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POLICING QUEER SEXUALITY

*Ari Ezra Waldman**

VICE PATROL: COPS, COURTS, AND THE STRUGGLE OVER URBAN GAY LIFE BEFORE STONEWALL. By *Anna Lvovsky*. Chicago and London: University of Chicago Press. 2021. Pp. viii, 337. Cloth, \$105; paper, \$35.

INTRODUCTION

Texas considers gender-affirming healthcare to be child abuse.¹ A ban on gender-affirming hormone therapy was signed into law by the governor of Arkansas in 2021, the year the Human Rights Campaign called the “worst year in recent history” for legislative attacks on trans rights.² In 2020, a federal appeals court overturned a city’s ban on gay conversion therapy, holding that the free speech rights of therapists predominate over the government’s interest in

* Professor of Law, University of California, Irvine School of Law (as of July 1, 2023). Thanks to Anna Lvovsky for this outstanding piece of legal history scholarship. Thanks to Ryan Calo, Danielle Citron, Tarleton Gillespie, Samantha Godwin, Nikolas Guggenberger, Woodrow Hartzog, Joseph Landau, Allison Orr Larsen, Asaf Lubin, Dwight McBride, Doug NeJamie, Helen Nissenbaum, Jeremy Paul, Sonia Rolland, Blaine Saito, Eden Sarid, Scott Skinner-Thompson, Alicia Sollow-Niederman, Christopher Sprigman, Katherine Strandburg, Matthew Tokson, and Patricia Williams for helpful discussions about the issues and arguments discussed in this Review. Thanks also to Maya Bornstein and AJ Jarrett for excellent research assistance. Any errors are my vices and no one else’s.

1. J. David Goodman & Amanda Morris, *Texas Investigates Parents Over Care for Transgender Youth, Suit Says*, N.Y. TIMES (Mar. 1, 2022), <https://www.nytimes.com/2022/03/01/us/texas-child-abuse-trans-youth.html> [perma.cc/C9UX-8Q9L]. This is just the latest attack on transgender minors. In the first two months of 2022, eleven states introduced nineteen proposals to ban gender-affirming healthcare for minors. *Legislative Tracker: Youth Healthcare Bans*, FREEDOM FOR ALL AMS., <https://freedomforallamericans.org/legislative-tracker/medical-care-bans/> [perma.cc/K3FC-2HVK].

2. Arkansas Save Adolescents from Experimentation (SAFE) Act, 2021 Ark. Legis. Serv. 626 (West); see also Wyatt Ronan, *2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures into Law*, HUM. RTS. CAMPAIGN (May 7, 2021), <https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law> [perma.cc/P2E9-SG3E].

protecting queer adolescents.³ Eleven states require providers to tell individuals seeking abortions that the procedure causes depression, infertility, or breast cancer.⁴

None of these policies withstand scientific scrutiny. The scientific consensus says that hormone therapies are safe and necessary, that conversion therapy is torturous, and that abortion does not cause psychological or physical harm.⁵ Facts and scientific expertise are under assault in the lawmaking and adjudicative processes.

Against this backdrop of cultural retrenchment, distorted expertise, and “alternative facts” comes a page-turner of legal history from Anna Lvovsky,⁶ *Vice Patrol: Cops, Courts, and the Struggle over Urban Gay Life Before Stonewall*. This painstakingly researched and exhaustive account of the criminalization of sexual identity from the 1930s to the 1960s is not about gender-affirming care.⁷ Nor is it about LGBTQ+ teens, conversion therapy, or abortion. Nevertheless, *Vice Patrol* offers powerful lessons for today’s civil rights battles, both in the courts and online. The book uses a case study of state enforcement of anti-vice laws against gay people to tell a larger story about an epistemological struggle over facts and knowledge, as well as the limits, if any, they place on power.⁸ Seen through this lens, we can push Lvovsky’s detailed and nuanced work even further than she may have imagined. I argue that the book’s illustration of the criminal justice system’s construction of legal knowledge about queer communities in the middle of the twentieth century mirrors how two very different, yet nevertheless powerful institutions today—

3. *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020).

