The Creation of the Modern Sex Offender

In 1968, a former policeman and liberal candidate for Los Angeles district attorney named Michael Hannon published an article in the gay magazine *Tangents* criticizing laws that punished what he called “victimless crimes.” Hannon inveighed in particular against California’s sex offender registry — the first of its kind in the nation — which allowed the police to identify and track the whereabouts of individuals convicted of certain sex crimes. The problem with the sex offender registry, he argued, was that it criminalized a hodgepodge of harmless as well as harmful offenses without any apparent rhyme or reason. While registration might be an appropriate legal response to violent sex crimes, it was a waste of public resources for lesser offenses that did not involve a victim. For example, the registry’s inclusion of “lewd or dissolute conduct” — a law that the police used primarily to crack down on gay cruising — was a particularly frivolous use of police power. “I take no offense,” he explained, “at the idea of the police informing themselves of the whereabouts of rapists in a community, but expenditure of time and money to keep track of persons whose only crime is to offend against quaint Victorian ideas of the proper way to perform a sex act strikes me as absurd.” Drawing on the idea of the victimless crime, Hannon proposed to modify the sex offender registry by removing crimes that did not involve harm in order to home in on ones that did.¹

In the 1970s, gay activists, liberal state officials, and law-and-order conservatives redefined what it meant to be a “sex offender” by transforming California’s sex offender registry to focus less on gay sex and more on rape and sex with minors. The 1950s and ’60s was a period of intense police repression of gay men who sought intimacy in bars, parks, and other public places. Gay activists challenged that regime by forming an alliance with liberals who
supported the reform of laws punishing victimless crimes. By the early 1980s, the gay-liberal coalition had persuaded the California Supreme Court to prohibit the police enforcement of the lewd conduct law in semiprivate spaces like gay bars and to remove those convicted under the law from the sex offender registry. At the same time, liberals and some gay activists supported registration for rape and sex involving minors. With their endorsement, conservatives spearheaded a campaign to make the registry entail much harsher punishments than it did before. The broad consensus that registration was appropriate for the “real” sex offenders completely overshadowed the minority of gay activists, feminists, and civil libertarians who argued that the registry should be abolished entirely. Through these battles, gay activists, liberals, and conservatives produced a new raison d’être for sex offender registration that the federal government would later adopt when it started requiring all states to maintain a registry in the 1990s.²

Recent work in queer theory has promoted an increasingly accepted notion that the gay movement has become more and more conservative since the 1970s. The gay movement, or so this story goes, has gradually deemphasized the pursuit of sexual freedom and focused more on the right to marriage. It has supported gentrification and the war on terror. It has become characterized increasingly by a “homonormative” sexual politics, to use Lisa Duggan’s term, that “does not contest dominant heteronormative assumptions and institutions but upholds and sustains them.”³ While it is true that the gay movement has become more conservative in a variety of ways in the last four decades or so, this scholarship runs the risk of making the gay movement bear a disproportionate responsibility for larger social and political developments that stem from other causes.⁴

The goal of this essay is to show why it is important to contextualize this much-discussed turn to the right in gay politics and to resituate it in the larger political landscape — specifically, to see how it developed within the limitations of the larger political culture in which gay activists were operating. To place preponderate blame on gay activists for helping to make sex offender registration more punitive since the 1970s would be simply to misunderstand who caused that shift. Mainstream conservatives and liberals were the main groups responsible for radically expanding the carceral state’s sphere of control over sex offenders. Some gay activists, too, endorsed the idea that registration was an appropriate legal response to rapists and child molesters. However, they did not invent this argument, and they were not its most vigorous promoters. Furthermore, conservatives put a great deal of indirect
pressure on the gay movement to endorse that position through the use of stigmatizing rhetoric that portrayed gays as child molesters. It is probable that the reason more gay activists did not argue for abolishing the registry altogether is that they were afraid of confirming that stereotype in the minds of the straight majority and jeopardizing their goal of getting gay cruising off the registry. Of all the groups that supported amplifying sex offender registration for crimes involving victims, gay activists were the least influential, and they had the most to lose.

