1

Legalizing Queer Life

Alfred Kinsey and Criminal Law Reform

Thomas Earl and Eldridge Rhodes did not know that police were following them on the evening of July 1, 1962, as they walked through San Diego's Gaslamp Quarter. The vice squad had stationed two officers in the area after receiving a series of complaints about two Black men soliciting clients for female prostitutes waiting at area hotels. Rhodes, who was Black, fit one of the suspects' descriptions; the police assumed that Earl, who was white, was a potential client. Upon spotting the men, police followed them to their destination – a room at the Service Hotel. There, the officers positioned themselves outside the door, where they heard kissing and the bed squeaking. Hoping to catch the men violating the state's antipandering law, the officers looked through a half-inch wide opening between the room's door and its frame. However, instead of seeing an encounter with a female prostitute, they witnessed two undressed men embracing on the bed. To get a better view, one officer gave the other a leg up to reach the door's glass transom, then fetched a stool from the hotel manager so the officers would not need to take turns looking through the pane. Upon witnessing the men engaging in oral sex, the officers broke down the door and arrested Earl and Rhodes for violating California's anti-sodomy statute.[1] Both men were convicted of the felony.

Laws prohibiting consensual sodomy were only one of the many criminal provisions that the state wielded to suppress queer life in the mid-twentieth century. Police also arrested gays and lesbians for vagrancy, disorderly conduct, lewdness, and solicitation. These statutes

did not target same-sex sexuality directly, but officials interpreted them broadly and readily deployed the laws to repress the queer world. Police often relied upon the provisions to harass homosexuals simply for standing on the street, as well as to shut down places where the queer community socialized. The statutes and their heavy-handed enforcement rendered gays and lesbians invisible, as venturing into queer life meant risking arrest and public disgrace.[2] Contact with the police could force gays and lesbians out of the closet, which jeopardized their family relationships, friendships, and careers. Criminal laws reflected American society's abhorrence of same-sex sexuality, but by defining gays and lesbians as outlaws, penal codes also reinforced their outsider status. These laws encouraged employers, landlords, and other decision-makers to act on their prejudices against gays and lesbians.[3] This was particularly the case when homosexual parents petitioned for custody of children after divorcing their different-sex spouses. One judge colorfully explained that he would not permit "children to be placed in a home where the felony of sodomy is committed at least twice a week."[4] Criminal laws thus had far-reaching consequences, anchoring a legal regime that condemned same-sex sexuality.

In the 1960s, gays and lesbians were thus living in a world that defined their very existence as an aberration that deserved punishment. That oppressive legal regime, however, was beginning to change. Had Earl and Rhodes lived in Illinois at the time of their arrest, their actions would not have been illegal. In 1961, a year before officers witnessed the men's assignation, Illinois had become the first state to decriminalize consensual sodomy. Other states soon followed suit. By 1978, almost half of states had repealed their consensual sodomy laws.[5]

What helped to make these reforms possible was that, as dire as the American legal system was for gays and lesbians, the web of laws that punished the queer community was also a relatively recent development. For most of the nation's history, federal and state officials had not condoned same-sex sexuality, but they had not explicitly targeted gays and lesbians. Homosexual activity was not yet seen as a marker of identity. Instead, it was a deviant behavior in which some members of the population engaged.[6] Only in the 1930s did governments begin suppressing queer life, after experts popularized a new conception of same-sex sexuality, one that framed homosexuality as a psychological disorder. Homosexuality became an affliction that would both mar the lives of individuals and

corrode American society. That notion spurred antiqueer laws and discriminatory policing, but it would also prove to be the key to legal change.

Creating Criminals

Sergeant Sonnenshein served in the military during World War I. He was known in his unit as "Tessie" and "fairy Sonnenshein." His fellow soldiers mocked him for being "perhaps a little queer" and would degrade him by demanding sexual favors. Sonnenshein would ignore their taunts, sometimes simply smiling in response. In 1918, the military court-martialed Sonnenshein, alleging that he had tried to fellate another man in the latrine. Although the judge advocate general agreed that Sonnenshein was "an effeminate type," that was not enough to sustain a conviction. Sonnenshein returned to duty.[7] Twenty years later, Sonnenshein's sexual orientation would have been sufficient for the military to expel him. Until the 1930s, however, the state was concerned with same-sex conduct, not homosexuality per se. As the political and medical context changed, so did social perceptions of same-sex sexuality. What had once been seen as a personal moral failing was now understood as a danger to society. Consequently, the state undertook wide-ranging efforts to repress homosexuality.

American states had criminalized same-sex intimacy since the nation's founding, but until the Second World War, the state's regulation of homosexuality was only incidental to its larger efforts to address crime, poverty, and social disorder.[8] In the colonial period, sodomy was punishable by death, a penalty that reflected biblical injunctions against the "crime against nature."[9] Yet state authorities typically ignored consensual same-sex activities, focusing instead on prosecuting forcible rape.[10] In the nineteenth and early twentieth centuries, the federal government took a similar approach in their law enforcement efforts. Immigration officers searched out homosexual immigrants not because of their sexual orientation, but because inspectors linked perversion and dependency. According to the theories of German sexologist Richard von Krafft-Ebing, who popularized the argument that homosexuality was an inborn constitutional defect, same-sex attraction was a nervous and hereditary disorder that produced weaker physical bodies.[11] His conception led immigration officials to conclude that homosexuals would become economically

dependent on the state, in violation of a provision that barred any immigrants who were "likely to become a public charge."[12] When they excluded or deported homosexuals, it was because same-sex sexuality was a proxy for dependency.

In the 1920s, a new framework for understanding homosexuality emerged – one that would lead officials to start targeting gays and lesbians because of their sexual desires. During this period, psychiatric theories reconceptualized homosexuality not as an innate trait, but rather as a flaw in psychological development. Homosexuals were individuals who were frozen at a pre-adolescent developmental stage. As a result, they were emotionally immature and impulsive. These same ideas also linked same-sex attraction to pedophilia. Since homosexuals related to children on a developmental level, psychiatrists reasoned, they were more likely to search them out as sexual partners.[13] Under this new theory, the "effeminate homosexual" constituted one extreme of sexual deviance. At the other end of the spectrum was the violent sexual predator.[14] In the 1930s, psychiatrists combined both poles into one diagnostic category: the sexual psychopath.[15] Psychiatrists explained that homosexuals were like violent sex offenders because both were immature and lacked self-control. Popular books, magazines, and newspapers echoed this theory, repeatedly linking uncontrolled sexuality and childishness.[16] For example, readers of *Parents' Magazine* learned that sex offenders "are immature, frequently with no more control over their impulses than the child who wants what he wants when he wants it."[17]

