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Toward a Gay-Friendly China?: Legal Implications of Transition for Gays and Lesbians

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I. INTRODUCTION

Some say that “[t]he gay movement in China began in 2005.”¹ While difficult to pin to one year, the gay movement and the visibility of the gay community in the People’s Republic of China (PRC) have grown considerably in the last six years.² In the first years of this century, gays and lesbians in China have become more visible in both the international and domestic Chinese press.³ Scholars, legislators, and policymakers have begun to acknowledge the existence of homosexuality to a greater degree and have even spoken of a need to protect gays and lesbians under the law.⁴ Organizations, both inside and outside of China, have begun to concentrate more on the issues surrounding the estimated thirty million⁵ homosexuals in the PRC.⁶ Universities have begun to study sexuality and

1. Anonymous Interview, in New Haven, Conn. (Oct. 20, 2005). This Article uses the words “gay” and “homosexual” interchangeably. For a discussion about how there is currently no preferred term, see EVE KOSOFSKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* 17-18 (1990).

2. It is a myth that there is or was no gay community in China. The gay community (informal networks, quasi-NGOs, and international connections) in China that very rarely has been written about has become increasingly vivid for this author in the last year. This Article does not mention the individuals who have helped to shape many of the conceptions in it by name for various reasons. Instead, where absolutely essential, those pieces of information are cited as anonymous interviews throughout.

3. See, e.g., Susan Jakes, *The Lawyer Who Is Out*, TIME, June 27, 2005, at 42-44; Ren Xiaoyi et al., *Mianlin xuduo nanti buli shehui wending* [*Facing Many Problems and Not Conducive to Social Stability*], FAZHI RIBAO [LEGAL DAILY], Oct. 17, 2005; *Liang nanren de 20nian hunyin* [*Two Males’ Twenty-Year Marriage*], NANFANG ZHOUMO [S. WEEKEND], Sept. 29, 2005, <http://www.southcn.com/news/community/hotpic/200509290400.htm> [hereinafter *Two Males’ Twenty Year Marriage*] (discussing the de facto marriage and twenty-year relationship of two men in Sichuan province). The story attracted considerable attention and appeared on the front page of one of the most prominent newspapers in mainland China.

4. Ren Xiaoyi et al., *supra* note 3.

5. Zhang Beichuan and Li Yinhe estimate these numbers based on the percentage of homosexuals in any given population at between three and four percent. See *infra* Appendix. A Draft Bill for Gay Marriage.

6. This corresponds to a general increase in the number of NGOs in China. See *Difang zhengfu yu NGO lianmei shouyan* [*Local Governments and NGOs Join Together for the First Act*], NANFANG ZHOUMO [S. WEEKEND], Mar. 23, 2006, at A6.

homosexuality.⁷ China's burgeoning civil society seems to be developing a place for the gay community.

Parts of the Chinese government also appear to be slowly developing some interest in the gay community. The government's policy under President Hu Jintao and Premier Wen Jiabao has been to concentrate on improving the situation of various disadvantaged, vulnerable, and marginalized groups in society; some argue that gays are one such "vulnerable" group.⁸ Although much of the government's attention to the gay community has been focused on the deepening HIV/AIDS crisis,⁹ the government's reaction to the disease has been increasingly sympathetic.¹⁰ The last six years have seen more media attention and societal debate over homosexuals than ever before,¹¹ suggesting that more policymaking and reform in the future are likely.¹²

This Article is meant to introduce policy developments relevant to the gay community in China over the last two decades and place them in a larger context of similar legal developments relating to gender law,

7. *Homosexuality Lecture Popular on Campus*, XINHUA ONLINE [P.R.C. VIEW], Feb. 8, 2006, http://news.xinhuanet.com/english/2006-02/08/content_4150329.htm.

8. See Willy Lam, *Socialism with a Harmonious Face: Hu Jintao's Plan for Reform*, P.R.C. BRIEF, Oct. 14, 2004, http://www.jamestown.org/publications_details.php?volume_id=395&issue_id=3108&article_id=2368694 (discussing the populist leadership of Hu Jintao and Wen Jiabao and how they are paying more attention to income inequality and social insurance issues than their predecessors).

9. At least one scholar has noted the government's liberalization of policy with regard to homosexuals in the wake of the accelerated economic liberalization of the late 1990s. He discusses the removal of homosexuality from the list of mental disorders in 2001 and the publication of Li Yinhe's thoughts on gay marriage in government-controlled newspapers. See Dali L. Yang, *China in 2001: Economic Liberalization and Its Political Discontents*, ASIAN SURVEY, Jan.-Feb. 2002, at 14, 27.

10. The government's policies on HIV/AIDS have gone from cracking down and eliminating AIDS in China to engagement and education. See John Balzano & Jia Ping, *Coming Out of Denial: An Analysis of AIDS Law and Policy in China (1987-2006)*, 3 LOY. U. CHI. INT'L L. REV. 187 (2006).

11. Zhang Beichuan, Li Yinhe, and Liu Linda describe the growing debate over homosexuality in the 1980s. See, e.g., ZHANG BEICHUAN, TONGXINGAI [HOMOSEXUALITY] (1994). In the early 1990s, the propaganda departments of the Chinese government advocated a policy called the "Three Nos." Under the Three Nos policy the government would not "support, oppose, or promote" homosexuality. Since that time, the situation with the media has changed and the media has become a force in helping to bring issues affecting gays and lesbians in China into the open. See, e.g., PENGYOU ZAZHI [FRIEND MAGAZINE], <http://friend.qdeol.com.cn/> (last visited Apr. 8, 2007). Finally, interviews and information are carried by mainstream newspapers. See, e.g., Liu Jun, *Tolerance Towards Homosexuals Expands a Little, but Homosexuality Remains a Taboo Topic*, CHINANNEWS.COM, <http://www.chinanews.com.cn/news/2006/2006-01-09/8/675733.shtml>; Two Males' Twenty-Year Marriage, *supra* note 3.

12. This evolution will, of course, be slow. The overwhelming number of homosexuals in China remain in the closet. Still, it would be a mistake to underestimate the pace at which large scale changes in Chinese society can take place right now.

antidiscrimination law and policy, and society in general.¹³ I argue that, given the developments to date, future law and regulations will most likely be an administrative tool to promote stability in the gay community and prevent certain developments in that community that would harm the rest of Chinese society, rather than being the product of a discourse on the natural rights and legal protection for gays and lesbians.¹⁴ The current policy trend is positive and should result in an overall improvement for the gay community in China although some of the same problems associated with laws protecting other minority or vulnerable groups may arise.

This Article will begin by examining the debate over various types of inequality amongst members of society and more concrete examples of the Chinese government using law and policy to protect certain minority groups from discrimination. Next, it will discuss the development of legislation on women's rights. Finally, this Article will discuss current law and policy developments with regard to homosexuals and situate them in the context of Parts I and II.

Before proceeding, it is useful to say something about the purposes and methodology of this Article. The first purpose is to provide an overview for readers in English of the developments in law and policy in China that affect homosexuals. Although there are more comprehensive overviews available in Chinese, this one will hopefully reach a different audience and provide a different perspective. The second purpose is to present these observations and arguments with Western legal developments and theory in mind, so as to provide a basis for comparison and analysis by other scholars who wish to do transnational advocacy and comparative research on gay and lesbian issues. The final purpose is to illustrate the universality of many of the issues confronting gay communities all over the world. The cultural lenses through which we view issues confronting gays in China can sometimes lead to unproductive discourse where problems appear too China-specific.

13. While the author is aware of the antidiscrimination movement, including the famous hepatitis B cases and other antidiscrimination suits, this Article does not discuss those issues. See P.R.C. Law & Dev. Consultants, *Voices Against Discrimination: Chinese Citizens Challenge Discriminatory Regulations and Practices*, P.R.C. L. & GOVERNANCE REV., No. 2 (June 2004), <http://www.chinareview.info/issue2/pages/main1.htm>. Instead, this Article is concerned with the law and policy that has developed to protect social groups such as women and ethnic minorities. But, even this analysis is not comprehensive.

14. This might be compared with recent developments in Hong Kong. See Robert Danay, *Leung v. Secretary for Justice: Privacy, Equality, and the Hypersexualized Homosexual Stereotype*, 35 H.K. L.J. 545, 545-67 (2005).

II. PROTECTING THE WEAK

A. *Law and Policy Responses to Inequalities in Chinese Society*

The Chinese leadership has gradually developed law and policy that attempts to promote equality by protecting groups viewed as vulnerable, such as ethnic minorities, women, children, the elderly, the disabled, and the economically disadvantaged.¹⁵ The Parts that follow will illustrate that some scholars, reporters, and citizens have argued that such legislation should extend to other groups that are vulnerable, such as homosexuals and those with HIV/AIDS. The central government has gradually taken up the task and enacted regulations for those with HIV/AIDS,¹⁶ but homosexuals remain unprotected. This Part will outline the development of the government's law and policy protecting and advancing vulnerable groups, including the debate over the inclusion of homosexuals.

In order to understand, even in a general way, the course of development of law and policy dealing with groups that are perceived as weaker or disadvantaged in Chinese society, it is necessary to first absorb a bit of political and legal history. At the beginning of the People's Republic in 1949, the Chinese Communist Party announced that it would create an egalitarian society.¹⁷ Although there were limits to this egalitarianism, the Party endeavored to create a classless society and eradicate economic and certain social differences in the years after the revolution.¹⁸ The leadership sought to accomplish this through economic reform, land reform, and social movements.¹⁹

For example, the Maoist leadership sought to end the oppression of women as a disfavored group in Chinese society. The 1949 Guiding Plan for the Chinese People's Political Consultative Congress declared that the

15. There is not a comprehensive theory surrounding what makes a specific group disadvantaged, and there is no distinction made between economic and social and political disadvantages. Like the United States Constitution, the Chinese Constitution contains a broad grant of equality to citizens. XIAN FA art. 33 (2004) (P.R.C.), <http://law.chinalawinfo.com/newlaw/2002/SLC/SLC.asp?Dd=chl&Gid=51974>. The law and policy discussed in this section seems to be an attempt by the government to implement that constitutional provision and others like it that broadly guarantee equality.

16. See HUMAN RIGHTS WATCH, LOCKED DOORS: THE HUMAN RIGHTS OF PEOPLE LIVING WITH HIV/AIDS IN CHINA 15-20 (Sept. 2003), available at <http://www.hrw.org/reports/2003/china/0803/china0903full.pdf>; see also *infra* Part IV.C.2.

17. See KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 70 (2004).

18. Richard Curt Kraus, *The Limits of Maoist Egalitarianism*, ASIAN SURVEY 1081, 1086-1090 (Nov. 1976) (describing the theory of this materialist egalitarianism and the problems in the implementation).

19. *Id.*

constraints of the feudal system on women would be cast aside, and women would enjoy the same political, economic, cultural, educational, and social rights as men.²⁰ The 1954 Constitution reaffirmed this grant of equality to women and men.²¹

What followed during the remainder of the Mao era until the late 1970s were several attempts to place women on equal footing with men and to promote the idea that women were “as good as men”²² or, rather, to “unsex” them.²³ Through laws such as the 1950 Marriage Law, political policies, and propaganda, the Communist Party strove on some level to promote the idea that women—whether in the socialized home or in the workplace—were capable of being productive, economically valuable members of society.²⁴ These policies, however, did not advocate a sexual revolution, and expressions of sexuality were not encouraged by the repressive regime.²⁵ Thus they were ultimately unsuccessful, and women did not gain significant ground in the workplace or government.²⁶

When the Chinese began to rebuild their legal system at the end of the twentieth century after the cultural revolution, the situation regarding policy and law meant to remedy inequalities changed significantly. The government realized and slowly publicized that economic inequalities, even great ones, were a necessary consequence of development.²⁷ More recently the leadership has stated that, while income disparity is inevitable, the government should ensure that economic inequalities between groups do not result in an inharmonious society.²⁸ Furthermore, they have begun to debate a more expansive list of social groups and minorities that they believe the law should protect.²⁹ In addition, some

20. LI YINHE, NÜXING QUANLI DE JUEQI [THE RAPID RISE OF WOMEN’S RIGHTS] 16 (2003).

21. XIAN FA art. 96 (1954) (P.R.C.), <http://www.xianfa.cn/Article/flfg/zgxf/200410/9.html> (“The women of the People’s Republic of China shall enjoy equal rights with men in all political, economic, cultural, social, and domestic aspects of life.”) (author’s translation).

22. Shelah Gilbert Leader, *The Emancipation of Chinese Women*, WORLD POLITICS, Oct. 1973, at 26, 75.

23. *Id.* at 77.

24. *See generally id.*

25. *Id.* at 76.

26. Wang Zheng, *Gender, Employment, and Women’s Resistance*, in CHINESE SOCIETY: CHANGE, CONFLICT AND RESISTANCE 62, 63 (Elizabeth J. Perry & Mark Selden eds., 2000) (arguing that the socially productive in the home or the workplace vision of the Maoists under the Mao era did not necessarily help women to achieve true gender equality).

27. LIEBERTHAL, *supra* note 17, at 305.

28. *See* Robert Lawrence Kuhn, *Changes and Challenges*, P.R.C. DAILY, Nov. 15, 2005, <http://www.china.org.cn/english/international/148755.htm>.