This historical account yields two lessons, one theoretical and one political. First, queer theory needs to distinguish the relative contributions of mainstream conservatives, mainstream liberals, and various gay activists to the war on sex—their different responsibilities for the spread and intensification of sex offender registration in recent decades. Second, LGBTQ politics should take a more vigorous role in conceptualizing and promoting constructive ways for the state to respond to sexual violence. Those two goals are interdependent, because truly progressive political activism requires a different style of engagement with the history of the gay movement. This style of engagement would focus less on blaming some gay activists for having bad politics and more on recuperating the insights of other gay activists who argued in the 1970s that the sex offender registry should be abolished altogether. This group pointed out that sex offender registration illogically singles out sex crimes as deserving of exceptionally stigmatizing punishment. They also produced an analysis of rape and child sexual abuse as social problems whose root cause was not deviant individuals but women’s and children’s systemic dependence on men in the institution of the family. However, the registration abolitionists of the 1970s did not manage to elaborate their analysis with enough power and sophistication to persuade lawmakers to deal with sexual violence in more effective and constructive ways. Now more than ever, it is imperative for queer theorists to pick up where these critics left off and develop their intellectual tradition further so that we might be in a position to proffer concrete policy alternatives to sex offender registration.5

THE LEWD CONDUCT LAW BEFORE 1968

When the California legislature enacted the first state-level sex offender registry in the country in 1947, legislators included gay sex among the deviant sexual practices that they identified as dangerous. They created the registry in the context of a national wave of concern about deviant sex. Between 1937
and 1967, twenty-six states passed “sexual psychopath” laws that authorized the indefinite detention of sex offenders, many of them gay men, in state hospitals. Unlike the ubiquitous sexual psychopath laws, though, only four other states besides California—Arizona, Nevada, Ohio, and Alabama—had enacted a sex offender registry by 1976. The architects of the California registry framed it as a surveillance system that would provide “local police authorities with the knowledge of the whereabouts of habitual sex offenders and sex deviates” — including the perpetrators of gay-related offenses like sodomy, indecent exposure, and, as it was called before 1961, “being a lewd or dissolute person.” Some law enforcement officials believed the registry was “effective as a deterrent to homosexual activity,” while others argued it was necessary because “homosexuals are prone to commit violent crimes and crimes against children.” For the lawmakers who created it, the sex offender registry was a means through which to suppress the harmful behavior of gay men.6

Of all the gay offenses to which the registry applied, the lewd or dissolute person law was the statute that police enforced most frequently. In the earliest case litigated by a gay rights organization in 1952, activists attacked the law for facilitating police entrapment — the practice in which a police officer would dress as a civilian and make sexual overtures at unsuspecting gay men to trick them into committing the crime of being a lewd or dissolute person. The defendant in the case was a gay rights activist named Dale Jennings who was entrapped by a plainclothes police officer in Los Angeles. According to Jennings, the officer had followed him home uninvited after the two met in the bathroom of a public park. The officer forced his way into Jennings’s home and “sprawled on the divan making sexual gestures and proposals. . . . At last he grabbed my hand and tried to force it down the front of his trousers. I jumped up and away. Then there was the badge and he was snapping the handcuffs on with the remark, ‘Maybe you’ll talk better with my partner outside.’ ”7 After contacting his associates at the homophile organization the Mattachine Society, Jennings made the rare and brave decision to defend his innocence in court; most men in his position would have pled guilty in the hope of plea-bargaining for a lighter sentence. Mattachine formed the Citizens Committee to Outlaw Entrapment (CCOE) to publicize the case and raise money for legal fees. “THE ISSUE HERE,” one of the CCOE’s flyers emphasized, “IS NOT WHETHER THE MAN IS A HOMOSEXUAL OR NOT, BUT WHETHER THE POLICE DEPARTMENT IS JUSTIFIED IN USING SUCH METHODS.”8 At the trial, Jennings’s attorney, too, defended the legitimacy of his client’s homosexual identity and called the practice of police entrapment
into question instead; though Jennings was openly homosexual, his conduct had been neither “lewd” nor “dissolute.” The jury voted eleven to one for an acquittal, and a new trial was scheduled. Before the trial took place, though, the city requested the case be dismissed. The \textit{CCOE} heralded the outcome as “the first time in California history an admitted homosexual was freed on a vag-lewd [lewd vagrancy] charge” and a “great victory for the homosexual minority.”9

