

FORUM

Into Law's Artifice: Postwar Policing, Sexual Difference, and the Epistemic Gap

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Vice Patrol analyzes how reconfigurations in postwar gay public life, psychiatric research, and policing surveillance technologies recast Americans' chimerical commitments to purging sexual vice.¹ Before a more radical, visible queer liberation movement emerged after 1969, vice enforcement was not a monolithic project but rather a conglomeration of newly empowered post-Prohibition liquor agents, policing units, and judicial institutions. Enforcement practices and institutional priorities generated inconsistencies over policing sexual difference, creating conflicts that became embedded in judicial processes, themselves fraught with institutional pressures and contradictions. These legal and administrative configurations did more than enforce existing law regulating sexual deviance; they actively produced identifiable targeted groups believed to be predisposed to sexual criminality.² *Vice Patrol's* insights are urgent; they reveal and explain the historical, institutional, and political processes of negotiating human expression into criminal acts requiring state policing intervention. The intrusive tactics that Lvovsky chronicles did not disappear; they were redirected, which is best articulated in the liberal disillusionment with "urban renewal" and with the Nixon administration's "War on Crime" that targeted "high crime" areas in urban communities of color, propelling forward racialized mass incarceration.

Postwar international political realignments, which in turn redefined conduct considered domestically subversive, spurred federal and, to a lesser extent, state purges and high-profile prosecutions of lesbian and gay people.³

¹ Anna Lvovsky, *Vice Patrol: Cops, Courts, and the Struggle over Urban Gay Life Before Stonewall* (Chicago: University of Chicago Press, 2021).

² Lvovsky uses "gay" as a reflection of historical nomenclature. "Queer" is used also as more capacious term to describe other non-heteronormative sexual orientations.

³ Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton: Princeton University Press, 2009); Stacy Braukman, *Communists and Perverts under the Palms: The Johns Committee in Florida, 1956-1965* (Gainesville: University Press of Florida, 2013); David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal*

Simultaneously, queer people found each other in urban enclaves, organizing resistance and reform strategies that responded to targeted sex panics, police and vigilante violence, coercive medical and psychiatric interventions, and nearly universal religious condemnations.⁴ Lvovsky situates *Vice Patrol* in this context, while shifting to a longitudinal reading of the daily realities in urban, street level, anti-homosexual vice enforcement. If existing literature addresses the *why* of anti-homosexual policing, *Vice Patrol* asks how vice squads created localized practices—sets of embodied acts by agents—to police sexual difference. This framing emphasizes local variation while attending to broader, national trends toward what Lvovsky identifies as the multidisciplinary creation of “the ethnographic study of the gay world as an early tool of law enforcement” (146). The (often apocalyptic) imagined and experiential consequences of exhibiting legible homosexual “tells” to vice agents necessitated queer adaptation of linguistic, behavioral, and sartorial signals. These ongoing adaptations muddled already incoherent juridical concepts and in turn, increased politicized demands for institutionalizing police expertise through specialized training.⁵ Lvovsky deftly navigates these interplays between

Government (Chicago: University of Chicago Press, 2006); Marcia M. Gallo, *Different Daughters: A History of the Daughters of Bilitis and the Rise of the Lesbian Rights Movement* (New York: Seal Press, 2007); Rachel Lewis, “Lesbians under Surveillance: Same-Sex Immigration Reform, Gay Rights, and the Problem of Queer Liberalism,” *Social Justice* 37 (2010): 90–106; Robert Byron Genter, “An Unusual and Peculiar Relationship: Lesbianism and the American Cold War National Security State,” *Journal of the History of Sexuality* 28 (2019): 235–62; Eric Cervini, *The Deviant’s War: The Homosexual vs. the United States of America* (New York: Farrar, Straus and Giroux, 2020); Miriam G. Reumann, *American Sexual Character: Sex, Gender, and National Identity in the Kinsey Reports* (Berkeley, University of California Press, 2005); William Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861–2003* (New York: Viking Press, 2008); Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago: University of Chicago Press, 1867); Marie-Amelie George, “The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States,” *Journal of the History of Sexuality* 24 (2015): 225–61; Henry L. Minton, *Departing from Deviance a History of Homosexual Rights and Emancipatory Science in America* (Chicago: University of Chicago Press, 2002); Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis by Ronald Bayer* (Princeton: Princeton University Press, 1987); and Clayton Howard, “The Closet and the Cul-de-Sac The Politics of Sexual Privacy in Northern California (Philadelphia: University of Pennsylvania, 2019).

