

**ORIGINAL SIN:  
A CROSS NATIONAL STUDY OF  
THE LEGALITY OF HOMOSEXUAL ACTS**

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**Abstract**

This paper is the first to study decriminalization of homosexual acts quantitatively in a cross-national perspective with a large sample of countries over a period of several decades. Employing path dependence as its theoretical framework, this work explains how political, economic and legal institutions at the domestic and the international levels affect the life of individual citizens. The rights and privileges of individuals, the findings of this study indicate, are determined by a wide array of variables, including legal origin, economic development, religion, democratization and the position of the nation in the international community. We use recently released cross-national data concerning decriminalization of homosexual intercourse, economic conditions and political institutions. A generalized estimating equation analyzes decriminalization of homosexual acts and a Cox proportional hazards model examines how long it takes to introduce this legal reform. Lastly, this study also offers some important lessons about civil rights and liberties more generally.

\* The first two authors had an equal share of the work on this paper and their names appear in alphabetical order.

**KEYWORDS:** Sodomy Law; Common Law; Path Dependence; Comparative Public Law; Legal Evolution;

In 1998, while responding to a report on a shooting in a private dwelling, the Houston police entered the apartment of John Lawrence. Upon entering the residence, the police found Mr. Lawrence, an adult man, engaging in consensual homosexual activity with another adult male by the name of Tyron Garner. Lawrence and Garner were arrested and convicted on charges of violating a legal ban on sodomy in the state of Texas. The State Court of Appeals upheld the provision, prohibiting two adults of the same sex from engaging in certain sexual acts. The Texas court used a 1986 decision of the U.S. Supreme Court, *Bowers v. Hardwick*, as controlling precedent. However, when the U.S. Supreme Court reviewed *Lawrence v. Texas* five years later, the justices handed down a 6-3 decision, not only reversing the decision of the State court, but also overruling *Bowers v. Hardwick*. In 2003, the U.S. Supreme Court's decision in *Lawrence* legalized consensual same-sex intercourse in the United States. Yet, prohibitions against sodomy still exist in ninety-three nations worldwide. In seven of those, individuals may pay with their lives for engaging in homosexual activity. This paper is the first to quantitatively study the decriminalization of homosexual activity cross-nationally with a large sample of countries over a period of several decades (1972-2002).

Our key argument is based on legal path dependence. We contend that nations with legal systems based on English Common Law inherited a prohibition of homosexual acts, which influenced the provision of gay rights—in some cases—for centuries to come. For instance, when it became part of the British Empire in 1840, homosexual intercourse became illegal in New Zealand. The prohibition against any type of sexual relations between men was expanded later in the 19<sup>th</sup> Century, and it was not until 1986, with the amendment of the Crimes Act and the passage of the Homosexual Law Reform Act, that consensual sex between men over the age

of sixteen became legal. Other examples include Australia, India<sup>1</sup>, and Israel (Joseph 1996; Sanders 2009). Using data drawn from “State-sponsored Homophobia: A World Survey of Laws Prohibiting Same Sex Activity between Consenting Adults” (Ottoson 2009), we examine the questions of why, and when, nations decriminalize homosexual acts.

This paper serves as the first large-scale quantitative cross-national study of the decriminalization of homosexual acts. While there has been some work on the legality of homosexual relations in particular countries (Healey 2002; Schmid 2000), particularly within the states of the United States (Eskridge 2008; Kane 2003; 2007; Pinello 2003; Robertson 2006), and some comparisons between countries in the West (Ben-Asher 1989; Wald and Green 1997; Hensle 2009), there has been very little cross-national inquiry of the legality of homosexual acts outside of the West (Sanders 2009). There also exists a paucity of time-series cross-national quantitative analysis beyond the United States<sup>2</sup>.

The findings in this paper illustrate how political, economic, and legal institutions influence the lives of individual citizens. Our study indicates that the legality of homosexual acts is determined by a wide array of variables, including the type of legal system<sup>3</sup>, economic development, religion, democratic conditions, and globalization. While the focus here is the rights of a minority defined by sexual orientation, this study also offers some important lessons about civil rights more generally (Haider-Markel and Meier 1996; Nownes 2004, *inter alia*).

This paper is important theoretically, but also significant from a policy perspective. In a world where more than ninety countries criminalize the consensual sexual activities of same-sex

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<sup>1</sup> A Delhi High Court ruled in July 2009 in *Naz Foundation v. Government of NCT Delbi* that Section 377 of the Indian penal code was unconstitutional and thus effectively decriminalized homosexual relations between consenting adults.

<sup>2</sup> Much of the literature that does exist takes a particularly legal perspective and does not attempt to address possible larger causal mechanisms.

<sup>3</sup> We use Type of Legal System and Legal Origin interchangeably (La Porta et al. 2008).

adults, and where such activity can, in some instances, lead to the death penalty (Ottoson 2009), a better understanding of the causes of such criminalization and the factors that lead to the *decriminalization* of homosexual activity is important.

What is more, the legality of homosexual acts is only one piece of the puzzle. It is important to recognize at the outset that countries where homosexual acts are legal are not necessarily places where homosexuals are *treated* equally. For example, less than thirty countries offer some kind of civil union for same-sex couples (Ottoson 2009). Legality, hence, is not the ultimate measure of discrimination against sexual minorities. With that in mind, an examination of the legality of homosexual activities is key to developing a better understanding of the rights of homosexuals cross-nationally.

#### LEGAL PATH DEPENDENCE

Path dependence refers to the “dynamics of self-reinforcing (...) processes in a political system” (Pierson and Skocpol 2002, 699). This type of process is widespread in politics (Stinchcombe 1965; Pierson 2000). Once certain institutional rules are in place, alternatives forgone in earlier stages of the historical process cease to be available (Shepsle 1986). Path dependence appears in the evolution of laws and legal systems (North 1990) but applies also to a variety of other political phenomena (Collier and Collier 1991; Kurth 1979; Ertman 1997; Huber and Stephens 2001; Skowronek 1993; Shefter 1977; Skocpol 1979).

We argue that legal path dependence is a key to understanding decriminalization of homosexual intercourse cross-nationally. The original sin related to homosexual acts (to the extent that there is one) is related to the legal system put in place by the state, rather than to the behavior of individuals. The “Original Sin” linked to the criminalization of gay sexual activity is that of the export of the Common Law system that criminalized buggery in Great Britain in 1533. Common law adopted by other nations (or alternatively imposed on them) in conjunction

with subsequent judicial decisions and statutes passed over the centuries, led to criminalization of homosexual acts (Sanders 2009). Conversely, the adoption and “export” of other legal systems, particularly French Civil Law, did not have this effect, as sodomy was decriminalized immediately following the French Revolution. As a result, countries that were less influenced by British law were much less likely to criminalize same-sex relations.

Two major self-enforcing mechanisms help entrench one legal system over alternative ones. The first is large setup (or fixed) costs. Setting up a new system of law entails costs, which short of a major event, such as a revolution or occupation by a foreign nation, are prohibitively high. These costs, therefore, considerably diminish the chances of implementing a new system of law. The second mechanism involves adaptive expectations. Once a certain legal system is in place (e.g., after a territory is occupied and colonized), the belief that this system will persist is enhanced (North 1990). Further, the longer the system persists, the stronger becomes the belief.

The results of these self-reinforcing mechanisms are characterized by multiple equilibria, possible inefficiencies, lock-in, and path dependence. Multiple equilibria connote that more than one legal system is possible and the final outcome uncertain. Hence, a potentially better solution (e.g., a superior legal system) may not win adherence because of the initial advantage of the existing system. What is more, once established, an existing legal system is “locked-in” and thus difficult to change. Consequently, increasing returns and significant transaction costs due to imperfect markets shape institutional change. Once an equilibrium solution is locked-in, change happens in a particular path, determined by legal and political institutions. This path dependence is a way “to narrow conceptually the choice and link decision making through time” (North, p. 98).