That great victory was, however, an isolated one. In the main, the California legislature and court system tacitly or explicitly endorsed the police’s discretionary use of the lewd or dissolute person law to repress gay men and their sexual culture throughout the 1950s and 1960s. In order to rectify the fact that the law unconstitutionally criminalized a type of person as opposed to a type of behavior, the legislature reformed it in 1961 by removing the word “person” from “lewd or dissolute person” and replacing it with “conduct.” However, the reform had little practical effect on the enforcement of the law, since the new statute still left it up to the police to define what behaviors fell under “lewd or dissolute conduct.” Indeed, the statute did not even require the presence of an offended person besides a police officer for a lewd conduct conviction to be valid. The courts’ claim that gay men offended the “public,” then, was usually made in bad faith, since the only so-called victim involved in most cases was the police officer, who went out of his way to catch gay men who were seeking a sexual assignation. Even worse, the reformed statute intensified the police repression of gay men by specifically proscribing solicitation — the mere act of inviting someone to have sex — for the first time.10

The courts, too, afforded the police complete discretion to use the lewd conduct law to criminalize just about any gay behavior. Judges relied on a very broad understanding of what constituted a “public” place, such as when a Los Angeles Municipal Court convicted a man in 1963 for “kissing another man on his lips for three seconds” in a bar.11 In 1967, the Los Angeles Superior Court held it was legitimate for the police to use the statute to criminalize the mere act of asking another person in public to go have gay sex in private. “We cannot believe,” the court argued, “the Legislature intended to subject innocent bystanders, be they men, women or children, to the public blandishments of deviates so long as the offender was smart enough to say that the requested act was to be done in private.”12 A California Court of Appeal affirmed in 1968 that it was “manifest that the legislature believed that the subjection in public to homosexual advances or observation in public of a homosexual proposition would engender outrage in the vast majority of people.”13 Along with the

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legislature and the police, judges sustained the idea that gay men were a deviant social element against which the heterosexual public required protection and whose social world needed to be suppressed.14

Otherwise gay-friendly liberal law reformers still supported the state repression of gay cruising during this period. In 1962, the American Law Institute, an organization dedicated to the scholarly study of the law, published its Model Penal Code to provide state legislatures with a prototype to refer to when revising their criminal codes, many of which were about a century old. The Model Penal Code proposed to reform how the state regulated sexuality to decriminalize behaviors that did not harm others while retaining criminal sanctions on ones that did. It removed laws punishing sex practiced by consenting adults in private, including gay sex, while prohibiting rape, prostitution, sex involving minors, “open lewdness,” and gay cruising (which it described as loitering “in or near any public place for the purpose of soliciting or being solicited to engage in deviate sexual intercourse”). In order to dispute the lewd or dissolute conduct law, gay activists in California would have to find a way to convince liberals that gay men’s public sexual culture was, in fact, victimless.15

THE BATTLE TO REFORM THE LEWD CONDUCT LAW

In the late 1960s, a surge of gay activism produced the first-ever large-scale attempt to reform California’s lewd conduct law. While the Mattachine Society had been the lone resister to the law in the 1950s, a critical mass of gay organizations, including the Homophile Effort for Legal Protection, the National Committee for Sexual Civil Liberties (NCSCL), and the Gay Rights Chapter of the American Civil Liberties Union (ACLU), now existed to exert a stronger influence on public policy about gay cruising. Building on the pioneering efforts of the homophile movement, the new cohort of gay activists and lawyers invented direct-action protest strategies, crafted legal arguments, and formed political alliances with liberal city and state officials to curtail the state repression of gay men.

In Los Angeles, gay activists had to contend with the virulent homophobia of Police Chief Edward “Ed” Davis, who defended the LAPD’s frequent crackdowns on gay cruising by portraying gay men as dangerous psychopaths who preyed on children. The “open and ostentatious merchandising of the concept of homosexuality is a clear and present danger to the youth of our community,” Davis claimed when justifying his refusal to establish a police
liaison to the gay community in 1972. Later that year, he argued in a lecture before the Beverly Hills Bar Association that there was “no such thing as a victimless crime.” “The homosexual who hangs out in the park, and we get a complaint because kids playing ball are molested by this guy who wants to hang out in the men’s toilet, he certainly has victims.” Davis justified making it a police priority to suppress gay male sexual culture by associating gay men with child molestation.16

One way in which gay activists countered the stigmatizing rhetoric of law-and-order conservatives like Ed Davis was by arguing that it was unjustifiable to criminalize homosexual activity when it took place in private places like bars and bedrooms. Such was the argument of the Homophile Effort for Legal Protection (HELP). Founded in 1968, HELP was a legal aid society for gay men that maintained a twenty-four-hour answering service for members who needed legal assistance, representation, or money for bail. Its newsletter helped gay men avoid being arrested for cruising by publishing a segment that identified “local trouble spots” that were currently being targeted by the LAPD. However, HELP did not argue for the complete decriminalization of gay cruising. As a contributor to the newsletter put it, the organization did not believe that gay men “should be permitted to engage in activities which, when committed in public view, are offensive to the average person. What goes on behind closed doors is another matter — be these the doors to a bar which is known to have nude entertainment or the door to your bedroom.” HELP disputed the idea that gay men were a menace to the public by drawing attention to the fact that the police were targeting even those portions of their sexual culture that played out in arguably private settings.17