4. Rachel Benson Gold & Elizabeth Nash, *Flouting the Facts: State Abortion Restrictions Flying in the Face of Science*, GUTTMACHER POL’Y REV. (May 9, 2017), <https://www.guttmacher.org/gpr/2017/05/flouting-facts-state-abortion-restrictions-flying-face-science> [perma.cc/YPB5-7KGG].

5. See *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 891–92 (E.D. Ark. 2021); Allison Orr Larsen, *Constitutional Litigation in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 203 (2018); Brief of American Psychological Association et al. as Amici Curiae in Support of Defendants-Appellees and Affirmance at 10, *Otto*, 981 F.3d 854 (No. 19-10604).

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7. For other canonical accounts of queer history in and around this time, see, for example, DAVID K. JOHNSON, *THE LAVENDER SCARE* (2006); ERIC CERVINI, *THE DEVIANT’S WAR* (2020); GEORGE CHAUNCEY, *GAY NEW YORK* (1994); WILLIAM N. ESKRIDGE, JR., *GAYLAW* (1999); JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* (1983); NAN ALAMILLA BOYD, *WIDE OPEN TOWN* (2003); LILLIAN FADERMAN & STUART TIMMONS, *GAY L.A.* (2006); ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, *BOOTS OF LEATHER, SLIPPERS OF GOLD* (20th anniversary ed. 2014). *Vice Patrol* makes an important contribution to this literature.

8. *Vice Patrol* also tells the story of internal struggles among different arms of the criminal justice system—courts and police—about the appropriate limits and goals of the criminal law. This Review does not focus on that aspect of the book because Professor Lvovsky’s own scholarship teases out the details and implications of those internecine struggles. The Review prefers to let her expertise speak for itself. See, e.g., Anna Lvovsky, *Rethinking Police Expertise*, 131 YALE L.J. 475 (2021); Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017).

the state and the information industry—approach expertise and socially construct knowledge about sexuality and sexual freedom.

Lvovsky shows that anti-vice campaigns against gay people in cities like New York, Chicago, Los Angeles, and Newark tried to walk a fine line on expertise. On the one hand, anti-vice agents denied that they bore any special training or insights into queer life, insisting that they identified gay bars or individuals simply based on their common sense (ch. 1). At the same time, these agents insisted that they—and not more prominent scientific and medical experts on sexuality—had insight into gay subcultures to which courts should defer (ch. 2). That sounds contradictory: How could the law defer to police and exclude actual scientific expertise while the police denied having any specialized knowledge about gay people? But seen through the lens of today’s fact-intensive fights over abortion, trans healthcare, conversion therapy, and sexual content moderation, it makes sense. Put simply, it’s not that reality doesn’t matter, what matters is who gets to decide what reality is. For instance, if the law accepts as true the public’s shared assumptions about queer life and, therefore, concludes that homosexuality is easy to spot, then contradictory scientific evidence is not just irrelevant, but wrong.

Vice Patrol tells the story of how anti-vice police helped define accepted legal and public knowledge about homosexuality, often crowding out more rigorous understandings of queer life, and how judges embraced their “commonsense” accounts at the cost of more accurate professional knowledge (chs. 1–2, 4). But the past is prologue. Allison Orr Larsen, Aziza Ahmed, and others have shown that biased amici are treated as experts in ongoing fights over abortion.⁹ Laws assigning individuals to public bathrooms based on their sex assigned at birth construct legal definitions of sex and gender that contradict the medical and scientific consensus.¹⁰ Courts striking down laws prohibiting gay conversion therapy for minors have ignored scientific knowledge about the harms of the practice and proceeded to strike down the laws on other grounds.¹¹

Policies in each of these areas defy the scientific consensus because the law allows judges and policymakers to construct knowledge independent of actual evidence. That is, these policies pander to the public’s lay assumptions and supposedly commonsense beliefs about women and LGBTQ individuals over more scientific, empirically defensible facts about the very people they target. This precise preference for lay opinion over empirical reality is one reason why anti-vice campaigns were so successful for so long.¹² Therefore, *Vice*

9. *E.g.*, Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014); Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J.L. & MED. 85 (2015); Ruth Colker, *Uninformed Consent*, 101 B.U. L. REV. 431, 449 (2021).

