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Institutional Paths to Policy Change: Judicial Versus Nonjudicial Repeal of Sodomy Laws

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What variables lead judicial and nonjudicial decision-making bodies to introduce policy change? In the theoretical framework proposed, the path-dependent nature of law has a differential impact on courts and legislatures. Likewise, certain political institutions including elections and political accountability lead those bodies to introduce policy change under dissimilar circumstances. Global trends, however, affect both institutional paths equally. We test this theory with data for the repeal of sodomy laws in all countries from 1972–2002. Results from two disparate multivariate models overwhelmingly confirm our predictions. The unique institutional position of courts of last resort allows them to be less constrained than legislatures by either legal status quo or political accountability. Globalization, on the other hand, has a comparable effect on both. This work is path breaking in offering a theoretical framework explaining policy change via different institutional paths, systematically testing the framework comparatively and with respect to a policy issue still on the agenda in many countries.

In 1969, the Canadian Parliament passed the Criminal Law Amendment Act. Among other sweeping changes to the existing criminal code, the Act decriminalized consensual same-sex relations, effectively repealing sodomy laws, which had been a part of Canadian jurisprudence since its inheritance of the English Buggery laws (McLeod 1996). A mere two years earlier, the Supreme Court of Canada had upheld the conviction of Everett George Klippert who had been sentenced to an indefinite prison term as a “dangerous sexual offender” for engaging in consensual sex with another man (*Klippert v. the Queen* 1967). The Court’s decision elicited strong condemnation from the Canadian legal community, causing Justice Minister Pierre Trudeau to table legislation in the House of Commons to amend the criminal code

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(Kinsman 1995). Heavily influenced by the United Kingdom's 1957 Wolfenden Report, the repeal initiative was added to a larger reform effort that called for the creation of a "zone of legal privacy . . . for acts committed between consenting adults." The combination of global trends and legal evolution led to significant policy change emanating from the Canadian legislature and culminated in passage of the 1969 Criminal Law Amendment Act.

Three decades later, the South African Constitutional Court ruled in *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* (1998) that three legal provisions pertaining to sodomy were all "inconsistent with the Constitution of the Republic of South Africa" including Section 20A of the Sexual Offences Act of 1957, which banned all sexual contact between males, Schedule 1 of the Criminal Procedure Act of 1977, which prohibited sodomy, and sections of the Security Officers Act of 1987, which excluded men found guilty of committing sodomy from employment as security officers. The Court referenced Section 9(3) of the 1996 Constitution in its opinion, which explicitly banned discrimination on the basis of sexual orientation (Jagwanth 2004). Demonstrating the potential of a strong judiciary backed by a "modern document designed for the twenty-first century" (Wing 2008), the South African Court found it within its powers to repeal the sodomy provisions.¹

The cases mentioned earlier relating to the rights of lesbian, gay, bisexual and transgender (LGBT) citizens from diverse parts of the globe both resulted in policy change. Yet, the institutional route leading to change differed significantly. In the first case, repeal of sodomy laws took place in the legislature. In the second, a court of last resort altered the status quo (legal status quo is used hereinafter interchangeably with legal state-of-affairs). Given the strong initial resistance to such change, as well as the potential backlash against the advancement of gay rights (D'Emilio 2006; Keck 2009; Klarman 2005; Rosenberg 2008), this area of the law is of particular interest for the study of paths to policy change.

What prompts a policy question to be resolved in courts rather than legislatures or vice versa? Developing a theory explaining why judicial bodies are in some instances the institutions charged with undertaking policy change while in others the location of important policy innovation is in nonjudicial institutions is the primary goal of

¹ Throughout this article, we examine policy changes as they pertain to the country as a whole. Therefore, if in a federal system some of the political units decriminalized sodomy while others did not, it is not until there is a blanket decision pertaining to the entire nation that we code for policy change. As an illustration, in the case of the United States, while some states repealed sodomy laws prior to the decision of the Supreme Court in *Lawrence v. Texas* in 2003, it was not until this decision that policy in the entire country changed uniformly. For that reason, the change in this country is coded as repeal by judicial means.

1 this study. We then turn to offer a robust empirical test for the
2 theory (we refer only to courts of last resort under the category of
3 judicial institutions; with only one exception, we refer to legisla-
4 tures as nonjudicial institutions).

5 The theoretical framework proposed here accounts for three
6 factors that influence policy change including legal path depen-
7 dence, political accountability, and globalization. We expect on the
8 basis of stark institutional differences that the first two predictors of
9 policy change will have a disparate impact on judicial compared
10 with nonjudicial institutions while the third will have a similar effect
11 on both. We take each of these issues up in turn.

12 First, courts of last resort are uniquely situated to change policy
13 despite the path-dependent nature of *stare decisis* (Kahn 2006;
14 Segal and Spaeth 2003). This does not hold for legislative bodies or
15 even lower-level judicial bodies which, compared with courts of last
16 resort, are more constrained by precedent (Segal and Spaeth 1996;
17 Songer, Segal, and Cameron 1994).² This logic leads to a *prima*
18 *facie* counterintuitive conclusion that, in certain ways, courts of last
19 resort are less constrained by the legal status quo than other politi-
20 cal and legal actors. The way it is used here, legal path dependence
21 refers to the process through which the legal state of affairs, formed
22 by past decisions, influences and informs future legal outcomes.

23 Second, apart from legal path dependence, we expect certain
24 political institutions and arrangements (i.e., the electoral rules
25 that enhance political accountability) to also affect those decision-
26 making bodies differently. In the context of sodomy reform, we
27 expect the presence of religious constituencies to influence the
28 locus of policy change. Indeed, past research has suggested that
29 these constituencies have a significant impact on the accountability
30 of government officials, as well as the trajectory of public policy
31 decisions (Adserà, Boix, and Payne 2003; Castles 1994; Fox 2001).
32 Such constituencies would constrain legislators but have a more
33 limited effect on justices who are, by institutional design, more
34 insulated from the electorate.³

36
37 ² Lower court justices do not enjoy the same type of institutional freedom as courts of
38 last resort. This is primarily because their decisions are subject to review by higher courts
39 and may be reversed if “incorrectly” decided (Segal and Spaeth 1996). Lower court justices
40 are thus unable to use their positions to affect policy change unless those changes are
41 endorsed and actively pursued by courts of last resort.

42 ³ We concede, despite the relative isolation of judges from politics, that courts of last
43 resort tend to be majoritarian rather than counter-majoritarian bodies. Indeed, the American
44 case is clear evidence to suggest that courts of last resort never stray too far from public
45 opinion (Barnum 1985; Flemming and Wood 1997; McCloskey 2010; Mishler and Sheehan
46 1993), or from the views of national elites (Dahl 1957; Whittington 2007). The reason
47 being, of course, that judges must compete with legislatures and executives for control over
48 policy while protecting the court as a governing institution. Nonetheless, while judges may

1 Finally, we expect globalization trends to similarly influence the
2 introduction of policy change via judicial and nonjudicial bodies.
3 Globalization has a pervasive effect in society. Social, political, and
4 economic globalization affects political entrepreneurs, public
5 opinion, political organizations, as well as social movements (Frank,
6 Boucher, and Camp 2009). Such trends, therefore, are likely to
7 equally impact courts, which are engaged in transnational judicial
8 dialogues, as well as legislatures, which are immersed in the glo-
9 balizing political system.

