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# SAYING NO: SECTIONS 377 AND 377A OF THE PENAL CODE

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By criminalizing certain forms of private consensual sexual conduct, sections 377 and 377A of the Penal Code disregard the individual's sexual autonomy. They impose a particular set of sexual "morals" on a sexually pluralistic Singapore society. I argue in this article that sections 377 and 377A should be abolished and replaced by laws that do not criminalize such private and consensual conduct.

## I. INTRODUCTION

*Pleasures are an impediment to rational deliberation, and the more so the more pleasurable they are, such as the pleasures of sex—it is impossible to think about anything while absorbed in them.*

∼ Aristotle, *Nicomachean Ethics*[1]

It is impossible to talk about sections 377 and 377A of the Penal Code[2] without dealing with a prescribed set of morals. Products of history and societies

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1 As quoted in R. Posner, *Sex and Reason* (Cambridge, Massachusetts: Harvard University Press, 1992) at 1[Posner].

2 *Penal Code* (Cap. 224, 1985 Rev. Ed. Sing.) [*Penal Code*].
Section 377 provides:

> Whoever has carnal intercourse against the order of nature with any man, woman or animals, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.
> *Explanation—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.*

Section 377A provides:

> 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

different from modern Singapore, these laws carry a moral baggage, dating all the way back to medieval Europe. Section 377 bans anal intercourse, bestiality[3] and fellatio not intended as foreplay.[4] It was influenced by English common law, which, in turn, has its roots in medieval canon law. Consent of the parties performing the sexual act was irrelevant; the law expressed the majority's abhorrence of particular sexual acts. Section 377A bans "gross indecency" between males both in public and private. Consent is also irrelevant. A man and woman could kiss and fondle each other in private, but two men cannot do the same legally. The law reflected the heterosexual male's idea of the "correct" sexual conduct. Again, it originates from the English, when Singapore was still a colony.[5]

Although English law has typically been characterized as more individualistic than its Singaporean counterpart,[6] when it came to sexual conduct, the English had not always respected the individual either. Before 1967, anal intercourse under English law was absolutely illegal. The parties' consent did not matter; their sexual autonomy was discounted.[7] Since then, fortunately, England law has gradually returned sexual autonomy to the individual.[8] So have some other jurisdictions formerly under British rule. Meanwhile, Singapore remains stuck with the rules of its former colonial master, rules that pre-date the existence of modern Singapore society. Thirty-eight years after independence, how much has and can Singapore free itself from the sexual bondage of colonialism? Should its position change?

Inevitably, to free Singapore from the English sexual bondage, we run up against the familiar debate between the individual and so-called societal interests. Arguments on morality slip in. On a broader plane, this debate is

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indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.

3 I shall refer to these sexual acts as "anal intercourse," and "bestiality" or "sexual intercourse with animals," instead of the archaic terms, "sodomy" and "buggery." Under English common law, anal intercourse, known as "sodomy," and bestiality were classified as "buggery": see *P.P. v. Kwan Kwong Weng* (16 September 1996), C.C. No. 46 of 1996 (H.C.) at para. 3.1 [*Kwan Kwong Weng* (H.C.)]. See also *infra* note 89 for more discussion on English law in this aspect.

4 *P.P. v. Tan Kuan Meng* (30 January 1996), C.C. No. 62 of 1994 (H.C.) [*Tan Kuan Meng*]; *P.P. v. Kwan Kwong Weng*, [1997] 1 Sing. L.R. 697 (C.A.) [*Kwan Kwong Weng* (C.A.)].

5 See Part II, below, for more on the origins of these provisions.

6 See *e.g.* K.Y. Lee, "Address by then Prime Minister Lee Kuan Yew at the Opening of the Singapore Academy of Law" (1990) 2 Sing. Ac. L.J. 155 at 155 ["Address"], where Lee said: "In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with the customs and values of Singapore society."

7 See *Sexual Offences Act 1956* (U.K.), 1956, c. 69, ss. 12–13 [*Sexual Offences Act 1956*], prior to amendment.

8 See Part III (A) and accompanying footnotes, below, for more on English developments in this area.

between the liberal and communitarian approaches toward state governance. The Singapore government is openly communitarian,[9] confident with its ability to define what is good or bad, and what is acceptable or unacceptable conduct. The people are expected to adjust their conduct to its prescribed set of norms,[10] an attitude acutely reflected in the words of Lee Kuan Yew:

> [W]e wouldn't be here, we would not have made economic progress, if we had not intervened on very personal matters—who your neighbour is, how you live, the noise you make, how you spit, or what language you use. We decide what's right. Never mind what the people think.[11]

In comparison, liberalism leaves the decision to the people; it believes there is value in doing so. If Singapore on the one hand wants to have people who are independent-minded and creative,[12] does it still make sense on the other to retain laws that tell them what to do with something as intimate as sex, if the conduct is consensual and in private?

I argue in this article that sections 377 and 377A of the Penal Code should be repealed.[13] Consensual sexual conduct in private should no longer be

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[9] See *e.g. Shared Values* (2 January 1991), Cmd. 1 of 1991 [*Shared Values*]; "Address", *supra* note 6.

[10] See Part IV, section D, below.

[11] I. Buruma, "The Singapore Way" *New York Review of Books* (19 October 1995) 66 at 68.

[12] See *e.g.* B.Y. Lee, "Address by Dr. Lee Boon Yang, Minister for Manpower" (Special Academic Awards Presentation Ceremony 1999, Singapore, 20 August 1999), online: Ministry of Manpower <http://www.gov.sg/mom/speech/speech99/m990820.html> ["Address by Minister for Manpower"]; C.H. Teo, "Speech by RADM (NS) Teo Chee Hean, Minister for Education & Second Minister for Defence" (Launch of Science. 02 and National Junior Robotics Competition Awards Presentation Ceremony 2002, Singapore, 6 September 2002), online: Ministry of Education <http://www1.moe.edu.sg/speeches/2002/sp06092002.htm> ["Speech by Minister for Education"].

[13] These two provisions are over-inclusive and under-inclusive. My argument focuses on the over-inclusiveness, that is, they cover not only non-consensual but also consensual acts. Section 377 is under-inclusive, because it might not cover all forms of non-consensual sexual acts, such as insertion of foreign objections into the vagina, depending on the interpretation of "penetration" under section 377—whether it is and should be confined to penile penetration. All unreported cases since 1991 and all reported cases related to section 377—summarized in Appendix II—involve either penile insertion into the mouth or anus. I have not found a section 377 case that involved non-penile penetration. *Ratanlal & Dhirajlal's Law of Crimes* referred to the rape provision when explaining "penetration"—which has usually proceeded on the assumption that it meant penile penetration—in the Indian counterpart of section 377: *Ratanlal & Dhirajlal's Law of Crimes*, vol. 2, 24th ed. (New Delhi: Bharat Law House, 1998) at 1823–4 [*Ratanlal*]. Gour in *The Penal Law of India* stated: "There need not be necessarily a seminal discharge for constituting the carnal intercourse," hence indicating that "penetration" was that of the penis. It also noted that "carnal knowledge, whether by man or woman, with an *inanimate object* would not be within the rule. [Emphasis added.]": H.S. Gour, *The Penal Law of India*, vol. 4, 10th ed. (Allahabad, India: Law Publishers (India), 1990) at 3260. Relevant Indian cases have doubted whether lesbianism fell within section 377, see *e.g. Khanu v. Emperor*, [1925] All India Rep. (Sind.) 286 [*Khanu*].

the law's concern except to protect the young[14] and those—such as the mentally disabled—who are incapable of consenting to sexual acts,[15] or to protect others from being forced to witness the public display of the conduct.[16] These laws should be repealed, because they impose a particular set of morals on all individuals without regard for the individual's autonomy and the human faculty to think and, thus, consent. This is contrary to the reforms in the U.K. and other common law countries, which have gradually left private, consensual sexual conduct outside of the law's realm.

Some local articles and papers have argued that sections 377 and 377A violate the constitutional right to equality[17] and the right to privacy.[18] In the U.S., courts have dealt with the argument on the right of homosexuals

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Going back to English roots, it has been explained that the Indian Penal Code drafters in consultation with Queen Victoria did not criminalize lesbianism, because the queen could not imagine that such acts could actually occur. On this view, therefore, since lesbian sexual acts do not involve the male penis, any form of non-penile penetration would fail to satisfy section 377, see *e.g.* J. Lee, "Equal Protection and Sexual Orientation" (1995) 16 Sing. L. Rev. 228 ["Equal Protection"]. Locally, however, despite the lack of cases directly on point, some judicial remarks suggest that "penetration" need not be penile. The Court of Appeal remarked in *obiter*, "[F]ellatio and *cunnilingus* are regarded as unnatural carnal intercourse within s377 except where couples who engage in consensual sexual intercourse willingly indulge in fellatio and *cunnilingus* as a stimulant to their respective sexual urges . . . [emphasis added]": see *Lim Hock Hin Kelvin v. P.P.*, [1998] 1 Sing. L.R. 801 (C.A.) at para. 16 [*Lim Hock Hin Kelvin*]. According to the *Sentencing Practice in the Subordinate Courts (2000)*, cunnilingus is punishable under section 377, as cited in D. Chia, "The Offence of Unnatural Sex in Singapore" (2001) 13 Sing. Ac. L.J. 406 at 425 ["Unnatural Sex"]. These references to cunnilingus seem to suggest the inclusion of non-penile penetration (in fact, for cunnilingus, it is arguable that it does not necessarily involve any penetration at all but only stimulation of the clitoris). Nonetheless, even if these statements indicate strong judicial endorsement of a larger scope of "penetration" under section 377, prosecutorial practice continues to confine the provision to penile penetration, see *ibid*. As for section 377A, its plain language excludes non-consensual acts between females.

Of course, one could argue that the under-inclusiveness does not mean that non-consensual acts outside the supposed narrow scopes of these provisions would go unpunished, as they could be brought under sections 354, 354A or 509 of the Penal Code. These provisions differ in punishment from sections 377 and 377A. For example, sections 354 and 354A provide for caning, whereas sections 377 and 377A do not. On the other hand, sections 354, 354A and 509 exclude consensual situations. The question then becomes—which is beyond the scope of this paper—whether cases involving non-penile penetration by force or non-consensual female-to-female sexual contact should be treated any differently. Canada, in contrast, has a more comprehensive legal framework that covers all forms of non-consensual sexual conduct: *Criminal Code* (Canada), R.S. 1985, c. C-46 [*Criminal Code* (Canada)].

[14] See *e.g. Criminal Code* (Canada), *ibid.* ss. 150.1, 159(3)(b)(ii).

[15] *Ibid.* s. 159(3)(b)(ii).

[16] *Ibid.* s. 159(3)(a).

[17] *Constitution of the Republic of Singapore* (1999 Rev. Ed.), art. 12 [*Constitution*]; "Equal Protection", *supra* note 13.

[18] T.C.P. Ha, *Sexual Privacy and the Penal Code* (LL.B. Dissertation, Faculty of Law, National University of Singapore, 1996).

to sexual intimacy as a subset of the right to privacy.[19] Although I do not make my case on constitutional grounds,[20] these arguments are consistent with the liberal rationale underlying my argument: the criminal law should respect the individual's autonomy to consent and interfere only to protect other people from harm. This "harm" should be narrowly confined to harm directed at the party or parties involved. It is not enough that the conduct offends some people's morals. Beyond "harm" in this narrow sense, the law should refrain from legislating alleged "moral" harm out of appreciation for the value in self-determination and out of respect for pluralistic views on "the good life". This value is why liberalism should prevail over communitarianism, which disregards the intrinsic worth of each individual.[21] Such an opposing communitarian approach is also questionable because of the definition of "morality" itself.[22] To legislate sexual "morality" based on the communitarian approach, the notion of "morality" should at least be what Hart calls the "critical" type[23] or what Dworkin terms as "moral conviction" in a discriminatory sense.[24] However, that does not appear to

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[19] The U.S. Supreme Court is expected to rule by July 2003 on *Lawrence and Garner v. the State of Texas* (No. 02–102), challenging the Court's decision of *Bowers v. Hardwick*, 478 U.S. 186 (1986) [*Bowers*], in which the majority denied the extension of sexual privacy to homosexual relationships: see M. Kirkland, "Court Hears Challenge to Texas Sodomy Ban" *United Press International* (26 March 2003) ["Court Hears Challenge"]; Part IV(A), below, for more on U.S. developments. See also J.A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago: The University of Chicago Press, 1987) at 610 [*Medieval Europe*]. The laws against anal intercourse, such as section 377 and the outdated English provisions, do not target only homosexual conduct, but in practice, there is "a firm link developing between the offence of buggery and the control of male homosexuals": see D. Selfe and V. Burke, *Perspectives on Sex, Crime and Society*, 2nd ed. (London: Cavendish Publishing Ltd., 2001) at 3 [*Perspectives*].

[20] Invalidating sections 377 and 377A on constitutional grounds is theoretically possible, as Singapore is a constitutional supremacy, and courts can strike down any legislation to the extent that it is inconsistent with the Constitution, see *Constitution, supra* note 17 art. 4. However, in reality, courts are unlikely to do so, since they usually defer to Parliament, and Parliament frowns upon judicial activism, see *e.g. Parliamentary Debates*, vol. 52, cols. 464–556 (25 January 1989) on the decision of *Chng Suan Tze v. Minister for Home Affairs* [1988] Sing. L.R. 132 (C.A.). In response to a defense counsel's argument that the defense of consent should be read into section 377A in light of English developments, Chief Justice Yong said, "Parliament has not seen the wisdom or the necessity to keep in step with the changes in English legislation. There is also no other cogent reason to impose the requirement that consent must be an ingredient of the s 377A charge. On the face of s 377A, no such indication may be discerned": see *Ng Huat v. P.P.* [1995] 2 Sing. L.R. 783 (H.C.) [*Ng Huat*]. Hence, if change were to come, it would be more practical and politically feasible to expect Parliament to take the lead.

[21] See Part IV (D)(II), below.

[22] See Part IV (D)(I), below.

[23] H.L.A. Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963) at 17–24 [Hart].

[24] R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 248 [*Rights*].

be the case.[25] Rather, the communitarian argument favors "morality" in the "positive"[26] or "anthropological" sense,[27] which generally refers to the attitudes displayed by a particular group toward human conduct,[28] and to which I argue responsible and educated legislators should not subscribe.[29]

My article is structured in the following manner. I shall discuss the origins of sections 377 and 377A in Part II, and the relevant judicial interpretations in Part III, the analysis of which helps to build up my argument. In Part IV, I shall argue why these provisions should be repealed. Section A of Part IV examines the reform in various common law jurisdictions and identifies a common liberal principle. Section B expounds on this principle, while Section C points out that it is already observed to an extent in the practical application of these two provisions. Section D considers and defends against the communitarian objections to this principle.

## II. Origins

The origins of sections 377 and 377A of the Penal Code are considered separately here, as their predecessors came into existence apart from each other. However, both reflect the imposition of a particular set of morals by the majority at a particular point in history, when politics and lawmaking were dominated by Christian, pro-heterosexual European males. Their origins help us question whether they should retain a place in contemporary Singapore, where people have pluralistic views toward sexual conduct.[30]

### A. *Section 377*

Section 377 reads as follows:

> Whoever has carnal intercourse against the order of nature with any man, woman or animals, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to fine.
> *Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.*

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25 See Part IV (D)(II), below.

26 Hart, *supra* note 23.

27 *Rights, supra* note 24.

28 *Ibid.* See also Hart, *supra* note 23.

29 See Part IV (D)(I), below.

30 See *e.g.* NewsRadio-NUS, *Sex, Rights & Videotape Online Poll, Appendix I; Censorship Review Committee, Report on the Survey on Changing Moral Values and Public Perception of Certain Printed, Audio and Visual Materials (1992)* summarized in S. Davie, "Morality and the Singaporean" *The Straits Times* (4 August 1992) 24 [*CRC Survey*].

