

BOOK REVIEW

**The Visibility Trap**

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*Vice Patrol*

Anna Lvovsky. University of Chicago Press, 2021. 346 pages.

INTRODUCTION

In August 2021, the Indiana Court of Appeals prohibited a transgender teenage boy (H.S.) from changing the gender marker on his birth certificate. Because he was fifteen at the time, his parents had filed the petition on his behalf.<sup>1</sup> As his parents testified, changing the gender marker on a young trans person's birth certificate is more than a formality. It makes it possible for them to obtain a passport and driver's license that match their identity, helping to avoid incongruities in gender regulation that can run the gambit from confusing to dangerous.<sup>2</sup>

The appellate panel was split. Legally speaking, the case turned on applying the "best interests" test to the evidence presented.<sup>3</sup> But beneath that legal question was an epistemological conflict over the definition of gender and the circumstances under which it can change. The trial court judge and appellate panel members disagreed not only on these questions but, by extension, over which sources of gender knowledge to credit as authoritative. The case did not necessarily depend on interpretation

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<sup>1</sup> *In re H.S.*, 175 N.E.3d 1184, 1185 (Ind. Ct. App. 2021).

<sup>2</sup> *Id.* at 1191 (Crone, J., dissenting) (quoting Appealed Order at 8, *In re H.S.*, 175 N.E.3d 1184).

<sup>3</sup> See *In re A.B.*, 164 N.E.3d 167, 171 (Ind. Ct. App. 2021).

of gender, but it reveals how the courtroom can be a crucible where competing epistemologies from medicine, public discourse, and lived experience collide.

This dynamic echoes a central theme in *Vice Patrol: Cops, Courts, and the Struggle over Urban Gay Life before Stonewall*, an important new work of legal history by Professor Anna Lvovsky.<sup>4</sup> *Vice Patrol* is a study of antihomosexual policing in U.S. cities between the fall of Prohibition and the Stonewall Rebellion. It expands historical understanding by following antihomosexual enforcement through the rungs of the legal system—from municipal police tactics to appellate review at the Supreme Court. Beyond these contributions to the history of sexuality, however, the book reveals how public discourse filters into and through the judiciary.

Visibility is the clarion call of LGBT politics, but *Vice Patrol* scrambles the signal. Lvovsky takes familiar moments of gay visibility as her starting point, showing how media attention hardened stereotypes about gay culture. Those stereotypes had a curious afterlife in the legal system, leading to “epistemic gaps” between enforcement institutions.<sup>5</sup> On her account, courts did more than showcase public debates over the nature of homosexuality: they “directly intervened” by “applying the weight of the law to recognize certain claims as authoritative over others—to establish binding truths about queer social and sexual practices.”<sup>6</sup> By elaborating on this process, Lvovsky reveals the “regulatory underside” to gay cultural visibility.<sup>7</sup> As French philosopher Michel Foucault quipped almost fifty years ago, “[v]isibility is a trap.”<sup>8</sup>

*Vice Patrol* offers a novel history of the visibility trap. It integrates interventions in legal history, history of sexuality, and queer theory with remarkable ease. Lvovsky brings new insight to a question that has puzzled scholars across several fields: Why and how does cultural representation lead to increased state repression? Blending impressive archival research with sophisticated theoretical analysis, Lvovsky follows cultural knowledge into the legal system to offer a fresh diagnosis of the

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<sup>4</sup> See generally ANNA LVOVSKY, *VICE PATROL: COPS, COURTS, AND THE STRUGGLE OVER URBAN GAY LIFE BEFORE STONEWALL* (2021).

<sup>5</sup> See *id.* at 265.

<sup>6</sup> *Id.* at 262.

<sup>7</sup> *Id.* at 179.

<sup>8</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 200 (1st Am. ed. 1977).

problem and how it develops. In her discovery of “epistemic gaps,” she uncovers a key mechanism of the visibility trap.<sup>9</sup> Disagreements between the police and the courts, not internal consensus about the purpose and object of regulation, enable legal regimes to “maintain and even expand their power over policed groups.”<sup>10</sup> On this account, epistemic gaps are the missing piece to understanding how the visibility trap actually works. Part I of this Book Review draws out the book’s primary arguments to elaborate this theory, offering additional context for non-specialists and pressing on a few of the claims. Part I also reveals a latent argument in *Vice Patrol* about visibility itself, showing how Lvovsky brilliantly disentangles the forms of cultural salience, stereotype, and self-representation that often fly under the banner of “visibility.”

In Part II, the Review tests Lvovsky’s visibility theory against contemporary transgender visibility politics. Reading antitransgender policing and transgender civil rights struggles through *Vice Patrol* gives us a new way to understand how regulated people can harness knowledge about their communities to influence its path through legal institutions. Recognizing the limits of visibility, *Vice Patrol* suggests that strategic unintelligibility can be an important tool to fight repression.

## I. VICE PATROL

State regulation of homosexuality has been a frequent but fleeting visitor to queer history of the United States. Early scholars often used the tools of social history, writing about community development and identity formation from the perspective of gay men and lesbians in cities after World War II.<sup>11</sup> Waves of police repression through bar raids and street violence crest and fall over these narratives, staying long enough to explain

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<sup>9</sup> See LVOVSKY, *supra* note 4, at 265.

<sup>10</sup> *Id.* at 18.

<sup>11</sup> See generally ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, *BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY* (1993); ESTHER NEWTON, *CHERRY GROVE, FIRE ISLAND: SIXTY YEARS IN AMERICA’S FIRST GAY AND LESBIAN TOWN* (1993); John Howard, *The Library, the Park, and the Pervert: Public Space and Homosexual Encounter in Post-World War II Atlanta*, 62 *RADICAL HIST. REV.* 166 (1995); JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* (2d ed. 1998); MARC STEIN, *CITY OF SISTERLY AND BROTHERLY LOVES, 1945–1972* (2000); NAN BOYD, *WIDE OPEN TOWN: A HISTORY OF QUEER SAN FRANCISCO TO 1965* (2005); LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* (2012).

the secretive coding of gay culture, or trigger community organizing to combat harassment. Subsequent work lingered longer on the legal regulation of gay life, making major interventions in the history of the Red Scare,<sup>12</sup> mass incarceration,<sup>13</sup> and immigration policy<sup>14</sup> by focusing on how state institutions perceived and processed nonnormative gender and sexuality.

In 2009, Margot Canaday's *The Straight State* inaugurated a new generation of queer legal history.<sup>15</sup> It traced how three parts of the federal government—the military, the welfare system, and the immigration apparatus—came to understand homosexuality as something it could and ought to regulate. Through this queer “social history of the state,” Canaday argued, “[w]e can see the state through its practices; the state is ‘what officials do.’”<sup>16</sup> More recently, leading historians of sexuality in the United States (including Canaday) called for scholarship that disaggregates “the state” to analyze its components as “a shifting pattern of governing powers working through society, economy, and culture.”<sup>17</sup>

*Vice Patrol* arrives to answer this call and mark another transformation of the field. Like Canaday, Lvovsky is most interested in the ways of knowing homosexuality within state institutions. Where Canaday focused on federal agencies and national policy, however, Lvovsky turns to state and local antihomosexual policing. She follows street-level enforcers and the knowledge they accumulated and produced about gay life as far as the U.S. Supreme Court. But the book mostly dwells in the bars and popular cruising sites, liquor-board hearings, and trial courtrooms where gay men most often encountered intimate

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<sup>12</sup> See generally, e.g., DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2006); STACY LORRAINE BRAUKMAN, *COMMUNISTS AND PERVERTS UNDER THE PALMS: THE JOHNS COMMITTEE IN FLORIDA, 1956-1965* (2012).

<sup>13</sup> See generally, e.g., REGINA KUNZEL, *CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY* (2010); CHRISTINA HANHARDT, *SAFE SPACE: GAY NEIGHBORHOOD HISTORY AND THE POLITICS OF VIOLENCE* (2013).

<sup>14</sup> See generally, e.g., EITHNE LUIBHÉID, *ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER* (2002); MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* (2011).

<sup>15</sup> See generally CANADAY, *supra* note 14.

<sup>16</sup> *Id.* at 5 (2009) (quoting WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 8 (1996)). See also generally NOVAK, *supra*.

<sup>17</sup> INTIMATE STATES: GENDER, SEXUALITY, AND GOVERNANCE IN MODERN US HISTORY 7–8 (Margot Canaday, Robert O. Self & Nancy F. Cott, eds., 2021).

governance.<sup>18</sup> Lvovsky's primary-source research alone is reason to seek out this book—one review can hardly do justice to the incredible material that she found. You may find yourself, like the reviewer, recalling elaborate construction plans for police surveillance in public restrooms (false ceilings! two-way mirrors!)<sup>19</sup> months after you finish reading.

This is not the place to go for stories of queer resistance to state oppression. The voices of gay men (and some women) who were the targets of antihomosexual policing are largely absent from *Vice Patrol*.<sup>20</sup> Nor does the book follow any particular police officers, prosecutors, or judges over time. Instead, the object of study is how homosexuality is understood within the criminal justice system.<sup>21</sup> This is a significant and original redirection of the field to follow information flows into hearings and courtrooms and examine how they transform in the process of becoming authoritative state knowledge. It intersects with the literature historicizing gay self-conception by asking when and where legal and public knowledge considered homosexuality as conduct or status, pathology or moral failing, situational or inherent.<sup>22</sup> As a case study in the life and role of truth claims in the operation of a repressive regime, the book makes an important contribution to legal history beyond the history of sexuality. And

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<sup>18</sup> The book is organized around three modalities of antigay policing: liquor license regulation enforcement, decoy operations by plainclothes police officers, and secret surveillance of popular cruising sites by municipal police departments.

<sup>19</sup> See LVOVSKY, *supra* note 4, at 181.

<sup>20</sup> And for good reason. Lvovsky is interested in the internal dynamics of the criminal justice system and how understandings of gay life developed and mixed in legal settings. No one book can do everything—yet this absence does leave a puzzle about what role Lvovsky would assign to the epistemologies of homosexuality that came from the homophile and gay liberation movements. By the 1960s, when homophile organizations had gained some traction in several major cities, did organized gay activism contribute to the public's understanding of homosexuality? And did it perhaps even filter to police officers, prosecutors, and judges? How should we think about the difference between individual defendants' strategic self-presentations and the coordinated visibility politics of gay activists?

<sup>21</sup> The book joins works like Professor Regina Kunzel's *Criminal Intimacy* in chasing down connections between the histories of the penal system and the social sciences. See REGINA G. KUNZEL, *CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY* 9–14 (2008); see also FOUCAULT, *supra* note 8, at 35–42.

<sup>22</sup> Gay voices do appear in chapters 3 and 5 to highlight how individual defendants contributed to judicial understanding of homosexuality through their self-presentations. Notably, the men who appear in these sections were mostly outside of the organized homophile and gay liberation movements and may not have identified as gay at all. See LVOVSKY, *supra* note 4, at 112, 185.

that's saying something, because the book also significantly advances our understanding of antigay policing.

One of the extraordinary accomplishments of *Vice Patrol* is that it traces the path of sociological knowledge into *and* back out of the criminal legal system. The opening chapters attend to the first, better-known part of the dynamic by following popular and medical knowledge into the enforcement apparatus for state-level liquor-board regulations. The cast of characters is familiar to readers of the field, as historians have long mined the troves of material that the liquor boards left behind for glimpses of queer cultures and government repression. Lvovsky's innovation is to read these materials "along the archival grain,"<sup>23</sup> arguing that the success of antihomosexual policing through liquor regulations depended on the availability, indeed the apparent obviousness, of public knowledge about homosexuality.

The book's argument braids three claims. First, the different professional groups and institutions that composed the criminal justice system (to say nothing of "the state") did not all embrace antigay policing with equal enthusiasm.<sup>24</sup> The public, police, attorneys, judges, and defendants each had their own understandings of the antigay project and its ideal targets. Second, these competing epistemologies transformed when they collided in courtrooms.<sup>25</sup> Knowledge about homosexuality that developed in other arenas—popular culture, medicine, and the streets—shifted under the unique pressures of criminal law adjudication. Lvovsky presents a complete feedback loop between public culture and legal institutions. She shows how public knowledge about homosexuality informed the doctrines and institutions of antigay criminal law enforcement at the same time that legal proceedings themselves transformed popular ideas.

Third, Lvovsky argues that the legal system's ability to hold incompatible views about gay life enabled antigay policing to

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<sup>23</sup> See generally ANN LAURA STOLER, *ALONG THE ARCHIVAL GRAIN: EPISTEMIC ANXIETIES AND COLONIAL COMMON SENSE* (2009).