⁴ Emily K. Hobson, *Lavender and Red: Liberation and Solidarity in the Gay and Lesbian Left* (Berkeley: University of California Press, 2016); Terence Kissack, “Freaking Fag Revolutionaries: New York’s Gay Liberation Front, 1969–1971,” *Radical History Review* 62 (1995): 105–34; and Barbara Ruth, *Smash the Church, Smash the State: The Early Years of Gay Liberation*, illustrated edition, ed. Tommi Avicoli Mecca (San Francisco: City Lights Publishers, 2009).

⁵ Thomas Grillot, Pauline Peretz, and Yann Philippe, “‘Wherever the Authority of the Federal Government Extends’: Banning Segregation in Veterans’ Hospitals (1945–1960),” *Journal of American History* 107 (2020): 388–410; Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (New York: Oxford University Press, 2016), 334; Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge, MA; London: Harvard University Press, 2017); Adrian Vermeule, *Law’s Abnegation: From Law’s Empire to the Administrative State* (Cambridge, MA: Harvard University Press, 2016); Eskridge, *Dishonorable Passions*; Kellie Wilson-Buford, *Policing Sex and Marriage in the American Military: The Court-Martial and the Construction of Gender and Sexual Deviance, 1950–2000* (Lincoln, NE: University of Nebraska Press, 2018); Timothy Stewart-Winter, “Queer Law and Order: Sex,

political conflict and judicial independence, procedural rights, and surveillance technologies, as well as between emerging psychiatric authority over homosexuality and established legal expertise over criminality.

The 1950 Hoey Committee Senate and regular Civil Service Commission reports, punctuated by lurid newspaper and television exposés, generated popular support for intrusive policing tactics. Local police forces developed investigative and surveillance techniques specific to infiltrating gay socializing and cruising venues. For example, while Prohibition era policing enlarged investigations of illicit activities associated with alcohol generally, repealing the Volstead Act created new liquor laws that vastly expanded surveillance and jurisdictional purview over urban sites of gay public socializing. Lvovsky argues that laws prohibiting bartenders from “knowingly” serving homosexual patrons “rested on the availability of some shared public understanding of sexual deviance; the assumption that such visible tropes were... so widely recognized that their meaning could be imputed, without further evidence” (46). Rather than developing national agreement on policing practices congruent with popular attitudes on homosexuality, the increased attention to sexual difference actually created conceptual confusion over “the very thing being policed” (3). Reading that phrase, I wondered if Lvovsky was making a careful but necessary rhetorical concession to the evidentiary obliqueness inherent in studying individuals strategizing to evade legal recognition. Instead, the phrase is frustratingly and elegantly, accurate. New sexual and legal logics challenged conceptual links among sexual criminality, psychiatric deviance, and the proper jurisdictional purviews of the law. Sexual difference became a fuliginous jurisdictional area of presumed deviance through what Lvovsky terms an “epistemic gap” (17) that revealed fluid processes through which queer subjects became legible to each other and to vice police. Before 1969, urban gay self-representations evolved dialectically with vice enforcement mandates and psychiatric authority, until a more militant, and often explicitly anti-policing queer liberation movement emerged, sparked in part by policing violence.

Lvovsky exposes the daily calculations and gritty realities of urban vice policing through sources such as local vice squad records and memos, prosecutors’ notes, investigators’ field reports, and training manuals. This archival move toward the sources, some seemingly ephemeral, behind formal adjudication excavates internal calculations over professional expertise, disputes over sexual knowledge in local courtrooms, and the extent to which criminality could be assigned to gay consensual social and sexual behaviors. Lvovsky identifies three sites of confrontations in reputed queer spaces: post-Prohibition liquor law regulation; enticement/entrapment campaigns; and new surveillance techniques (4). These sites make visible how vice agents came to conceptualize new jurisdictional areas in public and quasi-public spaces and then

Criminality, and Policing in the Late Twentieth-Century United States,” *Journal of American History* 102 (2015): 61–72; George, “The Harmless Psychopath, 225–61; and Naoko Wake, *Private Practices: Harry Stack Sullivan, the Science of Homosexuality, and American Liberalism* (New Brunswick: Rutgers University Press, 2011).

scrutinized them for evidence of vice infractions. Simultaneously, newly empowered psychiatrists and criminologists testified in courtrooms as experts on gay behavior, creating fissures within and between medical and policing authorities over definitions of criminal sexual deviance and courtroom authority.