Section 377 became law in Singapore with the passage of the Penal Code of the Straits Settlement in 1871. This precursor of the Singapore Penal Code, in turn, was derived from the Indian Penal Code of 1860.[31] Consent was irrelevant;[32] it was the inherent nature of the act that was "abhorred" and targeted for eradication. How Lord Macaulay, the principal drafter of the Indian Penal Code, briefly treated the offence in his work sums up the attitude:

> [It relates] to an odious class of offences respecting which it is desirable that as little as possible should be said. ... We are unwilling to insert, either in the text or in the notes, any thing which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more compensate for any benefits which might be derived from legislative measures framed with the greatest precision.[33]

Led by Lord Macaulay, the Indian Law Commission drew inspiration from the English common law in drafting the Penal Code.[34] The Commission's choice of words for the Indian provision, *in pari material* with our section 377, echoes Sir Edward Coke's influential restatement of English law,[35] which defines the offence of "sodomy" as "committed by carnal knowledge against the ordinance of the Creator, and other of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast."[36] Until 1533, when ordinary criminal courts first obtained jurisdiction over the offence of "sodomy" by order of statute, it was a capital offence in England triable only by ecclesiastical courts.[37] The Christian roots of the offence are, thus, evident.

Even without tracing the legislative history of section 377, the wording itself, "carnal intercourse against the order of nature," betrays an acceptance—whether conscious or unconscious—of the medieval sexual ethos, and implicitly assumes canonical views about the nature of sex and

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[31] K.L. Koh, C.M.V. Clarkson and N.A. Morgan, *Criminal Law in Singapore and Malaysia: Text and Materials* (Singapore: Malayan Law Journal Pte. Ltd., 1989) at 4–7 [*Criminal Law*].

[32] *Lim Hock Hin Kelvin, supra* note 13; *Kwan Kwong Weng* (C.A.), *supra* note 4.

[33] T.B.M. Macaulay, *The Works of Lord Macaulay: Speeches, Poems and Miscellaneous Writings v. 1*, vol. 11 (London: Longmans, Green & Co., 1898) at 144.

[34] Although the Penal Code also referred to the Penal Code of France and Livingston's Code for Louisiana, English common law has always been the primary source of reference for former British colonies that inherited the Penal Code, see *Criminal Law, supra* note 31 at 7.

[35] E. Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* excerpted in "Equal Protection", *supra* note 13 at 281–5.

[36] Sexual acts between women were left out of Sir Edward Coke's work but was included in earlier treatises: see "Equal Protection", *ibid.* at 257–258.

[37] *Statute* 1533 (U.K.), 25 Hen. VIII, c. 6.

its role in human life.[38] The Catholic Church in those days condemned, as it still does today, oral or anal intercourse of any gender combination, masturbation and "fornication".[39] Such medieval Christian attitudes toward sex endure persistently partly because the Church deployed the legal establishment to preserve its social control and keep at bay those who threatened its prescribed way of life.[40] This factor explains how "virtually all restrictions that now apply to sexual behavior in Western societies stem from moral convictions enshrined in medieval canonical jurisprudence."[41] It demonstrates how a group in power preserved its relevance by imposing its moral values on the society it controlled, and, it also proves that these legal restraints on sexual conduct are not Asian by origin or even influence.

### B. *Section 377A*

Section 377A reads as follows:

> 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.

Like section 377, consent is irrelevant under section 377A.[42] The inherent nature of the conduct—sexual contact between males—is the crux, so whether it takes place in private or public does not matter. Unlike section 377, however, 377A criminalizes conduct that does not amount to intercourse.[43] Appearing first in Singapore in 1938,[44] it was based on an 1885 English provision[45] that began life as a last minute addition to "a Bill to make further provision for the protection of women and girls, the suppression of brothels and other purposes."[46] Mr. Henry Labouchère introduced it in the House of Commons at the report stage, after the rest of the Bill had been passed by the House of Lords. The Wolfenden Report noted that because

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38 *Medieval Europe, supra* note 19 at 589.

39 *Ibid.* at 583.

40 *Ibid.* at 585–6.

41 *Ibid.* at 587.

42 *Lim Hock Hin Kelvin, supra* note 13.

43 Appendix III; see also Hong Kong, *Report on Laws Governing Homosexual Conduct (Topic 2)* (Hong Kong: Law Reform Commission, 1983) at 58 [*Hong Kong Report*].

44 Straits Settlements, *Legislative Council Proceedings* (S.E. 102), vol. 1938 (13 June 1938) at B50 [*Legislative Council Proceedings*].

45 England and Wales, *Report of the Committee on Homosexual Offences and Prostitution*, (London: Home Office and Scottish Home Department, 1957) at para. 106 (Chair: J. Wolfenden) [*Wolfenden Report*].

46 *Ibid.* at para. 108.

the law on "indecent" *assault* at that time protected only male persons under age 13, the proposed provision was intended to make the law applicable to any person regardless of age.[47] Without much debate over its contents and implication, the provision was passed into law.[48]

The hastily enacted English provision made its way to Singapore. In 1938, during the second reading of the bill in the Straits Settlement Legislative Council to enact the provision as section 377A, the Attorney General stated that because the law at the time reached only public conduct, "the chances of detection are small." Consenting partners could elude the law by staying behind close doors. "It is desired, therefore, to strengthen the law."[49] Hence, the move here to criminalize private sexual conduct between consenting males appeared to be deliberate. Like the motives behind section 377, here is a piece of legislation wielded by those in power to impose on everyone their moral judgment of how and with whom we should have sexual contact.

## III. Relevant Judicial Interpretations

The *mens rea* requirements of sections 377 and 377A are more straightforward, compared with those of the *actus reus*. The main difficulty with the *actus reus* lies with the interpretation of key phrases. In the explanation and analysis below, their imposition of a given set of morals becomes apparent, which again relates to the question of whether these laws should continue to penetrate and threaten with criminal sanctions the most intimate areas of our lives.

### A. *Section 377*

A person fulfils the *mens rea* element if he or she committed the alleged act "voluntarily," which, according to section 39 of the Penal Code, means acting with the intention, knowledge or reasonable belief that the act would likely be caused.[50] However, exactly what acts constitute "carnal intercourse against the order of nature"—not defined in the Penal Code—is less certain.[51] So far courts have had no qualms accepting anal

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[47] *Ibid.*

[48] "Equal Protection", *supra* note 13 at 269.

[49] *Legislative Council Proceedings 1938, supra* note 44 at B49.

[50] *Penal Code, supra* note 2, s. 39.

[51] The Malaysian Penal Code, derived from the same predecessors as Singapore's, however, has expressly defined "carnal intercourse against the order of nature" by amendment in 1989. Its section 377A states: "Any person who has sexual connection with another person by the introduction of the penis into the anus or *mouth* of the other person is said to commit carnal

intercourse[52] and bestiality[53] as "carnal intercourse against the order of nature." What has been more problematic is oral sex, primarily, fellatio.[54] The judicial treatment of fellatio indicates some discomfort with imposing the "morality" of section 377 on consenting couples who do not accept or practice that morality.

"Carnal intercourse against the order of nature"—based on its staunch canonical roots—would mean any sexual intercourse that bears no possibility of conceiving human beings.[55] Strictly speaking, this would include vaginal intercourse involving the use of contraception or during a woman's biological cycle when she cannot conceive.[56] Brought to its logical conclusion, all infertile people having sex would be doing it "against the order of nature"! Thankfully, Singapore courts have rejected such an interpretation based on the notion of conception. Justice Lai Kew Chai in *Tan Kuan Meng* called it "outmoded because of the growth of family planning which involved an intention to prevent conception."[57] The Court of Appeal in *Kwan Kwong Weng* said "[i]t could not be right" and rejected it as an "outdated theory."[58] In rejecting the conception basis, therefore, courts hinted at a struggle to reconcile the archaic phrase with modern, pluralistic Singaporean views on sex. They implicitly acknowledged that one cannot simply impose morals

intercourse against the order of nature [emphasis added]. . . . . .": see *Penal Code* (Malaysia), cap 22, s. 377A–B. The 1989 amendment also added section 377C to criminalize separately such acts committed "without the consent, or against the will, of the other person" or by force. Of course, one could suggest that Singapore should clarify the scope of section 377 and state unequivocally whether it extends to fellatio. However, as will be argued in Part III, the core of my contention against section 377 is not the scope of physical acts it covers, but rather its disregard for consent.

52 See *e.g. Kanagasuntharam v. P.P.* [1992] 1 Sing. L.R. 81 (C.A.) [*Kanagasuntharam*].

53 In *P.P. v. Ong Li Xia and Yeo Kim Han* (24 July 2000), C.C. No. 50 of 2000 (H.C.) [*Ong Li Xia*], the High Court accepted that sucking of a dog's penis satisfied the section. A local writer has questioned whether this should be considered fellatio and not bestiality, "since bestiality requires sexual intercourse," see "Unnatural Sex", *supra* note 13. But the writer's definition of sexual relations, limited to vaginal intercourse, is inconsistent with Indian Penal Code commentaries on bestiality, which have generally defined it as intercourse "in any manner" with an animal, including the insertion of the human penis into a bullock's nostrils, see *e.g. Ratanlal, supra* note 13 at 1822–1823. At any rate, whether the act should have been classified as fellatio is irrelevant, since it could never culminate in vaginal intercourse between man and woman and would be illegal according to *Kwan Kwong Weng* (C.A.), *supra* note 4; see below. In fact, the writer reasoned that if the judge in *Ong Li Xia* indeed had fellatio in mind, this would mean "penetration" in section 377 "does not always require penetration by the penis of a male human being." This raises the question of how "penetration" in section 377 is and should be defined, a question beyond the scope of this article but relevant to having a more comprehensive legal framework governing sexual offences, see also note 13.

54 On whether cunnilingus also comes under section 377, see *supra* note 13.

55 *Kwan Kwong Weng* (C.A.), *supra* note 4 at para. 19; *Khanu, supra* note 13.

56 *Kwan Kwong Weng* (C.A.), *ibid.*

57 *Tan Kuan Meng, supra* note 4.

58 *Kwan Kwong Weng* (C.A.), *supra* note 4 at para. 22.

frozen at a particular point in history on contemporary society and expect them to be observed absolutely.

Before the 1996 High Court decision of *Tan Kuan Meng*, courts assumed that fellatio came under the scope of section 377.[59] For example, the Court of Appeal in *Kanagasuntharam* not only convicted the accused of rape, but also under section 377 for forcing the rape survivor to perform fellatio on him.[60] Then came *Tan Kuan Meng*, which decided that fellatio as an end in itself was caught under section 377, whereas fellatio as foreplay culminating in heterosexual vaginal intercourse fell outside its scope. Defense counsel submitted that fellatio was not "carnal intercourse against the order of nature," as section 377 was targeted at anal intercourse and bestiality.[61] Justice Lai referred to three Indian cases: *Khanu* held that fellatio fell within the Indian equivalent of section 377, because the act had no "possibility of conception of human beings,"[62] a basis that had been rejected locally, as noted above; *Government v. Bapoji Bhatt* interpreted the provision along the lines of English law on sodomy,[63] so since "sodomy" had been decided in England to exclude fellatio,[64] it also had to be the case under the Indian Penal Code; *Lohana Vasanthal Deuchand and others v. the State*, in contrast, decided that fellatio as an "actual replacement" of vaginal intercourse for "satisfying his sexual appetite" was "against the order of nature."[65] Justice Lai found the third decision the most attractive. He decided that fellatio "between a man and a woman as a lustful substitute for and not a prelude to and enhancement for natural sex [*i.e.* vaginal sex] between them is carnal intercourse against the order of nature and punishable under s377 of the Penal Code."[66]

The Court of Appeal affirmed his Honour's position in the 1997 decision of *Kwan Kwong Weng*, disagreeing with the trial judge[67] that section 377 codified the English common law offences of anal intercourse and bestiality,

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59 At English common law, fellatio did not constitute the offence of "sodomy," see *R. v. Jacobs*, [1871] Russ & Ryan 332 [*Jacobs*]. Instead, the practice in England and Hong Kong, which had the common law offence of "buggery" instead of the Penal Code offence, was to prosecute fellatio under "gross indecency" provisions, of which section 377A is the local equivalent: see *Hong Kong Report, supra* note 43. In Singapore, whether fellatio should be charged under section 377 or 377A is a matter of prosecutorial discretion: see *e.g. P.P. v. Tan Ah Kit* (28 November 2000), C.C. No. 67 of 2000 (H.C.).

60 *Kanagasuntharam, supra* note 52; see Appendix II for a summary of other section 377 cases involving fellatio.

61 *Tan Kuan Meng, supra* note 4.

62 *Khanu, supra* note 13 at 286.

63 *Government v. Bapoji Bhatt*, (1884) 94 Mysore L.R. 280.

64 *Jacobs, supra* note 59.

65 *Lohana Vasanthal Deuchand and others v. the State*, [1968] All India Rep. (Gujarat) 252 at para. 9.

66 *Tan Kuan Meng, supra* note 4.

67 *Kwan Kwong Weng* (H.C.), *supra* note 3.

thus excluding fellatio. In their view, "it goes beyond just these two offences as the words 'carnal intercourse against the order of nature' used by the framers of the Indian Penal Code clearly indicates that they intended to cover more . . . by this one all-embracing provision concerning 'unnatural offences' in the Code."[68] Their Honours focused on the physical nature of the act, with vaginal intercourse as the only "natural" form of sexual intercourse. "As between a man and a woman and from a biological point of view, that being the only sensible point of view to take, sexual intercourse in the order of nature is the coitus of the male and female sexual organs."[69] Fellatio that did not culminate in vaginal sex, therefore, would be unnatural; and homosexual fellatio could never be legal. That intercourse involving the male and female sexual organs should be the only natural intercourse may seem convincing to some. From a biological standpoint, these two organs are physically "meant for each other." However, it seems hard to separate this view from the conception basis. The two organs are biologically "meant for each other" because it is the only way to conceive naturally.[70] This view appears inherently based on the idea of "sex for reproduction." The court's interpretation—whether unintentionally or otherwise—harks back to the medieval sexual ethos.[71]

The above discussion on fellatio is not intended to analyze whether the act should have been treated in this manner under section 377.[72] What I intended was to highlight how courts—Indian and Singaporean—have struggled to interpret an archaic and religiously loaded phrase that persists to this day. Social demands and practice on contraception dissuaded local courts of the "conception basis" of interpretation. So they tried biology. Yet reality still rendered such a view hard to swallow. "Of course,

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68 *Kwan Kwong Weng* (C.A.), *supra* note 4 at para. 17.

69 *Ibid.* at para. 28.

70 But see "Separating Reproduction from Sex" in *Sex and Reason, supra* note 1 at 405–34. Alternatives to conception by vaginal intercourse include surrogacy and, more controversially, cloning and artificial wombs: see *e.g.* R. McKie, "Men Redundant? Now We Don't Need Women Either: Scientists Are Developing an Artificial Womb that Allows Embryos to Grow Outside the Body" *The Observer* (10 February 2002) 7; J. Johnston, "Call to Curb Biotech Industry as 'Design Your Own Baby' Future Dawns" *The Sunday Herald* (24 February 2002) 4.

71 It should be noted that even though the Court found that the complainant's consent had been vitiated by trickery, prosecution had conceded the presence of consent. Rape charges were dropped at the start of preliminary inquiry proceedings. Since the fellatio and the vaginal intercourse took place within the same overall transaction, prosecution's concession would probably also go to the case of rape. Hence, left with only the charge of fellatio under section 377, the Court may have been dissatisfied with acquitting an accused who, in its opinion, took advantage of the "naïve and gullible" complainant.

72 See *e.g.* K.L. Koh, "Trends in Singapore Criminal Law" in *Review of Judicial and Legal Reforms in Singapore between 1990 and 1995* (Singapore: Butterworths Asia, 1996) 318 at 362–66.