29. Some scholars point to the fact that the idea of legal protection of the minority is an outgrowth of the Cultural Revolution. Scholars and intellectuals of today, in the context of the Chinese regime’s Rule of Law Movement, believe that the law can play a key role in the

scholars have begun to discuss drafting a comprehensive antidiscrimination law.³⁰

Still reeling from the horrors of the Cultural Revolution, intellectuals began to discuss how law and policy could be used to protect minorities during the 1980s.³¹ The policies and laws that have emerged in the Reform Era (1980 to present) are more aimed at providing special assistance for groups that the government deems vulnerable than eradicating inequalities with broad strokes.³² Thus, for example, while the legislation in the 1950s simply declared that the sexes and the classes would be equal, the Reform Era legislation, despite paying some attention to equality, acknowledges the inequality and vulnerability of many groups and endeavors to promote and protect them from becoming destabilizing forces that harm the rest of society.

During the Reform Era, factors such as uneven economic and social development across provinces and regions,³³ an influx of international influences, the disintegration of the tightly controlled work unit system,³⁴ the breakdown of the social insurance and health care benefits of the iron rice bowl,³⁵ and the development of a more diverse and varied society in China³⁶ have exposed significant differences among various groups in society.³⁷ Women still remain in a disadvantaged position.³⁸ A trend towards urbanization and industrialization has created a “desperate”³⁹

protection of minorities and minority viewpoints. See, e.g., MERLE GOLDMAN, *SOWING THE SEEDS OF DEMOCRACY IN CHINA* 7-8 (1994).

30. The Center on Human Rights Law at Sichuan University and CLD consultants sponsored a workshop on a draft of the Antidiscrimination Law on January 27, 2007, in Beijing.

31. See GOLDMAN, *supra* note 29, at 7-8.

32. See discussion *infra* Part III.

33. Wealth disparity is constantly cited as one of the more pressing problems in China. See Cai Fang, *The Rural Urban Income Gap and Critical Point of Institutional Change* 93-95 (Chinese Acad. of Soc. Sci. Inst. of Population and Labor Econ., Working Paper No. 37, 2003), available at <http://iple.cass.cn/file/37/pdf>; Huang Ping & Frank N. Pieke, *China Labor Migration: Some Policy Issues*, SOC. SCI. P.R.C., Autumn 2005, at 112, 112-20.

34. See Barry Naughton, *Danwei: The Economic Foundations of a Unique Institution*, in DANWEI: THE CHANGING CHINESE WORKPLACE IN THE HISTORICAL AND COMPARATIVE PERSPECTIVE 169 (Xiaobo Lü & Elizabeth J. Perry eds., 1997).

35. At present the mainland government is trying to construct a social service network where the old system existed before. For example, the government is working on a Primary Health Care Law. *Chuji weisheng baojian fa cao'an zhengzai qicao* [*Drafting of the Primary Health Care Law*], FAZHI RIBAO [LEGAL DAILY], Feb. 8, 2006, http://www.legaldaily.com.cn/misc/2006-02/08/content_261562.htm.

36. See LIEBERTHAL, *supra* note 17, at 311-13.

37. See MARGARET M. PEARSON, *CHINA'S NEW BUSINESS ELITE: THE POLITICAL CONSEQUENCES OF ECONOMIC REFORM* (1997), for an interesting discussion of class differences created by the establishment of the private sector.

38. See discussion *infra* Part III.

39. Huang Ping & Pieke, *supra* note 33.

situation in the countryside, leaving rural residents poor while urban residents enjoy the benefits of development.⁴⁰ Another consequence of the urban-rural divide is a floating population of rural laborers (*nongmin gong*), whose numbers are estimated at 200 million.⁴¹ They move to urban areas for varying lengths of time to find work and have become a kind of lower class in cities and towns.⁴² Children, the disabled, and those infected with HIV/AIDS have also become so-called vulnerable groups that the government has begun to pay more attention to through law and policy.⁴³

The PRC's rapidly developing body of law has been paying attention to this problem of inequality for some time now.⁴⁴ For example, one of the first of a series of protection laws was enacted in the mid-1980s. The Law for the Self-Government of Minority Regions was enacted in 1984 (and amended in 2001) to provide conditions that would preserve the unique cultures of national minorities, as well as to ensure that the members of those groups could receive certain benefits in society.⁴⁵ Another protection law was enacted to protect the rights and interests of the disabled in 1990 and is currently scheduled for

40. ZHONGGUO RENKOU YU LAODONG WENTI BAOGAO NO. 6 [REPORT OF CHINA'S POPULATION AND LABOR No. 6] 5-10 (2005) (discussing problems faced by the countryside and cities as huge numbers of rural dwellers seek employment in a time of rapid urbanization).

41. Joseph Kahn, *China to Drop Urbanite-Peasant Legal Differences*, N.Y. TIMES, Nov. 3, 2005, at A8.

42. For an excellent case study of the rural migrant movement from the 1960s onward, see XIANG BIAO, *TRANSCENDING BOUNDARIES: ZHEJIANGCUN: THE STORY OF A MIGRANT VILLAGE IN BEIJING* (Jim Weldon trans. 2005) (2000).

43. Baozhang shehui ruoshi qunti gongxiang dazhong chuanbo ziyuan [Ensuring that Vulnerable Social Groups Share in the Distribution of Benefits], <http://ruanzixiao.diy.myrice.com/bzshrsqtgxdzcbzy.htm> (Mar. 24, 2004) (discussing the law for the protection of minors and other protection laws and laws that redistribute social benefits); *Canjiren baozhang fa xiugai quanmian kaizhan* [Amendment of Law for the Protection of the Disabled Develops Fully], FAZHI RIBAO [LEGAL DAILY], Oct. 10, 2005, at 3. The new 2006 Regulations promulgated by the State Council illustrate a more serious concern on the part of the government with regard to those with HIV/AIDS. See Aizibing fangzhi tiaoli [Provisions on AIDS Prevention and Treatment] (promulgated by the Central Government, Jan. 29, 2006, effective Mar. 1, 2006) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=73527>.

44. Ronald C. Keith, *Legislating Women's and Children's "Rights and Interests" in the PRC*, P.R.C. Q., Mar. 1997, at 29, 30 ("Rights and interests have become a focal point of [the] National People's Congress (NPC) legislative politics in the context of regime decline, axiological crisis and rapid socio-economic change . . .").

45. Minzu quyuzi zhi fa [Law for the Self-Government of Minority Regions] (amended by the Standing Comm., Nat'l People's Cong., Feb. 28, 2001, originally effective Oct. 1, 1984) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=34941>. The categories created by the national government for minorities, such as the Zhuang in the south/southwest, have been criticized as artificial under certain circumstances. See KATHERINE PALMER KAUP, *CREATING THE ZHUANG: ETHNIC POLITICS IN CHINA* 4-8 (2000).

amendment in 2007.⁴⁶ The Law for the Protection of Minors was enacted in 1991.⁴⁷ The Law for the Protection of the Rights and Interests of Women (LPRIW), discussed in greater detail later in this Article, was enacted in 1992 and recently amended in 2005.⁴⁸ In 1994 the Labor Law added special protections for women and children, prohibiting them from working in certain dangerous environments or under hazardous conditions.⁴⁹ Also in 1994, the government enacted a law for the protection of mothers and infants.⁵⁰ Finally, the Law for the Protection of the Rights and Interests of the Elderly was enacted in 1996.⁵¹

Within a twelve-year period this series of laws was quickly enacted, and each law was devoted specifically to a disadvantaged group. Most are short laws that embody more of a symbolic statement of policy than any sort of implementable law.⁵² For example, the 2005 amendments to the LPRIW added a provision prohibiting sexual harassment but did not define the term.⁵³ In a system where courts are forbidden to interpret the law, such a provision may be difficult to enforce because it offers no guidance on what type of behavior is considered sexual and rises to the level of harassment. However, the prohibition on sexual harassment does at least show that the government believes that some type of sexual harassment behavior should be punished under the law.

In addition to the protection laws that have already been enacted, there are several government policies promoting the protection of various groups in society and proposed laws or plans for laws. For example, the

46. Canji ren baozhang fa [Law for the Protection of the Disabled] (promulgated by the Standing Comm., Nat'l People's Cong., Dec. 28, 1990, effective May 15, 1991) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=4924>.

47. Weicheng nianren baohu fa [Law for the Protection of Minors] (promulgated by the Standing Comm., Nat'l People's Cong., Sept. 4, 1991, effective Jan. 1, 1992) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=5369>.

48. Funü quanyi baozhang fa [Law for the Protection of the Rights and Interests of Women] (amended by the Standing Comm., Nat'l People's Cong., Aug. 28, 2005, originally effective Oct. 1, 1992) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=59781>.

49. Laodong fa [Labor Law], ch. 7 (promulgated by the Standing Comm., Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=9587>.

50. Muying baojian fa [Law for the Protection of the Health of Mothers and Infants] (promulgated by the Standing Comm., Nat'l People's Cong., Oct. 27, 1994, effective June 1, 1995) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=10460>.

51. Laonian ren quanyi baohu fa [Law for the Protection of the Rights and Interests of the Elderly] (promulgated by the Standing Comm., Nat'l People's Cong., Aug. 29, 1996, effective Oct. 1, 1996) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=15020>.

52. See Margaret Y.K. Woo, *Law, Development, and the Rights of Chinese Women: A Snapshot from the Field*, 19 COLUM. J. ASIAN L. 345, 349 (2005).

53. Law for the Protection of the Rights and Interest of Women, art. 40.

government currently supports various policies to reduce the burdensome costs of education on rural residents. This policy stems from the lack of local funding for education in rural areas that has caused local governments to seek funds in the form of endless fees⁵⁴ (e.g., book fees, classroom fees, uniform fees, cafeteria fees) from poor local residents.⁵⁵ The “Three Agricultural Issues” policy (*san nong wenti*) is a broad policy aimed at reducing poverty of burdens on “agriculture, rural villages, and rural residents.”⁵⁶ The increased attention to massive problems in the countryside is related to the numerous large scale protests and demonstrations in rural areas.⁵⁷

With regard to migrants and rural labor, national policies have called for the abolition of various types of local restrictions on these rural workers. Recently, several provinces made a commitment to abolish discriminatory provisions in local regulations with regard to employment, healthcare, education, and housing.⁵⁸ The draft of a national Employment Promotion Law promises to end employment discrimination toward migrants and the common phenomenon of government confiscation of migrant land while migrants are away working in cities.⁵⁹ In addition, there have been calls for a Rural Migrant Protection Law, seemingly in the tradition of 1990s’ protection laws noted above.⁶⁰

54. See, e.g., *Fujian tuixing gongfei dingbao “xian ‘e zhi”* [Fujian Province Public Fee Gazette to Limit the Amount of Fees], FAZHI RIBAO [LEGAL DAILY], Nov. 21, 2005, at 6. For an excellent discussion of fees, fines, and other “peasant burdens” (*nongmin fudan*), see generally THOMAS P. BERNSTEIN & XIAOBO LÜ, TAXATION WITHOUT REPRESENTATION (2003).

55. Deng Xinjian, *Zhenzhi jiaoyü luan shou fei falü gai zhenme yang kaichu fang* [How Law Can Go About Curing the Problem of Arbitrary Fees in Education], FAZHI RIBAO [LEGAL DAILY], Sept. 15, 2005, at 5.

56. The three problems ripe for resolution as described by the leadership involve the agricultural industry, agricultural villages, and agricultural inhabitants. *San nong wenti* [Three Agricultural Problems], XINHUA ONLINE [P.R.C. VIEW], http://news.xinhuanet.com/ziliao/2004-02/18/content_1319484.htm (last visited Mar. 10, 2007) (author’s translation).

57. See generally KEVIN J. O’BRIEN & LIANJIANG LI, RIGHTFUL RESISTANCE IN RURAL CHINA (2006) (studying the development of protests and their effects in modern China).

58. Zheng Caixiong, Wu Yong & Guo Nei, *Rural Dwellers to Be Granted Urban Rights*, P.R.C. DAILY, Nov. 2, 2005, at Nation 3, available at http://www.chinadaily.com.cn/english/doc/2005-11/02/content_489873.htm.

59. Jiuye cujin fa (cao’an) [(Draft) Employment Promotion Law] (Oct. 2005) (text on file with the author).

60. Anonymous Interview, in Beijing, China (Sept. 2005).

All these policies and laws seem to represent the government's efforts to prevent development from harming certain groups and to maintain a "harmonious society."⁶¹

B. *The Vulnerable Group Concept and Its Expansion*

Former Premier Zhu Rongji used the term "vulnerable groups" (*ruoshi qunti*) in a Government Work Report (*zhengzhi gongzuo baogao*) before the National People's Congress in 2002.⁶² Premier Zhu used the term in the context of the labor market to say that "vulnerable groups would require special employment subsidies."⁶³

Thus, the term, which many originally said only applied to groups economically disadvantaged by the reforms,⁶⁴ quickly became popular in the media and attracted attention both inside and outside of China.⁶⁵ At the time, examples of vulnerable groups included unemployed or laid-off workers, the disabled, victims of disasters, and rural residents and migrants.⁶⁶ Some estimates put the overall size of all these groups at eleven to fourteen percent of the population or between 140-180 million people.⁶⁷ Given other estimates of the number of unemployed and migrant peasant populations, this number seems small.⁶⁸

Regardless of size, the government's concerns with and goals for these vulnerable groups seem generally clear, even if vague in the

61. Goujiang shehui zhuyi hexie shehui [Erecting a Harmonious Socialist Society], RENMIN RIBAO [PEOPLE'S DAILY ONLINE], <http://theory.people.com.cn/GB/40557/44459/index.html> (last visited Apr. 8, 2007) (author's translation).