This new psychiatric category became a legal classification in the 1930s, when a sex crime panic swept the nation. A series of highly publicized, violent sex crimes against children prompted public outrage. Citizens consequently pressed elected officials to protect innocent victims from assault, leading thirty states and the District of Columbia to enact sexual psychopath statutes.[18] Under these laws, individuals convicted of sex-related offenses, including consensual sodomy, could be institutionalized in psychiatric hospitals, rather than imprisoned. These statutes cast offenders as patients rather than criminals, ostensibly portraying them in a more sympathetic light. However, the laws did not replace the penal code provisions that punished gays and lesbians for their homosexuality. Moreover, because many of the statutes allowed sexual psychopaths to be institutionalized indefinitely,

the civil commitment laws could be just as punitive as criminal codes. The sexual psychopath laws varied not just in the length of time a person could be committed to a psychiatric hospital, but also in how they defined sexual psychopathy, which – depending on the jurisdiction – could include everything from rapists and pedophiles to sadomasochists, exhibitionists, voyeurs, and homosexuals.[19] As broad as the statutes were, the psychiatric definition of sexual psychopathy was even more expansive. Some psychiatrists included in the category anyone who engaged in extramarital or premarital sex.[20] The diagnostic label was so imprecise that it generated significant controversy within the scientific community, with one prominent psychiatrist deriding it as a "wastebasket" classification.[21]

Because sexual psychopath laws were blunt instruments, judges and prosecutors did not level them against all defendants who fell within the statutes' wide scope. Instead, they often reserved the weapons for the most dangerous offenders.[22] Yet the laws' very existence was a terrifying specter for gay men, who could be institutionalized until "cured." Prosecutors often wielded the threat of commitment under sexual psychopath laws to convince defendants to plead guilty to nonviolent offenses.[23] They sometimes also proceeded with adjudications under the laws. Although commitments for sexual psychopathy typically involved cases of forcible rape, gay men arrested for consensual sodomy were likewise adjudicated under the statutes.[24] Because of California's sexual psychopath law, Thomas Earl's conviction for sodomy was only the start to his legal troubles. Soon after issuing the verdict, the court adjudicated him a sexual psychopath and transferred him to Atascadero State Hospital.[25] In most states, sexual psychopaths received therapy, but medical professionals in California took a more aggressive approach. Doctors at Atascadero were known for treating their patients with shock therapy, as well as punishing those who tried to decline the sessions with solitary confinement in cold cells.[26]

Psychological theories that cast homosexuality as inherently dangerous to children gave rise to more than just this sexual psychopath regime. They also produced a host of discriminatory provisions at the federal level. These were not criminal laws, but they nevertheless reinforced to the American public that same-sex sexuality was a threat to the social order that needed to be contained. During World War II, the military instituted a ban on homosexuals, fearing that gays and

lesbians could not control their desires, and therefore would not be able to adjust to the rigors of military life.[27] The policy cast same-sex sexuality as antithetical to patriotic duty. Similar concerns about national security led the federal government to target homosexual employees in investigations into disloyalty. Authorities feared that gays and lesbians were emotionally unstable and susceptible to blackmail, a particularly dangerous proposition during the Cold War. Under the theory that "one homosexual can pollute a Government office," the federal civil service tried to purge itself of queer employees.[28] As the Cold War raged, more gays and lesbians lost their federal jobs than suspected communists. Federal officials, for their part, emphasized the similarities between homosexuals and communists, arguing that individuals in both groups could pass undetected and tended to participate in underground subcultures.[29]

The federal government's depiction of homosexual men and women as state security risks consequently framed same-sex sexuality as a grave danger, one that could corrode American society. Writers in the 1950s reinforced that notion by routinely using the metaphor of disease to describe homosexuality.[30] That language resonated with Americans, who feared that sexual and political threats to the nation were contagious and spreading as queer communities expanded in the late 1940s.[31] The country's mobilization during World War II had led gay men and lesbians to leave their homes and neighborhoods for war-related work in urban centers. There, they discovered more permissive environments – and one another.[32] After the war, many remained in these cities, giving rise to new queer communities. Bars and restaurants that catered exclusively to gays and lesbians proliferated not just on the coasts, but all around the country, opening in cities as diverse as Denver, Colorado; Kansas City, Missouri; and Richmond, Virginia.[33]

The public's concern about homosexuality only grew as gays and lesbians began organizing for their rights. In 1950, Dale Jennings and four others formed the Mattachine Society, the first homophile rights organization.[34] Several of its founders were members of the Communist Party, and all traveled in leftist circles.[35] In 1953, Paul Coates, a Los Angeles newspaper writer, revealed to his readers that the group's legal adviser had been an "unfriendly" witness before the House Un-American Activities Committee, invoking his Fifth Amendment right to avoid providing answers to its questions about his communist

activities. Coates noted that, with approximately 200,000 homosexuals in the Los Angeles area, "[a] well-trained subversive could move in and forge that power into a dangerous political weapon."[36] The Mattachine's ties to communism reinforced the image of homosexuality as sinister, corrupt, and a danger to American society.[37]

Thus, by the 1950s, all levels of government were on alert against the menace of homosexuality. The federal government's discriminatory policies resulted in thousands of suspected homosexuals losing their jobs.[38] Yet that number paled in comparison to how many queer individuals would suffer detention, arrest, conviction, and imprisonment at the hands of local law enforcement officials – vice patrol squads that, in the 1950s and 1960s, launched extended campaigns to suppress homosexuality. Vice officers would raid the taverns and clubs where gay men, lesbians, and gender nonconformists gathered, using every option they had available to penalize queer life. Their sustained efforts made it dangerous for gays and lesbians to venture into the few bars and restaurants that welcomed the queer community.

Penalizing Queer Life

Hazel's was a lively and popular queer bar located in San Mateo, California, a city just south of San Francisco. Founded in 1939 by Hazel Nickola, the bar survived World War II's economic downturns and, by 1956, was once again thriving. Hazel's welcomed Black, white, and Asian patrons alike to its convivial space, where a bawdy humor reigned supreme. Most of Hazel's patrons were homosexual men, who would dance, kiss, and caress their partners within the haven of the bar's accepting ambiance, but women likewise found themselves drawn to the bar's unrestrained atmosphere.[39] The freedom the queer community enjoyed at Hazel's came to a terrifying end shortly after midnight on February 19, 1956, when San Mateo County Sheriff Earl Whitmore led a raid on the bar. His uniformed officers rounded up the almost 300 patrons, arresting 90 of the regulars who undercover agents recognized from their prior investigations. They charged those individuals with vagrancy for their illicit behavior. At the time, police often relied upon vagrancy statutes – which gave law enforcement virtually unlimited discretion to arrest individuals who seemed to threaten the social order – to suppress queer life.[40]

The officers also arrested Hazel's owner for permitting lewd dancing. Soon thereafter, Hazel's lost its liquor license for becoming "a resort for sexual perverts."[41]

Hazel's was just one of the many queer bars and clubs that police raided in the 1950s and 1960s.[42] In these sweeps, mass arrests for dancing, flirting, or kissing members of the same sex were common, with police typically charging the patrons with vagrancy, lewdness, disorderly conduct, or solicitation.[43] At a time when the country was already on alert because of the Cold War, these large-scale raids reminded Americans that one of the significant dangers they needed to guard against was same-sex attraction. Each arrest underscored homosexuality's status as a crime, which reinforced social stigma against gays and lesbians. The sweeps also served as warnings to members of the queer community. Gays and lesbians were constantly aware that they risked detention and prosecution if they dared to seek out the companionship of other homosexuals. That fact made it even more difficult for individuals to obtain the support and encouragement they needed to challenge society's discrimination.