10. *Cf.*, *e.g.*, Joseph Landau, *Broken Records: Reconceptualizing Rational Basis Review to Address “Alternative Facts” in the Legislative Process*, 73 VAND. L. REV. 425, 427 (2020).

11. *Otto v. City of Boca Raton*, 981 F.3d 854, 871 (11th Cir. 2020).

12. Until, that is, courts insisted on actual evidence. *See, e.g.*, *Stoumen v. Reilly*, 234 P.2d 969 (Cal. 1951) (requiring the state provide proof of actual “illegal or immoral acts” to shut down a bar); *Scott v. Macy*, 349 F.2d 182 (D.C. Cir. 1965) (holding that the government can only fire

Patrol demonstrates that marginalized populations suffer when the law untethers itself from facts.

Vice Patrol also describes how anti-vice police insisted that homosexuality was so obvious and subject to a set of shared, cultural understandings that anyone could spot a gay person on the street or in a bar (pp. 41–59). Remarkable as it may seem, that same idea undergirds much of social media’s sexual content moderation, which also insists that sexuality is reduceable to a few easily identifiable elements such that any code and anyone with a few hours of training can spot it. As a result, marginalized populations suffer again; gay, trans, queer, and nonnormative sexual expressions are disproportionately censored by social media companies.¹³ In this way, Lvovsky’s research helps demonstrate digital social platforms’ designed-in hostility toward LGBTQ+ sexuality. *Vice Patrol* can change the way we understand the role of expertise in content moderation and digital governance, as well as in broader struggles for civil rights.

This Review proceeds in three Parts. Part I describes how *Vice Patrol* provides a nuanced account of the role of policing and the construction of legal knowledge about queer life in the anti-vice era. Part II uses *Vice Patrol*’s study of police “expertise” in the anti-vice context to illustrate how courts and legislatures rolling back civil rights today are following in the anti-vice era’s footsteps and choosing to rely on faulty, supposedly “commonsense” assumptions and lay opinions over more rigorous, scientific knowledge about marginalized communities. Finally, Part III connects anti-vice police’s insistence that homosexuality was readily identifiable with social media’s bankruptcy and antiqueer design. With Lvovsky’s work about the relationship between law and knowledge so prevalent in contemporary struggles for sexual freedom, the Review concludes with a reminder of the stakes and the value in looking to the historical foundations of civil rights struggles.

someone for “immoral conduct” if it specifies precisely how the conduct affected “occupational competence”); *Kelly v. United States*, 194 F.2d 150 (D.C. Cir. 1952) (holding that testimony of plainclothes decoys was insufficient to justify a conviction for lewd solicitation without corroboration).

13. See, e.g., Sarah Perez, *Tumblr Says It Fixed the ‘Safe Mode’ Glitch That Hid Innocent Posts, Including LGBTQ+ Content*, TECH CRUNCH (June 24, 2017, 12:45 PM), <https://techcrunch.com/2017/06/24/tumblr-says-it-fixed-the-safe-mode-glitch-that-hid-innocent-posts-including-lgbtq-content/> [perma.cc/3XKD-QLXQ]; Elle Hunt, *LGBT Community Anger over YouTube Restrictions Which Make Their Videos Invisible*, GUARDIAN (Mar. 19, 2017, 9:49 PM), <https://www.theguardian.com/technology/2017/mar/20/lgbt-community-anger-over-youtube-restrictions-which-make-their-videos-invisible> [perma.cc/9JN5-FAWF]; Sera Golding-Young, *Facebook Blocked My Ad, Mislabeled It “Sexually Explicit,”* ACLU N. CAL. BLOG (Sept. 23, 2020), <https://www.aclunc.org/blog/facebook-blocked-my-ad-mislabeled-it-sexually-explicit> [perma.cc/5SF8-ZHX7]; Libby Watson, *YouTube’s Restricted Mode Is Hiding Some LGBT Content*, GIZMODO (Mar. 18, 2017, 3:30 PM), <https://www.gizmodo.com.au/2017/03/youtubes-restricted-mode-is-hiding-some-lgbt-content> [perma.cc/2HHU-WKMS]; Molly Priddy, *Why Is YouTube Demonetizing LGBTQ Videos?*, AUTOSTRADDE (Sept. 22, 2017), <https://www.autostraddle.com/why-is-youtube-demonetizing-lgbtqia-videos-395058/> [perma.cc/253T-RKGZ].