Path dependence applies to the evolution of law in a variety of ways and Common Law is a prominent example of such institutional development (North 1990). For instance, one reason why legal systems are hard to change is the interdependence between legal education, case law,

judicial selection, and the existence of juries and other major institutions. Thus, it would be difficult to change from a system based primarily on codes to one based on cases. Doing so would require fundamental changes such as reforming legal education and the retraining of magistrates, judges and justices. Along the same lines, the adoption of a jury system in systems with no juries would require among other changes, a distinction between law and fact, trials which occur on consecutive days, and judges and lawyers trained to deal with juries. Granted, certain laws are not locked-in. Speed limits, for example, are not entrenched in the system. In most countries, those limits may be changed easily. However, by its nature, the legal framework of Common Law has the capacity to lock-in laws, particularly if different players have vested interests in those laws. Those vested interests may be economic, moral, religious, or sociopolitical in nature.

The legal framework in Common Law consists of constitutional provisions, acts of the legislature, and judicial decisions. It is a precedent-based system in which past decisions are integrated into the law; as such, each case sets a legal precedent. Therefore, the law changes marginally as new cases are decided and a new legal precedent is set, thus becoming part of the legal structure. Judicial decisions “reflect the subjective processing of information in the context of the historical construction of the legal framework” (North, p. 97). The Northwest Ordinance, for instance, passed in 1787 by the Continental Congress, illustrates path dependence and the historically derived continuity it implies. The Ordinance stemmed from preexisting English and colonial provisions and concerned government and settlement of the West and its integration into the new nation. Due to the vested economic and political interests of various parties, for decades to come, the political and economic structure in the territories was derived from the framework dictated by the Ordinance. Along the same lines, for political, moral, religious, and, in some cases, economic reasons, the legal status of gay marriage or abortion law in the United States is difficult to change.

The legality of homosexual acts in Common Law systems, we argue, was heavily influenced by path dependence. More specifically, the effect of the English Buggery Act of 1533 on the legal status of sodomy was somewhat similar to the effect of The Northwest Ordinance on American expansion to the West. Legal prohibitions against sodomy were entrenched in English law (Rayside 1992). While certain laws prohibiting homosexual acts in the military appeared as early as the eleventh century, it was Henry VIII of England who introduced such legislation into English criminal law in the form of the Buggery Act of 1533. The Buggery Act made buggery (referring to an act of sodomy) punishable by death (Dundes 2002). It was not until 1861 that the capital punishment prescribed by the law was removed<sup>4</sup>. The Sexual Offences Act of 1967 provided limited decriminalization of homosexual acts. The Act implemented some of the recommendations in the Wolfenden Report<sup>5</sup> published in 1957. Thus, it took ten years of campaigning for only a subset of the recommendations in the Report to be etched into law. With processes such as colonization, these prohibitions found their way into other countries with Common Law systems and, by ways of path dependence, influenced how laws concerning homosexuality and homosexual acts developed in those jurisdictions.

Conversely, in other colonial empires, such as France, homosexual acts have been legal since 1791. The criminal code drafted by the National Constituent Assembly after the French Revolution rejected the definition of crimes based on the proscriptions of the Christian religion. Homosexual acts were thus not mentioned in the new penal code. The Napoleonic Code of 1804 and its subsequent Penal Code of 1810 did not undo the decriminalization of homosexual intercourse.

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<sup>4</sup> Section 61 of the Offences against the Person Act 1861

<sup>5</sup> The Report of the Departmental Committee on Homosexual Offences and Prostitution (better known as the Wolfenden report) was commissioned by the British government after a series of prominent people were convicted for homosexual behavior. It recommended that homosexual sex no longer be a criminal offence (Devlin 1965).

French civil law was introduced in many countries under French occupation during the Napoleonic Wars. Due to path dependence, this has had extensive influence in Europe and because of colonization, beyond the continent as well (e.g., in many Latin American countries, many of which adopted it voluntarily after the Spanish occupation was over). Notably, path dependence applies to the case of French Code just as well. As provisions prohibiting homosexual acts were absent from the Napoleonic Code of 1804 and the Penal Code of 1810, there was no “original sin” entrenched in the legal system in nations that adopted Civil Law. Hence, law developed in a different path.

Whereas Great Britain was exporting a legal system that outlawed sodomy, French code (which in various forms was imposed by France, Spain, and the Netherlands on their colonies, or adopted voluntarily by many other states) did not contain such a provision. For centuries to come, its influence on the way legal and political institutions dealt with the issue of homosexual acts was, thus, fundamentally different. As for systems with origins in Communist or Socialist law, many of these states have gone through a process of democratization in the 1990s. As a part of this process, those states adopted a civil law system. While some of those states had had anti-sodomy laws in place, the process of democratization in many cases was followed by decriminalization of gay sexual activity.

A Common Law system is not the only legal variable to increase the likelihood of anti-sodomy laws, as some religions proscribe homosexual acts. Establishment of a state religion, or even more so, a legal code that stems from religious principles, increases the likelihood that legal proscriptions against homosexual acts will be codified. For example, on May 11, 2001, the Egyptian police arrested fifty-two men. The group, who later became known as Cairo 52, was aboard the Queen Boat, a floating gay nightclub. While all fifty-two pleaded innocent, they stood trial, some of them more than once. They were found guilty of charges ranging from “habitual debauchery” to “contempt for religion.” Even in the face of international criticism, the courts

carried on with the trials, in a nation where Islam was the state religion and homosexual intercourse was illegal.

Based on the principles of the Qur'an, the central text of Islam, and Hadith, which are oral traditions determining the Muslim way of life, Islam proscribes homosexual acts. Like in versions of Judaism and Christianity, from its beginning as a religion, Islam rejected homosexual intercourse. Some nations with a Muslim majority but which are relatively secular in nature and/or multi-religious (e.g., Indonesia) do not treat homosexual activity as a crime; as such, there are no prohibitions against it in their legal codes. In some cases (e.g., Turkey), tolerance to homosexual sexual activity has been entrenched in the system for years (Murray and Roscoe 1997). Yet, nations in which Islam is the state religion (e.g., Egypt), and in Islamic states where Sharia law and the Qur'an are the primary sources for legislation, there typically exists a codified prohibition of homosexual activity. Furthermore, in several of those states (e.g., Saudi Arabia, Somalia, and Mauritania), death is the prescribed punishment for engaging in such activity.

Taken together, the legal code and state religion create a powerful explanation as to why certain states are less prone to decriminalize sodomy. Due to path dependence, nations with Common Law systems operate within a legal framework in which homosexual intercourse is a criminal act. Likewise, in Islamic law, sodomy is prohibited. Yet, certain variables reduce the costs associated with changing the legal status quo. As a result, they increase the likelihood that decriminalization will occur. Our key argument is that the type of legal system (Common Law or Islamic Law) had an influence on the evolution of gay rights in the different political systems. However, the effect of this "original sin" was gradually mitigated as nations became more democratic, provided better representation for minorities, globalized and as their economy developed.

EXPLAINING THE LEGALITY OF HOMOSEXUAL ACTS CROSS-NATIONALLY – LITERATURE REVIEW  
AND HYPOTHESES <sup>6</sup>

To explain prohibitions against homosexual activity, we propose that there are four primary and interrelated factors at play: the type of legal system; the democratic conditions and the political opportunity structure for minority populations; the state of economic development within the country; and the extent to which a country is globalized socially, economically, and politically. We hypothesize that these dynamics jointly influence whether a nation has chosen to codify prohibitions of homosexual activity.

