

Morality Policy and Political Unaccountability:

Capital Punishment, Abortion, and Gay Rights in Canada, United Kingdom, France, and Germany

by

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This paper looks at the relationship between legal change and opinion change on morality policies--called issues of conscience in parliamentary regimes. These findings on capital punishment, abortion, and gay rights in Canada, United Kingdom, France, and Germany are part of a larger project embracing other moral conflicts as well as the United States.¹ To evaluate the impact of legal change, I consider key policy enactments in terms of the state of majority opinion before and after a policy change is effected by new legislation. My judgments were informed by case histories of policy changes with respect to abolishing capital punishment, liberalizing or legalizing abortion, and decriminalizing homosexuality as well as sanctioning same-sex unions.

Capital Punishment: Great Britain. In 1947 the British Gallup poll showed that 65% favored the death penalty, and the following year two-thirds expressed disapproval for a reform objective of “not hanging anyone for murder for five years.” The Labour Government in late 1948 appointed a Royal Commission on Capital Punishment, but no reforms were forthcoming, though reform agitation got a big boost in the early 1950s when the hangings of two men and one woman were clouded by suspicions of official wrong-doings. Nonetheless “[p]ublic opinion polls taken during this period [1953 and 1955], for instance, showed continued majority support for the retention of capital punishment, despite perceptible movement away from *overwhelming* acceptance of it.”² In January of 1956, one month before the House of Commons voted again on abolition, a survey by

¹ See T. Alexander Smith and Raymond Tatalovich, *Cultures at War: Moral Conflicts in Western Democracies* (Peterborough, Ontario: Broadview Press, 2003). Given space limitations, it was not possible to give citations for every survey referenced in the case studies that follow. For the interested reader, those data are collected in Appendices A1, A2, and A3 in *Cultures at War*. For the table of contents and publication information, search using “Tatalovich” on the homepage of Broadview Press: www.broadviewpress.com

² James B. Christoph, *Capital Punishment and British Politics* (Chicago: University of Chicago Press, 1962), p. 109; earlier surveys referenced are found on pp. 43, 53-54.

Mass-Observation for the *Daily Telegraph* showed 34% favoring a suspension of the death penalty (45% disapproved), which contrasted from the 13% who had favored a temporary halt to hangings in 1948. These opinion data led Christoph to conclude that “at no time were the abolitionists able to claim a majority for their position, but instead they had to base their case upon evidence that opinion was moving in that direction in a rather remarkable way.”³ While not abolished, the mangled attempt by a Conservative Government to reform capital punishment eventually yielded the 1957 Homicide Act, but still no turn-about in public opinion seems to have resulted.

Indeed abolition came in 1965, yet three decades later “[c]apital punishment surveys regularly show that some three-quarters of the electorate favour the return of capital punishment for murder.”⁴ Support for capital punishment among Britains is shown in a long line of polls dating back at least to 1938, when fifty-five percent opposed its abolishment.⁵ A similar question was asked seven more times through 1970. Usually upwards of two-thirds opposed abolition and, what seems particularly odd since capital punishment was outlawed in 1965, the highwater mark of retentionist sentiment was reached in 1962 and 1964 (when 81% and 79% were opposed to banning it). An especially telling question was asked by Gallup in mid-1962 presumably to measure the miscarriage of justice in the Timothy Evans hanging: “If it were proved that an innocent man had been wrongly convicted of a murder and hanged, would this alter your views about the death penalty in any way?” Nonetheless fifty-two percent answered no; only nine percent favored abolition. In the wake of

³ Ibid., p. 116; survey data on p. 117.

⁴ Bill Jones, “Crime and Punishment,” in Bill Jones, ed., *Political issues in Britain today* (New York: Manchester University Press, 1994), p. 369.

⁵ Gallup, *The Gallup International Public Opinion Polls: Great Britain 1937-1975* vol. 1 (New York: Random House, 1976), p. 11. The question was: “Should the death penalty be abolished?” 45% said yes and 11% had no opinion.

abolition, Gallup changed the question to assess support for re-introducing the death penalty, and support exceeded seventy percent where army or police personnel are murdered, for terrorist murders, and murdering a woman after a sexual assault, and murder was done “just for the fun of it.” Looking even longer term, by the end of the Twentieth Century, nearly seven-in-ten British respondents wanted a return to capital punishment. There is little doubt that Labour abolished capital punishment despite consistent and widespread feelings to the contrary among the British people.

Capital Punishment: Canada. High levels of support for capital punishment have been the norm in Canada, except that public opinion had no impact on the decision by Canada to abolish the death penalty. The nadir of popular approval came during the permissive 1960s but, during the past two decades, usually no less than three-fifths of Canadians express their support.

Prior to 1961, anybody convicted of murder in Canada was automatically sentenced to death, unless the sentence was commuted by the Governor General. In late 1967 the Canadian Parliament limited the death statute to only the murder of police officers and prison guards for an experimental five-year period. After that suspension expired, in January of 1973, the Solicitor General of Canada introduced legislation to Parliament—which was enacted—to extend that partial ban on capital punishment. In 1976 Parliament made its abolition permanent. During the period from 1966/1967 through 1976 the issue of capital punishment was debated not only in Parliament but on the editorial pages and in public opinion, and the Liberal Government even commissioned an independent study to evaluate its deterrent effects. Nonetheless Canadian public opinion seems not to have been much influenced by those events, according to one scholarly analysis: “The best estimate of the trend in public opinion over the past decade is that, in the mid-1960s, there was stable approval of the death

