¹²¹ The Court of Appeal, however, refused to accept the distinction. It ruled that the original intent of Section 377A “covered all situations relating to ‘acts of gross indecency’ between males, [and] it would follow that similar situations involving male prostitutes would also be covered on an a fortiori basis.”¹²² The Court of Appeal ultimately ruled that this underlying public morality purpose of Section 377A was an issue that could only be overturned by the legislature.¹²³ By collapsing the range of gay sexuality, both legitimized and delegitimized, into one case, the Court of Appeal called upon the legislature and Singaporean society to consider homosexuality across the spectrum, not just when it looks heterosexual.

III. GAY SKIN, ASIAN MASKS: SEGREGATING PRIVATE IDENTITY FROM PUBLIC VISIBILITY AND TWO FACES FOR GAY RIGHTS IN SINGAPORE

A. *Lim Meng Suang and the Pitfalls of Equal Protection in the Illiberal State*

The competing strategies in both challenges to Section 377A illustrate the tensions between sexual identity and national identity within Singapore’s hybridized form of democracy, where rights seem incomplete when compared to the more expansive rights of citizens in full democracies. Like the Texas statute that was overturned in *Lawrence v. Texas*, Section 377A

¹¹⁹ *Id.* at para. 53 (“Mr. Ravi’s argument [on the absurdity of Section 377A] here closely resembles Ms. Barker’s argument that ‘personal liberty’ in Art 9(1) should be interpreted to include a limited right to privacy and personal autonomy. For the results given above, Mr. Ravi’s argument in this particular guise must likewise be rejected.”).

¹²⁰ *Id.* at para. 49.

¹²¹ *Id.* at para. 131.

¹²² *Id.* at para. 148.

¹²³ *Id.* at para. 79.

prohibits sodomy only between homosexuals and not heterosexuals.¹²⁴ Thus, as in *Lawrence*, there was a compelling argument for the government to strike down the statute on equal protection grounds.¹²⁵ Lim and Chee's case specifically raised the point that Section 377A prohibits homosexual men from engaging in behavior that is lawful between heterosexual couples and lesbian couples.¹²⁶ Lim and Chee referenced *Lawrence*, among other foreign precedents, as a model for striking down the law.¹²⁷ However, equal protection in Singapore evolved somewhat differently than in Western democracies. As Professor Kevin Tan explains, in Singapore "the law recognizes the need for a state to discriminate between its subjects. In itself, discrimination is neither morally objectionable nor unlawful."¹²⁸ Rather, "the key to legal discrimination is the concept of classification . . . the idea of 'equal before the law' and 'equal protection under the law' was that of equal justice."¹²⁹

To determine whether Section 377A violated equal protection, the Singapore Court of Appeal set forth an "intelligible differentia" test for the High Court to apply on remand, where "a differentiating measure prescribed by legislation would be consistent with Art 12(1) only if: (a) the classification was founded on an intelligible differentia; and (b) the differentia bore a rational relation to the object sought to be achieved by the law in question."¹³⁰ The test prescribed by the Court of Appeal indicates rational review, an older standard of equal protection that preceded the strict scrutiny and intermediate scrutiny standards developed in the United States,¹³¹ but different from the form of rational review ambiguously utilized in *Lawrence*.¹³² The traditional form of rational review, which is also

¹²⁴ Penal Code (Cap 224, 1985 Rev Ed) s 337(A) ("Any male person who, in public or private, commits, or abets 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 punished with imprisonment for a term which may extend to 2 years."); see also Douglas Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia*, 4 ASIAN J. COMP. L. 1, 16–17 (2009).

¹²⁵ See *Lawrence v. Texas*, 539 U.S. 558, 579–85 (2003) (O'Connor, J., concurring).

¹²⁶ *Lim Meng Suang I*, SGHC 73, at para. 24.

¹²⁷ See Chang, *supra* note 63, at 328.

¹²⁸ KEVIN TAN, CONSTITUTIONAL LAW IN SINGAPORE 156 (2011).

¹²⁹ *Id.*

¹³⁰ *Tan Eng Hong I*, S.G.C.A. 45, at para. 124.

¹³¹ See, e.g., Jack Lee Tsen-Ta, *Equal Protection and Sexual Orientation*, 16 SING. L. REV. 228, 231 (1995) ("Rational review may be termed the 'traditional' standard of review. It was the earliest to be applied and is evident in all four jurisdictions [the United States, India, Malaysia and Singapore]. It is apparently the sole standard of review in India. On the other hand, American courts have gone on to develop heightened standards of review in the form of strict scrutiny, and more recently, intermediate review.")

¹³² See *Lawrence v. Texas*, 539 U.S. 558, 586 (Scalia, J., dissenting); see also Tribe, *supra* note 7, at 1916.

employed in other postcolonial Commonwealth countries such as India and Malaysia, prohibits legislation against a class but allows for reasonable classification between persons.¹³³

In applying the first prong of the rational review test in *Lim Meng Suang*, Judge Loh agreed with the Attorney General's interpretation and found intelligible differentia for Section 377A based on gender.¹³⁴ Judge Loh ruled that the intelligible differentia of Section 377A covered acts of gross indecency between males but not gross indecency between males and females or between females.¹³⁵ Judge Loh stated that "Parliament, in dealing with the issues arising within and without the country, is entitled to pass laws that deal with, inter alia, the myriad of problems that arise from the inherent inequality and differences pervading society."¹³⁶ Judge Loh's ruling is consistent with Professor Tan's description of Singaporean tolerance of discrimination between subjects where "legislative discrimination or selective application of the law [is] necessary to deal with 'the complex problems arising out of an infinite variety of human relations.'"¹³⁷

Judge Loh's reasoning also indicates the general deference to public order and social stability as overriding interests in illiberal pragmatic governance.¹³⁸ In applying the second prong of the intelligible differentia test, Judge Loh ruled that the differentiation bore a rational relation to the object sought in the original 1938 legislation, identified as a direct response to the prevalence of gross indecent acts between males.¹³⁹ In respect to the argument that gay men were being treated differently from women, Judge Loh noted that in 1938, there was little concern with female gross indecency,

¹³³ See Joseph Tussman & Jacobus TenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949) ("The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.").

¹³⁴ See *Lim Meng Suang I*, SGHC 73, at paras. 28, 48.

¹³⁵ See *id.* at para. 48.

¹³⁶ *Id.* at para. 44.

¹³⁷ TAN, *supra* note 128, at 156 (quoting *Public Prosecutor v. Su Liang Yu* [1976] 2 MLJ 128 (Malay.)).

¹³⁸ See Li-ann Thio, *Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore*, 20 UCLA PAC. BASIN L.J. 1, 53 (2002) ("Singapore retains an array of laws allowing the curtailment of individual liberties without judicial redress so as to serve the imperative of the broadly defined idea of 'public order.'").

¹³⁹ *Lim Meng Suang I*, SGHC 73, at para. 67 ("The act of males engaging in grossly indecent acts with other males was to be criminalised. The prevalence of such acts was a regrettable state of affairs and was not desirable. It was necessary to strengthen the criminal law and enable it to prosecute males engaging in such grossly indecent acts even if the acts were committed in private. This was because the then prevailing law made it difficult to detect and prosecute such acts.").

which is consistent with the then contemporaneous European tradition of viewing male homosexual behavior as being more aggressive and transgressive than female homosexual behavior.¹⁴⁰ Again, the justification for the law centers on public order and social stability.

Professor Yap Po Jen suggests that Judge Loh's ruling overly fixated on the 1938 rationale for the law with little regard to the evolution of its intent over time.¹⁴¹ However, as this author has previously written, even though attitudes regarding homosexuality in the former colonial power had since liberalized, Singapore resisted similar international pressure to conform. Instead, Singapore nationalistically vaunted its conservative Asian values as part of its postcolonial identity, even though the anti-gay position retained specters of the colonial past.¹⁴² In this respect, Judge Loh specifically tied the conservatism of the present, as reflected in the 2007 Parliamentary debates, to the same conservatism of the colonial past.¹⁴³ In the end, Judge Loh ruled that the continued moral conservatism of the majority constituted a valid state interest satisfying the second prong of the rational review test.¹⁴⁴ Judge Loh's justification relied largely on Parliament's concern with maintaining a balance between adopting certain Westernized values for the sake of economic growth while not upsetting the status quo for a conservative, postcolonial population.¹⁴⁵ In *Tan Eng Hong*,

¹⁴⁰ See Robert G. Moeller, "The Homosexual Man Is a 'Man,' the Homosexual Woman Is a 'Woman'": Sex, Society, and the Law in Postwar West Germany, 4 J. HIST. SEXUALITY 395 (1994).

¹⁴¹ See Yap Po Jen, *Section 377A and Equal Protection in Singapore: Back to 1938?*, 25 SING. ACAD. L.J. 630 (2013).

¹⁴² Chang, *supra* note 63, at 337.