<sup>24</sup> LVOVSKY, *supra* note 4, at 3, 100, 124. As Lvovsky points out, legal repression of sexual difference is a pervasive subject in histories of urban queer life at midcentury, but it is rarely the primary focus. As a result, the existing literature offers sophisticated explanations of gay cultural and political development, but it can sometimes impute a top-down power structure and overestimate consensus amid the various state institutions responsible for antihomosexual regulation.

<sup>25</sup> *Id.* at 7.

continue for so long.<sup>26</sup> Through decades of intimate contact with a secretive subculture, police had more current and refined knowledge about gay life than the judiciary. When trial court judges expressed skepticism about police tactics, the police could exploit this “epistemic gap” to hide their knowledge in plain sight.<sup>27</sup> Police might know, for example, that wearing white tennis shoes was part of the wordless code that gay cruisers used to locate each other, but judges did not. By keeping this information away from the prying eyes of the judiciary, police officers could both use and hide their knowledge of gay-cruising culture to make carefully scripted solicitations instead appear brazen. Closing that gap by bringing public knowledge up to speed was key to blunting the regime at the end of the 1960s.<sup>28</sup> The remainder of this Part tours the main scenes and themes to elaborate on each of these arguments, pausing periodically to highlight Lvovsky’s theory of the visibility trap.

A. “I Can Spot One a Block Away”<sup>29</sup>

When Prohibition fell, states across the country empowered liquor boards to regulate the newly legal bars.<sup>30</sup> Under the broad umbrella of the state’s police powers over the health, safety, and morality of the community and buoyed by the holdover concerns of Progressive reformers and the temperance movement, agencies passed rules to withhold liquor licenses from establishments that condoned vice.<sup>31</sup> Most states crafted new rules to prohibit

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<sup>26</sup> *Id.* at 3.

<sup>27</sup> *Id.* at 17, 150, 155.

<sup>28</sup> *See id.* at 150. Lvovsky writes that “the pervasive surveillance that hung over gay life following World War II began to wind down” toward the end of the 1960s. *Id.* at 258.

<sup>29</sup> LVOVSKY, *supra* note 4, at 41.

<sup>30</sup> *Id.* at 27. For a study of the broader role of Repeal in constructing the contemporary U.S. state, see generally LISA MCGIRR, *THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE* (2016).

<sup>31</sup> *Id.* at 28–30; *see, e.g.*, *La Rue v. State of Cal.*, 326 F. Supp. 348, 350 (C.D. Cal. 1971) (discussing historical regulations passed by California’s Department of Alcoholic Beverage Control forbidding liquor licensure to establishments featuring certain activities “contrary to public welfare and morals.”) (subsequent history omitted); *Stoumen v. Reilly*, 37 Cal. 2d 713, 716 (1951) (discussing section 58 of the Alcoholic Beverage Control Act, which makes it a misdemeanor for restaurant or bar owners to permit the use of their establishments as a place “to which people resort for purposes which are injurious to the public morals”); CAL. CONST. art. XX, § 22 (“The [Department of Alcoholic Beverage Control] shall have the power, . . . to deny, suspend, or remove any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals.”).

“disorderly or disruptive conduct,” but some, like New Jersey, made their intentions more apparent by withholding licenses from any establishment that hosted “known . . . prostitutes, female impersonators, or other persons of ill repute.”<sup>32</sup> Homosexuals were easily folded into these categories. In places like California and New York, where homosexual regulation was not technically on the books, agencies still interpreted their charge to include rescinding liquor licenses from managers who allowed “homosexuals, degenerates[,] and undesirable people to congregate.”<sup>33</sup>

Officials could not have eyes in every tavern, so they enlisted the owners and managers to their cause. To keep their liquor licenses, bar owners were required to monitor their own patrons. Enforcement generally followed the same pattern: Plainclothes liquor agents would linger in suspected bars and gather evidence of allegedly homosexual conduct. They would then charge bar owners with violations, initiating a set of administrative proceedings “where attorneys for both sides argued over the evidence, before being appealed to a board of directors or the individual commissioner himself.”<sup>34</sup>

The knowledge requirement was key. In order to revoke a license, the liquor officials had to do more than prove that queer people had gathered at a bar; they had to prove that bar owners knew about it. This setup gave bar owners a strong incentive to protest that they had not noticed anything queer afoot, or even that queerness was not always self-evident. Sure, they had patrons who favored “knit sweaters, long haircuts, and elaborate cocktails,” but those were signs of trendy nightlife culture, not sexual deviance.<sup>35</sup>

You might think that in order to regulate homosexuality, the criminal justice system needed to know who it was dealing with. That would be the standard form of argument, assuming an internal coherence to the regulated minority and a sturdy definition that investigators, prosecutors, and judges could use to tell whether a particular defendant’s patrons qualified. In much of socio-legal history, including queer legal history, the social or the legal category is held constant in order to demonstrate the historical evolution of the other category. Stories that trace the remarkable process of decriminalizing homosexual conduct

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<sup>32</sup> LVOVSKY, *supra* note 5, at 29.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 29–30.

<sup>35</sup> *Id.* at 58.

and eventually winning civil rights protections for a gay minority sometimes treat homosexuality as self-evidently constituting the same distinct cultural group across the twentieth century. Scholarship that instead historicizes gay identity can similarly depict state institutions as static operators of a monolithic repressive regime.

Lvovsky's methodological innovation is to successfully historicize both legal and nonlegal discourse about homosexuality. She transforms adjudication from a vessel to contain "external" forces into a crucible for constructing new knowledge out of the available materials.<sup>36</sup> She depicts antihomosexual policing as a process of uneven development which "invariably came down to a negotiation over who precisely the homosexual was."<sup>37</sup>

Of course, the negotiation did not start from scratch. Epistemologies of homosexuality emanating from the public, medical authorities, and the police vied for dominance at midcentury. Many urbanites came to know (or think they knew) the homosexual after a brief period in the late 1920s and 1930s when niche queer entertainments burst into the mainstream. For a few years, urban partygoers thrilled to gender-bending performances punctuated by sexual innuendos and flirty banter.<sup>38</sup> Performers in this "pansy craze" were not explicit about their sexual proclivities, but audiences knew what they were seeing.<sup>39</sup> So did the journalists, photographers, filmmakers, and novelists who brought the trend to a broader audience.<sup>40</sup> Although they were familiar with older traditions of female impersonation, patrons flocked to these performances because they promised a

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<sup>36</sup> See *id.* at 14. ("The history of antihomosexual policing reveals that litigation is not necessarily a microcosm of broader social debates about policed communities or public morality. It is a process that follows its own institutional pressures and norms, which can meaningfully alter those debates as they are translated into the courts.")

<sup>37</sup> LVOVSKY, *supra* note 4, at 8. The boundary between gender and sexuality was much more conceptually fluid in the early and mid-twentieth centuries than it is today. See *id.* at 26–29; GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKINGS OF THE GAY MALE WORLD, 1890-1940*, at 55–57 (1994). See also generally KUNZEL, *supra* note 21. It is also important to note the difference between conceptual clarity—a line between gender identity and sexual orientation—and lived experience of gender and sexual non-normativity. For an account of how fluid these categories remain in social practice, see generally DAVID VALENTINE, *IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY* (2007).

<sup>38</sup> LVOVSKY, *supra* note 4, at 37.

<sup>39</sup> *Id.* at 38–40.

<sup>40</sup> *Id.* at 37–39. The pansy craze made headlines in the Black and white press of the period. *Id.*

glimpse of sexual transgression. Queerness became a spectacle that the public could purchase.

All this left the impression that homosexuality could be easily identified. From drag balls at Harlem's Rockland Palace to "pansy cabarets" in Chicago's Towertown, nightlife patrons learned to associate homosexuality with the figure of the "fairy," an effeminate man who carried a whiff of sexual deviance wherever he went. The telltale signs turned out to be legion: from "full-length gowns, elaborate wigs, and consummate makeup" to "the limp wrists, high-pitched voice, and swaying hips" of the paradigmatic "swish," to subtler flags like sporting bleached hair or a red tie.<sup>41</sup>

Fast forward to the other side of Prohibition, and the new liquor regulations—with their knowledge requirement—made for a potent mix with public stereotypes about homosexuality. If homosexuality was visible to the naked eye, it naturally followed that it should be obvious to any bar owner that they were serving queers. So liquor-board enforcers had two objectives: first to observe the seeable signs of gayness, and second to insist that these signs were such common knowledge that any bar owner would know what they meant. And observe they did, posting up in suspected bars and restaurants, searching for the supposedly obvious signs until the wee hours.<sup>42</sup> During enforcement hearings, the popular stereotypes enabled enforcement officials to fulfill their double brief. When they testified that they had observed bar patrons wearing red ties or flipping limp wrists, they enlisted the popular epistemology of homosexuality to their cause. Any bar owner who disagreed was contradicting more than the state's evidence; they were disputing understandings of homosexuality that had been assimilated into common sense.<sup>43</sup>

Calling our attention to the world of policing, Lvovsky casts moments of visibility like the pansy craze in darker tones. The pansy craze is usually celebrated as a brief moment of relative tolerance for an otherwise-beleaguered group.<sup>44</sup> In his classic *Gay New York*, historian George Chauncey invoked it to bust the myth that gay culture was invisible to the public before the

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<sup>41</sup> *Id.* at 40.

<sup>42</sup> *Id.* at 31–32.

<sup>43</sup> Bar owners did protest that stereotypes were bound to be overinclusive or that officials had misinterpreted the subtler signs and signals. They mostly failed. *See, e.g.*, Lvovsky, *supra* note 4, at 45 (citing State of N.J. Dep't of Alcoholic Beverage Control Bulletin 326, no. 1, 2 (1939)).

<sup>44</sup> *See id.* at 278 n.3 (collecting references).

Stonewall Rebellion in 1969.<sup>45</sup> Lvovsky shows that with increased visibility came greater queer repression. Introducing gay people to the broader public, often for the first time, was a genuine opportunity to dispel misconceptions about queer life. But it just as easily helped state officials weaponize those understandings and misunderstandings for their regulatory project. Lvovsky writes: “[F]ar from simply ushering in a more tolerant public discourse on sexual deviance, or even entrenching reductive stereotypes about queer communities, such celebrated moments of queer visibility fueled the states’ most literal uses of police power against gay men and women.”<sup>46</sup> Here is the visibility trap laid bare.

Even medical authority was no match for popular knowledge in this context. Bar owners tried to contradict the popular sense that homosexuality was inscribed on the body by bringing psychiatrists into the proceedings as expert witnesses. Prewar medicine had largely mirrored popular understanding, but after World War II, psychiatric definitions took pride of place.<sup>47</sup> Psychiatrists disagreed about the origins and treatments of homosexuality. However, they agreed that it was neither a sin nor a crime nor a physical ailment but rather a disease of the mind, “a manifestation of an unstable personality at best and a dangerous pathology at worst.”<sup>48</sup>

The psychiatric consensus was just powerful enough for bar owners to try to use it to their advantage. Psychiatrists presented a view of homosexuality that contradicted the common sense that these defendants supposedly shared with liquor-board officials and members of the public. The best way to strategically deploy psychiatric knowledge depended on the regulatory setting. In California, bar owners used medical experts to argue that homosexual desire did not always manifest in prohibited homosexual behavior, or more radically, that deviation from the

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<sup>45</sup> CHAUNCEY, *supra* note 37, at 3. Lvovsky also cautions against conflating the popularity of pansy entertainments with public acceptance of sexual nonconformity. Many patrons bought their tickets because queer cabarets made them feel morally superior, or “just to ‘ridicule the homos.’” LVOVSKY, *supra* note 4, at 40.

<sup>46</sup> LVOVSKY, *supra* note 4, at 26.

<sup>47</sup> See Regina Kunzel, “Sex Panic, Psychiatry, and the Expansion of the Carceral State,” in *INTIMATE STATES: GENDER, SEXUALITY, AND GOVERNANCE IN MODERN US HISTORY* 193, 200–01 (Margot Canaday et al. eds., 2021) (stating that proponents of criminalizing non-normative sex appealed to psychiatry, which had become more influential and respected in the postwar era).

<sup>48</sup> LVOVSKY, *supra* note 4, at 74.

sexual norm was not necessarily proscribed sexual deviance.<sup>49</sup> In New Jersey, it was in their interest instead to argue that the business of identifying homosexuals was best left to medical professionals.<sup>50</sup> Either way, medical knowledge failed to sway liquor-board proceedings. Psychiatrists had gained epistemic authority about homosexuality in public discussions, but “the power of the law consistently held the line of popular intuition and common sense.”<sup>51</sup> After all, it was in the interest of the liquor boards to rule that their agents were competent to enforce the regulations.