penalty at between 50 and 58 per cent of Canadians and stable disapproval of it, between 33 and 40 per cent. A period of instability in the late 60s seemed to generate an increase in support of the death penalty to between 60 and 66 per cent of Canadians and a lessening of abolitionist opinion to 27-33 per cent.”⁶ That is, support for capital punishment increased just as Parliament voted the partial ban, and this best estimate was probably no statistical anomaly given future opinion trends. The question asked in 1970—whether the death penalty should be reinstated for kidnapping figures in public life—“generated the strongest retentionist sentiment in twenty years” and was attributed to “a widely publicized kidnapping and murder of a politician in Quebec by separatists turned political terrorists.”⁷ But that spike in popular approval of capital punishment has not abated since, because Canadians have expressed high levels of support for the death penalty despite its abolition. The ultimate sanction was abolished for ordinary crimes in 1976, yet two years later polls showed that 68% supported capital punishment. Analysis of CIPO surveys in 1965, 1975, and 1982 led Richard Johnston to conclude that “opinion was one-sidedly pro-capital punishment in each year” and the “restorationist sentiment of the 1980s was not a reaction after the fact of abolition” but rather “the abolition of the death penalty itself came in defiance of public opinion.”⁸ Polling trends from 1978 through 1998 show support for the death penalty hit its recent nadir in 1996 (55%) but has since risen slightly to 61% in 1998—the year Canada fully abolished the death penalty for all crimes.

Capital Punishment: France. The experience of France is more suggestive that some

⁶ David B. Chandler, *Capital Punishment in Canada* (Toronto: McClelland and Stewart, 1976), pp. 52-53.

⁷ *Ibid.*, p. 51.

⁸ Richard Johnston, *Public Opinion and Public Policy in Canada: Questions of Confidence* (Toronto: University of Toronto Press, 1986), pp. 79, 81.

shifting public opinion did materialize after capital punishment was ended. One informed account (that supports abolitionism) argues that the ebb-and-flow of French opinion is heavily influenced by grisly murders that are highly publicized. In mid-1969 President George Pompidou reprieved six prisoners sentenced to death, and polls showed the minority of French who favored capital punishment dropping from the 39% level (50% were opposed) in May to 33% by October (with 58% now opposed).

But in September of 1971 two prison inmates took a nurse and guard hostage and, after the building was stormed, both hostages were found dead with their throats cut. The press and public outrage that ensued shifted popular sentiment towards capital punishment, by a 53%-39% margin. Both prisoners were executed, and it was not until 1977 that a French jury convicted but refused to condemn a child-killer (who was defended by abolitionist crusader Robert Badinter). Five years later, during the precise month—September 1981--when the Socialists under President Francois Mitterrand enacted a statutory ban on capital punishment, a poll by *Sofres* for *Le Figaro* revealed that 62% of the French public would keep the guillotine. Yet three years after its abolition, a poll by IFRES showed that public opinion shifted again, with 49% now favoring abolition and 46% opposed.

The French National Election Surveys probed whether “the death penalty should be reestablished” and found that the percentages of affirmative responses declined from 1988 (64% said yes), to 1995 (56%), and 1997 (50%). This trend led the researcher to conclude “after a long period of declining law and order in the 1970s and 1980s, public opinion in support of the death penalty perhaps is beginning to decline, having succumbed to the rising power of the discourse of the

cultivated elite, whose voice is one with that of a growing highly educated population.”⁹ A less optimistic prognosis is offered by one abolitionist who, after concluding that “more than twenty years without an execution [that being in 1977], the majority of the French public are still not convinced [about abolition]” and cites two surveys taken the same month (in the late 1990s). Abolitionists were 54% when an IFOB poll asked “[a]re you in favour of restoring the death penalty?” but the minority (46% versus 50%) when asked by a BVA poll “[a]re you in favour of the death penalty?”¹⁰

In sum, France is a mixed case, showing greater volatility in public opinion than Canada or Great Britain—where retentionists always represented the prevailing viewpoint. In the short-term (meaning at least one decade) following its 1981 abolition of capital punishment, polls showed that retentionists were the majority of French, and the activists most engaged in this historic campaign to rid Europe of the death penalty were not entirely convinced that they have won the intellectual battle for public opinion in France. Yet if the minority retentionist view recorded in two polls of the late 1990s is a harbinger of the future, then this trend-line may signal that a long-term redistribution of values has occurred top-to-bottom in French society.

Capital Punishment: Germany. Article 102 of the Basic Law of the Federal Republic of Germany, dated May 23 of 1949, declares “Capital punishment shall be abolished.” According to one official in the Federal Ministry of Justice, “[i]t was above all the impression of the abuse of

⁹ Etienne Schweisguth, “The Myth of Neoconservatism,” in Michael S. Lewis-Beck, ed., *How France Votes* (New York: Chatham House Publishers, 2000), p. 183; see survey results on page 179 and the question on page 175.

¹⁰ Michel Forst, “The Abolition of the Death Penalty in France,” in *The Death Penalty Abolition in Europe* (Germany: Council of Europe Publishing, May 1999), pp. 109, 113, 115-116.

capital punishment during the Nazi regime that, in 1949, the Parliamentary Council revolved to abolish capital punishment in the constitution of the Federal Republic of Germany.”¹¹

Yet one year prior to 1949 virtually three-fourths of Germans backed capital punishment despite the Nazi experience; one year later fifty-five percent had not changed their minds. Majority support among Germans for capital punishment continued through the 1950s and 1960s, according to the Allensbach-Institut, but dropped to a plurality in 1971. Afterwards, abolitionism was favored by a plurality but not the majority (except for 1972 and 1979) until the 1983-1995 period, when German opinion favoring capital punishment was a decidedly minority viewpoint. Yet an EMNID poll in 1958 indicated that eight-of-ten Germans supported capital punishment for murder, with that percentage also falling to a bare majority in 1973 although support for capital punishment in murder cases rebounded to 60% in 1977. The long-term trend clearly shows a stronger abolitionist constituency, although the upward spikes in public opinion favoring capital punishment in 1977, and again in August of 1986, were attributed to terrorist slayings and showed “the volatility of certain sectors of the population under the influence of recent events. Certain indicators suggest that a large number of persons who claimed not to have made up their minds may include a substantial number of supporters of capital punishment.”¹² Surely anti-abolitionist sentiments remain as tenacious as they are volatile, because a 1997 Emnid-Institut survey found that 55% of Germans favored the re-introduction of capital punishment for the “most severe” crimes, like sexual murder or the murder of children. In sum, it is beyond doubt that Germany abolished capital punishment at a time when

¹¹ M. Mohrenschlager, “The Abolition of Capital Punishment in the Federal Republic of Germany: German Experiences,” *Revue Internationale de Droit Penal* 58 (199?): 512.

