# 1

# Introduction

In 1998, while responding to a report of a shooting in a private dwelling, the Houston police entered the apartment of John Lawrence. Upon entering the residence, the Texan policemen found Mr. Lawrence, an adult man, engaging in consensual homosexual sex 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 United States Supreme Court, *Bowers v. Hardwick* (478 U.S. 186) as controlling precedent. In *Bowers*, the court had recognized the constitutionality of prohibitions on same-sex sexual relations, which in some states had been in place for centuries. However, when the United States Supreme Court later reviewed *Lawrence v. Texas* (539 U.S. 558) in 2003, the justices handed down a 6 to 3 decision, not only reversing the decision of the state court but also overruling their own court's precedent in *Bowers*. The resolution in *Lawrence* effectively legalized consensual same-sex intercourse in the United States (Pedriana, 2009).

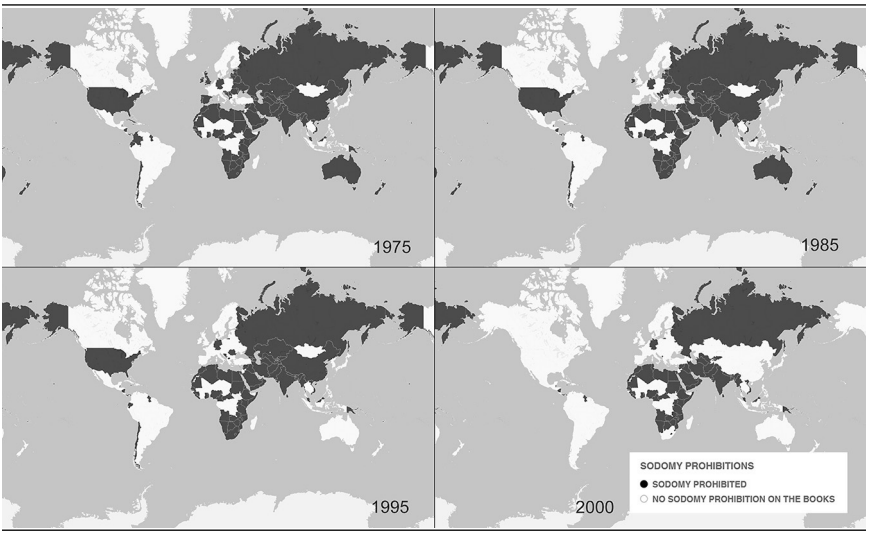
The United States is not the only country that has witnessed a sea change in the legal status of homosexuals in the recent past. In an opinion concurring in the judgment of the Constitutional Court of South Africa repealing the sodomy provision of this country, Justice Albie Sachs intimated:

> It is important to start the analysis by asking what is really being punished by the anti-sodomy laws. Is it an act, or is it a person? Outside of regulatory control, conduct that deviates from some publicly established norm is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace, or provocative of injury. In the case of male homosexuality, however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm. . . . Thus, it is not the act of sodomy that is denounced . . . but the so-called sodomite who performs it; not any proven social damage, but the threat that same-sex passion in itself is seen as representing to heterosexual hegemony. (*National Coalition for Gay and Lesbian Equality v. Minister of Justice and Others*, 1998, p. 188)

Since the 1960s the legal and societal environment facing the LGBT community (Lesbian, Gay, Bisexual and Transsexual—used interchangeably with LGBTI (Intersex) and LGBTIQ (Queer) throughout the book)—has changed dramatically in many countries. The number of countries that do *not* outlaw sodomy has almost doubled from 60 countries in 1975 to 103 countries (or a little more than 50 percent of the countries in the world) today. Yet, in various countries sodomy provisions remain on the books, prescribing in certain cases as harsh a penalty as capital punishment in case of their violation.

For a graphic illustration of this momentous change, examine the maps in Figure 1.1. The maps show the progression over time of one of the key aspects of gay rights examined in this book—sodomy laws and their repeal. The top left section of the first map indicates the distribution of sodomy laws in the world in the year 1975. The distributions in each consecutive decade until 2005 appear in the other three maps in the figure. In all four maps, the countries in grey are those where sodomy laws are in effect in that year; the countries in white are the ones where no sodomy provisions are on the books. We go into greater detail and discuss sodomy laws later on in this book (predominantly in Chapters 3 and 4). Yet, even a cursory glance at the maps will clearly indicate one important global trend over time; at least since 1975, an increasingly greater share of the countries in the world do not have sodomy provisions on the books. First, several countries in Europe repealed previously established laws (e.g., Spain). Later on, countries in Africa, Asia, and North and South America joined them. Overall, this trend toward more progressive

**Figure 1.1. Distribution of Sodomy Laws around the World and over Time (1975–2005)**




legal conditions for gay individuals, at least as far as same-sex legal prohibitions and their repeal are concerned, is clear. In the four decades since the 1970s, a diminishing number of countries posed any type of legal barriers for members of sexual-minority groups to engage in sexual activity in line with their sexual orientation. As we discuss at length in Chapters 5 and 6, such a trend toward more liberal conditions for homosexuals in certain parts of the world was true not just for sodomy laws but applied as well—particularly since the 1990s and early 2000s—to a broader range of legal rights for LGBT individuals.