I. POLICING HOMOSEXUALITY

Lvovsky frames *Vice Patrol* as a “useful case study of the politics of knowledge underlying the administration of the criminal law” (p. 17). Law also helps construct knowledge by facilitating a process through which different social groups and institutions engage in the contestation and development of mental constructs of what the world is.¹⁴ In the anti-vice context, this played out as different arms of the criminal justice system realizing they needed a reliable, easily duplicable system of distinguishing gay people from heterosexual people if they wanted to enforce anti-vice laws against the former and not the latter.

That started with the rise of liquor regulations. After Prohibition, cities and states sought to recapture control over urban nightlife—and stave off the temperance movement—by passing strict regulations over alcohol, nightlife, and indecent behavior.¹⁵ States created liquor regulatory boards, like the Division of Alcoholic Beverage Control (ABC) in New Jersey and the State Liquor Authority (SLA) in New York. Their job was to police establishments that served alcohol, from prohibiting sales to minors, to keeping away gay people (p. 27). Their rules rarely mentioned the words “gay” or “homosexual,” instead using broad prohibitions against bars that “bec[a]me disorderly” and knowingly “permit[ted] . . . degenerates and undesirable people to congregate” (p. 29). In California, a bar could be shut down if it knowingly functioned “as a meeting place” for “known homosexual[s]” (p. 29). Prohibition’s permissive sexual culture was over; the era of morality policing had begun.

These anti-vice statutes covered anything the state deemed undesirable: “perversion,” public nuisances, lewdness, female impersonation, and disorderly conduct, to name just a few.¹⁶ The laws were vague and broad, but, when applied to bars, taverns, and cabarets, they all had a similar hook: the requirement of *knowledge*. The liquor authority could only rescind a bar’s license to serve alcohol and shut the establishment down if it could show that the bar knowingly served undesirable elements, knowingly let gay people gather, or knowingly permitted sexual deviance (p. 25). But how could a bar know it was

14. Kenneth J. Gergen, *The Social Constructionist Movement in Modern Psychology*, 40 AM. PSYCH. 266, 266 (1985); see also PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 1–15 (1966); DAVID BLOOR, *KNOWLEDGE AND SOCIAL IMAGERY* 5 (2d ed. 1991) (“[K]nowledge for the sociologist is whatever people take to be knowledge. . . . [T]he sociologist will be concerned with beliefs which are . . . invested with authority by groups of people.”); BRUNO LATOUR & STEVE WOOLGAR, *LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS* (1979) (arguing that our understanding of technology and new forms of knowledge is based on social forces interacting to create, distribute, regulate, and use that technology).

15. CHAUNCEY, *supra* note 7, at 305–308.

16. See p. 5.

serving gay people? Many masculine-presenting men and feminine-presenting women can meet even the most heteronormative expectations of behavior. To us, “gaydar” is a tool of humor, not science or law.¹⁷

But to liquor authorities, gay cultural stereotypes were evidence and sources of knowledge. Throughout the more permissive years of Prohibition, different forms of sexual expression became popular in urban downtowns. The Pansy Craze took over bars in Manhattan’s Bowery district and Times Square (p. 36), reaching even rarified media; so-called “fairies” were profiled in *Vanity Fair* in 1931 (p. 39). Hollywood got in on the act too with the 1932 film “Call Her Savage,” showing a pair of effeminate men dancing and singing in falsetto while wearing maids’ aprons (p. 37).¹⁸ Spectacular drag balls drew curious heterosexual people from all corners of urban life to Harlem and Times Square; those who could not attend could read about them in local newspapers (p. 37). By the time the police started cracking down on public displays of queer sexuality, and particularly after the end of World War II, urban populations were at least familiar with what they thought were the telltale signs of homosexuality: flamboyance, limp wrists, high voices, spectacle, and taboo eroticism.¹⁹