Prohibition-era popular perceptions of the “gay world” in 1920s and 1930s emphasized the campy exuberance of urban drag balls, sketching rouged, male effeminacy as a visible manifestation of same-sex desire.⁶ Yet as homosexuals became an identifiable group subject to medical scrutiny, World War II army psychiatrists disputed the universality of obvious effeminacy as a marker of homosexuality and sought to develop new diagnostic tools to identify unfit homosexual draftees. In the process, they developed structures of institutional surveillance even as they failed to reach a diagnostic consensus. Postwar social scientists and psychiatrists fragmented prewar caricatures as they pursued new research inquiries that cast doubt on dominant perceptions delivered through sensationalist media accounts and long-standing links among moral depravity, criminality, and public order. Lvovsky frames this fragmentation of the homosexual subject and its incomplete reconstitution through “epistemic gaps,” or the perceptual spaces in which observations by experts in the field made imputed queerness legally legible, a transmogrative process of assigning legal meaning to expressions of sexual desire.

These ongoing professional and disciplinary conflicts fueled expansions of postwar criminal justice and administrative law through institutionalizing training programs, specializations, and a pedagogy of vice policing. More insidiously, unpredictable institutional pressures and contradictory expert opinions continued to challenge juridical consistency on sexual regulation. Alfred Kinsey’s research suggested that same-sex desire was natural human variation across a continuum of sexual orientations. Other studies followed, which as Lvovsky points out, complicates the historical accounts of medicine and psychiatry that framed homosexuals as psychologically unstable or innately predatory. Psychiatric intervention was not a uniform declension narrative for marginalized sexualities; although complicit in creating legal categories of dangerous sexual deviance, by the mid-1960s, psychiatric and judicial intercessions began to seriously question anti-homosexual vice policing’s social and civil value.

Lvovsky attends to mainstream media that portrayed homosexuality as mental illness and as an object of cultural fascination.⁷ Reportage varied from lurid exposés to the latest experts, some of whom built careers by explaining differences among psychopathological deviance, immorality, and criminality. Rather than reflect the emerging institutional and disciplinary fragmentations over the “thing being policed” (18), sensationalist media depictions taught Americans how to recognize the “new—the modern—homosexual” (221). As a

⁶ George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890–1940* (New York: Basic Books, 1995).

⁷ On fascination and law, see Clare Sears, *Arresting Dress: Cross-Dressing, Law, and Fascination in Nineteenth-Century San Francisco* (Durham: Duke University Press, 2015).

1964 *Life Magazine* exposé warned: “Homosexuality shears across the spectrum of American life—the professions, the arts, business and labor... But today, especially in big cities, homosexuals are discarding their furtive ways and openly admitting, even flaunting, their deviation...”⁸ Law enforcement, public educational institutions, and the federal government’s public facing agendas exhibited swaths of agreement, creating what Lvovsky describes as a “deliberate project of social regulation” (221). Homosexuals were outrageously apparent in their flamboyant artifices, while the same fluid gender performativity allowed gender and sexually coded dissimulations in ordinary public spaces such as parks, beaches, and public facilities. Two men exchanging glances in a public restroom was a subtle *pas de trois*, between two men and the specter of a vice agent peeping through the bathroom wall, a scenario rich with sexual meanings and legal evidence. Internal tensions over the constitutionality and ethics of vice stings eventually created fissures within and between judicial and policing apparatuses (190). These encounters produced specific, often inconsistent forms of evidence, made apparent through Lvovsky’s approach to the archives as an ontological space that yielded historical perceptual and conceptual differences about “the thing being policed” (18).

By the decade before the Stonewall Rebellion, diverse, sometimes contrapuntal enforcement and administrative priorities were in conversation with how gay individuals deployed linguistic, sartorial, and behavioral practices, evolving into a “newly coded nature of gay cruising” (150–51). As enforcement agents moved from passive observers to central actors in vice stings, judicial authorities expressed ethical and due process concerns over intrusive patrolling and enforcement practices. Vice agents’ perceptions translated into criminal charges, grounded in mainstream cultural, medical, and sexual logics. On the ground, localized queer identity abstractions cohered in surveillance and adjudicatory processes, revealing what legal scholar Risa Goluboff has identified as the “fluid and improvisational aspects” of localized law.⁹ Vice patrol officers found themselves in awkward, extended flirtations that judges and court officials found constitutionally dubious. Defense attorneys elicited graphic testimony from vice agents describing enticement behaviors that made them indistinguishable from the individuals they were targeting as sex criminals. Queer individuals negotiated their own visibility to potential sexual partners, reorganizing spatial environments and creating cultural codes in which alternative sexual desires could be expressed and celebrated. In parks, alleys, and bars, queer people manipulated existing stereotypes, aware of the specifics of localized enforcement and blurring legal assumptions about the bright lines between law enforcement, its subjects, and how law is produced.