The police, gay activists also pointed out, used the lewd conduct law to suppress not just sex acts but any expression of intimacy at all, no matter how minor. On New Year’s Eve in 1966, eight police officers launched a brutal assault on a bar called the Black Cat in Silver Lake and arrested fifteen men, thirteen of whom they charged with lewd conduct for kissing when the clock struck midnight.18 The mere possibility of police harassment cast a pall over gay social life in the bars, even when the police were not actually present. In September 1970, the Gay Liberation Front (GLF) organized a protest they described as a “touch-in” at the Farm, a popular gay bar in West Hollywood, in order to contest the bar’s policy prohibiting kissing, holding hands, and other physical contact. The Farm’s owner defended the policy as a necessary precaution to prevent the police from “bust[ing] the bar for encouraging ‘lewd conduct.’” A flyer for the protest queried angrily, “DO YOU BELIEVE THAT
two men or two women with their arms around each other constitutes ‘lewd conduct’?”. At the protest, about eighty men and women marched in mock shackles and chains while loudspeakers played music like the Beatles’ “I Want to Hold Your Hand.” Later that month, GLF and the Farm arrived at an agreement securing “touch privileges” for bar patrons. (The bar endured still more grief the following year, though, when a county official urged the Public Welfare Commission not to renew its dancing and entertainment license because of a recent series of arrests for lewd conduct on or near the premises.) In these ways, activists challenged the notion that gay men were dangerous sex predators by highlighting the utterly quotidian nature of the behaviors for which they were being arrested.

When gay men contested a lewd conduct charge in court, they greatly increased the risk that they would actually be put on the sex offender registry. While many prosecutors and judges thought that the “lewd or dissolute” behaviors for which the police arrested gay men were indeed criminal, they did not believe those behaviors were serious enough to warrant registration. Often, prosecutors would add another charge after the arrest and offer to waive the charge for lewd conduct as long as the accused pled guilty to the non-registrable offense. On the whole, then, the most punitive aspect of sex offender registration during this period was not the requirement that the offender contact the local police once a month. Rather, prosecutors wielded the threat of registration to coerce defendants into pleading guilty to a lesser criminal charge. In this context, men accused of lewd conduct displayed considerable bravery when they refused a plea bargain. In 1970, for example, after plainclothes vice officers arrested GLF activist John Platania in Griffith Park in Los Angeles, Platania chose to represent himself at a jury trial instead of hiring a lawyer to get the charge reduced and avoid public exposure. “With the full support of the GLF,” a journalist for the gay magazine the Advocate commented approvingly, “[Platania] is turning his arrest by vice squad officers into a full-scale, public challenge of police entrapment procedures.”

Likewise, when the Metropolitan Community Church reverend Ronald Thaxton Pannel took his lewd conduct case to court in 1973, he refused to plea bargain for the lesser charge of “disturbing the peace” because he wanted to see through his dispute of the lewd conduct law’s constitutionality. “As long as the 647(a) [lewd conduct issue] has not been resolved,” he told the Advocate, “then I don’t have to enter a plea of my 415 [charge for disturbing the peace]. I’m hoping that by the time I’m forced to plead one way or the other, I will have enough money to plead innocent and demand a jury trial.”

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essential to activists’ challenge to the lewd conduct law was the courage of individual gay men who risked their livelihoods in order to challenge the statute’s constitutional basis.