10 We use data for the repeal of sodomy laws in the period
11 between 1972 and 2002 to estimate two sets of models (generalized
12 estimating equation [GEE] time-series cross-sectional and multino-
13 mial logit analyses). Separate analyses for all countries and for
14 democracies only confirm that the predictors with differential
15 effects are legal path dependence and political accountability. Glo-
16 balization, on the other hand, similarly affects decisionmaking in
17 judicial as well as nonjudicial institutions.

18 It is important to note from the outset that sodomy reform is
19 only one piece of the puzzle for LGBT rights. Accordingly, we
20 recognize that countries where same-sex relations are legal are not
21 necessarily places where members of the LGBT community are
22 treated equally (Waldijk 2000). Legalization of sodomy, hence, is
23 not the ultimate yardstick for discrimination against sexual minori-
24 ties. With that in mind, however, an examination of the repeal of
25 sodomy laws is key to developing a better understanding of the
26 rights of the LGBT community cross-nationally. Although legal
27 change may not always precipitate change on the ground (Epp
28 1996), the repeal of sodomy prohibitions is still a meaningful policy
29 choice that warrants scholarly attention. While a court decision or
30 a legal measure may fail to translate into full equality for the
31 minority they aim to protect, such legal change has a declaratory
32 value, is educational, and provides members of the minority group
33 with venues to claim redress (McCann 1994; Scheingold 2004;
34 Waldijk 2000; Zemans 1983).

35 36 **Can Courts Change Policy?**

37
38 Scholarship on American politics has extensively entertained
39 questions concerning courts as policy makers and, more specifically,
40 concerning the way in which courts as policy makers relate to and
41 compare with other institutions. A common understanding is that

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44 have to adjust their decisions to reflect the views of national majorities, their institutional
45 position offers them a unique opportunity to initiate change in the presence of shifting
46 political winds.

1 not only do courts rarely initiate policy change against the prefer-
2 ences of national majorities (Barnum 1985; Dahl 1957; Flemming
3 and Wood 1997; Funston 1975; Mishler and Sheehan 1993), but
4 that courts are in fact incapable of initiating such change and
5 are therefore a “hollow hope” for those seeking social change
6 (Rosenberg 2008, 1991). More recent scholarship, however, has 2
7 suggested that the interactions between courts and legislatures is
8 better understood as one in which the elected branch actively seeks
9 to involve the judiciary in the policy-making process. Specifically,
10 Graber (1993) and Lovell (2003) have argued that when resolving
11 controversial social issues, elected lawmakers wary of alienating
12 constituents with strongly held moral convictions will defer deci-
13 sionmaking to courts by delaying action on these issues, or by
14 intentionally inviting judicial intervention through vague and
15 ambiguously worded statutes. Most recently, Whittington (2007)
16 has suggested, much as Dahl did fifty years earlier, that courts are
17 often used to reinforce and uphold the policies of the dominant
18 political regime. Given the controversial nature of sodomy reform,
19 this line of reasoning would suggest that policy change is more
20 likely to be initiated by judges in countries where elected officials
21 would prefer to avoid being held accountable for their stance on
22 the issue.

23 With few exceptions, comparative public law has had little to
24 add to this discussion.⁴ By analyzing different institutional paths to
25 policy change in a large-N framework, we hope to identify *systematic*
26 effects and thus go beyond case studies to make meaningful con-
27 tributions to these debates in the literature (Epp 1998; Frank,
28 Boutcher, and Camp 2009). We elucidate whether policy change
29 may emanate from courts of last resort and, if so, how this policy
30 change compares with policy change originating in the elected
31 branches. A key explanatory variable in this context is legal path
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33
34 ⁴ The study of law in a comparative context is by no means a novel idea (Ehrlich 1921;
35 Goodnow 1893). One category of studies within comparative law considers a broad set of
36 exogenous and endogenous influences on various legal systems and their policy outputs. In
37 addition, some of the work examines the differences between the legal reasoning of judges
38 from different countries, regions, and legal traditions (Chu 2009; Halberstam 2010; Kiikeri
39 2001; Whytock 2009). Other scholarship examines the implications for American jurispru-
40 dence (Tushnet 1999). What these scholars have in common is that they are all concerned
41 primarily with how foreign actors and structures influence the behavior of members of the
42 judiciary in other states, and in this respect, limit their analyses to the cross-influences
43 of courts upon one another, while largely ignoring the role of other political actors. What
44 these studies indicate is that many of the same factors including institutional features (e.g.,
45 federal structures and constitutions) (Hirschl 2004, 2010; Maioni 1998; Rayside 2008;
46 Rose-Ackerman 2010; Urribarri, Songer, and Schorpp 2008), resources (Atkins 1991; Epp
47 1998; Galanter 1974; Haynie 1994), judicial ideology (Dotan 1999; Sheehan, Mishler, and
48 Songer 1992), and rights consciousness (Ewick and Silbey 1999) influence the development
49 of individual rights across a wide range of countries, although sometimes in conflicting and
50 contradictory ways.

1 dependence, which is the process through which past decisions and
2 the legal status quo they produce constrain future legal outcomes.

3 4 **Legal Path Dependence and the Origins of Sodomy Laws**

5
6 Although analysts have had difficulty in developing a clear
7 definition of the meaning of path dependence (Mahoney 2000), we
8 refer specifically to the processes involving positive feedback, or
9 increasing returns, that induce further movement in the same
10 direction over time (North 1990; Pierson 2000, 2004; Smith 2008).
11 At the core of this definition of path dependence is the notion that,
12 once out of the gate, institutions stay on a particular path because
13 the costs involved in switching to a new path are prohibitively high
14 (Kahn 2006). The timing and sequence of events in such a theory
15 matters a great deal because future outcomes are shaped by past
16 decisions (Maioni 1998; Pierson 2004; Rose-Ackerman 2010).

17 While past research indicates that the phenomenon of path
18 dependence is widespread in politics (Ertman 1997; Hacker 1998;
19 Huber and Stephens 2001; Kurth 1979; Pierson 2000, 2004), relatively
20 little has been said regarding the path-dependent nature of
21 legal development. We define precedent as previously defined legal
22 rules. In a Common Law system, the principle of stare decisis
23 dictates that precedent must be upheld and respected in future
24 cases. As an important institutional norm, stare decisis produces the
25 law's path-dependent character (Hathaway 2003). Specifically, stare
26 decisis compels lawmakers to respect the decisions of their predecessors.
27 Once a precedent is set, lawmakers have limited ability to
28 switch paths and induce change.⁵ In sum, by explaining how the
29 legal system has the capacity to lock-in laws and thus generate
30 stability over time, path dependence is critical for explaining the
31 legal state of affairs. This is also true, we argue, in the realm of
32 sodomy laws.

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35 ⁵ We believe that precedent is "flexible" and in some instances may be circumvented
36 by both judges and legislators. Indeed, judges are free to choose among precedents that
37 coincide with their own subjective interpretation of the facts. Moreover legislators may act
38 to overturn precedent. In the United States, for example, Congress can pass legislation
39 (amendments) in order to reverse statutory (constitutional) interpretations, while in
40 England legal precedents can be overruled by subsequent Acts of Parliament. However,
41 precedent is not without meaning. Ultimately, lower court judges adhere to precedent to
42 avoid being overruled (Segal and Spaeth 1996; Songer, Segal, and Cameron 1994), while
43 members of courts of last resort uphold precedent in order to maintain institutional
44 legitimacy and prestige (Epstein and Knight 1998). At the same time, it is often difficult
45 for legislators to reverse precedent given the majority, and sometimes supermajority, requirements
46 necessary to do so, and because the principle of precedent is deeply ingrained in the
47 legal culture of many Common Law systems (Brigham 1991; Gillman 1999; Hathaway
48 2003).

