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FORUM

Response

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I want to begin by thanking the editors of *Law and History Review* for hosting this rich exchange on *Vice Patrol*, as well as Marie-Amélie George, Yvonne Pitts, and Steven Maynard for their generous and generative comments. Engaging so deeply and so rigorously with another scholar's project, connecting it to one's own research and even to one's own life experience, is an act of remarkable collegiality, and I am grateful for their time and reflections.

In the subsequent pages, I want to respond to their core provocations: George's examination of the persisting myth of the visible gay body; Pitts's meditation on the law's (and the book's) ambivalence about the "thing being policed"; and Maynard's inquiries into the politics of a history that, in emphasizing ambiguity and contestation, departs from more familiar and uniformly critical stories of this period. Conveniently, these topics also let me reflect on the intellectual origins of this book, my methodological commitments as a historian of sexuality and a legal historian, and what I see as the value of complicating our understanding of legal institutions.

The Visible Gay Body

George homes in on a key theme of *Vice Patrol*: the law's (and the public's) profound attachment to the supposed visibility of queer bodies. From liquor proceedings to media surveys of gay life, legal and cultural authorities at midcentury insisted that queer individuals' fashions and cultural codes made them "obvious" to straight observers—even as those codes shifted dramatically, and even as journalists sometimes remarked on how inconspicuous they were. George connects this story to her own research on the LGBTQ rights movement, and specifically to the limits of assimilationist strategies. What does this history of enforced visual difference say about the possibilities of ever convincing straight Americans that queer people are "just like them"?[1]

[1] George, *supra*, at 819.

I especially appreciate George's comments because the question of visibility is central to *Vice Patrol*'s origins. I came to history from a background in literature and critical theory, influenced by critics and queer theorists who approached the imperative to make queerness visible largely as a project of social control.[2] Some histories share those cynical priors.[3] But I was struck by the more liberationist vision that emerged in many urban studies, which often portray moments of cultural openness as shifts toward pluralism and acceptance. *Vice Patrol* began as an attempt to revisit that story, exploring the very real ways that cultural visibility fueled the regulation of gay life. As my research led to broader epistemic debates—the authority of psychiatrists, for instance, or vice officers' entanglements with queer ethnography—the focus expanded toward the law's broader role in shaping knowledge about sexual difference.

The book ultimately centers on three claims. First, *Vice Patrol* argues that anti-gay policing, far from being a monolithic project universally embraced by legal actors, was a site of profound contestation and struggle within the legal system, reflecting a range of political, institutional, and pragmatic factors well beyond the perceived morality of gay life. Second, it argues that, at a time when professional experts increasingly challenged public assumptions about homosexuality, legal battles around policing emerged as a critical arena for shaping the power and the ultimate legacy of these competing voices. Courtroom debates brought the power of the law to bear in deciding which bodies of knowledge were authoritative. They were also sites where the impact of seemingly familiar cultural developments could be unexpected, with liberal moments redounding to fuel policing and more regulatory chapters ironically softening the operations of the law. Third, and finally, *Vice Patrol* argues that, in this context of contestation over both the value of vice enforcement and the nature of homosexuality itself, the power of the police's campaigns hung on the coexistence of multiple competing views of gay life in the legal system: what I call *epistemic gaps* separating how vice officers and judges understood queer practices, which disarmed internal checks on police abuses. The daily realities of anti-gay policing, in short, did not just reflect the law's internal struggles over the value of vice policing. They also reflected the law's deeper disagreements about the thing being policed.

Claims about recognizing queer bodies are just one part of the final project, among many legal disputes about the value of public knowledge and stereotype. Still, George's commentary suggests that there may be something special about this original thread: that something about *seeing* queerness as a way of knowing about queerness stands out.

[2] Such critics have, for instance, suggested that moments of gay cultural visibility have appeased anxieties about sexual difference, flattered straight audiences' sense of innate superiority, or perpetuated reductive stereotypes about queer communities. Lee Edelman, *Homographesis: Essays in Gay Literary and Cultural Theory* (New York: Routledge, 1994); Scott Herring, *Queering the Underworld: Slumming, Literature, and the Undoing of Lesbian and Gay History* (Chicago: University of Chicago Press, 2007); and Leo Bersani, *Homos* (Cambridge: Harvard University Press, 1996).