¹² *Ibid.*, pp. 513-514.

public opinion firmly supported it, that majority support persisted two decades after its abolishment, and even fifty years later we cannot say with assurance that public opinion in Germany conforms with elite opinion, or the 1949 law, because a 1996 Allensbach-Institute survey reported a drop in abolitionist sentiment to 45%.

Abortion: Canada. A detailed case study by Tatalovich found striking parallels between Canada and the United States in how abortion policy evolved.¹³ In both, there were two junctures at which the intersection of law and opinion can be evaluated, the first being the 1960s when fourteen states liberalized their Nineteenth Century anti-abortion laws (four others repealed them entirely) and when the Canadian Parliament (1969) approved a new abortion law that provided for restricted therapeutic abortions. A poll taken in June of 1965 by the Canadian Institute of Public Opinion (Gallup) showed that 72% of Canadians supported therapeutic abortion “to preserve a mother’s physical or mental health.” Following the enactment of those provisions, in 1970 a January poll showed the public narrowly opposed (43% to 48%) to abortion “at any time during the first three months” and was even more divided in November when 45% opposed (but 44% favored) revising the law “to permit an abortion for all who wish to have one.” In sum, a few Canadian surveys but substantial polling in the United States indicate public support for therapeutic abortions on medical grounds even before these reformed laws were enacted.¹⁴ Thus we can safely conclude that the new abortion laws were brought into conformity with medical practice and public opinion

¹³ Raymond Tatalovich, *The Politics of Abortion in the United States and Canada* (Armonk, NY: M.E. Sharpe, 1997).

¹⁴ Monica Boyd and Deirdre Gillieson, “Canadian Attitudes on Abortion: Results of the Gallup Polls,” *Canadian Studies in Population* 2 (1975): 53-64. Several U.S. polls are surveyed in Raymond Tatalovich and Byron W. Daynes, *The Politics of Abortion* (New York: Praeger, 1981), pp. 116-120.

during the 1960s, a time when many North American and European countries were re-assessing their historic prohibitions on abortion (except for endangerment to the mother).¹⁵

The second policy change is more important for contemporary morality politics, namely the interventions by the U.S. Supreme Court in *Roe v. Wade* (1973) and the Canadian Supreme Court in *Morgentaler v. The Queen* (1988). What was the trajectory of public opinion leading up to those rulings and in their aftermath? While Canadians, like Americans, are opposed to re-criminalizing abortion, surveys indicate that the “contours of public opinion on abortion are fundamentally the same in Canada and the United States, though Canadians may be somewhat more liberal. Most people in both countries favor abortion under certain conditions, namely therapeutic ones, rather than elective abortion.”¹⁶ Almost a decade after the 1969 Canadian therapeutic abortion law was enacted, a study in Edmonton, Alberta concluded that it remained “generally congruent with public opinion” and may be characterized as “custom reinstitutionalized,” such that the law “is unlikely to change in the immediate future” though discontent would be directed “at the regulatory and judicial level.”¹⁷

Canadian public has not rallied around elective abortion in the decade since *Morgentaler*. Recent Gallup polls show virtually a tie, with three-in-ten Canadians approving abortion under “any” circumstance. Maybe that picture is optimistic given the results of the 1981 and 1990 World

¹⁵ See Rebecca J. Cook and Bernard M. Dickens, “A Decade of International Change in Abortion Law: 1967-1977,” *American Journal of Public Health* 68 (July 1978): 637-644.

¹⁶ Tatalovich, *The Politics of Abortion in the United States and Canada*, p. 142; see also polling trends on 111-112.

¹⁷ Timothy F. Hartnagel, James J. Creechan, and Robert A. Silverman, “Public opinion and the legalization of abortion,” *Canadian Review of Sociology & Anthropology* 22 (1985), pp. 424-425.

Values Survey that asked Canadians “whether you think it (abortion) can always be justified, never justified or something in between?” While Nevitte, Brandon, and Davis were impressed that those choosing “never” dropped from 38% to 21% in Canada--suggesting to them the rising strength of the moderates--more relevant here is the fact that by 1990 only a small fraction of Canadians (8.5%) endorsed abortion as “always” being justified.¹⁸

Abortion: Great Britain. Any legal development in Great Britain has special meaning for Canada though word of its abortion reforms also spread to the United States. Throughout the 1950s and 1960s none of the Private Member’s Bills on abortion were successful. What re-kindled the reform movement was public concern over the thalidomide tragedy of 1961. The Abortion Act of 1967 was quite liberal for its time, authorizing abortions where continuation of the pregnancy (1) involved a risk to the life or physical or mental health of the woman or “any existing children” and (2) where “a substantial risk” existed that the child would be born with “such physical or mental abnormalities as to be seriously handicapped,” with a social caveat to (1) which stipulated that, in determining “such risk of injury to health” that “account may be taken of the pregnant woman’s actual or reasonably foreseeable environment.” Although the provision on fetal deformity was the important addition to existing British legal precedents, it was this social cause that provoked much of the outcry during the parliamentary debate.