Over time, the fairy lost his monopoly on public knowledge about queer life. Men in gay bars assimilated their styles to avoid detection, so liquor officials tried to update their stereotypes to match.<sup>52</sup> With the supposedly obvious set of outward signs shifting toward more common habits and gestures for normative American men, defendants had more space to dispute the idea that anything the prosecution cited was really such a common sense sign of homosexuality. Now, when liquor-board officials insisted that men wearing preppy clothes were gay, the bar owners could protest that preppy clothes were common for rich people and Ivy Leaguers. Without a popular consensus to invoke, the proceedings “devolved into an increasingly naked struggle over what constituted the public itself.”<sup>53</sup> Yet, the logic of enforcement still rested on popular knowledge about queer life.

## B. Disaggregating Intimate Governance

Enter the vice squad. These specialized units emerged in the postwar years as police chiefs sought to rationalize crime administration and professionalize their forces.<sup>54</sup> A range of misdemeanors like “lewd vagrancy,” solicitation, and disorderly conduct, as well as state laws making sodomy a felony, gave vice squads plenty of tools to maintain the public order.<sup>55</sup> Police

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<sup>49</sup> *Id.* at 81–82.

<sup>50</sup> *See id.* at 82.

<sup>51</sup> *Id.* at 96.

<sup>52</sup> *Id.* at 56.

<sup>53</sup> LVOVSKY, *supra* note 4, at 62.

<sup>54</sup> *See id.* at 102; *see also* CHRISTOPHER LOWEN AGEE, *THE STREETS OF SAN FRANCISCO: POLICING AND THE CREATION OF A COSMOPOLITAN LIBERAL POLITICS, 1950-1972*, at 39–40 (2014).

<sup>55</sup> LVOVSKY, *supra* note 4, at 103–04. Vice squads were also typically tasked with regulating sex crimes, gambling, and sex work. *Id.*

across the country approached their task with vigor. Lvovsky focuses on two of their favored tactics at suspected cruising spots: posing as decoys to arrest men for solicitation and setting up secret surveillance to catch them in the act.

This is the analytical heart of the book. Lvovsky pries apart antihomosexual policing to understand the motives, actions, knowledge, and interests of its constituent groups. Other scholars paint the state with too broad a brush—as a “monolith[ ]” where officials “universally embraced” antigay policing.<sup>56</sup> Lvovsky finds instead “a profound moral and institutional struggle over not only the morality of same-sex practices but also the proper character of law enforcement itself.”<sup>57</sup> Uncovering these disagreements, she argues, reveals that judicial discretion could temper or exacerbate police campaigns, provides new clues to explain familiar moments in gay history, and changes our understanding of how gay men experienced police enforcement.<sup>58</sup>

1. Discretion, leniency, and expertise on the bench.

According to Lvovsky, trial court judges (and a few prosecutors) were not “dutiful soldiers” when it came to backing up police enforcement.<sup>59</sup> Many judges objected to the idea of criminalizing consensual sexual intimacy, even the gay kind.<sup>60</sup> Judges also balked at police tactics, echoing broader concerns about the role of the police in a democratic society.<sup>61</sup> As to the first objection, judicial skepticism did not reflect acceptance, or even tolerance, of homosexuality, but some judges were nonetheless persuaded that the men who appeared in their courtrooms should not be incarcerated.<sup>62</sup> Other judges viewed police decoy tactics as little more than “low trickery and deceit.”<sup>63</sup> By its nature, decoy

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<sup>56</sup> *Id.* at 3; *see also id.* at 100.

<sup>57</sup> *Id.* at 140.

<sup>58</sup> *Id.* at 140–41.

<sup>59</sup> *Id.* at 124.

<sup>60</sup> LVOVSKY, *supra* note 4, at 119–21.

<sup>61</sup> *Id.* at 125–26. Protest from the Black freedom struggle, labor movement, and legal attacks on vagrancy regulation combined with Cold War pressure to differentiate U.S. policing from totalitarian governance all increased judicial scrutiny of policing in these years. *See id.* (first citing Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 93–96 (2000); then citing RISA LAUREN GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* 61–63 (2016); and then citing SARAH A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* 7–9 (2019)).

<sup>62</sup> *Id.* at 119.

<sup>63</sup> *Id.* at 125 (citing ALBERT DEUTSCH, *THE TROUBLE WITH COPS* 87 (1955)).

work required officers to single out men whom they thought would be receptive to their advances and to initiate contact by striking up conversations or exposing themselves in parks and public bathrooms. These practices reeked of entrapment.<sup>64</sup> As one judge put it, without the intervention of the police officer, the defendant “would have gone home, minding his own business.”<sup>65</sup>

Judges who disagreed with police practice could fight discretion with discretion. They often relied on their power over factual findings to rule that the admissible evidence did not support the charges and then dismiss the case.<sup>66</sup> Whether it was motivated by sympathy for the defendants or antipathy for the police, judicial “creative intervention” in these cases provided a counterweight to police enforcement from within the legal system.<sup>67</sup> For their efforts, Lvovsky proposes that trial court judges be acknowledged as allies in the struggle for gay civil rights.<sup>68</sup>

Some men were more likely to receive judicial leniency than others. Antigay policing brought men from across racial and class divides into the courtroom, and in some cities white middle-class men became explicit targets. Lvovsky makes clear that enforcement priorities varied by city: the Washington, D.C., police force pursued white-collar workers, while the Los Angeles Police Department followed broader policing trends to single out men in working-class communities of color.<sup>69</sup> Despite the variety, antihomosexual campaigns became “largely white-identified” in the courtroom.<sup>70</sup> Lvovsky argues that the greater wealth and whiteness of these defendants helped fuel judicial antipathy to police.<sup>71</sup>

The other wedge between judges and police concerned the meaning of homosexuality itself. Unlike liquor boards in the

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<sup>64</sup> *Id.* at 124. Entrapment is “[a] law enforcement officer’s or government agent’s inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to cause a criminal prosecution against that person.” *Entrapment*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>65</sup> LVOVSKY, *supra* note 4, at 132 (citing *People v. Humphrey*, 111 NYS2d 450, 454–55 (Co. Ct. 1952)).

<sup>66</sup> *Id.* at 128–29.

<sup>67</sup> *Id.* at 140.

<sup>68</sup> *Id.* at 99.

<sup>69</sup> *See id.* at 106–07.

<sup>70</sup> LVOVSKY, *supra* note 4, at 21. Lvovsky quotes one NYPD officer saying that the “normal” homosexuals were too hard to identify, so they fell back on publicly circulating stereotypes to target “flamboyant” men. *Id.* at 107.

<sup>71</sup> *See id.* at 21.

1940s and 1950s, trial court judges generally subscribed to the psychiatric understanding of homosexuality as a mental condition (as opposed to a mark on the body or a social contagion). Homosexuality was a problem, yes, but many judges thought that medical treatment offered better solutions than prison. This was partially an intellectual bond, borne of psychiatrists' greater public authority on sexuality in the aftermath of World War II. But it was also an institutional one. Psychiatry had become a close ally of the legal system through state "sexual psychopath" laws that swept the country in midcentury. Moral panics concerning the sexual safety of children in the years directly before and after World War II sparked reactionary legislation across the country.<sup>72</sup> In twenty-nine states and Washington, D.C., people charged with sex crimes like sodomy were referred to psychiatrists in state-run clinics for evaluation.<sup>73</sup> Like the liquor regulations, these laws did not name homosexuality, but homosexual men were among the primary targets.<sup>74</sup> If defendants were deemed "sexual psychopath[s]," they could be committed to psychiatric institutions.<sup>75</sup>

Lvovsky argues that these laws were less brutal than they appear on paper and in fact "created an institutional advocate for leniency."<sup>76</sup> Prosecutors in Kansas, Wisconsin, and Michigan had no qualms about charging men with morals offenses, but they thought that sexual psychopath laws were too harsh when applied to consensual homosexual conduct, and so they declined to invoke them.<sup>77</sup> Judges were happy to defer to psychiatric assessments, releasing men who did not meet the clinical criteria for sexual psychopathy.<sup>78</sup> Lvovsky concludes that the laws, and the "medicalization of homosexuality more broadly, often had a

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<sup>72</sup> See Estelle B. Freedman, "Uncontrolled Desires": *The Response to the Sexual Psychopath, 1920-1960*, J. AM. HIST. 83-106 (1987); George Chauncey, *The Postwar Sex Crimes Panic*, in TRUE STORIES FROM THE AMERICAN PAST 160, 175-78 (William Graebner ed., 1993); Marie-Amelie George, *The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States*, 24 J. HIST. SEXUALITY 229-61 (2015); Kunzel, *supra* note 47, at 193-200.

<sup>73</sup> George, *supra* note 72, at 226.

<sup>74</sup> See *id.*; Freedman, *supra* note 72, at 95-98.

<sup>75</sup> LVOVSKY, *supra* note 5, at 120; Freedman, *supra* note 72, at 84-85. See also Chauncey, *supra* note 72, at 166-67; Kunzel, *supra* note 47, at 198-201.

<sup>76</sup> LVOVSKY, *supra* note 4, at 121.

<sup>77</sup> *Id.* at 120.

<sup>78</sup> See *id.* at 121.

surprisingly liberal effect in the particular economy of the courts.”<sup>79</sup>

On this point, Lvovsky is less persuasive. Some men who were charged with sex crimes found an escape hatch through the doctor’s office, but they might not have appeared in court at all if a new carceral infrastructure had not brought them under increased police scrutiny in the first place.<sup>80</sup> Moreover, the medicalization of homosexuality delegated the censure of the state to the censure of medicine. Prior accounts argue that a significant portion of the people committed to institutions under sexual psychopath laws were sent there for homosexual activity.<sup>81</sup> Deference to psychiatry also served to undermine due process, as men who were deemed “patients,” sometimes before even being charged with a crime, could be whisked away to indefinite commitment.<sup>82</sup> Once committed, some men endured such “treatments” as hormone injections, shock therapy, and even frontal lobotomy.<sup>83</sup> Lvovsky’s claim would have been strengthened by engaging more explicitly with the sources in the prior literature and clarifying why we should see leniency rather than punishment by other means.

The close relationship between trial courts and psychiatric institutions also raises the question: What do we mean when we say “criminal law,” or even “legal system”?<sup>84</sup> A “softened” judiciary had ripple effects through the criminal system,<sup>85</sup> but what did that amount to for policed queer communities? Is it really fair to say that “medicalization tempered the law’s daily

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<sup>79</sup> *Id.* Psychiatrists tended to view pathology as more sympathetic to defendants than accusations that they were criminals. Historian Allan Bérubé made a similar argument about psychiatrists working with the military during World War II, calling them “quiet advocates for their gay patients.” ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II* 166 (2010).

<sup>80</sup> See Kunzel, *supra* note 47, at 193, 201 (2021) (“The expanded criminalization of nonnormative sex, then, was promoted, justified, and effectively erased as such through the discourse of medicine. The carceral and criminal expansion sanctioned by new sexual psychopath laws was accomplished through the language of illness, treatment, and cure.”). Although relatively few people were ultimately convicted under sexual psychopath laws, they gave police license to expand and intensify antihomosexual policing. Most of those arrests were never subject to judicial scrutiny.

<sup>81</sup> See, e.g., Tamara Rice Lave, *Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws*, 69 *LA. L. REV.* 549, 583–84 (2009).

<sup>82</sup> See Kunzel, *supra* note 47, at 193. Kunzel explains that some men were denied their constitutional right to a jury trial, for example, because judges categorized them as patients rather than defendants. *Id.* at 198.

<sup>83</sup> Freedman, *supra* note 72, at 99; George, *supra* note 72, at 246–47.

<sup>84</sup> See LVOVSKY, *supra* note 4, at 13.

<sup>85</sup> See *id.*

applications”<sup>86</sup> For gay men in bars, parks, and bathrooms, vulnerability started on the streets, not in the courtroom.<sup>87</sup>

2. Principled nonenforcement and the hydraulics of antihomosexual policing.

Vice squads noticed how poorly their antihomosexual arrests fared in court and responded accordingly.<sup>88</sup> Some officers would keep abreast of which judges were likely to preside over arrests for certain periods of days or weeks and then tailor their vice enforcement accordingly.<sup>89</sup> Other officers tried to preempt judicial skepticism by systematically downgrading the severity of the charges they used to arrest gay men. Arrest rates did not decline, but vagrancy and disorderly conduct took the place of solicitation statutes.<sup>90</sup> Finally, some officers reacted by beating homosexual detainees. Lvovsky cites evidence that police officers *explicitly* justified violence in anticipation of judicial leniency.<sup>91</sup> Whatever progressive intentions may have motivated judges toward leniency in some cases did not dissipate the energy for punishment; they merely redirected the pressure away from courts and back to cops.

These hydraulic effects are only visible because Lvovsky so deftly disentangles the police from the judiciary, with a major payoff for our understanding of antigay policing.<sup>92</sup> By following the entailments of judicial discretion back out of the courtroom and into the streets, Lvovsky challenges two shibboleths of the field. First, she denaturalizes the prevalence of petty misdemeanors as the primary police tools to regulate queer life. Facing skepticism in the courtroom, police officers relied on misdemeanor

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<sup>86</sup> *Id.* at 276 n.18; *see also id.* at 120 (“In context, the sexual psychopath laws of the 1950s did not necessarily make homosexual offenders more vulnerable before the law.”).