[fellatio] may not recommend itself to everyone for stimulating the sex urge. But the fact remains that *it is practised by some*. In [*Tan Kuan Meng*] some statistical evidence was given of these forms of oral sex being practised in Singapore. *We cannot shut our minds to it*."[73] This reality contributed to the court's compromising position on fellatio, and highlighted the courts' discomfort with regulating sexual conduct based on a given set of morals in the face of divergent social practice. Should a law that disregards individual autonomy and consent continue to control sexual intimacy in a sexually pluralistic society? This question relates to my argument in Part IV.

### B. *Section 377A*

Section 377A is silent on the *mens rea* requirement, and I cannot find any case dealing directly with this question. One possible view is that the *mens rea* should be similar to section 377's, thus, requiring "voluntariness."[74] It has also been suggested that the offence is one of strict liability.[75] This is questionable. Section 377A is not a public welfare provision, such as one governing the fitness of imported foods, for which the offence usually carries a fine.[76] In contrast, offenders of section 377A could be imprisoned for up to two years—a more serious punishment—and arguably should not be held strictly liable.[77] My focus, however, is on the *actus reus* requirement of "gross indecency."

"Gross indecency" is not defined in the Penal Code either. At common law, it is generally regarded as sexual acts that are more than ordinary indecency but do not necessarily amount to intercourse.[78] Most of the 377A cases I found through Lawnet and in newspaper articles assumed that the

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73 *Kwan Kwong Weng* (C.A.), *supra* note 4 at para. 30 [emphasis added].

74 See Part III (A), above.

75 "Equal Protection", *supra* note 13 at 271.

76 *Environmental Public Health Act* (Cap 95, 1988 Rev. Ed. Sing.) s. 40(1). See also *Public Prosecutor v. Teo Kwang Kiang* [1992] 1 Sing. L.R. 9 (H.C.) [*Teo Kwang Kiang*].

77 Also, local courts have been inconsistent with their treatment of provisions that do not provide expressly for the *mens rea*—whether they are of "strict liability" in the sense that liability is absolute without any defense, or that the defendant disproves *mens rea* under the Penal Code Chapter IV general exceptions, or in the English common law sense that *mens rea* is presumed but rebuttable. See *e.g. Abdullah v. R* (1954) 20 M.L.J. 195 (C.A. Sing.); *Tan Khee Wan Iris v. P.P.* [1995] 2 Sing. L.R. 63 (H.C.). But see *e.g. Lim Chin Aik v. the Queen* [1963] A.C. 160 (P.C.); *Teo Kwang Kiang, ibid.* See also *Balakrishnan v. P.P.* [1998] C.L.A.S.N. 357 (H.C.); W.C. Chan, "Requirement of Fault in Strict Liability" (1999) 11 Sing. Ac. L.J. 98.

78 "Equal Protection", *supra* note 13 at 269.

conduct—usually fellatio or masturbation—met the standard of "gross indecency."[79] *Ng Huat v. P.P.* was a rare, if not the only, case that articulated some sort of guideline.[80] Chief Justice Yong Pung How sitting in the High Court explained: "What amounts to a grossly indecent act must depend on whether in the circumstances, and the *customs and morals of our times*, it would be considered grossly indecent *by any right-thinking member of the public*."[81]

The statement is based on certain assumptions of morality. It is assumed that "gross indecency" can be measured against a particular set of "customs and morals," one that frowns upon same-sex relations. Further, it is presumed that this set of "customs and morals" is either uniformly subscribed across the board by our society; or, it prevails over other sets of "customs and morals" so that a conduct that falls short of "grossly indecent" based on an alternative set would nevertheless be illegal so long as this particular set finds it "grossly indecent." Similarly, the notion of "right-thinking member of the public" requires an evaluation based on such a particular set of morals.

As shown below in Part IV, Singapore society holds pluralistic views on sexual conduct.[82] The interpretation of "gross indecency," like that of "carnal intercourse against the order of nature," also gives rise to the question of whether it is justifiable to control sexual conduct in favor of a particular set of morals and in disregard of consent.

## IV. A Liberal Approach to Sexual Morality

As discussed in Parts II and III, sections 377 and 377A were intended to condemn the inherent nature of certain conduct, because it offended a particular set of morals, not because of *how* the conduct was carried out—whether it was consensual or by force. They send the message: you, people, cannot decide for themselves what kind of sexual conduct is "right." Your own morals may be "wrong." Let a particular set of morals be decided for you You may not subscribe to them, but they are superior to whatever you may think or desire. Just follow suit and you will not go wrong.

The punishment for not following suit can be severe—up to ten years or life imprisonment for section 377, and up to two years imprisonment for section 377A—the equivalent of a maximum prison term for causing death by rash or negligent conduct.[83] Theoretically, even consensual parties could

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[79] See Appendix III.

[80] *Ng Huat, supra* note 20. In this case, the accused, a radiographer, was alleged to have touched the penis, chest, nipples and buttocks of the complainant when he was conducting an X-ray on his wrist.

[81] *Ibid.* [emphasis added].

[82] See Appendix I; *CRC Survey, supra* note 30.

[83] *Penal Code, supra* note 2, s. 304A.

suffer the maximum penalties. In practice, however, life imprisonment has not been imposed even in cases involving force.[84] Sentencing discretion does take into account the element of consent to an extent. For example, in the 377A cases of *Tan Teck Hua* and *Lau Kim Soon*,[85] the judge stated: "I had borne in mind the fact that this offence involved two consenting adults," and concluded that a "short" custodial sentence of three months would do.[86] But the fact is that the possibility exists.

> [T]he law is hanging over [the homosexuals'] heads and there is tremendous fear, there is perceived repression whether it is real or not. But as long as the law is there, and they know it can be used against them at any time should there be a shift in the way the government wants to treat the homosexual population in Singapore, it in turn holds people back. It prevents them from fulfilling their full potential . . . as Singaporeans in Singapore. So, it is not the application of the law, but the mere existence of the law that is actually harmful to the community.[87]

Section 377A obviously targets male homosexual contact. Although section 377 has a much wider scope, homosexuals probably suffer the most from its constraints,[88] as their sexual relationships would not involve penile vaginal intercourse. In fact, in my argument below, many sources that I cite are concerned specifically with homosexual sexual conduct. Regardless of homosexual, heterosexual or inter-species conduct, however, the core of these arguments for and against sanctioning it is the same: should a particular set of morals be imposed on everyone?

The "mere existence" of sections 377 and 377A bucks against the trend in other common law jurisdictions to respect private consensual sexual conduct. Their enduring presence in the law is what offends the underlying rationale of this trend—that the law should not rob the individual of his or her sexual autonomy, so long as the conduct is truly consensual and private. The state should respect the individual autonomy to consent and give due

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84 See *e.g.* cases summarized in Appendix II.

85 *P.P. v. Tan Teck Hua* (18 November 1988), D.A.C. No. 12295 of 1988 (Dist. Ct.) [*Tan Teck Hua*]; *P.P. v. Lau Kim Soon* (18 November 1988), D.A.C. No. 12296 of 1988 (Dist. Ct.) [*Lau Kim Soon*]. These two cases involved the same incident.

86 *Tan Teck Hua, ibid.* at 2. See also Part IV (C), below, for a discussion on *Tan Boon Hock v. P.P.* [1994] 2 Sing. L.R. 150 (H.C.) [*Tan Boon Hock*], a section 354 case in which consent influenced Chief Justice Yong's decision to reduce the sentence.

87 Excerpt of interview with S. Koe featured in L. Chua, S. Jeyapathy, A. Kaur, D. Khoo, S. Retnam & and Wong, "Sex, Rights & Videotape: Episode One", *Mediacorp NewsRadio 93.8* (9 February 2003) ["Sex, Rights & Videotape: Episode One"]. Koe is Chief Operating Officer of Asian gay and lesbian online network fridae.com. Transcripts and recordings of "Sex, Rights & Videotape" are available at the National University of Singapore C.J. Koh Law Library.

88 See *e.g. Perspectives, supra* note 19 at 3.

regard to the value of self-determination. Sections 377 and 377A should be abolished. Section A examines the legal developments in some other common law jurisdictions and identifies a common liberal principle underlying the trend; Section B expounds on the principle; Section C draws support for the principle from practical applications of the provisions; and, Section D deals with opposing communitarian arguments.

### A. *Cutting the Apron Strings: The Trend*

Various common law jurisdictions, including England itself, have gradually erased the archaism of "sodomy" or "buggery" offences.[89] Instead of condemning the inherent nature of the sexual conduct, the legislative trend in these jurisdictions has been to focus on protection—protecting people from harm against their will, children and those deemed incapable of consent, and other people from being forced to witness the conduct displayed in public—and to draw the line at consensual private conduct. I will first look at the reform in Hong Kong,[90] which has demographics more closely resembling Singapore's, compared to the other jurisdictions—Canada, the U.S., New Zealand and England—which I will go on to consider. The relevant laws in Hong Kong, Canada, the majority of jurisdictions within the U.S. (including the District of Columbia),[91] New Zealand and England have been reformed by legislative action, while those in the U.S. states such as Georgia and Arkansas have been struck down by the judiciary as unconstitutional.[92]

#### I. *Hong Kong*

The role of the law has been central to our consideration. In the sphere of homosexual conduct we see it principally as a means of protecting the vulnerable, including young people and the mentally disabled, from exploitation

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[89] After 1967 but before 1994, "buggery" in English common law was governed by section 12(1) of the *Sexual Offences Act 1956* as amended by the *Sexual Offences Act 1967*, which partially decriminalized consensual homosexual acts, including anal intercourse. However, the definition of "buggery" was developed not by statute but by common law. After 1994, non-consensual anal intercourse in England was classified as rape, while section 12 was retained as an offence for certain consensual acts, see *Sexual Offences Act 1956*, *supra* note 7, s. 12; *Sexual Offences Act 1967* (U.K.), 1967, c. 60, s. 1 [*Sexual Offences Act 1967*]; *Criminal Justice and Public Order Act 1994* (U.K.), 1994, c. 33, ss. 142–143 [*Criminal Justice and Public Order Act 1994*]. See also generally *Perspectives, supra* note 19.

[90] *Hong Kong Report, supra* note 43 at A199.

[91] See generally "State-by-state Breakdown of Sodomy Laws", online: American Civil Liberties Union <http://archive.aclu.org/issues/gay/sodomy.html> ["Breakdown"].

[92] *Ibid.*

or sexual corruption; and as a protection to people generally against public behavior that is indecent or offensive to the majority.[93]

This was the guideline of the Hong Kong Law Reform Commission's 1983 recommendation—which became law in 1991[94]—to decriminalize same-sex consensual sexual conduct in private.[95] Before that, consensual anal intercourse was illegal, a crime of "buggery" at English common law as applied in the former colony. There was also the equivalent of section 377A on "gross indecency."[96] The Commission's guiding principle reflects that of other common law jurisdictions which, like Singapore, bore English criminal law origins but have since moved on.

### II. *Canada*

In 1968, Canada decriminalized anal intercourse and "gross indecency" between married heterosexual couples and consenting persons both age 21 or above. However, it retained some English influence by retaining the term, "buggery" and "gross indecency."[97] Subsequently, amendments based on the Law Reform Commission's 1978 report truly unchained Canada from archaism. The term "buggery" was removed. Now anal intercourse or other forms of sexual conduct—including those not amounting to sexual intercourse—are not illegal unless there is no consent or the parties involved are by law deemed incapable of consent.[98] This position is based on the report's three guidelines:

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[93] *Hong Kong Report, supra* note 43 at 121. The standard of what amounts to offensive public conduct may still be biased, as it is based on what the general public views as offensive to witness. A pro-heterosexual public may be more willing to accept a heterosexual couple kissing in public but find the same act between homosexual couples less acceptable. There is also the issue of what is "private." Various jurisdictions that have reformed laws concerning homosexual acts had to grapple with the definition of "private" and whether it should it be treated any differently in homosexual situations, see *e.g. ibid.* at 133. However, it is beyond the scope of this paper to focus on these related issues.

[94] *Crimes Ordinance* (H.K.), c. 200, s. 118A-E, 118I-J [*Crimes Ordinance* (H.K.)].

[95] The Commission did not expressly recommend the decriminalization of the heterosexual act, which was also illegal, but the 1991 Crimes (Amendment) Ordinance (90 of 1991) did partially decriminalize *both* heterosexual and homosexual acts, see *ibid.* In England, although the consensual act between men was decriminalized starting in 1967, the heterosexual act remained illegal until 1994, when the anomaly was finally removed and all forms of non-consensual anal intercourse were classified as rape, see *Criminal Justice and Public Order Act 1994, supra* note 89 ss. 142–143; *Perspectives, supra* note 19 at 31–3.

[96] See *Offences Against the Person Ordinance* (H.K.), c. 212, ss. 49, 51 (repealed). Bestiality, however, remains illegal, see *Crimes Ordinance* (H.K.), *supra* note 94 s. 118L. See *infra* note 273 on bestiality.

[97] *Criminal Code* (Canada), R.S. 1970, c. C-34, ss. 155, 157–158 (repealed).

[98] *Criminal Code* (Canada), *supra* note 13.

(1) Protect the integrity of the human person from violation. "In sexual relations, therefore, *consent must be of the essence*";
(2) Protect children and others who "have not attained full sexual autonomy or who have not yet achieved this equilibrium" from exploitation and corruption; and
(3) Protect public decency. "Sexuality is an intimate matter. . . . It is not therefore legitimate to force others to witness acts which are essentially private."[99]

## III. *The United States*

In the U.S., where Puritanism had co-existed with Catholicism since the 19th century,[100] state laws prohibiting "sodomy" have been gradually repealed or struck down as unconstitutional.[101] As one of the most recent state supreme courts to strike down its state's sodomy laws, the Georgian Supreme Court by a 6–1 vote in 1998[102] invalidated the same law upheld by the U.S. Supreme Court in *Bowers*[103] twelve years ago as not in violation of the federal right to privacy. The times had moved on for Georgia. "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than consensual, private, adult sexual activity," said Chief Justice Benham in his majority opinion.[104] The U.S. Supreme Court is also reconsidering its decision in *Bowers* in the most recent challenge of *Lawrence and Garner v. the State of Texas*.[105]

## IV. *New Zealand*

In New Zealand, since the 1961 Crimes Act, consensual sexual conduct in private has not been criminal. Section 128(3) states, "A person has unlawful sexual connection with another person if that person has sexual connection with the other person (a) Without the *consent* of the other person; and (b) without believing on reasonable grounds that the other person *consents* to that sexual connection [emphasis added]." "Unlawful sexual connection" includes anal or oral intercourse. Conduct not amounting to sexual intercourse would be illegal only if one party involved is below a certain

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99 Canada, *Report on Sexual Offences* (Ottawa: Law Reform Commission, 1978) at 6–8 [*Canadian Report*] [emphasis added].
100 *Medieval Europe, supra* note 19 at 608.
101 See generally "Breakdown", *supra* note 91.
102 *Powell v. State*, 510 S.E.2d 18 (1998) [*Powell*].
103 *Bowers, supra* note 19.
104 *Powell, supra* note 102 at 24.
105 "Court Hears Challenge", *supra* note 19.

age or does not consent, in other words, is assaulted.[106] Again, we see the central role of consent in demarcating legal control over sexual conduct.