[3] An especially notable example is Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago: University of Chicago Press, 1999).

That story may stand out because of the sheer theatricality of midcentury stereotypes of gay individuals. The broadness of such tropes made them persistent fixtures of the popular imagination, and it continues to capture historians' attention today.

But I also suspect that this story stands out due to the primacy of visual perception as a supposedly commonsensical or democratic form of knowledge. A recurrent theme in the book is the law's preference for lay wisdom over trained expertise: the many ways, and reasons why, legal agents defended the primacy of common-sense presumptions about sexuality against the aspersions of so-called "experts." That dynamic extends beyond physical stereotype, but it may feel especially salient when it comes to the public's presumed ability to visualize the sexual other. And not, crucially, because those visual marks of difference were especially self-evident; as the book argues, they often were not. But because there was something especially valuable about the public's purported ability to spot queer bodies—something about visuality as a tool of social control that the public was especially loath to give up.

George contrasts this history with activists' more successful strategies of social assimilation in the late-twentieth century. For a range of reasons, she suggests, Americans may have been more willing to concede that gay families act just like straight families than that gay people look like straight people.

Simply drawing the comparison offers a useful bridge between the legal battles explored in *Vice Patrol* and the broader universe of gay-rights organizing and litigation that took root in these same years. Although often conceptualized separately, these fields involved many shared strategies of sympathy and persuasion.

At the same time, George's comparison itself affirms the exceptionalism of the visible body as a tool of social hierarchy. Latent in her history, after all, is the public's unique desire to visualize queer bodies: the notion that straight Americans could accept gay people in their neighborhoods, their restaurants, and even their PTAs, but only if they could *see* them. The precise stereotypes examined in *Vice Patrol* are often specific to their time. (Red ties and sneakers?) But George reminds us that the habit of claiming visual mastery over queer bodies as a way of asserting social mastery over queer communities—what else, after all, is something like "gaydar" in the straight community?—persists well past the decades studied in the book.

The Thing Being Policed

Pitts offers a rich meditation on another key theme: the role of the police in constructing legible categories of sexual "deviance," both for their contemporaries and for historians writing about queer history today. As Pitts observes, a certain imprecision over "the thing being policed" was not just a feature of midcentury vice squads. It also hangs over the book itself, inherent in any historical account of marginalized social and sexual practices.

Historians of sexuality have long observed that writing queer history raises close questions of definition, recovering the tales of individuals who rarely recorded their subjectivities for posterity. Were the Black, gender-bending

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sex workers bullied by police officers in Detroit, for instance, best seen as gay, trans, or neither? A focus on policing raises additional questions. However we identify those individuals, does it make sense to think of such abuses as part of the same program of policing as officers' far gentler arrests of middle-class, white men? What of officers' similar enticement tactics against cisgender, straight female prostitutes? (If only for reasons of space, I answer *yes* to the first, *no* to the second.)

Particularly in a police history, moreover, we must recognize the police's role in shaping our understandings of such stories. A key part of vice enforcement at midcentury was defining the conceptual bounds of criminalized activity: translating the complex universe of queer people' social and sexual practices into something legible as proper subjects of the criminal law. This was especially the case given the many vague statutes enforced by officers: "lewd solicitation," "disorderly conduct," "nuisance." At what point did tapping one's foot in a bathroom or flirting at a bar become sufficiently "disorderly" to count as criminal? At what point were certain fashions or mannerisms sufficiently conspicuous to pose a "nuisance"? At what point were men seeking consensual partners in bathrooms part of the same pattern of "vice" as suspects targeting young teenagers? This is, I take it, the *artifice* of Pitts's title. Demanding an immense amount of discretion, vice laws empowered police officers to fit queer individuals' diverse, often-fluid practices into clear legal classifications, straining a range of ambiguous acts into such discrete categories as "criminal," "disorderly," and even "homosexual."[4]