*Type of Legal System*

Due to path dependence we expect nations with a legal system based on English Common Law to be more likely to ban homosexual relations. The other nations in our data have Civil Law. Some of them have had this system for centuries. In addition, many of the republics of the former Soviet Union changed their originally Communist or Socialist systems to Civil Law upon democratization in the 1990s. The *Common Law* dummy variable, thus, equals 1 for nations with a Common Law system. The value is 0 otherwise.

*H1: Ceteris paribus, nations with a Common Law legal system should be more likely to ban homosexual relations.*<sup>7</sup>

Sanders (2009) stresses that much of the prohibitions against homosexual activity in Islamic nations were imported from Western common law systems (p. 12-15). We do not dispute this contention, yet we argue that apart from Common Law, *Islam* should have an independent effect.

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<sup>6</sup> All data except the data on sodomy laws were taken originally from the Quality of Government Database (Teorell 2008); however, all original data sources are cited as such.

<sup>7</sup> We use data from La Porta et al 1999 to test this hypothesis.

*H2: Islamic states and nations where Islam is the state religion are more likely to prohibit same-sex relations.<sup>8</sup>*

Akin to Islam, Catholic dogma proscribes homosexual acts as sinful and contrary to natural law (Dempsey 2008). Catholicism is officially endorsed as a state religion in certain countries. Yet, unlike Islam, it is not likely to be a major source of legislation given the greater history of independent government action in Western Europe and Latin America. However, we predict that the higher the *Percentage of Catholics in the Population*, the greater the likelihood that the state will criminalize homosexual activity.<sup>9</sup>

*H3: The more sizeable the percentage of Catholics in a population, the higher the probability that laws proscribing homosexual behaviour will exist.*

#### *Democratic Conditions and Political Opportunity Structure for Minority Populations*

Based on the democratic understanding of consensual sexual activities between adults as a human right (Mertus 2007), we expect the spread of democracy to influence this right (Gurr 2000; Davenport 1999). Along the same lines, there is a great deal of empirical analysis to support the contention that established democracies are more likely to make greater legal provisions for historically marginalized populations (Davenport 1999; Gurr 2000; Wilensky 2002). To measure *Democratic Conditions*, we utilize the POLITY score, which was imputed using Freedom House data where it was missing. The scale ranges from 0 (least democratic) to 10 (most democratic) (Hadenius and Teorell 2005).

*H4: The more democratic the polity, the more likely it is that homosexual activity will be legalized.*

An examination of political inclusion and political opportunity structures is essential to understanding the legal prohibitions of homosexual activity. More specifically, we look to the inclusion of women in the political process (Grey 2002; Meyer 2003; Swers 2001; 2002; Thomas

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<sup>8</sup> To test this hypothesis, we use data from the CIA World Factbook (September 2009).

<sup>9</sup> We use data from La Porta et al 1999.

1991; Vega and Firestone 1995). Women's inclusion is a good proxy for the political inclusion of the other – particularly in relation to the issue of gender (Robinson and Spivey 2007; Seidman 2009). As a measure of political inclusion and political opportunity structure, we examine the *Percentage of Women Legislators* in national legislative bodies. To measure this we use the Inter-Parliamentary Union Women in National Parliaments data (Inter-Parliamentary Union 2005). We use the data for the legislative body as a whole in unicameral systems, and where there exists more than one legislative chamber, we use only the percentage of women in the upper house<sup>10</sup>.

*H5: As the number of women in the legislature increases, the likelihood of legal prohibition of homosexual activities decreases.*

#### *The State of Economic Development*

As economic conditions improve, we expect the decriminalization of homosexual activity to be more likely. Political inclusion and political opportunity structures are related to changes in the economic composition of a state (Doorenspleet 2004; Huntington 1991; Lipset 1960; Przeworski, Limongi Neto et al. 1997). To measure *Economic Development*, GDP per capita in constant US dollars at base year 2000 was used. Missing data were imputed by using the CIA World Fact Book and through extrapolation (Gleditsch 2002).

*H6: As GDP per capita increases, the likelihood that homosexual activity is criminalized should decrease.*

#### *Globalization*

Conventional theories of sovereignty have emphasized the nation-state as the guarantor of rights and liberties (Weber 1994 [1919]; Anderson 1983). Yet, some have argued that globalization erodes the nation-state and leads to porous national boundaries in terms of legal arrangements, capital flow, immigration and in a variety of other ways (Spivak and Butler 2007; Grewal 2005). Globalization reduces transaction costs across a range of human interactions, opening up new opportunities and exposing social systems to new ways of thinking (Hollingsworth 1998). In

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<sup>10</sup> Ideally we would use the percentage in the lower house, however, such data are not available.

terms of the path dependence of legal change, information about alternative legal arrangements should be more readily available in a globalized state. Consequently, it becomes easier to identify alternative legal frameworks and the way civil rights and liberties in general and gay rights in particular are organized in other jurisdictions. Political entrepreneurs, public opinion (Lax and Phillips 2009), political organizations, and social movements (Barclay et al. 2009) are then able to recognize alternative legal arrangements within which to settle gay rights. This in turn would increase the likelihood of decriminalization of sodomy. In addition, the world culture and normative diffusion literature argues that the strengthening of links between countries allows for the diffusion of new human rights and norms of tolerance (Finnemore 1996; Boli and Thomas 1997; 1999; Meyer et al. 1997; Ramirez and McEnaney 1997).

To measure these international connections we use the KOF Index of Globalization (Dreher 2006; Dreher et al. 2008). The indexes for the globalization variables range from 0-100. Higher values indicate higher levels of globalization. The overall index of *Globalization* is the weighted average of *Economic Globalization*, *Social Globalization* and *Political Globalization* (Teorell et al. 2009). The measure for economic globalization is defined as the long distance flow of services, goods, capital, information, and perceptions that accompany market exchanges. This index not only measures actual flows of trade and investments, but also trade restrictions, such as tariff rates (Dreher 2006; Dreher et al. 2008). The index of political globalization is measured by the number of embassies and high commissions in a country, the number of memberships the country has in international organizations, participation in UN peace-keeping missions, and the number of international treaties signed since 1945 (Dreher 2006; Dreher et al. 2008). Lastly, the social globalization measure includes three categories of indicators: personal contacts (e.g., telephone traffic and tourism), information flows (e.g., number of internet users), and cultural proximity (e.g., trade books and number of warehouses of Ikea per capita) (Dreher 2006; Dreher et al. 2008).

*H7: Increased levels of globalization (and political globalization in particular) increase the likelihood that homosexual activity is decriminalized.*

### Analyzing Legal Change

Apart from explaining why a state's legal code may prohibit gay sexual activity, we are also interested in analyzing the likelihood for legal change, that is, when a nation decriminalizes homosexual activity. Due to path dependence, the duration until decriminalization increases with Common Law. Furthermore, we expect globalization and economic development to reduce the costs associated with changing the legal status quo related to sodomy. Unlike in the model for decriminalization as such, however, in the duration model we do not expect democratic conditions as such to influence the risk. Instead it is democratization (Vanhanen 2005), a dynamic process influencing changes in institutional infrastructure as well as alterations in legal frameworks, that would increase the risk for legal change. Democratization considerably reduces the costs associated with changing political and legal equilibria, because it opens up the legislative process at the same time as it challenges previous norms. How far along the nation has gone in its process of democratization should predict the risk that it repeal a previously existing prohibition against sodomy. We, thus, control for democratic conditions in this model, but expect democratization, rather than democracy in the polity, to increase the risk that homosexual acts are decriminalized.