Lvovsky demonstrates that anti-vice police and liquor authorities fell back on these stereotypes to argue that bars were “knowingly” serving gay people. Sure, police sometimes leveraged rumor and gossip. Anti-vice officers told liquor authorities that one bar they wanted to shut down was known as “a homosexual’s haven” (p. 35). More commonly, though, anti-vice officers said they knew gay people when they saw them. At the Times Square Garden in 1938, for instance, a liquor agent identified gay men by the “effeminate” way they “spoke . . . [and] walked” (pp. 41–42). Plain-clothed agents on hand at the famously gay-friendly Gloria Bar & Grill in Manhattan testified at liquor board hearings that they could spot a gay person by a set of specific physical characteristics: painted fingernails, red lips, a powdered face, and a feminine voice (p. 42). Importantly, these officers were not lying or providing baseless *ex post* justifications for their arrests. There is every reason to believe they “were confident that they could spot queer men, immediately and infallibly, on the basis of the telltale mannerisms of the fairy” (p. 42). Even more crucially, they were confident that *defendants* could spot queer patrons on the same grounds. Because liquor agents had to prove that bar owners “knowingly” served gay individuals, popular stereotypes about gay men did not just help establish that a bar actually served gay patrons. They also demonstrated that the defendants realized they were doing so. Police were relying on what

17. Not for all of us. See Heather Murphy, *Why Stanford Researchers Tried to Create a ‘Gaydar’ Machine*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/science/stanford-sexual-orientation-study.html> [perma.cc/EV8W-ART7].

18. P. 37. Hollywood, however, was no friend to LGBTQ+ expression. See WILLIAM J. MANN, *BEHIND THE SCREEN: HOW GAYS AND LESBIANS SHAPED HOLLYWOOD, 1910–1969* (2001).

19. P. 42; see ALAN SINFIELD, *THE WILDE CENTURY* (1994) (using the writings and trial of Oscar Wilde to describe how the stereotypes of the gay, effeminate man were established during the twentieth century).

Lvovsky calls “a presumed baseline of public knowledge about sexual difference” (p. 41) that was so widespread, the presumption went, that anyone, especially a bartender or bar owner, could spot gay people on sight. In context, it was less important that the liquor agents’ stereotypes about gay people were accurate than that they were *common*—presumably shared by others.

Notably, anti-vice agents relied on such stereotypes even as they themselves often amassed more sophisticated insights about gay life. It is easy for us look back and see a rabidly homophobic institution of authority using baseless stereotypes to harass some of the most marginalized in society. But other than gay people themselves and progressive academics like the psychologist Evelyn Hooker, whose ethnography of gay life in Los Angeles helped depathologize homosexuality,²⁰ anti-vice police actually did have more knowledge about gay subcultures than most everyone else. Liquor agents and, in later years, police officers set out to blend into gay bars to entrap gay men; as a result, they often developed genuine insights into certain aspects of queer urban culture. They were, in many respects, some of the earliest ethnographers of queer life (ch. 4). Theirs was a highly politicized ethnography conducted without any “underlying rigor or depth of understanding” in the exercise of power, but it was an ethnography nonetheless (p. 143). Police learned to dress, talk, and respond to visual and subtle cues so they could ingratiate themselves among those who cruised local parks, flirted in bars, or met in public bathrooms (p. 144). Nevertheless, liquor agents did not come to court demanding credit for knowing more about queer life than the average person. They continued to insist that everything they knew about queer life was obvious and that ordinary observers, whether bartenders or trial judges, knew at least as much as they did.