Police departments were able to make mass arrests, like the one at Hazel's, because they had a wide array of criminal statutes at their disposal to ensnare the queer community. But the panoply of charges that officers levied against those rounded up in bar raids was only the tip of the proverbial iceberg. Vice patrols could be remarkably creative in their efforts to target gays, lesbians, and those who served them. They eagerly arrested queer bar-goers who made the mistake of jaywalking to their car parked on the opposite side of the street, or who failed to stop their vehicles when exiting the parking lot.[44] In Miami in 1954, police arrested a bartender at a queer club for his "noisy jukebox" and another for "serving a drunk."[45] Notably, police did not have to make arrests to discourage gays and lesbians from congregating in the few social spaces that welcomed them. Common police tactics – entering a bar every half hour to check patrons' IDs or parking a marked patrol car outside – could ruin a night out.[46] Patrons quickly learned to stay away, leaving the bars no choice but to shutter their doors.[47] To avoid this type of harassment, bar owners often resorted to bribing corrupt vice officers or paying organized crime for protection from the police.[48] Constant police surveillance meant that danger and fear infused queer nightlife.

FIGURE 2 Drag performer José Sarria entertaining patrons at San Francisco's Black Cat, a queer club, 1950s. Singers, dancers, and cabaret hosts who transgressed gender norms were a mainstay of queer nightlife in the mid-twentieth century. José Sarria Records, 1996-01. Courtesy of Gay, Lesbian, Bisexual, Transgender Historical Society.

Vice departments' efforts also extended beyond closing queer social spaces. Officers actively rooted out homosexuals by patrolling parks, beaches, and other known locations of same-sex activity. To ferret out gay men looking for sexual partners, vice squads sent undercover agents to movie theaters, bathhouses, gyms, and hotel lobbies.[49] They also sent officers to flirt with men in bars and parks, hoping to entice propositions, often successfully.[50] These police practices generated large numbers of arrests, in the process heightening gay men's anxieties about approaching potential sexual partners.[51] Longing looks and suggestive language could indicate someone's interest, but they could just as easily be a trap for the unwary. Women, who typically did not engage in sexual encounters at cruising sites, shouldered less of the brunt of police activity, although they nevertheless suffered from vice patrols' constant surveillance.[52] Police routinely arrested female bar patrons because of their "mannish" dress, taking their sartorial choices as evidence of their lesbianism and, therefore, their vagrancy.[53] Conventional wisdom in lesbian circles quickly

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became that women needed to wear at least three items of female clothing to avoid arrest.[54] Vice squads thus focused on suppressing every manifestation of sexual deviance, which meant that queer individuals chanced harassment, arrest, and imprisonment simply for being who they were.

Police most often arrested members of the queer community for solicitation, vagrancy, lewdness and disorderly conduct, crimes that were easy to prove given that the offenses took place in public. It was much more difficult for vice squads to charge gay men with consensual sodomy, given that the crime typically occurred in private and between willing participants. That challenge did not deter law enforcement officials, who went to great lengths to catch same-sex couples *in flagrante delicto*. Officers would typically hide themselves behind peepholes in public restrooms where gay men were known to meet for sex, hoping to spot queer sexual encounters. Open windows, adjacent closets, and air vents all provided officers an opportunity to stake out would-be sodomites.[55] Surveillance campaigns could last months, requiring officers to spend long hours at their dark and dank stations.[56] Vice squads also overcame off-putting logistical challenges to enforce anti-sodomy laws against gay men.[57] Where restrooms lacked natural observation posts, police created them. Some departments cut holes in ceilings, camouflaging the gaps with false air vents, while others drilled openings in the back walls of toilet stalls.[58] Gay men were so familiar with these tactics that an observant lavatory cruiser marked one such hole with the warning: "Cop's Peephole. Beware."[59] The vice squad found this caution more of a help than a hinderance. By plugging the opening with toilet paper, the officers were able to lull lavatory patrons into a false sense of security. They then used another aperture to view the sexual encounters, allowing the squad to make felony arrests.[60]

These extensive clandestine observations were extremely successful, allowing vice squads to dramatically increase their arrests of homosexual men for consensual same-sex sodomy in the 1950s and 1960s.[61] Officers focused on securing these charges because the law reserved some of its harshest punishments for consensual sodomy. Several states had five-year mandatory minimum sentences, which some judges were all too happy to impose.[62] In other jurisdictions, offenders could be subject to life imprisonment.[63] For some Americans, including judges, these consequences appeared far too punitive. Judges who considered the punishments inappropriate responded either by imposing the lowest penalty they could

or using their discretion to reduce the charges to misdemeanors.[64] As a result, defendants charged with consensual sodomy could leave the courthouse with probation and a fine, much like those arrested for other misdemeanor offenses, such as vagrancy and lewdness.[65] But regardless of the ultimate sentence, the arrests for consensual sodomy mattered: each one reinforced homosexuality's status as a crime. Unlike vagrancy, lewdness, and solicitation, which applied to large swaths of the population, consensual sodomy laws were uniquely associated with homosexuality. Arrests under consensual sodomy provisions therefore made clear that the state considered homosexuality a threat to society.

Members of the public often agreed with the state's assessment, expressing their disapproval by meting out their own punishments. They sometimes learned of the offenses through local newspapers, which often printed the names of defendants arrested in gay bars or in public toilets on their broadsheets, sometimes adding their home addresses and places of employment.[66] Even if the charges were later dismissed, these individuals had to face the stony judgment of their family, friends, and coworkers.[67] Americans were sometimes willing to dismiss same-sex assignations as unfortunate aberrations, so long as the individuals were married. The solution in those cases was for the people involved to recommit to their different-sex spouses and dedicate themselves to overcoming their deviant desires.[68] Despite some community members' willingness to overlook what they identified as mistakes, the social punishments for same-sex sexuality were often harsh. In the wake of an arrest, many people lost their jobs, if not their careers.[69] In Florida, 29-year-old Harris Kimball lost his license to practice law in 1957 after being arrested for lewd and lascivious conduct.[70] Doctors, dentists, teachers, and even hairdressers had their licenses suspended, putting their livelihoods in jeopardy for years.[71] Of course, members of the queer community did not need to be arrested to be found out and punished. In 1963, a male Columbia University student, who was using binoculars to peer through nearby dormitory windows, spied two Barnard College women having sex. Barnard administrators promptly expelled the female students, but the Peeping Tom remained enrolled at his Ivy League institution.[72]

Typically, however, discovery came from being caught in a police dragnet. Because arrests could be so personally devastating, many gays and lesbians approached social interactions with insecurity, anxiety,

and dread.[73] One man in San Francisco described the "constant fear" of meeting police decoys in streets, parks, and other public places.[74] In deciding whether to spend an evening at a bar, gay men and lesbians calculated the likelihood of being swept up in a raid, weighing this against the comfort of a night spent amidst queer compatriots.[75] Criminals also took advantage of the community's precarious situation, with potential partners all too often transforming into extortionists who demanded large sums of money in exchange for their silence.[76] When willing sex partners became thieves, their victims could not turn to the police for help.[77] A homosexual man in Tampa learned this the hard way in 1957. After he reported the robbery to police, officers charged him with sodomy.[78]

Since gays and lesbians who made even the most tentative forays into queer life could suffer extreme repercussions, it was difficult for these individuals to be out, let alone fight for their rights. The personal costs were far too great. In the 1950s, those few who banded together to argue that homosexuality was neither dangerous nor perverse kept their activities as secret as possible.[79] As it turned out, these individuals did not need to disclose their sexual orientation to press their case, as a powerful advocate had emerged from outside of the queer community: a zoologist with a penchant for bow ties named Alfred Kinsey.