62. ZHU RONGJI, ZHENGFU GONGZUO BAGAO [REPORT TO THE NPC ON GOVERNMENT WORK] (Mar. 5, 2002), <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=291679&pdm=rdgb> (author's translation).

63. *Id.* (author's translation).

64. See Zheng Hangsheng, ZHONGGUO WANG [P.R.C.'S OFFICIAL GATEWAY TO NEWS & INFO.], Jan. 20, 2003, <http://www.china.org.cn/chinese/zhuanti/264513.htm>; see also Ding Yuanzhu, *Wei shehui buli qunti, ruoshi qunti, bianyuan qunti, jianzhu xin shisi shehui bao hu tixi* [Establishing a Social Protection System for the New Era for the Sake of the Disadvantaged, the Vulnerable, and the Marginalized], LIAOWANG [OUTLOOK MAG.], Apr. 17, 2000, at 24, 24-25 (discussing how the reforms have led to economic equalities and disparities, but also mentioning women, children, and the elderly in the list of groups that need social support); Li Zhiyong, *Guanzhu ruoshi qunti* [Examining Vulnerable Groups], DANGZHENG GANGBU XUEKAN [PARTY AND CADRE J.], 2001 (defining "vulnerable groups" primarily as the economically disadvantaged with little mention of social prejudice, but stating that the purpose of policy to protect them is to avoid damaging the overall harmony of society).

65. The actual origins of the term vulnerable groups (*ruoshi qunti*) is unclear, but it became increasingly popular during the late 1990s. A Yahoo! search for the term "弱势群体" [*ruoshi qunti*] on Apr. 8, 2007 revealed over 4.6 million results.

66. Zheng Hangsheng, *supra* note 64.

67. *Id.*

68. Some articles estimate the size of the migrant population itself at 200 million. Kahn, *supra* note 41, at A8.

specifics.⁶⁹ The disadvantaged nature of these groups makes them a threat to reform, development, and stability in China.⁷⁰ The government's goal is to increase the distribution of capital and to help these disadvantaged groups achieve a comparatively good standard of living.⁷¹ This effort has included the creation of state-sponsored social services, health care policy, and welfare and pension reform to create a social safety net where the iron rice bowl had existed before.⁷²

Although the vulnerable group policy does not seem to have ever been enshrined into law, it *has* become popular rhetoric in China. Amidst characterizations of the new leadership as populist in its orientation, government attention to vulnerable groups has become a popular subject among scholars and activists.⁷³ And, as the public-interest movement in civil society develops and the government engages in ever-larger social service legislation projects, such as the Social Security Law and pension reform, the number of vulnerable groups has increased.

It is now possible to find scholars and the media expanding the use of the vulnerable group concept (*ruoshi qunti*) to describe a broader spectrum of groups in society.⁷⁴ Consider the following passage from an article posted on the Xinhua news agency Web site, advocating for the rights of homosexuals and individuals who have contracted HIV/AIDS as minority groups:

Members of minority groups and members of the majority (or, one could say: normal people) are all members of humankind. Based on this type of basic membership, these people should have equal rights and receive equal protection . . . but we should also realize that minorities are members of a vulnerable group of society [*ruoshi qunti*], and these rights are of particular importance for the weak in society. This is true because the strong may be able to remedy infringement of their rights on their own,

69. See Zheng Hangsheng, *supra* note 64.

70. *Id.*

71. *Id.*

72. See LIEBERTHAL, *supra* note 17, at 260, 303.

73. See Lam, *supra* note 8.

74. See, e.g., Wang Xu, *Lun ruoshi qunti jiqi falu goujian* [*Legal Structure for Vulnerable Groups*], LUOYANG GONGYE GAODENG ZHUANKE XUEXIAO XUEBAO [J. LUOYANG TECH. C.], Dec. 2005, at 83, 83 (noting that vulnerable groups are vulnerable because they lack not only economic, but also cultural and organizational resources, and citing laws like the Law for the Protection of the Rights and Interests of Women as an example of legal protection for those groups); Wang Duanfeng, *Ruoshi qunti zhengzhi canyu chengdu bu gao de yuanyin ji duice tanxi* [*Reasons Why the Degree of Political Participation of Vulnerable Groups Is Not High and Policy Analysis*], SICHUAN XINGZHENG XUEYUAN XUEBAO [SICHUAN SCH. ADMIN. J.], Issue 5, 2005, at 62, 62-63 (noting a broader conception of the vulnerable group concept than merely economic).

but the weak may not have this ability and can only rely on the machinery of the state to publicly resolve their grievances.⁷⁵

There is no explicit governmental support, however, for the expansion of the vulnerable group policy, and some believe that homosexuals do not qualify. Consider a comment made by the pastor of a house church in support of an article that was posted on the *Guangming Daily* Web site:

The *Guangming Daily* published an article entitled ‘Should We Protect and Grant a Remedy for their Rights?’ This article criticized the idea that the law should protect homosexuals according to the theory of vulnerable groups. The articles state that ‘vulnerable groups’ mainly refers to groups of people that have lower incomes, difficult lives, low social resources, a weak competitive position within society, and lack the potential to develop. Examples would be the disabled, the elderly. . . , the unemployed, the wounded, others with particularly difficult circumstances[. . .]. The article argues that homosexuals have food to eat, access to education, access to healthcare, and employment. . . . The article also says that the various remedies that homosexuals seek under the law, for example antidiscrimination remedies and fair and equal treatment, are really the rights of every person. But there should not be special protection and advancement of homosexuals.⁷⁶

Together the two preceding passages illustrate one important aspect of the vulnerability debate: whether the government should protect those who are not necessarily economically disadvantaged but lack sufficient social resources to fight for themselves.⁷⁷ Some might argue, as they have in the United States, that homosexuals lack the social resources to advance in society and often may be victims of discrimination that limits their access to jobs, education, and even health care.⁷⁸

75. *Aizibing ren, tongxinglian, he shaoshu ren de quanli* [The Rights of Those with AIDS, Homosexuals, and Other Minorities], XINHUA ONLINE [P.R.C. VIEW], Nov. 11, 2003, http://news.xinhuanet.com/comments/2003-11/11/content_1171114.htm (author’s translation). Other scholars describe homosexuals as a vulnerable group as well. See, e.g., LIU DALIN ET AL., ZHONGGUO TONGXINGLIAN YANJIU [RESEARCH INTO HOMOSEXUALITY IN CHINA] 36 (2004).

76. Ya Wei, *Zhongguo shehui dui tongxinglian rengyou maodun xinli* [The Public Still Has Conflicted Feelings About Homosexual Love], VOICE OF AMERICA, Nov. 16, 2005, <http://www.voanews.com/chinese/archive/2005-11/w2005-11-16-voa37.cfm> (author’s translation).

77. See Wana Fang, Du Ding, Shi Feng, Zhao Lei & Lu Junxi, *Shoufeng nan tongxinglian baogao gongbu jinban you gao xueli ji wending gongzuo* [First Study of Homosexual Men Indicates That Nearly Half Have Higher Education and Stable Jobs], BEIJING YULE XINBAO, Nov. 30, 2006, <http://www.jcrb.com/zywfiles/ca566882.htm>.

78. There have been several statistical studies done in the United States that have shown that gay men do, on account of discrimination in the workplace, make less money than straight men. The results for lesbians have varied. See Dan A. Black et al., *The Earnings Effects of Sexual Orientation*, 56 INDUS. & LAB. REL. REV. 449, 466 (2003). While such work has been very challenging in the United States, it has barely begun in China. It is entirely possible, therefore,

For others in China, the issue is one of individual rights. Li Yinhe, one of China's most famous sociologists and a longtime advocate and researcher of gay and lesbian issues concludes:

[Certain people] use their moral standards to command others and to criticize others, and this is all fine. These people have the right to express these kinds of opinions. But if only one portion of a nation's people use their particular morals to decide law, and they use this law to punish a group of people with different moral standards, this is clearly wrong. It is wrong because the latter group also has a right to express its opinions and the right to receive constitutional protection of freedom of expression and freedom of publication.⁷⁹

At its core, the idea of vulnerable groups is about the law helping certain groups to remedy the extreme economic and social disadvantages that they cannot resolve on their own through other political, social, or economic means. An analogous theory has, of course, been advanced for some time now in the United States, where the United States Supreme Court has stated that "the review of statutes directed at particular religious, or national, or racial minorities" may require a "more searching judicial inquiry" because "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."⁸⁰

But the application of the vulnerable group policy and protection law to homosexuals may carry an unfortunate stigma for them.⁸¹ In other words, the conception of gays as disadvantaged will help them as a

that gays in China face similar circumstances making it difficult to remain competitive as a group on account of discrimination, despite the fact that many of them remain in the closet.

79. Li Yinhe, *Fandui xing jiushi suowei de daode gaotang ma?* [*Is Anti-Sexuality a form of Lofly Morality?*], YOUYA [GRACE], Feb. 17, 2006 (author's translation) (on file with author). Consider also the words of Li Yinhe's late husband Wang Xiaobo in his essay *The Intellectual's Misfortune*: "Any belief . . . if abused, can become a stick to beat others and a tool to inflict misery." WANG XIAOBO, *WO DE JINGSHEN JIAYUAN* [MY SPIRITUAL HOME] 13 (1997) (author's translation).

80. *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938) (internal citations omitted). The discrete and insular minorities formulation has been a motivation for other antidiscrimination legislation as well. See, e.g., Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).

81. One should of course be careful not to turn vulnerable groups (*ruoshi qunti*) into a close analogue of the concepts "protected class" or "discrete and insular minorities" under U.S. constitutional law, primarily because the two countries lack similar governmental and judicial institutions and philosophical discourses on rights. As the above Parts show, the concept of vulnerable groups is still mostly political and social rhetoric and has not been written into the law. The concept is being broadened by the media and by individuals posting on the Internet in some instances to protect not only the rights of economic minorities, but also social minorities, in Chinese society.

group, but may also unnecessarily stereotype them. Consider some of the harmful stereotypes that law and policy governing women's rights have displayed.

III. PROVIDING SPECIAL SUPPORT FOR WOMEN: THE DEVELOPMENT OF GENDER LAW

Before examining recent trends in law and policy towards homosexuals in China, it is important to examine how the government has shaped law and policy surrounding women. This inquiry is important for two reasons. First, women may be an appropriate comparison for gays because they are not technically included in the economics-only version of the vulnerable group concept, but are still treated as a disadvantaged sector of the population under the law.

Second, gay issues are necessarily connected with issues of gender and sex.⁸² It is commonly argued that gay men or lesbian women may face discrimination from society and the government because the biological sex of the person that they sexually desire is different from that regularly accepted for their gender.⁸³ Also, at the heart of debates over gay issues are larger debates on how the law should respond to traditional conceptions of gender. Gay men may face difficulty because they are considered too effeminate or too womanly, which may be perceived as generally unacceptable gender behavior for those who are biologically male.⁸⁴ Changes in societal views and laws on women, or rather sex and gender, often signal a change in attitudes towards sexual orientation, and, therefore, homosexuals may become the victims when traditional conceptions of gender are written into the law.⁸⁵ Thus, to the extent that China's legislation on women's rights reinforces traditional gender roles, it may end up disadvantaging both lesbian and straight women as well as gay men.

A. *A Worsening Situation*

Although the Communist Party has long espoused women's rights and a break with traditional gender roles, the road for women since the establishment of the PRC has not been easy or smooth. After many

82. See, e.g., WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 1-9 (1999); DAVID A.J. RICHARDS, *WOMEN, GAYS, AND THE CONSTITUTION* 294-95 (1998).

83. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U.L. REV. 197, 208 (1994).

84. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2 (1995).

85. See RICHARDS, *supra* note 82, at 295.

years, the results of the women's movement are not as encouraging as they could be. Indeed, only 14% of the members of the Chinese Communist Party are female and many rural units of the Communist Party have no female members at all.⁸⁶ In 2003, when a new group of leaders (Hu Jintao, Wu Bangguo, and Wen Jiabao) came to power, no women were in line for such high level positions.⁸⁷

Gender-based employment discrimination (including sexual harassment) and violence against women are common problems. In a 2000 survey done by the Chinese Academy of Social Sciences of six hundred women in Shenzhen City, 32% said they had been victims of sexual harassment.⁸⁸ A similar survey in Beijing revealed that 71% of the participants had been victims (mostly in the workplace) of sexual harassment.⁸⁹ Women are often seriously deprived of educational opportunities as well. One survey indicated that of the 2.6 million children that did not enter school in 2004, two-thirds were female, and 70% of China's illiterate population is female.⁹⁰ Alarming, despite numerous laws and regulations enacted since the early 1990s to protect women, violence and discrimination seem to have *increased* in the last few years.⁹¹ In 2003, surveys indicated that the rate of domestic violence had risen 8.2% since 2000, and the number of cases of domestic violence leading to death increased over 50% between 2002 and 2003.⁹²

B. *The Current Laws and Their Issues*

China's current law and regulations directed toward women are partly about formal equality (e.g., broad provisions granting women the same rights as men), partly about substantive equality (e.g., provisions requiring organs of government, corporations, and social organizations to have an appropriate number of women leaders),⁹³ and partly about

86. LI YINHE, *supra* note 20, at 18-21.

87. See ANDREW J. NATHAN & BRUCE GILLEY, CHINA'S NEW RULERS 135-36 (2004).

88. *Dui xing saorao de fanwei ying zuochu mingque de jieding* [Suggested Clear Definition to the Scope of Sexual Harassment], FAZHI RIBAO [LEGAL DAILY], Aug. 19, 2005, at 3.