V. *England*

The above jurisdictions, which inherited English common law, have progressed from the original English-medieval position. Singapore has not chosen to do so. Predictably, the arguments on local morals and "interest of the community" come into play in defending this status quo. These will be dealt with further below in Section C. What I want to emphasize here, is the rejection of blind adherence to a product of history, a product that disrespects individual sexual autonomy by controlling sexual conduct based on a preferred majority's values. Since the 1957 *Wolfenden Report*,[107] the consequent *Sexual Offences Act 1967*[108] and further amendments,[109] England itself has gradually disavowed this product. The function of criminal law in regulating homosexual conduct, according to the Committee, is

> . . . to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence. It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined.[110]

This position is similar to the Hong Kong, Canadian and New Zealand approaches. Currently, it is no longer illegal under English law to have consensual anal intercourse of either gender combination, or engage in private homosexual conduct not amounting to intercourse—which could previously be "grossly indecent"—subject to limits[111] such as "age of consent."[112]

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[106] But sexual acts with animals remain illegal, see *Crimes Act 1961* (New Zealand), ss. 128, 128A-B, 142–4.

[107] *Wolfenden Report, supra* note 45.

[108] *Sexual Offences Act 1967, supra* note 89.

[109] See *e.g.* *Criminal Justice and Public Order Act 1994, supra* note 89; *Sexual Offences (Amendment) Act 2000* (U.K.), c. 44 [*Sexual Offences (Amendment) Act 2000*]. See generally *Perspectives, supra* note 19.

[110] *Wolfenden Report, supra* note 45 at para. 13.

[111] See *e.g.* the following provisions for detailed limitations: *Sexual Offences Act 1956, supra* note 7 s. 12; *Sexual Offences Act 1967, supra* note 89 s. 1; *Criminal Justice and Public Order Act 1994, supra* note 89 ss. 142–143.

[112] The age of consent for homosexual acts has been lowered to 16, matching that of girls in heterosexual acts, see *Sexual Offences (Amendment) Act 2000, supra* note 109 s. 1. For debates over "age of consent," see *e.g.* *Perspectives, supra* note 19; England and Wales,

Perhaps one would remark that the reforms above reflect societies with sexual mores that are more permissive than those in Singapore. However, that is not necessarily true. In fact, what makes the evolved English and Hong Kong attitude more compelling is the implicit moral disapproval of homosexuality detectable between the lines. For example, Wolfenden and subsequent committees' concerns over the male age of consent for homosexual acts centered on how to minimize the chances of young boys turning homosexual. "[W]e should not wish to see legalised any forms of behaviour which would swing towards a permanent habit of homosexual behaviour a young man who without such encouragement would still be capable of developing *a normal habit of heterosexual adult life*."[113] The 1981 Policy Advisory Committee on Sexual Offences, in considering whether to lower the age of consent to 18,[114] consulted experts, and the majority concluded: "We regard it as improbable that young men who are not homosexuals by the age of 18 could be *converted* to homosexuality after that age. We do not therefore consider that a reduction in the minimum age ... *would be likely to result in an increase in the number of homosexuals*."[115] The age of consent requirement was treated as a point of no return: homosexuality is undesirable, but if the actors cannot change, then the acts should not be criminalized. If the moral attitude was approving, or at least positive, toward homosexual conduct, why should these committees be worried about the increase in the number of homosexuals and the occurrence of homosexual conduct? The Hong Kong Commission after consulting experts on the predisposition of homosexuality noted: "There is nothing that can be done to change that innate character."[116] Hence, it felt unjustified[117] to condemn people who, to put it crudely, simply cannot help it. To be fair, the concerns were partly about preventing young boys from "coming out" when they may be unprepared for a society that is generally disapproving of homosexuality.[118] Nonetheless, between the lines we can notice the notion that heterosexuality is "right."[119] "[A] normative yet somehow ever-threatened heterosexuality is inscribed at the heart of the institution of law."[120]

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*Report on the Age of Consent in relation to Sexual Offences* (London: Policy Advisory Committee on Sexual Offences, 1981) [*Policy Advisory Committee Report 1981*].

113 *Wolfenden Report, supra* note 45 at para. 66 [emphasis added].

114 It has now been lowered to 16, see *Sexual Offences (Amendment) Act 2000, supra* note 109.

115 *Policy Advisory Committee Report 1981, supra* note 112 at para. 50 [emphasis added].

116 *Hong Kong Report, supra* note 43 at 121.

117 *Ibid.*

118 *Policy Advisory Committee Report 1981, supra* note 112 at paras. 42–43; *Wolfenden Report, supra* note 45 at para. 71.

119 *Perspectives, supra* note 19 at19.

120 S. Watney, *Policing Desire: Pornography, AIDS and the Media* (London: Methuen, 1987) at 64.

However—and this is the lynchpin of my argument—the English and Hong Kong approaches *chose* to remove moral judgment from the law's concerns, despite "moral" disapproval. The Hong Kong Commission concluded: "[T]he law has no business simply with enforcing spiritual values. Besmirching the collective virtue of a community is not, in our view, an evil consequence the law could or should seek to combat: spiritual transgressions which do not affect the lives of others should, we believe, be dealt with by spiritual, rather than temporal, sanctions."[121] "There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[122]

### B. *A Liberal Principle*

In short, the above jurisdictions show a trend towards the following Millian principle:

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, *is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant*. ... The only part of the conduct of any one, or which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[123]

This principle is liberal in outlook. It embodies the idea of state neutrality[124]—the state does not endorse by legislation what visions

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[121] *Hong Kong Report, supra* note 43 at 113.

[122] *Wolfenden Report, supra* note 45 at para. 61.

[123] J.S. Mill, *On Liberty* (Chicago: The Great Books Foundation, 1955) at 11 [*On Liberty*] [emphasis added].

[124] W. Kymlicka, *Contemporary Political Philosophy: An Introduction*, 1st ed. (Oxford: Clarendon Press, 1990) at 216–8 [*Philosophy*]. However, there is debate over whether a liberal state can truly be "neutral." "Even a liberal state must make *some* assumptions about people's interests or well-being." For example, the state may protect or enforce equality, individual rights and responsibilities or justice as fairness, because its ideology is premised on the intrinsic moral worth of every individual. Hence, the type of "state neutrality" discussed here should be limited to "the intrinsic merits of different (justice-respecting) conceptions of good life." Some prefer the term "state anti-perfectionism.": see W. Kymlicka, *Contemporary Political Philosophy: An Introduction*, 2nd ed. (Oxford: Oxford University Press, 2002) at 217–9.

of the "good life" are acceptable or unacceptable[125] in a diverse society.

Singaporean attitudes on sexual practice are pluralistic. In the 1992 Censorship Review Committee's survey, 14% of 1,102 Singaporeans age 17 and above did not disapprove of homosexuality "as a way of life."[126] In the informal online poll conducted by the NewsRadio-NUS radio production, *Sex, Rights & Videotape*, of the 943 respondents, 85.8% disagreed that consensual oral sex should be illegal just because it is not followed by vaginal intercourse; 71.1% disagreed that it should be illegal for a heterosexual couple to engage in consensual anal intercourse; 60.4% disagreed that it should illegal for two men to engage in consensual anal intercourse; 16.1% disagreed that bestiality should be illegal.[127] These survey results may not accurately gauge or represent the extent of such pluralism, but they prove its existence. They prove that Singapore society does not share homogenous views about sex. Sections 377 and 377A offends this reality. They impose Christian medieval values about sex on people who do not share them.

In contrast, liberalism strives to avoid imposing any particular set of morals on everyone. This is especially significant in a pluralistic society, where such imposition would override some individuals' visions of the "good life." Instead, liberalism respects and appreciates the individual's self-determination of his or her "good life," resorting to legal intervention only if another person is harmed or is forced to do something against his or her will. That is where the above Millian principle on harm and consent comes into play. By repealing sections 377 and 377A, the state signifies that it respects the individual's sexual autonomy, that it appreciates the value of liberalism. "Liberalism's greatest value . . . is the absence of values."[128]

### C. *The principle in practice*

In Benthamite language, where there is consent, there is no mischief, "for no man can be so good a judge as the man himself, what it is gives him pleasure or displeasure."[129] "The power of the law need interfere only to prevent

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[125] *Ibid.*; see also excerpt of interview with V. Ramraj featured in "Sex, Rights & Videotape: Episode One", *supra* note 87 [V. Ramraj in "Sex, Rights & Videotape: Episode One"]. Dr. Ramraj is Assistant Professor at the Faculty of Law, National University of Singapore.

[126] *CRC Survey, supra* note 30.

[127] See Appendix I.

[128] S. Pralong, "The Value of Liberalism" in Z. Suda & J. Musil, eds., *The Meaning of Liberalism: East and West* (Budapest: Central European University Press, 2000) 85 at 85 ["The Value of Liberalism"].

[129] J. Bentham, "Cases Unmeet for Punishment" in J.H. Burns and H.L.A. Hart, eds., *An Introduction to the Principles of Morals and Legislation* (London: Methuen & Co., 1982) 158 at 159.

them from injuring each other. It is there that restraint is necessary; it is there that the application of punishment is truly useful."[130] The proposed liberal principle is, thus, also practical. Even before the Hong Kong law was reformed,[131] the police usually investigated only upon complaints.[132] In the U.K., the police was sometimes reluctant to enforce the offence of "gross indecency" too actively and exercised discretion in ignoring overtly private activities.[133] Such practicality should appeal to Singaporean pragmatism.[134] Rigorous enforcement of sections 377 and 377A is impractical, because law enforcement would have to expend valuable resources to police consensual private conduct, which may be inconvenient to detect and difficult to prove. In fact, it appears to be the practice in Singapore to prosecute only non-consensual cases or to protect the young.[135] In other words, sections 377 and 377A *put into practice* are quite consistent with the liberal principle underlying the trend elsewhere. Non-interference with private consensual conduct is practiced and is nothing new in Singapore. This phenomenon lends support to decriminalizing them formally by repealing the provisions.

In most of the post-1991 reported and unreported cases involving section 377 or 377A, set out in Appendixes II and III, the accused had applied force or threatened to use force in procuring the sexual act, or the sexual partner was a young person,[136] or the court believed that the complainant did not consent to the act.[137] In some section 377A cases, the acts were consensual but they took place in public, such as in a community children's pool.[138]

A few other cases—also summarized in the appendices—are discussed in more detail below. In the first three—*Tan Kuan Meng*,[139] *Kwan Kwong Weng*[140] *and Armstrong Desmond Ronald v. P.P.*[141]—the accused most probably did not use violence or threat of force to make the complainants perform the sexual acts. The complainants were not so young that they were

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130 J. Bentham, *The Theory of Legislation* (London: Routledge & Kegan Paul Ltd., 1931) at 63.

131 *Crimes (Amendment) Ordinance* (H.K.), 90 of 1991, which repealed the *Offences Against the Person Ordinance* (H.K.), c. 212, s. 49–53 and amended the *Crimes Ordinance* (H.K.), *supra* note 94.

132 *Hong Kong Report, supra* note 43 at 61.

133 *Perspectives, supra* note 19 at 11.

134 See *e.g.* generally S.K. Chan, "The Criminal Process—the Singapore Model" (1996) 17 Sing. L. Rev. 433 ["Singapore Model"]; "Address", *supra* note 6.

135 See Appendix II and III.

136 See *e.g. Adam bin Darsin v. P.P.* [2001] 2 Sing. L.R. 412 (C.A.) [*Adam bin Darsin*].

137 See *e.g. Kwan Kwong Weng* (C.A.), *supra* note 4, and discussion below.

138 See *e.g. Abdul Malik bin Othman v. P.P.* (27 October 1993), M.A. No. 429/93/01 (Sub. Ct.) [*Abdul Malik*].

139 *Tan Kuan Meng, supra* note 4.

140 *Kwan Kwong Weng* (C.A.), *supra* note 4.

141 *Armstrong Desmond Ronald v. P.P.* (29 January 2003), D.A.C. No. 35597 of 2002 (Sub. Ct.) [*Armstrong*].

deemed as incapable of consent solely because of their age. Nonetheless, the courts saw a power imbalance. Although there appeared to be consent, the courts regarded the accused as being exploitative or in control over the complainant whom they perceived as naïve or helpless against the accused. This demonstrates the extent to which local courts implicitly approach section 377 and 377A with protection of the vulnerable in mind. As for the last case discussed below, *P.P. v. Jaberali*,[142] the act occurred between two consensual adults but it was probably the violent crime that occurred immediately after the sexual act that brought it to the prosecution's attention.

### I. *Tan Kuan Meng*

The accused was convicted under section 377. In one of the case's earlier incidents, the accused called up the complainant and demanded that she pay for a hotel room and wait for him in the room naked. They had never met before. Following his instructions, she checked into a hotel, stripped and even paged the accused to give him the room number. The relationship spanned six months during which the complainant had vaginal intercourse and fellatio with the accused in hotel rooms on various occasions. Justice Lai concluded that the complainant did not consent. "[T]he accused manipulated the will of the complainant by putting her in terror and great fear of him. The fear was so severe that she submitted to his demands for sexual perversions, sex and money against her will. *She was a simple, plain and hardworking girl*. ... That she was somewhat *weak-minded*, that she did not stand up to him, was no license for him to have *exploited her* in such a despicable manner."[143]

### II. *Kwan Kwong Weng*

The accused was convicted of fellatio under section 377. He convinced the 19-year-old complainant that her vagina was poisoned because her ex-boyfriend had performed cunnilingus on her, and that he could cure her. The treatment turned out to be sexual intercourse, after which he asked the complainant to perform fellatio because he had expended a lot of energy on the "treatment" and needed to balance his "yin" and "yang." The court concluded that the complainant, despite her age, previous sexual experience and polytechnic level of education, was "naïve and gullible,"[144] and decided that the complainant's consent to perform fellatio had been vitiated

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[142] *P.P. v. Jaberali s/o Abbas* (30 June 2001), D.A.C. No. 120 of 2001 (Sub. Ct.) [*Jaberali*].
[143] *Tan Kuan Meng, supra* note 4 [emphasis added].
[144] *Kwan Kwong Weng* (C.A.), *supra* note 4 at para. 3.

by trickery.[145] It even disapproved of the prosecution's concession on consent.[146]

## III. *Armstrong*

The accused was convicted of committing fellatio under section 377A with a 17-year-old boy. The acts were consensual and in private, and the boy's age "cannot be considered as tender."[147] Nevertheless, the court refused to treat the case "as being in the same category as offences which occurred in private between 2 consenting and mature adults with homosexual inclinations."[148] Instead, it focused on how the accused had abused his position of trust and authority, as he was a youth worker, and the complainant was a volunteer under his supervision. The court also emphasized that the accused had betrayed the trust of the complainant's "naïve and simple parents" who let the accused stay overnight in the same room with their son.[149] The judgment indicates that the court had in mind the protection of young people from abuse of authority and trust.[150]

## IV. *Jaberali*

Unlike the above cases, this one did not involve a power imbalance, or a "naïve" complainant. But it involved exertion of power of another kind from which the law should equally protect us—violence. Here, the accused consented to the complainant's proposition to perform oral sex on him. He was convicted under section 377 for the act. However, this case would probably not have surfaced if the accused afterward had not robbed and assaulted the complainant, fracturing his jawbone.[151] The district judge, on appeal by the prosecution against the sentence, said the accused "took advantage of the victim and the situation."[152] "The offence of fellatio between two consenting adults was clearly the lesser offence which normally attracts only a short custodial sentence. It was the offence of robbery with hurt which merited far greater consideration and punishment."[153] It is also noteworthy that the complainant was not punished for the fellatio.

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[145] *Ibid.* at para. 34.
[146] *Ibid.* at para. 33. See also *supra* note 71 on the withdrawal of multiple rape charges at the commencement of preliminary inquiry proceedings.
[147] *Armstrong, supra* note 141 at para. 122.
[148] *Ibid.* at para. 125.
[149] *Ibid.* at paras. 122–3.
[150] England has enacted laws specifically on sexual offences involving abuse of position of trust, see *Sexual Offences (Amendment) Act 2000, supra* note 109, s. 3.
[151] *Jaberali, supra* note 142 at paras. 7–8, 18.
[152] *Ibid.* at para. 18.
[153] *Ibid.* at para. 16.