¹⁴³ *Lim Meng Suang I*, SGHC 73, at para. 85 ("It is clear from the speeches made during the October 2007 Parliamentary Debates that the purpose of [Section] 377A has not changed from the purpose articulated by AG Howell in 1938. After extensive consultations at all levels, the Government decided to repeal [Section] 377 but retain [Section] 377A. Because of the Petition presented to Parliament, which called for the repeal of [Section] 377A, the debate over the abolition or retention of this provision took place and in fact overshadowed the rest of the proposed amendments to the 1985 Penal Code. The reason for [Section] 377A's retention, which affirmed the purpose of the provision as articulated by AG Howell in 1938, was that Singapore was a conservative society where the majority did not accept homosexuality."); *id.* at para. 78 ("Should we look at the October 2007 Parliamentary Debates to ascertain the purpose or object of [Section] 377A? I do not think there is a need to do so, but in any event, I found that those debates did not assist the Plaintiffs at all. In this case, the purpose of [Section] 377A was articulated, albeit within the context of a colonial government, when it was enacted by the Legislative Council in 1938. Section 377A was considered again some 69 years later, and it was decided that the provision should be retained even though [Section] 377 was to be repealed. That was the view taken by Parliament in 2007. In effect, the purpose of [Section] 377A as articulated by AG Howell in 1938, was reaffirmed by Parliament in 2007. That purpose therefore still remains valid today.")

¹⁴⁴ *Id.* at para. 138.

¹⁴⁵ See Tan, *supra* note 30, at 23–44 ("Nation building, therefore, took the form of preserving private spheres where these eternal 'Asian' ethnicities could flourish and provide the deeper historical, cultural, and moral resources for a stable and substantial overarching Singaporean identity. In the public sphere, there were to be secularism, equal opportunities for all, and common modes of communication and

Judge Loh largely dispensed with the Article 12 equal protection argument with a sweeping reference to his reasoning in *Lim Meng Suang*.¹⁴⁶ Furthermore, in its October 2014 ruling that upheld the constitutionality of Section 377A, the Court of Appeal relied almost exclusively on colonial moral justifications from 1938 to satisfy the second prong of the intelligible differentia test.¹⁴⁷

By setting rational review as the standard, the Court of Appeal also created a limited structure for understanding equal protection for gays. Although lesbian sex is mentioned, the first prong of the intelligible differentia test is more centrally concerned with the question of comparing gays to heterosexuals.¹⁴⁸ Finding commonality between gays and heterosexuals is not only the chief question in *Lim Meng Suang*, but is also the driving question in the incrementalist approach to gay advocacy in Singapore, though it ultimately proves to be the wrong question. Lim and Chee's challenge asked the Court, and society generally, to determine whether gays are similarly situated as heterosexuals, and therefore should be treated the same. Tan's case asked the Court to additionally determine whether, even if gays are treated differently than heterosexuals, they should also be treated as criminals. By including additional liberty arguments, the Tan challenge imagined that a solution to Section 377A must ultimately exist outside the rational review structure set by the Court of Appeal in the standing case. To accomplish this, Tan combined his liberty claim with equal protection under a larger natural law umbrella, which Judge Loh hesitantly agreed to engage in upon appeal.¹⁴⁹ Like Pink Dot, the Lim and Chee lawsuit employed a strategy that abides within the legal structure provided, whereas Tan Eng Hong challenged the validity of the structure itself.

participation. The public sphere would be the 'common space' that with time and collective confidence should increase as Singaporeans give priority to their national over their ethnic identities.”).

¹⁴⁶ *Tan Eng Hong II*, SGHC 199, at paras. 85–86.

¹⁴⁷ *Lim Meng Suang II*, S.G.C.A. 53, at paras. 117-152.

¹⁴⁸ *Tan Eng Hong I*, S.G.C.A. 45, at para. 126.

¹⁴⁹ *Tan Eng Hong II*, SGHC 199, at para. 20 (“I am compelled to consider the Natural Justice Issue because Mr Ravi has framed this issue in such a way that it does not fall outside the litigation boundary delineated by the Court of Appeal in *Tan Eng Hong v. Attorney General* [2012] SGCA 45. It will be recalled that the Court of Appeal found that if s 377A was void for violating the right to equality before the law and equal protection of the law under Art 12(1) and therefore unconstitutional, the Plaintiff's rights under Art 9(1) would be engaged on the facts of this particular case since his arrest and detention under s 377A had deprived him of his personal liberty.”).

B. *Tan Eng Hong and the Liberty Critique of Authoritarian Rule of Law*

Tan Eng Hong's challenge was fundamentally more confrontational than Lim and Chee's case because it argued that Section 377A subverts the rule of law,¹⁵⁰ a foundational principle upon which the Singaporean government bases its authority.¹⁵¹ Tan's attorney, M. Ravi, argued that in order to be legitimate, the rule of law must rely on more than simple formal validity and reflect larger overarching principles of natural justice.¹⁵² Equal application of the laws is not enough if the laws are invalid in the first place. Ravi's argument suggests that equal protection is insufficient without confronting more foundational liberty principles, so that if Section 377A "is found to contravene the fundamental rules of natural justice and is, accordingly, not 'law', the Plaintiff's arrest and detention under that section would have resulted in a deprivation of his personal liberty in a manner which was not justified by any law, and would have been unconstitutional."¹⁵³

M. Ravi specifically expanded equal protection into a larger rule of law argument involving liberty. He tied the prohibited conduct to fundamental identity, arguing that Section 377A was criminalizing a "natural and immutable attribute."¹⁵⁴ Normally, an immutable trait is used as a factor in determining indicia of a suspect class in applying American strict scrutiny review,¹⁵⁵ a standard not followed by Singapore or even the United States in respect to gay rights. Although Ravi did argue for a heightened standard of review,¹⁵⁶ citing recommendations from Professor Jack Lee,¹⁵⁷ this was not the main point behind his use of immutability. He couched immutability not solely within an equal protection framework but instead within his broader argument that Section 377A violates the rule of law, which touches on both equal protection and fundamental liberty.¹⁵⁸ Judge Loh reduced Ravi's point to a question of fact,¹⁵⁹ and created a factual impasse by situating the problem within a battle of experts.¹⁶⁰ However,

¹⁵⁰ *Tan Eng Hong II*, SGHC 199, at para. 21.

¹⁵¹ See generally Thio, *supra* note 138, at 53.

¹⁵² *Tan Eng Hong II*, SGHC 199, at para. 22(a).

¹⁵³ *Id.* at para. 21.

¹⁵⁴ *Id.* at para. 41.

¹⁵⁵ Lee, *supra* note 131, at 236.

¹⁵⁶ *Tan Eng Hong II*, SGHC 199, at para. 88.

¹⁵⁷ Lee, *supra* note 131, at 255.

¹⁵⁸ *Tan Eng Hong I*, SGHC 45, paras. 21, 22(d).

¹⁵⁹ *Tan Eng Hong II*, SGHC 199, at para. 45 ("Thus, on the Plaintiff's own case, in order for his argument here to succeed, he must demonstrate two facts, viz., homosexuality is inborn and unable to be changed.").

¹⁶⁰ *Tan Eng Hong II*, SGHC 199, at para. 63.

Ravi's immutability argument points to the ways in which conduct constitutes expression of fundamental identity, and that illicit gay conduct is merely symptomatic of the prohibitions against expression of gay identity.

Ravi's citation of Professor Lee suggests how rational review is insufficient because gays comprise a discreet and insular minority in Singapore, largely as a result of the immutability of their identity. Although Judge Loh rejected Ravi's proposal for strict scrutiny, which incorporates Lee's reasoning, Lee's analysis also reveals the inherent difficulty of an incrementalist approach that led to the favorable ruling in *Lawrence*. Lee starts by describing a hypothetical scenario:

If the majority has greater social contact with a minority, this diminishes the hostility that often comes with unfamiliarity and curbs the majority's tendency to exaggerate its superiority. The more we get to know people who are different in some ways, the more we begin to realise the ways in which they are the same. This is the beginning of political co-operation.¹⁶¹

Lee adds, however, that this scenario has been made virtually impossible for the gay community in Singapore. He notes that "homosexuals are anonymous and diffuse[d] throughout the population. It is this anonymity that makes them a discrete and insular minority. Strong prejudice against gays compels most to remain hidden for fear of losing their reputation and livelihood."¹⁶²

The lack of social acceptability drives gays to anonymous spaces. Gay men develop alternative spaces because the laws foreclose the venues for them to identify and encounter one another.¹⁶³ Tan Eng Hong was arrested precisely because the existing laws do not allow a forum for public expression of homosexual intimacy, and he was likely forced to seek more discreet settings for meeting potential partners. Because there are no public spaces to explore gay sexuality due to Section 377A and the resulting stigmas towards gay identity, gay men in Singapore must turn to semi-private spaces such as bathroom stalls and bathhouses to encounter one another. During the 2007 debate to repeal Section 377A, Parliament

¹⁶¹ Lee, *supra* note 131, at 243.