89. *Id.*

90. *Funü shoujiao chengdu diyü nanxing xu lifa jiejie* [Women's Education Rate is Lower than Men's and Requires a Legislative Solution], FAZHI RIBAO [LEGAL DAILY], July 14, 2005, at 3.

91. *Lifa dui jiating baoli shuo bu* [Legislation Says "No" to Domestic Violence], FAZHI RIBAO [LEGAL DAILY], Aug. 15, 2005, at 3, available at http://www.legaldaily.com.cn/bm/2005-08/15/content_181123.htm.

92. *Id.*

93. This Article makes no attempt to contribute to theory on formal and substantive equality, nor does it take a position on the two approaches under U.S. jurisprudence; rather it examines the Chinese situation using the following working definition of substantive and formal equality:

arguably harmful and unnecessary stigmatizing provisions of law (e.g., provisions discussing special professions not suited for women).⁹⁴ Although women's rights legislation allows women to seek remedies for violations of their rights with administrative agencies through arbitration or litigation,⁹⁵ strong social forces cause women to be too frightened or distrustful to come forward to vindicate those rights, even where the courts might be willing to allow it.⁹⁶

During the Reform Era of the last fifteen years, the PRC has enacted a host of laws and regulations ostensibly aimed at helping women and remedying imbalances in society.⁹⁷ This includes the international Convention on the Elimination of All Forms of Discrimination Against Women, which China ratified as early as 1980.⁹⁸

While formal sex equality judges the *form* of a rule, requiring that it treat women and men on the same terms without special barriers or favors on account of their sex, substantive equality looks to a rule's *results* or *effects*. Formal equality does not always produce equal outcomes for men and women because of significant differences in their characteristics and circumstances. . . . One formulation of substantive equality focuses on remedying the effects of past discrimination. . . . Another type of substantive equality focuses on biological differences between women and men.

KATHARINE T. BARTLETT ET AL., GENDER AND THE LAW 265 (2002). This Article acknowledges the dangers and imperfections in both the substantive and formal equality approaches.

94. This situation has played out in the United States. In a case before the California Supreme Court in 1984 regarding price differentials for men and women at clubs, the court refused to allow the seemingly innocuous distinctions because they reinforced unnecessary stereotypes about women by creating unnecessary differences. The court refused to analogize such sex-based price differentials to ones for the elderly or children, which the court called "special needs" groups. The court was concerned that "[w]hen the law 'emphasizes irrelevant differences between men and women[,] [it] cannot help influencing the content and the tone of the social, as well as the legal, relations between the sexes. . . ." *Koire v. Metro Car Wash.*, 707 P.2d 195, 201 (Cal. 1985) (quoting KANOVITZ, *WOMEN AND THE LAW* 4 (1969)). This rationale has particular relevance for China.

95. *Funu quanyi baozhang fa* [Law for the Protection of the Rights and Interests of Women] art. 52 (amended by the Standing Comm., Nat'l People's Cong., Aug. 28, 2005, originally effective Oct. 1, 1992) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=59781>.

96. See Anonymous Interview, *supra* note 1; see also Woo, *supra* note 52, at 352-56 (noting dissatisfaction of women with litigation outcomes).

97. Law for the Protection of the Rights and Interests of Women; *Muying baojian fa* [Law for the Protection of the Health of Mothers and their Infants] (promulgated by the Standing Comm., Nat'l People's Cong., Oct. 27, 1994, effective June 1, 1995) (P.R.C.), <http://vip.china.lawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=10460>; *Hunyin fa* [Marriage Law] (promulgated by the Standing Comm., Nat'l People's Cong., Apr. 28, 2001, effective Apr. 28, 2001) (P.R.C.), http://www.law-lib.com/law/law_view.asp?id=15279 (including provisions on domestic violence and equality in marriage); *Laodong fa* [Labor Law], ch. 7 (promulgated by the Standing Comm., Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) (P.R.C.) (including special protections for women and children workers), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=9587>.

98. See HUMAN RIGHTS IN P.R.C., IMPLEMENTATION OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN IN THE PEOPLE'S REPUBLIC OF

The most important example of this trend in legislation is the LPRIW, which was first enacted in 1992 and amended in 2005.⁹⁹ The LPRIW was enacted over proposals for a sexual equality law, which would have protected the sexes equally.¹⁰⁰ The proponents of the LPRIW stated that such a law was necessary before protecting the rights of men because women were more disadvantaged in society.¹⁰¹

The LPRIW is truly a mix of different types of provisions. First, it begins with a general guarantee of equal rights for both men and women.¹⁰² Second, the law specifically prohibits discrimination, cruelty, and violence against women—not on the basis of sex, but on the basis of being a woman.¹⁰³ Third, the law requires government organs, social organizations, and enterprises to increase the number of women in leadership positions or positions of power.¹⁰⁴ These provisions appear to be directed at the actual conditions of Chinese society and remedying past discrimination against women.

Other provisions, however, seem to perpetuate traditional stereotypes and may end up thwarting the very equality that the law claims to promote. For example, Article 26 of the LPRIW states that “all units shall, according to the general differences of women, protect the health and safety of women in the workplace, and are prohibited from assigning women to engage in *inappropriate* work or labor.”¹⁰⁵

The 2005 amendments to the law were also criticized. For example, the 2005 LPRIW contains a much debated provision that forbids sexual harassment of women.¹⁰⁶ This provision came on the heels of years of cases in which judges could find no provision of law that prohibited sexual harassment to deal with such cases brought by women.¹⁰⁷ Courts were either forced to dismiss such actions or resort to creative

CHINA iii (June 2006), available at <http://hrichina.org/public/PDFs/HRIC-CEDAW-REPORT.6.26.2006.pdf>.

99. Law for the Protection of the Rights and Interests of Women.

100. Anonymous Interview, *supra* note 1.

101. *Id.*

102. Law for the Protection of the Rights and Interests of Women, art. 1.

103. *Id.* art. 2.

104. *Id.* art. 12.

105. *Id.* art. 26 (emphasis added) (author’s translation).

106. *Id.* art. 40.

107. *Nu jiaoshi gao xiao zhang xing saorao* [Female Teacher Sues Principal for Sexual Harassment], CHONGQING WANBAO [CHONGQING CITY EVENING NEWS], Aug. 9, 2005, http://news.xinhuanet.com/legal/2005-08/09/content_3328333.htm. For another case, see *Zhongguo shouli xing saorao an quancheng huifang* [China’s First Sexual Harassment Case], RENMIN RIBAO [PEOPLE’S DAILY ONLINE], Jan. 1, 2001, <http://www.people.com.cn/GB/shehui/44/20020101/640225.html>.

interpretations of other provisions of law.¹⁰⁸ Before the provision was enacted, however, it was criticized on the grounds that it would leave sexual harassment of men by both women and men unprotected.¹⁰⁹ These arguments were rejected in favor of a provision that addressed sexual harassment specifically of women.

Similar types of sex-specific provisions can be found in other laws. For example, provisions of the Labor Law forbid women from engaging in certain types of work, such as harsh work in mines or high temperature environments.¹¹⁰ Drafts of the Employment Promotion Law, scheduled to be enacted within the next few years, allow for the state to determine certain types of work that are unsuitable for women.¹¹¹ The International Labor Organization (ILO) recently criticized the draft Law on this ground to the Chinese Ministry of Labor and Social Security.¹¹² The ILO memorandum on the law with regard to that specific provision stated:

Following the ILO Resolution of 1985 on equality of opportunity and treatment between men and women workers, specific measures of protection for women that are based on stereotyped thinking about their ability and their role in society have been called into question and may lead unnecessarily to breach of the principle of equality of opportunity and treatment. In this draft [Employment Promotion Law], although the phrases might be an expression of acknowledgement of the role women play in the modern Chinese labour market, the wording could be misinterpreted, and possibly lead to segregated job vacancies, training, guidance and job offers.¹¹³

Policy debates surrounding domestic violence also illustrate this phenomenon. In late 2005, the media reported on the calls of intellectuals for a law to protect women from domestic violence.¹¹⁴ The

108. *China's First Sexual Harassment Case*, *supra* note 107.

109. See, e.g., *Yizhi xing saorao de diyi bu* [*The First Step to Containing Sexual Harassment*], NANFANG RIBAO [S. DAILY], June 27, 2005, at A02, available at http://news.xinhuanet.com/legal/2005-08/09/content_3328333.htm.

110. Laodong fa [Labor Law], ch. 7 (promulgated by the Standing Comm., Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) (P.R.C.), available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=9587>.

111. See Jiuye cujin fa (cao'an) [(Draft) Employment Promotion Law] (Oct. 2005) (P.R.C.) (on file with author).

112. See Memorandum from the International Labour Office of Technical Comments on the Draft Employment Promotion Law, 2005 of the People's Republic of China (on file with author).

113. See *id.* at 10-11.

114. See *Jiating baoli fangzhi fa lifa jianyi qiao yi an chengxu tijiao* [*Domestic Violence Prevention and Treatment Law has Already Been Suggested According to Procedures*], FAZHI RIBAO [LEGAL DAILY], June 27, 2005, at 3, http://www.legaldaily.com.cn/bm/2005-12/12/content_233563.htm.

Legal Daily, a major source for legal news in the PRC, ran a long article discussing the progress of drafting such a law and the major issues involved.¹¹⁵ There was no mention of how many men are beaten by their wives or how many gay men are beaten by their boyfriends.¹¹⁶

The Criminal Code is yet another example. According to the current Criminal Code, as revised in 1997, the victim of rape (*qiangjian*) can only be a woman or a young girl.¹¹⁷ Courts and other authorities have made it clear that the strict provisions of the Criminal Code on rape do not apply unless the object of a crime is a woman.¹¹⁸ The crime of obscenity (*weixie*) can be committed against a male child, but not against a male adult.¹¹⁹ No analogue to nonconsensual sodomy exists as an alternative to protect men either.¹²⁰ Some commentary on the current state of the law has noted the inequity of these provisions and that the current arrangement is based on the fact that women and children are considered weaker and therefore in need of more protection.¹²¹ Other commentary on rape law has noted that although Chinese courts have expanded the definition of the crime of rape since the early 1980s, the law has not followed the trend in the United States, which has made rape more gender neutral.¹²²

Most of the problems that the media has reported with this provision stem from the lack of provisions to cover male-against-male rape.¹²³ In those cases, the perpetrator sometimes only receives a very light sentence.¹²⁴ Victims have also been allowed to recover damages

115. *See id.*

116. *See id.*

117. Xingfa [Criminal Law], art. 236 (promulgated by the Standing Comm., Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=17010>.

118. XIAO ZHONGHUA ET AL., XINGFA YINAN ZHENGYI YU SIFA DUICE [CRIMINAL LAW PROBLEMS AND JUDICIAL POLICY] 452 (describing the crime of rape as confined to women).

119. *See* Criminal Law, art. 237.

120. In 2001, the Ministry of Public Security issued a Reply stating that male prostitutes would be punished equally. Dui tongxinglian zhijian yiqiancai wei meijie de xingxingwei dingxing chuli wenti de pifu [Reply on Resolving the Problem of Arranging Sex for Money by Intermediaries Between Homosexuals] (issued Feb. 18, 2001), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=35517>.

121. *See* Peng Yanan, *Nanren buru shiti* [Men Don't Have Bodies], ZHONGGUO XINGBIAN WANG [P.R.C. CRIME AND DEF. WEB SITE], Oct. 13, 2005, <http://www.xingbian.cn/template/article.jsp?ID=5956&CID=362187916>.

122. *See* Harold M. Tanner, *Chinese Rape Law in the Comparative Perspective*, AUSTL. J. OF P.R.C. AFF., Jan. 1994, at 1, 8-9.

123. Li Xianran, *Deputy: Add Homosexual Rape to Criminal Law*, SHANGHAI DAILY.COM, Mar. 5, 2007, <http://www.shanghaidaily.com/article/?id=307933&type=National>.

124. Xinhua News Agency, *Lawmaker: Amend Criminal Law to Punish Same-Sex Assaults*, CHINA.ORG.CN, Mar. 6, 2007, <http://www.china.org/cn/English/2007lh/201681.htm>.

through punitive compensation under some circumstances.¹²⁵ In one case where a female teacher forced the school's most athletic "bright star" to engage in sexual relations with her by threatening him, authorities refused to prosecute because they "lacked a basis in law" to do so.¹²⁶ A lawyer informed the boy's family that there was simply no law to protect males against this kind of sexual assault.¹²⁷

While Chinese law does contain some traditional stereotypes of women, it should not be overlooked that these laws have brought major issues facing women to the public's attention and are a statement of the government's intent to correct sexual inequalities. The laws have perhaps empowered women and women's organizations to think about and, in some cases, attempt to seek redress for discrimination, harassment, and violence under the law.¹²⁸ They are the start of a legal framework dealing with gender and equality where almost none existed before.

Future legislation on homosexuals may take on characteristics of the current pattern of legislation dealing with women's issues. For example, a draft of a Law for the Protection of the Human Rights of Homosexuals was proposed to a group of gay leaders and intellectuals.¹²⁹ Those to whom the draft was distributed, however, determined that it was not an appropriate time to propose such a law.¹³⁰

Despite the delays, China is changing. Economic reforms have spurred what some call a sexual revolution and changes in family.¹³¹ All of this is having an effect on straight women and gays and lesbians. Furthermore, it affects the levels of tolerance in Chinese society and influences the development of law and policy.