Questioning Criminality

Those who knew Kinsey growing up would never have expected him to become an expert on homosexuality or sex crimes. The Eagle Scout from Hoboken, New Jersey, was raised as an evangelical Protestant.[80] Every Sunday, he walked to church, where he attended both morning services and evening prayer meetings.[81] Kinsey earned his PhD from Harvard in 1919 with a prize-winning dissertation that classified thousands of gall wasps.[82] Kinsey soon found himself teaching biology, entomology, and insect taxonomy at Indiana University in Bloomington. Then, in 1938, Kinsey made a decision that changed the course of his life. That year, he volunteered to teach a class on marriage and the family. At the time, few people in the United States had access to candid information on sex and reproduction. Many stores, even in cosmopolitan cities like New York, kept their books on the subject under the counter, limiting access to the few patrons who dared to request a copy.[83] Students were

captivated by Kinsey's class, which addressed masturbation, premarital sex, and birth control.[84] They often met with Kinsey in private, trusting him with their questions and anxieties. In those sessions, Kinsey learned that his students engaged in a surprising variety of sexual behaviors. He consequently began interviewing student volunteers about their sexual histories, starting the research that would stun the country.[85]

In 1948, Alfred Kinsey and his colleagues published *Sexual Behavior in the Human Male*, which quickly became a blockbuster for its shocking findings about Americans' sexual habits. Readers flocked to purchase the 804-page book, which spent months on the national bestseller lists, ultimately selling almost a quarter million copies.[86] The tome was so popular that, as late as mid-1949, the New York Public Library had stopped adding names to its lengthy waiting list.[87] Derivations of the work were almost as successful as the original: a 25-cent summary of Kinsey's findings sold three-quarters of a million copies.[88] Media outlets, from national magazines to small-town newspapers, reported extensively on Kinsey's controversial work, such that his findings were even more widely known than they were read.[89]

What captured the public's attention was the study's revelation that there was a wide chasm between what society prescribed as appropriate sexual behavior and what Americans actually did behind closed doors. One of Kinsey's most shocking findings was that same-sex sexuality was much more common than anyone had previously thought. His research showed that at least 37 percent of men in America had engaged in some kind of same-sex sexual conduct and that 13 percent of the American population was "predominantly homosexual." As Kinsey and his colleagues explained, "persons with homosexual histories are to be found in every age group, in every social level, in every conceivable occupation, in cities and on farms, and in the most remote areas in the country."[90] Kinsey's data was decidedly skewed. His study disproportionately relied on unrepresentative populations – college students, prison inmates, and gay men.[91] The report's accuracy, however, was less important than its effect on the popular imagination.

What the public took from Kinsey's work was that homosexuals were not a separate population, but rather existed in every part of society. These findings astounded Americans, who understood same-sex attraction as a pathological deviation. Kinsey's research also shook the foundation on which the country's antiqueer laws were based. The

conception of same-sex sexuality as a mental illness had undergirded the military's ban, the civil service's purge of homosexual employees, and the nation's sexual psychopath statutes. However, the scientist's findings that a large percentage of adult men had participated in same-sex activity called into question whether homosexuality was necessarily pathological. Kinsey's work thus directly undermined the theories on which these laws were based. Moreover, his research demonstrated that states' criminal codes were ineffective, as applying the sexual psychopath laws as written would have required states to institutionalize approximately 6.3 million men.[92] Kinsey's study raised similar concerns as to consensual sodomy laws. Given that 13 percent of the male population was "predominantly homosexual," police necessarily were only apprehending a small percentage of those who engaged in consensual sodomy.

FIGURE 3 Sexuality researcher Alfred Kinsey working with staff to prepare the final manuscript of "Sexual Behavior in the Human Female," 1953. Kinsey's findings, which indicated that a significant percentage of the American public engaged in same-sex activity, prompted states to reevaluate many of their criminal laws. Photo by Hulton Archive. Courtesy of Getty Images.

Kinsey's findings led him to criticize America's sex offender codes, which he characterized as archaic, moralistic, and unnecessarily punitive.[93] After publishing his study, he readily corresponded with attorneys defending men charged with sex crimes, providing them with statistical information so they could better represent their clients.[94] To a lawyer who asked for advice in a case involving a man who had been "charged with carnally knowing a pig by the anus," Kinsey noted that "a fair proportion of the population" engaged in this type of behavior.[95] His research had shown that 17 percent of men completed sex acts with animals and nearly 30 percent of men attempted to do so. Using this information, the attorney secured a reduction in his client's charge – from a felony that carried a fifteen-to-twenty-year sentence to a misdemeanor.[96] Even in an instance of bestiality, Kinsey's research had a significant effect on how officials applied the law.

Although Kinsey routinely denounced both consensual sodomy and sexual psychopath statutes, he was adamant that he was not a reformer.[97] In 1953, when the Mattachine Society asked Kinsey to serve on its advisory board, he not only declined the invitation, but threatened to sue the group. Kinsey's objection was that the Mattachine Society had been using his name when contacting other potential advisors, thereby making it seem as though the scientist was involved with the organization.[98] Kinsey was furious. The power of his work, he believed, came from its scientific objectivity. In such a controversial and fraught field, he knew it was particularly important to cast himself as a scientific expert, even as he ignored critiques of his methodology. Yet the same year that he feuded with the Mattachine Society, Kinsey forcefully condemned American penal codes in his follow-up study, *Sexual Behavior in the Human Female*.[99] He described consensual sodomy and sexual psychopath laws as "completely out of accord with the realities of human behavior."[100] Moreover, by criminalizing commonplace acts, the statutes made it possible for police to blackmail otherwise harmless members of society.[101]

Kinsey may not have wanted to be associated with the shadowy Mattachine Society, but he meant his work to lead to tangible legal reform. It would soon have the opportunity to do just that.

Rethinking Sexual Psychopathy

Morris Ploscowe, a New York magistrate judge, did not need Kinsey to tell him that penal codes were out of date. From the bench, the Harvard Law graduate had seen for himself that many people went to jail for engaging in commonplace sexual activities. Ploscowe described the criminal law as "an instrument of repression" that gave rise to extortion and police corruption.[102] As a result, when the Prison Association of New York asked him to draft a sexual psychopath statute to submit to the state legislature, Ploscowe excluded both consensual sodomy and disorderly conduct as provisions that would trigger the statute. He explained that police only ever used disorderly conduct laws to arrest men who engaged in sexual activities in subway and theater toilets. In his view, neither activity was "sufficiently dangerous or anti-social" to warrant classification as a sexual psychopath.[103]

New York's legislature was initially skeptical. They revised Ploscowe's draft and passed a version that included both sodomy and disorderly conduct. But Governor Thomas E. Dewey vetoed the bill. The politician, who served as the Republican Party's presidential nominee in 1944 and 1948, was concerned that the statute did not sufficiently distinguish between various types of sex offenses.[104] He insisted that those "who commit their acts privately ... are their own greatest victims." As a result, incarcerating these individuals was "unnecessarily inhuman."[105] Dewey did not mention gay men or lesbians explicitly, but he did not need to. At the time, New York courts rarely prosecuted private heterosexual consensual sodomy.[106] The legislature could read between the lines. Dewey's objection ultimately carried the day. When the Empire State finally enacted a sexual psychopath law in 1950, the text no longer included references to consensual sodomy or disorderly conduct.