Scholars, too, contributed to the movement to reform the lewd conduct law by furnishing empirical evidence backing up activists’ claim that the LAPD did, in fact, practice discrimination by enforcing the statute disproportionately against harmless gay male behaviors. A study from 1966 published in the UCLA Law Review, titled “The Consenting Adult Homosexual and the Law,” found that only 10 of the 434 arrests that LAPD officers had made for lewd conduct violations during the previous year involved private citizens as complaining witnesses. It noted, moreover, that most of the men who had been arrested pursued sexual contact only with other consenting adults and approached them through the use of circumspect body language. “The majority of homosexual solicitations,” the 185-page report noted, “are made only if the other individual appears responsive and are ordinarily accomplished by quiet conversation and the use of gestures and signals having significance only to other homosexuals.” The sociologist Laud Humphreys reported similar findings in his 1970 ethnography Tearoom Trade: Impersonal Sex in Public Places. A report from 1973 written by law students Thomas Coleman and Barry Copilow argued that the LAPD enforced the lewd conduct law against gay men “as a class of persons” in a purposefully discriminatory way. Together, these studies undermined the stereotype that portrayed gay men as dangerous sex offenders, and they made it possible for lawyers to argue instead that the lewd conduct law was a mode of state-sanctioned homophobia.

Gay activists formed alliances with liberal public officials who shared their perspective about the need to restrain the police from suppressing gay men’s harmless behavior. When a lawyer named Burt Pines ran for Los Angeles city attorney in 1973, he pledged to “take a strong, tough look at any prosecutions under 647 [the lewd conduct law] dealing with homosexual activity, and it’s certainly going to be an area that I would seek to de-emphasize.” Pines’s promise contrasted sharply with the proposal of his rival candidate Roger Arnebergh, who suggested gay bars incorporate as private clubs to help gay men “avoid unintentionally or unknowingly offending” a bystander. After Pines prevailed in the race for city attorney, he made good on his vow through a new policy that reduced the number of cases his office prosecuted involving arrests for lewd conduct in gay bars. Between June and August 1974, the Advocate conjectured, Pines’s policy had singlehandedly prompted a 48 percent reduction in arrests in Hollywood. Los Angeles mayor Tom Bradley also took
the view that the police should deprioritize relatively minor crimes. In a keynote address to a police association in 1975, Bradley called for police departments to reexamine the enforcement of “the whole range of activities which are generally described as victimless crimes,” from “penny ante-poker [sic] to surveillance of gay bars.” These key city officials lent unprecedented mainstream support to gay activists’ goal of reforming the lewd conduct law.26

The statutory basis of the solicitation portion of the lewd conduct law eroded in 1975 when California decriminalized anal and oral sex between consenting adults in private. In 1963, the California legislature had formed the Joint Legislative Committee for Revision of the Penal Code to overhaul the state’s nearly century-old code.27 In a 1971 report detailing its revision proposals, the committee recommended that sodomy be legalized between consenting adults in private, though, as a consulting attorney to the Society for Individual Rights noted, it “in no way corrects the present harmful result of [the lewd conduct law].”28 Around the same time, Willie Brown, a Democratic assemblyman (and future mayor) from San Francisco, began introducing a separate consenting adults bill in the legislature. A number of professional associations, responding to pressure from the NCSCL and other gay rights organizations, passed resolutions in support of the idea, including the American Bar Association in 1973. When an iteration of the “Brown bill” finally passed in 1975, gay activists had new cause to question the validity of the lewd conduct law’s prohibition of solicitation.29 As Peter Thomas Judge, the president of the Gay Rights Chapter of the ACLU of Southern California, underscored in a letter to Willie Brown, “Since [the Brown bill] became law the courts and legal enforcement agencies continue to maintain the posture that it is illegal to ask someone to engage in an act that is now legal.”30 Though neither the penal code revision nor the Brown bill altered the lewd conduct law directly, the decriminalization of sodomy between consenting adults in private provided gay activists with a fresh round of ammunition with which to attack it.31

After the passage of the Brown bill, several disputes in the Los Angeles City Council signaled that gay activists were gaining ground in the argument over the lewd conduct law. In 1975, the Democratic Senator George Moscone of San Francisco (another future mayor of the city) sponsored a bill proposing to remove the word “solicit” from the statute. The bill did not pass the California Senate, but, at the same time, conservative city council members in Los Angeles who tried to gather enough votes to pass a resolution opposing the bill were unsuccessful.32 The next year, the city council made major cuts...
to the LAPD vice squad in the wake of a police raid on a gay charitable fundraiser. Citing Penal Code Section 181’s prohibition of involuntary servitude, the police had deployed sixty officers, thousands of dollars, and a helicopter to disrupt a mock “slave auction” at the Mark IV bathhouse, the proceeds of which were to go to the Los Angeles Gay Community Services Center. Outraged by the raid and faced with an $18 million deficit, the city council voted to remove forty-seven vice officers from the department. The former consensus that gay men were a threat to public decency was coming undone.33