It is solely for this reason that one cannot conclude that the 1967 reformed abortion law was not a perfect match with public sentiments, although undoubted purely therapeutic grounds for abortions were widely accepted. Indeed what inspired the activists to re-double their efforts were

¹⁸ Neil Nevitte, William P. Brandon, and Lori Davis, “The American Abortion Controversy: Lessons from Cross-National Evidence,” *Politics and the Life Sciences* (February 1993), p. 26.

early polls showing that their worries about an unsympathetic British public were ill-founded. A National Opinion Poll in July 1962 found 72% approving the termination of pregnancy “where there is a good reason to believe that the baby would be born badly deformed,” and another in March of 1965 showed that two-thirds believed that abortion should be legalized in some cases, as opposed to one-fourth wanting abortion illegality in all cases.¹⁹ Two National Opinion Polls commissioned by the Abortion Law Reform Association, the leading advocacy group, reported that 65% of voters agreed in mid-February of 1967 that abortions should be allowed on social grounds and later, in September, large majorities supported abortion where the mother could not cope with more children, in cases of risk of fetal deformity, and where pregnancy resulted from a sexual crime.²⁰ Clearly these polls were strategically employed to influence voting in the House of Lords, though they are not totally dissimilar from Gallup.

Gallup polling since 1966 shows no fewer than seven-in-ten Brits approving abortions to safeguard the mother’s health and where the child would be born deformed, whereas lack of family income elicited 33% approval in 1966 and 45% in 1998. No more than about one-fourth of the British public supported on-demand abortion, however, which was technically not permitted under the 1967 law. Compared to the miss-match between the law and public opinion in the U.S. and Canada following judicial intervention, there seems a closer overlap between British opinion and British law on abortion.

Abortion: France. Compared with many European countries, “France appears to have

¹⁹ Cited in Keith Hindell and Madeleine Simms, *Abortion Law Reformed* (London: Peter Owen, 1971), pp. 122-123.

²⁰ Cited in *Ibid.*, pp. 184, 210-211.

legalized abortion late, rather slowly, and in a fairly restrictive way.”²¹ Before the 1975 reforms, legislation first enacted in 1920 and strengthened in 1923 made criminal abortion punishable by a large fine and imprisonment, with endangerment to the mother’s life being the only therapeutic exception. However there is scholarly debate about how restrictive the French law was in practice. Although the 1975 statute explicitly permitted abortion to protect the life of the mother as well as her physical and mental health in addition to fetal abnormality, another provision stated that any adult woman suffering a “state of distress” could terminate her pregnancy up to the tenth week of pregnancy. It was this short eligibility period that led some commentators to view the French law as overly restrictive, though Dorothy Stetson argues that the determination of “distress” actually empowered women by removing that decision from the control of physicians.²² The abortion reforms that were provisional under the 1975 law were made permanent in 1979, and by 1982 abortion services were covered under the health service. Thus, “nearly ten years elapsed between the first debate in the National Assembly and the enactment of the legislation in force today.”²³

So what was the state of public opinion during this period of institutionalization of abortion policy? In 1969 a slightly larger plurality opposed (47%) rather than favored (43%) “a law allowing a pregnant woman of less than three months to terminate her pregnancy with the approval of her doctor.” More important was the battery of questions in 1973, the year when the first (unsuccessful)

²¹ Janine Mossuz-Lavau, “Abortion policy in France under governments of the Right and Left (1973-84),” in Joni Lovenduski and Joyce Ooutshoorn, eds., *The New Politics of Abortion* (London: SAGE Publications, 1986), p. 86.

²² Dorothy McBride Stetson, “Abortion Policy Triads and Women’s Rights in Russia, the United States, and France,” in Marianne Githens and Dorothy McBride Stetson, eds., *Abortion Politics: Public Policy in Cross-Cultural Perspective* (New York: Routledge, 1996), p. 109.

²³ Mossuz-Lavau, “Abortion policy in France under governments of the Right and Left (1973-84),” p. 86.

bill to reform the abortion law was considered. One survey determined that a large majority of French supported some kind of reform, since only 13% backed “maintaining the law as it stands,” with more accepting the need for abortions “in the event of abnormal births” (41%) than for “psychological trauma” as well as abnormal births (21%). Only 22% endorsed “total freedom of choice.”

When asked about specific indications for abortions, the French in 1973 seemed decidedly more permissive than the British or Canadians, although not supportive of on-demand abortions. To the question “what is the best legal solution to the abortion question?,” only 22% would “sanction abortion in general” whereas 65% would “sanction abortion in accordance with new and more liberal laws.” A similar question forced respondents to choose “the most preferable for the present era” from three alternatives: sanctioning abortion “in cases in which the woman feels that either her material or moral circumstances are prohibitive to her having a child” (48%), or “in limited and circumscribed situations only” (25%), or “only in the event of possible danger to the mother’s health” (24%).²⁴

A final question indicated that the acceptable circumstance for a legal abortion were far-reaching for large numbers of the French people. In 1973 there was consensus regarding the mother’s “physical or mental condition” (90%) and where the “child may be abnormal” (88%) and, beyond those, growing majorities endorsed abortions for a mother under age 18 (55%), for a mother who “lives alone, without sufficient economic means” (69%), where the “household already contains as many children as economic circumstances permit” (76%), and where the “father or mother would be either physically or mentally incapable of raising the child” (82%). Going further, the French

²⁴Gallup, *Gallup International Public Opinion Polls: France 1939, 1944-1975*, p. 1065.

split nearly evenly with a plurality favoring abortions for an unmarried mother or where the “happiness of the future mother or of the couple will be adversely affected by the birth of another child” (both at 44%). In sum, these multiple results suggest that the 1975 reforms likely did not range widely from what French opinion was willing to accept.