Pitts's invitation to broaden our struggle over the "thing being policed," in short, is well taken. At the same time, it is important to note that *Vice Patrol* invokes that phrase more narrowly, to refer to specific disagreements between vice officers and judges over the circumstances of particular arrests. The key disputes about the thing being policed—and, accordingly, the "epistemic gaps" examined in the book—are fairly concrete debates over how judges and officers understood the social organization and internal dynamics of queer cruising. Was cruising private and subtle or predatory or exhibitionistic? Were they deliberate and cautious or spontaneous and instinctual? Part of an urban subculture or a symptom of a disease? The central disagreements here were less about what qualified as "deviant," but rather about how conceded forms of deviance organized themselves in public and which enforcement tactics they justified.

I emphasize this distinction because a key commitment of the book is attending to the specificity of legal institutions, taking the broad dynamics that initially intrigued me—say, the repressive legacies of gay visibility—and pinpointing how precisely those dynamics fueled and were instantiated in the operations of policing. When I argue, for instance, that seemingly progressive cultural moments drove the state's crackdowns against queer life, I do not mean simply that pockets of openness like the pansy craze spurred contempt for queer communities or alerted authorities to the need for regulation. I mean that this trend provided a direct evidentiary foundation for the states' charges

[4] Maynard, *supra*, at 829 (discussing "dialectics of discovery").

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following the fall of Prohibition, empowering liquor officials to argue that bar owners must have recognized their gay crowds.[5] Similarly, in suggesting that medicalization fueled judicial pushback to vice arrests, I do not mean that medicalization raised general skepticism about penal responses to sexual difference. I mean that it sparked specific qualms and modes of resistance against police entrapment, convincing judges that plainclothes decoys tempted "ordinary" defendants into crime and therefore encouraging acquittals or dismissals in such cases.[6]

The same principle applies to the epistemic project at the heart of vice enforcement. Given the unique pressures of the courts, including the evidentiary demands of relevant statutes and officers' diverse relationships with judges, vice officers did not always seek to consolidate legal understandings of queerness, translating their own (selective, stereotypical, reductive) perceptions of queer practice into legal truth. They often downplayed their own perspectives, withholding their (genuine) insights about gay life and letting judges rely on their own pre-existing assumptions about queer individuals. These omissions, in turn, help shield intrusive tactics like enticement and clandestine surveillance from scrutiny, preventing judges from recognizing the true excesses of those practices and insulating anti-gay arrests from challenge. (Given that dynamic, I would add a caveat to Pitts's observation that vice policing imposed conceptual stability, "translating inchoate observations of fluid, perceptual queerness into stable, external, conceptual legal categories."[7] In many cases, that project also *resisted* stability, preserving a deeply fluid and inconstant view of sexual difference.)

Recognizing these epistemic gaps as a set of precise disagreements between specific institutional actors, in short, reveals the concrete ways that such gaps expanded the possibilities of policing—not just by popularizing social understandings that legitimated anti-gay enforcement, but also by directly undermining judicial checks on police power. And it reminds us to take police knowledge seriously as a tool of regulation. Vice officers did not always victimize queer communities by simplifying, stereotyping, or misrepresenting them. They often did so by gaining accurate, rarefied insight about those communities, and by weaponizing those insights selectively for their use.

Law, Liberalism, and Critique

Maynard ends his powerful reflection on the book's epistemic claims with two equally powerful critiques: first, the choice to frame judicial and psychiatric discretion as pushing back on anti-gay policing, and second, what Maynard identifies as a strand of "legal liberalism," crowding out more radical critiques. I have far more to say on both than I could fit here. Briefly, though, I see these points as intimately connected, and it is precisely the story of judicial discretion and lenience that, as I see it, fuels the book's own sharper critique of the law.

[5] Anna Lvovsky, *Vice Patrol: Cops, Courts, and the Struggle over Urban Gay Life before Stonewall* (Chicago: University of Chicago Press, 2021), 25–26, 46–48.