In some countries the legal conditions have improved to such an extent that the state is now actively obligated to protect LGBT individuals and communities. Fourteen countries—including the United States of America—have legalized same-sex marriage, which is also true for some regions in Mexico. Furthermore, several countries now prohibit employment discrimination against LGBT individuals.

In many countries—particularly in the West—homosexuality is not just legal but visible: openly LGBT individuals are elected to public office (Saunders, 2009). In Germany, Guido Westerwelle was the first openly gay candidate to serve as foreign minister and vice-chancellor, and the capital city of Berlin had an openly gay mayor for 12 years (Reddy, 2012). In 2013 there

were six declared members of the LGBT community in the United States Congress (Peters, 2013). Some countries are even taking measures to punish other countries for their discrimination against homosexuals (Gjorgievska, 2014; Williams, 2009). By any measure, this is a broad transformation in the United States, when one compares the present reality where there are now states that protect the work rights of members of the LGBT community to the situation that has existed in most of American history when people in all states would be fired for being gay. As bad as those circumstances were, of course, the American situation was good when compared to actions of certain other countries where people who were gay could lose even their lives.

The progress is particularly notable given the largely acrimonious environment just a few decades earlier, when, as Peters (2013) notes with respect to the United States, for instance:

> [f]or decades, the words "gay" and "Congress" were usually seen together only in stories of scandal and shame: an arrest after an illicit proposition in an airport bathroom, accusations of trawling for sex on a phone service. When Gerry E. Studds came out 30 years ago, the first congressman to do so, it was only after an affair with a 17-year-old Congressional page was revealed. (p. 13)

At the same time, in the United States there has still never been an openly gay individual nominated for the cabinet in the executive branch (Johnson, 2014) or the Supreme Court of the United States.

The variance in sexual-minority rights is true not only within the same country over time, but also cross nationally; variance among countries around the world is still substantial, with gay rights still being severely abused in certain places. For example, despite the improving worldwide trend, legal conditions for sexual minorities in Gambia deteriorated considerably in the summer of 2014. In this country, provisions imposing life imprisonment became law. It was no coincidence that six months earlier, the Gambian president, Yahya Jammeh, had articulated his contempt for this minority group. In a statement in February of that year, the African leader announced:

> Homosexuality will never be tolerated and in fact will attract the ultimate penalty since it is intended to bring humanity to an inglorious extinction. We will fight these vermins called Homosexuals or gays the same way we are fighting malaria-causing mosquitoes; if not more aggressively. We will therefore not accept any friendship, aid

> or any other gesture that is conditional on accepting Homosexuals or L.G.B.T. as they are now baptized by the powers that promote them. As far as I am concerned, L.G.B.T. can only stand for Leprosy, Gonorrhoea, Bacteria and Tuberculosis; all of which are detrimental to human existence. (Hannon, *Slate*, September 8, 2014)

The first goal of this book is to describe those different types of variance—first, between countries in the rights they afford LGBTIQ individuals and groups; and second, how those rights change over time within the same country. Such variance consists of trends towards improved legal terms for sexual-minority groups as well as cases where such trends fall short. After all, the story of gay rights worldwide is not merely a rosy tale of liberalizing conditions, since in a considerable number of countries different variants of the Gambian case have transpired. Upon describing such diametrically opposed trends, the second goal of this book is to offer explanations for the reasons why we see different legal treatments of sexual minorities in different countries and the factors that impact how these treatments change temporally.

The broad theoretical framework we offer here attempts to explain the causes that lead some countries to have sodomy laws on the books while others either never had such laws or have decided to repeal said provisions. We delve into questions concerning the causes for the prescription of the death penalty for homosexuality. Furthermore, we examine what leads certain countries to prohibit discrimination against homosexuals in the workplace. The theoretical framework offered in this book argues that there are systematic explanations for these trends rooted in legal systems, colonial heritage, and religion. Those roots are also influenced by other variables such as systems of government, political institutions, levels of globalization, ethnic heterogeneity, and geographical locations.