Abortion: Germany. The story of abortion reform in German is complicated by the intervention, on two occasions, of the German Constitutional Court and by the reunification of East Germany and West Germany. The West German law of 1871 criminalized abortion except those performed to save the life or health of the mother. In 1974 the Bundestag enacted a permissive bill that allowed elective abortion during the first twelve weeks and, thereafter, extended abortions to twenty-two weeks to save the life or health of the woman, and where the fetus suffered from an incurable injury to its health. After enactment, however, 193 opposition legislators along with the governments of six German *Lander* (states) filed suit in the German Constitutional Court. In 1975 the high court struck down the abortion reforms as violating the “right to life” in the German Basic Law.²⁵

The legal status quo in 1976 which, says Outshoorn, “was more conservative than German opinion, leading to a constant level of mobilization of both sides of the issues and to women ‘voting with their feet,’ going abroad or to the North for an abortion.”²⁶ Based on one 1973 poll by Allensbach-Institut, the parliamentary enactment of 1974 would represent left-wing anti-

²⁵ Kim Lane Scheppelle, “Constitutionalizing Abortion,” in Marianne Githens and Dorothy McBride Stetson, eds., *Abortion Politics: Public Policy in Cross-Cultural Perspective* (New York: Routledge, 1996), p. 38.

²⁶ Outshoorn, “The Stability of Compromise: Abortion Politics in Western Europe,” pp. 161-162.

majoritarianism and the 1975 ruling by the German Constitutional Court would illustrate right-wing anti-majoritarianism. Of the two, the judicial intervention was more egregious because 38% of West Germans favored elective abortion during the first trimester and another 41% would accept abortions for therapeutic or socio-economic reasons. The German Constitutional Court was much further to the Right of public opinion than the Bundestag was to the Left.

After the court nullification, the Bundestag enacted another reform statute that criminalized abortions unless the woman's life or health was endangered, the fetus was substantially deformed, or to "avert the danger of a distress which is so serious that the pregnant woman cannot be required to continue the pregnancy and cannot be averted in any other way she can reasonably be expected to bear." It was this more restrictive law that came under challenge with reunification talks in 1990, because the formerly Communist East Germany in 1972 had enacted a law permitting abortions during the first trimester and in cases of threats to the woman's life, her physical and mental health, the health of the fetus, and also socio-economic circumstances.²⁷ Since negotiators from the East and West were unable to resolve their differences on abortion, they agreed to allow each territory to retain its own jurisdiction pending a two-year deadline for a final solution.

In June of 1992 the Bundestag again passed a law permitting abortion without restrictions during the first trimester so long as the woman underwent counseling and followed the three-day waiting period. Undeterred, yet again 249 legislators from the Christian-based political parties appealed to the Constitutional Court, but this time the high court equivocated by saying "abortion remain[ed] a criminal offense under German law for those cases that still fell outside the Court's

²⁷ Cook and Dickens, "A Decade of International Change in Abortion Law: 1967-1977," p. 643.

1975 list of acceptable circumstances, but normative counseling that was designed to persuade the woman to have the child could be used instead of criminal sanctions to reduce the number of actual abortions that German women would have.”²⁸ The result of a 1995 revision authorizes first trimester abortions so long as the woman visits a counseling center, which means that the abortion law of unified Germany is much more liberal than the old criminal code of West Germany. Does this latest abortion revision comport with German opinion? My guarded answer based on the polls is probably not.

Four surveys taken in West Germany across the 1980s show that support for elective first-trimester abortion declined from 35% in 1980 to 22% in 1988, with the majority accepting abortions in special cases rising from 47% in 1980 to 61% in 1988, on the eve of reunification talks. Beginning in 1990, yearly polls showed that East Germans were much more willing to endorse first-trimester abortions. The differential between West and East Germans ranged from twenty percent (1990) to twenty-nine percent (1992), leading us to suspect that overall the majority of all Germans would not have favored the unified abortion policy. In 1995, for example, the 31 percentage point differential between East and West Germans yielded a 50% margin favoring first-trimester abortions in the unified sample. Therefore, assuming that comparable samples were drawn from 1990 to 1993 (in 1994 majorities of East and West Germans supported first-trimester abortions), the fact that the differentials for 1990, 1991, 1992, and 1993 were smaller as compared to 1995 would imply that the majority in those unified samples were opposed to abortions during the first three months. When Allensbach-Institut added a fourth option, abortion with counseling, to its standard three-pronged question, in 1992 and 1995 support for elective first-trimester abortions dropped in West and East

²⁸ Scheppele, “Constitutionalizing Abortion,” p. 40.

Germany. The odds seem high that since 1990 the majority of unified Germans have not approved of the permissive abortion policy adopted by Bonn. Thus, the 1992 parliamentary act is another example of left-wing anti-majoritarianism.

Homosexuality: Canada. It was 1967 when Justice Minister Pierre Elliott Trudeau famously declared: “The state had no business in the bedrooms of the nation.”²⁹ Whereupon he introduced a package of reforms (divorce, abortion, birth control) that included decriminalization of homosexual relations, all of which were eventually passed with little fanfare. One cannot say that Trudeau’s determination matched Canadian public opinion based on the results of a September 1968 Gallup Poll, which asked: “Do you think that homosexual behaviour, if it is conducted in private between men aged 21 and over, should or should not be a criminal act?” Forty-one percent said it should; 42% said it should not. Like their English brethren, a bare plurality of Canadians anticipated what the government would do a year later.

Looking at opinion polls retrospectively, Rayside and Bowler say that “[o]ver the course of a generation, a major shift towards a more liberal position on the principle of equality rights for lesbians and gay men has been evident” yet “[s]trong moral disapproval of homosexuality persists...as do fears rooted in traditional stereotypes which characterize homosexuals as deviant or sick, and threatening to children.”³⁰ These researchers, pointing to the 1968 Gallup Poll, make the argument that mass opinions “show a dramatic shift at the time of the 1969 Criminal Code amendment on the subject, and those opinions were no doubt influenced by the change in law,”

²⁹ George Radwanski, *Trudeau* (Toronto, 1978), p. 90.

³⁰ David Rayside and Scott Bowler, “Research Note: Public opinion and gay rights,” *The Canadian Review of Sociology and Anthropology* 25 (November 1988), p. 649.

insofar as “[n]ine years later, the numbers favouring de-criminalization had increased from 42 to 70 per cent.”³¹ In essence, argue Rayside and Bowler, attitudes towards homosexuality are soft and volatile. The “liberalized public opinion towards gay equality rights co-exists with strong heterosexist assumptions about what is normal and abnormal, healthy and sick, right and wrong.”³² As Rayside and Bowler seemingly predicted, more than two decades later less than one-fourth of Canadians believe that homosexuality can “always be justified.”