IV. THE PAST, PRESENT, AND FUTURE OF GAY LAW IN CHINA

This Part argues that the tide in China is turning and the environment for homosexuals is becoming better and more tolerant. The

125. Li Xianran, *supra* note 123.

126. *Xing qinfan naotou zhuanxiang: Nuxing dui nanxing shishi qiangbao suan bu suan qiangjian?* [*Is Female Violence Against Males Considered Rape?*], ZHONGGUO FAZHI ZAobao [P.R.C. LEGAL NEWS MORNING PAPER], Sept. 4, 2005, <http://news.tom.com/1988/20050904-2444088.html> (listing major incidents that illustrate why men need more explicit protection under the law) (author's translations).

127. *Id.*

128. *See, e.g.*, TONY SAICH, GOVERNANCE AND POLITICS OF CHINA 173 box 7.1 (2001).

129. Tongxing lianzhe renquan baozhang fa (cao'an) [(Draft) Law for the Protection of the Human Rights of Homosexuals] (2003) (P.R.C.) (on file with author).

130. E-mail from Anonymous, to author (Jan. 14, 2007, 23:24 EST).

131. LI YINHE, ZHONGGUO HUYIN JIATING JIQI BIANQIAN [CHINA'S MARRIAGE AND FAMILY INSTITUTIONS AND THEIR CHANGES] 5 (1994).

following Parts track the development of law and policy on homosexuals and discuss the relevance of each development.

A. The Past: Dynastic and Republican China

There has been a good deal written about the place of homosexual behavior in China before the fall of the Qing Dynasty.¹³² To discuss all of this material in depth is beyond the scope of this piece, but it is important for purposes of context, to make a few brief observations on gays in ancient and premodern China.

Law in ancient China rarely, if ever, explicitly forbade homosexual conduct.¹³³ Many people did have homosexual affairs, which were widely discussed in the literature of many of the dynasties.¹³⁴ Gay behavior was seemingly tolerated as long as it did not interfere with more formal social rules.¹³⁵ Thus, on the most basic level, the argument scholars make about homosexuality during dynastic China is that it was not an identity but a type of behavior that one engaged in while living his or her life within the strict social rules of Chinese society.¹³⁶ Men and women were expected to get married and have children, who were considered a source of support in one's old age.¹³⁷ Homosexual behavior, but not gay identity, existed outside of a social structure that no one dared to violate.¹³⁸ Consider the following:

In Chinese history, *tongxinglian* (homosexuality) has never been used as a noun to designate a generic personality possessing a unique psychosexual essence. . . . Before the term *tongxinglian* first appeared in Chinese in the early twentieth century, there was no generic term to describe sex between people of [the] same sex. . . . The notion of the homogeneous, universal and gender-inclusive “gay identity” did not exist in China.¹³⁹

It is extremely difficult to assess the merits of these claims because they often rely on depictions of homosexual behavior and life in

132. See, e.g., ZHANG ZAIDAN, AIMEI DE LICHENG: ZHONGGUO GUDAI TONGXINGLIAN SHI [HISTORY OF HOMOSEXUALITY IN ANCIENT CHINA] 1-40 (2001).

133. BRET HINSCH, PASSIONS OF THE CUT SLEEVE: THE MALE HOMOSEXUAL TRADITION IN CHINA 1-14 (1990).

134. See Teemu Ruskola, Note, *Law, Sexual Morality, and Gender Equality in Qing and Communist China*, 103 YALE L.J. 2531, 2549 (1994), for an interesting discussion of law and sexuality with particular reference to homosexuals in Qing and PRC China.

135. *Id.*

136. HINSCH, *supra* note 133, at 19.

137. See CHOU WAH-SHAN, TONGZHI: POLITICS OF SAME-SEX EROTICISM IN CHINESE SOCIETIES 96-97 (2000).

138. *Id.*

139. *Id.* at 22.

philosophy and literature.¹⁴⁰ Perhaps it is best to approach the assertion regarding the degree of comfort that men and women living in those times had with this arrangement, or the degree to which they lived their lives in the closet, with caution. Simply labeling ancient society as strictly Confucian and modern society as anchored in Confucianism or other philosophies often seems too simple a way to solve the cultural puzzle surrounding attitudes towards homosexuality in Chinese society.¹⁴¹ This is a criticism not only of the methodology used to study same-sex eroticism in ancient China, but also of the numerous contentions about political, legal, economic, and social history in China and Japan and throughout other countries in East Asia that have embraced Confucianism throughout their histories.¹⁴²

Although little data exists, homosexuality seems to have been generally less accepted in Chinese society through the Republican Era.¹⁴³ With the advent of more Western science and religion, and the general opening and loosening of social rules in the Republican Era, the study of homosexuality and the concept of a gay identity emerged.¹⁴⁴ Literature on this subject, however, indicates that it was these Western influences that led to an overall decline in the tolerance of same-sex love that existed throughout Chinese history.¹⁴⁵ Communist rule in 1949 did not result in a more tolerant environment for homosexuals either, although there was still no official policy on homosexual behavior written into the law.¹⁴⁶

B. Homosexuality During the People's Republic

The problem with the study of homosexuality during the early Communist period through the Cultural Revolution is one of obtaining information. The general view is that homosexuals were mostly prosecuted during these periods, although that might not always have been the case, as there are also stories of local authorities showing mercy or merely intervening when homosexuals became too visible.¹⁴⁷ During this period, there was neither debate nor very much serious scholarship about homosexuality. It would be a mistake, however, to completely

140. See HINSCH, *supra* note 133, at 13.

141. See CHOU WAH-SHAN, *supra* note 137, at 1.

142. For a discussion and dissection of various approaches to viewing Chinese history, see PAUL A. COHEN, *DISCOVERING HISTORY IN CHINA: AMERICAN HISTORICAL WRITING ON THE RECENT CHINESE PAST* (1984).

143. See CHOU WAH-SHAN, *supra* note 137, at 42-45.

144. *Id.*

145. *Id.*

146. See *id.* at 54.

147. See Ren Xiaoyi et al., *supra* note 3.

discount these periods as devoid of developments on the issue of gay rights. There are bits and pieces of law and policy from these eras, and Chinese scholars today have collected narratives from gays and lesbians who lived during these times.¹⁴⁸

From 1949 until 1979, one of the most significant pieces of law or policy that existed on homosexuality is a 1957 decision by the Supreme People's Court on consensual anal sex between two males from Heilongjiang Province, referred to here as the Mudanjiang case.¹⁴⁹

The background of the Mudanjiang case is somewhat unclear. The case was a prosecution of two adult males whose affair was discovered by authorities during a period of labor reform in Hucun County in Heilongjiang Province.¹⁵⁰ They were prosecuted for engaging in consensual anal sex.¹⁵¹ The Mudanjiang Intermediate Court adjudicated the case, but the court was divided on the question of the criminality of the behavior. The Intermediate Court certified the case to the Provincial High Court, which then, in turn, certified the case to the Supreme People's Court (SPC) in Beijing.¹⁵² At the time that this case was decided, the Communist Party and the National People's Congress, which first convened in 1954, had enacted only a few laws and regulations.¹⁵³ Tremendous holes in the law and an inexperienced and largely untrained judiciary led to an official grant of power under the 1954 Organic Law of the Courts to the SPC to answer questions of law certified by the Provincial High Courts.¹⁵⁴

In its certification to the SPC, the Heilongjiang court stated that local judicial authorities had two opinions on the resolution of the case. The first opinion was that consensual anal sex between two men is a serious violation of social morals and that such behavior during a period of labor reform is a very bad influence on those undergoing reform.¹⁵⁵ For these reasons, some believed the behavior should be punished under the criminal law.¹⁵⁶ The second opinion was that the behavior was both a bad influence and against morals, but that it should only be punished by

148. See, e.g., LI YINHE, TONGXINGLIAN YA WENHUA [SUBCULTURE OF HOMOSEXUALITY] (1998).

149. Li xx & Li xx (Sup. People's Ct., Apr. 29, 1957) (on file with author).

150. *Id.*

151. *Id.*

152. *Id.*

153. Wan Yi, *Lishi yu xianshi jiaokun zhong de anjian qingshi zhidu* [The Historical and Current Issues with the System of Case Certification], 2 FAXUE [LEGAL STUD.] (2005), http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=4521.

154. *Id.*

155. Li xx & Li xx (Sup. People's Ct., Apr. 29, 1957) (on file with author).

156. *Id.*

administrative sanctions and did not rise to the level of a crime.¹⁵⁷ The provincial court in its certification request stated that it believed that the behavior was against morals and harmful to society, and, therefore, criminal action should be taken to punish it.¹⁵⁸ The provincial court noted that central PRC authorities had not yet passed any laws or regulations on the subject.¹⁵⁹ The USSR, however, did have a provision of its criminal law that punished two men for anywhere from three to five years for engaging consensual homosexual sex.¹⁶⁰ Because there was no official pronouncement on this from the central government, the Provincial High Court certified the question to the SPC.

In a very short and direct reply, the SPC stated “[R]egarding whether consensual anal sex between two adults constitutes a crime, legislation has not yet provided a resolution. While law has still not articulated a clear answer, we believe it is not appropriate to treat this as a crime on the facts that you have provided.”¹⁶¹ It is interesting to note that the SPC did not comment on the lower provincial court’s moral condemnation of this behavior, nor did the court openly sanction treating consensual anal intercourse between two adults as an administrative offense.¹⁶² In addition, in neither the opinion of the provincial court nor that of the SPC did the courts use the word “homosexual” or “homosexuality.”¹⁶³ Both courts were talking in terms of conduct and not identity. In later years, the rationale that the provincial court articulated for treating such behavior as a crime would become the basis for the prosecution of consensual anal sex in Chinese courts.

The 1957 interpretation was the last authoritative legal statement on homosexual behavior before the onset of the Cultural Revolution in the mid-1960s. The Cultural Revolution was a time of chaos for China, when the government and society were thrown into complete disarray.¹⁶⁴ The growth of the conventional legal system was stopped dead in its tracks, and society relied on the pronouncements of a few elite leaders to govern their lives.¹⁶⁵ Lawlessness was praised, and some parts of the

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* (author’s translation).

162. *See* Wan Yi, *supra* note 153.

163. *See id.*

164. *See* JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 565-86 (1999).

165. *See id.* at 574-75.

administrative bureaucracy, the courts, the procuracy, and the legal profession ceased to function altogether.¹⁶⁶

For homosexuals living during this time, the repercussions were often drastic. Those who were outed were sure to be punished in one of many forms. For those who escaped with a light punishment, they might have been forced to undergo medical treatment or criticism and investigation.¹⁶⁷ A more likely punishment was that whatever authorities prevailed in that specific locality would either beat them to death or sentence them to death.¹⁶⁸ When it was revealed that an art teacher in Beijing had sex with one of his male students, he was beaten to death.¹⁶⁹ Another male teacher was sentenced to death by local authorities for similar behavior.¹⁷⁰ Sometimes those who feared that their behavior would be discovered would commit suicide in advance to avoid the beating.¹⁷¹

C. Reforming, Opening, and Coming Out?: Gay Law in the Reform Era

In 1979, after the death of Mao Zedong, the Chinese Communist Party proclaimed that it would reform China once again and open up to the rest of the world.¹⁷² The changes in China's economy and society have been immense and have taken place rapidly over a short period of time. The strict control over publication and media has been gradually relaxed over the last several years.¹⁷³ These developments have allowed research on sexuality and, in turn, homosexuality to proceed. As a result, the Chinese people and government have been slowly tackling some of the same issues surrounding homosexuality with which the United States has been dealing recently. For example, in the 1980s, a few Chinese scholars began to write about the criminality and mental health issues

166. See ELIZABETH PERRY & LI XUN, PROLETARIAN POWER: SHANGHAI IN THE CULTURAL REVOLUTION 1-5 (1997).

167. See LI YINHE, *supra* note 148, at 381-82.

168. *Id.* at 382.

169. *Id.*

170. *Id.*

171. *Id.*

172. For a catalogue of milestones in gay rights during the Reform Era, see *Zhongguo tongxinglian zou xiang gongkai de dashiji* [Significant Events as China's Homosexuals Move Toward Openness], ZHONGGUO QINGNIAN BAO [P.R.C. YOUTH DAILY], Jan. 13, 2006, http://zqb.cyol.com/gb/zqb/2006-01/13/content_119797.htm.

173. See Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 19-20 (2005).

associated with homosexuality.¹⁷⁴ More recently, a small body of literature on the gay marriage and adoption debates has appeared.¹⁷⁵

As noted above and in Part I, the response from society on homosexuality is mixed, but there are some promisingly liberal attitudes emerging. Despite the response from society, the issue of gay rights is not one that is up for discussion inside the government right now. There are, however, indicators that this could change. First, scholarship and media attention to the issue of gay rights are growing rapidly. Indeed, the scholars and activists who study gay and lesbian issues and the media seem to have a good relationship. For example, Zhang Beichuan, Li Yinhe, Zhou Dan, and Sun Zhongxin have all been interviewed for articles and television programs on the situation surrounding gays and lesbians in China.¹⁷⁶ Zhang Beichuan and lawyer activist Zhou Dan have appeared on TV to discuss gay and lesbian issues.¹⁷⁷ Second, a number of grassroots organizations now exist that are dedicated to improving the situation of gays and lesbians.¹⁷⁸ Many of these organizations are primarily dedicated to safe-sex and the HIV/AIDS crisis, but they also produce literature on other issues affecting the gay community, with whom they work closely in cities like Guangzhou, Chongqing, and Shanghai.¹⁷⁹

Most significantly, although gay issues have not reached an active position in the government's reform agenda, the homosexual population is not completely off the government's radar screen. Indeed, there are signs that some departments of the government are taking a more active interest in the gay rights issue. The following Parts discuss the intersection between gays and the law during the Reform Era.