The decriminalization of queer life in other parts of the country began similarly, starting with legislative projects that questioned the sexual psychopath framework. In these other states though, elected officials had hurriedly enacted sexual psychopath statutes in response to public outrage at sensationalized media accounts of violent crimes. Once the furor had died down, legislators then created commissions to analyze the laws' effectiveness. Appointing experts to evaluate criminal

laws had become a common practice in the 1920s, with commission members adopting a self-consciously scientific approach to their task. They gathered facts, analyzed the data, and made recommendations based on their findings.[107] Given that commissions were meant to avoid moralism, it was no surprise that members of the sexual psychopath commissions set about their task with Kinsey's admonishments in mind. More unexpectedly, given the widespread social condemnation of same-sex sexuality, the reports they produced ultimately led some lawmakers to reconsider their statutes. As in New York, these reforms did not begin as a queer rights project, but rather as broader investigations into how the criminal justice system applied sexual psychopath provisions. The sexual psychopath commissions would nevertheless have a significant effect on gay and lesbian rights, becoming the first of many instances in which experts became key to securing the queer community's civil liberties.

The commissions devoted themselves to their charge, leaving few stones unturned in their study of the sexual psychopath statutes. They typically held multiple public hearings where they heard from concerned citizens, educators, and law enforcement officers. They also interviewed leading experts and surveyed existing research.[108] No group was more committed than the Michigan commission, where the twenty-three members met more than eighteen times as a full group, at sessions that each lasted an average of six hours. They also interviewed experts – including psychiatrists, criminologists, and lawyers – consulted over 600 books and articles, and convened public hearings to hear from citizens and civic organizations.[109] The seven-member New Jersey commission likewise conducted an exhaustive review of expert material. They invited over 700 experts to testify at hearings. They also sent questionnaires to an additional 300 psychiatrists, school principals, and parent–teacher groups.[110] The commission members engaged in these extensive efforts without pay, making their herculean efforts all the more impressive.[111]

One of the experts who commissioners clamored to meet was Alfred Kinsey.[112] California's commission convened in Sacramento specifically to hear from the sociologist.[113] New York's Committee on the Sex Offender likewise consulted Kinsey before crafting its proposal in 1950. At Kinsey's urging, it recommended reducing consensual sodomy to a misdemeanor.[114] Reformers recognized the role that

Kinsey's findings could play and consequently strategized ways to ensure that commissioners considered his studies. For example, the Illinois Academy of Criminology, which opposed its state's sexual psychopath law, arranged for Kinsey to meet with the commission members before their work officially began.[115] The Illinois commission ultimately sat down with Kinsey on three separate occasions, with the researcher becoming so influential to the group's work that the commission identified him as an advisor in their report.[116] Of course, commissions did not need to meet with Kinsey to incorporate his research. The Pennsylvania commission noted in its findings that, based on Kinsey's study, "there were at least 2,275,760 male sexual deviants in Pennsylvania in 1940."[117] The New Jersey commission likewise argued that, based on Kinsey's studies, a substantial number of men could be committed to a state mental hospital under the sexual psychopath statute.[118] In California, the commission dryly noted that, based on Kinsey's research, "at some time or another, 95 percent of the male population commits a sex offense for which he might be prosecuted."[119]

As the commissions noted, the ways in which authorities applied the laws seemed to prove Kinsey's point that the statutes were unnecessarily punitive. In New Jersey, the commission emphasized that defendants who had been adjudicated as sexual psychopaths had rarely committed violent sex crimes. Instead, the state's cases of sexual psychopathy included an African American man who had followed – but never approached – a white woman, an exhibitionist who exposed himself when drunk, a straight man who met with a female prostitute in a movie theater, and a homosexual man who had written a bad check.[120] None of these people were the danger to society that the public feared. They were also not the types of crimes that had led the legislature to enact the sexual psychopath statute. Moreover, none of them deserved the sexual psychopath law's draconian sanctions. New Jersey's statute was exceptional in how broadly it applied.[121] Yet minor sex offenses gave rise to adjudications for sexual psychopathy around the country, which made reformers question the entire statutory scheme.

The evidence that the commissions marshalled produced a clear consensus: nonviolent crimes should not trigger a state's sexual psychopath statute. The commissions overwhelmingly concluded that the

state needed to distinguish between crimes that offended the community's "good taste and morals" from those that constituted physical dangers to society.[122] The crimes with which most gay men were charged – consensual sodomy, disorderly conduct, and vagrancy – clearly fell in the former category. In making this argument, the commissions implicitly challenged psychiatric orthodoxy, which linked homosexuality to pedophilia and violence. The reports suggested that, although gay men might be sexual deviants, they were not dangerous. That reframing undermined not just the criminal laws, but also social perspectives on homosexuality, both of which had made it impossible for gays and lesbians to be out and demand their rights. That the commissions agreed so resoundingly was perhaps no surprise, given that groups often relied on one another's work. Some interviewed commission members from other states, while others simply reviewed the other groups' published final reports.[123] Indeed, the document that the Pennsylvania commission ultimately produced consisted of little more than a summary of the New York and New Jersey commissions' findings.[124] The Keystone State group even reprinted their recommendations in full.

Most of the groups insisted that legislators had erred in crafting their sexual psychopath legislation and urged them to reform their statutes, but some commissions took their conclusions a step further. In California, Michigan, and New York, commissions recommended that the legislatures do more than simply scale back their sexual psychopath laws. They pressed elected officials to amend their criminal codes to differentiate between consensual and forcible sodomy.[125] Under this formulation, gay men would be charged with a lesser crime in recognition that same-sex sexuality was not the same, nor as harmful, as forcible conduct. The Illinois commission recommended an even more radical change to its state's penal laws. It proposed reducing public, consensual sodomy from a felony to a misdemeanor and decriminalizing private, consensual sodomy altogether. That way, the law would "discriminate between socially distasteful and socially dangerous conduct."[126]

Given that these recommendations departed so drastically from convention, legislatures were understandably reluctant to adopt them. As a result, most did not. Although elected officials had entrusted a review of the laws to experts, who produced meticulously detailed

studies of the sexual psychopath regime, the public had also demanded that their representatives take aggressive action against sex crimes.[127] Making the changes that the commissions suggested thus meant defying the public will. A handful of legislatures were willing to risk provoking their constituents' outrage, with some moving quickly. It only took New Jersey four months to incorporate all of the commission's suggestions.[128] The few other states that adopted the changes were more sluggish, but the fact that they made any reforms at all was notable. The vast majority of states balked at instituting the changes that their commissions recommended.