The Liberals in Ottawa seem poised to formally extend legal benefits and obligations of married couples to common law couples regardless of sexual orientation, notwithstanding Canadian public opinion. Perhaps anticipating legal change, public opinion towards same-sex marriages began to soften as reported in a Gallup poll of February, 2000 since 48% were opposed and 43% favored “marriages between people of the same sex.” When Gallup first polled Canadians in mid-1992, sixty-one percent were opposed, but that proportion dropped to 52% in April of 1998, and then rebounded to 56% against one year later, before falling below the majority threshold in 2000.³³

In sum, huge majorities of Canadians--bordering on consensus in some cases--believe that homosexuals should have “equal rights” in job opportunities, and they would not bar gays from being a junior school teacher, clergy, MP, doctor, sales person, member of the armed forces, or prison officer. On the other hand Canadians—unlike Americans—are more accepting of homosexual relations although—like Americans—they do not approve of same-sex marriages or homosexual

³¹ Rayside and Bowler, pp. 650-651.

³² Rayside and Bowler, p. 656.

³³ Gary Edwards and Josephine Mazzuca, “About Four-in-Ten Canadians Accepting of Same Sex Marriages, Adoption,” Poll Releases (March 7, 2000), Princeton, NJ: The Gallup Organization.

adoption of children. Yet six-in-ten Canadians agree “that homosexual couples, who are living as married, should receive the same tax and employment benefits as heterosexual married couples.”³⁴

On the status of homosexuality, therefore, Canadians express more liberal views than Americans, so arguably it may not be too long before the Canadian public registers its support for codifying same-sex marriages. At this point in time, however, public opposition is represented in Canadian law but, should it be revised by the Liberals anytime soon, that action would signal the kind of political trauma that confronted Ontario in 1994, when the New Democratic Party won election to give Ontario its first ever NDP Government. NDP Premier Bob Rae proceeded to fulfill a campaign pledge to guarantee equal protection for homosexuals, by drafting Bill 167 (Equality Rights Statute Law Amendment Act), which included homosexual unions, adoption rights, and access by same-sex partners to employment benefits. After much controversy, the bill failed on a free party vote, though polling of Ontario citizens showed majority support for same-sex benefits and adoption rights (the question of same-sex marriage was not specifically asked).³⁵

Homosexuality: Great Britain. In 1553 Henry VIII removed sexual offenses from church jurisdiction but retained the penalty of death in the criminal code. Homosexuality was not a crime but homosexual behavior was. This legal regime ended with the decriminalization of consenting, adult homosexual relations in the Sexual Offences Act of 1967, although the gay community was not pleased with its overly restrictive provisions (it applied only to England and Wales, but not the merchant navy or armed forces, for example, and the age of consent was set at 21). Nonetheless a

³⁴ Ibid.

³⁵ David Rayside, *On the Fringe: Gays and Lesbians in Politics* (Ithaca, NY: Cornell University Press, 1998), p. 152.

legal hurdle had been overcome and, judging from the polls, that political decision by a Labour Government was anticipated by public opinion. In 1966, a plurality of the British favored decriminalizing homosexual behavior and apparently that sentiment has increased. From 1979 through 1985, six-in-ten British respondents supported legalization, with a dip (to 55%) coming in 1986, after which the level of support hovered around two-thirds into 1993. The slight reversal during the mid-1980s may have been related to the Thatcher Government, since slightly fewer British were against homosexuality as an “accepted” lifestyle, a statistic also shifting to a small majority by the early 1990s. Perhaps decriminalization in 1967 did facilitate a shifting of values about homosexuality but there is evidence that attitudes were changing even before new law was enacted. *Homosexuality: France and Germany*. It was the 18th century when France (1791) along with Belgium (1792) decriminalized homosexual relations, though no age of consent was imposed before 1832, when it was eleven (until 1863) and then thirteen (until 1942), at which time it was increased to 21 under the pro-Nazi Vichy regime. There it stayed until 1978, when the age of consent lowered to 18, and finally to age fifteen for both homosexuals and heterosexuals in 1982.³⁶ Given the centuries-old experience of France, this case is excluded from our summary analysis (see Figure 1)

An 1871 law outlawed homosexual relations in West Germany and gays were a persecuted minority during the Third Reich. Following World War II, homosexuality was not decriminalized until 1969, when the age of consent for gay men was codified at twenty-one, being reduced to eighteen in 1973. In East Germany, homosexual acts were criminalized until 1968, when they were

³⁶ Peter Tatchell, *Out in Europe: A Guide to Lesbian and Gay Rights in 30 European Countries* (London: Published by Channel 4 Television, 1990), pp. 3, 16.

legalized and the age of consent was established at eighteen; a common age of consent of 14 was specified for homosexuals and heterosexuals in 1989.³⁷ Decriminalization occurred despite the views of most West Germans. In 1963, large majorities of men and women wanted homosexuality punished, especially male homosexual acts, but that sentiment eased considerably by 1968 poll, when the Allensbach-Institut polled Germans specifically on Bonn's proposal to legalize homosexual relations. To that, 38% supported the official position but 45% disagreed. Nearly twenty years later one survey indicated that many fewer Germans (11%) would still punish adult homosexuality as compared to homosexual acts involving under-aged youth (42%). The absence of polling in the aftermath of the 1968 law that decriminalized gay relations makes our conclusion very tentative. Clearly there was a marked shift in public opinion between 1963 and 1968 and, furthermore, there was an accompanying change in how Germans perceived homosexuality. When asked how they "feel about homosexuality," the most common views among German men in 1949 was that it was a vice (53%) or a disease (39%), and those percentages fell slightly in 1963 (to 47% and 38% respectively). By 1976 only 25% viewed homosexuality as a vice, more men judged it to be a disease (49%), but still only 13% of German men (and 20% of German women) accepted homosexuality as natural.³⁸ The historical trend, while favorable to legalization, did not show majority support at the time of enactment and, to this extent, this case illustrates left-wing anti-majoritarianism. If public acceptance of legalized homosexuality had occurred within a decade (of 1987, when only 11% would still punish it), this episode could be coded as redistribution of values.