174. See LIU DALIN ET AL., *supra* note 75, at 33-40.

175. LI YINHE, ZHONGGUOREN DE XINGAI YU HUNYIN [MARRIAGE AND SEXUALITY FOR CHINESE PEOPLE] 195-225 (1990).

176. *The Visibility of Society* (Phoenix television broadcast) (P.R.C.), available at <http://www.gaychinese.net/news/open.php?id=11931> (showing a clip of a television interview of Zhang Beichuan); Wang Zhuoqiong, *Free Speech? You Have To Pay*, P.R.C. DAILY, APR. 4, 2006 http://www.chinadaily.com.cn/china/2006-04/04/content_559070.htm (discussing Li Yinhe's policy of charging for interviews, but illustrating her desirability as an interviewee on issues related to homosexuality); Xu Jitao, *Voice of the Gays*, SHANGHAI STAR, May 18, 2006, http://www.shanghai-star.com.cn/Shanghai_star/Shanghai_star_news.asp?lv1=2&lv2=5&newsid=898&viewsid=8988_views=100 (discussing Zhou Dan); see also Ya Wei, *supra* note 76 (containing an interview with Sun Zhongxin).

177. See Liebman, *supra* note 173.

178. Anonymous Interview, in Beijing, China (Mar. 8, 2006).

179. Anonymous Interview, in Shanghai, China (Jan. 6, 2006); see also *New Hotline To Offer Help to Gay People*, CHINA DAILY, May 11, 2006, http://news.xinhuanet.com/english/2006-05/11/content_4532439.htm.

1. Decriminalization?: Effects of the Development of Modern Criminal Law on Gays

Although the severity of punishment for gays and lesbians during the Cultural Revolution ultimately subsided, police harassment of homosexuals and criminal sentences did not. In the years following the Cultural Revolution in the late 1970s and into the 1990s, homosexuals were subjected to a variety of different punishments. Sometimes gay men would merely receive a stern warning from officials or have their establishments closed.¹⁸⁰ Other times, police would take them into custody and possibly detain them for anywhere from a few hours to a couple of days.¹⁸¹ Li Yinhe's investigation discovered that during these periods of detention, there were varied cases of beatings, interrogation, and even "education."¹⁸² In one instance a gay man was taken into a small room by the police and forced to imitate "homosexual gestures and movements" while he cried and pleaded for his release.¹⁸³

In addition to police detention, administrative punishments, and Chinese Communist Party disciplines, homosexuals could also be officially sentenced under the "hooliganism" provision of the criminal code.¹⁸⁴ The SPC never officially interpreted hooliganism to include consensual anal sex between two adult men; instead, the court's 1984 interpretation only makes anal sex a crime where it is between men and young boys, through violence, by force, or under other severe circumstances.¹⁸⁵ Still, lower courts took license with the hooliganism and public order provisions of the criminal law to punish homosexuals for their public behavior.

Zhang Beichuan describes a case in Hangzhou City in which local authorities arrested and detained over sixty gay men in 1988.¹⁸⁶ The charges were based on the then effective Article 160 of the 1979 Criminal Law which states:

Where an assembled crowd engages in affrays, creates disturbances, humiliates women or engages in other hooligan activities that undermine public order, if the circumstances are flagrant, the offenders shall be

180. LI YINHE, *supra* note 148, at 380-84.

181. Anonymous Interview, in Shanghai, China (Mar. 6, 2006).

182. LI YINHE, *supra* note 148, at 380.

183. *Id.* at 385 (author's translation).

184. ZHANG BEICHUAN, *supra* note 11, at 633-34.

185. Guanyu dangqian banli liumang anjian zhong yingyong falu de ruogan wenti de jieda [Explanation Regarding Several Questions on the Use of Law in Managing Hooligan Cases] No. 6, Nov. 2, 1984, <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=2181>.

186. ZHANG BEICHUAN, *supra* note 11, at 633.

sentenced to fixed-term imprisonment of not more than seven years, criminal detention or public surveillance.

Ringleaders of hooligan groups shall be sentenced to fixed-term imprisonment of not less than seven years.¹⁸⁷

In using these provisions, courts often had the same reasoning as the lower courts in the Mudanjiang case (that homosexual behavior between two consenting adults was somehow wrong); therefore, despite the lack of clear legislation, there must be a way to punish it. Consider the following statement made by judicial authorities in 1987: “Because homosexuality offends public morals, disrupts public order, and influences the physical and mental health of minors, it is clearly a type of criminal behavior.”¹⁸⁸

Despite this reasoning on the part of the courts, Chinese criminal law never actually made an authoritative statement on the criminality of consensual homosexual behavior. Instead, the specific hooliganism provision was removed with the 1997 revisions to the Criminal Law.¹⁸⁹ The language in that section was, however, scattered throughout the rest of the revised law.¹⁹⁰ Interestingly, in 2002 the Supreme People’s Procuratorate issued a decision declaring void one 1984 Supreme Court interpretation on hooliganism, but it did not cancel the interpretation that included the language on anal sex.¹⁹¹

Although seemingly unintentional, the 1997 revisions were not the only legal revisions that hinted at a kinder attitude toward homosexuality. The original 1990 regulations on Reform of Criminals contained a section on “Polite and Civil Behavior.”¹⁹² That section included a prohibition on homosexual behavior along with other types of uncivil behavior such as swearing and telling lies.¹⁹³ These regulations were

187. Xingfa [Criminal Law], art. 160 (promulgated by the Standing Comm., Nat’l People’s Cong., July 6, 1979, effective Jan. 1, 1980) (P.R.C.), http://www.novexc.com/criminal_law.html.

188. ZHANG BEICHUAN, *supra* note 11, at 633 (author’s translation).

189. Xingfa [Criminal Law], ch. 4, sec. 1 (promulgated by the Standing Comm., Nat’l People’s Cong., Mar. 14, 1997, effective Oct. 1, 1997) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=17010> (dealing with crimes against the management of public order).

190. *Id.* art. 292 (replacing the old section, but, for example, article 292 bears a resemblance to the old hooliganism article, although it does not use the word “hooliganism”).

191. Zuigao renmin jiancha yuan guanyu feizhi bufen sifa jieshi he guifanxingwenjian de jue ding [Supreme People’s Procuratorate Decision on Cancelling Parts of Judicial Explanations and Normative Documents] (2002), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=39643>.

192. Fanzui gaizao xingwei guifan [Criminal Reform Guidelines], ch. 5, art. 48 (promulgated by the Ministry of Justice, Nov. 6, 1990, effective Nov. 6, 1990), http://www.69Law.com/Article/LAW_WebDB/155492.htm (author’s translation).

193. *See id.*

meant to serve as guidelines for prison officials in reforming the behavior of convicted criminals. In an interesting and rarely noticed revision, the 2004 Regulations removed homosexuality from the list and regulations altogether.¹⁹⁴ Perhaps one inference to be drawn here is that the drafters did not consider homosexual sex an impolite type of behavior anymore.

Today the legality of consensual anal intercourse between two adults still remains doubtful to some degree.¹⁹⁵ The law contains no provision prohibiting this type of behavior, and some point to the removals of the word “hooliganism” in the Criminal Law in 1997 and the Public Security Law in 2005 as indicators that this type of private intimacy is now permitted.¹⁹⁶ Authorities, however, sometimes still harass gays and lesbians as if they are criminals, although such harassment rarely results in formal criminal punishment. Gays and lesbians are instead subjected to quasi-formal administrative punishments, such as custody and education (*shourong jiaoyang*).¹⁹⁷ In other cases, the authorities may choose to shame gay men or women by telling their close friends, parents, colleagues, or neighbors about their sexual orientation.¹⁹⁸

It should not be ignored, however, as the following Parts will show, that Chinese society is changing to accept homosexuality more, rather than cracking down on it. In a recent case in Beijing, which received a good deal of attention in the media, a man was arrested after it was found that he was organizing gay sex parties for men in their twenties and thirties, for which he charged an entrance fee.¹⁹⁹ The judge who heard the

194. Jianyu fuxing renyuan xingwei guifan [Prison Inmate Behavioral Guidelines], ch. 5, art. 33 (promulgated by the Ministry of Justice, Mar. 2, 2004, effective May 1, 2004), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=52177>.

195. See Guo Xiaofei, *Dui yiqi tongxing maiyin an de falì xue jiedu* [Explanation of the Legal Studies on a Case of Homosexual Prostitution], FAXUE YU ZHENGZHI [L. AND POL.] (2004/05), for a call for the Chinese government to make a clear and direct statement on the criminality of homosexuality.

196. Zhian guanli chufa fa [Public Order Law] (promulgated by the Standing Comm., Nat'l People's Cong., Aug. 28, 2005, effective Mar. 1, 2006) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=59774>. This law replaced the 1994 Public Order Provisions that include a provision on hooligan activities. See Zhian guanli chufa tiaoli [Public Order Provisions], art. 19 (promulgated by the Standing Comm., Nat'l People's Cong., May 12, 1994, effective May 12, 1994) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=9004> (author's translation).

197. Ping Yu, Administrative Model vs. Adjudication Model: The Impact of Administrative Detention on Criminal Process in the People's Republic of China (2006) (unpublished Ph.D. dissertation, University of Washington) (on file with author).

198. LI YINHE, *supra* note 148, at 381.

199. Guo Xiaoming, *Nanzi zai jing zuzhi tongxinglian jiti yinluan bei pan 1 nian* [Man Sentenced to One Year for Organizing Homosexual Sex Disturbances in Beijing], JINGHUA

case commented that while modern society is more respectful and accepting of an individual's sexual orientation (*xing quxiang*), the law could not approve this method of expressing one's sexual orientation.²⁰⁰ This type of statement might not be the norm with Chinese judges, but it is very significant as it indicates a willingness to separate some type of permissible homosexual behavior from ideas of criminality and sexual perversion.

2. The AIDS Factor

AIDS forced the government and many sectors of Chinese society to recognize homosexuals as a group.²⁰¹ It is now under public health policies and laws that the government most often directs attention squarely at homosexuals as a group in society. To understand how this rarely noticed evolution took place, it is first necessary to understand something about the development of AIDS law and policy in China.

a. The Development of AIDS Law and Policy

AIDS policy has been developing in the PRC since the late 1980s, when the first national AIDS plan came out.²⁰² At that time and for many years afterwards, the severity of the spread of AIDS through China was neglected by the government and treated as a foreign phenomenon that China needed to protect itself against.²⁰³ The plans and policies that the government issued from 1987 until the late 1990s reflected this foreign-disease perspective on AIDS.²⁰⁴ Moreover, in the early 1990s the government sought to cover up major scandals and incidents related to AIDS—for example, the tragic blood transfusion scandals that led to the AIDS villages in Henan Province.²⁰⁵

The government, however, has gradually begun to recognize the seriousness of the AIDS problem as the number of infections grows by almost twenty-five percent per year and the United Nations and other

SHIBAO [JINGHUA TIMES], May 20, 2006, <http://news.163.com/06/0520/03/2HHLJQ8K00011229.html>.

200. *Id.*

201. Anonymous Interview, in Beijing, China (Mar. 8, 2006).

202. Quanguo yufang aizibing guihua 1987—1991 [National Plan for the Prevention of AIDS 1987—1991] (Aug. 17, 1987) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=33144>.

203. See HUMAN RIGHTS WATCH, *supra* note 16, at 14.

204. See *id.* at 60.

205. *Id.* at 60-66.

organizations have profiled the gravity of the situation in China.²⁰⁶ The law and policy that the government now puts out on AIDS reflects this shift. The policies and regulations now acknowledge the disease and its 600,000²⁰⁷ to potentially 1.5 million victims, and devote social and financial resources to combating its spread throughout China.²⁰⁸ In addition, the government has begun to try to reach out to various communities to promote healthier sexual behavior and reform drug use.²⁰⁹ To summarize, the general trend in AIDS policy and legislation in China has been from a conception of AIDS as a “foreign disease” to one of the most significant domestic problems facing the whole country.²¹⁰ The fear, loathing, and efforts to crack down on AIDS have been gradually replaced, at least in name, by outreach and education methods for prevention, treatment, and elimination of arbitrary discrimination.²¹¹

b. Homosexuals and AIDS

Homosexuals, “men who have sex with men” (MSM), or *tongzhi*²¹² have been associated with the AIDS phenomenon in the eyes of the Chinese government since the very beginning. As a result, at the beginning of the twenty-first century, when AIDS became a problem of national concern and interest, homosexuals in China, their lifestyle, and their identity as a group became more socially, and also somewhat politically, important. Pan Suiming, one of China’s pioneers in the area of sexuality studies, notes: “MSM became conspicuous as a ‘social problem’ at the beginning of the 21st century in China because of the appearance of AIDS.”²¹³

206. MINISTRY OF HEALTH, PEOPLE’S REPUBLIC OF CHINA JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS WORLD HEALTH ORGANIZATION, 2005 UPDATE ON HIV/AIDS EPIDEMIC AND RESPONSES IN CHINA 6 (Jan. 24, 2006); XIA GUOMEI, HIV/AIDS IN CHINA 5 (2004).