¹⁶² *Id.*

¹⁶³ Yap, *supra* note 141, at 635 ("If the State is seeking to argue that the object to be achieved by s 377A is to reduce HIV infection in Singapore by discouraging reckless male homosexual activity, one then has to examine whether the criminalisation of same- sex male intercourse would be effective in achieving this goal or such measures would only drive the infection underground, impede legal HIV prevention efforts, and in turn increase net HIV infection in the country.").

Member Hri Kumar Nair also suggested that criminalization drives homosexuality into underground spaces of anonymity.¹⁶⁴

C. *Reevaluating Lawrence in Light of Lim Meng Suang and Tan Eng Hong*

A comparison of the Singapore cases allows a reevaluation of the rationale promoted by *Lawrence*, and the subsequent entrenchment of incrementalism that followed. *Tan Eng Hong* illustrates the circular interconnectedness between criminalization of homosexuality, public discrimination against gays, illicit homosexual behavior, and justifications for the criminal sanctions against gays. This interrelationship was significant in the decision in *Lawrence* to overturn the Texas anti-sodomy statute.¹⁶⁵ As Justice Kennedy explained, “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”¹⁶⁶ *Lawrence* hinged, however, on the fact that Justice Kennedy found that the morality of the majority was not a valid interest that allows for differential treatment.¹⁶⁷

The decision could easily have come out the other way, as it did in Singapore. The opposite ruling in the Singaporean cases challenging Section 377A reveals the tenuousness nature of the *Lawrence* outcome under its semi-rational review approach, or any standard short of strict scrutiny. If criminalization drives public disapprobation of gay expression, and the morality of the majority is a compelling state interest that justifies the prohibition of gay expression, then there will always be a rational reason for retention of Section 377A. Thus, there is a need to look beyond equal protection, and consider protections of gay expression as an issue of liberty.¹⁶⁸ In this respect, the arguments raised in *Tan Eng Hong* provide a

¹⁶⁴ *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2242 (Hri Kumar Nair, Member of Parliament) (“making something illegal only forces it underground. That will restrict the ability of the Government to respond to the HIV threat through promotion and education, when Government agencies feel that they cannot engage with the gay community in any way except a condemnatory one.”).

¹⁶⁵ *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 577 (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

¹⁶⁸ *Lee*, *supra* note 131, at 256 (“heightened scrutiny reinforces the notion of fundamental liberties. If some rights are established as fundamental by the Constitution, it stands to reason that everyone is entitled to these rights before claims to non-fundamental rights can be granted.”).

useful lens to consider the gaps left in *Lawrence*, and the impetus to treat homosexuality as a matter of privacy weighed against societal morality.

Though equal protection is included in his larger natural law argument in *Tan Eng Hong*, Ravi tailored a more specific rule of law challenge that appeals to liberty, citing the landmark Singaporean habeas corpus case *Chng Suan Tze v. Minister of Home Affairs*.¹⁶⁹ Ravi cited *Chng* to argue that Section 377A is an arbitrary law violating fundamental rule of law principles.¹⁷⁰ In *Chng*, the appellants Chng Suan Tze, Kevin Desmond de Souza, Teo Soh Lung, and Wong Souk Yee were among sixteen individuals accused of conspiring against the government and detained without trial under the Internal Security Act (ISA) in 1987.¹⁷¹ The ISA conferred on the President and Prime Minister discretionary power to detain individuals in order to preserve public order and security.¹⁷² The government invoked the ISA to detain the appellants for being part of a “Marxist conspiracy.”¹⁷³ The appellants denied such involvement, alleging that the law was illegally applied to prevent them from exercising their civil and political liberties. The *Chng* case specifically challenged the discretionary power of the state to suspend the liberty interests of individuals, as such discretion rises to the level of arbitrariness.¹⁷⁴ Although the appellants were unsuccessful at the lower court levels, the Court of Appeal agreed with the appellants.¹⁷⁵ In *Chng*, the Court of Appeal asserted: “[T]he notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to review the exercise of discretionary power.”¹⁷⁶ In response to *Chng*, the Singapore Parliament quickly mobilized to amend the Constitution and the ISA to prohibit judicial review of detentions based on internal security.¹⁷⁷

At its heart, the *Chng* case differentiated “rule of law” from “rule by law,” with the former putting into question the legitimacy of the latter as an

¹⁶⁹ See *Chng Suan Tze v. Minister for Home Affairs and others and other appeals*, [1988] S.G.C.A. 16.

¹⁷⁰ *Tan Eng Hong II*, SGHC 199, at para. 65.

¹⁷¹ *Chng Suan Tze*, S.G.C.A. 16, at paras. 2–3.

¹⁷² *Id.* at paras. 43–46.

¹⁷³ *Id.* at para. 2.

¹⁷⁴ *Id.* at paras. 30, 78–82.

¹⁷⁵ *Id.* at para. 140.

¹⁷⁶ *Id.* at para. 156.

¹⁷⁷ Internal Security Act (Cap 143, 1985 Rev Ed), amended by Internal Security Amendment Act (Act 2 of 1989) (adding sections 8A, 8B, 8C, and 8D); see also Constitution of the Republic of Singapore (1965), Art 149(3); see also *Teo Soh Lung v. Minister for Home Affairs and others and other appeals* [1988] SLR 16 (upholding the amendments implemented following the decision in *Chng*); see also Josiah Zee, *Defending Singapore’s Internal Security Act: Balancing the Need for National Security with the Rule of Law*, MURDOCH U. L. REV., June 2011, at 35.

acceptable exercise by the illiberal state.¹⁷⁸ Perhaps in order to expedite his own legal conclusion, Judge Loh bundled Ravi's application of *Chng* as a simple example in his larger natural justice argument. Judge Loh refused to recognize the distinct criticism of rule by law that Ravi tried to make: "I find it difficult to see how Mr. Ravi's reliance on the concept of the rule of law as applied in *Chng Suan Tze* takes his case further than a singular reliance on the fundamental rules of natural justice."¹⁷⁹ Judge Loh misread Ravi's application of *Chng* as a simple call for judicial review¹⁸⁰ when Ravi was more likely drawing a larger criticism of the rule by law system that Section 377A represents. Ravi possibly invoked *Chng* to reveal the inherent contradictions of Section 377A as a product of illiberal pragmatism. The 2007 compromise to keep Section 377A as the official law but not proactively enforce it was intended by the Prime Minister and Parliament to maintain public order. However, that compromise instead creates disorder by allowing Section 377A to be discretionarily applied in an arbitrary and capricious manner. In other words, Section 377A demonstrates how the illiberal state justifies disorder in the name of order.¹⁸¹ Unsystematic enforcement creates a seemingly arbitrary system that contradicts the rule of law, and instead exposes it as rule by law in its rawest form.

D. *Public Visibility and the Semiotics of Queerness*

Ravi argued that Section 377A is fraught with so much ambiguity and discretion in application that it is unconstitutionally vague because it "violates the fundamental principles of natural justice and the rule of law which demand, among others, certainty and predictability."¹⁸² Ravi

¹⁷⁸ Raja, *supra* note 37, at 211 ("The Court's words hold the promise of a collaborative legal complex mobilization, of judges uniting with lawyers to assert the 'rule of law' in the face of 'rule by law' state practices). See also Jack Tsen-Ta Lee, *Shall the Twain Never Meet? Competing Narratives and Discourses of the Rule of Law in Singapore*, SING. J. LEGAL STUD. 298, 305 (2012).

¹⁷⁹ *Tan Eng Hong II*, SGHC 199, at para. 66.

¹⁸⁰ *Id.* at para. 67 ("Ostensibly, 'rule of law' in that context meant that the court retained the final power to re-examine the exercise of the Executive's discretion. The Executive was therefore subject to the rule of law. Unlike the respondents in *Chng Suan Tze*, it is not the Defendant's case in the present proceedings that s 377A is not reviewable by the court. I am therefore unable to see how bringing in the concept of rule of law as used by the court in *Chng Suan Tze* adds anything."); Judge Loh had also confined his reference to *Chng* in the *Lim Meng Suang* case to an analysis of judicial review. See *Lim Meng Suang I*, SGHC 73, at para. 112.

¹⁸¹ Jothie Rajah, *Punishing Bodies, Securing the Nation: How Rule of Law Can Legitimate the Urbane Authoritarian State*, 36 LAW & SOC. INQUIRY 945, 948-49 ("Just as the state has appropriated and emasculated Westminster institutions and ideologies as "an adjunct to, rather than as a constraint against" state authoritarianism [], so too has Singapore selectively performed emasculated facets of the rule of law, facets that lack the core capacity to limit state power.").