In the model for legal change, Common Law, globalization, and economic development are measured as described above. We also control for democratic conditions using the same variables. To test for democratization, we add Vanhanen's (2000; 2005) Index of Democratization, which combines measures of competition and participation as the basic dimensions of democracy. Competition is measured as the percentage of votes not cast for the largest party. This measure is multiplied by participation, measured as the percentage of the

population who actually voted in the election. The Index varies theoretically from 0 (no democracy) to 100 and empirically from 0 to 49.

*H8: States founded on systems based on Common Law are less likely to decriminalize homosexual behavior.*

*H9: More globalized states are more likely to overturn legal prohibitions of homosexual activity.*

*H10: Positive economic development increases the likelihood that a state will overturn legal prohibitions of homosexual activity.*

*H11: The process of democratization increases the likelihood that a state will decriminalize homosexual activity.*

#### DATA AND METHODS

Data are taken from the May 2009 report of The International Lesbian, Gay, Bisexual and Intersex Association on “State-sponsored Homophobia: A World Survey of Laws Prohibiting Same Sex Activity between Consenting Adults,” and from the University of Gothenburg Quality of Government Institute’s June 2009 “The Quality of Government Dataset” (Teorell et al. 2009)<sup>11</sup>. In our combined “Global Sexual Discrimination” dataset, states are categorized into one of three groups, with a state’s assignment depending on i) whether consensual homosexual intercourse is legal or illegal within the nation, and ii) if legal, in what year legality was attained.

(Insert Table 1 here)

As Table 1 indicates, our first group—which accounts for the majority of states (93)—details nations where consensual homosexual intercourse has been outlawed throughout the nation’s entire existence. Our second group depicts states which have *decriminalized* homosexual relations sometime within the last four decades, and the year of legalization; there are 47 such nations in our data. Our third group lists the 63 nations in which consensual homosexual intercourse has been legal since at least 1970.

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<sup>11</sup> All original data sets are also cited.

As for legal change, many of the countries decriminalizing sodomy since 1970 did so in the 1990s. As Figure 1 demonstrates, between 1970-2008, the 1990s was the decade with the most cases of legalization of consensual same-sex intercourse. More than half of the countries in the database that legalized homosexual acts made this legal reform sometime in that decade. A considerable number of the countries legalizing homosexual relations during this period were republics from the former Soviet Union. For instance, in 1998, the year with the greatest number of cases of legalization, three of the six countries legalizing consensual homosexual intercourse were Tajikistan, Kyrgyzstan and Kazakhstan.

(Insert Figure 1 here)

We use time-series cross-sectional data, listing all states in the abovementioned dataset for which data is available for the years from 1972 to 2002. To test Hypotheses 1-7, we employ a generalized estimating equation (GEE) model (Zorn 2001). A marginal approach, such as the GEE, is appropriate in this case since we are interested generally in what variables influence decriminalization of homosexual acts, rather than the propensity to do so in a particular nation, for which a conditional approach would suffice (p. 475). Since the dependent variable, *Legal* is dichotomous (1=homosexual acts are legal; 0= homosexual acts are illegal), and due to the data structure described above, we employ a GEE model with first-order autoregressive component and logit as the link function. We use robust standard errors clustered on the country.

Hypotheses 8-11 concern the timing of legal change. In this case, we are interested in estimating the hazard rate, that is, the “risk” that decriminalization would occur at a certain time, given that it did not occur previously (Allison 1984). We thus estimate a Cox proportional hazard model to test the remaining four hypotheses.

## RESULTS

What factors influence the likelihood that consensual homosexual acts are legal? Table 2 lends preliminary support to our key hypothesis. As Hypothesis 1 states, the type of legal system is strongly associated with the way homosexual intercourse is treated within the existing legal framework. Indeed, almost six out of every ten countries in which homosexual activity is illegal (the largest group in our dataset) have Common Law systems. Conversely, of the countries in which anti-sodomy laws were not on the books since at least 1970, over 80% have had civil law as their legal system.

(Insert Table 2 here)

In addition to the type of legal system, we also identified that the level of globalization would decrease transaction costs and increase the norms associated with tolerance. According to Hypothesis 7, globalization would increase the likelihood that homosexual acts would be decriminalized. Indeed, Figure 2 lends preliminary support to that contention. On the horizontal axis is the level of globalization, from minimal (left) to maximal (right). The bottom portion of each column represents the percent of nations within the corresponding level of globalization in which homosexual acts are legal. As the level of globalization increases, we find that the likelihood that homosexual acts are decriminalized to increase. Whereas 60% of the nations with minimum levels of globalization criminalize homosexual activity, only 11% of those with maximum levels of globalization do so.

(Insert Figure 2 here)

Table 3 presents the results of two generalized estimating equation models. These multivariate analyses corroborate several of our hypotheses. As suggested in Hypotheses 1 and 2, having a Common Law legal system significantly decreases the likelihood that the nation has decriminalized homosexual acts. Likewise, when Islam is the state religion, or when the state is

an Islamic state, homosexual acts are very likely to be outlawed. Importantly, even when we control for the effect of Common Law, Islamic law has an independent effect. This finding challenges contentions that anti-sodomy laws in the Islamic world are solely a product of Western influence (Sanders 2009).

Our findings also lend support to our theory concerning globalization. *Ceteris paribus*, nations with high levels of globalization, and particularly those with increased levels of political globalization (Model II), are significantly more likely to decriminalize homosexual activity. What is more, our theory concerning economic conditions wins support in the data. As Hypothesis 6 states, as gross domestic product (GDP) per capita increases, a nation is less likely to have anti-sodomy laws on its books.

Lastly, we fail to find support for our “democratic conditions” theory. Surprisingly, neither the variable measuring political inclusion of women (percent of women representatives in the legislature) nor the variable gauging the democratic nature of the polity has a statistically significant effect on the legality of homosexual acts. Hypotheses 4 and 5, therefore, do not find support in the data.

(Insert Table 3 here)

Table 3 details which factors impact the likelihood of decriminalization of sodomy. In order to examine the effects of the variables from each of the theories we propose, Figure 3 and Table 4 include predicted probabilities. These probabilities illustrate the influences of the variables, which have significant effects in Table 4 (Model I). More specifically, Figure 3 demonstrates the critical influence of Common Law systems. The vertical axis indicates the predicted probability that homosexual intercourse is decriminalized. The three columns on the right indicate the predicted probability of decriminalization at different levels of globalization in nations with a system of Common Law. The corresponding predicted probabilities in countries where the legal system is not based on Common Law are shown in the columns on the left.

As predicted in Hypothesis 1, the probabilities in the columns for nations not based on Common Law are larger across the board than in Common Law nations. Moreover, the analysis further substantiates Hypothesis 7 concerning the effect of globalization. As the nation becomes more globalized, the likelihood that homosexual acts will be decriminalized increases considerably. For instance, a state with a Common Law system where levels of globalization are low would have a probability of .05 for decriminalization. Conversely, at high levels of globalization, a state would have a probability of .36. What is more, higher levels of globalization in a state that is not based on Common Law system would result in a likelihood of .9. Thus, the likelihood that consensual same-sex intercourse will be decriminalized increases eighteen fold when we compare nations with Common Law systems and low levels of globalization to globalized nations whose legal systems are not based on Common Law.