1 The British Buggery Act of 1533 is the source of criminalization
2 of sodomy not only in British law, but in many countries beyond the
3 British Isles as well. Common Law, which was adopted by and/or
4 imposed on other countries by the British Crown, led to the crimi-
5 nalization of sodomy in countries as diverse as India, New Zealand
6 and Israel. Under the doctrine of *stare decisis*, decision makers in
7 these countries worked to uphold sodomy prohibitions.⁶ French
8 Civil Law, on the other hand, did not include an equivalent provi-
9 sion criminalizing the act of sodomy. The historically religious
10 source of the proscription on sodomy led the National Constituent
11 Assembly to reject its definition as a crime following the French
12 Revolution (Sanders 2009). French Civil Law was subsequently
13 introduced in many European countries as a result of French occu-
14 pation during the Napoleonic Wars and in many Latin American
15 countries owing to colonization. The notion of path dependence
16 applies equally to Civil Law systems; this unique point of departure
17 in French law influenced the development of sodomy reform in
18 other countries. Ultimately, sodomy laws were more likely to have
19 been repealed in Civil Law countries.

20 To summarize, path dependence leads us to expect not only
21 that the likelihood of legal prohibitions on sodomy in countries
22 where Common Law systems is greater, but also that the likelihood
23 of those provisions is diminished in Civil Law countries. How does
24 legal path dependence, however, relate to differences in the insti-
25 tutional origins of policy change? As we elaborate later, legal path
26 dependence has a divergent impact on judicial and nonjudicial
27 branches in Common Law countries.

28 29 **Theory—Alternative Paths to Policy Change**

30
31 In the theoretical framework proffered here, legal path depen-
32 dence and political accountability have differential effects on policy
33 change emanating from courts of last resort compared with change
34 originating in nonjudicial bodies. Courts, legislatures, and execu-
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37 ⁶ It is widely recognized by scholars that legal prosecutions for sodomy are relatively
38 rare. In the American context, see the Supreme Court's opinion in *Lawrence v. Texas* (2003),
39 as well as Leslie (2000), D'Emilio (1998), Rosen (1980–1981), and Weinberg and Williams
40 (1974). With respect to similar patterns of judicial nonenforcement in other countries, see
41 Gupta (2006). Despite the lack of enforcement of sodomy statutes, the laws still carry
42 significant meaning. Legal proscriptions against sodomy are important because they have
43 been used in combination with moral and even medical condemnations of homosexuality
44 to create an environment hostile to policy change. Thus, it is the existence of sodomy laws,
45 rather than their enforcement, that serves to diminish the societal status of gay men and
46 lesbians, criminalize their behavior, and create an environment where violence, harass-
47 ment, and discrimination against the LGBT community is tolerated and, in some instances,
48 even encouraged.

tives operate within a system where different institutions compete with one another over spheres of influence (Clinton 1994; Eskridge 1994; Spiller and Gely 1992). While the role of the elected branches of government in policymaking is relatively clear-cut, debates in the literature still exist concerning the extent to which courts function in the capacity of policy changers (Keck 2009; Klarman 2004; Rosenberg 2008). Yet, as the examples from South Africa and Canada (as well as other cases including Chile, the United States, Ecuador, and elsewhere) demonstrate, policy change takes place in both judicial and nonjudicial contexts. The key question, therefore, is not whether courts can initiate policy change—they do. Rather, we are interested in the difference in predictors of change emanating from each type of institution. To examine the alternative paths to policy change, we first examine the motivations underlying the actions of those different decision-making bodies and then analyze the differential effects of legal path dependence on each. In addition, we discuss the importance of political institutions insofar as political accountability dictates a differential effect of constituencies on decision makers in nonjudicial bodies compared with judicial ones. We then examine a range of control variables.

Motivations of judicial and nonjudicial bodies differ. On the one hand, reelection is a major motivation for elected officials and their policymaking unfolds accordingly (Jacobson 2004; Hall 1996; Fenno 1996; Kingdon 1989; Mayhew 1974). On the other hand, the introduction of policy change by courts may add to the court's legitimacy *if* such policies are respected and upheld (McCloskey 2010; Whittington 2007; Tushnet 1999; Lovell 2003). Although a parallel argument can be made about the introduction of successful policy change by nonjudicial bodies, questions about institutional legitimacy are particularly concerning for judicial bodies. This is because the judiciary lacks, as Hamilton puts it, "influence over either the sword or the purse." Courts, therefore, face potential challenges to their legitimacy both in terms of their lack of electoral unaccountability, as well as the danger that their pronouncements will either face significant delays in their implementation (Rosenberg 1991) or be ignored altogether (Bigel 1991). On the other hand, by embedding changing social, political, and economic realities in legal precedent, judges increase the likelihood that their decisions will be accorded respect and support by both political elites and the public (Kahn 1999, 43)⁷.

⁷ Granted, active attempts at altering the status quo, as in the case of the repeal of sodomy laws, will likely be more challenging for judicial as well as nonjudicial actors than a more passive affirmation of existing status quo. All of this is not to suggest that nonjudicial officials are themselves unconcerned with the success or failure of their own attempts at policy change. At least in the American context, the "perpetual tension" between the

1 The process through which law and politics mutually construct
2 each other, combined with the unique institutional position of
3 courts of last resort, lead to the somewhat counterintuitive conclu-
4 sion that, in some instances, courts of last resort are less constrained
5 by the legal status quo (Kahn 2006; Segal and Spaeth 1996, 1999, 5
6 2003).⁸ Key to our argument is the notion that, compared with the
7 decision-making process in nonjudicial institutions, the effects of
8 legal path dependence on decisionmaking in courts of last resort
9 are commensurably *weaker*.

10 As Chief Justice Marshall writes for the Court in *Marbury v.*
11 *Madison*: “It is emphatically the province and duty of the Judicial
12 Department to say what the law is.” Justices in a court of last resort
13 are in a position to recognize changes taking place in society and, by
14 institutional design, are free to act accordingly. These justices have
15 the (often exclusive) privilege to interpret constitutional and statu-
16 tory law, typically enjoy long tenures (life-appointments in many
17 cases), have no superior court to overrule their decisions, and
18 sometimes can even set their own agenda (Segal and Spaeth 2003).
19 Furthermore, legal decisionmaking does not amount to a dry applica-
20 tion of legal principle. To justify a change in policy, judges must
21 show that existing precedents are unreasonable or mistaken.⁹
22 Scholars have thus argued that, unlike lower courts, a Supreme
23 Court is not always bound by its own decisions (Hathaway 2003;
24 Thurman 1992; Cooper 1988). The unique institutional position 6
25 enjoyed by courts of last resort, combined with judicial detachment
26 from the vagaries of day-to-day political reality, enable judges to
27 recognize when competing claims in the polity make social change
28 possible (Kahn 1999).

30
31 Congress and the president can at times lead one branch to frustrate the attempts at policy
32 change of the other (Kahn 1981). In addition, failed efforts at policy change by the elected
33 branches are sometimes the result of courts striking down statutes passed by the legislature
34 (see also Clark 2009; Glick 2009; Rasmusen 1994). Finally, the judiciary has at times also
35 challenged policy initiatives undertaken by the executive (e.g., in the context of war powers,
36 see Fisher 2005 and Brandon 2005). Nevertheless, the constraints on nonjudicial policy-
37 making authority are primarily political (Fenno 1996; Mayhew 1974, Kingdon 1989, 45
38 inter alia).