¹⁸² *Tan Eng Hong II*, SGHC 199, at para. 80.

illustrated that under Section 377A, even “kissing, holding hands, or even merely hugging,”¹⁸³ could constitute an arrestable violation. Judge Loh dismissed this argument by reasoning:

It should be evident from the considerations which were extant in 1938 (when the earliest predecessor of 377A was enacted) that there is at least an arguable case that the conduct in the hypothetical example given by Mr. Ravi would not constitute an offence under [Section] 377A. In fact, it is quite telling that none of the more than a hundred case authorities cited by Mr. Ravi was of a decision by the Singapore court convicting two males for kissing, holding hands or hugging.¹⁸⁴

Judge Loh’s decision seems to indicate that there is some level of predictability to the law. However, Judge Loh’s finding is inconsistent with the original analysis of the Court of Appeal in the earlier *Tan Eng Hong* standing case and its extension to Gary Lim and Kenneth Chee.

In the same way that *Tan Eng Hong* was granted standing to sue even though there was no longer a prosecution pending under Section 377A, Gary Lim and Kenneth Chee were also deemed to have standing to conduct their own constitutional challenge based on the realistic possibility that they could be prosecuted under Section 377A. Under the unofficial compromise of non-enforcement, Gary Lim and Kenneth Chee likely would not have been arrested under Section 377A. Their conduct was completely private and consensual; exactly the type of relationship against which Parliament agreed not to proactively enforce Section 377A. In fact, Gary Lim and Kenneth Chee conveyed to the Court that “the real pressure which they experience on account of their relationship seems to have been from their respective parents, their respective families and members of society, and not from any officer of the law.”¹⁸⁵

Gary Lim and Kenneth Chee would not typically be arrested or prosecuted under the law because their conduct was not necessarily public. However, the Court of Appeal intimated that Section 377A had broad implications beyond the type of behavior contained in *Tan Eng Hong*’s situation:

¹⁸³ *Tan Eng Hong II*, SGHC 199, at para. 82.

¹⁸⁴ *Id.* at para. 83.

¹⁸⁵ *Lim Meng Suang I*, SGHC 73, at para. 10.

[W]ithout going into the merits of the Application, we want to acknowledge that in so far as [Section] 377A in its current form extends to private consensual sexual conduct between adult males, this provision affects the lives of a not insignificant portion of our community in a very real and intimate way. Such persons might plausibly assert that the continued existence of [Section] 377A in our statute books causes them to be unapprehended felons in the privacy of their homes.¹⁸⁶

Lim and Chee's sexual conduct would not have ever been discovered but for their admission that such conduct was taking place in private. The Court of Appeal's finding, however, suggests that there need not even be an admission. Even though their sexual conduct was not in public view, the nature of their relationship created a deduction that such conduct was taking place privately. In other words, their relationship itself communicates the fact that illicit conduct is occurring.

Tan Eng Hong's attorney intimated this point in his argument. Ravi's example of kissing and holding hands further subverts the distinction between seen and unseen, public and private. Ravi's desexualized illustration of kissing and holding hands indicates that even though those types of conduct do not facially constitute violations of Section 377A, they nevertheless signal private violations that could be prosecuted. Thus, Ravi's use of kissing and holding hands as a hypothetical suggests that Section 377A does not so much punish conduct, but really punishes identity.

Tan Eng Hong, Gary Lim, and Kenneth Chee were all subject to discretionary prosecution under Section 377A not necessarily because their conduct was in fact witnessed, but because their identities as gay men marked them as presumptive violators of the law. In this respect, Ravi indirectly raised the issue whether treating gays differently even within their own community is productive if the law, and society, will treat unobtrusive sex in private as equivalent to deviant sex in public.

¹⁸⁶ *Tan Eng Hong I*, S.G.C.A. 45, at para. 184.

IV. FALSE CLOSETS AND THE REPRESSIVE POLITICS OF GOOD GAYS AND BAD QUEERS

A. *Proscribing False Closets Through Equal Protection and Privacy*

The Singaporean government's unofficial non-enforcement of Section 377A as to private consensual conduct sets a hard divide between what is impermissible to be seen in public versus what is allowed to persist so long as it remain invisible. Judge Loh's reasoning in *Lim Meng Suang* on the issue of non-enforcement largely depended on the conclusion that Section 377A does not differentiate between public and private, seen and unseen. The issue of non-enforcement was a major argument lodged by Lim and Chee when challenging the rational relation of Section 377A to any legitimate government purpose:¹⁸⁷ if the law is not to be enforced, then there is no reason for the law to exist. Judge Loh, however, argued that actual enforcement is irrelevant to the primary purpose of Section 377A, which he concluded was intended to serve as "a moral signpost . . . that reflect[s] the views of a vast majority of society who were not ready to accept homosexuality as part of our mainstream way of life."¹⁸⁸ To this end, non-enforcement does not frustrate the purpose of Section 377A if the purpose is to function as the symbolic disapproval of homosexuality in Singaporean society.¹⁸⁹ Thus, for Judge Loh, it did not matter whether Lim and Chee would actually have been arrested, or even detected, as the original purpose of Section 377A was to prevent homosexual behavior even if it was private and consensual.

In fact, Judge Loh found that one of the primary purposes for adopting an anti-sodomy statute in 1938 was specifically to extend the law to encompass not only public but also private conduct. He asserted: "It was necessary to strengthen the criminal law and enable it to prosecute males engaging in such grossly indecent acts even if the acts were committed in private. This was because the then prevailing law made it difficult to detect and prosecute such acts."¹⁹⁰ Judge Loh's finding contains tacit acknowledgment that prosecution of public acts drives homosexual behavior

¹⁸⁷ *Lim Meng Suang I*, SGHC 73, at para. 101.

¹⁸⁸ *Id.* at para. 84.

¹⁸⁹ *Id.* at para. 134 ("Whether s 377A can still fulfill its purpose of signaling the public's disapprobation of male homosexual conduct notwithstanding the policy of non-enforcement is a consideration for Parliament and is also supported by the presumption of constitutionality. The Plaintiffs have only provided mere postulations, but no material evidence, to show that the purpose of s 377A would not be achieved if the provision is not actively enforced.")

¹⁹⁰ *Id.* at para. 67.

underground,¹⁹¹ into private and closeted spaces, so that it is less detectable.¹⁹²

Professor Eve Sedgwick defines such closeting as both a product and a manifestation of state oppression, where state endorsement of public discrimination against gays further confines them into unseen, private areas.¹⁹³ At one level, the unofficial nonenforcement of Section 377A means that individuals like Gary Lim and Kenneth Chee, who conduct their identities in the confines of private domestic spaces, are allowed to practice their gay identities, while individuals like Tan Eng Hong are not. In this light, the agreement to not prosecute private actions under Section 377A could be understood as a condemnation of only public obscenity. Professor Michael Hor argues how, if prosecution of publicly indecent acts is the purpose, then Section 377A is superfluous since there are other criminal laws that exist to prosecute those types of behavior.¹⁹⁴ The whole reason why Tan Eng Hong's challenge initially required a decision on standing was because the prosecution had dropped the Section 377A charge in favor of a public obscenity charge.¹⁹⁵ However, the decisions of the Court of Appeal and Judge Loh, which seem to disregard the public and private distinction, suggest that Section 377A concerns more than just keeping homosexual acts outside of public sight and consciousness.

Professor Joan Howarth argues that anti-sodomy statutes, even when unenforced, create "false closets" for many gay individuals, forcing upon them the choice to publicly identify as citizens or criminals in respect to their sexual identity.¹⁹⁶ Howarth's analysis suggests that the quest for legitimacy, when pursued in certain ways, becomes a closet that inevitably proves illusory and false. The equal protection argument provides a veneer of legitimacy to allow certain gay individuals, such as Gary Lim and Kenneth Chee who claim similarity to conforming heterosexuals, to hide among those heterosexuals. Gary Lim and Kenneth Chee would not be prosecuted under Section 377A, not just because they are hidden away from

¹⁹¹ See Yap, *supra* note 141, at 635.

¹⁹² Jean Shin, *The Asian American Closet*, 11 ASIAN L.J. 1, 1 (2004) ("The gay closet...is a term used to describe the process by which some gays may hide their sexuality from public view, in order to avoid social disapproval or legal sanctions.").

¹⁹³ See EVE SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 71 (1990).

¹⁹⁴ Michael Hor, *Enforcement of 377A: Entering the Twilight Zone*, in *QUEER SINGAPORE: ILLIBERAL CITIZENSHIP AND MEDIATED CULTURES* 45, 57 (Audrey Yue and Jun Zubillaga-Pow eds., 2012).

¹⁹⁵ *Tan Eng Hong I*, S.G.C.A. 45, at para. 1.

¹⁹⁶ Joan W. Howarth, *Adventures in Heteronormativity: The Straight Line from Liberace to Lawrence*, 5 NEV. L.J. 260, 268 (2004) ("Lawrence thus stands as a monument to the power of even unenforced law. By repudiating Bowers, Lawrence...vindicated Liberace's choice to use the law to construct a false closet. Liberace insisted on being part of the American mainstream. When made to choose, he chose being a citizen, not a criminal.").

public view, but because they invisibly conform even in full public view. Professor Kenji Yoshino characterizes this as the difference between “passing” and “covering.”¹⁹⁷ As advertised by the gay advocacy movement in Singapore, Gary Lim and Kenneth Chee are a gay couple that is like any other law-abiding couple in Singapore and therefore deserve equal rights. Under this view, they deserve equal rights not so much because of their gay identities, but because of their identity as a normative couple.