207. See MINISTRY OF HEALTH, *supra* note 206, at 1.

208. *Zhongguo aizibing ganren pinggu renshu xijiang 19 wan* [Estimated Number of People with AIDS Declines 190,000], XINHUA ONLINE [P.R.C. VIEW], Jan. 25, 2006, http://news.xinhuanet.com/politics/2006-01/25/content_4099189.htm (quoting the health minister as saying the number by 2010 would be 1.5 million).

209. HUMAN RIGHTS WATCH, *supra* note 16, at 72.

210. See *id.* at 72-73.

211. See Balzano & Jia Ping, *supra* note 10, at 187.

212. This term refers to those with sexual desire for people of the same sex. It is sometimes used as a more politically correct or culturally appropriate term.

213. Suiming Pan, *Ziji lingwu ziji de lou* [Your Way, Your Own Exploration], in TONG GE, ZHONGGUOREN DE NANNAN XINGXINGWEI: XING YU ZIWO RENTONG ZHUANGTAI DIAOCHA [STUDY ON THE STATUS OF SEX AND SELF RECOGNITION: MALE HOMOSEXUAL BEHAVIOR IN CHINA] 15 (2005).

Since the beginning, AIDS policy in China has focused on high-risk groups: prostitutes and sex workers (both male and female), intravenous drug users, and homosexuals.²¹⁴ The attitude towards the gay population in these plans and in regulations has changed considerably over the last eighteen years, from fear and loathing to concern.

In the National Plan for the Prevention of AIDS 1987-1991 (the 1987 Plan), the government still felt that it could merely shut AIDS out of China and prohibit any activities known to result in the spread of the disease. The 1987 Plan, therefore, stated that work to combat AIDS should include full-scale management of the “social public order.”²¹⁵ This type of philosophy has—in the past—carried criminal implications. The state prosecuted those who damaged the “socialist order” or disrupted the unity and harmony of society.²¹⁶ These efforts were extremely effective as the Chinese government, for example, managed to almost completely wipe out prostitution and pornography in the 1960s and 70s.²¹⁷ In the Reform Era (beginning in the 1980s), these industries again emerged in the continually growing social space that the government is still expanding.²¹⁸ Similar to the old philosophy, but with some acknowledgement of the realities then, the 1987 Plan makes clear the strict prohibitions of prostitution, drug use, and homosexuality.²¹⁹ The 1987 Plan condemns homosexual activity, as do the prison regulations discussed above, but should not be read as an official criminal prohibition.

The 1990 Plan to combat AIDS discusses homosexuality in more detail than its predecessor. First, it states that homosexuality is illegal in China.²²⁰ This statement is surprising because even before the 1997 Criminal Law was revised, no provision of public law prohibited homosexual behavior between two adult males. Second, the 1990 Plan acknowledges that, despite the illegality of homosexual behavior, there are homosexuals in China and authorities understand very little about the “circumstances of these people.”²²¹ Third, the 1990 Plan labels the homosexual population as one in which infections have been discovered

214. See National Plan for the Prevention of AIDS 1987-1991, *supra* note 202.

215. *Id.* (author’s translation).

216. See *id.* (author’s translation).

217. See *id.*

218. See *id.*

219. *Id.*

220. Aizhibing yufang he kongzhi zhongqi gui Hua [Intermediate Plan for Prevention and Control of AIDS] (1990-1992) (P.R.C.), <http://gwxy.gmc.edu.cn/jdxh/azb/zcfg/3.htm>.

221. *Id.* (author’s translation).

and which engages in high-risk behavior (e.g., anal sex).²²² The 1990 Plan finally states that as with other high-risk groups the government will devote resources to monitoring and controlling the rate at which the disease is spread through the homosexual population.²²³

With the 1998²²⁴ and 2001²²⁵ Plans, the government began to increase its efforts to combat HIV/AIDS under the realization that the disease had nearly spread out-of-control and the number of infections in China would reach drastic levels. Neither plan mentions homosexuals specifically, but both call on various parts of the government to engage in outreach activities with high-risk groups.²²⁶ Indeed, it was after the 2001 Plan that the government began to soften its efforts to crack down on AIDS and turned to more concrete, constructive education and outreach techniques. After 2001, public health policies at the central level directed at AIDS began to increase, culminating in new central regulations in February 2006.

In 2004, the State Council issued a Notice to the various local branches of the Chinese Center for Disease Control to establish specialized groups to conduct outreach efforts with local members of high risk groups in their areas.²²⁷ Among these groups were homosexuals. Based on this Notice, in 2005 the Ministry of Health issued more concrete “Guidelines for Intervention with High-Risk Behavior.”²²⁸ The Guidelines contain a specific section on homosexuals, which states that the methods for combating AIDS in the homosexual community should focus on training gay men and women to become educators within their own communities.²²⁹ These intra-community educators can then focus on educating their friends about prevention and

222. *Id.*

223. *Id.*

224. Zhongguo yufang yu kongzhi aizibing zhongchangqi guihua [Intermediate/Long Range Prevention and Control Plan for AIDS] (1998-2010) (P.R.C.), <http://www.gdnet.com.cn/hottopic/2003/1242/1202-01.htm>.

225. Zhongguo yizhi yu fangzhi aizibing xingdong jihua [Plan for Restraining and Preventing and Treating AIDS] (2001—2005) (P.R.C.), <http://www.cfjkjy.com/2004/11-16/9-25-6-2.html>.

226. *Id.*

227. Weishengbu bangongting guanyu zai geji jibing yufang kongzhi (weisheng fanyizhan) jianli gaowei renqun ganyu gongzuodui de tongzhi [Ministry of Health: Notice on Establishing Working Groups for High Risk Groups at Centers for Disease Control (Health Protection Stations)] (Dec. 12, 2004) (P.R.C.), <http://www.chinaaids.org.cn/zhq/showcontent.asp?lm=031&sn=2697>.

228. Weishengbu bangongting guanyu yinfa “gaowei xingwei ganyu gongzuo zhidao fangan (shixing)” [Ministry of Health: Guidelines for Intervention with High Risk Behavior] (July 6, 2005), http://www.aids-tcm.com/readarticle/htm/68/2005_7_6_328.html (author’s translation).

229. *Id.* art. 3(2)(iii).

outreach services such as condoms and information on safe sex and testing.²³⁰

The Guidelines reflect two things. First, they are a more constructive approach to helping the gay community in China to combat AIDS. There is no mention of the illegality of homosexual behavior and there is, at the very least, a more detailed strategy for reaching out to the underground gay community.²³¹ Second, the strategy of using those within the community to educate reflects the same realization on the part of authorities that was present in the 1990 Plan: they know very little about the gay community in China.²³² As some scholars have observed from surveying homosexual individuals, many local authorities have taken a “see no evil, hear no evil” approach to homosexuals in the past. Local officials would not actively seek out homosexuals and would only take action against them if they stumbled upon a gay bar or establishment. Because of this blindness, and with the rise of Non-Governmental Organizations (NGOs), it has become increasingly clear that the central government might need to depend on activists in the gay community and NGOs to manage the AIDS issue, within certain reasonable limits.²³³

This trend continued in the 2006 Provisions on the Prevention and Treatment of AIDS, which represent the Chinese government’s most recent and definitive statement on the AIDS crisis.²³⁴ These measures also encourage communities to reach out to high-risk groups and take action to effectively prevent the spread of the AIDS virus. Under the 2006 Provisions, MSM (there is no use of the term homosexual or *tongxinglian*) is a high risk group along with sex workers, individuals with multiple partners, and intravenous drug users.²³⁵

The AIDS regulations and policy detailed previously represent a change in the legal blindness of the Chinese government to the existence of homosexuals as a group in society. AIDS forced the central government to look at and deal with the gay community in some way, however small. On the positive side, the AIDS crisis allowed homosexuals to obtain political and legal visibility from the Chinese government and has paved the way for future action at least in the area of

230. *Id.*

231. *Id.*

232. *See id.*

233. *See, e.g.,* Wujuan et al., *Zhongguo NGO, aoao daibu* [*Chinese NGOs, Crying out for Food*], NANFANG ZHOUMO [S. WEEKEND], Mar. 23, 2006 (discussing facts and figures about NGOs in China).

234. Provisions on AIDS Prevention and Treatment, *supra* note 43.

235. *Id.* art. 63.

public health. Moreover, the direction of development of AIDS policy on homosexuals is cause for optimism as well. The policy shifted from dismissive talk about the illegality of homosexuality to discussion of somewhat more constructive ways of reaching out to a neglected community in China. Although difficult to find a specific and concrete link, it is also certainly possible to assert that the development of AIDS policy on homosexuals created a significant driving force in the social debate over their place among other vulnerable groups in Chinese society.

AIDS policy has also had negative effects on the gay community. First, and most obviously, the high-risk group designation stigmatizes gays. Not only is there the danger that AIDS is becoming too associated with homosexuals, but also the inclusion of homosexuals with sex workers and intravenous drug users still casts a criminal shadow on their sexual behavior. Second, there is the danger that homosexuals will be stigmatized as an inherently weak sector of society. In this way, homosexuals, to the extent that they do receive protection under Chinese law, may become the victims of the same stereotypical and traditionalist provisions of law, such as those excluding them from inappropriate jobs.

3. Declassification as a Mental Illness

Another notable development with regard to gays and lesbians is the removal of the blanket classification of homosexuality as a mental illness in the Chinese Classification of Mental Disorders III (CCMD III).²³⁶ Homosexuality has not been completely removed from the list of mental disorders; instead, the new manual lists a different definition under Sexual Psychological Disorders (*xing xinli zhangai*), which is subtitled “Sexual Perversions” (*xing biantai*). The criteria are:

- a) meets the criteria in the sexual orientation disorder definition;
- b) under normal life conditions, from an early age begins to manifest sexual desires towards members of the same sex, including thoughts, feelings, and sexual behavior;
- c) capable of having normal sexual relations with members of the opposite sex, but sexual desire is weak or lacking, so it is difficult to establish and maintain domestic relations with members of the opposite sex.²³⁷

The definition of “sexual orientation disorder” referred to in a) is:

236. Zhongguo jingshengbing zhang'ai fenlei yu zhengduan biao zhun di san ban III [Chinese Classification of Mental Disorders III] 62.31, http://www.21jk.org/p/ZDBZ/allZDBZ/CCMD-3/csp_article_content.asp?recordid=2049 (last visited Apr. 8, 2007).

237. *Id.* (author's translation).

Although originally one of different kinds of sexual development and sexual tendency disorders, in terms of sexual desire it is not per se an abnormality. However, some individuals' sexual development and sexual tendencies may cause a psychological disorder. For example, if an individual does not wish to be that way or is unsure and, on account of this, may experience anxiety, depression, and mental anguish; some may experiment with treatment to try to change [their orientation]. This is the main reason why "homosexuality" and "bisexuality" are included in the CCMD III.²³⁸

This revision in the CCMD III is often read one of two ways. First, some have reacted as though homosexuality has been completely removed from the list of mental disorders.²³⁹ Certainly some media and some NGOs covered the 2001 revision of the CCMD III as a great milestone.²⁴⁰ Others, however, still view homosexuality as a disease. For example, as indicated below, the All China Adoption Center recently issued a statement barring gay adoptions due to this perception.²⁴¹ Certainly, the reference connecting domestic relations and heterosexuality and the idea that everything else is normal but the individual's sexual desire, can and has reinforced traditional stigmas surrounding homosexuality. While redefining homosexuality as a mental illness is a step forward,²⁴² it has arguably not had the same effect as totally expunging the words homosexuality/bisexuality from the CCMD would have.²⁴³

238. *Id.* 62.3, http://21jk.org/p/zdbz/allzdbz/ccmd-3/csp_article_content.asp?recordid=2048 (last visited Apr. 8, 2007).

239. Zhongguo tongxinglian zou xiang zhengchang [Homosexuals in China Move Towards Normality], AIZHI NEWS, <http://www.aizhi.org/azxd/normal.htm> (last visited Apr. 8, 2007).

240. *Id.*

241. *See infra* Part IV.C.5.

242. The Chinese Classification of Mental Disorders II listed homosexuality under a category called "Sexual Perversions," subsection "Sexual Orientation Disorders." The basic criteria for homosexuality were largely the same, but the definition of "Sexual Orientation Disorder" was different. *See* Zhongguo jingshengbing zhang'ai fenlei yu zhengduan biao zhun di san ban II [Chinese Classification of Mental Disorders II], <http://www.21jk.org/p/ZDBZ/papercontent.asp?recordid=642> (last visited Apr. 8, 2007) (listing the criteria for homosexuality and bestiality). The general definition for "Sexual Orientation Disorder" lists all such variations as abnormal. *See id.*

243. "Homosexuality" has been totally expunged from the Diagnostic and Statistical Manual of Mental Disorders in the United States. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 799-801 (2002).