Unwilling to give up their livelihoods to the morals police, especially soon after the end of Prohibition, bars chose two opposite approaches to push back against anti-vice agents’ evidence against them. Some, like Gloria and Rutgers Cocktail Bar, challenged law enforcement’s expertise in identifying gay patrons. When two agents for the New York state liquor board suggested that physical characteristics could signal sexual deviance, Gloria’s lawyer asked pointedly: “Are you a doctor? . . . Have you ever studied the psychology of homosexuality?” (p. 42). Not wanting to seem too close to the gay subculture they were investigating, one witness demurred, saying he did not “associate” enough to know (p. 42). The other claimed to know that homosexuality derived from “misconceived seed,” whatever that meant (p. 42). Gloria’s attorney thought he had won; he had disqualified these so-called experts by surfacing their utter lack of qualifications. But precisely due to the nature of the liquor laws, with their reliance on common stereotypes about homosexuality, that

20. Pp. 142–43. Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECHS. 18 (1957); see also Brief of Amici Curiae American Psychological Ass’n & American Public Health Ass’n in Support of Respondents, *Bowers v. Hardwick*, 478 US 1039 (1986) (No. 85-140) (summarizing Hooker’s work and concluding that “extensive psychological research conducted over almost three decades has conclusively established that homosexuality is not related to psychological adjustment or maladjustment”).

lack of expertise didn't matter. As Lvovsky explains, anti-vice authorities would happily concede the point that they were not more expert at spotting gay people than anyone else. After all, they didn't have to be: "You don't have to be an expert to be able to see a homosexual" (p. 45).

Attorneys defending gay-friendly bars also brought in psychiatrists and medical experts who challenged the presumption that homosexuality was easy to spot. Lawyers for Sol Stoumen's Black Cat Bar attached a copy of Kinsey's *Sexual Behavior in the Human Male* to their briefs, leveraging "the most recent and authori[ta]tive studies" on sexuality to demonstrate that police could not be experts in identifying gay patrons (p. 78). After the ABC went after the Rutgers Cocktail Bar, defense attorneys put a psychiatrist on the stand to share his professional opinion that you cannot identify gay people from "delicate" mannerisms (p. 79). Wardell Pomeroy, one of the Kinsey Institute's principal researchers, testified at the hearing for Val's Bar in Atlantic City that because more than a third of American men had engaged in homosexual activity and most of his study's subjects were indistinguishable from heterosexual men, it would have been impossible for anyone to look at a person and know that they were gay (pp. 79–80). Some bar owners went even further, bringing in progressive psychiatrists to testify that homosexuality was neither pathological nor deviant.²¹

In other words, this strategy asked the law to socially construct homosexuality according to medical science, not popular stereotype or so-called "common sense." Liquor boards and state courts almost unanimously resisted. When attorneys for Pearl's Bar in Oakland tried to introduce scientific testimony to suggest that homosexuality was a disease rather than a crime, California courts rejected the very notion that medical expertise was even relevant.²² Dressing their holdings in lofty appeals to democracy, they insisted that turning the legitimacy of homosexuality into a question of science "contradicted the very purpose of morals legislation," which was to let society—that is, those in power—"define the outer boundaries of social behavior tolerated by the community" (p. 84). Put differently, it was the people or, more accurately, those who interpreted law, who got to decide what was deviant and what was not; science that challenged those social instincts was irrelevant.

Most liquor boards had more prosaic responses. They simply rejected the claim that medical or scientific knowledge about homosexuality was any better than the public's familiar stereotypes. At a hearing against Val's Bar, the New Jersey ABC decided that identifying gay men was "a matter of common obser-

21. Pp. 81–82. This testimony was ahead of its time. Many of the cases Lvovsky cites that used this argument were from the late 1950s and early 1960s. The American Psychiatric Association, pushed by years of on-the-ground activism, did not depathologize homosexuality until 1973. See, e.g., Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565 (2015) (describing the internal process of the American Psychiatric Association); CERVINI, *supra* note 7, at 335, 368–70 (documenting the role of LGBTQ+ activists in demanding the Association act).