³⁷ Ibid., pp. 17, 27.

³⁸ Elisabeth Noelle-Neumann, ed., *The Germans: Public Opinion Polls, 1967-1980* (Westport, CT: Greenwood Press, 1981), p. 251.

However, because so few Germans viewed homosexuality as “natural” in 1976, obviously the new legislation did not profoundly enlighten German public opinion.³⁹

Yet a break-through for gay rights in Germany came in 1994 when Parliament repealed a 1949 law that prohibited homosexual or heterosexual acts between an adult and a minor aged 16 to 18. Then in 1995 the Green Party launched a campaign to legalize gay unions, but same-sex marriages would not be legalized for another five years. In mid-2000 another gay marriage bill was debated in Parliament, this time backed by Chancellor Gerhard Schroeder’s Social Democrats (SPD) and their coalition partner, the Greens. It was anticipated that the bill would pass the Bundestag (lower house) but might be blocked in the Bundesrat (upper house), which was dominated by the Christian Democratic alliance, despite a Forsa Institute poll conducted for N24 television that found 56% favoring the legislation.⁴⁰ In fact, the bill was approved and in August of 2001, amid “wide public support for the partnership registration,” the first same-sex couple exchanged their vows in Berlin.⁴¹

Given this latest poll, apparently German opinion shifted since 1998, when a narrow 53%

³⁹ When asked about homosexuality between men in 1987, we only reported (Table A.3) that 11% would punish adult homosexual acts and 42% would punish homosexual acts with under-aged youth. But the multi-pronged question allowed respondents to choose more than one answer. In addition, arguably seven other responses had varying negative connotations: (1) disgusts/sickens me—40%; (2) I can’t understand it—40%; (3) is a topic which makes me uneasy—27%; (4) is a sickness—22%; (5) damages your health—17%; (6) is something I don’t want to talk about—14%; (7) one should resolutely combat it—12%. In contrast, four benign or favorable assessments elicited fewer responses: (1) people shouldn’t make such a big deal of it—29%; (2) doesn’t bother me—29%; (3) one shouldn’t make fun of it—25%; (4) is a very natural thing—12%. See question in footnote (f) in Table A.3.

⁴⁰ “Gay marriage bill set to be rejected by German parliament,” *Deutsche Presse-Agentur* (July 7, 2000).

⁴¹ “Same-Sex Partners Win Legal Status in Germany,” *New York Times* (August 2, 2001), p. A3.

were opposed to same-sex marriages according to Demoskopie Allensbach. Then how can we characterize the relationship between German public opinion and this same-sex enactment? Redistribution of values means that new law precedes attitude change; postmaterialist shift means that changing attitudes preceded new law. Clearly this is a close call but, assuming that the most recent poll accurately reflect popular feelings, then shifting attitudes likely accompanied the parliamentary debate—though they preceded the actual day of enactment.

Same-sex unions yielded a contrary political scenario in France. It took roughly eighteen months before the Socialist Government gained approval for its Civil Solidarity Pacts (PACS), which allowed unmarried homosexual and heterosexual couples new legal rights. It permits cohabiting couples to register their union and thereby gain inheritance, housing, and social welfare rights in addition to the ability to file joint income tax returns. The issue originated with a promise by Socialist Prime Minister Lionel Jospin to recognize gay relationships, but parliamentarians expanded the language to cover virtually any two people sharing a home. Despite assurances from the Government that PACS is not same-sex marriage, the parliamentary “[d]ebates over the bill were among the stormiest the country has seen as impassioned legislators railed at each other.”⁴²

Moreover the debate flowed onto the streets, given the outcry that France would become the first Catholic country to recognize homosexual unions. Earlier in the year 200,000 protesters marched in Paris, activists called “Future of the Culture” mailed Jospin 60,000 postcards saying that the bill would “destroy the remains of civilization still separating us from barbarism,” and roughly

⁴² Suzanne Daley, “France Gives Legal Status to Unmarried Couples,” *New York Times* (October 14, 1999), p. A3.

half of France's 36,000 mayors that they would not officiate at such unions.⁴³ Undeterred by several parliamentary delays from conservative lawmakers as well as noisy demonstrations outside the National Assembly Building, the Socialists prevailed 315-249 in the National Assembly. Since it was reported that opinion surveys indicated that under one-half of the French people favored PACS for homosexuals, though more favored PACS for other cohabiting relationships, at first glance this episode represents more anti-majoritarianism. However, although public attitudes toward same-sex marriages was ignored in both Germany and France, the politics represented a right-wing elitism in Germany and left-wing elitism in France. Final enactment was scheduled for mid-1999, but the parliamentary losers already were planning an appeal to the French Constitutional Council.

The relationship between public opinion, law, and changes in either or both involves more than one scenario. These eighteen cases are summarized in Figure 1 (see below) Logically there are eight different possibilities, of which only one indicates a redistribution of values. That occurs whenever traditional public attitudes, after the enactment of new law, are transformed consistent with that legislation. The most likely episode was the acceptance by the British and Canadians of consenting homosexual relations.

For those seeking an end to the old normative order, a better strategy may be to educate public opinion in advance of changing the law, which is consistent with the post-materialist thesis. Parliamentary decisions to reform abortion law in Great Britain in 1967 followed by Canada in 1969, and France in 1975 occurred in the wake of changed attitudes favoring abortions for therapeutic and socio-economic reasons. My tentative view is that enacting same-sex unions in Germany occurred in the wake of a marginal shift in the polls, whereby a narrow majority of

⁴³ Ibid.