In the 1979 case *Pryor v. Municipal Court*, the California Supreme Court affirmed gay organizations’ view that the lewd conduct law permitted the police to be too repressive of gay social life. In that case, the defendant Don Pryor had been arrested in Los Angeles in 1976 for soliciting an undercover vice officer for oral sex. In its friend-of-the-court brief in support of Pryor, the NCSCL argued that, since the Brown bill had decriminalized anal and oral sex between consenting adults in private, the state was now obligated to “afford a reasonable opportunity to all persons to communicate their desire to engage in the now-licit conduct.” Moreover, the statute’s vague wording was a “standing invitation to police corruption” and “capricious enforcement” against gay men.34 In its majority opinion, the *Pryor* court reviewed over seventy years of statutory interpretations of the law in search of a coherent legal definition of “lewd or dissolute conduct.” “The answer,” the court determined, “of the prior cases — such acts as are lustful, lascivious, unchaste, wanton, or loose in morals and conduct — is no answer at all,” and it constrained the police’s discretionary prerogative by requiring the presence of an offended private citizen for a conviction to be valid. The one disadvantage of the opinion, as the NCSCL saw it, was that, since Pryor had not actually been convicted of lewd conduct, the court deemed him ineligible to challenge the statute’s registration requirement. Still, the new restrictions *Pryor* placed on the legal definition and police regulation of lewd or dissolute conduct signaled that the law’s conceptualization of gay men as dangerous sex offenders was softening.35

**THE BATTLE TO REMOVE SEX OFFENDER REGISTRATION FOR LEWD OR DISSOLUTE CONDUCT**

After the *Pryor* decision, gay rights attorneys had reason to believe that they could also persuade the courts to remove lewd conduct from the category of crimes requiring those convicted under them to be listed on the sex offender registry. In two key cases from the 1970s, judges had indicated that they would
be amenable to such a change. In 1973, the California Supreme Court set aside the sentence of a man who had been convicted of lewd conduct for urinating outside a Taco Bell in downtown Los Angeles around 1:30 AM. The court argued his conviction must be overturned because the judge who sentenced him had not properly advised the defendant that pleading guilty to lewd conduct would mean he would have to register as a sex offender. “Although the stigma of a short jail sentence should eventually fade,” the court reasoned, “the ignominious badge carried by the convicted sex offender can remain for a lifetime.”

In the 1978 case of *People v. Mills*, a California Court of Appeals upheld the validity of sex offender registration in the case of a man who was convicted of fondling and attempting to rape a seven-year-old girl. However, the court went out of its way to make clear it was not ruling on the validity of registration for those guilty of lewd conduct violations. Referring to the aforementioned case, the judges pointed out that they were “not concerned with a private urination at 1:30 in the morning in a semi-private area, but with a compelled sexual molestation of a seven-year-old female. If there be an ignominious badge imposed it would appear deserved.” These cases established a legal precedent supporting the idea that the registry was appropriate for violent sex offenses but not for victimless crimes like lewd conduct.

The state legislature supported that idea, too. A 1979 bill introduced by the Republican state senator H. L. Richardson proposed to establish a mandatory jail term of ninety days for failure to register as a sex offender and make certain categories of offenders ineligible for community release programs — including individuals convicted of lewd conduct.

Responding to complaints from the ACLU and the NCSCL, the legislature amended the bill before passing it to omit lewd conduct from its scope. “This is the first time,” Thomas Coleman of the NCSCL noted, “the Legislature has acknowledged that registration requirements for rapists and child molesters are different issues from registration of lewd conduct defendants.” Gay activists and their liberal allies were securing for gay men immunity from the heightened criminal sanctions that a bipartisan majority of lawmakers was otherwise bringing to bear on sex offenders.

Some gay activists, liberals, and civil libertarians believed sex offender registration was bad policy, but they did not propose some superior alternative to address crimes involving victims like rape and child molestation. In 1972, the San Francisco Mental Health Advisory Board formed its Subcommittee on Homosexual Activity and the Law in response to complaints from gay activists about police entrapment. In addition to opposing entrapment,
the committee’s report recommended the sex offender registry be repealed entirely, since it entailed “a gross lifetime condemnation of a person.”^40 In a report to the California legislature, the Joint Legislative Committee for Revision of the Penal Code argued that it seemed “illogical to register sex offenders but not robbers, burglars, and others who pose a greater statistical threat to the safety and well-being of the population.”^41 E. H. Duncan Donovan of the Gay Rights Chapter of the ACLU of Southern California described sex offender registration as “a modern version of the Scarlet A for adultery. This dehumanizing practice . . . is not inflicted on ax murderers who have paid their debt to society.”^42 These activists pointed out that sex offender registration focused illogically on sex as a specific attribute of a crime that, supposedly, made it particularly harmful. The registry created a situation in which the state punished sex crimes in an exceptionally harsh way compared with violent crimes not related to sex. However, critics of sex offender registration did not advance—or, perhaps, were unable to imagine—some better legal response to sexual violence.