39 ⁸ Kahn (2006) explicitly makes this argument—courts of last resort sit atop a hierar-
40 chical structure that not only enables them to incorporate changing “social facts” into law
41 (because they are isolated from public opinion), but also relieves them from the fear of
42 being overruled. In other words, lower courts are more constrained by law than courts of
43 last resort because lower courts avoid making decisions they know will be overturned by a
44 higher court; for example, decisions that do not adhere to established precedent. See also
45 Segal and Spaeth (2003) in that matter.

46 ⁹ In *Lawrence v. Texas*, for instance, the United States Supreme Court announced that
47 it had misapprehended the liberty claim presented in *Bowers v. Hardwick*, as well as over-
48 stated the historical premises upon which the decision had been based. Consequently, the
49 Court ruled that *Bowers* amounted to an invalid interpretation of the Constitution, and was
50 thus subject to reversal.

1 The way we conceptualize the legal status quo is not as black
2 letter law, but rather as the set of rules that comprehensively orga-
3 nizes and constitutes the political, social, and economic spheres
4 (Brigham 1999; Ewick and Silbey 1998; Kahn 2006). Granted,
5 constitutional separation of powers and checks and balances work
6 to ensure that precedent operates as a significant constraint on
7 legislative bodies. For instance, this principle forbids elected offi-
8 cials from ignoring precedent simply because they disagree with
9 the Court's decision. Yet, our argument goes deeper; because the
10 legal status quo is entrenched in various aspects of the political,
11 social, and economic systems, path dependence operates as a more
12 significant constraint on legislative bodies. Introducing a contro-
13 versial policy game-changer is prohibitively costly for legislators
14 who operate in a political system and in a society that are organized
15 according to the existing legal state of affairs. Constituencies, inter-
16 est groups, social organizations, parties, economic bodies, and
17 financial institutions all work within the framework of existing
18 policy and thus typically favor the status quo. In turn, elected
19 officials are held accountable to such groups because of sunk costs,
20 vested interests, and path dependence.

21 In the context of a contentious issue such as sodomy reform,
22 introducing a controversial policy change is particularly costly for
23 elected officials. Such officials may avoid the public pursuit of con-
24 troversial policy goals (Graber 1993). In the context of sodomy
25 reform, it is no wonder that many elected officials have refused to
26 come out in support of "a group of people despised by virtually
27 everyone . . . condemned by every significant religious tradition,
28 and pathologized by scientific experts" (D'Emilio 2006). In con-
29 trast, courts are more autonomous from ordinary politics. Indeed,
30 under certain circumstances, their independence leads judicial
31 decision makers, particularly in courts of last resort, to "ignore,
32 resist and even disregard robust political pressure" (Kahn and
33 Kersch 2006: 18).

34 The theory canvassed thus far would lend itself to two interest-
35 ing empirical tests. The paths to policy change in Common Law
36 compared with Civil Law countries will not be the same
37 (Merryman and Perez-Perdomo 2007: 46–47). First, we expect □
38 that having a Common Law system would decrease the likelihood
39 of legislative repeal because elected officials are confined to work
40 within the boundaries of existing precedent. Second, a system of
41 Common Law would not have the same effect on courts of last
42 resort as they are less constrained by path dependence and by the
43 legal status quo. In Common Law systems, the constraints gener-
44 ated by legal path dependence on policy change tend to limit
45 nonjudicial rather than judicial institutions, thereby increasing the
46 likelihood of judicial repeal. Because their operation is closely inter-

1 twined with the political, social, and economic systems, nonjudicial
2 institutions in Common Law systems are more constrained by the
3 legal state of affairs than the somewhat autonomous judicial bodies.
4 This would translate empirically into a differential effect of the legal
5 system:

6 *H₁*: Ceteris paribus, a Common Law legal system should decrease
7 the likelihood of legislative repeal.

8 *H₂*: A Common Law system may not affect or even increase the
9 likelihood of repeal by a court of last resort.

10 11 **Political Institutions and Religious Constituencies**

12 While their origins are Judeo-Christian, proscriptions on
13 sexual relations between people of the same sex are found in other
14 religions as well (Sanders 2009). Based on the principles of the
15 Qur'an, the central text of Islam, and Hadith, which are oral
16 traditions determining the Muslim way of life, Islam condemns
17 same-sex intimacy. While it is true that not all countries with a
18 Muslim majority treat same-sex-related activity as a crime, we do
19 expect that there is considerable pressure on public officials not to
20 repeal sodomy laws in countries with a strong Muslim constitu-
21 ency.¹⁰ Akin to Islam, Catholic dogma also condemns sexual rela-
22 tions between members of the same sex as sinful and contrary to
23 natural law (Dempsey 2008). Therefore, we predict that the higher
24 the percentage of Catholics in the population, the greater the
25 likelihood that the state will fail to decriminalize sodomy.

26 We contend further that the effect of religious constituencies on
27 disparate types of decision-making institutions would be different.
28 The dissimilarities between the two institutional paths relate to the
29 issue of accountability. We expect constituents to have a greater
30 impact on elected officials than on courts of last resort. In the
31 context of gay rights, and in light of the controversial nature of
32 sodomy reform, it is the religious constituencies that we expect to
33 have the most sway. In particular, we expect the two denomina-
34 tional groups discussed earlier, Muslims and Catholics, to have the
35 greatest impact (Adserà, Boix, and Payne 2003). Importantly,
36 though, religious constituencies would affect different government
37 institutions dissimilarly. Those constituencies would have greater
38 influence when decisionmaking in legislatures is concerned.
39 Worried about funding, reelection, or pressure from lobbyists and
40

41
42 ¹⁰ Sodomy prohibitions do not exist in some countries with a large Muslim constitu-
43 ency because they are relatively secular in nature (e.g., Indonesia), are multi-religious, or
44 because tolerance of same-sex-related activity has been entrenched in the system for years
45 (e.g., Turkey). See Murray and Roscoe (1997).

1 interest groups, officials in nonjudicial bodies are likely to pay heed
2 to this type of pressure and thus be more constrained in consider-
3 ing the repeal of sodomy laws. Important to our theory is the
4 notion that rather than diffuse public pressure, it is Muslim and
5 Catholic constituencies specifically that would target officials and
6 pressure them against repeal. The larger those constituencies, the
7 stronger the hypothesized effect on legislators would be. Courts, on
8 the other hand, with their *relative* autonomy from political pres-
9 sures, would be less affected.

10 This is not to say that judges are insulated from their own
11 political and cultural environments (see Gibson 1980; Giles and
12 Walker 1975; Vines 1964). These pressures may influence the like-
13 lihood of members of the judiciary to alter culturally entrenched
14 views of sexual minorities. However, *on balance*, we expect that the
15 realities of popular political influence will be felt much more
16 acutely by those least separated from the public at large, that is,
17 officials serving in the political branches. Furthermore, justices'
18 views of their own role typically do not include responsiveness to
19 majoritarian elements such as public opinion or popular will, which
20 in the context of sodomy laws, means the court may be less resistant
21 to change (Kahn 2006). In sum, unconstrained by accountability
22 like its political counterparts, and not perceiving responsiveness as
23 part of its role, the judicial branch is less threatened or influenced
24 by outside pressures.

25 *H*₃: Dominant religious constituencies should not affect the like-
26 lihood of repeal by courts.

27 *H*₄: Dominant religious constituencies should decrease the likeli-
28 hood of repeal by nonjudicial institutions.