(Insert Figure 3 here)

In support of Hypotheses 2 and 6, Table 4 illustrates the effects of Islam and GDP per capita. The numbers in the cells are the probabilities that sodomy was decriminalized. As GDP increases, so does the likelihood that homosexual acts are decriminalized. Likewise, when a nation is based on Islamic law or endorses Islam as a state religion, the likelihood of decriminalization decreases considerably. For example, in a nation with Islamic law where GDP per capita is lower than \$3000, the predicted probability of decriminalization is .07. This probability is almost ten times greater in rich nations where there is no official endorsement of Islam.

(Insert Table 4 here)

### Analyzing Legal Change

Figure 4 lends preliminary support to Hypothesis 11, which concerns the effects of democratization on the risk that the legal system would change to allow homosexual relations between two consenting adults. Repeal of anti-sodomy laws is expected with post-communist

democratization. 44% (the largest group) of countries decriminalizing homosexual acts sometime in the last four decades had communist or socialist law as the origins of their legal systems.

(Insert Figure 4 here)

Table 5 presents the results of a Cox proportional hazards model explaining the risk that a nation would legalize same-sex intercourse between consenting adults, given that it had not done so previously. We find statistically significant effects for the type of legal system, political globalization, economic development and democratization. The effect for democracy in the polity is in the opposite direction to that hypothesized; however, it is statistically insignificant. The effects for economic and social globalization, and for number of women representatives in the nation's legislature, are marginally significant.

*Ceteris paribus*, nations with a Common Law system have an instantaneous relative risk of decriminalization of sodomy, which is 52% less than in nations without a Common Law system. In addition, an increase of one unit in the political globalization scale, holding all other variables constant, increases the risk of decriminalization by 3.5%. Moreover, a one unit increase in the democratization index increases the risk of legal change by 4.5%. Alternative specifications (not presented here), wherein democratization was excluded, yielded statistically significant results for democratic conditions. Yet, as the model presented in Table 5 clearly demonstrates, when the democratization variable is included, there is no effect in terms of democratic conditions.

(Insert Table 5 here)

## DISCUSSION AND CONCLUSIONS

In this paper, we developed a theory to explain prohibitions of homosexual acts cross-nationally and then tested it empirically. Legal path dependence, we argued, explains why a legal ban on homosexual activity exists and how long it endures. In Common Law systems, legal prohibitions of homosexual activity were entrenched in the system, with vested interests of various types making change unlikely. Thus, due to path dependence, where the legal system originates from

English Common Law, the likelihood of decriminalization decreases considerably. When legal institutions prohibiting homosexual activity are in place from the nation's founding, the costs associated with changing the legal status quo are high. Likewise, when a state's legal origin stems from Islam, a religion that prohibits sexual relations between two consenting male adults, the likelihood that homosexual activity is legal decreases<sup>12</sup>. Path dependence also explains why several factors reduce the costs associated with changing the legal status quo and thus increase the likelihood of decriminalization. When the nation is globalized, information concerning alternative legal arrangements is readily available. With economic, social, and political globalization, it is easier for legal institutions to "travel" between jurisdictions and to be imported from other nations. Consequently, in a highly globalized nation, it may be easier for political entrepreneurs and interest groups to utilize public opinion and work successfully towards legal change (Rimmerman and Wilcox 2007; Canaday 2009). We also find support for the part of the theory concerning economic development. When GDP per capita is higher, changing the path determined by pre-existing legal institutions is more feasible. While we find support for three of the four parts of the theory we proposed to explain the legality of consensual homosexual intercourse, the most dramatic effects result from combinations of those predictors. It is the combination of Islamic law and GDP, for instance, that could increase the likelihood of decriminalization ten fold, and it is the combination of Common Law and globalization that could multiply this likelihood by as much as eighteen.

As for the risk of legal change, we find support for the hypothesized effects of the legal system, level of globalization, economic development and democratization. There is less risk of legal change in a nation with Common Law. Higher levels of political globalization increase the likelihood that a change in the legal status quo concerning sodomy takes place, given that the

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<sup>12</sup> That said, in nations with a large Muslim population, which are also secular or multi-religious, or alternatively where there is a tradition of tolerance, Islam would not have such an effect.

prohibition still applies. Higher levels of GDP per capita also increase the risk of legal change. Notably, when controlling for both democratization and democracy in the polity, we find the former rather than the latter to have a statistically significant effect.

The lack of effect for democratic conditions in any of the models was puzzling. Democracy does not have an influence either on whether sodomy was decriminalized or on the risk that such decriminalization would happen, given that it had not happened in the past. The “Democratic Conditions” component of our theory, thus, fails to win support. Instead, it is the process of democratization that is a particularly strong precursor of legal change. An index for democratization was a strong predictor for an increase in the risk for legal change, and when included in the Cox proportional hazards model it eliminated the effect of democratic conditions. The shifts in institutional and political status quos inherent to democratization increase the likelihood of legal change. This is a major reason why the largest group among nations experiencing decriminalization in the time period studied are nations with Communist or Socialist origins to their legal systems. As mentioned, many of those were republics from the former Soviet Union, which went through a process of democratization during the 1990s. This process was accompanied in more than one case by repeal of a legal prohibition against homosexual acts (see also Figure 1).

The theoretical framework employed in this study focuses on legal development as it is affected by domestic and international institutions, religion, and economic conditions. We do not intend to discount the significance of public opinion (Brace et al. 2002; Haider-Markel and Kaufman 2006; Lax and Phillips 2009) or the critical role social movements play for gay rights (Barclay et al. 2009; Cook 1999; Pinello 2003). In fact, some of the variables we study may be conducive to shifts in public opinion and may result in higher levels of activity of social movements. For instance, in a politically globalized nation, the polity is more likely to be informed of changing global standards with respect to the legality of homosexual activity.

Changes in public opinion may follow suit (Frank et al. 2009). Along the same lines, economic development may result in more resources made available for campaigns (legal or otherwise) waged by social movements (Courier 2009). Barring issues of data availability, we would include control variables for public opinion and for the role of social movements in our models.

Our research provides substantial insight into the factors that contribute to the decriminalization of consensual homosexual relations. In addition, it teaches important lessons about how legal and political institutions develop and change over time, and about how those institutions interact with economic conditions and with global trends to influence the very private lives of individual citizens. The liberty of individuals to engage in the type of sexual activity they desire, and the right of members of a group defined by sexual orientation not to be discriminated against, are determined by institutional evolution, which in some cases is centuries old. What is more, it is global forces and economic trends well beyond the bedrooms of individual citizens that determine their political rights and liberties.

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- Section 377, Indian Penal Code
- British Sexual Offences Act 1967 (1967 c. 60)

TABLES

**Table 1**

The Types of States in the Database (1970-2008)			
	Homosexual Intercourse is Illegal throughout	Change from illegal to legal status for Homosexual Intercourse (year of legal change)	Homosexual Intercourse is Legal throughout
Country's name	Afghanistan Algeria Andorra Angola Antigua and Barbuda Bangladesh Barbados Belarus Belize Bhutan Botswana Brunei Darussalam Cameroon Comoros Djibouti Dominica Egypt Eritrea Ethiopia (-1992) Ethiopia (1993-) Gambia Germany, East Ghana Grenada Guinea Guyana India Iran Iraq Jamaica Kenya Kiribati Lebanon Lesotho Liberia Libya Malawi Malaysia Maldives Mauritania	Albania (1995) Armenia (2003) Australia (1994) Austria (1971) Azerbaijan (2000) Bahamas (1991) Bahrain (1976) Bosnia and Herzegovina (1998) Cape Verde (2004) Chile (1999) China (1997) Colombia (1981) Croatia (1977) Cuba (1979) Cyprus (1998) Ecuador (1997) Estonia (1992) Fiji (2005) Finland (1971) Georgia (2000) Guinea-Bissau (1993) Ireland (1993) Israel (1988) Kazakhstan (1998) Kyrgyzstan (1998) Latvia (1992) Liechtenstein (1989) Lithuania (1993) Macedonia (1996) Malta (1973) Marshall Islands (2005) Moldova (1995) Nepal (2007) New Zealand (1986) Nicaragua (2008) Panama (2008) Portugal (1983) Romania (1996) Russian Federation (1993)	Argentina Belgium Benin Bolivia Brazil Bulgaria Burkina Faso Cambodia Canada Central African Republic Chad Congo Congo, Democratic Republic Costa Rica Cote d'Ivoire Czech Republic Czechoslovakia Denmark Dominican Republic El Salvador Equatorial Guinea France Gabon Germany, West Greece Guatemala Haiti Honduras Hungary Iceland Indonesia Italy Japan Jordan Korea, North Korea, South Laos Luxembourg Madagascar Mali