22. See pp. 81–84.

vation, not requiring any special knowledge or skill” (p. 84). The ABC also rejected expert testimony challenging liquor agents’ ability to identify gay men. And New Jersey courts affirmed. Liquor agents, the Superior Court found, needed no “medical or psychiatric training . . . to form an opinion” about whether a bar was becoming disorderly, serving “degenerates,” or allowing gay people to gather (p. 84). As a New Jersey appellate court stated in *Paddock Bar, Inc. v. Division of Alcoholic Beverages Control*, “It is often in the plumage that we identify the bird” (p. 87).

With the law dismissing medical and scientific expertise, some bar owners tried a different tactic: shifting the locus of expertise from liquor agents to local cops. To be sure, most police had no sympathy for gay-friendly bars. They were more often aligned with liquor authorities, both in their perceptions of morality and in their on-the-ground assignments.²³ But some came to the bars’ defense. Attorneys for Gloria Bar & Grill called three city policemen to testify that they had never arrested gay people at Gloria or received any complaints about deviant activities (p. 91). The Rutgers Cocktail Bar also called a local cop who testified that he had never “observed any objectionable persons or conduct” at the bar (p. 91). Trenton, New Jersey’s Paddock Inn had a local detective testify that when he stopped into the bar, he saw personal friends and local businesses, but no “apparent homosexual[s]” (p. 91). In other words, some bars conceded that state investigators who patrolled gay bars might become especially good at identifying gay individuals—and yet they introduced those police officers as witnesses for their defense.

In response, liquor boards and courts walked a fine line between acknowledging law enforcement’s unique role and expertise and denying its relevance in deciding these cases. In its proceedings against the New Jersey bar One Eleven Wine and Liquors, the ABC praised local cops for their “considerable on-job training” but fell back on the widely held belief that anyone could identify gay people (p. 94). In response to local police who testified on behalf of Murphy’s Tavern, the ABC again emphasized the police’s “many years of investigative experience,” but concluded that no experience was really necessary (p. 94).

Throughout these cases, officials and state prosecutors “simultaneously acknowledge[ed] the professional insights that helped liquor agents identify gay customers and den[ied] that any such insights were actually necessary” (p. 95). Liquor regulators steered clear of assigning special expertise to liquor agents and anti-vice police because their entire regulatory edifice—that bar owners could ever knowingly serve queer patrons—stood on the presumption that anyone could spot a gay person (p. 95). Driven by their own incentives to uphold the evidentiary framework of the liquor laws, judges and liquor officials took sides in a broader epistemological debate about the relative authority of professional versus public knowledge about homosexuality: defending the value of lay knowledge and common sense over more specialized forms of expertise (p. 65).

23. See p. 91.

In other words, when Lvovsky states that the law was a “site of profound . . . contestation” about the wisdom of antigay policing and the nature of homosexuality itself, she is in part referring to a contest about whose knowledge matters (p. 6). This delicate balance was sustainable because the law and, more precisely, those who decide what the law is, get to resolve that contest. Agents could be trusted to know gay people when they saw them, but liquor authorities and courts dismissed the documented expertise of doctors and psychiatrists when they insisted that homosexuality was not identifiable on sight (pp. 65–66). Local police had on-the-ground expertise and knew their communities well, but they did not need that experience to declare a bar disorderly. Indeed, they were far better served by denying any such professional knowledge. This approach channeled skewed sources of knowledge to legal proceedings, excluding more rigorous forms of expertise about gay individuals in favor of the public’s commonsense presumptions.

II. MYTH-BASED LAW

The law’s approach to anti-vice campaigns against gay men in the twentieth century shows what can happen when the law collapses into a choice between two competing factual claims about the world. In the anti-vice context, legal authorities favored the public’s familiar intuitions over more rigorous empirical authorities. Bar owners who served men and women who conformed with public stereotypes of sexual “deviance” faced surveillance, discipline, and suspension of their licenses (pp. 52–53). Gay individuals themselves faced the prospect of arrest, humiliation, and conviction for merely socializing with others or starting up conversations with potential partners.²⁴ Today, transgender folks, sex workers, and queer people of color face similar risks.²⁵ And today, too, much lawmaking and adjudication touching on the rights of women and LGBTQ+ individuals rests on the choices those in power make about which authorities get to decide what reality looks like.²⁶ Those choices put the civil rights of many marginalized populations at risk. Indeed, we see *Vice Patrol’s* history—particularly about how power structures socially construct legal knowledge to suit their normative goals—repeating in many ongoing struggles for the civil rights of women and LGBTQ+ people.