29 Taken together, legal path dependence combined with political
30 accountability create a powerful explanation for the differences
31 between judicial and nonjudicial venues as initiators of policy
32 change. Yet, certain variables should be controlled for in order for
33 our analysis of the repeal of sodomy laws to be valid. Political
34 circumstances change as countries globalize, become more demo-
35 cratic, and as their gross domestic product (GDP) grows.

36 Globalization

37
38 Globalization has grown in scale, speed, and importance
39 (Kinnvall 2004). While some argue that globalization is not an
40 unprecedented phenomenon (Hirst and Thompson 1999;
41 Williamson 1996), current levels of globalization are different than
42 in the past. People move more freely across the globe as tourists,
43 immigrants, refugees, or international students and businessper-
44 sons (Appadurai 2000). Globalization has also increased contacts

1 among societies. There is heightened awareness of different political
2 arrangements through mass media. Likewise, there is a major
3 increase both in volume of trade and the financial flows involved as
4 well as in the intensity of these interactions and the key role of
5 information and communication technologies (Giddens 2002).
6 This phenomenon has reduced transaction costs across a range of
7 human interactions (Hollingsworth 1998) with vast political impli-
8 cations. It permits the exchange not only of goods and services, but
9 also of ideas, values, beliefs, and political institutions (Hermans and
10 Kempen 1998).

11 Scholars contend that globalization leads to more rights and
12 freedoms by diffusing the ideals of freedom and democracy
13 (Fukuyama 1992; Tsutsui and Wotipka 2004) or by forcing states to
14 adopt norms of rights and freedoms in response to increasing
15 international pressures (Finnemore and Sikkink 1998). Informa-
16 tion about alternative legal arrangements should be more readily
17 available in a globalized state. It becomes easier to identify alterna-
18 tive legal frameworks and the way civil rights and liberties in
19 general and gay rights in particular are organized in other juris-
20 dictions. In this sense, the strengthening of links among countries
21 allows for the diffusion of new human rights and norms of toler-
22 ance (Tsutsui and Wotipka 2004). Moreover, the world culture and
23 normative diffusion literature argues that the strengthening of links
24 between countries allows for the diffusion of new human rights and
25 norms of tolerance (Boli and Thomas 1997, 1999; Ramirez and
26 McEaney 1997). In terms of legal elites, an increasing trend
27 toward communication among members of the judiciaries across
28 national borders also seems to exist. For instance, to support its
29 2003 decision in *Lawrence v. Texas* (as well as in more recent cases),
30 the Supreme Court of the United States has cited a number of
31 authorities beyond the Fourteenth Amendment including *Dudgeon*
32 *v. United Kingdom*, a decision by the European Court of Human
33 Rights invalidating sodomy laws (Wells 2004).¹¹ In a more formal
34 context, the 1996 Constitution of South Africa, discussed earlier,
35 explicitly *requires* the consideration of foreign law by members of
36 the Constitutional Court. In the case of sodomy reform, we argue,
37 there is a norm diffusion that happens among countries. More
38 highly globalized countries should thus be more likely to repeal
39 their prohibitions.

40 Globalization has a pervasive effect in society and should affect
41 both institutional paths. Global trends are likely to equally impact
42 courts, which are engaged in transnational judicial dialogs, as well
43

44
45 ¹¹ Although this has not occurred without controversy, as evidenced by the vocal
46 opposition to references to foreign law in American courts led by Justice Antonin Scalia
47 (Finkelman 2007).

as legislatures, which are immersed in the globalizing political system. When the country is immersed in the global culture (socially and politically), political entrepreneurs, public opinion, political organizations, and social movements are able to recognize alternative legal arrangements within which to settle gay rights (Barclay et al. 2009). Thus, both courts and nonjudicial bodies should be in a position to repeal sodomy laws with greater social and political globalization.

H₅: Notwithstanding the institutional path, the likelihood of policy change increases with globalization.

We also control for GDP and for the democratic conditions in the country. To demonstrate the robustness of our findings, as described later, all models are estimated for all nations as well as for democracies only.

Data and Methods

Two sets of regression models are estimated to test the hypotheses. First is a multinomial logistic regression with year dummies, and the second is GEE time-series cross-sectional analysis. The dependent variable for the multinomial logit, *Repeal Type*, has three levels – 0 for no repeal; 1 for nonjudicial repeal; and 2 for judicial repeal. For the GEE analyses, three dependent variables are coded. *Legal* indicates whether a country decriminalized sodomy¹² (1 = sodomy is legal, 0 = otherwise). The second dependent variable for the GEE models is *Court Repeal*, which is coded 1 for countries where repeal happened in court in the three decades following 1972 and 0 otherwise. *Nonjudicial Repeal*, which is equal to 1 when nonjudicial institutions repealed sodomy, and 0 otherwise, is the third dependent variable for the GEE models. Data for all outcome variables are taken from the May 2009 report of The International Lesbian, Gay, Bisexual and Intersex Association.¹³ From 1972 to 2002, nine countries repealed their sodomy provisions via judicial institutions, while 35 countries repealed their statutes via nonjudicial institutions. Other than in Fiji where repeal originated with the executive, the legal measure against sodomy was revoked by the legislature in all other such cases. All countries

¹² For our purposes, decriminalization and legalization are both considered to be instances of the repeal of sodomy laws. While there may be some difference between the two concepts, the behavior we seek to explain is policy change and both legalization and decriminalization represent a shift in policy of the type we are interested in.

¹³ “State-sponsored Homophobia: A World Survey of Laws Prohibiting Same Sex Activity Between Consenting Adults”.

1 are listed in the appendix. Given common wisdom about policy
2 emanating from the political branches, the fact that over 20% of the
3 repeals in the three decades under examination here were via the
4 judicial path further underscores the significance of our research
5 question.

6 As for our predictors, *Common Law* is a dummy that equals 1 for
7 countries whose legal origin is Common Law and 0 otherwise.¹⁴
8 Based on the CIA fact book and Barrett (1982), *Percent Catholic* [12]
9 indicates Catholics as percentage of the population and *Percent*
10 *Muslim* indicates Muslims as percentage of the population. To
11 measure international connections, we use a measure of
12 globalization—the KOF Indexes of Globalization (Dreher 2006; [13]
13 Dreher, Gaston, and Martens 2008). The indexes for the globaliza-
14 tion variables are measured in line with the standard in compara-
15 tive public law (Frank and McEneaney 1999; Tsutsui and Wotipka
16 2004) and range from 0 to 100. Higher values indicate higher levels
17 of globalization. The index of *Political Globalization* is measured by
18 the number of embassies and high commissions in a country, the
19 number of memberships the country has in international organi-
20 zations, participation in United Nations peace-keeping missions, [14]
21 and the number of international treaties signed since 1945 (Dreher
22 2006; Dreher, Gaston, and Martens 2008). The *Social Globalization*
23 measure includes three categories of indicators: personal contacts
24 (e.g., telephone traffic and tourism), information flows (e.g.,
25 number of internet users), and cultural proximity (e.g., trade
26 books and number of warehouses of Ikea per capita) (Dreher
27 2006; Dreher et al. 2008). The *Globalization* predictor is a weighted [15]
28 average of social, political, and economic globalization. To measure
29 *Democratic Conditions*, we utilize the POLITY score, which was
30 imputed using Freedom House data. The scale ranges from -10
31 (least democratic) to 10 (Hadenius and Teorell 2005). GDP per [16]
32 capita in constant U.S. dollars at base year 2000 was used (Gleditsch
33 2002). See appendix for descriptive statistics and a correlation
34 matrix.