	Mauritius Micronesia Morocco Mozambique Myanmar Namibia Nauru Nigeria Oman Pakistan Palau Papua New Guinea Qatar Samoa Sao Tome and Principe Saudi Arabia Senegal Serbia and Montenegro Seychelles Sierra Leone Singapore Solomon Islands Somalia Sri Lanka St Kitts and Nevis St Lucia St Vincent and the Grenadines Sudan Swaziland Syria Tanzania Tibet Timor-Leste Togo Tonga Trinidad and Tobago Tunisia Turkmenistan Tuvalu USSR Uganda United Arab Emirates Uzbekistan Vanuatu Vietnam Vietnam, South Yemen Yemen, North Yemen, South Zambia Zanzibar Zimbabwe	Slovenia (1977) South Africa (1998) Spain (1979) Tajikistan (1998) Ukraine (1991) United Kingdom (1982) United States (2003) Yugoslavia (1994)	Mexico Monaco Mongolia Netherlands Niger Norway Paraguay Peru Philippines Poland Rwanda San Marino Slovakia Suriname Sweden Switzerland Taiwan Thailand Turkey Uruguay Venezuela Vietnam, North
Total	93	47	63

**Table 2**

Legality of Homosexual Acts by Legal System (1970-2008)		
	Homosexual Intercourse is Illegal Throughout	Homosexual Intercourse is Legal Throughout
English Common Law	48	2
Civil Code	28	49
Socialist/Communist laws	6	9

\* Numbers in cells indicate number of countries.

**Table 3**

<i>Generalized Estimating Equation Model</i>		
Cross-Sectional Time-Series Analyses of Predictors of Legalization of Homosexual Acts (1972-2002)		
Variable	Model I (Robust Standard Error)	Model II (Robust Standard Error)
<b>Common Law</b>	<b>-2.78 ***</b> (.44)	<b>-2.84 ***</b> (.46)
<b>Islamic State or Islam as State Religion</b>	<b>-2.24 *</b> (1.05)	<b>-2.25 *</b> (1.16)
Catholics (as % of population)	.0059 (.005)	.006 (.005)
<b>Globalization (General Index)</b>	<b>.028 ***</b> (.006)	n/a
<b>Economic Globalization</b>	n/a	<b>.01 *</b> (.005)
<b>Political Globalization</b>	n/a	<b>.01 ***</b> (.002)
<b>Social Globalization</b>	n/a	<b>.01 *</b> (.005)
<b>GDP Per Capita</b>	<b>.0000354 *</b> (.0000157)	<b>.000037 *</b> (.00002)
Percent Women in Legislature	-.009 (.006)	-.01 (.007)
Democracy	.009 (.015)	.005 (.017)
Constant	-.87 (.39)	-.92 (.42)
	N = 3471	N = 3170

	Number of Groups = 146 Observations per Group min 4; average 23.8; max 30 Wald $\chi^2$ (7) = 65.38 Prob > $\chi^2$ = .000 Correctly Predicted: 78.8% Reduction in Error: 42.5%	Number of Groups = 133 Observations per Group min 4; average 23.8; max 30 Wald $\chi^2$ (10) = 69.23 Prob > $\chi^2$ = .000 Correctly Predicted: 80.1% Reduction in Error: 46.1%
<ul style="list-style-type: none"> <li>• Due to issues of data availability, the following 45 nations were not included in the analyses: Afghanistan, Andorra, Bhutan, Brunei Darussalam, Comoros, Cuba, Czechoslovakia, Djibouti, Dominica, Equatorial Guinea, Eritrea, East Germany, West Germany, Guinea, Iraq, Kiribati, North Korea, Laos, Liberia, Libya, Liechtenstein, Marshall Islands, Micronesia Monaco, Nauru, Palau, San Marino, Sao Tome and Principe, Serbia and Montenegro, Solomon Islands, Somalia, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Taiwan, Tibet, Timor-Leste, Tonga, Turkmenistan, Tuvalu, USSR, Uzbekistan, North and South Vietnam, North and South Yemen, Yugoslavia, Zanzibar. The truncation is not systematically associated with any of the predictors as a result --- a third of the nations on this list has or had common law systems and the averages for GDP, women in legislature, democracy and Catholics in population for this group of nations and for the sample as a whole are not distinguishable statistically. Values for the globalization variables are not available for those 45 nations.</li> <li>• Data were not available for some of the countries for some of the years. Data were missing most typically in the Democracy variable provided by Freedom House.</li> <li>• ***p&lt;.001 **p&lt;.01 *p&lt;.05 #p&lt;.1, one-tailed tests where directionality hypothesized.</li> <li>• Robust standard errors are clustered on the nation.</li> </ul>		

**Table 4**

Predicted Probabilities (for Model I in Table 4) <i>Effects of Islamic Law and GDP Per Capita</i>		
	<b>Islamic Law or Islam as State Religion</b>	<b>Not Islamic Law and Islam is not State Religion</b>
<b>GDP Per Capita below \$3,000</b>	.07	.39
<b>GDP Per Capita between \$3,000-\$11,000</b>	.13	.59
<b>GDP Per Capita above \$11,000</b>	.19	.67

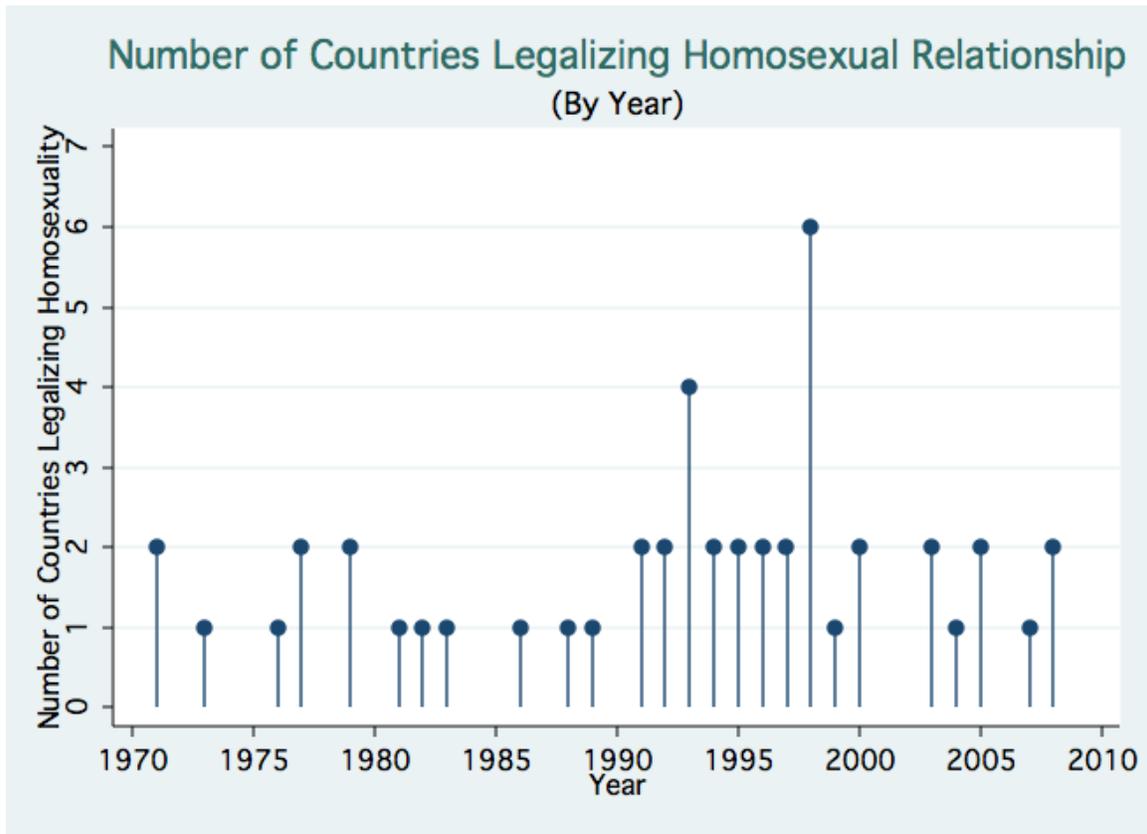
\* Numbers in cells represent the probability that homosexual intercourse is decriminalized in the state.