Thus, at another level, the nonenforcement of Section 377A against people like Gary Lim and Kenneth Chee can be understood as a method of disciplinary state control through self-policing within the gay community. Nonenforcement constitutes a compromise between the state and certain gay individuals who agree to conform as citizen subjects and recognize the legitimacy of the rule of law when applied against nonconforming subjects such as Tan Eng Hong. The alienation of Tan Eng Hong by gay activists such as People Like Us and Pink Dot segregates gays who are like heterosexuals, and therefore deserve protections, from gays who are not, and therefore do not deserve protections. The “covering” that occurs through the compromise camouflages gay identity within the veneer of social and moral acceptability. In his address to Parliament during the debate to repeal Section 377A, Prime Minister Lee Hsieng Loong alluded generally to spaces where homosexuality exists and will continue to be tolerated with full public knowledge.¹⁹⁸ Yet obtaining tolerance through this method is, as Howarth describes, false, since working within the rules legitimizes only the rules, not the subjects.¹⁹⁹

During the 2007 parliamentary debates, petitioners from the Repeal 377A movement described the gay community as model citizens, “often responsible, invaluable, and highly respected contributing members of society.”²⁰⁰ Prime Minister Lee Hsien Loong responded by acknowledging their good citizenship, but nevertheless bifurcated their interests from the family-oriented goals of the mainstream population, calling for compromise

¹⁹⁷ Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (passing, in which the gay individual is expected to hide her minority sexuality and to impersonate a heterosexual; and covering, in which the “underlying identity is neither altered nor hidden, but is downplayed.”).

¹⁹⁸ *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2400–01 (Lee Hsieng Loong, Prime Minister and Minister for Finance) (“De facto, gays have a lot of space in Singapore. Gay groups hold public discussions. They publish websites. I have visited some of them. There are films and plays on gay themes . . . There are gay bars and clubs. They exist. We know where they are. Everybody knows where they are. They do not have to go underground. We do not harass gays. The Government does not act as moral policemen. And we do not proactively enforce section 377A on them”).

¹⁹⁹ Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 245 (2006).

²⁰⁰ *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2399 (Lee Hsieng Loong, Prime Minister and Minister for Finance).

between the two poles for the sake social stability and harmony.²⁰¹ Gary Lim and Kenneth Chee represent a deeper retreat into the domestic arena for the purposes of legitimization. Parliament justified the retention of Section 377A by citing the values of Singapore as a family-oriented society set against deviant gay subjects like Tan Eng Hong.²⁰² Gary Lim and Kenneth Chee serve as a foil to Tan Eng Hong—they are presented not as deviating from family values, but rather as exemplifying family values.

The disavowal of Tan Eng Hong and the veneration of Gary Lim and Kenneth Chee have been central to the incrementalist strategy of gay advocacy in Singapore. With the polarization of Gary Lim and Kenneth Chee against Tan Eng Hong as representative models of gay identity, Singapore is at the same crossroads for gay rights as post-Stonewall politics of gay liberation in the United States. Originally, the gay rights movement was much more radical in its response to the criminalization of gay identity,²⁰³ and treated domesticity and marriage with more ambivalence.²⁰⁴ However, as Professor Yuvraj Joshi has observed, “[s]ince the late 1970s, there has been a paradigm shift within queer politics in which equality

²⁰¹ *Id.* at cols. 2399–2400 (Lee Hsieng Loong, Prime Minister and Minister for Finance) (“So, we should strive to maintain a balance, to uphold a stable society with traditional, heterosexual family values, but with space for homosexuals to live their lives and contribute to the society.”).

²⁰² *Id.* at col. 2242 (Li-Ann Thio, Nominated Member of Parliament) (“Acts of gross indecency” under 377A also covers unhygienic practices like “rimming” where the mouth comes into contact with the anus. Consent to harmful acts is no defence, otherwise, our strong anti-drug laws must fall as it cannot co-exist with letting in recreational drugs as a matter of personal lifestyle choice. Opposite-sex sodomy is harmful, but medical studies indicate that same-sex sodomy carries a higher price tag for society because of higher promiscuity and frequency levels. The New York Times reported that even informed homosexuals return to unsafe practices like bare-backing and bug-chasing after a health crisis wanes. A British Study showed that the legalisation of homosexual sodomy correlated with an upsurge of STDs among gays...Public sexual morality must buttress strong families based on faithful union between man and wife, the best model for raising children. The state should not promote promiscuity nor condone sexual exploitation.”).

²⁰³ Michael Warner, *Normal and Normaller: Beyond Gay Marriage*, 5 GLQ: J. LESBIAN & GAY STUD. 119, 123 (1999) (For example: “[i]t resisted any attempt to make the norms of straight culture the standards by which queer life should be measured”; “[i]t especially resisted the notion that the state should be allowed to grant legitimacy to some kinds of consensual sex but not others or to confer respectability on some people’s sexuality but not others”; “[i]t insisted that much of what was taken for morality, respectability, or decorum was, in practice, a way of regulating sexual relations and pleasures”; “[i]t taught that self-esteem must not be purchased with a disavowal of sex; it must include esteem for one’s sexual relations and pleasures, no matter how despised they may commonly be”; “[i]t made itself alert to the invidiousness of any institution, like marriage, that is designed both to reward those inside it and to discipline those outside it: adulterers, prostitutes, divorcees, the promiscuous, single people, unwed parents, those below the age of consent—in short, all who are, for the purposes of marriage law, queer”; “[i]t insisted that any vision of sexual justice begin by considering the unrecognized dignity of these outcasts, the ways of living they represent, and the hierarchies of abjection that make them secondary, invisible, or deviant”; “[i]t became alert to the danger that the same hierarchies would continue to structure the thought of the gay and lesbian movement itself, whether through ‘internalized homophobia,’ in-group hostility, or simply the heteronormative perspective unconsciously embedded in so much of our thought and perception.”).

²⁰⁴ See Douglas Nejaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and its Relationship to Marriage*, 102 CAL. L. REV. 87, 94–98 (2014).

politics have eclipsed liberation politics. Legal recognition of same-sex relationships has become heralded as the final frontier of queer politics.”²⁰⁵ Gary Lim and Kenneth Chee represent a similar shift in Singaporean gay activism away from radical politics of individual liberty to a politics of respectability for the committed couple.²⁰⁶

In the United States, the transformation of gay identity into an issue of respectability arguably begins with *Lawrence v. Texas*, the case which Lim and Chee emulated and referenced with the hope of obtaining similar results. Several scholars note how in *Lawrence*, Justice Kennedy domesticated the defendants John Lawrence and Tyron Garner by framing their sex within an imagined context of a committed, consensual relationship.²⁰⁷ However, there was never any factual corroboration whether Tyron Garner was in a committed relationship with John Lawrence²⁰⁸ (similar to Gary Lim and Kenneth Chee) or whether the two were simply engaged in an otherwise anonymous rendezvous, (similar to Tan Eng Hong and his nameless “co-accused” partner).²⁰⁹ By adopting one interpretation of the facts over the other, the *Lawrence* decision painted a scenario where homosexuality is a publicly acceptable domestic practice, to the tacit exclusion of other forms of sexual expression that continue to be unimaginable and unspeakable.²¹⁰ As Joshi explains, “respectable queerness—suggests that the newfound public recognition of gay people and relationships is contingent upon their acquiring a respectable social identity that is actually constituted by public performances of respectability and by privately queer practices.”²¹¹ Justice Kennedy did not pronounce sodomy as absolutely permissible, but rather

²⁰⁵ Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 416 (2012); see also Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147, 148 (2009).

²⁰⁶ See generally JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES* (1983); see also Martin Meeker, *Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s*, 10 J. HIST. SEXUALITY 78 (2001).

²⁰⁷ Franke, *supra* note 6, at 1408 (“Just as the Court’s earlier Bowers decision and the military’s ‘don’t ask, don’t tell’ policy overdetermined gay men and lesbians in sexual terms, we now celebrate a victory that at its heart underdetermines, if not writes out entirely, their sexuality. Previously, when courts considered the legal status of gay men, they approached the specter of homosexual sex with a horror ordinarily reserved for incest cases. Now gay men are portrayed as domesticated creatures, settling down into marital-like relationships in which they can both cultivate and nurture desires for exclusivity, fidelity, and longevity in place of other more explicitly erotic desires.”); Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387, 398 (2012); Noa Ben Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J. L. & GENDER 243, 255 (2014).

²⁰⁸ Murray, *supra* note 207, at 398.

²⁰⁹ *Tan Eng Hong I*, S.G.C.A. 45, at para. 4.

²¹⁰ See Yoshino, *supra* note 197, at 815 (describing the historical connotations of “sodomy [as] the ‘sin which should neither be named nor committed,’ or the ‘detestable, and abominable sin, amongst Christians not to be named.’”).