35 We use time-series cross-sectional data, listing all countries for
36 the years 1972–2002. The multinomial logit with year dummies is
37 the appropriate approach if we wish to include both legislative and
38 judicial repeals in the same analysis, because the dependent vari-
39 able is categorical. To test the effects of predictors on legislative and
40 judicial repeal separately, we employ a GEE model (Zorn 2001). A
41 marginal approach, such as the GEE, is appropriate because we are

42
43 ¹⁴ The coding scheme for the Common Law variable is based on La Porta et al. (1999). [46]
44 Their 5-categories variable was turned into a dummy. The coding of this variable is based
45 on the legal origins of the country. Countries with English Common Law legal origins are
46 coded 1. Otherwise, the other 4 categories of the La Porta et al. variable are lumped
47 together. The coding in those cases is 0.

interested generally in what variables influence decriminalization of sodomy, rather than the propensity to do so in a particular country, for which a conditional approach would suffice (p. 475). Because the dependent variables are dichotomous and because of the data structure described earlier, we employ a GEE model with first-order autoregressive component and logit as the link function. In both analyses, we use robust standard errors.

For added confidence in our results, we provide two versions of each model estimated. Democratic conditions are potentially critical for the facilitation of legal equality (Wilensky 2002). Hence, along the lines of similar/different systems designs (e.g., PrzeworskiA, Stokes, and Manin 1999; Przeworski et al. 2000; Teune and Mlinar 1978; 1995), the first model in each of the two tables presents the analysis of data for both democratic and non-democratic systems.¹⁵ The second twin-model in each case presents the results for democratic countries only.¹⁶

Results

Table 1 offers a first insight into the predictors of repeal. With *Repeal Type* as the outcome variable, the predictors for repeal by nonjudicial institutions are largely in support of our hypotheses. In the first column, the results for all countries are presented. Legal path dependence in Common Law countries decreases the likelihood of repeal via the legislature. Religious constituencies (Muslim and Catholic) have a similar effect—the larger those constituencies are, the less likely would legislative repeal be. Globalization increases the likelihood of legislative repeal. Lastly, democratic conditions increase the likelihood of legislative repeal. In the analysis of democracies only (the second column), the effects are very similar. Democratic conditions, however, have an insignificant effect. The reason is little variance in this predictor, when only democratic countries are included in the analysis. As for judicial repeal, in both samples (all countries and democratic countries only), a Common Law legal system increases the likelihood of repeal. Political accountability to religious constituencies does not have a statistically significant influence. Judicial repeal is more likely when the country is more democratic, and more globalized. These effects are true for both the sample of democratic countries

¹⁵ Over 90% of the world's democracies are included in our analysis. For those excluded (mostly because of issues of data availability) see bottom of Table 1.

¹⁶ Democratic nations were those in which the democracy score was above average. Changing the cutoff point, to half a s.e. above the mean for instance, made no substantive change in coefficients.

Table 1. Multinomial Logistic Regression Models

Analyses of Repeal of Laws Criminalizing Same-Sex Sex (1972–2002)		
Variables	All Countries	Democratic Countries
Repeal by Nonjudicial Institutions		
Legal Path Dependence	-1.46*** (0.18)	-1.27*** (0.19)
% Muslim	-0.009*** (0.002)	-0.02*** (0.003)
% Catholic	-0.005** (0.002)	-0.0044* (0.0019)
Democratic Conditions	0.09*** (0.014)	0.05 (0.04)
Globalization	0.037*** (0.006)	0.031*** (0.007)
GDP	-0.00002 (0.000012)	-0.000011 (0.000013)
Constant	-3.5*** (0.38)	-3.04*** (0.49)
Repeal by Courts		
Legal Path Dependence	3.38*** (0.31)	3.4*** (0.31)
% Muslim	-0.018 (0.017)	-0.02 (0.017)
% Catholic	0.008 (0.006)	0.008 (0.007)
Democratic Conditions	0.33*** (0.08)	0.24* (0.13)
Globalization	0.05*** (0.01)	0.052*** (0.015)
GDP	0.00001 (0.00002)	0.00002 (0.00002)
Constant	-11.1*** (1.6)	-10.6*** (1.8)
	N = 4,376; Wald $\chi^2 = 18,746.6$	N = 2,185; Wald $\chi^2 = 13,623.95$
	Prob > $\chi^2 = 0.0$; Pseudo $R^2 = 0.3$	Prob > $\chi^2 = 0.0$; Pseudo $R^2 = 0.21$

Dummies for years not presented in the table.

Because of issues of data availability, the following countries were not included in the analyses: Afghanistan, Andorra, Angola, Antigua and Barbuda, Bahamas, Barbados, Belize, Brunei Darussalam, Cape Verde, Comoros, Czechoslovakia, Djibouti, Dominica, Equatorial Guinea, Eritrea, East Germany, West Germany, Grenada, Guinea, Haiti, Iceland, Iraq, Kiribati, North Korea, Laos, Liberia, Libya, Liechtenstein, Luxemburg, Marshall Islands, Mauritania, Micronesia, Monaco, Nauru, Niger, Palau, Samoa, San Marino, Sao Tome and Principe, Seychelles, Solomon Islands, Somalia, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname, Taiwan, Tibet, Timor-Leste, Tonga, Tuvalu, USSR, Uzbekistan, Vanuatu, North and South Vietnam, North and South Yemen, Yugoslavia, Zanzibar. Values for the globalization variables are not available for those countries.

* $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$; **** $p < 0.001$; one-tailed tests where directionality hypothesized.

only and for the sample of all countries. Possibly because of collinearity with the Social Globalization predictor, the effect of GDP is not significantly different from zero. The goodness of fit measures are reasonably high in both the model for democratic countries and the one for all countries.

The GEE models are presented in Table 2. The first two columns indicate the results for the predictors of repeal (the institutional path notwithstanding) in all countries and in democratic countries only, respectively. The third and fourth columns present the predictors of repeal by the country's court of last resort in all countries and in democratic countries only, respectively. The last two columns on the right have the predictors of repeal by nonjudicial institutions for all countries and for democratic countries separately in each column. With *Legal* as the dependent variable, the first two columns outline which variables predict repeal generally. The coefficient on Common Law is negative, but does not reach standard levels of statistical significance. The effect of

1 democratic conditions is statistically significant, and so is that of
2 social and political globalization. The differences between the
3 sample of democratic countries and of all countries are in the
4 coefficients for democratic conditions (not statistically significant in
5 democratic countries) and Percent Muslim, which is significant only
6 in democratic countries. The performance of the models is good
7 overall.

8 The results in Table 2, third and fourth columns, lend support
9 to our hypotheses concerning judicial repeal. As expected, the
10 Common Law variable does not decrease the likelihood of judicial
11 repeal of prohibitions on sodomy. The path-dependent nature of
12 legal evolution in Common Law countries has little effect on jus-
13 tices' ability to alter policy status quo when it comes to this type of
14 rights. A trend toward globalization increases the likelihood that
15 the sodomy law is repealed with a court decision. Large religious
16 constituencies seem to have insignificant effects on courts. Lastly,
17 the effects in the subsample of democratic countries largely
18 resemble those in the general sample.

19 In the fifth and sixth columns of Table 2, the outcome variable is
20 *Nonjudicial Repeal*. The negative and highly significant coefficient
21 indicates that a Common Law system decreases the likelihood of
22 repeal via legislatures. The path-dependent nature of legal devel-
23 opment in Common Law systems influences nonjudicial institutions
24 when they attempt to reform policy related to sodomy law. Further-
25 more, the electoral link hypothesis wins support. The coefficients on
26 both Percent Muslims and Percent Catholics are negative and sig-
27 nificant. The effect of globalization is in line with the theoretical
28 expectations. The effects in democratic countries are comparable. In
29 the subsample of democracies, Democratic Conditions is not statis-
30 tically significant because of decreased variance in this predictor.