<sup>87</sup> To be clear, Lvovsky is attentive to some of the effects on the street, as the next Section shows. The crux of my argument in this Section and the subsequent Section is that criminalization had broader collateral consequences that are not reducible to the backlash dynamic that she identifies.

<sup>88</sup> Lvovsky refers to this as “principled nonenforcement” by courts. *See* LVOVSKY, *supra* note 4, at 100.

<sup>89</sup> *Id.* at 138.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 139 & n.88 (citing, for example, COUNCIL ON RELIGION AND THE HOMOSEXUAL, *THE CHALLENGE AND PROGRESS OF HOMOSEXUAL LAW REFORM* 27 (1968)).

<sup>92</sup> Thanks to Professor John Witt for pointing to similar hydraulic effects in Professor William Stuntz’s claim that the constitutional revolution in criminal procedure had the perverse effect of driving up plea bargaining because the cost of adjudication skyrocketed. *See* William J. Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 4 (1997).

charges rather than solicitation and sodomy statutes. Second, police violence was not a simple or “inevitable” reflection of the state’s antagonism toward queer people but evidence of “a less visible tension between the police and the *courts*.”<sup>93</sup>

The internal dynamics of the criminal justice system help explain key parts of gay history, but their effect on queer legal historiography is less clear. Lvovsky suggests that other historians are wrong to view antihomosexual policing as “an unrelenting regulatory campaign against a stigmatized community that could expect little sympathy within the legal system.”<sup>94</sup> She argues that judicial lenience shifted charging practices, redounding to the benefit of everyone caught in the vice squad’s web. Even if her counterfactual is correct and flashes of sympathy emitted from some chambers, many queer people could find little succor. As Lvovsky notes, judicial leniency often backfired. It was ineffective at reducing arrests on morals charges, and it generated more violence in the process.<sup>95</sup> Over the middle decades of the twentieth century, “some 50,000 men were arrested on loitering charges in New York City alone,” and “sodomy convictions reached record numbers” nationwide.<sup>96</sup>

Most of the people brutalized by police or arrested and held overnight without charges would never have appeared before a judge, let alone a sympathetic one.<sup>97</sup> And many queer people were not “respectable” enough to receive judicial sympathy, even where it was otherwise available. These decades were also the height of a blunt-force police tactic: the bar raid. Police would harass, intimidate, humiliate, and beat patrons before rounding them up in mass arrests.<sup>98</sup> The fact that prosecutors often dropped the resulting charges did not make the experience any more pleasant.<sup>99</sup> Indeed, even an arrest without subsequent

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<sup>93</sup> LVOVSKY, *supra* note 5, at 139 (emphasis in original).

<sup>94</sup> *Id.* at 140.

<sup>95</sup> Lvovsky notes that even the more sympathetic judges nevertheless “convicted most defendants brought before them.” *Id.* at 124; *see also id.* at 136–38.

<sup>96</sup> Margot Canaday, *Heterosexuality as a Legal Regime*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 442, 450 (Michael Grossberg & Christopher Tomlins eds., 2008).

<sup>97</sup> For recent studies of misdemeanor arrests as a regulatory system, see generally ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018).

<sup>98</sup> *See, e.g.*, BOYD, *supra* note 11, at 6, 95 (2003); AGEE, *supra* note 54, at 22; Canaday, *supra* note 96, at 450; D’EMILIO, *supra* note 11, at 46–53.

<sup>99</sup> *See, e.g.*, Canaday, *supra* note 96, at 450.

charges could cost a man his job and his reputation.<sup>100</sup> Some judges may have been surprisingly sympathetic to respectable men on their dockets, but from the perspective of many queer urbanites at mid-century, the legal system offered little reprieve.<sup>101</sup>

### C. The Visibility Trap

If judges were so skeptical, then why did antihomosexual policing continue for so long? The short answer is that police obscured their tactics. Over the course of the 1960s, partially in response to police harassment over the previous decades, men in gay bars adopted subtler signals for mutual recognition. Men cruised each other with little more than a stance or a glance, and the paradigmatic sartorial marker was the modest tennis shoe.<sup>102</sup> The shift made decoy policing more difficult, but not impossible. Police departments across the country invested enormous energy into following along. They developed training programs and circulated detailed manuals to learn how to wear short jackets with slacks, drop camp slang into their speech, and approach targets by asking, “Where’s the action?”<sup>103</sup>

Nowhere were cruising codes as elusive as public bathrooms. Men could propose a sexual encounter with the tap of a foot, or the flash of finger through a stall partition. Discretion was the watchword for “tearoom” encounters, posing a particular challenge for police. In addition to developing decoy tactics as they did in other cruising sites, police departments constructed

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<sup>100</sup> *Id.* One remaining puzzle: Why did the fault lines within the criminal justice system divide judges and some prosecutors from police officers, and why did psychiatry form an alliance with the judiciary instead of the other relevant professions? Lvovsky leaves breadcrumbs that could be fruitfully followed. She points to various aspects of professional development and institutional norms as explanations for why trial court judges may have been more sympathetic to defendants than their appellate counterparts, and why police officers were less persuaded by shifting elite norms around homosexual activity than the judges and psychiatrists they encountered in court. See LVOVSKY, *supra* note 5, at 49–50, 88, 183. Future research could deepen our understanding of how cultures of class structured responses to antigay regulation.

<sup>101</sup> The argument is open to further criticism for failing to fully internalize the author’s own accurate picture of *which* gay men were likely to benefit from judicial sympathy. If homosexual policing were one of the few times that trial courts saw white-collar white men hauled before them on morals charges, and if on that basis judges began to question police tactics more broadly, then we would learn something important about the interplay of race and class within the administration of criminal justice. But it does not follow that the justice system has been wrongly maligned for rubber-stamping police harassment. If anything, the exception proves the rule.

<sup>102</sup> LVOVSKY, *supra* note 4, at 149.

<sup>103</sup> *Id.* at 160.

lookouts for secret surveillance, using preexisting architectural features, or building hiding places—like air vents—to disguise video cameras.<sup>104</sup> In Mansfield, Ohio, officers took turns hiding in a closet with a camera poised inside a paper towel dispenser.<sup>105</sup> Cruisers worked hard to keep their activities undetected, forcing police to become ethnographers of gay cruising in order to make arrests.

The “discovery” of urban gay communities in the 1950s and 1960s by social scientists and the media is usually credited with advancing a more relatable image of gays and lesbians.<sup>106</sup> Lvovsky argues that the legacy of visibility also has a dark underbelly, where recognition “lent itself directly to the work of restricting gay men’s legal and social rights . . . as a reliable technology of the police.”<sup>107</sup> The point is not to taint ethnography *per se* but to find resonances in the methods and knowledge that police developed over the same period. Through extended surveillance, the police produced their own ethnographies of cruising culture, which enabled officers to perform arrests in the field. For these queer communities, visibility was literally a trap.

#### 1. Power-ignorance.

This part of Lvovsky’s argument is in direct conversation with Michel Foucault, one of the most influential theorists of the relationship between power and knowledge. Through a series of genealogical studies of authoritative nonstate institutions in modern Europe, Foucault became suspicious of the idea that objective truth existed outside of power relations. Instead, he argued that “power produces knowledge” in the sense that “there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.”<sup>108</sup> Much of his work, across a variety of domains, developed the theory that epistemologies come to appear neutrally true only through historical power struggles.

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<sup>104</sup> *Id.* at 190–91.

<sup>105</sup> *Id.* at 192. Part of the explanation for these invasive tactics is that they presented a rare opportunity for police to charge men with sodomy—a felony—rather than the misdemeanor crimes of street enforcement. *See id.* at 195–96.

<sup>106</sup> LVOVSKY, *supra* note 4, at 15.

<sup>107</sup> *Id.* at 144.

<sup>108</sup> FOUCAULT, *supra* note 8, at 27.

Foucault argued against imagining a “subject of knowledge” like a psychiatrist or police officer or attorney producing knowledge that is then adjudged to be “useful or resistant to power.”<sup>109</sup> Instead, it is the historical “processes and struggles” that constitute power-knowledge that make it possible to speak of psychiatry or policing or law as “possible domains of knowledge” in the first place.<sup>110</sup> From this perspective, power can be seen as a “productive” force.<sup>111</sup> This is what Foucault termed power-knowledge (“*le savoir-pouvoir*”), or power perpetuating itself by producing and naturalizing its own epistemologies as objective truth.

Foucault’s definition of power led him to a particular diagnosis of the visibility trap. One commentator explained that “[a] more extensive and finer-grained knowledge enables a more continuous and pervasive control of what people do, which in turn offers further possibilities for more intrusive inquiry and disclosure.”<sup>112</sup> Regulation is thus dependent on constant visibility, which is achieved by surveillance, categorization, and confession.

In the book’s central chapters, Lvovsky offers just the sort of history of power-knowledge that Foucault called for. She historicizes the operation of power-knowledge within midcentury criminal court proceedings to provide a novel account of how the criminal justice system arrived at authoritative knowledge about homosexuality. By disaggregating the state, she leaves enough room to see how incompatible epistemologies jockeyed for position to produce the judiciary’s authoritative knowledge about homosexuality. The process reveals that the legal system could contain these incompatible epistemologies of homosexuality at the same time and, in turn, that actors within the system could leverage their knowledge to gain the upper hand.

Even more novel, however, is the role that Lvovsky ascribes to ignorance. She shows police officers structuring judicial knowledge by feigning ignorance. In the courtroom, officers

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<sup>109</sup> *Id.* at 27–28.

<sup>110</sup> *Id.* at 28. Power-knowledge “determines the forms and possible domains of knowledge.” *Id.*

<sup>111</sup> See *id.* at 214.

<sup>112</sup> Joseph Rouse, “Power/Knowledge,” in *THE CAMBRIDGE COMPANION TO FOUCAULT* 95, 99 (Gary Gutting ed., 2d ed. 2005). For further elaboration of power-knowledge, see generally MICHEL FOUCAULT & COLIN GORDON, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* (1980); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Vintage Books ed. 1988); FOUCAULT AND LAW (Ben Golder & Peter Fitzpatrick eds., 2010); ALAN HUNT, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* (1994).

strategically disavowed any special knowledge of queer life. Police could make illegal sexual advances “appear[] . . . all but spontaneous at trial” by occluding their training and trickery.<sup>113</sup> In one high profile case, a police officer chatted up some men playing pool in a Greenwich Village gay bar in 1965. The officer was wearing “white pants, light sneakers, and a polo shirt,”<sup>114</sup> and he told the men that he frequented “this type of bar” before the conversation became sexual and the officer arrested the men for solicitation.<sup>115</sup> With support from the American Civil Liberties Union (ACLU), the men argued before the trial court, appellate court, and finally, the U.S. Supreme Court that the officer had invited the alleged sexual advances through his clothing, gestures, and language.<sup>116</sup> But the courts did not know the subtle codes of cruising. They interpreted the men as having initiated the encounter and could see little sign of entrapment.<sup>117</sup> In this way, the combination of specialized knowledge within police departments and the ethnographic ignorance of the courts legitimated decoy tactics in spite of judicial reservations about criminalizing homosexual intimacies.<sup>118</sup>

The same dynamic enabled clandestine surveillance for a time. Some judges, particularly in state appellate courts, continued to associate gay men with sexual psychopaths and predators whose sexual drives were always on the verge of spilling into view and contaminating public life.<sup>119</sup> Of course, police only resorted to secretly filming public bathrooms because this was so far from the truth. Yet challenges to clandestine surveillance failed because of “the courts’ blindness . . . to the cultural conditions that necessitated the very tactics they assessed.”<sup>120</sup> Taken together, these “epistemic gap[s]”<sup>121</sup> within the criminal justice system enabled police to continue to entice men and surveil cruising sites while evading judicial skepticism.<sup>122</sup>

This is the history of power-knowledge in formation. The epistemic gap allowed police to weaponize feigned ignorance.

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<sup>113</sup> LVOVSKY, *supra* note 4, at 144–45.

<sup>114</sup> *Id.* at 174.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 175–76.

<sup>117</sup> *See id.* at 176–77.

<sup>118</sup> LVOVSKY, *supra* note 4, at 178.

<sup>119</sup> *Id.* at 182.

<sup>120</sup> *Id.* at 183.

<sup>121</sup> *Id.* at 17.

<sup>122</sup> *See, e.g., id.* at 145, 150, 178.