The ontological uncertainties of defining “the thing being policed” required translating inchoate observations of fluid, perceptual queerness into stable, external, conceptual legal categories. Legal expertise drew on psychiatric research to understand and explain criminality and sexual behavior. Judges

⁸ “Homosexuality in America—A Secret World Grows Open and Bolder,” *Life Magazine*, June 26, 1964, 66.

⁹ Goluboff, *Vagrant Nation*, 334.

expressed skepticism about translating psychosexual theories into constitutional defenses of surveillance and enticement techniques. Although psychiatrists' contentions that homosexuality was a benign variation or congenital psychosexual deviance and not a criminal choice may have ameliorated judicial harshness, this is not a story of social or legal progress. Instead, it is a story of disruption and reconstitution.

The story Lvovsky tells had and continues to have legal and social repercussions beyond anti-homosexual policing. The 1973 removal of homosexuality from the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) marked a hard-fought disciplinary consensus that separated homosexuality from insanity and disability. Critical disability scholar Regina Kunzel has demonstrated how the homophile Mattachine Society's campaign to remove homosexuality as a psychopathic personality from the second edition of the DSM relied upon a rhetoric that disassociated it from congenital psychiatric deviance. The 1973 removal, however, left unquestioned the power of medical authority to stigmatize sexual difference and condone involuntary medical interventions as protecting public health.¹⁰ Gay, cisgender, white people shed an association with sexual criminality, while simultaneously communities of color became increasingly policed, justified by sociological interpretations of black communities' generational dysfunction and propensity toward violence and crime.¹¹

Vice Patrol offers a methodological model of an ongoing legal process of disruption and reconstitution through analyzing evidentiary legibility, vice policing training and practices, and institutional judicial priorities. In plumbing vice enforcement in all its messy detail, Lvovsky reveals how oft-observed negotiations within and outside legal institutions failed to create perceptual constancy of homosexual criminality as coherent and identifiable. *Vice Patrol* makes visible the creation of new legal and sexual jurisdictions through framing vice agents' perceptual and the law's conceptual opacity in determining enforcement practices. Using this analytical framework allows for stepping back from existing, overdetermined formal legal categories to consider multiple variables across institutional structures, and while assessing ground-level pressures from conflicted internal enforcement practices. Future research directions inspired by Lvovsky's work include exploring how urban racial geography and economic deprivation shaped zones of enforcement; how trial and defense lawyers, prosecutors, and their influential professional organizations engaged these cultural and legal fissures in authority; and how vice patrols responded to episodic violent resistance to policing in the decades before Stonewall.¹² By 1970, impact litigation and radical, militant queer resistance inflected the reconstitution of criminal procedure and ground-level policing, reinforced by the incorporation of Fourth and Fifth Amendment due process

¹⁰ Regina Kunzel, "Queer History, Mad History, and the Politics of Health," *American Quarterly* 69 (2017): 315–19.

¹¹ Kevin Mumford, *Not Straight, Not White: Black Gay Men from the March on Washington to the AIDS Crisis*, illustrated edition (Chapel Hill, NC: The University of North Carolina Press, 2016).

¹² Elizabeth A. Armstrong and Suzanna M. Cragg, "Movements and Memory: The Making of the Stonewall Myth," *American Sociological Review* 71 (2006): 724–51.

protections into state law. In less than 15 years however, the queer sexual liberation retreated into a politics of survival as a new medicolegal policing nexus emerged. In response to the “gay plague,” as the AIDS epidemic was initially labeled, public authorities called for new medicalized surveillance enforced through law. In 1986, conservative public intellectual William F. Buckley proposed involuntary HIV testing and concluded that, in spite of conceding “subordinate attention” to civil liberties, “everyone detected with AIDS should be tattooed.”¹³ Queer activists organized direct action street protests and turned toward forcing government recognition, publicly funded research, and limits on corporate pharmaceutical power to control drug access.

The institutional and social consequences of vice enforcement certainly fell more heavily on marginalized groups, but *Vice Patrol* is more than the story of law’s malleability at the hands of enforcement agents and jurists. Rather, it reveals an insidious, largely obscured, historically situated ontological creation of “the thing being policed” and the perils of translating that “thing” into legal categories of criminal deviance.

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¹³ William F. Buckley, “Crucial Steps in Combating the Aids Epidemic; Identify All the Carriers,” <https://archive.nytimes.com/www.nytimes.com/books/00/07/16/specials/buckley-aids.html> (February 14, 2022).

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