31 Overall, legal path dependence decreases the likelihood of
32 repeal in Common Law countries and increases this likelihood in
33 systems of Civil Law. Yet, its effect is considerably more substantial
34 where the legislative path is concerned. Between the multinomial
35 logit analyses and the GEE models, the results lend robust support
36 for the theory developed here. Tables 1 and 2 confirm that judicial
37 and nonjudicial institutions introduce policy change under dissim-
38 ilar circumstances. In Common Law systems, the juxtaposition of
39 the two tables indicates legislatures are less likely to be the venues
40 for policy innovation. Courts of last resort, on the other hand, are
41 either more likely or as likely to introduce policy change. Indeed,
42 an overwhelming majority of Civil Law countries repealing sodomy
43 laws between 1972 and 2002 saw those provisions rescinded in
44 nonjudicial institutions; in 97% of the cases, when a sodomy pro-
45 vision was repealed in a Civil Law country, the decision was non-
46 judicial. Conversely, courts have been considerably more popular

1 as venues for repeal in Common Law countries where in 64% of the
2 cases the institutional path to policy change was judicial. Religious
3 constituencies are statistically significant predictors of legislative
4 repeal, but have no significant effect on judicial repeal. Political
5 accountability impacts the likelihood of the introduction of policy
6 change in legislatures; conversely, courts as initiators of policy inno-
7 vation are largely unaffected by accountability to constituencies.
8 Democratic Conditions is statistically significant in both tables.
9 When the country is more democratic, repeal of prohibitions on
10 same-sex sex is more likely via either institutional path. The same
11 is true for globalization. Finally, comparison of a subsample of
12 democracies to the general sample indicates the results are largely
13 the same in both cases, with discrepancies largely accounted for by
14 the theoretical framework we developed. The only consistent dif-
15 ference is that in analyses of democratic countries only, because of
16 limited variance in that regressor, Democratic Conditions does not
17 come out statistically significant.

19 **Discussion and Conclusions**

21 The goal of this study was to analyze the origins of policy
22 change via different institutional paths, comparing judicial and
23 nonjudicial institutions. This question, which has been crucially
24 important in the study of public policy, judicial politics, and social
25 movements, was examined here for the first time systematically in
26 a cross-national framework over a period of several decades and
27 with respect to a question still on the agenda in numerous coun-
28 tries, namely the decriminalization of same-sex intimacy. While the
29 debate in the literature may still be unsettled, the theory developed
30 here suggests that policy change emanates from judicial as well as
31 nonjudicial bodies.

32 The key message of this study, however, is not limited to the
33 notion that courts create policy change. Rather, we explain theo-
34 retically, and then substantiate empirically, that different sets of
35 variables systematically explain policy change via disparate institu-
36 tional venues. Our findings clearly indicate that legal precedent in
37 a Common Law system limits the introduction of policy change via
38 the political branches more than via courts of last resort, and
39 particularly when such change proves contentious. At the same
40 time, the path-dependent nature of law in civil law countries makes
41 it easier for policy change to emanate from the legislature. Indeed,
42 whereas legislative repeal constitutes 97% of the cases where
43 sodomy laws were revoked in Civil Law countries, 6 in every 10
44 repeals in Common Law countries were judicial. Such findings are
45 significant not only to our understanding of law, but to a range of

1 topics including legal development, accountability, and the effects
2 of religiosity on policy formation and change.

3 In addition, our findings lend support to the notion that political
4 actors are more constrained by legal status quo than their judicial
5 counterparts, and accordingly, that the effects of path dependence on
6 decisionmaking in supreme courts are commensurably weaker. More
7 broadly, this finding addresses a major criticism leveled against
8 path-dependence scholars concerning their inability to explain policy
9 change. We contend that the judicial hierarchical structure enables
10 courts of last resort to produce policy change. Indeed, as Kahn (2006)
11 suggests, such courts may serve as important mechanisms of change,
12 a relief valve of sorts, in theories of path dependence.

13 Furthermore, it is evident that political institutions, such as
14 accountability, entail closer proximity between the will of constitu-
15 ents and decision-making authorities in the political branches. At
16 the same time, we find courts are less affected than legislatures by
17 majoritarian elements including, for instance, political pressures
18 exerted by religious groups. Some forces at the domestic (e.g.,
19 democratic conditions) and global (e.g., globalization) levels affect
20 repeal, notwithstanding its institutional venue. In a subsample of
21 democracies, the effect of democratic conditions is diminished, but
22 the effects of the other predictors remain largely unaffected.

23 There is also an important normative element to this discussion
24 concerning the legitimacy of unelected judges altering the policy
25 made by decision makers who are accountable to the electorate.
26 Indeed, this concern was expressed most famously by Bickel (1962)
27 who wrote of the “counter-majoritarian difficulty” and more
28 recently by Powers and Rothman (2002) who see the judiciary as
29 ill-equipped to resolve issues better left to legislatures. A number of
30 responses have been offered to this critique, ranging from empiri-
31 cal studies demonstrating the reluctance of the court to stray too far
32 from public opinion (Barnum 1985; Mishler and Sheehan 1993), to
33 suggestions that lawmakers themselves create conditions favorable
34 to judicial policy making (Gillman 2002; Rogers 2001). The theory
35 proposed in this study (and the empirical support presented there-
36 after) directly engages this scholarship. As far as the protection of
37 sexual minorities is concerned, the findings in this study clearly
38 indicate that judicial institutions may well be the ones to extend
39 legal protections to minority populations. It is not always clear in
40 such instances, however, that judges are acting in a counter-
41 majoritarian fashion. When the United States Supreme Court
42 handed down its decision in *Brown*, for example, only 17 states
43 required segregation of public schools (Balkin 2008). Similarly,
44 when the Court decided on the constitutionality of sodomy prohi-
45 bitions in *Lawrence*, only 13 states still criminalized same-sex
46 sodomy. Under the right circumstances, policy change may

originate from courts of last resort, but such change does not necessarily run contrary to popular will or to elected institutions.¹⁷

As far as predictors of social change are concerned, and in particular in the context of the rights afforded sexual minorities, the analytical advantage of examining disparate institutional paths is clear. For instance, despite failures to find effects for religiosity in past work (e.g., Frank and McEneaney 1999), our theory and empirical tests illustrate the critical importance of analytically treating disparate institutional paths in order to accurately assess the effects of independent variables such as religious constituencies. The political stars align differently in dissimilar jurisdictions. When Common Law and strong religious constituencies are present in a polity, courts may be the venue of choice for those seeking social change. Indeed, the Canadian and South African cases described earlier are but two examples illustrating these dynamics.

Lastly, this work also offers some empirical predictions to be further developed and tested in future work. Civil law systems tend to hold case law to be subordinate to statutory law, which might also explain the greater reliance on nonjudicial institutions. Testing this theoretical account would complement the findings in this study. In addition, religious constituencies beyond those studied here may influence policy output (Campbell and Monson 2003; Wright, Erikson, and McIver 1987). A thorough treatment of the dynamics of a broader range of religious groups and consequent judicial and nonjudicial policymaking (with respect to gay rights and otherwise) merits further study. With respect to institutional paths to policy change, future work may wish to examine the introduction of other policies (related to sexual minorities or otherwise) via disparate institutional paths. The set of predictors offered in this article may account, for instance, for the introduction of antidiscrimination policies in different countries. While some accounts in the literature claim that, in Europe for instance, the mere decriminalization of same-sex sex inexorably led to the introduction of antidiscrimination measures (e.g., Waaldijk 2000), the theory proposed here offers an alternative analysis. Considering institutional paths of policy change and their respective predictors including type of legal system, special constituencies, democratic conditions, and globalization, our theory offers a rich framework for scholars studying those processes. Moving beyond sexual minorities, the findings here may serve future examinations of policy change relevant to additional minority groups and policy domains.