Antihomosexual policing was not a single coherent project of repression, and in fact it thrived in the spaces between competing understandings of why it was necessary and whom it should target. *Vice Patrol* accepts Foucault's invitation to give power-knowledge its own set of histories, explaining how it operated in different moments. Lvovsky drills into the fight for epistemic dominance within state institutions, revealing the strategic operation of ignorance. In midcentury antigay policing, we see harmful practices persist *without* a single governing rationale.

## 2. Closing the Epistemic Gap

Over the course of the late 1960s, homophile activists and civil libertarians pressed their campaign to end police harassment in cities around the country. Their work dovetailed with broader efforts to constrain law enforcement from the bench. Lvovsky argues that the epistemic gap had to close before anti-homosexual policing could recede, or at least transition into a new form.<sup>123</sup> In a final chapter and epilogue, she details the media's role in transforming queer visibility and, by extension, police practices. The homophile movement makes its most sustained appearance here, as a new generation of activists pushed toward more public militancy. Their cultural salience garnered national media attention on a new scale.<sup>124</sup> In fact, early entries in the burgeoning genre of gay exposé relied on gay activists like Randy Wicker and Don Slater to educate journalists "on the city's gay fringes."<sup>125</sup> Their efforts did not always work; sometimes the media's coverage was more "zoological" than sympathetic.<sup>126</sup> Lvovsky emphasizes the way it revived a familiar stereotype in different clothes—one of the "flaunting" homosexual, the "overt," "flagrant," obvious gay man who nevertheless needed to be pointed out by the media to be visible in the urban landscape.<sup>127</sup>

Media attention on her account was "a deliberate project of social regulation: a self-conscious attempt to give Americans who had lost their grasp on a rapidly shifting urban culture a new way to isolate, scrutinize, and regain control over an

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<sup>123</sup> See LVOVSKY, *supra* note 4, at 258–61.

<sup>124</sup> *Id.* at 223.

<sup>125</sup> *Id.* at 224.

<sup>126</sup> *Id.* at 220–21.

<sup>127</sup> *Id.* at 236.

unwelcome interloper.”<sup>128</sup> The coverage also served another function: it put gay cultural codes in magazines and newspapers for the world to see, bridging the epistemic gap between judges and vice officers. It also put the aggressive tactics of vice squads into wider circulation, opening them up to further criticism.<sup>129</sup> Police departments responded by using those tactics less often, leaving a different antigay policing in its place. Vice campaigns increasingly focused “on the poor, the gender nonconforming, and the [B]lack and brown members of the queer community.”<sup>130</sup>

Lvovsky’s argument undersells the role of homophile activists in closing the epistemic gap between courts and police. In her evidence, however, she portrays the positive effects that media coverage could have when it was motivated by gay activists seeking visibility on their own terms. Randy Wicker is a prime example: Lvovsky describes how he shepherded a *New York Times* journalist through New York City’s gay nightlife to produce the first front-page story on the city’s gay subculture and how he convinced the WBAI radio station to broadcast an hour of gay men speaking for themselves.<sup>131</sup>

Beyond these episodes, Wicker led a one-man campaign for more representative gay visibility. The WBAI broadcast was a smashing success, which Wicker converted into further coverage in *Newsweek*, the *New York Times*, and *Harper’s*.<sup>132</sup> According to Professor John D’Emilio, Wicker’s media savvy “had a

<sup>128</sup> LVOVSKY, *supra* note 4, at 221.

<sup>129</sup> *Id.* at 265.

<sup>130</sup> *Id.* at 259. As Professor Timothy Stewart-Winter has demonstrated:

[A]s the gay rights movement saw victory—as gay bars with predominantly white, middle-class patrons came under less scrutiny and suffered much less harassment—it[ ] . . . withdrew from the fight against the growing police state. The targeted policing of [B]lack and Latino communities was made possible by mobilized social conservatives and by the evaporation of organized support from white liberals—including gays—for reining in police.

Timothy Stewart-Winter, *Queer Law and Order: Sex, Criminality, and Policing in the Late Twentieth-Century United States*, 102 J. AM. HIST. 61, 62 (2015). Vice patrol tactics survive in the twenty-first century. See AMNESTY INT’L, USA: STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S., 32–42 (2005) (discussing decoy tactics); *id.* at 43–45 (discussing police raids); J. Kelly Strader & Lindsey Hay, *Lewd Stings: Extending Lawrence v. Texas to Discriminatory Enforcement*, 56 AM. CRIM. L. REV. 465, 466, 496–97 (2019); see also generally Andrea J. Ritchie, *Crimes against Nature: Challenging Criminalization of Queerness and Black Women’s Sexuality*, 14 LOY. J. PUB. INT. L. 355 (2012).

<sup>131</sup> See LVOVSKY, *supra* note 4, at 223–24.

<sup>132</sup> D’EMILIO, *supra* note 11, at 159.

snowballing effect.”<sup>133</sup> He motivated a series on the gay movement in the *Village Voice* and the *New York Post*, and he accepted speaking invitations at some of the city’s finest venues.<sup>134</sup> The articles and appearances acquainted at least some readers and attendees with self-representations by gay people, softening attitudes toward homosexuality. His efforts also worked alongside legal campaigns by the Mattachine Society of New York and the New York Civil Liberties Union to prohibit police officers from enticing gay men for solicitation arrests.<sup>135</sup> Men like Wicker helped to close the epistemic gap between police and judges by producing a coherent alternative identity category—the respectable gay man—to combat negative stereotypes.

Highlighting the activist role helps surface a deep insight of *Vice Patrol*: that visibility is neither liberalizing nor repressive by nature, and it can operate to perpetuate or undermine regulatory regimes depending on what variety is at play. Condescending portrayals which reduced gay life to a set of recognizable physical and sartorial signs might produce *cultural salience*, but media informed instead by gay *self-representation* could help displace those very stereotypes. Part of the solution to the visibility trap was a different kind of visibility.

It also explains the book’s ambivalent denouement. It’s not entirely clear what kind of bookend Stonewall is meant to symbolize—the end of the antigay policing regime, or a pivot point in its perpetual evolution. Lvovsky writes that her book is a study of “a regulatory bubble: a relatively contained period when the suppression of gay life drew uniquely sustained and pervasive police attention.”<sup>136</sup> The bubble did not burst in the late 1960s, or not exactly. Instead, she says that it was “redirected” away from decoys and surveillance toward other tactics to “badger, if not outright brutalize” queer people.<sup>137</sup>

From the perspective of white middle-class gay men, the late 1960s represented a significant turning point in police harassment. Homophile activists worked very hard to contradict negative stereotypes that circulated in the media and, as Lvovsky shows, wormed their way into the legal system to

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<sup>133</sup> *Id.* at 159.

<sup>134</sup> *Id.* D’Emilio wrote that Wicker gave speeches at “the American Humanist Association, the New York Ethical Culture Society, Rutgers University, the City College of New York, and the Judson Memorial Church.” *Id.* at 159–60.

<sup>135</sup> LVOVSKY, *supra* note 4, at 252–53.

<sup>136</sup> *Id.* at 259.

<sup>137</sup> *Id.*

harmful effect. They did so by promoting a different figure, the respectable homosexual. To borrow from Professors Emily Hobson and Christina Hanhardt, the homophile movement's visibility politics were focused on "countering charges of 'deviance'" by portraying queer life "as what would remain if the racial diversity, class marginality, and gender transgression . . . could be 'taken out.'"<sup>138</sup> The uneven burden of antigay policing after Stonewall is partially a consequence of this homophile visibility strategy. Self-representation provided activists the chance to change public knowledge about homosexuality directly, but it did little for the many queer and trans people who did not fit the mold. In Lvovsky's words, "as more 'respectable' segments [of the queer community] fought their way into the fold of state protection," vice enforcement persisted for everyone left behind.<sup>139</sup>

## II. TRANS VISIBILITY POLITICS: LESSONS FROM *VICE PATROL*

Today, transgender people in the United States are under attack. From municipal policing to state legislation and federal administrative law, trans people face well-organized efforts to regulate non-normative gender identities out of existence. Much like debates over homosexuality at midcentury, contemporary trans politics turns on competing epistemologies of gender. This Part argues that advocates for transgender rights can draw lessons

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<sup>138</sup> Emily K. Hobson, *Policing Gay LA: Mapping Racial Divides in the Homophile Era, 1950-1967*, in *THE RISING TIDE OF COLOR: RACE, STATE VIOLENCE, AND RADICAL MOVEMENTS ACROSS THE PACIFIC 188, 193* (Moon-Ho Jung ed., 2014) (quoting CHRISTINA B. HANHARDT, *SAFE SPACE: GAY NEIGHBORHOOD HISTORY AND THE POLITICS OF VIOLENCE*, 265 (2013)).

<sup>139</sup> LVOVSKY, *supra* note 4, at 259. Police departments do still use sting operations—dubbed "lewd stings" to criminalize queer and trans people. The tactics look remarkably similar to those described in *Vice Patrol*. In their study of lewd stings, for example, Professors J. Kelly Strader and Lindsey Hay record an incident from 2013 where "police officers wore provocative clothing such as gay pride t-shirts and speedos to a public park. There, the officers lured sting targets into bushes along a jogging trail and arrested them when they approached." See Strader & Hay, *supra* note 130, at 468 ("Simply put, many of the sting operations are homophobia/transphobia in disguise."). In 2014, several gay men challenged the New York Police Department for allegedly targeting them in pornographic video stores and private spas for prostitution charges. For example, Robert Pinter met a younger man in a Manhattan porn shop and agreed to have consensual sex with him. When the younger man, an undercover vice officer, offered to pay for the sex, Pinter said nothing, and the officer arrested him. The city later settled his wrongful arrest lawsuit for \$450,000. Duncan Osborne, *EXCLUSIVE: City Settles Robert Pinter's Porn Shop False Arrest Claim for \$450,000*, GAY CITY NEWS (Apr. 26, 2014), <https://perma.cc/RQ5Z-CP96>; Jared Trujillo, *To Decriminalize Sex Work, NYC Must First Defund NYPD's Vice Squad*, N.Y. C.L. UNION (May 5, 2021), <https://perma.cc/3TCZ-U76R>; see Strader & Hay, *supra* note 130, at 468.

from *Vice Patrol* to better understand repressive state regulation, and how to develop visibility campaigns to defeat it. The book shows us how stereotypes are metabolized by the legal system, suggesting ways that regulated people can strategically deploy visibility, rather than see it as a neutral good. By understanding the successes and limitations of the homophile visibility strategy, the transgender movement can design its own approach to visibility with the internal dynamics of the legal system in mind.<sup>140</sup> Perfect visibility to the state can be counterproductive, and strategic invisibility may stave off unwanted surveillance.<sup>141</sup>

#### A. The Trans Visibility Trap

Trans people are caught in a visibility trap. Officials from municipal police departments to the White House single out transgender people as targets for the regulation of gender. Political opponents have also organized a cottage industry of state legislation designed to keep trans people out of public life.<sup>142</sup> They endanger transgender lives by limiting access to health insurance and gender-affirming medicine.

The Alliance Defending Freedom (ADF), one of the leading legal organizations of the conservative Christian movement, tested the waters starting in 2013, when it began circulating model legislation called the Student Physical Privacy Act to prevent transgender students from using the restroom consistent with their gender identity.<sup>143</sup> Since then, the group has supported North Carolina's now-infamous HB2,<sup>144</sup> which restricted trans bathroom access and preempted municipal antidiscrimination

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<sup>140</sup> In his recent book *Sex is as Sex Does*, Professor Paisley Currah similarly argues that trans politics will benefit from disaggregating the state institutions that regulate and define sex. See generally PAISLEY CURRAH, *SEX IS AS SEX DOES* (2022).

<sup>141</sup> Professor Eric Stanley calls this stance "being against intelligibility." ERIC STANLEY, *ATMOSPHERES OF VIOLENCE: STRUCTURING ANTAGONISM AND THE TRANS/QUEER UNGOVERNABLE 3* (2021).

<sup>142</sup> See Sarah Posner, *The Secret History of Bathroom Bills*, TYPE INVESTIGATIONS (Jan. 22, 2018), <https://perma.cc/93BX-ELWT>.

<sup>143</sup> Melissa Gira Grant, *The Groups Pushing Anti-Trans Laws Want to Divide the LGBTQ Movement*, NEW REPUBLIC (Feb. 17, 2022), <https://perma.cc/6LP8-67D9>. Bills modeled on the Student Physical Privacy Act were introduced in Kentucky, Minnesota, Nevada, and Texas in 2015 and in Kansas in 2016. See, e.g., H.B. 2737, 2016 Leg. Sess. (Kan. 2016) (died in committee); see also Grant, *supra* (citing Rachel Percelay, *A "Religious Freedom" Legal Powerhouse Is Leading The National Fight Against Transgender Student Rights*, MEDIA MATTERS FOR AM. (Nov. 5, 2015), <https://perma.cc/RZ7X-GQ67>).