It is important to note right at the outset that we do not purport to argue that an identical set of processes and institutions leads to all changes in the legal status of sexual minorities. This book examines a range of such rights—from the right not to lose one's life because of one's sexual orientation, through the right to freely live one's sexual desires, to the right not to be discriminated against based on sexual orientation. While several common threads run through the frameworks we offer to analyze those various legal rights, those frameworks do differ. For instance, as we show in Chapter 2, religion plays a major role in explaining the variance between countries that prescribe the death penalty to citizens violating a sodomy prohibition and countries that do not. While religion is still critical for explaining the

mere presence of such provisions on the books, in Chapters 3 and 4 we demonstrate that legal path dependence since colonial times is at least equally important. Furthermore, when we examine issues of equality under the law in Chapters 5 and 6, the importance of international law and international institutions come to the fore. Those explain a good deal of the variance in equality under the law for LGBT. The connections between those predictors and the different types of sexual-minority rights examined in this book are probabilistic and not necessarily deterministic; legal path dependence, or the influence of religion within state affairs, influences the likelihood of certain legal circumstances for sexual minorities.

Thus, while it makes perfect sense to examine different types of gay rights in the same book—it is a set of legal provisions that pertain to sexual minorities—there are aspects of those political phenomena that differ. Put another way, the dependent variables in all chapters are clearly related to each other; they concern the rights denied or granted sexual-minority groups over time and in different jurisdictions around the world. Yet, the sets of predictors offered to explain variance in those outcome variables somewhat differ.

In sum, the first valuable insight from this book is probably the notion that while the political and legal issues examined all fall into the category of gay rights—and while obviously there is a *prima facie* hierarchy where abolition of death penalty for sodomy is at the most basic level, sodomy repeal is next, and equality under the law is at the top—in fact, moving up this apparent ladder of rights (which we measure using the Gay Rights Index in Chapter 6) is a result of a combination of legal and political processes. Both legal and political institutions and the work of legal and political agents explain the phenomena we study here. It might be tempting to argue that since they are all considered rights of a minority group defined by sexual orientation, there is some cumulative nature by which similar predictors explain all. In reality, however—we argue and demonstrate—no one set of independent variables could satisfactorily account for all. Yet, taken together, the analyses and accounts developed in this book for the different types of sexual-minority rights shed new light on legal provisions protecting gays in different parts of the world and on the ways those provisions evolve over time.

Our research provides substantial insight into the factors that contribute to the legal conditions framing and defining same-sex relations. In addition, it offers important lessons about how legal and political institutions develop and change over time, and 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 minority group 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, including the types of activity they are allowed to engage in within those very bedrooms (Cook, 1999).

## The Importance of de jure Provisions

This book is focused on the description and analysis of the variance in laws, which is done for a reason. While in countries where homosexuality has been legalized there can still be high levels of discrimination and violence, the abolition of the death penalty for same-sex relations—or alternatively the legalization of homosexuality—are still crucial steps. As Stone Gledhill (2013) notes:

> While there is still an alarmingly high level of homophobic violence (and violence in general) in South Africa (Msibi, 2009), sexual minorities interviewed in Goodman's (2001) research spoke of feeling safer being openly homosexual in public, as well as being able to go to the police for any discrimination or harm perpetrated against them. Vitally, they saw decriminalization as a first step to attaining further freedoms in expressing their sexuality. (Goodman, 2001)

Conversely, in places where anti-LGBT provisions are still on the books, such as in India, members of sexual-minority groups may be in real danger. Even if Section 377 of the Indian Penal Code—on which we expand extensively later in the book—is not rigorously enforced, the reality is that it can still create a situation of oppression and abuse (Khosla, 2011). The law can provide a "fig leaf of legitimacy for the harassment of queer people by families, friends, the medical establishment and other official institutions" (Narrain, 2009, p. 138). It can also provide a platform for abuse given the shame and social ostracism that individuals might face if they are exposed as being gay (Patel, 2010). Nasir, a 27-year-old self-described *kothi*—a term used in India to describe men, often homosexual with feminine characteristics, who do not conform to traditional gender roles—intimates:

> The Sampangi-Ramanagar police filed a false case against me under a wrong name [. . .] and put me in the lock-up. When I protested against this confinement, they told me we cannot do anything with you, so just be here. I was made to be there until 11pm and after approximately an hour, three policemen came to me and asked me whether I have a penis or not: "let us see". When I didn't listen to them, they started hitting me in order to make me take off my clothes [. . .], put a stick into my arsehole [. . .] and forcibly inserted [their] penises in my mouth and the other in my arse [. . .] till they all came out and left me. (Narrain, 2009, p. 138, citing Bhan, 2005, p. 8)

Such treatment, particularly likely in the absence of legal protections, is neither limited to India nor to low-level government employees and officials. President Robert Mugabe of Zimbabwe in 1997 at the national independence celebrations declared, "[i]f dogs and pigs do not do it [homosexual acts], why must human beings? We have our own culture, and we must re-dedicate ourselves to our traditional values that make us human beings" (cited in Hepple, 2012). Mugabe, however, as chief executive, was not alone. Other branches of the Zimbabwean government left little in the way of hope for gay rights. Quansah (2004) summarizes the ruling in *Banana v. the State*:

> The appellant was a former non-executive president of Zimbabwe. He was convicted, *inter alia*, on two counts of sodomy by the High Court. He appealed against the conviction to the Supreme Court. The Court had to decide whether, amongst others, the Common Law crime of sodomy was in conformity with Section 23 of the Zimbabwean Constitution, which guaranteed protection against discrimination on the ground of gender. The [Court] held that Section 23 of the Constitution did not include an express prohibition against discrimination on the ground of sexual orientation. That provision prohibited discrimination between men and women, not between heterosexual men and homosexual men. The latter discrimination was prohibited only by a constitution, which proscribed discrimination on the grounds of sexual orientation. The real complaint by homosexual men, in the majority's view, was that they were not allowed to give expression to their sexual desires, whereas heterosexual men were. Insofar as that was discrimination, the majority thought it was not the sort of discrimination, which was prohibited by Section 23

> of the Constitution. [. . .] The real discrimination was against homosexual men in favor of heterosexual men, which was not discrimination on grounds of gender. Consequently, the majority concluded that the criminalization of consensual sodomy was not discrimination under the Constitution. (pp. 213–214)

In Jamaica—another country where legal provisions prohibit same-sex sexual relations—as recently as 2013, Dwayne Jones, a 17-year-old, was chopped to death when he was identified as "a cross-dressing teen" (Brathwaite, 2013). That same year in Jamaica, there were nine murders of LGBT individuals targeted for being gay. Likewise, members of sexual-minority groups have received death threats (Lavers, 2013). A painfully clear example of the existing level of discrimination against homosexuals that is socially acceptable can be seen in a recent article in the *Jamaica Observer* with the blunt title "Thousands rally against tossing out buggery act; shout out for clean, righteous living" and subtitled "Stand up for families, fight against greed, selfishness, speakers urge" (Skyers, 2014). In Saudi Arabia in as late as 2014, 35 individuals were arrested for attending a "gay party" (GayAsiaNews, 2014); and in 2003 the country executed three men because they were homosexual (Arab News, 2002). In Egypt, where homosexuality is illegal and LGBT members have been regularly arrested, there are reports that sexual-minority rights are not better protected since the military seized control again in 2013 (Trew, 2014).

In sum, laws on the books may have pernicious effects even when they are seldom enforced. As Justice Kennedy of the United States Supreme Court noted in the ruling that invalidated sodomy laws in the United States, if "homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and the private spheres" (*Lawrence v. Texas,* 539 U.S. 558 [2003]). Along the same lines, Narrian notes that the expectation of heterosexual marriage in India is fierce; and with no legal alternative, suicide may become a real outlet (2009, p. 139). Lastly, in South Africa, before the repeal of anti-sodomy laws, the journalist Mark Gevisser said that to live their lives the way they wish when the law makes criminal their behavior created a situation for the LGBT community where "[w]e exercise the freedom we think we might have in South Africa not by right but by favor, by indulgence. We are dependent on, at best, the goodwill of the police to meet and act as we do; and at worst we are dependent on their blind eye, their lack of knowledge or their inefficiency" (2013, p. 61).

## This Book's Argument

Beyond the specific examples above, our data show that prohibitions against sodomy still exist in some 80 nations and territories worldwide. In seven of those, individuals may pay with their lives for engaging in homosexual activity. This book offers a comprehensive analysis of the legal conditions for lesbian, gay, bisexual, and transsexual individuals with a large sample of countries over a period of several decades. Three major issues concern us in this book: the death penalty prescribed to same-sex sexual behavior (Chapter 2); the decriminalization of sodomy or the repeal of sodomy laws as in the examples from the United States and South Africa, as well as the institutions (judicial or non-judicial) through which decriminalization happened (Chapters 3 and 4); and legal provisions against discrimination of sexual minorities (Chapters 5 and 6). Of those three issues, the one that has lasted the longest and had the most far-reaching implications is the decriminalization of sodomy. We examine capital punishment for sodomy and thoroughly analyze it here; yet, it is important to bear in mind that with few exceptions, in the overwhelming majority of countries and jurisdictions where such a penalty had been on the books, it was repealed long ago. Only recently has equality under the law for sexual minorities (e.g., equality in the workplace) made the political agenda for some countries. Sodomy clauses, on the other hand, are legal provisions that remained on the books for decades in the case of some countries, and centuries, in the case of others. While most countries prescribing death for same-sex sexual relations repealed this provision during the 19th or early 20th centuries, the sodomy provisions remained on the books well into the 20th and 21st centuries. Accordingly, in recent decades it was the repeal of such laws that was typically the first legal obstacle on the way to legal equality for sexual-minority groups.