By 1955, only four states had removed consensual sodomy from the list of crimes that triggered the sexual psychopath provision. Given that thirty states and the District of Columbia had sexual psychopath laws at the time, these changes did not constitute a wide-ranging shift in the law. Additionally, the reforms did not necessarily limit the state's use of the laws. In California, the legislature circumscribed the scope of its statute in 1950.[129] At the time, the state committed an average of fifty offenders per year as sexual psychopaths.[130] Between 1953 and 1958, however, California applied the law to almost 350 men per year.[131] By the mid-1960s, it was institutionalizing an average of 800 offenders each year.[132] The states willing to amend their sexual psychopath laws were few and far between, and yet there was even less movement on the consensual sodomy front. Although New York reduced consensual sodomy from a felony to a misdemeanor in 1950, no state was willing to decriminalize consensual sodomy altogether.[133]

In the end, the commissions' work only produced minor changes in their states' statutes. Yet these limited reforms were important, because they were the first legal stones to tumble. They started what would eventually become a cascade of reform in favor of gay and lesbian rights, one that would eventually make queer family recognition possible. The next criminal laws to follow were prohibitions on consensual sodomy. At the time the commissions issued their reports, no state was willing to seriously consider decriminalizing consensual sodomy altogether. Even if the commissions convinced individual legislators that they should amend the penal codes, doing so was politically impossible. Within a decade, however, that was no longer true. Once again, Kinsey – along with a cadre of lawyers, law professors, and judges – would be at the center of those reform projects.

Decriminalizing Consensual Sodomy

In 1951, Manfred Guttmacher, a well-known forensic psychiatrist and criminologist, received an unusual request. A Post Office inspector from New York wanted Guttmacher's opinion on whether to prosecute a man who published sadomasochistic pornography. At the time, Guttmacher served as the chief medical officer for the Supreme Bench of Baltimore, overseeing a medical services division that provided psychiatric, psychological, and social work evaluations to the city's court system. His office advised on approximately 400 cases every year, with lawyers, judges, and juries accepting its recommendations in 98 percent of cases.[134] In the pornography case, Guttmacher was conflicted. He reasoned that the materials could help sadomasochists better suppress their desires. But he could also imagine that the photographs could lead people to act out violent sex crimes.[135] Guttmacher turned to the leading expert in the field: Alfred Kinsey. Kinsey assured Guttmacher that pornography was nothing to fear. It provided an outlet for sexual desire, rather than giving rise to imitation. He also cautioned that the Post Office's action was illegal.[136]

Guttmacher often asked the researcher for advice. For example, when Guttmacher became involved in a case challenging the military's ban on gays and lesbians, he turned to Kinsey for support.[137] Guttmacher revered the scientist, describing his work as "a bold, vast project, brilliantly conceived, patiently and sensitively executed, and carried out with the greatest honesty."[138] Guttmacher and his identical twin, a gynecologist named Alan who would later become the president of Planned Parenthood Federation of America, were both taken with Kinsey. The pair even offered to provide their sexual histories to add to Kinsey's data set.[139]

Perhaps because of his familiarity with Kinsey's research, Guttmacher became a strident opponent of sexual psychopath and consensual sodomy statutes. Echoing Kinsey's arguments, Guttmacher described the former as laws that were more likely to "lead to abuse rather than cure."[140] As for the latter, he maintained that they "all too often degenerate[d] into a source of blackmail and police corruption."[141] In 1951, Guttmacher had the chance to help abolish the statutes he abhorred. That was the year that the American Law Institute (ALI), a highly respected organization dedicated to

simplifying and clarifying American law, asked Guttmacher to serve on the Advisory Committee for the Model Penal Code (MPC). The MPC, in turn, would help transform American criminal laws.

The MPC was a model criminal code meant to assist legislators in reforming their penal statutes.[142] Since its founding in 1923, the ALI had recommended the reform of state laws in nine areas, including contracts, property, torts, and trusts.[143] When the group turned to criminal law and its administration, American penal codes were little more than ad hoc collections of statutes, and even those were painfully out of date. Only one state – Louisiana – had tried to systematically reform its criminal code since the nineteenth century.[144] Given the dire need, as well as the ALI's distinguished reputation, the MPC was well-poised to have a significant practical effect on states' penal codes. To begin its work, the ALI set up an Advisory Committee to research and draft each section of the MPC. Once the Advisory Committee gave its approval, the Council of the ALI, an elected volunteer board of directors, would vote on the provisions before sending them to the entire ALI membership for a final decision.

The ALI tapped many experts for the Advisory Committee on Sex Offenses who, like Guttmacher, identified Kinsey's research as foundational to their views. The Advisory Committee included Morris Ploscowe, who had proposed that New York exclude consensual sodomy from its sexual psychopath statute's purview. In 1951, he published *Sex and the Law*, which he described as applying Kinsey's sociological research to legal principles.[145] In that text, he set out the two main arguments that the Advisory Committee would make for decriminalizing consensual sodomy. The first was pragmatic and rooted in Kinsey's findings: given homosexuality's prevalence, states simply could not enforce the statutes effectively.[146] The second was more theoretical. Since homosexuality was a psychological condition, rather than a behavioral choice, states had no basis criminalizing consensual sodomy.[147] Homosexuality was not a matter for the state to punish, but rather a condition for the afflicted to address with medical professionals and religious advisors. This framework constituted a notable shift. In the 1930s, psychiatric theories of homosexuality had led states to identify homosexuality as a dangerous pathology requiring the state's intervention. For that reason, lawmakers included consensual sodomy within their sexual psychopath laws. But by the

time the ALI drafted the MPC, medical conceptions of same-sex sexuality would form the basis for excluding consensual sodomy from criminal codes altogether.

Ploscowe's dual arguments – one concerning homosexuality's prevalence, the other its status as a mental illness – convinced the Advisory Committee to draft a code that excluded consensual sodomy from its list of sex offenses. But the Advisory Committee took his points a step further. In addition to stating that the laws were unenforceable and that homosexuality was a medical issue, they also declared that same-sex sexuality was innocuous.[148] The Advisory Committee boldly announced that "no harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities."[149] In other words, the state should not be regulating homosexuality at all. Thus, the Advisory Committee's claim was not just a denunciation of existing criminal laws. It also suggested that governments should eliminate all of their antiqueer policies. The Advisory Committee's statement came at a time when gays and lesbians risked their jobs, homes, and families when their sexual orientation became known. It was a radical change from existing conceptions of homosexuality, both in the criminal law and society at large.