Therefore, from the cases set out in Appendixes II and III and those analyzed above, the trend in Singapore, at least since the 1990s, leans toward prosecutorial application of sections 377 and 377A only to apparently non-consensual cases or situations where protection was deemed necessary. Further, the court's insistence that consent was lacking, even where such evidence was tenuous or incredulous, suggests discomfort with punishing an accused whose sexual partner had consented.

Still, one may argue that this is not necessarily consistent practice. In *Tan Boon Hock v. P.P.*, the accused was charged under section 354 for outraging the modesty of a police officer who had gone undercover to "flush out" homosexuals such as the accused. The police officer entrapped the accused by inviting the accused to join him in the bushes.[154] Chief Justice Yong said: "It is disquieting that an accused arrested as a result of a police operation (where, as far as the homosexual accused could discern, there would appear to be little question of consent being forthcoming from the other man who then turned out to be a police officer in disguise) should be charged . . . under s354."[155] But because the accused had pleaded guilty, the issue was not examined in court. Although this was not a 377 or 377A case, it does show that police and prosecutorial practice do not always adhere to the principle of intervening only for protection purposes.

However, the contention can be turned on its head. It also goes to show that prosecutorial and police discretion is an unreliable mechanism for observing the liberal principle articulated above. Prosecutors and police officers come and go. A new Attorney General could come into office and decide to enforce sections 377 and 377A by the book. As consent is irrelevant, a survivor of the assault theoretically could be charged and convicted of the offence along with the perpetrator. In *Ng Huat*, Chief Justice Yong admitted that possibility, but his Honour did not consider it a "real cause of concern . . . [T]he judicious exercise of prosecutorial discretion should prevail to ensure that such travesties of justice did not occur."[156] One could bolster this view with the "Shared Value" notion of trusting our leaders as they are "*junzi*,"[157] trustworthy and honorable men (and, presumably, women).

Whether or not this notion of *junzi* is true or defensible, the reality is that prosecution enjoys absolute discretion in criminal prosecutions, including on what charge to proceed in each case.[158] A "*junzi*" prosecutor may decide that it would be "right" to "flush out" everyone who engages in non-vaginal

[154] *Tan Boon Hock, supra* note 86.
[155] *Ibid.* at 156.
[156] *Ng Huat, supra* note 20.
[157] *Shared Values, supra* note 9 at para. 41.
[158] *Constitution, supra* note 17 art. 35; *Criminal Procedure Code* (Cap. 68, 1970 Ed. Sing.) Chapter XXXIV.

sexual intercourse, because his values say so. He would be acting within his legal power. Indeed, it is also true that such prosecutions could be tempered by sentencing discretion, such as the case of *Tan Boon Hock* in which the Chief Justice reduced the sentence of four months' imprisonment and three strokes of the cane to a S$2,000 fine.[159] However, as mentioned at the beginning of Part IV, the mere existence of sections 377 and 377A is offensive to individual autonomy and self-determination. Prosecutorial discretion, being discretionary by nature, can change, unlike the terms of a penal code.[160] So can sentencing discretion.

I have shown that the trend in several common law jurisdictions is to shed the archaic English influence and to regulate sexual offences based on the Millian liberal principle. Unlike the rationale behind sections 377 and 377A, liberalism avoids imposing the values of a majority on a sexually pluralistic society. I have also drawn support from prosecutorial and sentencing discretion to show that the practice of this liberal principle is not alien to Singapore criminal justice. Parliament should make the next move and secure its status by repealing sections 377 and 377A and show its respect for individual autonomy unequivocally.

### D. *Opposing arguments*

Repealing sections 377 and 377A would not be the first time Parliament takes morality out of lawmaking. In 1996, Parliament amended the Women's Charter to recognize marriages involving people who had undergone sex change operations.[161] Then Community Development Minister Abdullah Tarmugi said: "*We don't want to get into the morality of it*. Ultimately, we think it's a practical step that we have to take. . . . There would, presumably, be some criticism, and some moral views about it, but it's a practical step. It's not a new lifestyle that we're condoning."[162] Perhaps one could argue that allowing transsexuals to marry might not be as offensive to the majority's moral values. After all, the couple would still be married as man and woman. Perhaps one would argue that de-criminalizing consensual private sexual conduct, in comparison, would be a more objectionable step for Parliament to venture: it is one thing for prosecutorial and sentencing discretion to apply implicitly the liberal principle to sections 377 and 377A, but another for Parliament to remove them; opposing communitarian arguments call

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[159] *Tan Boon Hock, supra* note 86.

[160] Excerpt of interview with M. Hor featured in "Sex, Rights & Videotape: Episode One", *supra* note 87. Hor is Associate Professor at the Faculty of Law, National University of Singapore.

[161] *Women's Charter* (Cap. 353, 1997 Rev. Ed. Sing.) s. 12.

[162] R. Saini and B.P. Koh, "Transsexuals Keeping Their Fingers Crossed" *The Straits Times* (26 January 1996) L1 at L1-L2 [emphasis added].

for their maintenance as a moral symbol of what the "right" values for Singapore society should be.[163] I shall first describe some of these key objections, then defend the liberal principle against them in two ways—by pointing out the conceptual problems of the underlying communitarian rationale, and arguing why the value of liberalism should prevail over that of communitarianism.

The objections would go something like this: "Deviant" sexual practices prohibited by sections 377 and 377A offend our Singaporean-Asian morals.[164] Although sections 377 and 377A are medieval and canonical by origin, they support our cultural values and morals. In the *Sex, Rights & Videotape* informal poll, most of the 39.6% of respondents who wanted consensual anal intercourse between men to remain illegal, said so because "it is socially unacceptable."[165] Just because other common law jurisdictions have chosen to liberalize does not mean that Singapore, as a sovereign state with its own Asian identity and circumstances, should follow suit. According to our Asian values, "[t]o give reins to unbridled carnal desires and free unethical sexual relationships is *immoral*."[166]

Similarly, these sexual practices are sinful, as they offend religious morals. "The society in Singapore I can boldly say does not condone homosexuality or lesbianism, or bestiality or sodomy [because] we have religions being practised in this country."[167] To followers of certain religions, such as Catholicism, these sexual practices are against their religious teachings that sex should be for "procreation." Even to those who do not view the role of sex as strictly, they may believe that the only natural sex is vaginal intercourse because that is how we are biologically constituted.[168]

This set of majority morals has woven together a social fabric that is intertwined with Singapore's success, as it emphasizes the institutions of marriage and family, placing them above individual interests. "The family

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163 The Media Development Authority, previously Singapore Broadcasting Authority, continues to ban about 100 pornographic sites. However, in its Internet policy statements, it acknowledges the reality that bans on Internet sites are hard to enforce effectively: see "Myths and Facts about MDA and the Internet", online: Media Development Authority <http://www.mda.gov.sg/medium/internet/i_myths.html>. Hence, the 100-site ban is probably more symbolic of the government's stand than for effective measures, see *e.g.* R. Clarke, "Regulating the Net", online: Australian National University <http://www.anu.edu.au/people/Roger.Clarke/II/Regn.html>.

164 See *e.g. Parliamentary Debates*, vol. 51, col. 110 (26 May 1988) (Dr. S. Vasoo), in which "homosexual practices" were labeled "not really acceptable" in Singapore.

165 See Appendix I.

166 *Parliamentary Debates*, vol. 46, col. 231 (23 July 1985) (Mr. Tang Guan Seng) [*Parliamentary Debates 1985*] [emphasis added].

167 Excerpt of interview with D. Gerald featured in "Sex, Rights & Videotape: Episode One", *supra* note 87. Gerald was defense counsel in *Tan Kuan Meng, supra* note 4.

168 *Medieval Europe, supra* note 19 at 579–83.

is the fundamental building block out of which larger social structures can be stably constructed."[169]

> What holds [the family] together? It is their common bond based on the values that they share and experiences that they share. If there is no consensus in the family, if the interests of the individual members always take precedence over those of the family as a whole, such a family will surely break up. As with a family, so with a nation.[170]

Because these sexual practices banned by law are immoral or sinful, if left unchecked, they can threaten our society's survival.[171] "Traditional Asian ideas of morality, duty and society which have sustained and guided us in the past are giving way to a more Westernised, individualistic, and self-centred outlook on life."[172] Although "[n]ot all foreign ideas and values are harmful,"[173] "permissive" or "alternative" lifestyles,[174] like these sexual practices, could lead to decadence and the downfall of Singapore society. As Lord Devlin put it: "There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."[175] Therefore, Singapore must protect its success by preventing the erosion of traditional values.[176] If these sexual practices are decriminalized, it could encourage more people to indulge in them without respect for the majority values. It is not conducive to compare the consequences of reform in other jurisdictions. A member of the Wolfenden Committee made the following reservation on decriminalizing private consensual homosexual sexual conduct:

> Not only have we differences of background, social philosophy, tradition, *etc.*, but if the behavior is made lawful the police authorities are freed from responsibility for investigating and assessing the volume of the conduct and . . . have largely lost their rights to enquire. In the result, the very nature of such conduct would tend to conceal itself from police

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[169] *Shared Values, supra* note 9 at para. 12.

[170] *Parliamentary Debates*, vol. 56, col. 846 (14 January 1991) (Dr. Tay Eng Soon) [*Parliamentary Debates 1991*].

[171] *Hong Kong Report, supra* note 43 at 129; *Wolfenden Report, supra* note 43 at paras. 54–5.

[172] *Shared Values, supra* note 9 at para. 2.

[173] *Ibid.*

[174] *Ibid.* at para. 13.

[175] P. Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965) at 13 [*Enforcement of Morals*].

[176] *Shared Values, supra* note 9 at paras. 5–6.

> notice, and might readily occur to an increasing extent without official recognition.[177]

Even if this floodgate argument can be successfully challenged as an exaggeration of the law's effect on human behavior, and studies show that decriminalization of sexual practices do not necessarily lead to a jump in frequency of the conduct,[178] the moral credibility of the law and Parliament would be weakened.[179]

Consequently, Parliament should prevent a minority in our society from making the wrong choices, hence harming society and its success founded on the majority's morals. The majority's interest should prevail over individuals' in the minority,[180] because Singapore is a democracy and our lawmakers represent the populous. In Lee Kuan Yew's opinion, "[l]eaders have a moral duty to act in the collective interest and it is from this that they derive their moral authority."[181] Further, the individual's interests should make way for communal and national interests in Singapore, being a predominantly Asian society: "Putting the interests of society as a whole ahead of individual interests has been a major factor in Singapore's success."[182] If the majority disapproves of certain sexual conduct, the individual should sacrifice his or her preference, as it would be in the interest of the community not to rupture its moral cohesion. After the 1992 Censorship Review Committee survey revealed that the "moral attitude" of the majority of Singaporeans was "conservative," with 86% of the respondents opposing homosexuality,[183] then Permanent Secretary of Home Affairs Dr. Ong Chit Chung said: "We must give due consideration to the preferences of the moral majority, or the silent majority, in the HDB heartland, and not just pamper the more vocal minority."[184] It is, therefore, justifiable that Parliament should safeguard the majority's morals, which have provided for Singapore's success, against practices that could threaten this tried and tested formula.

These objections against applying a liberal principle to the legislation of sexual conduct are manifestly communitarian. "The essence of communitarianism is the idea that the state can define what is good and bad, and what is right and wrong, define what kinds of conduct are acceptable or unacceptable," and it is confident about the ability of the state to do that.[185]

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[177] *Wolfenden Report, supra* note 45 at 119–20.

[178] *Ibid.* at para. 58. See also Part IV D(I), below.

[179] *Ibid.* at 119–20.

[180] *Enforcement of Morals, supra* note 175 at 9; *Hong Kong Report, supra* note 43 at 129.

[181] E.K.B. Tan, "Law and Values in Governance: The Singapore Way" (2000) 30 Hong Kong L.J. 91 at 97 ["The Singapore Way"].

[182] *Shared Values, supra* note 9 at para. 11.

[183] *CRC Survey, supra* note 30.

[184] "Heed the Conservative Majority, Dr. Ong Urges" *The Straits Times* (16 August 1992) 3.

[185] V. Ramraj in "Sex, Rights & Videotape: Episode One", *supra* note 125.

It chooses one group's vision of the "good life" that it deems to be the "right" version and imposes it on the entire society.[186] In the context of my argument, the "chosen" group would usually be the perceived majority, but it might not be the case in other situations as communitarianism works hand in hand with paternalism.[187] Returning to these objections, one can find support for them in Lord Devlin's work on the enforcement of morals. In rejecting the Wolfenden recommendation to decriminalize private consensual homosexual acts in England,[188] his Lordship stated:

> We should ask ourselves in the first instance whether, looking at it calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offence. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it.[189]

This argument has conceptual problems, which take the argument down on its own weakness.

One crude proposition we can derive from Devlin's argument is as follows: Society has the right to punish sexual conduct of which its members disapprove, even though that conduct does not injure others, on the basis that the state has a role to play as moral tutor, and the criminal law is its proper tutorial technique.[190] Dworkin calls it the "eccentric" Devlin proposition,[191] which has been criticized.[192] I shall not focus on this proposition. Instead, my focus is on the following more complicated version, based on Dworkin's interpretations.[193] At any rate, the problems with Devlin's overall position permeate both versions.

Applied to the context of sections 377 and 377A, the second version runs something like this: the majority in a society has the right to use criminal sanctions to defend its moral convictions from "deviant" sexual practices it disapproves. It may invoke this right when it feels that such sexual immorality threatens the society's survival. This threshold of public

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186 *Ibid.* See also generally *Philosophy, supra* note 124 at 199–237.

187 So, if the majority changes to embrace what would have been the minority's view on sections 377 and 377A, communitarianism would not necessarily switch to imposing the "new" majority's views. This is because communitarianism does not and need not always prefer the majority's views. Rather, it prefers what it deems as the "right" view: see *e.g.* generally *Philosophy, supra* note 124 at 199–237.

188 Devlin began his research in approval of the *Wolfenden Report*, that the law should stay away from a certain private realm of morality. "But study destroyed instead of confirming the simple faith in which I had begun my task; and [this work] is a statement of the reason which persuaded me that I was wrong," see *Enforcement of Morals, supra* note 175 at vi-vii.

189 *Ibid.* at 17.

190 *Rights, supra* note 24 at 242.

191 *Ibid.*

192 See *e.g.* Hart, *supra* note 23.

193 *Rights, supra* note 24 at 242–55.

feeling or disapproval is that of "intolerance, indignation and disgust."[194] The main problems with this proposition lie with the concepts of "society's survival," the threshold of social disapproval and "morality." There is also the issue of whether a majority has the right to enforce its morality by law and against the minority,[195] with which I shall deal later in arguing why liberalism should prevail over communitarianism.[196]

I. *Conceptual problems*

(1) "*Society's survival*": Firstly, what does it mean when one contends that Singapore society's survival is threatened by the sexual conduct prohibited by sections 377 and 377A? If the contention means that the conduct is alien to Singaporean culture, so that its decriminalization would undermine the society founded on this culture, then the contention is wrong. So-called Singaporean culture often looks to the racial and cultural roots of Singaporeans. However, fellatio has been practiced historically in China; Chinese classics referred to it as "playing the flute."[197] In decriminalizing private consensual homosexual acts, the Hong Kong Law Reform Commission was influenced by the existence of homosexual practices in traditional China, even among royalty. "Scholars of comparative cultures and societies felt that the Chinese had a fairly open attitude toward sexual practices; sex was not something to be feared, nor was it regarded as sinful."[198] The Indian culture is also open to non-vaginal sexual relations. For example, the Hindu *Kama Sutra* describes how to perform fellatio in eight variations.[199] Muslim societies have also traditionally been more tolerant of homosexuality than Christians.[200] It would certainly be a leap of logic and rationality to conclude that such sexual practices somehow contributed to the decay of these great civilizations. "We have found no evidence to support this view, and we cannot feel it right to frame the laws which should govern this country in the present age by reference to hypothetical explanations of the history of other peoples in ages distant in time and different in circumstances from our own."[201] Other emulated civilizations back this non-phenomenon. Greece in its Golden Age idealized male homosexuality. In technologically advanced Japan, the

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194 *Ibid.*
195 *Ibid.* at 244–45.
196 See Part IV (D)(II), below.
197 N. Douglas & P. Slinger, *Sexual Secrets: the Alchemy of Ecstasy* (Rochester, Vermont: Destiny Books, 1979) at 255 [*Ecstasy*].
198 *Hong Kong Report, supra* note 43 at 17.
199 *Ecstasy, supra* note 197 at 251.
200 The emphasis here is on "traditionally," as some "modern" Muslim states are sexually highly repressive by today's Western standards: see *Sex and Reason, supra* note 1 at 67.
201 *Wolfenden Report, supra* note 45 at para. 54.

sexual culture is rife with pornography[202] and tolerates homosexuality. One may say that Japan had Western influence, especially American, "[b]ut the essential culture of Japan is indigenous, and conforms to the generalization that non-Christian societies are not as anxious about sex as Christian ones."[203] The Japanese Criminal Code is silent on consensual sexual acts in private, such as anal intercourse, unless the act was committed with someone under 13 years old.[204] Hence, compared to the Judeo-Christian Western world, the non-Western world—except for the reign of communism, which is incidentally of Western origin—is generally less sexually repressive. "Many non-Western cultures seem positively licentious by Western standards; this is a traditional ground on which Westerners have pronounced themselves more civilized."[205] It would be ironic if Singapore society in seeking its own Asian identity, validates itself against a Euro-centric and once imperialistic standard.