¹⁷ Lastly, with respect to the question of judicial accountability, there are certain courts, such as some state supreme courts in the United States, where the institution of judicial elections allows the mapping of performance onto reelection. While the discussion of such courts is beyond the scope of this research, consideration of this type of judicial accountability may be of interest for future work.

Appendix

Institutional Paths to Policy Change (1972–2008)

Change from illegal to legal status for Sodomy (institutional path for policy change)	No Policy Change
Albania (legislative repeal in 1995)	<i>Homosexual Intercourse has been Illegal at least Since 1972:</i>
Armenia (legislative repeal in 2003)	Afghanistan; Algeria; Andorra; Angola; Antigua and Barbuda; Bangladesh; Barbados; Belize;
Australia (judicial repeal in 1994)	Bhutan; Botswana; Brunei Darussalam;
Austria (legislative repeal in 1971)	Cameroon; Comoros; Djibouti; Dominica;
Azerbaijan (legislative repeal in 2000)	Egypt ²³ ; Eritrea; Ethiopia (–1992); Ethiopia (1993–); Gambia; Ghana; Grenada; Guinea;
Bahamas (legislative repeal in 1991)	Guyana; India; Iran; Iraq; Jamaica; Kenya;
Bahrain (legislative repeal in 1976)	Kiribati; Lebanon; Lesotho; Liberia; Libya;
Belarus (legislative repeal in 1994)	Malawi; Malaysia; Maldives; Mauritania;
Bosnia and Herzegovina (legislative repeal in 1998) ¹⁸	Mauritius; Micronesia; Morocco; Mozambique;
Cape Verde (legislative repeal in 2004)	Myanmar; Namibia; Nauru; Nigeria; Oman;
Chile (legislative repeal in 1999)	Pakistan; Palau; Papua New Guinea; Qatar;
China ¹⁹ (legislative repeal in 1997)	Samoa; Sao Tome and Principe; Saudi Arabia;
Colombia (legislative repeal in 1981)	Senegal; Seychelles; Sierra Leone; Singapore;
Croatia (legislative repeal in 1977)	Solomon Islands; Somalia; Sri Lanka; St Kitts and Nevis; St Lucia; St Vincent and the Grenadines; Sudan; Swaziland; Syria;
Cuba (legislative repeal in 1979)	Tanzania; Tibet; Timor-Leste; Togo; Tonga;
Cyprus (judicial repeal in 1998)	Trinidad and Tobago; Tunisia; Turkmenistan;
Ecuador (judicial repeal in 1997)	Tuvalu; USSR; Uganda; United Arab Emirates; Uzbekistan; Vanuatu; Vietnam;
Estonia (legislative repeal in 1992)	Vietnam, South; Yemen; Yemen, North;
Fiji (executive repeal in 2005) ²⁰	Yemen, South; Zambia; Zanzibar; Zimbabwe
Finland (legislative repeal in 1971)	<i>Homosexual Intercourse has been Legal at least Since 1972:</i>
Georgia (legislative repeal in 2000)	Argentina; Belgium; Benin; Bolivia; Brazil;
Ireland (judicial repeal in 1993)	Bulgaria; Burkina Faso; Cambodia; Canada;
Israel (legislative repeal in 1988)	Central African Republic; Chad; Congo;
Kazakhstan (legislative repeal in 1998)	Congo, Democratic Republic; Costa Rica; Cote d'Ivoire; Czech Republic; Czechoslovakia;
Kyrgyzstan (legislative repeal in 1998)	Denmark; Dominican Republic; El Salvador;
Latvia (legislative repeal in 1992)	Equatorial Guinea; France; Gabon; Germany;
Liechtenstein (legislative repeal in 1989)	West ²⁴ ; Greece; Guatemala; Haiti; Honduras;
Lithuania (legislative repeal in 1993)	Hungary; Iceland; Indonesia; Italy; Japan;
Macedonia (legislative repeal in 1996)	Jordan; Korea, North; Korea, South; Laos;
Malta (legislative repeal in 1973)	Luxembourg; Madagascar; Mali; Mexico;
Moldova (legislative repeal in 1995)	Monaco; Mongolia; Netherlands ²⁵ ; Niger;
Nepal (judicial repeal in 2007) ²¹	Paraguay; Peru; Philippines; Poland; Rwanda;
New Zealand (legislative repeal in 1986)	San Marino; Slovakia; Suriname; Sweden;
Nicaragua (legislative repeal in 2008)	Switzerland; Taiwan; Thailand; Turkey;
Norway (legislative repeal in 1972)	Uruguay; Venezuela; Vietnam, North
Portugal (legislative repeal in 1983)	
Romania (legislative repeal in 1996)	
Russian Federation (legislative repeal in 1993)	
Serbia (legislative repeal in 1994)	
Slovenia (legislative repeal in 1977)	
South Africa (judicial repeal in 1998)	
Spain (legislative repeal in 1979)	
Tajikistan (legislative repeal in 1998)	
Ukraine (legislative repeal in 1991)	
United Kingdom (judicial repeal in 1982) ²²	
United States (judicial repeal in 2003)	
Yugoslavia (legislative repeal in 1994)	

¹⁸ Republika Srpska in 2000.

¹⁹ Homosexual acts are also legal in all Chinese associates; Hong Kong (1991) and Macau (1996).

²⁰ The sodomy statutes were declared unconstitutional and unenforceable by Supreme Court Justice Gerard Winter on August 26, 2005, but they are still on the books.

²¹ Sodomy decriminalized by a Supreme Court decision on December 21, 2007.

²² England and Wales (1967), Northern Ireland (1982); Scotland (1981).

²³ There is no general prohibition on homosexual acts in the Penal Code. However, statutes on offences against the religion, morality and debauchery are used to prosecute homosexual and bisexual men in particular.

²⁴ East Germany (1968) and West Germany (1969).

²⁵ Homosexual acts are also legal in Aruba and the Netherlands Antilles.

432 **Institutional Paths to Policy Change**

Descriptive Statistics				
Variable	Mean	SD	Minimum	Maximum
<i>Common Law</i>	.307	.461	0	1
<i>Democratic Conditions</i>	.083	7.52	-10	10
<i>Political Globalization</i>	48.1	24.69	1.56	98.78
<i>Social Globalization</i>	45.65	21.028	2.78	94.44
<i>GDP</i>	6,815	7,814	170.55	84,408.23
<i>% Muslim</i>	23.21	35.68	0	99.9
<i>% Catholics</i>	31.13	35.58	0	99.1

Correlation Matrix						
	Common Law	Democracy	Pol. Globalization	Soc. Globalization	GDP	% Muslim
Democracy	0.065					
Pol. Globalization	-0.13	0.486				
Soc. Globalization	0.058	0.481	0.42			
GDP	0.011	0.293	0.39	0.71		
% Muslim	0.0091	-0.42	-0.15	-0.15	-0.0056	
% Catholic	-0.296	0.25	0.26	0.15	0.0324	-0.49

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