Given the draft's tenor, as well as its departure from existing penal codes, the ALI Council unsurprisingly rejected the Advisory Committee's proposal. Even Council members who agreed with eliminating consensual sodomy in theory feared that its exclusion would torpedo the entire project. The goal was to create a model code that legislators would adopt wholesale, so that states' penal codes would become uniform. Without a consensual sodomy prohibition, legislatures might reject the entire MPC.[150] Others voted against the Advisory Committee's recommendation as a matter of principle. For these Council members, sodomy was a marker of moral decay that the law should at least try to suppress, even if the state was bound to fail at eliminating same-sex sexuality. The Council consequently added a prohibition on consensual sodomy to the draft it sent to the ALI members for ratification. As a compromise, the provision made consensual sodomy a misdemeanor rather than a felony.[151]

The members of the ALI, who had to vote on the final draft, were conflicted on which version to endorse. They knew and understood the

competing arguments that had produced the Advisory Committee recommendation and the Council drafts.[152] What ultimately resolved the debate was the argument of Learned Hand, one of the most well-respected judges of the twentieth century.[153] Hand explained to the group that he had changed his mind on the issue. At the Council meeting, he had voted to retain the prohibition against consensual sodomy because he feared that omitting it would risk the MPC's adoption throughout the country. However, he confessed that he had "always been in great doubt" about his decision, because he believed that consensual sodomy "is a matter of morals, a matter very largely of taste, and it is not a matter that people should be put in prison about." He was now urging the members to exclude consensual sodomy because criminal laws should not serve as mere expressions of moral condemnation. If police were not going to be able to enforce the laws, then they should not be on the books.[154]

Hand's argument won the day. After hearing from the esteemed jurist, the members of the ALI voted to eliminate the consensual sodomy provision from the MPC.[155] Notably, Kinsey's name did not appear in the debate, and neither did his studies. His research, however, undergirded the entire discussion. Kinsey's work had established that these laws were futile, given that millions of Americans violated them. The ALI had applied the scientist's research when crafting the MPC, turning his conclusions into law. Indeed, after the members approved the final draft, the ALI sent Kinsey a copy, noting that he would immediately see the extent to which they were indebted to his work.[156]

The MPC inspired criminal law reform throughout the United States. In 1961, Illinois became the first state to decriminalize consensual sodomy when it adopted a draft version of the MPC.[157] By 1978, twenty-two states had decriminalized consensual sodomy, almost all as a result of legislators rewriting their penal codes based on the MPC.[158] Because of these results, the MPC has been described as one of the most successful academic law reform projects in American history.[159] Contrary to the Council's dire predictions, legislative debates over whether to enact the MPC did not focus on the absence of a consensual sodomy provision. Some Republican-dominated states, as well as states in which public opinion favored criminalization, retained their sodomy laws when revising their codes.[160] Other legislators adopted the MPC wholesale because they did not realize the

provision was missing.[161] In two states, Arkansas and Idaho, legislators went back to add consensual sodomy laws after they belatedly learned that their new codes did not include prohibitions on the conduct.[162] The nascent gay liberation movement kept quiet during these legislative debates, realizing that legislators were more likely to decriminalize consensual sodomy if the issue remained under the radar.[163]

These penal code reforms eliminated one of the state's harshest punishments against same-sex sexuality. Although few men were subject to these draconian sanctions, the changes did away with a major risk that came with being queer. The changes also began to sever the connection between same-sex sexuality and criminality, given that states limited prosecutions of consensual sodomy to homosexuals. Of course, the effect on the day-to-day lives of gays and lesbians was more limited, as the decriminalization of consensual sodomy did not end police harassment of gays and lesbians. Law enforcement officials continued to suppress queer life by wielding the many other criminal statutes at their disposal. As one gay liberation group noted in 1970, "any homosexual from Chicago, where homosexuality is legal, will tell you that changing the law makes no difference."[164] That was because the MPC had decriminalized activities that took place in private, but gay men and lesbians typically risked arrest when they flirted, danced, and embraced in public spaces like bars, restaurants, and cruising grounds.

The MPC thus inaugurated an important change in penal codes, but it did not make it safe for homosexuals to be out. For that, the queer community needed legislators and judges to revise the other laws that police used to suppress gay and lesbian life. The next challenge was thus to decriminalize vagrancy and lewdness. Only then could it be legal to be openly queer.

Legalizing Queer Life

On December 31, 1966, gay and lesbian revelers – many in drag thanks to a contest at a nearby bar – gathered to celebrate the end of the year at Los Angeles's Black Cat tavern. At the stroke of midnight, as patrons sang "Auld Lang Syne" and kissed, undercover officers announced themselves and began making arrests. The typical bar raid

soon turned bloody, with officers throwing punches and dragging men to the curb. Police beat two of the victims so badly that they were left unconscious in the gutter, one with broken ribs and the other with a cracked skull. Onlookers were shocked by the police's brutality. Activists quickly organized a picket along Sunset Boulevard, as well as a rally that more than 200 people attended.[165] The crowd called for an end to police abuse and entrapment, bearing signs that read "Peace Officers – Not Storm Trooper[s]" and "Blue Fascism Must Go."

The outrage the raid provoked demonstrated how much American society had changed in the decade since vice officers shuttered Hazel's bar. One reason for the shift was that, as a result of Kinsey's work, many people realized that homosexuality was much more common than they had ever expected. That, in turn, raised questions as to whether the state should be criminalizing queer life. But the change also stemmed from broader concerns about police techniques and their effect on Americans' civil rights. The MPC had focused on the substantive problems with state criminal laws, but the country was also reckoning with the procedural issues associated with their enforcement.[166] Much of the focus at the time was on the racial disparities in policing, but judges increasingly questioned the police surveillance tactics that produced arrests of gays and lesbians for vagrancy, lewdness, and solicitation.[167] Some bristled at enforcing victimless crimes and considered the prosecutions a waste of police resources.[168] For others, the problem was that police decoys might be tempting vulnerable suspects to yield to latent impulses. Without the vice officers' enticements, these judges reasoned, the defendants might never have succumbed to their desires. Because of these concerns, some judges used their discretion to dismiss the charges or acquit the defendants at trial.[169]

Judges were not the only ones to express discomfort with how police officers enforced the laws. In the 1960s, citizens began voicing similar concerns after they became more aware of vice patrols' work, following the publication of detailed exposés on queer life in national newspapers and magazines.[170] One of the first of these appeared in the June 26, 1964 issue of *Life* magazine, which printed a fourteen-page "report on homosexuality" that featured photographs from inside a queer bar.[171] In the years that followed, the popular press became filled with journalists' forays into gay and lesbian communities.[172]

To uncover the queer world, reporters sought guidance from vice squad officers, who had painstakingly become experts in gay men's clothing preferences, physical cues, and specialized lexicon.[173] Vice patrols took these journalists along on their evening rounds, leading to articles that highlighted how easily officers blended into queer life.[174] Some readers responded with alarm at the queer world's existence. But for others, the stories' revelations of gay and lesbian subcultures were not as concerning as the police tactics the authors depicted. As one woman explained, the government should not have the right to surveil citizens' private lives.[175] Another dismissed the patrols' work as harassment, entrapment, and a simple waste of public funds.[176] Liberal magazines were more likely to run repudiations of vice squads than mainstream publications, often printing them alongside reports of other police abuses. However, as criticisms mounted, outlets across the political spectrum began publishing these denunciations. A year after *Life*'s multipage profile on gay life, it featured an editorial that decried plainclothes decoys as "unjust and repugnant."[177]

Vice patrols' clandestine operations struck a particular nerve because they seemed to be yet another example of how police harassed vulnerable groups. Following the Cold War, when the fight against totalitarian states highlighted their Orwellian encroachments on privacy, such actions seemed distinctly un-American. As a result, an undemocratic air lingered over undercover surveillance.[178] In the 1960s, confrontations between law enforcement officials and civil rights protestors reignited concerns about police abuse. The public recoiled from their television screens, which displayed horrifying images of sheriffs unleashing fire hoses, bull whips, truncheons, and dogs upon peaceful Black demonstrators.[179] Although these events took place in Southern towns, mistrust of police spread around the country. In 1966, one former New York City police commissioner lamented that "[n]ever before in the 150-year history of law enforcement has the police 'stock' been at a lower point."[180] As Vietnam War protests spread around the country, often leading to violent clashes, newspaper headlines increasingly focused on the police's cruelty.