Our explanations for those legal trends concerning sexual minorities are based on legal path dependence and the influence of religion and the religious state. On the legal side, we contend that the legal inheritance from colonial times has had long-lasting effects on sexual-minority rights around the world. Nations with legal systems based on English Common Law inherited a prohibition on homosexual acts, which influenced gay rights, in some cases, for centuries to come. Common Law sodomy prohibitions, which find their origins in colonial times, were entrenched in the system, with vested interests of various types and of different parties, rendering legal change quite unlikely. Thus, due to path dependence, where the legal system originates from English Common Law the likelihood of decriminalization declines precipitously.

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 religion plays a key role in the state's politics (large religious constituencies, legal limitations on minority religions, religious courts with extended jurisdictions, etc.), the likelihood that homosexual activity is legal decreases (Eastman, 1997).[1] For instance, under the British Empire, homosexual intercourse was made illegal in New Zealand in 1840. The prohibition against any type of sexual relations between men was expanded in this country later in the 19th 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—but are not limited to—Australia, India, and Israel (Frank et al., 2010; Joseph, 1996; Sanders, 2009). As we will elaborate in great detail, the prototypical alternative legal system—Civil Law structures (of various types)—again due to legal path dependence, did not have the effect of increasing the likelihood of sodomy provisions. The reason is that such provisions had been annulled shortly after the French Revolution in the late 18th century, in most cases never to be reinstated.

We identify three major pillars that supported such a path-dependent nature of the legal evolution of sodomy provisions: codification efforts by the British Empire that transported much of the legal setup of the motherland to colonies and territories all over the world and, with it, transported the sodomy provisions; legislation by local legislatures that preserved the spirit of English law; and rulings by constitutional courts and supreme courts in the different nations that articulated constitutional or statutory interpretations largely along the lines of original English law. Using original data in addition to data drawn from several existing sources, we examine those questions cross nationally over time, as well as while using case studies.

As for the religious aspects, in Judeo-Christian traditions and later on in Islam, the death penalty for homosexuality was divinely prescribed (Eron, 1993). Indeed, in response to the Human Rights Council of the United Nations, Nigeria defended capital punishment for same-sex relations using religious justifications and contended that it was a "just" penalty (Strasser, 2010). States that limit religious freedom are more likely to frame sodomy as a sin and to take religious texts as guides on how to punish such acts. The Jewish bible spells out that sodomy is evil when it reports on the efforts by the people of Sodom to rape Lot's guests (Genesis 18:17).[2] While there are numerous interpretations of the scripture, it is the traditional interpretation that is of particular interest for us here, as we believe it is key for the link between the

involvement of the state in religion and its likelihood to employ the death penalty as punishment for sodomy. One might argue that the evil of Sodom was attempted rape and not homosexuality. However, in Leviticus 18:22 God tells Moses: "Do not have sexual relations with a man as one does with a woman; that is detestable." Traditional Christian analysis strongly agrees that homosexuality is evil (Gagnon et al., 2001; Olyan, 1994). For example, see Jude 1:7.[3] Certain views in the Qur'an are not dissimilar (Sura 26:165–167).

Traditional Islamic interpretations continue to this day to see male same-sex sex as prohibited by God (Duran, 1993; Habib, 2009; Wafer, 1997). While non-Abrahamic religions have had more ambivalent attitudes (and sometimes much more positive views) towards homosexuality in the past, many religious conservatives even in these faiths, either through Western influence or other factors, have also come to define homosexuality as evil (Bacchetta, 1999; Crompton, 2006; Dynes, 1992; Sharma, 1993). This link with a religious view that sodomy is evil—while not true everywhere, for every religion, or every religious authority within different religions—is key.

Indeed, even the prohibition in 16th century English law, which later influenced sodomy legislation around the world, finds its origins in a political dispute around religion. As we elaborate, it was the English Reformation and the assumption of a religious leader replacing the papacy that was the key motivation for King Henry VIII to pass his anti-sodomy legislation. As we also show, in some cases the influence of religion has indeed come full circle. This was the case in Sudan, for instance, as well as in Nigeria and Pakistan in recent years. In those countries, the origins of sodomy prohibitions were in English law. The Sudanese Penal Code, for example, was adopted in 1899 with some changes from the Indian Penal Code. It was only nine decades later that the Sudanese government added legal prohibitions on sodomy, this time pursuant to Sharia law. Replacing language largely echoing the provisions mostly in Section 377 of the Indian Penal Code, Section 148 of the new Sudanese provision reads:

> Sodomy: (1) Any man who inserts his penis or its equivalent into a woman's or a man's anus or permitted another man to insert his penis or its equivalent in his and is said to have committed Sodomy; (2) (a) Whoever commits Sodomy shall be punished with flogging one hundred lashes and he shall also be liable to five years imprisonment; (b) If the offender is convicted for the second time he shall be punished with flogging on hundred lashed and imprisonment for a term which may not exceed five years. (c) If the offender is convicted for