²¹¹ Joshi, *supra* note 205, at 416.

delineated where and when sodomy was permissible. In the same way, the competing challenge by Gary Lim and Kenneth Chee immediately following the ruling in the Tan Eng Hong standing case served as a method of eclipsing and silencing Tan in favor of a more respectable version of homosexuality. As a couple who only wanted to legally pursue their “more enduring bond” with one another, their challenge against Section 377A was implied to be seeking a more venerated goal than the less deserving Tan, the single man who presumably desired only anonymous sex.

Gary Lim and Kenneth Chee, as a committed monogamous couple, look as though they are married, and their equal protection argument depended largely on this similarity. Tan, on the other hand, could not claim such a comparison. To this effect, Judge Loh acknowledged the potential applicability of *Hollingsworth v. Perry* in *Lim Meng Suang*,²¹² but not in *Tan Eng Hong*. Marriage is often cast as the archetypical model for legitimate consensual sex and intimacy.²¹³ In the United States, *Lawrence* paves the path to legitimizing gay marriage,²¹⁴ or perhaps seen another way, legitimizing gays through marriage.²¹⁵ *Hollingsworth* and *Windsor*, read in this light, represent the further entrenching of marriage as the ideal expression of legitimate sexuality.²¹⁶ The *Windsor* decision was, at a certain level, a validation of the choice of Edith Windsor and Thea Spyer to conform to the normative standard of marriage—they chose to legitimize their relationship, and thus should be allowed the right to enjoy the same benefits as others who made similar choices.²¹⁷ In this respect, the *Lawrence* decision has indeed become, as Justice Scalia partly anticipated,²¹⁸ the forerunner to a normative strategy for legitimizing gay marriage.

²¹² *Lim Meng Suang I*, SGHC 73, at para. 141.

²¹³ See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 961 (N.D. Cal. 2010) (finding of fact no. 34, “Marriage is the state recognition and approval of a couple’s choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents.”).

²¹⁴ *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting) (“This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples.”).

²¹⁵ Marc Spindelman, *Homosexuality’s Horizon*, 54 EMORY L.J. 1361, 1398 (2005) (“[the] moral heuristic of marriage spawns a novel set of social meanings for lesbian and gay identities. Merely locating these identities squarely at the center of the moral matrix it configures, which predicates granting lesbians and gay men full standing within the moral community, gives us, in identity terms, lesbians and gay men as moral citizen, heterosexuals’ equals.”).

²¹⁶ See Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709 (2002); see also Carlos A. Ball, *This is Not Your Father’s Autonomy: Lesbian and Gay Rights From a Feminist and Relational Perspective*, 28 HARV. J.L. & GENDER 345 (2005).

²¹⁷ Marc Spindelman, *Homosexuality’s Horizon*, 54 EMORY L.J. 1361, 1391 (2005) (“[U]nmarried couples can properly be treated differently than married couples on a theory of presumed consent—you’re choosing not to get marriage benefits if you don’t marry.”).

²¹⁸ *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (“This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples”); *Windsor v. Perry*, 133 S. Ct. 2675, 2709 (2013)

B. *The Biopolitics of Respectable Domesticity*

The question remains whether gay marriage is indeed the end of gay rights.²¹⁹ However, in the same way that we currently debate whether our society has become post-racial,²²⁰ we will soon likely enter an era where we will ask if we have also become post-sexuality. In this respect, gay marriage is perhaps a mirage of formal equality that can mask surviving and invidious inequalities.²²¹ From a cynical perspective, *Hollingsworth* and *Windsor* may have simply granted invisibility to remaining homophobic prejudices in society by segregating the gay community into good gays and bad queers.²²² Ironically, *Windsor* could potentially be used to validate discrimination against “bad queers.” There is an argument that those who do not choose the same path of formal equality through marriage as Edith Windsor and Thea Spyer, freely choose to reject that equality and therefore freely choose to be

(Scalia, J., dissenting) (“When the Court declared a constitutional right to homosexual sodomy, we were assured that the case had nothing, nothing at all to do with ‘whether the government must give formal recognition to any relationship that homosexual persons seek to enter.’ *Id.*, at 578, 123 S. Ct. 2472. Now we are told that DOMA is invalid because it ‘demeans the couple, whose moral and sexual choices the Constitution protects,’ ante, at 2694—with an accompanying citation of *Lawrence*.”).

²¹⁹ Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1071 (2014) (“Andrew Sullivan has been the most vocal and transparent proponent of this view . . . [that] ‘formal public equality’ as the endgame for the gay rights movement, and rights of access to marriage and the military as equality’s two central planks. Indeed, he argued, ‘If nothing else were done at all, and gay marriage were legalized, ninety percent of the political work necessary to achieve gay and lesbian equality would have been achieved. It is ultimately the only reform that truly matters.’ Dan Savage, who emerged as a gay leader in the wake of Prop. 8, recently declared that the ‘entire gay rights agenda’ entails the right to marry, bans on discrimination in employment and education, and immigration rights for transnational same-sex couples. He went on to say that once these laws are in place, ‘the fight over gay rights [will be] essentially over.’”) (quoting ANDREW SULLIVAN, *VIRTUALLY NORMAL* 173, 178 (1995)); see also Andrew Sullivan, *The End of Gay Culture: Assimilation and Its Meaning*, NEW REPUBLIC, 16 (2005) (identifying assimilation as the “end of gay culture”); see also DANIEL HARRIS, *THE RISE AND FALL OF GAY CULTURE* (1997).

²²⁰ Sumi Cho, *Post-racialism*, 94 IOWA L. REV. 1589, 1594 (2009) (defining post-racialism as the “belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action.”).

²²¹ See Robinson, *supra* note 219, at 1066 (“To assume that same-sex couples will follow the trajectory of different-sex couples seems curious and shortsighted. Advocates for LGBT people should think more critically about the enduring effects of homophobia as well as the structural obstacles that same-sex couples are likely to face, including families of origin that are less likely to respect and support a same-sex marriage. In limiting their claims to formal equality, marriage equality advocates may foreclose future avenues of relief.”).

²²² Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL’Y 105, 158 (2010) (“[L]egalization of same-sex marriage may validate those couples who fit in best with straight culture and implicitly penalize those who are not married, thus privileging to an even greater extent already normative authorizations. Marriage wages an attack on sexual LGB culture in its failing attempt to create ‘good gays’ and reinforces the hierarchy of sexual shame by delegitimizing otherwise potentially fulfilling non-monomogamous sexual lives.”).

discriminated against. In this respect, marriage becomes at once both a sanctuary and a prison for gays to enjoy apparent equality in society. The path to that prison starts with *Lawrence*. Justice Kennedy went to great lengths to differentiate between legitimate and illegitimate sex²²³ and effectively constrained John Lawrence and Tyron Garner within an imagined normative structure of a committed relationship even though there was no evidence of such.²²⁴ He placed Lawrence and Garner in a false closet, where their contrived domesticity defined their non-criminality. Justice Kennedy's idealized vision of committed gay relationships has become a standard by which the gay community polices itself. The marriage equality movement is a push toward normalizing gay sex so that it is like heterosexual sex.²²⁵ Those who subscribe to the ideal of marriage enjoy protections, whereas those who do not are left out.

In his lectures on the evolution of disciplinary power in the modern state, Michel Foucault defines "biopower," or the "right to make live and let die,"²²⁶ as a method of modern population control in the liberal democracy. Having evolved beyond old exercises of power such as war and the physical killing of aberrant elements of the population,²²⁷ the modern state exercises biopower to affect population dynamics through the granting and denying of civil rights.²²⁸ The state allows certain demographics to thrive through recognition of their rights, while consigning others to political death through nonrecognition.²²⁹ The right to live, or rather the right to live under certain

²²³ *Lawrence*, 539 U.S. at 578 ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.").

²²⁴ Murray, *supra* note 207, at 398 ("Although it is possible that Justice Kennedy, who wrote for the *Lawrence* majority, was unaware of the precise details of the facts, some have suggested that his depiction of Lawrence and Garner as a couple was intended to establish this type of monogamous, coupled intimacy as the norm for same-sex sexuality"); see also Franke, *supra* note 6, at 1408.

²²⁵ Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 57 (2012) ("This transformation of same-sex sodomy into marriage-like intimacy not only reflects marriage's disciplinary force, but also underwrites an effort to impose some kind of discipline in the interstitial space between marriage and crime. The opinion speaks of liberty, autonomy, and dignity--and the possibility of sex that is not subject to the state's disciplinary project. But it soon makes clear that its protection is contingent and cabined. Though *Lawrence* offers the promise of a space for sex without legal regulation, it ultimately reneges. The constitutional protection afforded in the space between marriage and crime is available to certain types of sex: private consensual sex between two adults.").

²²⁶ MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED 241 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 1997).

²²⁷ See generally Barrak Alzaid, *Fatwas and Fags: Violence and the Discursive Production of Abject Bodies*, 19 COLUM. J. GENDER & L. 617 (2010).