<sup>144</sup> H.B. 2, 151st Gen. Assemb., 2d Extra Sess. (N.C. 2016).

ordinances altogether. It also worked to repeal Houston's anti-discrimination ordinance, which protected against gender identity bias and prohibited discrimination based on sexual orientation.<sup>145</sup>

The ADF also spearheaded outreach to public school districts to prevent trans students from using the bathrooms and locker rooms consistent with their gender identities, resulting in prohibitions in Illinois, Missouri, Kentucky, Arizona, Colorado, Nevada, and Virginia.<sup>146</sup> State legislators introduced 147 anti-trans bills in thirty-four states over the course of 2021; similar efforts in 2022 have moved quickly in South Dakota, Arizona, Kentucky, Alaska, and Alabama.<sup>147</sup> Florida Governor Ron DeSantis has pushed the state's Agency for Health Care Administration to ban gender care for transgender minors and to effectively ban gender care for transgender adults on Medicaid.<sup>148</sup> At the federal level, officials in the Trump administration rescinded Obama-era Title IX guidance on student gender identity, banned transgender people from serving in the military, reduced antidiscrimination protections in health insurance for trans people, and prohibited the Centers for Disease Control from even using the word "transgender" in its official communications.<sup>149</sup>

Although the Biden administration changed course, state legislative attacks on transgender people have reached new heights. As of February 2022, ten states have banned trans students from participating in sports in accordance with their gender

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<sup>145</sup> Grant, *supra* note 143.

<sup>146</sup> Percelay, *supra* note 143. The ACLU sued the Virginia school district on behalf of a trans student which resulted in years of litigation and one trip to the U.S. Supreme Court. On August 26, 2020, the Fourth Circuit ruled for the student. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593–99 (2020).

<sup>147</sup> Natasha Lennard, *Anti-Trans Bills Are Moving Through State Legislatures with Remarkable Speed*, THE INTERCEPT (Feb. 3, 2022), <https://perma.cc/SWU2-D5Z5>. In June 2022, the Alabama Attorney General defended that state's ban on gender care for people under 19 by analogy to the Supreme Court's decision eliminating the national right to abortion. See Opening Brief for State Defendants at 33, *Eknes-Tucker v. Governor of the State of Ala.* (June 27, 2022) (No. 22-11707). The brief erroneously argued that trans healthcare is not rooted in U.S. history and tradition. See Opening Brief for State Defendants at 33–34, *Eknes-Tucker* (No. 22-11707).

<sup>148</sup> See Marc Caputo, *DeSantis Moves to Ban Transition Care for Transgender Youths, Medicaid Recipients*, NBC NEWS (June 2, 2022), <https://perma.cc/DN7A-2RU6>.

<sup>149</sup> See U.S. Dep't of Educ. & U.S. Dep't of Just., *Dear Colleague Letter* (Feb. 22, 2017); Selena Simmons-Duffin, *Transgender Health Protections Reversed By Trump Administration*, NPR (Jun. 12, 2020), <https://perma.cc/F4V3-NML5>; Hallie Jackson & Courtney Kube, *Trump's Controversial Transgender Military Policy Goes into Effect*, NBC (Apr. 12, 2019), <https://perma.cc/2ASX-RNNH>.

identities, eight states have explicitly excluded transgender medical care from Medicaid, and two states have prohibited doctors from providing gender-affirming medical care to trans youth.<sup>150</sup> In one of the most aggressive steps, Texas Attorney General Ken Paxton issued an opinion letter finding that gender-affirming medical treatments for transgender minors constitute child abuse under state law.<sup>151</sup> The governor, Greg Abbott, promptly instructed state agencies to investigate parents who support their transgender children and clarified that licensed mandatory reporters and even members of the general public can face criminal penalties for failing to report adults who help trans kids access care.<sup>152</sup>

Antitransgender policing is another element of the hostile project of gender regulation.<sup>153</sup> Transgender people experience high levels of discrimination, harassment, and violence by police officers.<sup>154</sup> One-fifth of their interactions with police include harassment due to antitransgender bias.<sup>155</sup> Six percent of participants in the National LGBTQ Task Force's National Transgender Discrimination Survey reported that police had assaulted them, and two percent reported that police had sexually

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<sup>150</sup> Alabama, Arkansas, Florida, Idaho, Mississippi, Montana, South Dakota, Tennessee, Texas, and West Virginia banned transgender students from sports. Movement Advancement Project, *Equality Maps: Bans on Transgender Youth Participation in Sports*, <https://perma.cc/N9PZ-BRDN>. Arkansas and Tennessee banned medical care. However, Tennessee specifies that care is prohibited for "prepubertal" children, which is consistent with the trans-inclusive medical standards for transgender healthcare. *Id.* Arizona, Arkansas, Georgia, Missouri, Nebraska, Ohio, Tennessee, and Texas excluded trans healthcare from Medicaid. *Id.*

<sup>151</sup> Letter from Ken Paxton, Tex. Att'y Gen., to Matthew Kraus, Chair of Tex. H. Comm. on Gen. Investigating, Opinion No. KP-0401, Re: Whether certain medical procedures performed on children constitute child abuse (RQ-0426-KP) (Feb. 18, 2022).

<sup>152</sup> Letter from Greg Abbott, Gov. of Tex., to Jaime Masters, Tex. Comm'r of Fam. & Protective Servs. (Feb. 22, 2022); *see also* Jo Yurcaba, *Texas Governor Calls on Citizens to Report Parents of Transgender Kids for Abuse*, NBC NEWS (Feb. 23, 2022), <https://perma.cc/V4LP-VH2H>; Julian Mark, *Texas Governor Directs State Agencies to Investigate Gender-affirming Care for Trans Youths as 'Child Abuse'*, WASHINGTON POST (FEB 23, 2022), <https://perma.cc/MP9C-Q8KW>.

<sup>153</sup> *See generally* CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX (Eric A. Stanley et al. eds., 2d ed. 2015); JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (2011); DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW (2011).

<sup>154</sup> Jamie M. Grant, Lisa Mottet, Justin Tanis, Jack Harrison, Jody L. Herman & Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L LGBTQ TASK FORCE 159-61 (2011), <https://perma.cc/AF89-W3LQ>.

<sup>155</sup> *Id.* at 158. Reported rates are higher for trans people of color. *See id.* at 160.

assaulted them because of their gender identities.<sup>156</sup> The risks increase for trans people of color, trans people who do sex work, and trans people who are HIV positive. As the National Center for Transgender Equality reported in 2016, “[t]rans people who have done street economy work are more than twice as likely to report physical assaults by police officers and four times as likely to report sexual assault by police.”<sup>157</sup> According to the 2011 National Transgender Discrimination Survey, incarceration rates for transgender people may be roughly eight times the national average.<sup>158</sup>

Antitrans policies are often framed as a backlash against advances in trans cultural representation and political standing. Less than a decade has passed since *Time Magazine* announced “The Transgender Tipping Point,” a new era of transgender social acceptance through self-representation in media.<sup>159</sup> Actress and activist Laverne Cox perfectly encapsulated the promise of visibility when she told *Time*:

We are in a place now . . . where more and more trans people want to come forward and say, “This is who I am.” And more trans people are willing to tell their stories. More of us are living visibly and pursuing our dreams visibly, so people can say, “Oh yeah, I know someone who is trans.” When people have points of reference that are humanizing, that demystifies difference.<sup>160</sup>

In the years since, openly transgender people have risen to prominence as actors and directors, fashion models and designers, athletes, politicians, activists, business leaders, and Jeopardy champions. Five years ago, only thirty percent of American adults said they knew someone who identified as transgender; in

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<sup>156</sup> *Id.* at 160. The report includes harrowing accounts of assault and harassment:

After I was raped, the officer told me that I got what I deserved. . . . They all started to laugh. “I could show her,” one police officer said. Just then my friends bolted through the door and instructed me to run. I stumbled to my feet and narrowly escaped the officer’s hands. “Fucking dykes! Don’t come back here unless you wanna get fucked!” one of the officers screamed as we ran off.

*Id.* at 160–61.

<sup>157</sup> NAT’L CTR. FOR TRANSGENDER EQUAL., BLUEPRINT FOR EQUALITY: A TRANSGENDER FEDERAL AGENDA 28 (2016).

<sup>158</sup> *See id.* at 163.

<sup>159</sup> *See* Katy Steinmetz, *The Transgender Tipping Point*, TIME MAGAZINE (May 29, 2014).

<sup>160</sup> *Id.*

2021, that number was higher than fifty percent.<sup>161</sup> In the United States, trans visibility may be at an all-time high.<sup>162</sup>

Transgender activists have also sought recognition within the legal system. They highlight the continued criminalization of trans people, as well as the legal obstacles to transgender inclusion in existing institutions and civil rights protections. They ask courts, agencies, and legislative assemblies to treat transgender men as men, transgender women as women, and reduce barriers for nonbinary participation in social, political, and economic life. These efforts have produced major advances for transgender civil rights since 2014: in 2016, President Obama's Department of Education issued guidance defining a student's sex by their gender identity for the purposes of Title IX;<sup>163</sup> in 2020 the U.S. Supreme Court ruled that Title VII covers discrimination on the basis of gay or trans identity;<sup>164</sup> and in New York, activists successfully pressed the legislature to repeal the state's "Walking While Trans" law,<sup>165</sup> to take just a few salient examples.

These are extraordinary accomplishments for legal advocates, with material and symbolic value to transgender Americans.<sup>166</sup> When North Carolina passed a law preempting municipal antidiscrimination ordinances and requiring people to use the sex-segregated restrooms matching the gender markers on their birth certificates, the federal government sued.

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<sup>161</sup> Compare PEW RSCH. CTR., WHERE THE PUBLIC STANDS ON RELIGIOUS LIBERTY VS. NONDISCRIMINATION 28 (2016), with Matt Loffman, *New Poll Shows Americans Overwhelmingly Oppose Anti-transgender Laws*, PBS NEWS HOUR (Apr. 16, 2021), <https://perma.cc/32WE-JNJ2>.

<sup>162</sup> Micha Cardenas, *Dark Shimmers: The Rhythm of Necropolitical Affect in Digital Media*, in TRAP DOOR: TRANS CULTURAL PRODUCTION AND THE POLITICS OF VISIBILITY xii (Reina Gossett et al. eds., 2017).

<sup>163</sup> See U.S. Dep't of Just. & U.S. Dep't of Educ., Dear Colleague Letter (May 13, 2016); see also Caitlin Emma, *Obama Administration Releases Directive on Transgender Rights to School Bathrooms*, POLITICO (May 12, 2016), <https://perma.cc/X4KA-3KVK>.

<sup>164</sup> *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1754 (2020).

<sup>165</sup> Melissa Gira Grant, *The NYPD Arrests Women for Who They Are and Where They Go—Now They're Fighting Back*, VILLAGE VOICE (Nov. 22, 2016), <https://perma.cc/Q54S-G5MJ>; Emma Whitford, *When Walking While Trans Is a Crime*, THE CUT (2018), <https://perma.cc/H4EK-BHW9>; Melissa Gira Grant, *This Is How Sex Workers Win*, THE NEW REPUBLIC (Mar. 2, 2021), <https://perma.cc/F2N2-69P3>; Natasha Lennard, *Repealing the "Walking While Trans" Ban Is Part of the Struggle to Decriminalize Sex Work*, THE INTERCEPT (Feb. 4, 2021), <https://perma.cc/H5JJ-NAQJ>; Cecilia Nowell, *New York's 'walking while trans' ban targeted women of color, advocates say. Now it's being repealed.*, THE LILY (Feb. 5, 2021), <https://perma.cc/REJ3-HQDS>.

<sup>166</sup> See, e.g., Taylor N.T. Brown & Jody L. Herman, *The Cost of Employment Discrimination Against Transgender Residents of Florida*, WILLIAMS INST. (2015).

Then—Attorney General Loretta Lynch famously addressed transgender people directly, stating that “the Department of Justice and the entire Obama Administration wants you to know that we see you; we stand with you; and we will do everything we can to protect you going forward.”<sup>167</sup>

Within the transgender movement, and the broader LGBT legal movement of which it is a part, much of the debate over how to respond to apparent backlash turns on visibility politics. Some advocates herald visibility as the path to social justice, arguing that cultural representation that accurately portrays transgender lives will sway public opinion in favor of inclusion. Leading movement organizations like the National LGBT Task Force, the Human Rights Campaign, and GLAAD remind queer and trans people that the basic building block of LGBT politics is the act of coming out.<sup>168</sup> Queer and trans people make the personal political by making their gender and sexual identities known to their public and private communities. Starting in 2009, activists have celebrated International Transgender Day of Visibility to “acknowledge the determination it takes to live openly and authentically,” and “lift up the violence and discrimination that many transgender and non-binary people, especially trans women of color and Black trans women, still face.”<sup>169</sup> Because most Americans learn about transgender people from the media, GLAAD launched a transgender media program “to fairly and accurately tell the stories of transgender lives.”<sup>170</sup> In 2012, Janet Mock, author, editor, and activist at the forefront of the “transgender tipping point,” also launched a visibility campaign

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<sup>167</sup> Loretta E. Lynch, Attorney General, U.S. Dep’t of Just., Press Conference Remarks (May 9, 2016). A certain irony in her statement was not lost on activists. At the same time that the Attorney General was invoking transgender visibility in a statement of solidarity and support from the government, transgender people were languishing in the jails and prisons around the country. In the words of two advocates, “the DOJ’s championing of trans rights simply does not align with the DOJ’s practices regarding trans people who are incarcerated.” Angela Peoples & H Kapp-Klote, *Loretta Lynch and the Criminalization of Trans People*, TRUTHOUT (May 18, 2016), <https://perma.cc/M4NM-8X8B>.