If the contention means that family—the so-called basic building block of Singapore society—is threatened by these sexual acts, it is also dubious. Surely not every immorality threatens society's survival.[206] Oral sex between heterosexual married couples should not be so, even if it does not lead to vaginal intercourse. It can be reasonably regarded as part of nurturing a healthy, intimate relationship. If the concern is that "deviant" sexual practices—especially homosexual conduct—cause marriages to break down, it is inconsistent with legal reality. Extra-marital heterosexual sex can destroy marriages as well,[207] but adultery is not criminalized. If the contention is about the inherent inability of these sexual practices to reproduce, hence hampering the continuity of the nuclear family unit,[208] neither is it consistent with legal reality. When this argument was pitched against homosexuality, the Hong Kong Law Reform Commission responded: "If homosexuality is a crime against . . . the human race because it hinders procreation and hence should be prosecuted, then similar activities such as birth control and even masturbation logically should equally be

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[202] But Japanese pornography has been criticized for degrading women and glorifying sexual violence: see *e.g.* K. Funabashi, "Pornographic Culture and Sexual Violence" in K. Fujimura-Fanselow and A. Kameda, eds., *Japanese Women: New Feminist Perspectives on the Past, Present, and Future* (New York: The Feminist Press, The City University of New York, 1995) at 255. Despite global criticism, Japan dragged its feet until 1999 to enact legislation banning most forms of child pornography: see R. Mercier, "Power, Not Sex, Behind Pornography" *The Japan Times* (7 December 1999).

[203] *Sex and Reason, supra* note 1 at 69.

[204] *Criminal Code* (Japan), 1954, trans. T.L. Blakemore (Tokyo: Charles E. Tuttle Co., 1954), arts. 174, 176, 178.

[205] *Sex and Reason, supra* note 1 at 67.

[206] *Rights, supra* note 24 at 244.

[207] *Wolfenden Report, supra* note 45 at 55.

[208] *Perspectives, supra* note 19 at 7.

treated as criminal offences."[209] Singapore law does not ban contraception; abortion is not illegal. Married couples are not forbidden from having vaginal intercourse except to reproduce. Therefore, if this argument were put into practice consistently, the logical conclusion would be that infertile people would be banned from having sex, much less marry, and adultery would be illegal. Even if supporters of this contention were willing to live with such consequences, these would be laws that are practically unenforceable. The cost of enforcement would far outweigh the benefit derived from it. Law enforcement resources could be diverted from preventing crimes of violence to policing conduct that does not injure others. Moreover, private consensual conduct can be difficult to police. Therefore, if these laws were enacted for the mere sake of reflecting some moral stand, then law enforcement would lose its moral *force*, as its overall effectiveness would be impeded.

Further, if the contention means that society's survival is threatened because decriminalization of these sexual acts prohibited by sections 377 and 377A would fling open the floodgates to increased occurrences of "deviant" sexual practices and paedophilia, it is also problematic by presupposing that society's survival hinges on legal control. It may be true that some people might not engage in the prohibited conduct but for decriminalization, but we also should not exaggerate law's effect on human conduct. Because such consensual and private conduct, as analyzed above, is difficult to police, many people who would engage in it post-decriminalization were probably undeterred pre-decriminalization anyway.[210] In fact, despite the laws protecting women and girls from sexual exploitation, the Hong Kong Law Reform Commission found that they remained the most exploited.[211] On the other hand, those who found the prohibited sexual practices objectionable most probably would continue to think so despite decriminalization. Other social forces, such as popular opinion of morality, may be stronger in influencing sexual conduct.[212] As for the concern about pedophilia, it can be appeased since the proposed liberal principle would continue to protect the young and vulnerable. Therefore, a contention on such grounds would be unsustainable, too.

(2) "*Threshold of social disapproval*": Secondly, the related notions of "intolerance, indignation and disgust" are also conceptually problematic. The argument that once public disapproval crosses this threshold, the majority may invoke its right to legal resort is one that "involves an intellectual sleight of hand."[213] "[H]ow shall we know when the danger is sufficiently

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209 *Hong Kong Report, supra* note 43 at 133.
210 *Wolfenden Report, supra* note 45 at para. 58.
211 *Hong Kong Report, supra* note 43 at 113.
212 *Wolfenden Report, supra* note 45 at para. 58.
213 *Rights, supra* note 25 at 245.

clear and present to justify not merely scrutiny but action?"[214] When does tolerant disapproval become intolerance? According to the *Sex, Rights & Videotape* informal poll, only 14.2% of 943 respondents agreed that oral sex (fellatio or cunnilingus) between man and woman as an end in itself—*i.e.* the couple does not use it as a prelude to vaginal intercourse—should be illegal; only 28.9% agreed that consensual anal intercourse between a heterosexual couple should be illegal; and, only 38.8% agreed that consensual homosexual relations should be illegal.[215] Even if we rely on the 1992 Censorship Review Committee's survey that showed 86% of the respondents rejecting homosexuality as "a way of life,"[216] these numbers do not unequivocally indicate that the level of disapproval has crossed into one of "intolerance, indignation and disgust." The CRC survey results could simply indicate that a large segment of the population would not adopt these practices personally. Hate crimes, if any, directed at homosexuals are not reported in Singapore. Few, if at all, demonstrate on the streets pronouncing the doom of people who have oral or anal intercourse. When Parliament allowed transsexuals to marry, the reaction of devout Christians can hardly be said to have reached this level.[217] If violence, demonstrations or other forms of expressed outrage is what it takes to gauge the threshold, then practically speaking, this so-called threshold "means that nothing more than passionate public disapproval is necessary after all."[218] Hence, Dworkin calls this threshold requirement an "intellectual sleight of hand," a trap against which responsible and intelligent legislators should guard. "Moral conviction or instinctive feeling, however strong, is not a valid basis for overriding the individual's privacy and for bringing within the ambit of the criminal law private sexual behaviour of this kind."[219]

(3) "*Morality*": Nonetheless, working on this tenuous basis, should the legislator act on passionate public disapproval? It might be said that passionate public disapproval reflects the majority's morality, so that the legislator according to communitarian thinking has the duty to act on it for the overall interests of society.[220] As Dworkin argues, however, here we have a misunderstanding of what it is to act on morality,[221] as there is a problem with defining "morality." Sometimes, "morality"—as used in the communitarian

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214 *Ibid.*
215 See Appendix I.
216 *CRC Survey, supra* note 30.
217 R. Saini & B.P. Koh, "Views on Proposed Amendment" *The Straits Times* (26 January 1996) L2.
218 *Rights, supra* note 24 at 245.
219 *Wolfenden Report, supra* note 45 at para. 54. See also below on the problem with what qualifies as "moral conviction."
220 *Rights, supra* note 24 at 247; "The Singapore Way", *supra* note 181.
221 *Rights, ibid.* at 248–55.

argument described above—does not refer to true moral convictions in the discriminatory sense.[222] Instead, the above communitarian argument draws support from "anthropological" morality, which is based on what a given group finds acceptable or unacceptable.[223] Defining "morality" in this manner is undesirable for legislating sexual conduct. It could mean: (1) prejudice: "Homosexuals are not real men." The prejudice is premised on considerations that our conventional judgment excludes. It is akin to winning a contest by violating its rules, which excludes certain considerations upon which the prejudicial "victory" relies;[224] (2) emotional reactions: "Fellatio is sick." "We should distinguish moral positions from emotional reactions, not because moral positions are supposed to be unemotional or dispassionate ... but because the moral position is supposed to justify the emotional reaction, and not vice versa."[225]; (3) implausible rationalization: "The 'deviant' sexual practices lead to the decadence and subsequent downfall of society." This sort of rationalization can be disproved but it cannot be proven. As pointed out above, homosexual acts were common in traditional China and idealized at the height of ancient Greek civilization. It can be disproved that they did not cause the ruin of these great civilizations, but it cannot be proven that they did so. "It challenges the minimal standards of evidence and argument one generally accepts and imposes upon others."[226] Although sincere as a form of rationalization, this sort of belief would be disqualified from being a true moral conviction on this ground;[227] (4) parroting: Citing the beliefs of others is not a moral stand.[228] Multiplying the force of a moral conviction by parroting also does not amount to "passionate public disapproval" based on moral conviction.

Even assuming the notion of "moral" or "morality" is used in Dworkin's discriminatory sense of "moral conviction" and is not disqualified by the above or other grounds, it still manifests internal inconsistencies, which damage the dependent communitarian argument. For example, "morality" based on Biblical teachings might stand as a moral conviction in the discriminatory sense. But how consistently does one adhere to its teachings? If a person condemns anal intercourse, does he or she also condemn pre-marital sex?[229] Does a person who believes that fellatio should be illegal because it is a sin also believe that the Biblical sins of adultery and pre-marital sex

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[222] *Ibid.* at 248. See also Hart, *supra* note 23 on "critical" morality.
[223] *Rights, ibid.* Or, "positive" morality: see Hart, *ibid.*
[224] *Rights, ibid.* at 249.
[225] *Ibid.* at 250.
[226] *Ibid.*
[227] *Ibid.*
[228] *Ibid.*
[229] See generally *Medieval Europe, supra* note 19.

should be illegal as well?[230] Our laws do not reflect such consistency. This was a consideration that influenced the U.K. and Hong Kong law reform commissions to decriminalize private consensual homosexual acts.[231] "Certain forms of sexual behavior are regarded by many as sinful, morally wrong, or objectionable for reasons of conscience, or of religious or cultural tradition; and such actions may be reprobated on these grounds. But the criminal law does not cover all such actions at the present time."[232]

If the person purporting that consensual anal intercourse should be criminalized for being sinful disagrees with the logical conclusion that pre-marital sex should be criminalized, then questions of sincerity and consistency of moral conviction arise. If the reason is that pre-marital sex is so common that it is no longer that immoral, then one is suggesting that an act can be popularly sanctioned.[233] Hence, he or she cannot sincerely or consistently rely on Biblical support for his or her "moral conviction," because it has shifted away from the source's standard. Similarly, if the reason for not criminalizing pre-marital sex is that policing would be difficult, then one's so-called "moral stand" is not purely based on that moral source. Some other factors—not necessarily moral-based—are at work and influencing this stand. If upon realizing the logical conclusion, the person accepts it, one should nevertheless be cautious as to whether this change of heart is genuine, or merely a performance for the sake of the argument, hence not truly a "moral conviction."[234] Even if the change of heart is genuine and the logical conclusion that all Biblical sins should be criminalized is implemented, we still run into the problems of enforceability and moral force of law enforcement, as argued above.

In other words, responsible lawmakers cannot settle the issue of enforcing morality based on "anthropological" morality or by solely relying on the majority's feelings that society's survival is somehow threatened by "deviant" sexual practices.[235] They must assess public disapproval of these practices, gauge whether the level of disapproval justifies overriding the minority's freedom, identify whether it is indeed based on "moral conviction" in the discriminatory sense, and consider whether as *prima facie* such a "moral conviction" it is consistent with the majority's other views and conduct so as to qualify as a *bona fide* moral conviction against these sexual practices. Otherwise, lawmakers would be restraining the sexual freedom of a segment of society based on illogical, unjustified or unprincipled grounds.

[230] *Rights, supra* note 24 at 251.
[231] *Wolfenden Report, supra* note 45 at para. 14; *Hong Kong Report, supra* note 43 at 133.
[232] *Wolfenden Report, ibid.*
[233] *Rights, supra* note 24 at 251.
[234] *Ibid.*
[235] *Ibid.* at 252–3.

It would be contrary to the reputation and calling of Singaporean lawmakers who are touted as intellectual elites[236] and *junzi*.[237] As put in Parliament:

> [I]t is quite acceptable [based on communitarian thinking] to place society above the individual. *But this is on the presumption that there is a just society*. I hasten to add that only a just society deserves to place itself above the individual. If society is just, you can expect individuals to subjugate themselves to this just society, and *only in such a state can there be legitimacy in these shared values.* [Emphasis added.][238]

Therefore, if these conceptual problems with the opposing communitarian argument cannot be resolved, the argument would be "shocking and wrong" not because it contends that majority's morality counts, but because of what it purports counts as the community's morals.[239]

### II. *Liberalism over communitarianism*

What if the problems highlighted above can be resolved, and the communitarian objections can stand as a logical, just and principled argument? Nonetheless, the liberal approach should prevail over it, and sections 377 and 377A should be repealed, because liberalism provides what communitarianism cannot. It avoids the danger of tyranny of one group of people—usually the majority in this context[240]—over others, by appreciating the inherent value of self-determination. In doing so, liberalism achieves the noble purpose of tolerance, which ought to be highly valued and crucial in a diverse society such as Singapore.

The main difference between the liberal and communitarian approaches toward legislating sexual conduct is that the liberal approach adjusts society to fit the individual's preferences and visions of "good"; whereas the communitarian counterpart provides a standard that evaluates individual sexual preferences, and individuals who deviate from that standard are expected to adjust, even suppress, their preferences accordingly.[241] That is the problem with the communitarian approach in a sexually pluralistic Singapore society. The state imposes the majority preference over minority groups who disagree with it.

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[236] See *e.g.* G. Rodan, "Elections Without Representation: the Singapore Experience under the PAP" in R.H. Taylor, ed., *The Politics of Elections in Southeast Asia* (Washington, D.C.: Woodrow Wilson Center Press and Cambridge University Press, 1996) at 61.

[237] *Shared Values, supra* note 9 at para. 41.

[238] *Parliamentary Debates 1991, supra* note 170 at col. 854 (Dr. Koh Lam Soon).

[239] *Rights, supra* note 24 at 255.

[240] See *supra* note 187 and accompanying main text, above.

[241] *Philosophy, supra* note 124 at 206.

Liberalism would object, because the majority's imposition harbors a danger that was pointed out in Parliament during a debate on the communitarian-based Shared Values:

> But neither do we want blind conformity and compliance in the name of nation or of consensus, a disease which is not unknown in the East. *Tyranny of the majority may be even worse than individualism.* Our shared values must never be an excuse to stamp out individual ideas and aspirations that can lead to new achievements.[242]

Then Senior Minister of State for Education, Dr. Tay Eng Soon, was speaking in a broader context, but the danger of tyranny of the majority is equally compelling for my liberal proposition. "Surely the fact that, say, 75% of the people in the eighteenth century thought it was okay to oppress women . . . does not make it correct [or] morally acceptable. And so, what's moral or not is not simply a matter of popular opinion."[243] This is, of course, already assuming that "morality" passes muster as a true moral conviction.[244] Especially when the majority's opinion does not qualify as true moral convictions, the risk of tyranny of the majority increases.