It is noteworthy that some gay activists and feminists generated a critique of child sexual abuse during this period as a problem of the heterosexual family, though that critique did not enter into discussions in the legal arena about whether sex offender registration was good policy. In 1977, the ACLU’s Gay Rights Chapter and the National Organization for Women (NOW) jointly published a pamphlet titled “Sexual Child Abuse: A Contemporary Family Problem” that framed child sexual abuse as a form of exploitation endemic to the “family and friends of the family.”^43 A pamphlet from Parents and Friends of Gays called “About Our Children” asserted that “Gay persons respect children”; most commonly, it was “fathers, stepfathers, grandfathers, uncles, and mothers’ boy friends” who perpetrated child sexual abuse. As they challenged the stereotype that gays and lesbians were child molesters, these activists also transcended the facile notion that child sexual abuse was caused by a few sick or evil individuals; rather, it was a social problem that was woven into the fabric of the heteronormative family. As such, the family itself was amenable to a political critique.^44

The argument gay activists made that succeeded in court called for the deregistration of gay men’s harmless behaviors but endorsed sex offender registration for crimes involving victims. Jerry Blair contended in the San Diego Law Review in 1976 that the “compulsory registration of obscene misdemeanants severely dilutes the effectiveness that registration might otherwise provide in the prevention of child molestation, forcible rape, and other violent
sex crimes.”45 In a friend-of-the-court brief in a lewd conduct case from 1979, the ACLU affiliates of Northern and Southern California and the Pride Foundation argued that individuals who committed sex crimes against women or children were especially likely to be repeat offenders. “The great majority of sex offenses,” the brief contended, “with the exception of rape and child molestation, are one-time events.”46 In the context of a political culture in which conservatives were vigorously promoting sex offender registration and ambivalent liberals either agreed with them or lacked an alternative policy to put forward, gay activists, too, capitulated to conservatives in order to shift the registry’s focus away from gay men’s behavior.

The 1983 California Supreme Court case In re Reed codified this shift. In that case, the court determined that the lewd conduct law’s registration requirement was a form of punishment that was out of proportion to the crime. The petitioner, Allen Eugene Reed, had been arrested by an undercover vice officer in a public restroom and, upon conviction, was required to register as a sex offender. The language the court used to describe Reed’s behavior could not have been more different from the way courts had talked about deviant gay men in the 1950s and 1960s: Reed was “not the prototype of one who poses a grave threat to society.” At the same time, the court made clear that its decision to remove the lewd conduct law’s registration requirement was contingent on the fact that Reed had challenged registration as it applied to that particular statute but not registration overall. His “relatively simple sexual indiscretion” did not “place him in the ranks of those who commit more heinous registrable sex offenses.”47 The culmination of three decades of political conflict, the Reed case reconstructed the legal definition of the sex offender, de-emphasizing homosexuality and concentrating instead on sex crimes against women and children.

CONCLUSION: SEX OFFENDER REGISTRATION AFTER THE GAY RIGHTS REVOLUTION

Although a conviction under the lewd conduct law no longer entailed registration as a sex offender, the statute still threatened the livelihoods of many gay men. After the Reed decision, lewd conduct remained a crime of “moral turpitude” that required the automatic suspension of teaching and other professional licenses — a consequence that did not follow from other misdemeanors, such as battery, that did not involve sex. Moreover, after Reed, individuals

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convicted of lewd conduct were no longer allowed to enter a plea bargain to a lesser offense, meaning a teacher, for example, was now forced to contest the testimony of a vice officer in court if he wanted keep his job. Though gay activists achieved major reforms of the lewd conduct law, they were not able to overturn the legal framework that supported it. The basic idea that there existed something called “lewd or dissolute conduct” persisted, leaving gay men who cruised for sex vulnerable to criminalization.\(^{48}\)