[6] Ibid., 126–27, 128–32.

[7] Pitts, *supra*, at 843.

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Maynard describes *Vice Patrol* as less a legal history than a "queer social history of the juridical apparatus of the local state,"[8] a label that I love and proudly claim. But I also do see it as a legal history. The book excavates the inner workings of the legal system—the logics, politics, and practices of individual actors authorized to enforce the law—which is as central to the core of legal history as shifts in doctrine or legislation. The disciplinary space I occupy—as a historian at a law school, where I teach classes on both legal history and criminal law and policing—invites me to see legal history this way. It also, I suspect, animates some of the interpretative choices that Maynard questions.

As Maynard notes, my focus on judicial pushback, including the surprising impact of medicalization, presents a departure in tone from that of scholars who offer more uniformly sinister depictions of the levers of midcentury vice enforcement, from sex-offender registries to child-abuse panics to legal distinctions defining queer individuals as a criminal underclass. These histories provide the backdrop against which *Vice Patrol* was written, and one reason for my focus is that I assume most readers come with those important stories already in mind. My instinct (perhaps contestable) is to emphasize the new, complicating dynamics or institutions that may be taken for granted in less legally centered accounts.

But it is also worth noting that most previous scholars focus on fairly different phenomena than those I discuss: generally, they focus on high-level policy and discursive developments, tracing the advent of new laws, institutional capacities, and concepts of deviance—including through certain high-profile cases—rather than the daily, anonymous work of enforcing those laws on the ground. Without questioning the significance of those histories, the records of such daily practices often disrupt how the engines of vice enforcement—and, sometimes, specific institutions and developments—have previously been portrayed. And I believe that the story revealed by these sources (which often astonished and confounded me when I encountered them in the archives myself) is as true and as important for understanding the history of anti-gay policing as the more familiar headlines and social panics.

That story is important, crucially, not because it celebrates or sympathizes with judges. (Although Maynard gently accuses me of sympathy toward the judicial class, indeed, *are* the judges I discuss sympathetic? As I emphasize, judges and others who questioned the vice squads were often driven less by tolerance or progressive outrage than by more dubious pressures, from impatience with petty cases to disproportionate sympathy for white defendants to patriarchal norms against intruding on other men's sexual autonomy. This is is hardly a heroic tale.)

So why is the story important? For one thing, to the extent that *Vice Patrol*'s claims about epistemic gaps are worth making, as Maynard suggests they are, those claims cannot be made without the story of judicial pushback. The sly power of such gaps, after all, was to use vice officers' and judges' disagreements about the nature of queer life to deflect scrutiny of manipulative enforcement tactics—exploiting gaps in knowledge, in effect, to circumvent deeper gaps in values. That story rests on a foundation of institutional struggle.

[8] Maynard, *supra*, at 829.

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At the same time, the courts' ambivalence about vice enforcement, and especially the impact of psychiatry, exemplifies the transformative power of legal institutions. A key thread in the book is the ironic legal legacy of seemingly familiar cultural trends, from the punitive evidentiary afterlife of the pansy craze to defendants' strategic uses of medicalization to elicit lenience. The point is not to condemn the pansy craze or, certainly, to defend medicalization. It is to show that legal disputes are not necessarily microcosms of broader cultural debates, but are rather arenas with their own internal pressures and logics, which may transform the significance of those debates in unexpected ways. That point seems easy enough to swallow when I trace the repressive undersides of the pansy craze; we have far more appetite for stories that locate new vectors of oppression than for those that complicate them. But the story about psychiatry is the inverse edge of the same phenomenon.