Further, even if the majority's opinion is justified on true moral grounds, it should not necessarily prevail over the minority. Singapore may be a democracy, but democracy is more than imposing the majority's will. It is also about the protection of minorities, and the Constitution recognizes that.[245] It is why the Constitution provides for fundamental rights.[246] As noted in the Introduction, the scope of this paper is not about whether sections 377 and 377A violate any of these fundamental rights.[247] However, the existence of these fundamental rights in the Constitution proves that democracy in Singapore is not merely about the prevailing of majority over the minority. Really, the question is how the state resolves the tension between majority preference and protection of these rights. This is where the liberal and communitarian schools of political thought enter the picture. In resolving the tension, communitarianism would usually favor the former, and liberalism, the latter.

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[242] *Parliamentary Debates 1991, supra* note 170 at col. 848 (Dr. Tay Eng Soon) [emphasis added].

[243] V. Ramraj in "Sex, Rights & Videotape: Episode One", *supra* note 125. What was "good" or "moral" in the past, such as in eighteenth century New England, had often been defined and imposed by a particular group—for example, propertied white men—to the intentional exclusion of other groups such as blacks and women, *Philosophy, supra* note 124 at 224–230.

[244] See Part IV (D)(I), above.

[245] See *e.g. Constitution, supra* note 17 art. 152(1): "It shall be the responsibility of the Government constantly to care for the interests of the racial and religious minorities in Singapore."

[246] *Ibid.* Part V.

[247] See Introduction, above.

That the liberal principle would deny the majority's sexual preference from prevailing over the minority's even when the majority may be "right" is not because liberalism holds that no one can make mistakes. In other words, liberalism does not arrive at this conclusion on the ground that the minority, like the majority, cannot make mistakes. (Otherwise, liberalism should not object to state paternalism, since by logical conclusion, the state could not make mistakes either!) Rather, its conclusion is based on the belief that *self-determination is inherently valuable*.[248] Individuality, as Mill calls it, is "one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress."[249] This is because, "individuals are not only autonomous agents but also self-originating sources of value. In other words, individuals have the ability—indeed the right—to make up their own mind about what matters to them."[250] Conforming to custom for the sake of conformity "does not educate or develop in him any of the qualities which are the distinctive endowment of a human being."[251]

In contrast, communitarianism stamps out individuality and insists on conformity, for the sake of maintaining social harmony. However, in the process, it defeats its own purpose of ensuring only "right" activities are performed:

> Although the magistrate's opinion in religion be sound, and the way that he appoints be truly evangelical, yet, if I be not thoroughly persuaded thereof in my own mind, there will be no safety for me in following it. No way whatsoever that I shall walk in against the dictates of my conscience will ever bring me to the mansions of the blessed. . . . I cannot be saved by a religion that I distrust and by a worship that I abhor. It is in vain for an unbeliever to take up the outward show of another man's profession . . . no religion which I believe not to be true can be either true or profitable unto me.[252]

Locke's view on religious tolerance is relevant to other acts that affect only one's spiritual or moral constitution. Although communitarianism may succeed in forcing people to pursue (or abandon) certain activities, "it does so under conditions in which the activities cease to have value for the individual involved."[253] If I do not believe that the Judeo-Christian god would save

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[248] *Philosophy, supra* note 124 at 201–3.
[249] *On Liberty, supra* note 123 at 66.
[250] "The Value of Liberalism", *supra* note 128 at 88–9.
[251] *On Liberty, supra* note 123 at 69.
[252] J. Locke, *A Letter Concerning Toleration* (New York: The Liberal Arts Press, 1950) at 34.
[253] *Philosophy, supra* note 124 at 204.

me if I abstain from oral sex for orgasmic pleasure, I do not gain any spiritual benefit. The communitarian exercise "creates the very sort of pointless activity that it was designed to prevent."[254]

Liberalism's appreciation of self-determination is reflected in the legal reform of laws regulating sexual conduct. The Wolfenden Committee, in response to communitarian arguments, wrote:

> *There remains one additional counter-argument which we believe to be decisive*, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. ... To say this is not to condone or encourage private immorality. On the contrary, to emphasize the personal and private nature of moral or immoral conduct is to *emphasise the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law*.[255]

The stand also appears to be similar in Hong Kong. When the Law Reform Commission recommended decriminalizing private consensual homosexual acts, the Commercial Radio Opinion Survey Service reported that 74% of Chinese men and 67% of Chinese women in Hong Kong wanted the acts to remain illegal.[256] Nonetheless, despite the overwhelming objection, the law was so amended, thus, passing liberalism's value of self-determination into reality.

In Singapore, the government's catalogue of "Shared Values" includes "regard and support for the individual."[257] In a Parliamentary debate, Singapore's leaders referred to Confucian thinking and said: "'The foundation of the nation lies in the family, and the foundation of the family lies in the individual self.'"[258] Granted, this "individual" was discussed in the context of communitarianism, but it goes to show that the individual is important to Singapore society. It is a matter of transforming the importance from the communitarian to the liberal view of the individual. If Singapore is serious about becoming a creative society and producing individuals capable of independent thinking,[259] it should not demand by law the individual to conform his or her private and intimate sex life to popular norms. "By treating other human beings as ends rather than means, we increase the

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[254] *Ibid.*

[255] *Wolfenden Report, supra* note 45 at para. 61 [emphasis added].

[256] *Hong Kong Report, supra* note 43 at A179.

[257] *Shared Values, supra* note 9 at para. 30.

[258] *Parliamentary Debates 1985, supra* note 166 at col. 236 (Mr. Ong Teng Cheong).

[259] See *e.g.* "Address by Minister for Manpower", *supra* note 12; "Speech by Minister for Education", *supra* note 12.

chance that they too will treat us as such, and thus will help contribute to our transformation as we do to theirs."[260]

Nevertheless, because of liberalism's "individualistic" emphasis, it has been accused of being prone to decadence.[261] For example, one may argue that decriminalizing non-vaginal intercourse could open up the "floodgate" of such conduct. Even if this "floodgate" argument is sustainable,[262] it demonstrates a misunderstanding of the liberal approach. A neutral state applying the liberal approach does not judge the sexual acts in question.[263] So what if more people engage in anal intercourse (paedophilia aside)? The contention of social decadence manifests a moral judgment of the act; the liberal approach does not. The individual decides whether the act accords with his or her vision of "good." This then invites a related criticism: in a morally neutral state, individuals would behave selfishly without regard for the "common good," causing social chaos to ensue.[264] "Absolute liberty may corrupt absolutely."[265]

However, again, "to see liberalism in that way is to fundamentally misunderstand it, because liberalism at its heart has a very noble purpose and that purpose is tolerance—to bring about tolerance in a diverse society—to accommodate difference."[266] It should not be confused with the idea that individuals are allowed to act as they wish without regard to others so long as they believe their conduct makes them happy.[267] The liberal principle put forth here is narrower. It does not support harming others in pursuit of one's own happiness, because other individuals also have the liberty to pursue their own visions of happiness without hindrance or harm. For example, the law punishes rape, because the liberty of another not to have sex against her will[268] justifies legal protection. In jurisdictions where consensual anal

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[260] "The Value of Liberalism", *supra* note 128 at 92.

[261] See *e.g.* generally *Philosophy, supra* note 124 at 199–237; V. Ramraj in "Sex, Rights & Videotape: Episode One", *supra* note 125.

[262] But see Part III (D)(I), above.

[263] *Philosophy*, on "state neutrality," see *supra* note 124.

[264] *Philosophy, ibid.* at 216–8.

[265] *Rights, supra* note 24 at 261.

[266] V. Ramraj in "Sex, Rights & Videotape: Episode One", *supra* note 125. Free from values, liberalism gives the individual the freedom to choose and express his or her own values: see *e.g.* "The Value of Liberalism", *supra* note 128 at 85; *Philosophy, supra* note 124 at 199–237.

[267] See *e.g.* generally *Rights, supra* note 24 at 259–65.

[268] It is dissatisfactory that the legal concept of rape in Singapore is narrowly confined to that of vaginal penetration. More progressive jurisdictions have updated their laws to recognize forcible sexual intercourse by either gender against either gender, see *e.g. Criminal Code* (Canada), *supra* note 14 ss. 271–272. "Why, for example, does the law of sexual offences persist by and large in characterizing men as the 'aggressors' and women as the 'victims'? Why does it enshrine a stereotyped image of masculine and feminine roles? . . . [T]he public is ready to put aside these anachronisms and to have these offences restructured and adapted to modern conditions," see *Canadian Report, supra* note 99 at 6.

intercourse has been decriminalized, consensual sexual contact with children below a certain age remains illegal, because of the competing value of child protection.[269] Consensual sexual contact in public is also not decriminalized because other individuals deserve protection from being forced to witness acts they may not want to see. "It is not sexual behavior itself or any specific type of it but rather *its public exhibition which society seeks to repress*."[270] Our criminal law already provides for public exhibition offences,[271] so sections 377 and 377A are not necessary for this function.[272] If bestiality should remain criminalized, it would also have to be justified on other grounds, such as animal protection,[273] and not on "moral" grounds.

Therefore, by not making laws that curb individual freedom unless the liberty of self-determination of others is infringed,[274] the proposed liberal approach does not reject the common good. Rather, it provides an interpretation of it: society's common good is the result of combining individual preferences, which are all counted equally, as consistent with the principles of justice. The common good is hurt if the state discriminates against what the individual accepts as good to him or her.[275] The state is there to ensure that these options stay open,[276] regardless of popularity; and, tolerance is there to make independent choice over these options possible.

Tolerance is nothing new to the Singapore-Asian society. Confucianism, from which the Shared Values drew inspiration,[277] is relatively and historically more tolerant than Western thought, such as Christianity.[278] Ancient Chinese society tolerated homosexual conduct as a private matter, even though some found it "repugnant."[279] The Hong Kong Law Reform Commission in 1983 surveyed nine Asian jurisdictions—South Korea, Taiwan, mainland China, Japan, India, Pakistan, the Philippines, Malaysia and

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269 See *e.g.* note 89 for English provisions and *Criminal Code* (Canada), *supra* note 13 ss. 150.1, 159(3)(b)(ii).

270 *Canadian Report, supra* note 99 at 8 [emphasis added]. But see *supra* note 93.

271 See *e.g. Penal Code, supra* note 2 s. 268; *Miscellaneous Offences (Public Order and Nuisance) Act* (Cap. 184, 1997 Rev. Ed. Sing.) ss. 20, 27A.

272 But one question is whether the judge would exercise sentencing discretion differently toward a homosexual situation as compared with that of heterosexual. See also *supra* note 93.

273 See *e.g. Animals and Birds Act* (Cap. 7, 2002 Rev. Ed. Sing.) ss. 41–42. See also *Canadian Report, supra* note 99 at 30. An interesting question would be: what if one day humans are able to communicate more effectively with animals and can discern animals' consent? If we recognize animals' autonomy equally to humans', based on my argument, should sexual acts between both consensual humans and animals be decriminalized?

274 *Rights, supra* note 24 at 263.

275 *Philosophy, supra* note 124 at 206.

276 *Ibid.* at 216–8.

277 *Shared Values, supra* note 9 at 41.

278 F. Fukuyama, "Confucianism and Democracy" (1995) 6 J. of Democracy 20 at 25.

279 *Hong Kong Report, supra* note 43 at 17.

Singapore[280]—and concluded that "more countries in the region tolerate consensual homosexual conduct by adults in private than penalize it, and that characteristically their legal systems only intervene where the homosexual activity involves . . . force, abuse of the young, oppression, fraud, absence of consent, exploitation or occurrence in public."[281] Only the former British colonies retained the likes of the Penal Code provisions. Hong Kong, a culturally, religiously and morally pluralistic society,[282] finally demonstrated tolerance in decriminalizing consensual homosexual acts in private. Couched as "privacy," its Law Reform Commission reported: "Privacy is a very valuable commodity in Hong Kong, and highly prized by the great majority of people who live and work here. Despite a mixture of cultural ethics, we believe that this respect for individual privacy in this wide sense is pervasive of many facets of family and business life in this Territory."[283]

In Singapore, pluralism also extends from race and religion to different visions of "good life," including sex.[284] Tolerance, hence, is crucial for peaceful co-existence, and liberalism can provide that. Liberalism is about tolerating diversity, and a liberal society is about the co-existence of individuals who have different visions of the "good life."[285] Punishing individuals not because they harm others against their will but because they enjoy sexual intimacy in different ways is unjust. "Laws that constrain one man on the sole ground that he is incompetent to decide what is right for himself are profoundly insulting to him. They make him intellectually and morally subservient to the conformists who are from the majority and deny him the independence to which he is entitled."[286] In Singapore, the government recognizes justice as a key political value.[287] Liberalism can safeguard that value, with a principle that respects self-determination and individual sexual preferences; communitarianism cannot. Manifest in sections 377 and 377A, it strips individuals of their liberty simply because they do not have a shared sense of "good" with the popular. Liberalism may not provide this shared sense of "good," but it does provide a shared sense of justice.[288]

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280 *Ibid.* at 65–71.
281 *Ibid.* at 71.
282 *Ibid.* at A179, A199.
283 *Ibid.* at 131.
284 See Appendix I.
285 See *e.g. Philosophy, supra* note 124; V. Ramraj in "Sex, Rights & Videotape: Episode One", *supra* note 125.
286 *Rights, supra* note 24 at 263.
287 See *e.g. Shared Values, supra* note 9 at para. 51.
288 *Philosophy, supra* note 124 at 225. But what if everyone in a given society—even the minority—chooses communitarianism, believing it to be the "good life"? In other words, the minority consents on its own terms to be oppressed or ruled by the majority's views. Would and should liberalism argue that communitarianism has no place even though it was

## V. Conclusion

"A government holds a monopoly on the legal use of physical force."[289] It also holds a legal monopoly over sexual liberty. Sections 377 and 377A were born at particular points in history when particular groups monopolized and controlled what was "right" for society. The words "carnal intercourse against the order of nature" betray section 377's medieval canon roots. The phrase "gross indecency" alludes to section 377A's imposition of a given set of morality. The passage of its English precursor, intending to protect men of all ages from "assault" and slipping through with nineteenth century prostitution laws, raise doubts about its scope over consensual contact between men in private. Through colonialism, unfortunately, these laws passed into our time.

Their archaism, vagueness, and, most of all, disregard for individual autonomy have challenged courts' sensibility and ability to administer justice. The compromising ruling on fellatio under section 377, the conscientiousness to find absence of consent, the justification to protect the young or vulnerable, and the exercise of sentencing discretion hint at courts' discomfort with penalizing consensual sexual conduct in private. Several other jurisdictions have shrugged off the British colonial influence and decriminalized private consensual sexual conduct. The principle is liberal: individuals should enjoy sexual autonomy unless and until they infringe the autonomy of others against their will, or harm those who are unable to exercise their autonomy in an informed manner, or disregard the autonomy of others to avoid these acts on public exhibition. Taking this principle to its logical conclusion, consensual incest should not be illegal as well.[290] In fact, this was the conclusion of the 1978 Canadian Law Reform Commission report.[291]

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a choice made via liberalism? On the one hand, liberalism rejects state paternalism to a large extent. Hence, an argument could be made that it should not oppose the imposition of communitarianism chosen in this manner simply because it disagrees with the benefits of communitarianism. On the other hand, liberalism is about state neutrality, to which communitarianism objects. Liberalism champions the notion of a marketplace of different ideas and versions of the "good life." If communitarianism were chosen by everybody in a liberal society, then communitarianism by its nature would destroy this marketplace and damage a fundamental attribute of liberalism: see generally *Philosophy, supra* note 124 at 199–237. This point is beyond the scope of this article but relevant in showing the tension between liberalism and communitarianism.