In response to public outcry, many urban police departments began retreating from their controversial methods in the late 1960s. They reduced the number of raids they conducted and diminished their use of decoy patrols. As a result, it became *safer* – even if not entirely *safe* –

for gays and lesbians to socialize in public. That meant that the queer community could start to be visible in American life. The détente between police on the one hand, and gays and lesbians on the other, went even further in certain cities. Some departments began establishing liaisons between officers and the queer community, as well as instituting civilian review boards where gays and lesbians could lodge complaints against officers.[181] In San Francisco, the queer community and law enforcement began socializing at an annual softball game, where the ceremonial first ball was painted lavender and covered in glitter.[182]

Changes to police practices were important, but they did not resolve the queer community's problem. Law enforcement officers around the country continued to suppress gay and lesbian life, applying vagrancy and lewdness ordinances to limit queer sociability. In the 1960s, most gay men and lesbians were unwilling to endure the embarrassment and expense of challenging the laws publicly.[183] However, the laws' wide applications led other minority groups to fight against them, prompting reforms that would alter the lives of queer individuals around the country. Vice patrols had never wielded vagrancy laws solely against gays and lesbians, but rather had always used them to police all social misfits. The statutes allowed police to arrest anyone who violated social mores, from labor organizers and communists, to gamblers, hobos, and hippies.[184]

What tipped the scales in favor of law reform was that, in the 1950s and 1960s, southern officials often deployed vagrancy to arrest civil rights activists and their allies, tainting the provisions as fundamental bulwarks of Jim Crow.[185] In 1958, Birmingham police accused three ministers of lacking proper identification, then arrested them for vagrancy. The group had traveled from Montgomery to visit Revered Fred Shuttlesworth, who had cofounded the Southern Christian Leadership Conference with Martin Luther King, Jr.[186] The arrests became front-page news, sparking national protests.[187] Although civil rights organizations used the incident to challenge vagrancy laws as unconstitutional, the Supreme Court upheld the provisions.[188] In the years that followed, it was so common for civil rights workers to be arrested for vagrancy that organizations educated staff and volunteers on the topic before they traveled south.[189] An army of lawyers formed to defend civil rights activists when they inevitably faced vagrancy charges.[190]

Civil rights groups thus continued to fight against vagrancy laws. They spent more than a decade lobbying legislatures, convincing elected officials to revise their penal codes. They also challenged the laws in the courts, leading state high courts to invalidate the provisions.[191] As a result of their efforts, by the late 1960s, vagrancy statutes were on their way out.[192] The death knell for these laws finally came in the early 1970s, when the Supreme Court held them to be unconstitutionally void for vagueness.[193] The petitioners in these cases included four Jacksonville, Florida, residents – two Black men and two white women – who were arrested for "prowling" when they rode in a car along the city's main thoroughfare. Another was a Black civil rights leader who was walking along a city block, looking for a friend. A third was an African American man who had dropped off a woman at her home. The circumstances of each reinforced the laws' excessive breadth, as well as their potential for abuse. The Court struck down the laws after decrying them for encouraging arbitrary arrests, criminalizing innocent activities, and placing far too much power in the hands of the police.[194]

None of the cases involved gays and lesbians, but the Court's decisions had a significant effect on queer life. As a result of the Court's rulings, vice patrols lost one of their main tools for repressing same-sex sexuality. Without these laws, officers could no longer arrest people like the Black Cat bar's patrons for spending an evening out together. For the six revelers who were charged that night – and whose convictions meant they had to register as sex offenders – the decisions came too late.[195] But for other gays and lesbians, who no longer had to weigh the risk of a police raid with the need for community and companionship, the change transformed their lives. The end to vagrancy made it easier for gays and lesbians to gather publicly, thereby giving rise to increasingly visible queer communities.

* * *

With the Supreme Court's decisions striking down vagrancy laws, an era of rampant antiqueer policing ended. By 1971, gays and lesbians did not invariably risk arrest when they socialized. In an increasing number of states, their private sexual activity was no longer a crime. Moreover, lawyers, judges, and psychiatrists denounced the notion

that homosexuals should be institutionalized as sexual psychopaths. Kinsey's research had shown that same-sex attraction was widespread, making it less likely that gay men and lesbians were inherently dangerous. His findings gave rise to penal code reforms, such that the queer community was no longer by definition criminals. That is not to say, of course, that the police stopped harassing, intimidating, and arresting gays and lesbians. Antiqueer policing continued in new forms, shifting its focus to cross-dressers and individuals who participated in survival economies, a change that disproportionately burdened gender nonconforming, racial minority, and economically marginalized individuals.[196] But as a general matter, the system of legal oppression – which had made it impossible for gays and lesbians to be open about who they were – had begun to crack.

These changes occurred at the state and local levels, where criminal laws are most typically administered. Because penal codes differ from state to state, and law enforcement practices vary by municipality, many of the legal changes were geographically uneven. Yet the fact that any state decriminalized consensual sodomy was extremely consequential. In addition to eliminating a legal basis for discriminating against gays and lesbians, each legislative enactment helped to chip away at social conceptions of same-sex sexuality as a dangerous menace. Legal changes in one part of the nation thus communicated an important message to Americans all around the country. What made it possible for elected officials to reconsider their sexual psychopath and consensual sodomy laws was growing evidence that gays and lesbians were not deviant. Kinsey's findings had convinced legal experts that penal codes were out of date, punishing ordinary behavior rather than aberrant acts. Sociological research thus opened the door to legal change by identifying same-sex sexuality as a variation on the norm, rather than a difference that warranted punishment. Such a framework was a far cry from acceptance for gays and lesbians, but it was nevertheless a notable change.

For queer rights advocates, reforms to the criminal justice system were important, but only a start. Despite the sea change in penal codes, gays and lesbians continued to experience widespread discrimination, which showed no sign of abating. Advocates demanded the right to live their lives free of judgment and injustice. Being out should not mean losing family relationships, homes, or jobs. Otherwise, the cost

would simply be too high. Without these changes, people could not live openly as gays and lesbians. That was particularly true for lesbian mothers and gay fathers, who faced an additional obstacle to leaving the closet: the prospect of losing custody of their children when their sexual orientation became known. As far as family courts were concerned, queer parents were categorically unfit. Same-sex sexuality was incompatible with family life given its long-standing connection to pedophilia and crimes against children.

Criminal laws had assumed that homosexuals were a small group of dangerous predators, while sexual psychopath statutes insisted that gay men were harmful to children. Although the prevalence of same-sex activity had led elected officials to revise their penal codes, these legislative debates did not directly address whether homosexuals were dangerous to youth. In the 1970s, that would become the central issue in a new set of queer rights battles, fought over child custody. As lesbian mothers and gay fathers increasingly went to court to secure rights over their children from different-sex unions, debates over child welfare would become the central issue for decisionmakers. The result of those disputes would determine not just the outcome of any given custody case, but the future of the queer rights movement.