> the third time he shall be punished with death or life imprisonment. (Human Rights Watch Report 2005, 21n)

Another example for the long arm of the religious state is Uganda, where current religious ideology has proved to be influential in the context of LGBT rights and their denial. Homosexuality was outlawed in Uganda when Uganda was under control of the British Empire, based on the Indian Penal Code (Sanders, 2009, p. 12). Many current African politicians and religious leaders have argued that homosexuality was "imported from the West" (Awondo et al., 2012, p. 148), and so the Common Law origin of criminalizing homosexuality is irrelevant. There is, however, strong evidence to the contrary. Epprecht (2009) points out that in general in Africa, until colonialism and the imposition of Christianity, same-sex relations were much more acceptable. Hoad (2007) argues that same-sex relations were something that, in various parts of Africa, was an accepted practice at least in some periods within the life cycle. Specifically related to Uganda, Msibi (2011, p. 99) points to the acceptance of same-sex relations among many of the peoples of the country before colonialism. One historical event that underlines both the different attitudes towards homosexuality in the country before colonialism and the impact of colonialism is the story of King Mwanga II:

> It is no secret that King Mwanga II, the Baganda monarch [. . .] engaged in sexual relations with other men: he made sexual demands upon his male servants and was enraged when they started refusing [. . .] to his advances on the grounds of their Christianity; his response was to order the killing of those who were converting to the new religion, and these slain servants are now called the "Uganda martyrs" [. . .]. The King's same-sex activities were falsely presented by Western colonialists to show that the Baganda were disgusted at them; this was in keeping with the West's imposition of homophobia in Africa. (Msibi, 2011, p. 99)

At the time of this book's printing, circumstances in Uganda have gone from bad to worse as far as legal rights for LGBT are concerned. The current religious and political leadership in Uganda is extremely hostile to homosexuality, and the situation has deteriorated due to outside influences based on religious ideologies. In the last decade there has been a concerted effort to enhance punishments for homosexuality and to punish not just sodomy but any homosexual "propaganda" (Awondo et al., 2012). One of the key factors

is the lobbying and support efforts funded by International House of Prayer, an evangelical organization based in the United States (Lowder, 2014). The Campus Crusade for Christ, one of the largest charities in the United States, is another organization that uses its resources to coordinate anti-homosexual workshops in Africa and to support efforts to outlaw homosexuality or make existing laws more stringent. This includes imposing the death penalty for homosexuality (Michaelson, 2014).

While the death-penalty bill was being debated, a Ugandan gay-rights activist was killed after being identified by a Ugandan newspaper as someone who deserved to die. Both the bill and the advocacy for killing gay-rights activists were conspicuously framed in religious terms (Gettleman, 2011). Largely due to international pressure, the president stifled attempts to pass the capital-punishment bill, despite strong support in parliament (Awondo et al., 2012, p. 147). Though the bill failed, the general atmosphere towards homosexuals in the country has only deteriorated (Feder, 2014).[4]

As important as the Ugandan, American, Indian, and South African examples are, this book aims to go beyond case studies and specific illustrations from particular countries and complement those with research drawing on large-N databases and cutting-edge quantitative, analytical approaches. As such, it makes important contributions to the literature. While we have scholarship 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; Hensle, 2009; West & Green, 1997), there has been very little cross-national inquiry of LGBT rights outside of the West (Frank et al., 2009; Sanders, 2009). With quantitative research limited to a relatively small number of nations and to cross-sectional snapshots, there also exists a paucity of time-series cross-national quantitative analysis beyond the United States.[5] Further, the research that does exist focuses mostly on liberalization and its sociological antecedents, such as level of individualization in society (e.g., Frank & McEneaney, 1999; Frank et al., 2010). Instead, here we examine institutional and legal evolution, and the political and economic variables that lead to changes in law and policy. Unlike work that examines legal trends such as contractions or expansions in the scope of legal regulation (e.g., Frank & McEneaney, 1999; Frank et al., 2010), we examine actual laws pertaining to the death penalty for sodomy, same-sex sex, and discrimination against sexual minorities. It is the renewed political power of religious denominations in

recent decades that has preserved, if not reinstated, anti-sodomy laws in various regions of western Asia and Africa (Hinsch, 1990). Let us now examine each of those key influences—legal path dependence and the involvement of religion in the state—in more detail.