²²⁸ FOUCAULT, *supra* note 226, at 240.

²²⁹ *Id.* at 255.

conditions as defined by the state, can only be enjoyed by those who claim those rights and conditions. As Professor Eduardo Mendieta summarizes, biopower is the “insidious rationality of having to submit life to the management of the state, [where] the granting of rights presupposes having been allowed to live, or to be recognized as living by the political order.”²³⁰ In the modern liberal democracy, populations are controlled no longer through physical force, but through consent and consensus. Professor Christian Laval describes how Foucault’s theory operates in the liberal democracy, where “[p]ublic opinion is set up as a permanent tribunal, which is expected to provide the cheapest and most efficient regulation . . . [and] [g]overnmentality is the deliberate and careful way in which this chain is set to work in order to form, guide, correct, and modify behavior.”²³¹ What results is a self-policing population that is disciplined into building consensus through conformity and exclusion.²³²

The incrementalist march towards marriage equality narrows rights, which Foucault’s designates as “life,” to a discreet group of subjects who concede to conventional norms of acceptable sexuality. A recent report by Harvard Law Review on developments in the law on sexual orientation and gender identity suggests that “[s]ame-sex marriage, it may be said, helps one particular constituency—middle-aged and middle-class gays and lesbians in committed partnerships—but it does little to resolve problems that are most significant to other constituencies under the LGBT umbrella.”²³³ Gay rights, when conceived of as climaxing in the equal right to marriage, excludes those who may not subscribe to marriage and desire to express their sexuality outside of normative monogamous relationships.²³⁴ Those who do not conform to marriage, once granted as an equal right, are consigned to

²³⁰ Eduardo Mendieta, Professor at State Univ. N.Y. at Stony Brook, Speech at Meeting of the Foucault Circle at the American Philosophical Association Central Division Meeting: ‘To make live and to let die’—Foucault on Racism (Apr. 25, 2002), http://www.stonybrook.edu/commcms/philosophy/people/faculty_pages/docs/foucault.pdf.

²³¹ Christian Laval, *From Discipline and Punish to the Birth of Biopolitics*, in *BEYOND FOUCAULT: NEW PERSPECTIVES ON BENTHAM’S PANOPTICON* 43, 55 (Anne Brunon-Ernst ed., 2012).

²³² See Franke, *supra* note 199, at 246 (“a kind of governance of the self that is entailed in being subject to law . . . to be governed by the state not as abject criminals, but as citizen-subjects, [which] presupposes the internalization of a set of norms of self-governance.”).

²³³ *Developments in the Law: Sexual Orientation & Gender Identity*, 127 HARV. L. REV. 1682, 1689 (2014).

²³⁴ Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1187 (2006) (“If cases like *McLaughlin* and *Lawrence* are understood exclusively as points on the long road to marriage, we lose sight of the possibility that, for some people, the right to engage in sex outside of marriage might be as significant as the right to enter into a legal marriage.”).

non-recognition,²³⁵ which creates political death. For example, following *Windsor*, the United States Citizenship and Immigration Services began to grant spousal and fiancée immigration rights to qualifying same-sex partners.²³⁶ However, in order to qualify, the couples are required to marry. Those who elect not to marry cannot take advantage of those rights. The granting of equal rights for committed gay relationships started with the imagined domestication of John Lawrence and Tyron Garner and culminated with the conferring of marriage equality to Edith Windsor and Thea Spyer. Gary Lim and Kenneth Chee claim this American model as their inherited legacy. This communicates to individuals like Tan Eng Hong, who may not be able to access such spaces due to socioeconomic or other differences,²³⁷ that there is no place for their versions of homosexuality.²³⁸

Ironically, the “out and proud” sensibility in the early days of gay rights in the United States was largely a response to the tyranny of the closet and the exiling of gay expression to more secretive and invisible venues caused by restrictive laws.²³⁹ Many activists regard the Stonewall riots²⁴⁰ as the turning point for a more public gay rights movement,²⁴¹ which was founded as a radical protest against rule of law.²⁴² Several scholars have criticized how the revolutionary beginnings of gay liberation have given way

²³⁵ See Yuvraj Joshi, *The Trouble With Inclusion*, 21 VA. J. SOC. POL’Y & L. 207, 241 (2014) (“Legal recognition defines which interests need and deserve the law’s protection and which remain outside the scope of protection, either because they are deviant or altogether unintelligible.”).

²³⁶ Janet Napolitano, Sec’y of Homeland Sec. for Dep’t of Homeland Sec. Press Office, Statement on the Implementation of the Supreme Court Ruling on the Defense of Marriage Act, (July 1, 2013), *available at* <http://www.dhs.gov/news/2013/07/01/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court> (“After last week’s decision by the Supreme Court holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional, President Obama directed federal departments to ensure the decision and its implication for federal benefits for same-sex legally married couples are implemented swiftly and smoothly. To that end, effective immediately, I have directed U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.”).

²³⁷ See Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539 (2006); see also Francisco Valdes, *Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of Sexual Orientation*, 48 HASTINGS L.J. 1293 (1997).

²³⁸ See Lisa Duggan, *Beyond Same-Sex Marriage*, 9 STUD. GENDER & SEXUALITY 155 (2008).

²³⁹ See Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J. L. & GENDER 1, 16–24 (2009).

²⁴⁰ On June 27, 1969, the New York City Police Department raided the Stonewall Inn, a bar in Greenwich Village that catered to a primarily gay clientele. The patrons resisted, and incited a riot that lasted for three days. See DAVID CARTER, *STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION* (2004).

²⁴¹ D’EMILIO, *supra* note 206, at 231–33; Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679, 681 (1996).

²⁴² See Teresa M. Bruce, *Neither Liberty Nor Justice: Anti-Gay Initiatives, Political Participation, and the Rule of Law*, 5 CORNELL J.L. & PUB. POL’Y 431 (1996).

to accommodationist strategies²⁴³ and submission to the rule of law.²⁴⁴ As Professor Katherine Franke critiques, a major pitfall of seeking equal citizenship is acknowledging the self as a citizen-subject.²⁴⁵ In contrast to Professor Kenji Yoshino, who identifies covering as a type of camouflage where “underlying identity is neither altered nor hidden, but is downplayed,”²⁴⁶ Franke suggests that rather than downplay, gay politics up-plays a certain type of visibility and public performance that invites spectatorship. Franke describes “a certain kind of citizen-subject who becomes politically legible by and through a particular form of intimate affiliation.”²⁴⁷ “Of course, the citizen-subjects who have signed up for this form of enfranchisement are called upon to enact a peculiar set of public performances.”²⁴⁸ Yoshino focuses on passing and covering as reactions to being judged by others²⁴⁹ in an effort to not be seen. Franke, on the other hand, suggests that modern gay subjects engage in performances so that they are seen “not as abject criminals, but as citizen-subjects.”²⁵⁰ Yet the desire to be seen as respectable validates the norms for respectability.²⁵¹

The development of the self-policing subject depends on the interrelation between public spectacle and civic participation, of seeing the self as a citizen and thus an extension of the state when it stands in judgment of deviant elements.²⁵² Yoshino briefly notes the juridical nature of passing, where “[t]o pass” can mean “to judge.”²⁵³ The performance of respectable gayness involves both judging and being judged, both seeing and being seen as participating citizens of the democratic state. It is through these normalizing judgments, the consciousness of watching and being watched, that society determines who are equal citizens and who are not—this forms the basis of liberal government.²⁵⁴ Foucault develops his theory of biopower

²⁴³ See Suzanna Danuta Walters, *The Few, the Proud, the Gays: Don't Ask, Don't Tell and the Trap of Tolerance*, 18 WM & MARY J. WOMEN & L. 87 (2011); see also SUZANNA DANUTA WALTERS, *ALL THE RAGE: THE STORY OF GAY VISIBILITY IN AMERICA* 18 (2001); see also Victoria Clarke, *Lesbian and Gay Marriage: Transformation or Normalization?*, 13 FEMINISM & PSYCHOL. 519 (2003); see also Warner, *supra* note 203.

²⁴⁴ See generally Franke, *supra* note 199.

²⁴⁵ *Id.* at 246; see also Diane Richardson, *Locating Sexualities: From Here to Normality*, 7 SEXUALITIES 391 (2004).

²⁴⁶ Yoshino, *supra* note 197, at 772.

²⁴⁷ Franke, *supra* note 199, at 239.

²⁴⁸ Franke, *supra* note 199, at 239.

²⁴⁹ Yoshino, *supra* note 197, at 813.

²⁵⁰ Franke, *supra* note 199, at 246.

²⁵¹ See Joshi, *supra* note 205, at 467.

²⁵² See generally FOUCAULT, *supra* note 52, at 32–69.

²⁵³ Yoshino, *supra* note 197, at 813.