Table 5

<i>Cox Proportional Hazards Model</i>	
Time to Legalization (1972-2002)	
Variable	Estimate (Robust Standard Error)
<b>Common Law</b>	<b>-.73 ***</b> <b>(.05)</b>
Economic Globalization	.003 # (.0018)
<b>Political Globalization</b>	<b>.003 **</b> <b>(.0012)</b>
Social Globalization	.002 (.002)
<b>GDP per capita</b>	<b>.000032 ***</b> <b>(.0000054)</b>
Women in Legislature	.0051 # (.0027)
Democracy in Polity	-.007 (.012)
<b>Democratization</b>	<b>.044 ***</b> <b>(.004)</b>
Number of Observations: 1836 Wald $\chi^2$ (8) = 869.47 Prob > $\chi^2$ = .000 Log-Likelihood = -12577.098	
<ul style="list-style-type: none"> <li>• The 63 nations where sodomy had been decriminalized prior to the time period studied were excluded from the analysis by the computer. Furthermore, due to data availability, mostly related to the democratization and globalization variables, some of the remaining nations were not included in the duration analysis.</li> <li>• ***p&lt;.001 **p&lt;.01 *p&lt;.05 #p&lt;.1, one-tailed tests where directionality hypothesized.</li> </ul>	

FIGURES

Figure 1: Number of Countries Legalizing Homosexual Acts (by year)



**Figure 2: Percent of Countries with Legal Homosexual Intercourse at Different Levels of Globalization**

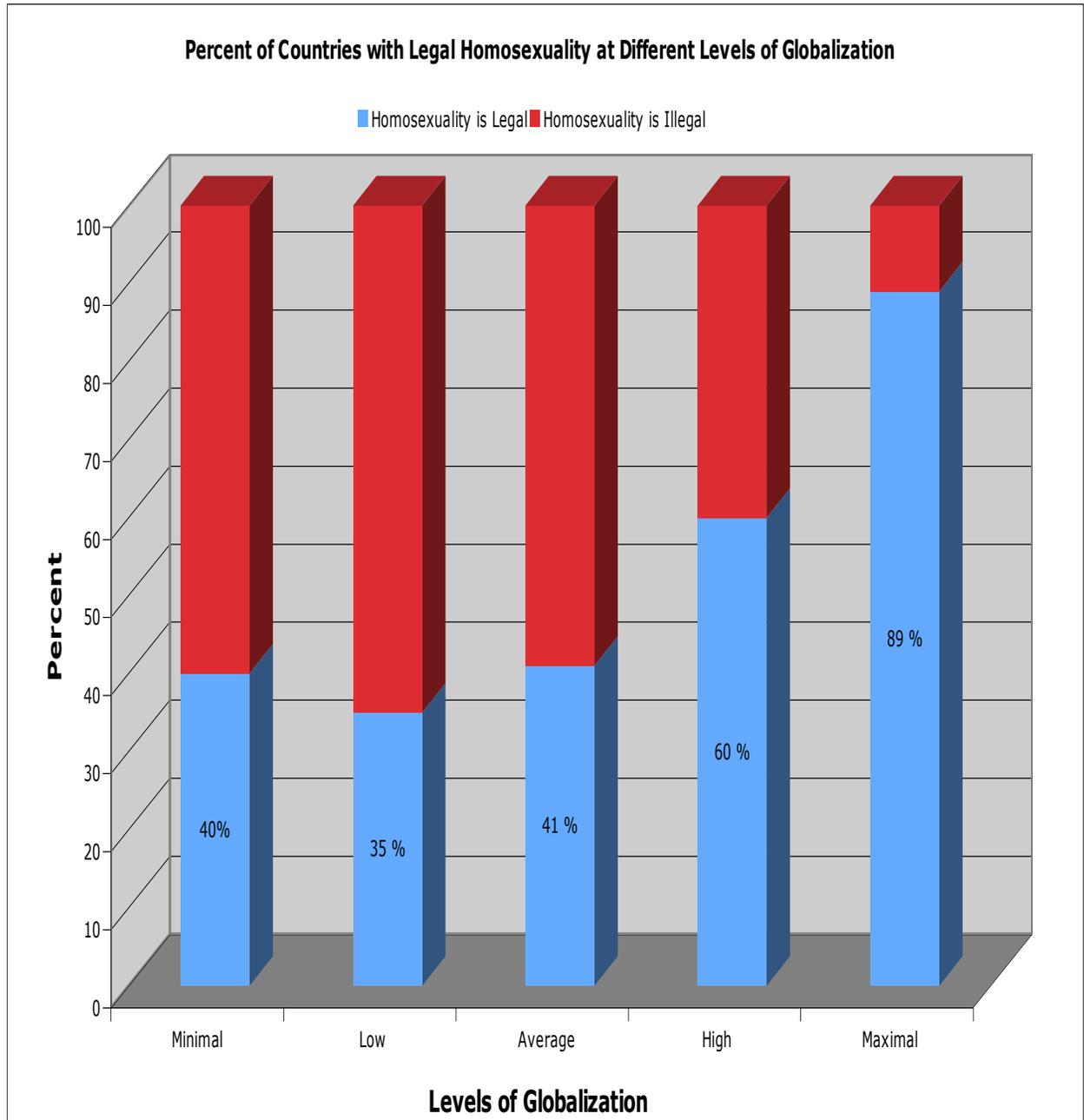


Figure 3: Predicted Probabilities: Combined Effects of Type of Legal System and Globalization