## Path Dependence

Path dependence refers to the notion that social structures, human behavior, and various forms of human activity develop in ways that are dependent on earlier stages of their evolution; what happened earlier constrains the evolution in later stages and, in a real sense, it is dependent on the path previously paved. The evolution of technology is often path dependent. One such example is the qwerty keypad, which at a certain point in time was designed based on the needs and technological constraints of that period. Yet, switching between the qwerty design and any alternative offered thereafter has proven particularly tricky; not only are individuals and institutions used to the old design, but much of the technology they use is built to fit with the qwerty model. The same can be said for the Windows operating system. Without embroiling ourselves in the debates around the upsides and downsides of Windows, that this operating system has proven itself particularly impervious to replacement is not least due to the fact that it has been the infrastructure upon which much of the current technologies for various professions are founded. Thus, the notion of path dependence is theoretically powerful, as it helps us analyze current conditions based on the evolutionary path that has preceded them in the field of technology and otherwise.

Moving from the realm of technology to the context of political and social phenomena, path dependence refers to the "dynamics of self-reinforcing . . . processes in a political system" (Pierson & Skocpol, 2002, p. 699). This type of process is widespread in politics (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 also applies to a variety of other political phenomena (Collier & Collier, 1991; Ertman, 1997; Huber & Stephens, 2001; Kurth, 1979; Skowronek, 1993; Skocpol, 1979).

We argue that legal path dependence is a key to understanding the evolution of gay rights and, in particular, the decriminalization of homosexual intercourse cross nationally and over time. Of particular importance for the

analysis of the legal treatment of same-sex sexual relations is the legal system put in place by the state. While this may be an external shock, its consequences are far reaching due to the dynamics of path dependence.

The pertinent case for sodomy laws is the export of the Common Law system that had criminalized buggery in Great Britain in 1533 and has proven particularly pernicious. Common Law adopted by other nations (or alternatively imposed on them) in conjunction with subsequent judicial decisions and statutes passed over the centuries, has led to criminalization of homosexual acts (Sanders, 2009). Conversely, the adoption and export of other legal systems, particularly French Civil Law (and its different derivatives in other European nations and colonial empires), did not have this effect, as sodomy was decriminalized immediately after the French Revolution. As a result, countries that were less influenced by British law were 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 putting in place 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). The longer the system persists, the stronger becomes the belief. North (1990) contends that while there are multiple potential equilibria, which means that more than one legal system is possible and the final outcome is uncertain, an equilibrium, even one superior to the status quo (e.g., a superior legal system), may not win. This is due to the initial advantage of the existing system. Once established, an existing legal system is locked-in. Consequently, increasing returns and significant transaction costs due to imperfect markets shape institutional change. Once an equilibrium solution is locked-in, evolution takes 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" (p. 98).

Although analysts have had difficulty in developing a clear definition of the meaning of path dependence (Mahoney, 2000), we refer specifically to the processes involving positive feedback, or increasing returns, that induce further movement in the same direction over time (North, 1990; Pierson, 2000, 2004; Smith, 2008). At the core of this definition of path dependence is the notion that, once out of the gate, institutions stay on a particular path

because the costs involved in switching to a new one are prohibitively high (Kahn, 2006). The timing and sequence of events in such a theory matters a great deal because future outcomes are shaped by past decisions (Maioni, 1998; Pierson, 2004; Rose-Ackerman, 2010).

While past research indicates that the phenomenon of path dependence is widespread in politics (Ertman, 1997; Hacker, 1998; Huber & Stephens, 2001; Kurth, 1979; Pierson, 2000, 2004), relatively little has been said regarding the path-dependent nature of legal development (Asal et al., 2013; Sommer et al., 2013). We define *precedent* as previously defined legal rules (Segal & Spaeth, 2003). In a Common Law system, the principle of *stare decisis* dictates that precedent must be upheld and respected in future cases. As an important institutional norm, stare decisis produces the law's path-dependent character (Hathaway, 2003). Specifically, stare decisis compels lawmakers and judicial decision makers to respect the decisions of their predecessors. Once a precedent is set, lawmakers have limited ability to switch paths and induce change.[6] In sum, by explaining how the legal system has the capacity to lock in laws and thus generate stability over time, path dependence is critical for explaining the legal state of affairs.

The crucial aspect of legal path dependence, which is of particular interest for us, relates to laws passed in England in the 16th century (under the influence of religious-state ideology) and the laws repealed in late 18th-century France. While in Chapter 3 we delve into the historical details more fully, it makes sense here to canvass some of the historical evolution of sodomy laws. As discussed, we identify three key pillars that served the path-dependent nature of sodomy laws over the centuries. The first pillar is legal codification, which was a key element in the British colonial project and that served the transportation of laws from the motherland to the colonies. A quintessential example of such legal codification is the Indian Penal Code, which was implemented in India in 1862, but whose derivatives influenced legal reality in vast swaths of the British Empire and continued to do so for decades after. The second pillar supporting path dependent legal evolution is judicial rulings rendered by local courts. As courts play a key role in the system of Common Law and as case law is a central source for legal precedent in such systems, it was judicial rulings in the spirit of the laws of England that for decades and centuries helped perpetuate the same legal reality. The *Bowers* ruling in the United States, mentioned at the start of this chapter, is but one example of the role courts have played in sustaining the legal status quo concerning gay rights put in place in colonial eras. Lastly, the third pillar of path dependence is legislation passed by local legislators. In Chapter 4, we thoroughly examine