[289] A. Rand, "The Nature of Government" in A. Rand, ed., *The Virtue of Selfishness* (New York: Penguin Books, 1961) 125 at 128.

[290] *Penal Code, supra* note 2 ss. 376A-D.

[291] "Nor can it be argued, within this framework, that the genetic risk of in-breeding justifies the intervention of the criminal law . . . In the first place, the available scientific evidence is controversial . . . But even if this contention could be made out, we would still have to ask whether this is an appropriate problem for the criminal law. It should be remembered that the law does not intervene to prohibit marriage and subsequent procreation by persons who

The opposition would point to such a conclusion as evidence of liberalism's decadence. These arguments range from staunch medieval prohibitions to the more contemporary variations of social survival and defense of Asian values, but they are all communitarian. The thrust of the arguments remains the same. The state defines the "common good," usually according to majority preference. For the sake of that common good, the minority is forced to give up his or her vision of "good." This sort of argument is inherently problematic. When should majority preference override the minority's sexual freedom? What sort of majority "morality" qualifies? Responsible and intellectually superior lawmakers, as Singapore's are touted to be, should not adhere to majority preference if the basis of that "morality" is not truly moral but illogical, unjustified or unprincipled.

Singapore society is pluralistic toward sexual conduct. Even if the majority's preference is truly "morality"-based, the liberal principle should nevertheless prevail over the communitarian outlook, for at the heart of the liberal principle is a noble rationale—tolerance; at the core of liberalism is a shared sense of justice—respect for everyone's preference; at the end of liberalism is the possibility of social prosperity—the harmonious co-existence of independent-minded, creative people.

Local prosecutorial discretion has, at least, implicitly, put the liberal principle into practice. But it is not enough. The symbols of sections 377 and 377A linger. By the book, they condemn certain consensual conduct in private and deprive one's liberty for doing so. Sometimes, laws that seemed "right" may turn out to be unjust. Sometimes, laws that are hastily passed may turn out to be inappropriate. Legislators are, after all, human. The births of sections 377 and 377A may be forgivable, but their conscious retention is a different matter. If Singapore is to have true "regard for the individual" and to encourage sincerely independent thinking, Parliament should seal the liberal principle in the books by abolishing sections 377 and 377A completely and enacting a new law consistent with it.

**Postscript**

On 26 June 2003, as this article was going into print, the U.S. Supreme Court in a historic 6-3 decision overruled *Bowers* (*supra*, note 19) which had held that the constitutional right to privacy did not invalidate Georgia's sodomy law. "Bowers was not correct when it was decided, and it is not correct today," the court said in *Lawrence and Gardner* v. *the State of Texas* 2003 U.S. LEXIS 5013.

are not related but who may exhibit genetically serious mental or physical disabilities. Nor does the law permit compulsory sterilization of such persons," see *Canadian Report, supra* note 99 at 26–27.

## APPENDIX I: NEWSRADIO-NUS, SEX, RIGHTS & VIDEOTAPE ONLINE POLL

### *Description of Poll*

*Sex, Rights & Videotape* was a radio program produced by five students—Shivani Retnam, Amarjit Kaur, Sonita Jeyapathy, Denise Khoo and myself—under the supervision of Associate Professor Eleanor Wong from the Faculty of Law, National University of Singapore. The program, which aired on Mediacorp NewsRadio 93.8, was aimed at informing and encouraging discussion among the lay public about certain legal issues, such as sexual offences, freedom of information, freedom of speech, censorship and privacy.

To reflect some public opinion on the program, we set up an informal poll online to gather views from Singaporeans and people living in Singapore. We requested friends to help us spread the word, e-mailed local university student organizations and Singaporeans studying abroad, distributed fliers and put up posters. Although the poll is by no means a professionally designed survey, and it is possible that some respondents may each have generated more than one set of responses by logging on multiple times, the poll results do reflect pluralistic attitudes toward sexual practices.

For the questions relevant to this paper, we logged a total of 943 sets of responses, among which 526 were classified as responses from women and 417 from men. Here is a breakdown of the age groups to which these respondents claimed to belong:

| | |
|---|---|
| 18 and below | 12.3 % |
| 19–25 | 43.9% |
| 26–39 | 36.1% |
| 40 and above | 7.7% |

### *Extracts of poll results cited in this paper*

| **Question** | **Agree** | **Disagree** |
|---|---|---|
| Woman performs oral sex on man (fellatio). Both people are willing to perform/have the oral sex. They intend to have sex (vaginal intercourse) after the oral sex. Oral sex in this situation should be illegal. | 11.6% | 88.4% |
| Man performs oral sex on woman (cunnilingus). Both people are willing to perform/have the oral sex. They intend to have sex (vaginal intercourse) after the oral sex. Oral sex in this situation should be illegal. | 11.6% | 88.4% |

| Question | Agree | Disagree |
|---|---|---|
| Woman performs oral sex on man. Both people are willing to perform/have the oral sex. They *do not* intend to have sex (vaginal intercourse) after the oral sex. Oral sex in this situation should be illegal. | 14.2% | 85.8% |
| Man performs oral sex on woman. Both people are willing to perform/have the oral sex. They *do not* intend to have sex (vaginal intercourse) after the oral sex. Oral sex in this situation should be illegal. | 14.2% | 85.8% |
| Anal sex between a man and a woman should be illegal, even if they both agree to do it. | 28.9% | 71.1% |
| Anal sex between two men should be illegal, even if they both agree to do it. | 39.6% | 60.4% |
| It should be illegal for a man to have sexual relations (oral sex and/or anal sex) with another man, even if they both agree to it. | 38.8% | 61.2% |
| Humans having sex with animals (*i.e.* bestiality) should be illegal. | 83.9% | 16.1% |

## APPENDIX II: SUMMARY OF SECTION 377 CASES

These cases were located in the following manner:

– via the Lawnet reported judgments database using two separate Boolean search strings, "(carnal intercourse against the order of nature)" and "(377 and (Penal Code))."
– via the Lawnet unreported judgments database – which contains only post-1991 cases – using two separate Boolean search strings, "(carnal intercourse against the order of nature)" and "(377 and (Penal Code))."
– unreported judgments cited in reported cases
– *Straits Times* newspaper reports

* denotes newspaper reports
† denotes that the case is discussed in more detail in Part III (C) of the main text

| Case | Year of judgment | Partner (age) | Acts | Notes |
|---|---|---|---|---|
| *Raymond Pok*[292] | 2003 | Girl (14/16) | Fellatio, anal | Also charged, *inter alia*, for rape under section 376. |
| *Philip Lim Beng Cheok**[293] | 2003 | Boys (13–15) | Fellatio | Also charged under section 377A. The report was unclear about the alleged acts, mentioning only fellatio and masturbation. Thus, it is likely that the fellatio charge came under section 377. |
| *Siddharth Mujumdar*[294] | 2002 | Girls (11, 9) | Fellatio | Violence used; also charged under section 354. |
| *Peh Thian Hui*[295] | 2002 | Girl (13–14) | Fellatio | Girl was his lover's daughter. Also charged under sections 376 and 354. |
| *Wong Siu Fai*[296] | 2002 | Boy (5) | Fellatio | Accused performed fellatio on the boy, his friend's son. |
| *Jaberali*†[297] | 2001 | Man | Fellatio | Accused consented to the man's request for fellatio, but subsequently robbed and hurt the man. |
| *Nathan*[298] | 2000 | Woman | Fellatio | Used force; also charged with rape. |
| *Ong Li Xia*[299] | 2000 | Girl (age unclear) | Bestiality | Accused "abetted" and "instigated" the survivor to suck a dog's penis; also charged under section 509 for forcing the survivor to insert foreign objects into her own vagina. |

[292] *P.P. v. Raymond Pok* (4 February 2003), C.C. No. 1 of 2003 (H.C.).
[293] E. Chong, "52-year-old Man Admits Sexually Abusing Five Boys" *The Straits Times* (8 March 2003); C.K. Chong, "18 Years for Tutor Who Preyed on Students" *The Straits Times* (11 March 2003) [*Philip Lim Beng Cheok*].
[294] *P.P. v. Siddharth Mujumdar* (5 August 2002), C.C. No. 44 of 2002 (H.C.).
[295] *P.P. v. Peh Thian Hui* [2002] 3 Sing. L.R. 268 (H.C.).
[296] *P.P. v. Wong Siu Fai* [2002] 3 Sing. L.R. 276 (H.C.).
[297] *Jaberali, supra* note 142.
[298] *P.P. v. Nathan* (17 March 2000), C.C. No. 18 of 2000 (H.C.).
[299] *Ong Li Xia, supra* note 53.

| Case | Year of judgment | Partner (age) | Acts | Notes |
|---|---|---|---|---|
| *Michael G. Netto*[300] | 2000 | Woman | Fellatio | Threatened woman with knife; also charged with rape, housebreaking and robbery. |
| *Tan Ah Kit*[301] | 2000 | Boys (13, 14) | Fellatio, anal | One of the boys had "Moderate Mental Retardation." |
| *Lim Chee Yong**[302] | 2000 | Woman | Anal | Woman, his lover, reported the incident. Judge accepted her evidence that there was no consent. |
| *Abdul Hamid bin Yahya*[303] | 2000 | Girls (10, 12) | Fellatio | Girls were his orphaned nieces; also section 354 charges. |
| *Adam bin Darsin*[304] | 2000 | 8 boys (12–14) | Fellatio | Accused performed fellatio on the boys. |
| *Radhakrishna*[305] | 1999 | Girl | Fellatio | Girl was the accused person's biological daughter. Threatened to beat her if she resisted; also charged with rape. |
| *Mohd. Saiffudin bin Ayub*[306] | 1999 | Girl (14) | Not clear | Brother-in-law of girl; also rape charges. |
| *Muhd. Ramatullah*[307] | 1999 | Woman | Fellatio | Woman was tourist from Australia; also convicted of rape. |
| *Lim Hock Hin, Kelvin*[308] | 1998 | 5 boys (8–12) | Anal | Charged for fellatio under section 377A; had previous convictions for similar offences. Court imposed a sentencing guideline for pedophiles: "Bearing in mind the |

300 *P.P. v. Michael George Netto* (30 November 2000), C.C. No. 57 of 2000 (H.C.).
301 *P.P. v. Tan Ah Kit* (28 November 2000), C.C. No. 67 of 2000 (H.C.).
302 E. Chong, "Man Jailed Three Months for Perversion" *The Straits Times* (15 March 2000) 64.
303 *P.P. v. Abdul Hamed bin Yahya* (22 September 2000), C.C. No. 60 of 2000 (H.C.).
304 *Adam bin Darsin, supra* note 136.
305 *P.P. v. Radhakrishna Gnanasegaran* (27 April 1999), C.C. No. 14 of 1999 (H.C.).
306 *P.P. v. Mohd. Saifuddin bin Ayub* (15 September 1999), C.C. No. 38 of 1999 (H.C.).
307 *P.P. v. Muhd. Rahmatullah Maniam bin Abdullah and Abdul Rahman Ameer Hamsha* (30 September 1999), C.C. No. 34 & 35 of 1999 (H.C.).
308 *Lim Hock Hin Kelvin, supra* note 13.

| | | | | |
|---|---|---|---|---|
| | | | | gravity of the offence, we started from the position that a paedophile who commits unnatural carnal intercourse (in the form of anal intercourse) against young children below the age of 14 years, without any aggravating or mitigating factors, should be sentenced to ten years' imprisonment." |
| *Kwan Kwok Weng*†[309] | 1997 | Girl (19) | Fellatio | Rape charges dropped; prosecution conceded that there was consent. |
| *Abdul Nasir bin Abdul Rahim*[310] | 1997 | Girls (9, 6) | Fellatio, anal | Girls were his step-daughters; also rape charges. |
| *Tan Kuan Meng*†[311] | 1996 | Woman | Fellatio | Also rape and extortion (section 385) charges. |
| *Norli bin Jasmani*[312] | 1996 | Girl (13) | Fellatio | Girl was his niece; also rape charges. |
| *Victor Rajoo*[313] | 1995 | Woman | Fellatio | High Court acquitted him of rape but convicted him for section 377 acts; Court of Appeal convicted him of rape. |
| *Sikendar Sellamarican*[314] | 1994 | Boy (13) | Fellatio, anal | Had previous similar convictions also involving children. |
| *Kanaga-sutharam*[315] | 1992 | Girl (17) | Fellatio, anal | Hit girl continuously and put her "in constant fear of being stabbed." Also rape charges. |
| *Jumahat*[316] | 1992 | Girl (age unclear) | Fellatio | Also rape charges. But the court found that prosecution had failed on evidence and acquitted the accused. |

309 *Kwan Kwong Weng* (C.A.), *supra* note 4

310 *P.P. v. Abdul Nasir bin Abdul Rahim* (6 March 1997), C.C. No. 4 of 1997 (H.C.).

311 *Tan Kuan Meng, supra* note 4.

312 *P.P. v. Norli bin Jasmani* (19 November 1996), C.C. No. 17 of 1996 (H.C.).

313 *P.P. v. Victor Rajoo* [1995] 3 Sing. L.R. 417 (C.A.).

314 *P.P. v. Sikendar Sellamarican* (4 April 1994), C.C. No. 7 of 1994 (H.C.), cited in *Adam bin Darsin, supra* note 136.

315 *Kanagasuntharam, supra* note 52.

316 *P.P. v. Jumahat* (14 August 1992), C.C. No. 9 of 1992 (H.C.).

## Appendix III: Summary of Section 377A Cases

These cases were located in the following manner:

– via the Lawnet reported judgments database using two separate Boolean search strings, "(gross indecency)" and "(377A and (Penal Code))."
– via the Lawnet unreported judgments database—which contains only post-1991 cases—using two separate Boolean search strings, "(gross indecency)" and "(377A and (Penal Code))."
– unreported judgments cited in reported cases
– *Straits Times* newspaper reports

* denotes newspaper reports

† denotes that the case is discussed in more detail in Part III (C) of the main text

| Case | Year of judgment | Partner (age) | Acts | Notes |
|---|---|---|---|---|
| *Armstrong Desmond Ronald*†[317] | 2003 | Boy (17) | Fellatio | Boy was youth volunteer under the supervision of the accused, a youth worker. |
| *Philip Lim Beng Cheok**[318] | 2003 | Boys (13–15) | Masturbation | Also charged under section 377. The report was unclear about the alleged acts, mentioning only fellatio and masturbation. Thus, it is likely that the masturbation charge came under section 377A; see also Appendix II. |
| *Lim Hock Hin, Kelvin*[319] | 1998 | 5 boys (8–12) | Fellatio | Charged with having anal sex under section 377; see also Appendix II. |
| *Kong Chee Cheong**[320] | 1995 | – | Fellatio | Later extorted consenting partner, putting him in fear of injury. |
| *Ng Huat*[321] | 1995 | Patient | Touching | Accused was radiographer attending to the complainant. |
| *Abdul Malik bin Othman*[322] | 1993 | – | Fellatio | Consenting partner; in public children's pool. |
| *Lau Kim Soon*[323] | 1988 | – | Fellatio and masturbation | Consenting partner; public place. |
| *Tan Teck Hua*[324] | 1988 | – | Fellatio and masturbation | Consenting partner; public place (same incident as *Lau Kim Soon*). |

[317] *Armstrong, supra* note 141.
[318] *Philip Lim Beng Cheok, supra* note 293.
[319] *Lim Hock Hin Kelvin, supra* note 13.
[320] "Man Made Extortion Bid After Oral Sex" *The Straits Times* (26 October 1995) 44.
[321] *Ng Huat, supra* note 20.
[322] *Abdul Malik, supra* note 138.
[323] *Lau Kim Soon, supra* note 85.
[324] *Tan Teck Hua, supra* note 85.