If gay cruising was still exposed to state repression, it was now, at least, exempt from sex offender registration, which became a ubiquitous legal response to rape and child sexual abuse in the 1990s. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, requiring all states to create and maintain a sex offender registry.\(^{49}\) In 1996, the U.S. Congress passed Megan’s Law, which amended the Wetterling Act to require that states create a public database allowing citizens to track the whereabouts of registered sex offenders, making the registry much more punitive than it was before.\(^{50}\) Though the cast of characters to which sex offender registration applies has changed, the policy’s narrow-minded reliance on stigmatizing individuals as a way of controlling sexual violence persists. Alongside other tough-on-crime campaigns like the War on Drugs, the War on Sex Offenders has contributed to the massive expansion of the carceral state in the United States.\(^{51}\)

The political exigencies of our contemporary situation call for queer theorists to start using the history of gay politics in a different way. It is not enough to criticize gay activists for being complicit in the rise of sex offender registration in the late twentieth century, even though it is true that some of them were. Gay activists were not the most influential group driving that shift; mainstream liberals and conservatives were. When the historical context is recovered and taken into consideration, it becomes clear why many gay activists steered clear of challenging the widespread demand for harsher punishments for sex involving minors. They did not want to risk corroborating the accusation made by conservatives that gays were themselves child molesters. Understanding the pressures that gay activists were facing at the time makes it possible for queer theorists nowadays to focus less on blaming the gay movement for helping sustain the registry and more on trying to reform the sexual politics of the majority.

In order to contest the regime of sex offender registration, queer theorists must recuperate and extend the ideas of those who once called for the abolition
of the registry altogether. Laws that stigmatize individuals as “sex offenders” oversimplify the complex structural origins of sexual harm. Drawing on the intellectual tradition of the registration abolitionists, we should conceptualize alternative ways for the state to address sexual violence. These will include policies geared toward closing the wage gap to make women and children as a group less dependent on men within the family — the site, as gay activists, feminists, and civil libertarians argued in the 1970s, where most sexual violence occurs.

There are other good reasons to oppose sex offender registration besides the fact that it is a shallow response to sexual violence. It should be opposed also because it contributes to the stigmatization and demonization of sex itself as well as to the repression of benign sexual variation. The sex-specific nature of the registry enshrines in the law the assumption that sex is something that is uniquely harmful, rather than a key aspect of human flourishing. “Sex” is not a synonym for “harm,” and the law should not treat it as such. 52

NOTES


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8. “Now is the time to fight,” [1952], box 1, folder 14, Mattachine Society Project Collection, C0112008-016, *one* National Gay and Lesbian Archives, USC Libraries, University of Southern California.

10. Two events in particular precipitated the 1961 legislative revision of California’s vagrancy law of which the lewd or dissolute person statute was a part. The first was the 1960 California Supreme Court decision *In re Newbern*, which deemed unconstitutional the “common drunk” provision of the statute. The second was Arthur H. Sherry’s influential law review article “Vagrants, Rogues and Vagabonds — Old Concepts in Need of Revision,” *California Law Review* 48, no. 4 (1960): 557–573. For a useful discussion about the legislative history of California Penal Code Section 647(a), see the majority opinion in *Pryor v. Municipal Court*, 25 Cal. 3d 238 (1979).


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35. Pryor v. Municipal Court.


42. Draft of Transcript of Public Hearings, November 1981, box 14, Arthur C. Warner Papers, Public Policy Papers, Department of Rare Books and Special Collections, Princeton University Library.


47. In re Reed, 33 Cal. 3d 914.


52. As Alfred Kinsey once wrote, “It is ordinarily said that criminal law is designed to protect property and to protect persons, and if society’s only interest in controlling sex behavior were to protect persons, then the criminal codes concerned with assault and battery should provide adequate protection. The fact that there is a body of sex laws which are apart from the laws protecting persons is evidence of their distinct function, namely that of protecting custom.” Alfred C. Kinsey, Wardell B. Pomeroy, and Clyde E. Martin, Sexual Behavior in the Human Male (Philadelphia: W.B. Saunders, 1948), 4. On the concept of benign sexual variation, see Gayle Rubin, “Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality,” in The Lesbian and Gay Studies Reader, ed. Henry Abelove, Michèle Aina Barale, and David M. Halperin (New York: Routledge, 1993), 3–44; and Rostom Mesli, “Gayle Rubin’s Concept of ‘Benign Sexual Variation’: A Critical Concept for a Radical Theory of the Politics of Sexuality,” South Atlantic Quarterly 114, no. 4 (October 2015): 803–826.