Most importantly, recognizing judicial resistance—the role of "lenience," "flexibility," and, yes, "creativity" in court—reveals just how much discretion judges exercised over these cases, and how unevenly that discretion was distributed.[9] Perhaps the most common question I have received since *Vice Patrol*'s release is why we do not see similar flights of judicial pushback against controversial morals policing today, such as undercover stings against low-level drug dealers. Certainly, there are multiple distinctions. But I have no doubt that class and race are chief among them. *Vice Patrol* is a foil of sorts to recent histories of anti-Black policing: a story about the very different dynamics of enforcing a largely white-identified morals offense. The book traces how seemingly sympathetic, liberal judges treated their cases differently given the suspects involved, and how even well-intentioned flights of mercy entrenched race- and class-based distinctions. And it suggests that the most self-righteous displays of judicial resistance often failed to help queer individuals, encouraging vice officers to develop more intrusive and abusive tactics. This account of ambivalence and resistance is not, as I see it, a story of liberal faith in the law. It is a critique of the inherent inequities of a discretionary legal system, and indeed of the limits of legal liberalism.

That said, Maynard is right that the book is not entirely Foucauldian either, and that is by design. As a historian of sexuality, I am of course deeply indebted to Foucauldian perspectives, and Maynard rightly identifies several broadly Foucauldian moves in the book.[10] But when the Foucauldian approach represents the dominant framework in a field, it risks occluding what a less

[9] Sociologists have long documented the immense role of discretion and creative problem-solving among lower courts. Malcolm Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russell Sage Foundation, 1979); and Issa Kohler-Hausmann, *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing* (Princeton: Princeton University Press, 2018). By focusing on the rare form of policing that regularly ensnared comparatively privileged defendants, *Vice Patrol* opens an unusual window on just how creative and lenient such problem-solving could be for the right beneficiaries.

[10] My own such entanglements, in fact, have led me directly to Bernard Harcourt's projects in this space—small world. "Anna Lvovsky on Psychiatric Power, Medical Expertise, and Sexuality," *Foucault 13/13*, October 10, 2015, http://blogs.law.columbia.edu/foucault1313/2015/10/30/foucault-413-anna-lvovsky-on-psychiatric-power-medical-expertise-and-sexuality/ (accessed January 30, 2023)

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pre-theorized lens might catch. I sympathize, for instance, with the appeal of "seiz[ing] on" "epistemic gaps as the strategic cracks or fissures in the edifice of power/knowledge that is sex, law, and policing."[11] But a key lesson of this history is that epistemic gaps are not necessarily cracks in the edifice of power, to be turned productively against the state. They are often sources of regulatory strength: points of elasticity and obfuscation that allow contested forms of policing to evade hostile social and institutional headwinds, like the proverbial tree that bends rather than breaks in the wind.

What practical lessons should we take from this history, then? *Vice Patrol* does not end with specific recommendations, largely because I hope it may reach a range of disciplinary audiences whose ideas and inspirations I could not fully predict. Some of these takeaways may bear specifically on the causes of LGBTQ individuals, and some may not. My own subsequent projects, for instance, have involved expanding *Vice Patrol*'s claims about police expertise to suggest new legal strategies for litigants challenging police entrapment, coerced confessions, and excessive force.[12]

Beyond that, as Maynard intuits, my primary efforts to make my work useful involve writing amicus briefs in LGBTQ-related cases. Do these projects—all fundamentally aimed at empowering litigants in court—suggest that I "believe in [the law]" as a tool for good? I teach at a law school, and I concede that I don't see my work there as pulling the wool over my students' eyes. For all the law's shortcomings, I'm not prepared to write it off entirely as a path for improving people's lives. Whether that view is liberal or simply practical, I'm not sure. Truthfully, I've never cared about a cause that I felt offered me the privilege of giving up potential tools of change, legal or otherwise.

That said, I happily echo and amplify Maynard's call for activists to mine *Vice Patrol* for more radical directions, unearthing new lessons and dimensions in a history that I have far from exhausted. And of course this forum is an example of exactly that type of excavation and reinterpretation: a chance to hear three profoundly thoughtful readers press their own stamp on my materials and claims. Another reason why I'm so grateful for, and humbled by, the opportunity to reflect on and respond to these terrific essays.

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[11] Maynard, *supra*, at 837.

[12] Anna Lvovsky, "Rethinking Police Expertise," *Yale Law Journal* 131 (2021): 475–572.

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