4. Zero to Marriage

One might expect China, a place where so many homosexuals remain in the closet, not to have embarked on a discussion of gay marriage, but that is not the case. The few scholars in the area of gay and lesbian studies have been writing about issues of gay marriage and family for years.²⁴⁴ In addition, one scholar, Li Yinhe, has attempted to bring the issue before both of China's representative bodies: the National People's Congress (NPC) and the Chinese People's Political Consultative Congress (CPPCC).²⁴⁵

Chinese marriage law does not explicitly prohibit gay marriage,²⁴⁶ nor have officials introduced any antigay marriage amendments or Defense-of-Marriage-Act-type provisions. In the face of a growing gay movement, an increase in NGOs, and the AIDS crisis, the response of the Chinese government to gay issues has only become softer, and, although it may be because the size of the gay movement has not reached a threatening stage, there is not yet any sign of a significant backlash. When Li Yinhe proposed gay marriage provisions during the recent revisions of the Marriage Law, she was told China was not ready for gay marriage.²⁴⁷ The provision was not inserted, but no explicit prohibition was inserted either.²⁴⁸ Similarly, in 2003, Li Yinhe was not able to obtain the thirty votes necessary under Chinese legislative procedure to propose a plan for gay marriage to the National People's Congress.²⁴⁹ In 2006, although she obtained the support of one anonymous delegate to the CPPCC, the proposal failed.²⁵⁰

Of course there is opposition to gay marriage in China, but there is also some support. In a 2005 poll conducted online by Li Yinhe, only

244. See, e.g., ZHANG BEICHUAN, *supra* note 11; LI YINHE, *supra* note 175, at 195; LIU DALIN ET AL., *supra* note 75.

245. See App.

246. Hunyin fa [Marriage Law], art. 2 (promulgated by the Standing Comm., Nat'l People's Cong., Apr. 28, 2001, effective Apr. 28, 2001) (P.R.C.), http://www.law-lib.com/law/law_view.asp?id=15279.

247. Anonymous Interview, in Beijing, China (Jan. 8, 2006).

248. An official from the Ministry of Civil Affairs did say that China would not allow any such marriages. *China Makes Most Marriages Easier*, CNN.COM, Aug. 20, 2003, <http://www.cnn.com/2003/world/asia/ref/east/8120/chinamarriage/index.html> (citing an official from the Ministry of Civil Affairs who stated that the Chinese Marriage Law forbids gay marriage). This statement is questionable. The Chinese Marriage Law does not *explicitly* forbid gay marriage. See Marriage Law, art. 4 (using the term "fuqi" or "husband and wife").

249. *Gudu de xuezhe Li Yinhe* [*The Lonely Scholar, Li Yinhe*], NANFANG ZHOUMO [S. WEEKEND], Mar. 24, 2006 [hereinafter *Lonely Scholar*] (on file with author).

250. Li Yinhe, Guanyu tongxing hunyin de ti'an [Proposal for a Gay Marriage Bill] (Jan. 26, 2007), <http://www.bullog.cn/blogs/liyinhe/archives/24414.aspx>. The full proposal appears as an appendix to this Article.

thirty percent of the respondents said that gays should not have the right to marry, while seventy percent were in favor of it.²⁵¹ Conversely, there are unproductive arguments that extend the logic of allowing gay marriage into a perverse dimension. Consider the following commentary on Li Yinhe's marriage plan and her answer:

[Respondent:] "I would like to marry a dog. Would you mind helping me to present a legislative plan on this issue. . . ."

[Professor Li:] "Human rights are not dog rights. Perhaps you should find a nation of dogs."²⁵²

Despite some encouraging signs, even the main proponent of gay marriage herself, Li Yinhe, is not optimistic that gay marriage will materialize in the near future.²⁵³ Although the media reported extensively on Professor Li's marriage proposal, the true test of how far gay activists can go without a backlash is whether more homosexuals begin to come out of the closet in larger numbers in urban areas.²⁵⁴

5. Adoption

In this context, it seems appropriate to say something brief about the future of homosexual adoption in China. Like marriage, Chinese law says very little about homosexual adoption. The PRC Adoption Law and its implementing regulations neither explicitly prohibit nor explicitly allow homosexual adoption.²⁵⁵ Some gay couples, whether in the closet or open about their sexual orientation, have adopted children in their homes.²⁵⁶ Still, the government has not expressed an encouraging attitude towards adoption. Consider the following statement by the Chinese Center for Adoption Affairs in the Ministry of Civil Affairs.

The Center for Adoption Affairs does not support homosexuals seeking to adopt a child. With regard to [Chinese] Law, the Marriage Law of the People's Republic of China only recognizes households composed of heterosexual couples, and it does not recognize the legality of homosexual

251. See Zhuan fang xingxuejia Li Yinhe: qishi tongxinglian rutong qishi zuopiezi [Interview with Li Yinhe: Discriminating Against Homosexual Love Is Like Discriminating Against Left-Handed People], TOM NEWS, Feb. 17, 2006, <http://news.tom.com/2006-02-17/0027/13720351.html>, for the results of the poll.

252. *Lonely Scholar*, *supra* note 249 (author's translation).

253. *Id.*

254. *Id.*; see also *Zhengxie fayan ren cheng tongxing hunyin tai chaoqian* [Chinese Political Consultative Congress Spokesperson Says Gay Marriage Too Premature], NANFAN DUSHI BAO [S. METROPOLITAN], Mar. 5, 2006 (on file with author).

255. Shouyang fa [Adoption Law] (promulgated by the Standing Comm., Nat'l People's Cong., Nov. 4, 1998, effective Apr. 1, 1999) (P.R.C.), <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=44778>.

256. See, e.g., *Two Males' Twenty-Year Marriage*, *supra* note 3.

households. Homosexual households are not protected by the law. With regard to Chinese medical science, China's Standards for the Classification and Diagnosis of Mental Disorders states that homosexuality is a kind of sexual dysfunction belonging to the "psychological sexual dysfunction" class of mental disorders. With regard to traditional Chinese ethics and the people's sentiment and customs, homosexual behavior offends the public morals of society and is not accepted by society. According to the PRC Adoption Law, adoption may not offend principles of public morals, and, therefore, homosexual foreigners may not adopt children from China.²⁵⁷

This legal analysis is deficient in many ways. First, marriage and the ability to adopt are not linked under Chinese adoption law because single persons can adopt children. At the end of 2006, the *New York Times* reported that new rules on foreign adoptions with highly restrictive criteria for adoptive parents would take effect in May 2007. The rules require that children be adopted into a family where the world-be parents have been married for at least two years (this requirement becomes harsher if either spouse was previously divorced), are no greater than fifty years old, and meet certain mental and physical requirements.²⁵⁸ Again, it is hard to reconcile such restrictive rules with the more liberal adoption law. Second, in 2001, the blanket classification of homosexuality as a disease was removed from China's psychological manuals.²⁵⁹ Now, only some forms of homosexuality are considered a disease, a factor which weakens the basis for the second reason for a blanket prohibition on homosexual adoption.²⁶⁰ Third, there is a long tradition of homosexual behavior throughout Chinese history. It has only been in the last hundred or so years that the government has truly begun to crack down on homosexual behavior.²⁶¹ The Adoption Affairs Center's statement does, however, show that although the government can at times be friendly or just helpfully ignorant about homosexuality, pockets of more direct hostility do exist.

V. HOMOSEXUALS AS A GROUP, REEXAMINED

The Parts above illustrate that the government and society have gradually recognized homosexuals as a distinct group in Chinese society.

257. *Tongxinglian zhe nengfou zai zhongguo shouyang zinu?* [Can homosexuals adopt girls and boys in China?], WWW.GOV.CN, Oct. 12, 2005, http://www.gov.cn/banshi/2005-10/12/content_76246.htm (author's translation).

258. Pam Belluck & Jim Yardley, *China Tightens Adoption Rules for Foreigners*, N.Y. TIMES, Dec. 20, 2006, at A1.

259. See *supra* Part IV.C.3.

260. *Id.*

261. See *supra* Part IV.A-B.

And, to some extent, law and society have also begun to draw hetero-homo lines. The 1957 Supreme People's Court interpretation did not speak in terms of homosexuals as a group and homosexuality as an identity, but instead of behavior.²⁶² By the late 1980s and with the slow recognition of the AIDS epidemic by the government, laws and regulations began to mention "homosexuals" (*tongxinglian zhe*).²⁶³

As the law slowly begins to recognize the homosexual identity in China, an equality debate is emerging. This debate is emerging during a larger, fiercer international debate on gay equality in other countries around the world. This debate fits into a larger debate on equality in Chinese society and the groups (women, children, the elderly, the poor, and ethnic minorities) that require legal protection. Homosexuals may eventually gain legal protection as their disadvantaged circumstances are exposed by the Chinese and international media. As the Parts above indicate, however, the protection laws of the past have often reinforced traditional stereotypes and have done little to promote true equality. Laws that purport to promote gender equality are one example. Homosexuals may also become both the beneficiaries and victims of these types of laws.

VI. CONCLUSION

The general message of this piece is that, as with all other things in China, law and policy on gays and lesbians within Chinese society are currently in transition. The developments in the last few years have been quite positive for gays and lesbians, but these developments are occurring in a system that faces significant legal infrastructure problems and human rights abuses.²⁶⁴ The overwhelming number of gays and lesbians in China are in the closet and either too frightened, or unable, to vindicate their rights in court or through other administrative means. So, although there is certainly reason for encouragement, there are still tremendous obstacles to overcome.

262. Li xx & Li xx (Sup. People's Ct., Apr. 9, 1957) (on file with author).

263. See, e.g., National Plan for the Prevention of AIDS 1987-1991, *supra* note 202, art. I(6).

264. See Jerome Alan Cohen, *China's Legal Reform at the Crossroads*, FAR E. ECON. REV., Mar., 2006, at 23, for an excellent and current summary of challenges facing the legal system.

APPENDIX:

LI YINHE'S PROPOSAL FOR A GAY MARRIAGE BILL ²⁶⁵

The following is a proposal that our nation pass legislation permitting gay marriage. The reasons are as follows:

According to the current law, homosexuality is not illegal, and homosexuals enjoy the same rights as all citizens of the People's Republic of China. There are those among the homosexuals who have a desire to marry, and their desire and their rights as citizens do not conflict. Therefore, their rights should be accorded recognition.

Recognizing that gays and lesbians are a minority group, many nations have already enacted protective antidiscrimination legislation for them. A growing number of Western nations have already recognized gay marriage and domestic partnerships for gays and lesbians. The earlier ones were Australia and the Northern European nations. The later ones were Canada, France, Germany, and some states (e.g., Massachusetts) and cities (e.g., San Francisco) in the United States. If our country permits gay marriage, which belongs to legislation that protects the rights and interests of minorities and opposes discrimination, then, in terms of human rights, it will put our nation in an advanced position in world, and we can prove that our Party and our government represent an advanced culture and gain an advantage in human rights struggles with Western nations. In terms of legislation on homosexuality, several Western nations, particularly Catholic countries, are under religious pressure, making it very difficult to pass legislation that protects the rights and interests of this minority. Chinese traditional culture, however, is not terribly antihomosexual, and this is an advantageous background for human rights purposes that we should take full advantage of. Once Chinese law protects gay marriage, it will become an advantageous piece of evidence that our nation protects human rights. It will make United States federal law, which barely allows homosexuals to join the military, look deficient.

Because homosexual relationships may not take the form of a marriage with all its restraints and protections, it will be easier for some homosexuals to casually seek out partners, increasing the likelihood of

265. Li Yinhe, Guanyu tongxing hunyin de ti'an [Proposal for a Gay Marriage Bill] (Jan. 26, 2007), <http://www.bullog.cn/blogs/liyinhe/archives/24414.aspx> (author's translation). The draft bill was submitted by scholar Li Yinhe to the Chinese People's Political Consultative Congress in March 2006, and she plans to resubmit it in the March 2007 session. See *id.*; Posting of oga to Lazi T, <http://lazi.worldpress.com/2006/09/06/%e5%81%89%e5%a4%a7%e7%9a%84%e6%9d%8e%e9%8a%80%e6%b2%b3/> (Sept. 6, 2006).

transmission of sexually transmitted diseases. If, on the other hand, we recognize same-sex marriages, a great many homosexuals will establish and maintain longer relationships and avoid short-term relationships, thus decreasing the likelihood of transmission of sexually transmitted diseases.

Historical and cross-cultural research reveals that nations where the population is increasing with greater pressure all generally take a more relaxed policy approach to homosexuality, whereas nations with a smaller population are stricter. The reason for this difference is that if there is this type of a large group of people not reproducing, it will directly impact the population of a country. According to statistics, male and female homosexuals make up three to four percent of the population, which in China means between thirty-nine and fifty-two million people. Because China does not permit gay marriage, homosexuals will marry and reproduce with opposite sex partners. If they could live their lives with same sex partners, and this large group did not reproduce, this would have advantages in China for population control.

Our nation has successful experience protecting the rights and interests of minorities and vulnerable groups. For example, in protecting the rights and interests of ethnic minorities and the rights of women and children we are among the leaders in the world. Granting protection to homosexuals, a vulnerable minority group, will make our nation more open and progressive, and create a more tolerant and harmonious atmosphere amongst groups in society, which has advantages for the stability of the state and society. Lately, in Western society homosexuals have unceasingly protested and come into conflict with majority culture. But a harmonious, tolerant approach is more in accordance with the peace-loving harmonious spirit of Chinese culture.

In sum, there are a hundred advantages and not one single disadvantage to China recognizing same-sex marriages. For the sake of the rights and interests of the state, the people, and the homosexual minority, I propose this draft and hope that it will be approved.

Attached: The concrete reform proposal has two parts: one is to establish legislation to permit homosexual marriage; the second is to amend the current Marriage Law. In the Marriage Law the words “husband and wife” should be amended to “spouses.” At the first mention of the word “spouse” the phrase “not limited by sex” should be added.