legislative decisions concerning sodomy laws and their repeal. The legal and political status quo entails sunk costs; and once a certain path is paved due to an initial decision, switching paths becomes particularly tricky. This reality is clearly reflected in the type of legislation that was passed in many legislatures in British colonies and territories. This type of legislation, which largely preserved the principles of the legislation from the motherland, sustained legal development along the same path. The source of all those is the original anti-sodomy legislation passed in England centuries earlier, when King Henry VIII was in power.

We go into details of the historical background to the Buggery Act of 1533 in the next chapter. Yet, the effect of the act on the legal status of sodomy was far reaching, as legal prohibitions against sodomy became entrenched in English law (Dundes, 2002; Gilbert, 1976, 1981; Rayside, 1992). It was not until 1861 that the capital punishment prescribed by the law was irrevocably removed.[7] The Sexual Offences Act of 1967 provided limited decriminalization of homosexual acts.[8]

The Buggery Act is critical to our story, not just because of the extensive powers this legislation granted to the king of England nearly five centuries ago. Rather, it was the act and its legal derivatives—which were exported to British colonies around the world either in its original form or as a part of legal codes—that made this act particularly consequential. The legal codes included initiatives by the colonial authorities such as the Indian Penal Code (the Macaulay Code), the Fitzjames Stephen Code, the Griffith Code, and the Wright Penal Code. Interestingly, the push towards codification inside England was substantial, with the idea of legal codification warmly endorsed by Jeremy Bentham in *A Fragment on Government* (1776) and *An Introduction to the Principles of Morals and Legislation* (1789), as well as by his disciple John Stuart Mill. Yet, it was predominantly in the colonies, at least initially, that the notion of legal codification materialized. This process of legal codification, implemented in the colonies, became a key means by which legal path dependence took shape. The extensive codification in the colonies was a significant element in the legal infrastructure supporting the path-dependent legal evolution that eventually led to the morphing of the Buggery Act into the legal prohibitions of later years.

Conversely, in other colonial empires, such as France, same-sex sexual relations 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. 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, several of which adopted it voluntarily after the Spanish occupation was over).

The concept of path dependence applies to the case of the 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 prohibition on same-sex sex entrenched in the legal system in nations that adopted Civil Law. Hence, law in Civil Law jurisdictions developed along a different path. The legal system was lacking a prohibition on sodomy in many Civil Law countries, and this was the equilibrium that was locked in. Any attempts to alter the status quo by proposing alternative equilibria, even if superior in certain ways, were unlikely to succeed because of the prohibitively high cost of change once path dependence was set in motion (North, 1990).

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 previously had anti-sodomy laws in place, the process of democratization in many cases was followed by decriminalization of gay sexual activity.

### State-Religion Relations and Prohibitions on Sodomy

A Common Law system is not the only factor that decreases the legal protections sexual-minority groups enjoy. Another key variable is the influence of religion on the state. 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 would be codified. One example of this influence of religion comes from Egypt. On May 11, 2001, the police in the Egyptian capital of Cairo arrested 52 men. The group, which later became

known as Cairo 52, was aboard the Queen Boat, a floating gay nightclub. While all 52 pleaded innocent, they stood trial, some of them more than once (Hawley, 2001). 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. As Ottoson (2009) indicates, there is no general prohibition on homosexual acts in the Egyptian Penal Code. Yet, the state would take advantage of statutory provisions concerning religion, morality, and debauchery, to prosecute homosexuals and bisexual individuals.

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. As with versions of Judaism and Christianity, from its beginning as a religion, Islam rejected homosexual intercourse. Different schools of thought within Islam have different legal prescriptions when it comes to sodomy, also termed *zina*, with some regarding it as unlawful sexual relations between individuals. Saifee (2003) provides a brief summary of some of the current perspectives on this matter within Islam:

> The majority of Sunni jurists regard heterosexual anal intercourse between a non-marital couple a *zina*. Such activity within marriage, although considered sinful, is not a crime of *zina*. Sunni schools of thought differ in their criminal classification of homosexual sodomy. The Shafi'i, Hanbali, and Maliki schools regard homosexual intercourse as *zina* and thus liable to *hadd* punishment, while the Hanafis consider homosexual sodomy a crime of *ta'azir*, or discretionary punishment. (p. 378)

Some nations with a Muslim majority but which are relatively secular in nature 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), a certain level of tolerance for homosexual sexual activity has been entrenched in the system for years (Murray & 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. In Chapter 2 and then again when we develop the Gay Rights Index in Chapter