Germans supported in 2000

Figure 1
**Linkages Between Opinion Change and Legal Change on Abortion, Capital Punishment,
 and Homosexuality in United Kingdom, Canada, France, and Germany**

<u>Type</u>	<u>Time 1</u>	<u>Time 2</u>	<u>Time 3</u>	<u>Morality Policy Cases</u>
Left Anti-Majoritarian	old opinion	changed law	old opinion	same-sex marriage: F capital punishment: C, UK, F, G abortion rights: C(1988) abortion reform: G (1974), (1990) homosexual relations: G
Redistribution of Values	old opinion	changed law	new opinion	homosexual relations: UK, C
Popular Backlash	new opinion	changed law	old opinion	
Post-Materialist Shift	new opinion	changed law	new opinion	abortion reform: C(1969), UK, F same-sex marriage: G
Status Quo	old opinion	unchanged law	old opinion	same-sex marriage: C, UK
Futuristic Shift	old opinion	unchanged law	new opinion	
Political Fad	new opinion	unchanged law	old opinion	
Right Anti-Majoritarian	new opinion	unchanged law	new opinion	abortion reform: G(1975)

SOURCE: Adapted from Figure 8.2 in T. Alexander Smith and Raymond Tatalovich, *Cultures at War: Moral Conflicts in Western Democracies* (Peterborough, Ontario, Canada: Broadview Press, 2003), p. 231.

what they had opposed two years earlier.

The normative status quo pertains whenever past and present-day public opinion remains unchanged and is reflected in formal law. Legal proscriptions against same-sex marriages in Canada and Great Britain seemingly affirm the majoritarian viewpoint that marriage is a union between heterosexual couples.

There are several cases of anti-majoritarianism where a morality policy was changed by political elites on the Right or (more commonly) on the Left despite public opinion. Figure 1 identifies one case of right-wing anti-majoritarianism. In Germany, the 1975 mis-match between a more liberal public opinion and the restrictive legal code was the result of a ruling by the German Constitutional Court that nullified a reformed abortion law enacted by the Bundestag.

Of the nine cases of left-wing anti-majoritarianism (Figure 1), one can be attributed to rulings by judicial elites. Canadian public opinion has not rallied behind the ruling of its high court that nullified the 1969 law and left Canada with no abortion law whatsoever. The others resulted from legislative elites enacting morality policies at odds with popular attitudes.

My reading of the British reforms of abortion and homosexuality during the 1960s is not entirely consistent with Pym's observation that "[c]ampaigns like that mounted by the HLRS [Homosexual Law Reform Society] between 1958 and 1966 or that of ALRA [Abortion Law Reform Association] from 1963 onwards made people rethink their attitudes towards homosexuality and abortion. These groups' activities stimulated wider and more liberal coverage of the issues in the mass media, and...these vigorous [abortion] campaigners cultivated a public climate in which reform

was possible.”⁴⁴ As noted, liberalized abortion was supported by most British but the polls did not show majority support for legalizing homosexuality relations, although public opinion was trending in that direction.

Nor did most Germans approve legalizing homosexuality in 1968, one year before the Bundestag did so. In 1999 the French Socialists prevailed in the National Assembly on a bill to legalize same-sex unions, despite much public outcry and a tepid response from the majority of French citizens. One issue on which all these four countries—and likely many others across Europe—are left-wing anti-majoritarian is capital punishment. The abolition of the death penalty in Great Britain, Canada, Germany, and France occurred at a time when public opinion was not supportive (with the possible exception of France where public acceptance lagged behind the law by more than a decade). Today polls continue to find lopsided majorities favoring the restoration of capital punishment in all those countries, except France.

Two attempts to reform the German abortion law were left-wing anti-majoritarian. The first came in 1974 when the Bundestag authorized elective first-trimester abortion despite the fact that a minority of West Germans held that position, but more flagrant was the 1990 reunification of East and West Germany that yielded a parliamentary enactment that more closely mirrored the permissive first-trimester law of East Germany than the criminal code of West Germany. My best estimation is that most (unified) Germans would not favor elective abortion during the first three months.

Because the content of morality policy is non-representative of public opinion, the morality policy process is politically unaccountable. This finding of elitism raises troubling normative

⁴⁴ Bridget. Pym, *Pressure Groups and the Permissive Society* (Newton Abbot, G.B.: David & Charles, 1974), pp. 117-118.

questions about representative government.

Thirty years ago Richard H.S. Crossman provoked a scholarly debate in the Great Britain when he alleged that cabinet government was a “myth” insofar as the British Prime Minister really controls the front-benchers in that parliamentary system.⁴⁵ Of course the back-benchers were even further removed from the center of power in the House of Commons, although there was a linkage between the Government and public opinion during that period, a time when class politics were dominant and the political parties reflected a left-right cleavage on economic issues. If not cabinet government, surely the Parliament was collectively responsible to the British public when they enacted the economic programs of Crossman’s Labourites.

My research goes beyond the question of cabinet government to representative government, because the norms of collective responsibility do not extend to morality policy. Especially in Canada, but also in Great Britain and on the Continent, changes in morality policy are never proclaimed in party manifestos, nor do national elections focus on issues like abortion, capital punishment, and homosexuality. Nevertheless policy changes are enacted, most often against the wishes of the citizenry of Canada, United Kingdom, France, and Germany. If the post-materialist era promises to elevate more issues of conscience onto the governing agenda, the mis-match between elite opinion and popular attitudes signals a fundamental breakdown in the tenets of representative government in parliamentary systems. The implications of these findings, therefore, should provoke scholarly inquiry by all who believe that the governed should be able to hold their governors accountable for their policy choices.

⁴⁵ Richard H.S. Crossman, *The Myths of Cabinet Government* (Cambridge, MA: Harvard University Press, 1972).