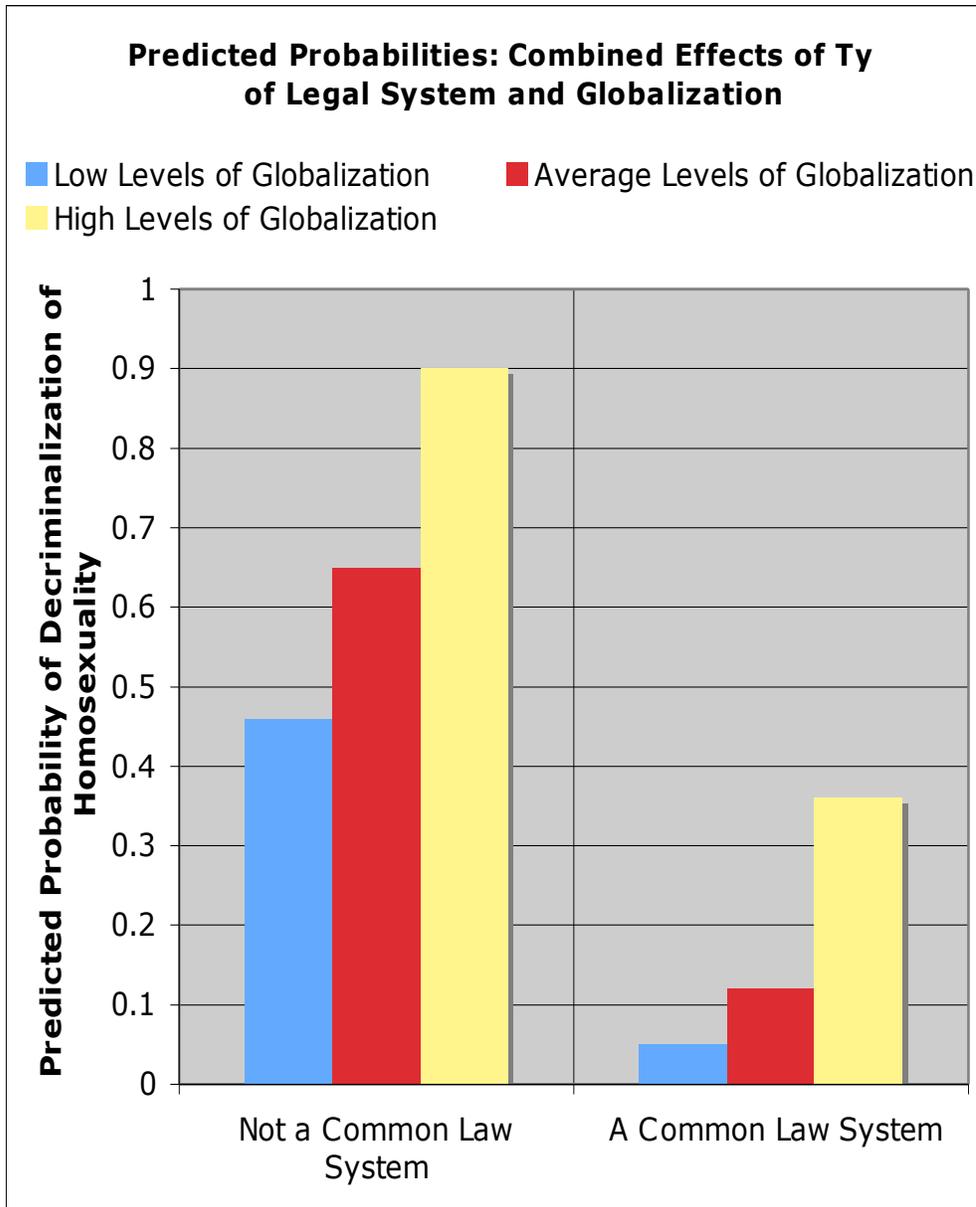
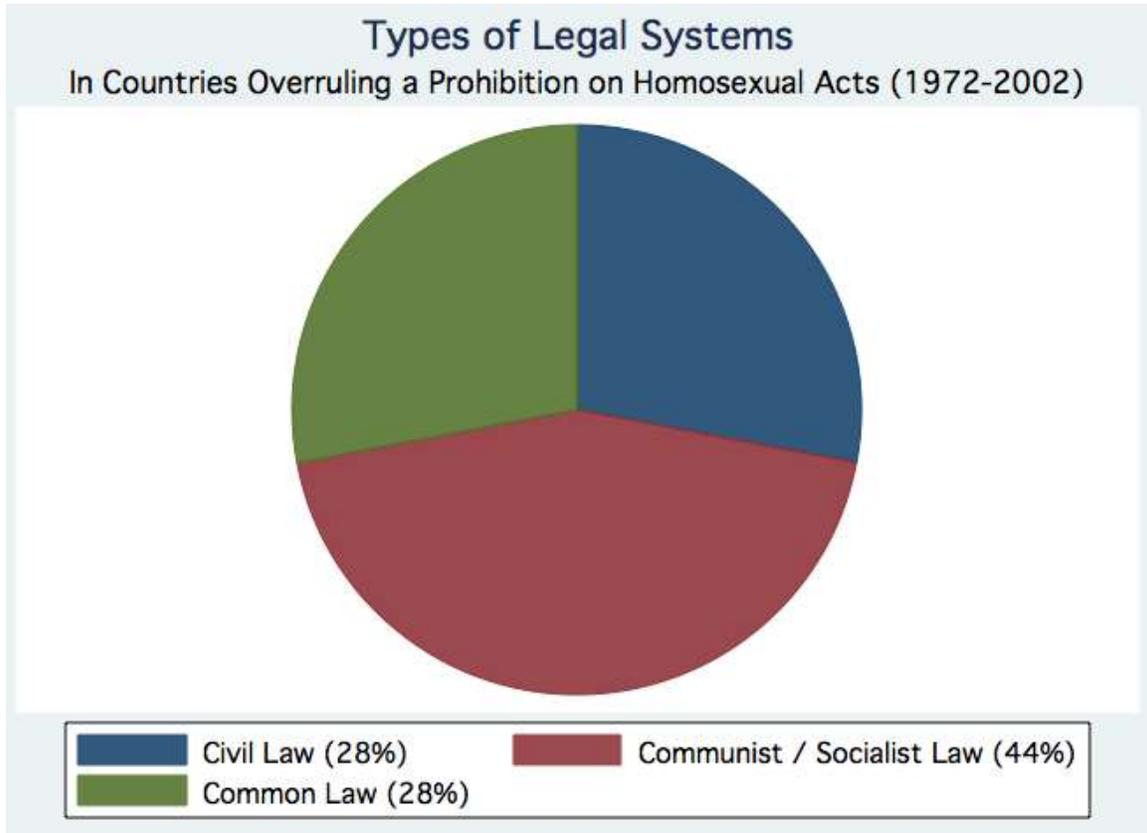


Figure 4: Types of Legal Systems in Countries Overruling a Prohibition on Homosexual Acts



Appendix A

<i>Weibull Regression</i>	
Time to Legalization (1972-2002)	
Variable	Estimate (Robust Standard Error)
<b>Common Law</b>	<b>-.66 *** (.05)</b>
Economic Globalization	.0008 (.002)
<b>Political Globalization</b>	<b>.003 ** (.001)</b>
Social Globalization	.004 # (.0026)
<b>GDP per capita</b>	<b>.00003 *** (.000006)</b>
<b>Women in Legislature</b>	<b>.008 ** (.003)</b>
Democracy	-.017 (.012)
<b>Democratization</b>	<b>.04 *** (.004)</b>
<b>Constant</b>	<b>-32.2 *** (.85)</b>
Number of Observations: 1836 Wald $\chi^2$ (8) = 609.11 Prob > $\chi^2$ = .000 Log-Pseudolikelihood = 766.4	
<ul style="list-style-type: none"> <li>• The 63 nations where sodomy had been decriminalized prior to the time period studied were excluded from the analysis by the computer. Furthermore, due to data availability, mostly related to the globalization variable, some of the remaining nations were not included in the duration analysis.</li> <li>• ***p&lt;.001 **p&lt;.01 *p&lt;.05 #p&lt;.1, one-tailed tests where directionality hypothesized.</li> </ul>	