²⁵⁴ MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS* 67 (Graham Burchell trans., 2008) (“The Panopticon is the very formula of liberal government.”).

largely in response to the failed revolutionary movements of the 1960s that eventually led to the rise of liberal democracy, and his criticism suggests that liberal government is a veiled form of totalitarianism.²⁵⁵ The shift in gay rights towards a strategy of incrementalism and assimilation aligns gay interests with the interests of the state,²⁵⁶ and demonstrates governmentality.

Ironically, although *Lawrence* seemed to declare that the morality of the majority was not a valid state interest,²⁵⁷ and Lim and Chee similarly challenged public morals as the reasonable rationale for Section 377A,²⁵⁸ the domesticated versions of gay existence that they presented actually legitimize the morality of the majority in other ways. Family values are routinely cited as reasons justifying the differential treatment of gays. The push for marriage equality embraces rather than challenges the validity of granting special privileges to families. *Lawrence*, *Windsor*, *Hollingsworth*, and Lim and Chee's case all envision and constrain gay sexuality within the structure of normative family values. In the same way that Pink Dot does not challenge the restriction the Singaporean government places on public assembly and expression through speech, but instead acquiesces to the narrow restrictions imposed by the state, mainstream gay advocates in both Singapore and the United States have limited gay expression to the state's definition. The monogamous family unit becomes the narrow space for acceptable public expression of gay sexuality, just like a small corner in Hong Lim Park where gays are allowed to congregate publicly once per year. In the same way that Tan Eng Hong was hidden from view in the 2013 Pink Dot, the rights of "bad queers" like him been effaced and forgotten in the discourse of marriage equality.

V. CONCLUSION

Professor Jothie Rajah describes illiberalism "as the Other of liberalism . . . understood in terms of the absences, fractures and subversions of political liberalism."²⁵⁹ Indeed, the apparent freedoms enjoyed by citizens in liberal democracies have often been used to criticize more restrictive conditions in many developing nations, particularly "Orientalized" countries

²⁵⁵ Jessica Whyte, *Is Revolution Desirable?: Michel Foucault on Revolution, Neoliberalism and Rights*, in RE-READING FOUCAULT: ON LAW, POWER AND RIGHTS 207, 209 (Ben Golder ed., 2012).

²⁵⁶ Franke, *supra* note 199, at 246.

²⁵⁷ *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

²⁵⁸ *Lim Meng Suang I*, SGHC 73, at para. 25.

²⁵⁹ Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* 13 (2012).

in Asia and the Middle East.²⁶⁰ Yet the comparison of recent gay rights cases in the United States and Singapore suggests that the liberalism and illiberalism may be equivalent if not also linked.²⁶¹ At first blush, it may appear that the Singaporean gay rights movement, represented by Pink Dot and the Gary Lim and Kenneth Chee lawsuit, follows a Westernized strategy that has been successful in the United States and Europe.²⁶² However, the strategy adopted in Singapore may not be a pure emulation of liberalism but a response to illiberalism. As discussed earlier, illiberal pragmatism manifests in the unsystematic enforcement of Section 377A, which creates a culture of fear and caution for gay activism in Singapore. Sensitivity to the totalitarian style of government has led to a strategy of incrementalism and accommodation to the rule of law, where gays cautiously set their own boundaries as to the proper time, place, and manner for gay life such as Pink Dot. Rather than think of Singaporean gay activism as modeling a Western style of advocacy, it may be useful to consider the possibility that the gay rights movement in Singapore, though similar, evolved independently from gay movements in Western countries. The fact that both systems of government bred gay movements that resulted in incrementalist approaches suggests that the two systems are not so different. Thus, a comparative analysis of the gay movements in Singapore and the United States exposes the illiberal aspects of American democracy. Under both systems, legal sexual expression is limited to heteronormative ideals of “more enduring” bonds of monogamy and marriage. The legacy of *Lawrence* and marriage equality, in this light, is simply the American version of Pink Dot. Gays are allowed freedoms of sexual expression insofar as they follow the rules. Moreover, by validating marriage as an institution, the push for marriage equality also maintains and shields continuing hierarchies and inequalities inherent in the institutions.²⁶³

²⁶⁰ See EDWARD W. SAID, *ORIENTALISM* (1979) (using the term “Orientalism” to critique the construction and marginalization of the East as an ‘Other’ culture against which Western culture defines and legitimates itself as an archetypical standard”); see also Chang, *supra* note 63, at 312.

²⁶¹ Though he does not make the connection, Foucault’s critique of the normalizing force of economic globalization during the 1960s also relates to the development of Singapore as a capitalist nation during that time. See Whyte, *supra* note 255, at 209 (“In the wake of the decline of revolutionary Marxism and the defeat of development programmes in the Third World, the implementation of neoliberal economic policies resulted in global economic restructuring . . . Far from providing a bulwark against this attack, the new politics of human rights helped facilitate state interventions aimed at re-making societies on the model of market. The new politics of rights shared key elements of the neoliberal consensus, not least a belief that organization of life through the market was the best insurance against totalitarianism.”).

²⁶² See generally Chang, *supra* note 63, at 328.

²⁶³ See Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535 (1993); see also Joshi, *supra* note 205, at 338–41.

Rather, there is some usefulness to recognizing differences among gays, and that marriage and monogamy are not solutions for all. Judge Loh's application of the intelligible differentia test to finally validate Section 377A in *Lim Meng Suang* illustrates some fundamental problems with seeking only structural equal treatment as heterosexuals. Despite attempts to hide among heterosexuals, gays are still perceived as fundamentally different. Judge Loh's explanation of rational review in the Lim and Chee decision, that "equality before the law and equal protection of the law under Art 12(1) does not mean that all persons are to be treated equally, but that all persons in like situations are to be treated alike,"²⁶⁴ foreshadows his eventual conclusion that Singaporean society intentionally differentiates gays from heterosexuals. Even if Section 377A had been ruled a violation of equal protection, structural equality does not address the underlying attitudes at play that are responsible for the laws in the first place. Successful constitutional challenges to anti-sodomy statutes in other jurisdictions have often come hand in hand with attitudinal changes in society regarding homosexuality, which is the chief assumption behind incrementalism. As both Judge Loh and Parliament have made clear, however, Singaporean society has not arrived at this point, and progress will likely be slow given the illiberal pragmatics of the government. Although Pink Dot has been exponentially growing, public opinion on homosexuality in Singapore has remained overwhelmingly negative with 78% of the population believing that homosexual relations are "always wrong/almost always wrong," and only 11% believing they are "not wrong most of the time/not wrong at all."²⁶⁵ In spite of attempts by gay couples like Gary Lim and Kenneth Chee to differentiate themselves from the stereotypes of criminality and deviance that Tan Eng Hong represents, society still views them no differently. The decision by the Singaporean Court of Appeal to consolidate the two cases reflects this sentiment, yet its decision also allows for something more radical to occur.

The Singapore Court of Appeal ultimately upheld the anti-sodomy statute, but one thing has become clear: if gays continue to be formally discriminated against, they will be discriminated against together. The Court of Appeal refused to entertain Lim and Chee's attempt to characterize their relationship as outside the moral scope of objectionable behavior such as male prostitution.²⁶⁶ Their relationship, although private and consensual, is to be treated equally as those of male prostitutes and people like Tan Eng

²⁶⁴ *Lim Meng Suang I*, SGHC 73, at para. 44.

²⁶⁵ Wong, *supra* note 66.

²⁶⁶ *Lim Meng Suang II*, SGHC 53, at para. 148.

Hong. In other words, in the eyes of the Singapore government, good gays and bad queers are the same. This forces solidarity upon the gay community, which can then potentially create an alternative path to empowerment, and mark a return to the roots of gay liberation that appears to have been sidetracked as a matter of legal strategy in the United States. The current state of gay advocacy in Singapore offers a visualization of the road not travelled in *Lawrence* and the potential to imagine gay identity itself rather than legitimate expressions of gay identity as a recognized right, as well as a warning of the pitfalls of *Lawrence* and *Windsor*.

The Singaporean gay community currently adopts an incrementalist strategy for advocacy that accommodates the illiberal democracy in which it exists.²⁶⁷ The community has sought to create spaces for expression of gay identity within the rules on multiple fronts, organizing Pink Dot according to the time, place, and manner permitted by the government.²⁶⁸ Its model test case argues for equal treatment of gays with heterosexuals, per *Lawrence* and *Windsor*. Yet, these American gay rights cases ultimately establish normative standards for proper sexual expression that produce self-policing gay subjects who are similarly compliant as subjects in an illiberal state. Tan Eng Hong, on the other hand, presents the perhaps radical argument that the behavior of some gay couples should not be differentiated from those that are deviant and criminal, and should not be venerated as models more suitable for publicly presentation. Acknowledging the intelligible differentia between gays and heterosexuals, but not the intelligible differentia between committed gay couples, like Gary Lim and Kenneth Chee, and single men looking for singular sexual encounters, raises the question whether any of that behavior should be criminal, which may form the basis of a better model for gay liberation.

²⁶⁷ See generally MOBILIZING GAY SINGAPORE, *supra* note 30.

²⁶⁸ *Id.* at 140.