<sup>168</sup> See, e.g., *Coming Out*, HUM. RTS. CAMPAIGN, <https://perma.cc/4NXY-AJ4L>; see also *Coming Out*, GLAAD, <https://perma.cc/48CY-JYQU>. Although “coming out” is understood as a political act by virtue of making LGBT people more visible to non-LGBT people, the origins of the phrase come from the turn of the twentieth century, when gender and sexual nonconforming communities mimicked aristocratic debutante balls by “coming out” into the gay community. See generally CHAUNCEY, supra note 37.

<sup>169</sup> Press Release, Madeleine Roberts, Hum. Rts. Campaign, Human Rights Campaign Honors International Transgender Day of Visibility 2021 (March 31, 2021), <https://perma.cc/6LWA-F6HE>.

<sup>170</sup> GLAAD Transgender Media Program, GLAAD, <https://perma.cc/65S2-7T75>.

called #GirlsLikeUs.<sup>171</sup> It seems that visibility remains, as Professor Eve Sedgwick suggested, connected with “the most significant stakes for the [LGBT] culture.”<sup>172</sup>

A growing chorus responds that visibility without protection invites surveillance and backlash.<sup>173</sup> Professor Eric Stanley points to the “grim reality that the expansion of even ‘positive’ representation might not have simply a neutral corollary to violence but perhaps a causal one as well.”<sup>174</sup> Visibility’s dual nature has been called a “fundamental paradox.”<sup>175</sup> Some criticize these campaigns for promoting a sanitized image of transgender people, duplicating the implicit racial and class exclusions in the respectable gay figure of the homophile era.<sup>176</sup> Others argue that trans visibility on these terms is limited to inclusion in the status quo and forecloses the possibility of trans politics as a means to challenge distributions of power that marginalize trans people in the first place.<sup>177</sup> Another set of responses emphasizes that, for some transgender people, being out in their daily lives invites danger or undermines their desire to “pass” as cisgender. In response, critics have begun to call for less visibility.<sup>178</sup>

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<sup>171</sup> Janet Mock, *Solidarity & Sisterhood: My Journey (So Far) with #GirlsLikeUs*, JANET MOCK, <https://perma.cc/UC9N-F5WM>.

<sup>172</sup> EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 18 (1990).

<sup>173</sup> See CHAUNCEY, *supra* note 37, at 33–45; Rosemary Hennessy, *Queer Visibility in Commodity Culture*, CULTURAL CRITIQUE 31, 31–33 (1994); Erin J. Rand, *Essay, An Appetite for Activism: The Lesbian Avengers and the Queer Politics of Visibility*, 36 WOMEN’S STUD. COMM’N 121, 124–28 (2013); Nicole E. Roberts, *The Plight of Gay Visibility: Intolerance in San Francisco, 1970–1979*, 60 J. HOMOSEXUALITY 105, 109–12 (2013); SUZANNA DANUTA WALTERS, *ALL THE RAGE: THE STORY OF GAY VISIBILITY IN AMERICA* 35–38, 43–49 (2001); Cardenas, *supra* note 162, at 170–73; TOBY BEAUCHAMP, *GOING STEALTH: TRANSGENDER POLITICS AND U.S. SURVEILLANCE PRACTICES* 139 (2018).

<sup>174</sup> STANLEY, *supra* note 141, at 85.

<sup>175</sup> Cardenas, *supra* note 162, at xvi.

<sup>176</sup> See, e.g., Alex V. Green, *Trans Visibility Won’t Save Us*, BUZZFEED NEWS (Dec. 4, 2019), <https://perma.cc/FRP8-6YES>.

<sup>177</sup> See generally Emmanuel David, *Capital T: Trans Visibility, Corporate Capitalism, and Commodity Culture*, 4 TSQ: TRANSGENDER STUD. Q. 28 (2017); see also Rosemary Hennessy, *Queer Visibility in Commodity Culture*, CULTURAL CRITIQUE 31, 43 (1994) (making a similar claim about queer visibility politics in the 1990s).

<sup>178</sup> See CARLY ANN THOMSEN, *VISIBILITY INTERRUPTED: RURAL QUEER LIFE AND THE POLITICS OF UNBECOMING* 115–16 (2021). *But see* WALTERS, *supra* note 173, 18–19 (advocating visibility without assimilation). See also generally STANLEY, *supra* note 141; Jos Truitt, *Against Visibility*, FEMINISTING, <https://perma.cc/BFH2-76ZC>; Eriq Zhang, *The Radical Act of Invisibility on Trans Day of Visibility*, WASHINGTON POST (Mar. 31, 2022), <https://perma.cc/ZB6C-XR4H>.

## B. Trans Visibility and New York City's Walking While Trans Law

*Vice Patrol* encourages us to question whether the waves of progress and repression that attend greater transgender visibility are as uniform as they may appear. By disaggregating the institutions of criminal justice, Lvovsky makes a convincing case that police officers exploited their disagreement with state court judges to sustain their project of antihomosexual policing. In her case study, gay activists succeeded in closing this “epistemic gap” within the criminal justice system by promoting their own understanding of gay life in the public sphere. Their visibility campaign produced an alternative legal subject—the respectable gay man—who was fit for prime time and tailored to combat negative stereotypes. It neither displaced police knowledge nor was it tailored to be inclusive of all the gay men who police routinely targeted, but it made it much more difficult for the police to exploit judicial ignorance. Trans advocates today are already following that example.

A range of misdemeanor crimes that are not explicitly about regulating gender or sexual nonnormativity nonetheless operate to regulate transgender people. Police justify heightened scrutiny on gender nonconformity by frequently conflating it with disorder.<sup>179</sup> Crimes like disorderly conduct, lewd conduct, indecent exposure, solicitation, and loitering are routinely used to target gender nonconformity.<sup>180</sup> Trans women, and especially trans women of color, are particular targets for arrest under quality-of-life statutes related to sex work.<sup>181</sup> In states that criminalize loitering for the purposes of prostitution (LPP) or solicitation, police have arrested transgender women for walking their dogs, walking home from their jobs, or simply walking down the street in New York's West Village.<sup>182</sup> Advocates have rechristened the laws “walking while trans” bans because they are so often used to harass and arrest transgender women.<sup>183</sup> And the potential

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<sup>179</sup> Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CAL. L. REV. 1637, 1664 (2021) (citing MOGUL, RITCHIE & WHITLOCK, *supra* note 153).

<sup>180</sup> *Id.*; Strader & Hay, *supra* note 130, at 465–66.

<sup>181</sup> See Morgan, *supra* note 175, at 1664; Strader & Hay, *supra* note 130, at 470; Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof 2017 Special Issue: Enhancing Women's Effect on Law Enforcement in the Age of Police and Protest*, 24 WM. & MARY J. WOMEN & L. 5, 13–14 (2017); Ritchie, *supra* note 130, at 368.

<sup>182</sup> AMNESTY INT'L, *supra* note 130, at 23 (2005); see also Grant, *supra* note 143.

<sup>183</sup> MOGUL, RITCHIE & WHITLOCK, *supra* note 153, at 61.

risk to trans people is not exclusive to those who are already targets of vice enforcement—trans people are “frequently pathologized as hypersexual if not as potential sex workers” regardless of “socioeconomic location[ ].”<sup>184</sup>

These “walking while trans” bans reflect, in part, a popular association between transgender women and prostitution. According to media scholars, the image of the trans sex worker is “near universal.”<sup>185</sup> Media accounts depicted transgender women as hypersexual going back to the sexual revolution of the 1960s.<sup>186</sup> Trans studies scholars explain that “[t]he most obvious and visible facet of this hypersexualization, in media narratives and popular understanding, is, consequently, the figure of the trans prostitute.”<sup>187</sup> As trans writer Julia Serrano has elaborated, “most popular images and impressions of trans women revolve around sexuality: from ‘she-male’ and ‘chicks with dicks’ pornography to media portrayals of us as sexual deceivers, prostitutes, and sex workers.”<sup>188</sup> These images render transgender women visible through the figure of a dangerous, gender-nonconforming sex worker.

*Vice Patrol* makes the relationship between cultural visibility and antitransgender policing look awfully familiar. A cultural representation hardened into a strong stereotype linking trans women of color to criminalized behavior. As one transgender Latina woman described an interaction with police in Jackson Heights, “I was just buying tacos. They grabbed me and handcuffed me. They found condoms in my bra and said I was doing sex work. After handcuffing me they asked me to kneel down and they took my wig off. They arrested me and took me away.”<sup>189</sup> During a deposition in a Legal Aid Society lawsuit contesting antitransgender policing, one officer testified that he scrutinized women for Adam’s apples to arrest them on prostitution charges.<sup>190</sup> In its much-cited 2005 study, Amnesty

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<sup>184</sup> Nihils Rev & Fiona Maeve Geist, *Staging the Trans Sex Worker*, 4 TSQ: TRANSGENDER STUD. Q. 112, 117 (2017).

<sup>185</sup> *Id.* at 113.

<sup>186</sup> *See id.* at 115 (attributing this stereotype to the popular press).

<sup>187</sup> *Id.* at 116.

<sup>188</sup> JULIA SERANO, WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 134 (2016).

<sup>189</sup> MAKE THE ROAD NEW YORK, TRANSGRESSIVE POLICING: POLICE ABUSE OF LGBTQ COMMUNITIES OF COLOR IN JACKSON HEIGHTS 4 (2012).

<sup>190</sup> Graham Rayman, *NYPD Changes How It Applies Loitering Law as It Settles Legal Aid Lawsuit over Arrests of Transgender People, Women Accused of Prostitution*, NEW YORK DAILY NEWS (Jun. 5, 2019), <https://perma.cc/3ELH-2ZUT>.

International found express linkages between the stereotype of the trans sex worker and antitransgender policing. The report concluded that “subjective and prejudiced perceptions of transgender women as sex workers often play a significant role in officers’ decisions to stop and arrest transgender women.”<sup>191</sup> In the hands of police officers, the stereotype became a self-fulfilling justification to target trans women for arrest.<sup>192</sup>

Cultural representation fueled antitransgender policing, but it did not engender a disagreement inside the enforcement system. The New York Court of Appeals squashed efforts to challenge the law in the immediate aftermath of its passage in 1976. The Court endorsed police competence and discretion in singling out perpetrators, writing that:

Based on particulars obvious to and discernible by any trained law enforcement officer, it would be a simple task to differentiate between casual street encounters and a series of acts of solicitation for prostitution, between the canvas of a female political activist and the maneuvers of a Times Square prostitute.<sup>193</sup>

Buoyed by supportive courts, police officers routinely arrested trans women for LPP.

To challenge the law, advocates developed a visibility campaign to *open* an epistemic gap between enforcement agencies. Attorneys with the Legal Aid Society had attempted to overturn the law on constitutional grounds in federal court, but the suit stalled in district court, leading to a 2019 settlement. NYPD agreed to revise its enforcement guidelines, but the law remained intact.<sup>194</sup> In response, advocates regrouped and formed a broader coalition of transgender groups, LGBT movement lawyers, the organizing powerhouse Make the Road NY, and public defenders to put pressure on district attorneys not to enforce the

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<sup>191</sup> AMNESTY INT’L, *supra* note 130, at 22. Again, the similarities with *Vice Patrol* merit elaboration: “[L]aw enforcement officers profile LGBT individuals, in particular gender variant individuals and LGBT individuals of color, as criminal in a number of different contexts, and selectively enforce laws relating to ‘morals regulations.’” *Id.* at 4.

<sup>192</sup> New York courts sometimes sustained LPP arrests by relying on evidence that included the defendant’s clothing. For example, in *People v. Jones*, N.Y. L.J., Sept. 20, 1989, at 21 (N.Y. App. Term June 22, 1989), evidence that a defendant who the court understood as “a 25 year old male[] [who] wore a black skirt and black bra” weighed in favor of the charges. *Id.*

<sup>193</sup> *People v. Smith*, 378 N.E.2d 1032, 1036 (1978).

<sup>194</sup> Jaclyn Diaz, *New York Repeals “Walking While Trans” Law*, NPR (Feb. 3, 2021), <https://perma.cc/9TTY-V7CD>.

law and to push for legislative repeal in Albany.<sup>195</sup> A Lambda Legal strategist later reflected, “I would say one of the biggest tools we had in the campaign was having people to go and meet directly with our elected officials, and to put a human face behind the violence that people were subjected to under this law.”<sup>196</sup>

The campaign successfully convinced Brooklyn District Attorney Eric Gonzalez to end enforcement and to vacate all bench warrants and underlying charges for “walking while trans” dating back to 2012.<sup>197</sup> Gonzalez explained, “I had my eyes opened to some of the issues that trans women who were sex workers faced, such as the constant harassment from police, even when they were not engaged in sex work.”<sup>198</sup> He went on to say that “[a]fter sitting down with some trans individuals, I learned about the trauma of arrest and incarceration in their lives and how that impacted them quite differently than other communities.”<sup>199</sup> Meeting trans women made him more sympathetic to the harms of enforcement. On February 2, 2021, when New York Governor Andrew Cuomo signed a law to repeal the act, he similarly positioned the move as a way of “reducing the harassment and criminalization transgender people face simply for being themselves.”<sup>200</sup>

Trans advocates introduced a new way of thinking about sex work and gender identity to some of the most powerful actors in New York’s criminal legal system. They displaced the stereotype of the unruly trans sex worker with a more sympathetic representation, including of trans sex workers and the real-world problems that flow from overpolicing. The agents of epistemic change were not police or any enforcement institution, but rather the regulated group and their advocates.

Their success recalls the closing chapters of *Vice Patrol*, when homophile activists engineered self-representation to accomplish their goals in law reform. In the contemporary scene,

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<sup>195</sup> See Jo Yurcaba, *New York Repeals “Walking While Trans” Law After Years of Activism*, NBC NEWS (Feb. 4, 2021), <https://perma.cc/Q7VE-KLVJ>. Trans women like Bianey Garcia led the charge. Garcia was arrested for being trans and having condoms in her purse as she walked home from a nightclub with her boyfriend in 2008. *Id.*

<sup>196</sup> Amanda Luz Henning Santiago, *How New York Repealed the ‘Walking While Trans’ Law*, CITY & STATE NY (Jun. 21, 2021), <https://perma.cc/T5TG-5KZ4>.

<sup>197</sup> See Diaz, *supra* note 194.

<sup>198</sup> Santiago, *supra* note 196.

<sup>199</sup> *Id.*

<sup>200</sup> Diaz, *supra* note 194.

organized transgender advocacy from community groups and direct service organizations to national political and legal organizations play a larger and more coordinated role in shaping common sense about gender identity. To fully understand the visibility trap in antitransgender policing, then, we must recognize transgender people and their advocates as important contributors to the fight for epistemic dominance in Lvovsky's model. With their work inside the frame of analysis, we can better understand how the criminal system absorbed a competing discourse about trans life and how that discourse helped to undermine the state's LPP law.

The strategic use of self-representation in the campaign also helps us understand how "visibility" as a concept is undertheorized in trans political debate. Visibility itself has no particular political valence, its operation depends on who is becoming visible to whom and under what conditions. And here again Lvovsky comes to our aid. She traces the operation of one kind of visibility—*cultural salience*—which joins with *state surveillance* to produce a visibility trap. She argues that "legal regimes can maintain and even expand their power over policed groups . . . by sustaining exploitable disagreements about the nature of the very conduct being regulated."<sup>201</sup> At the same time, gay visibility was a key component of resolving those disagreements, rendering them more difficult to exploit. There, the key form of visibility came from within gay communities as a form of *self-representation*. In short, *Vice Patrol* encourages us to differentiate between the queer politics of visibility—what I'm calling self-representation—and visibility in mainstream media (*cultural salience*) or visibility to the criminal justice system (*state surveillance*).

### C. Strategic Visibility in the Crucible of the Courtroom

Self-representation, moreover, need not be naïve. Visibility politics are strategic precisely because they produce figures designed to achieve certain ends. Making rights claims requires a deliberate practice of making oneself visible to the civil courts. It carries the possibility of state protection with the dangers of misrecognition, exclusion, and violence. Nowhere is this more evident than in the particular theater of the courtroom. There, the scripts are narrower, and litigants must tailor their self-representations

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<sup>201</sup> LVOVSKY, *supra* note 4, at 18.

to fit into the preexisting categories of the relevant jurisprudence. Constitutional arguments under the Equal Protection Clause, for example, require that litigants present themselves as part of a “discrete and insular minority.” Rights claimants must make themselves legible to judicial authority by balancing authentic self-representation with the exigencies of existing doctrine. They should not, however, be mistaken for accurate descriptions of subjective experience.

The decision that opened this Book Review is a case in point. After losing in trial court, trans minor H.S. and his parents appealed to the Indiana Court of Appeals to change the gender marker on his birth certificate. In Indiana, adults can change their legal names and gender markers by demonstrating that their requests are made “in good faith and not for a fraudulent or unlawful purpose.”<sup>202</sup> State courts have rejected attempts to impose additional requirements, such as evidence that applicants have undergone medical interventions.<sup>203</sup>

The bar for minors is higher.<sup>204</sup> In H.S.’s case, members of the appellate panel agreed that gender-marker changes for minors must serve “the best interests of the child,” both to protect “the State’s interest in the child’s wellbeing” and to ensure that parental support for the change did not go “essentially unquestioned.”<sup>205</sup> As the appellate panel debated how to apply the “best interests” test to the evidence presented, it adjudicated an epistemological conflict over the definition of gender.

All the evidence supporting the petition was predicated on one concept of gender identity: an individual’s internal sense of having a particular gender. Under this definition, a person is considered transgender when their gender identity does not match the gender they were assigned at birth. In medicine, this understanding of gender is pathologized as “gender dysphoria,” for which patients can seek a range of hormonal and surgical treatments.<sup>206</sup> Transgender people like H.S. often socially transition by changing their gender presentation to match their identities and sometimes seek medical support.

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<sup>202</sup> *In re H.S.*, 175 N.E.3d 1184, 1186 (Ind. Ct. App. 2021) (citing *In re Petition for Change of Birth Certificate*, 22 N.E.3d 707, 710 (Ind. Ct. App. 2014)).

<sup>203</sup> See *id.* at 1186 (citing *In re R.E.*, 142 N.E.3d 1045, 1047 (Ind. Ct. App. 2020)).

<sup>204</sup> See *id.* at 1188.

<sup>205</sup> *Id.* at 1187–88.

<sup>206</sup> *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N (2020), <https://perma.cc/GP5X-F7YH>.

H.S. produced evidence consistent with this understanding of gender, including the belief that an individual's sense of their own gender, as well as the opinions of medical professionals, are authoritative indicators.<sup>207</sup> His doctor wrote that he had changed sex "by medical procedure." His counselor explained that his symptoms were consistent with gender dysphoria and also that he had presented himself as male at all sessions, had begun testosterone therapy, and had stated a desire to change his legal name and gender marker.<sup>208</sup> His parents credited his sense of self, and they observed that his transition seemed to have made him happier.<sup>209</sup> His mother testified that H.S. "understands what's going on. He knows it's not a phase, it's who he is as a person."<sup>210</sup> The dissenting judge shared this concept of gender, characterizing the medical providers' letters as "relevant to and probative of" H.S.'s medical history and crediting H.S.'s sense of himself as a factor to consider in the best-interest analysis.<sup>211</sup>

The trial court understood gender differently. It found that H.S.'s parents were acting to "support their child's decisions" rather than "objectively considering the best interests of their child."<sup>212</sup> The court also discounted the provider letters and relied instead on its own view that H.S., and teenagers in general, are unreliable narrators of their own genders. It wrote that any "parent who has raised a teenager is well-aware that their thoughts, opinions, and wishes change rapidly. Teenagers are full of hormones and emotions which often results in impulsive, short-sighted decisions. At this age, teenagers are also easily influenced by peer pressure, trends, and pop culture."<sup>213</sup> Despite the overwhelming medical and social evidence, the court relied on its own assessment that H.S. "appears much younger than

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<sup>207</sup> His parents also credited psychological knowledge of gender identity as authoritative. His father testified that he and his wife

value evidence so when this thing started, we spent some time looking up [ . . . ] evidence based articles, psychological studies and that sort of thing and came to the conclusion that [ . . . ] this would definitely be something that would be beneficial to pursue. And as we got into it, it definitely has become clear that this is the right thing.

*In re H.S.*, 175 N.E.3d at 1190–91 (Crone, J., dissenting) (quoting Tr. Vol. 2 at 15–16).

<sup>208</sup> *Id.* at 1189.

<sup>209</sup> *Id.* at 1190.

<sup>210</sup> *Id.*

<sup>211</sup> *See id.* at 1189. As the dissent explained, the trial court should not have admitted the letters into evidence if it questioned their authenticity. *Id.*

<sup>212</sup> *In re H.S.*, 175 N.E.3d at 1191 (quoting Appealed Order at 8).

<sup>213</sup> *Id.* at 1190 (quoting Appealed Order at 7).

the stated age,” and his “biological maturity level seems far less than expected for fifteen [ ] years of age,” meaning that he did not “fully underst[and] or appreciate[ ] the significance of the requested action.”<sup>214</sup> The strong implication was that H.S. may not be male, and that his parents were simply playing along. Transgender identities should not be taken seriously, at least not for teenagers.

The appellate majority endorsed this view. Like the trial court, it did not believe that H.S. or his parents or his doctor or his counselor were reliable sources for H.S.’s gender identity, and it would not credit the parents’ “conclusory testimony prompted by their teenager’s relatively recent disclosure.”<sup>215</sup> It found the medical evidence lacking, never mind that the statute does not require medical evidence of this kind.<sup>216</sup> The court did not articulate a standard by which future trans teenagers could fare better, writing only that a minor’s medical history is “highly relevant.”<sup>217</sup>

The case epitomizes one of Lvovsky’s key insights—that the raw materials of visibility are forged into authoritative mandates in the crucible of the courtroom. The case turned on a “best interests of the child” analysis, but conflicting views about sex and gender fueled the arguments on both sides. The trial court and appellate majority believed that each person is either male or female, a fact that is self-evident at birth. For H.S. and his family, the best strategy was to hew closely to the medical model of transsexuality by arguing that a child’s gender identity can conflict with the sex they are assigned at birth and that it is in the best interests of that child to enable them to live according to that identity. That representation may have been a faithful articulation of H.S.’s subjectivity, or it may have been an attempt to fit his gender into the closest available script. It is the peculiar nature of judicial opinions that the appellate majority’s view now carries the weight of authoritative truth within its jurisdiction. This dynamic will only grow in political importance, as challenges to recent antitransgender state legislation and administrative actions reach courts.

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<sup>214</sup> *Id.* at 1192 (quoting Appealed Order at 8–9).

<sup>215</sup> *Id.* at 1188. Curiously, the court admitted in a footnote, “I acknowledge that neither expert medical testimony nor medical records is a statutory prerequisite for a gender marker change. However, as a practical matter, it could be crucial to the trial court’s decision-making process.” *Id.* at 1188 n.3.

<sup>216</sup> *See id.* at 1188 & n.3.

<sup>217</sup> *In re H.S.*, 175 N.E.3d at 1188.

## III. CONCLUSION

Which leaves a further puzzle ripe for future scholarship: As we watch the legal system develop a new body of authoritative knowledge about gender identity, how will H.S. and other transgender people respond? Will they develop new strategic politics of visibility, an “opacity with representation,” that can secure protection without inviting harm?<sup>218</sup> With its keen diagnosis of the visibility trap, *Vice Patrol* recounts an episode where well-placed disagreements could have systemic effects. But it also illuminates a path for further histories examining how regulated people made strategic use of ignorance and knowledge to intervene in the visibility trap.

Such histories might complicate the stories we know about queer- and trans-rights movements by disentangling the forms of visibility generated within queer and trans communities from the epistemologies of gender and sex that civil rights advocates present on their behalf. We might discover new dimensions to LGBT civil rights history, following from Part II of this Book Review, by centering advocates’ strategic decisions about when and how to make queer and trans lives visible to different state agencies.<sup>219</sup> The next generation of LGBT legal history might build from *Vice Patrol* to tell the story of queer and trans legal consciousness.

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<sup>218</sup> STANLEY, *supra* note 141, at 88. For a study of how undocumented queer young people develop strategic visibility politics, see generally Jesus Cisneros & Christian Bracho, *Coming Out of the Shadows and the Closet: Visibility Schemas Among Undocuqueer Immigrants*, 66 J. OF HOMOSEXUALITY 715–34 (2019).

<sup>219</sup> See, e.g., Kate Redburn, *Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement 1964-1986*, LAW & HIST. REV. (forthcoming 2022).