24. See e.g., pp. 132–33.

25. See Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 WM. & MARY J. WOMEN & L. 5, 6, 13 n.34, 14, 16 (2017).

26. Claims about broad social phenomena are somewhat misleadingly called “legislative facts.” See Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955) (noting that legislative facts are “ordinarily general” rather than specific to the case at hand); Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 403, 403 n.79 (1942); see also John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877 (1988).

Consider, for example, *Gonzales v. Carhart*, a prominent case touching on abortion rights.²⁷ In *Carhart*, the Supreme Court affirmed the constitutionality of the federal ban on an abortion procedure that was used during the latter half of a pregnancy to protect against serious health risks for the pregnant person.²⁸ As part of his decision, Justice Kennedy noted that despite the lack of “reliable data . . . it seems unexceptionable to conclude that some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.”²⁹ That conclusion was based entirely on an amicus brief that presented “first person anecdotes” compiled by the antiabortion Justice Foundation to suggest that abortions cause depression and suicidal ideation.³⁰ Kennedy never interrogated the quality of this evidence, which was based on the work of a discredited psychologist and testimonials from a small, nonrandom sample of women,³¹ but nevertheless cited it and elevated it as the product of “the principal expert on women’s post-abortion experiences.”³² At the same time, the Court dismissed the medical consensus that there was no correlation between abortion and depression, and concluded that it was irrelevant to the question of whether the Court should defer to Congress’s own wisdom in declaring the procedure dangerous and unnecessary.³³

It is notable that the *Carhart* Court called it “unexceptionable” that some people regret their abortions, that psychological harm can result, and that abortion can be risky. Without any data to back up those assertions, Justice Kennedy could only be relying on his perception of common sense, or, to use Lvovsky’s framing, “some *shared public knowledge* about” abortion (p. 25). In fact, Lvovsky notes that making inferences of homosexuality was “so very unremarkable” because the police believed that identifying queer people required only “simple deductions that could be corroborated” by anyone (pp. 45–46). Lvovsky was referring to the supposedly shared intuition about what gay people look like and how they act, an intuition that was challenged by medical and scientific experts. As in the anti-vice context, where liquor boards and courts dismissed medical or scientific expertise in favor of observations “entirely obvious to the layman” (p. 95), the *Carhart* majority conflated the expertise of all

27. 550 U.S. 124 (2007).

28. *Carhart*, 550 U.S. at 132–33 (referring to the federal “Partial-Birth Abortion Ban Act of 2003”); *id.* at 166–68.

29. *Id.* at 159 (citation omitted).

30. Ahmed, *supra* note 9, at 107–108 (quoting Brief of Sandra Cano, The Former “Mary Doe” of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner, *Carhart*, 550 U.S. 124 (No. 05-380)).

31. Linda Greenhouse, *The Counter-Factual Court: Brandeis Lecture, Louis D. Brandeis School of Law, University of Louisville, March 5, 2008*, 47 U. LOUISVILLE L. REV. 1, 11–13, 16 (2008); see Landau, *supra* note 10, at 470.

32. J. Shoshanna Ehrlich, *Ministering (In)Justice: The Supreme Court’s Misreliance on Abortion Regret in Gonzales v. Carhart*, 17 NEV. L.J. 599, 605 (2017).

33. *Carhart*, 550 U.S. at 166–67.

amici, choosing to legitimize the views of an antiabortion group over the scientific consensus.

Ongoing battles over transgender rights follow a similar pattern. The scientific consensus makes clear that gender and sex are different,³⁴ that gender dysphoria—the feeling of distress that results when one’s gender identity differs from their sex assigned at birth—is harmful and debilitating,³⁵ and that gender-affirming hormone therapies are safe, necessary, and, if needed, reversible.³⁶ But the rhetoric surrounding bans on gender-affirming care replaces this data with what the bans’ proponents believe to be a commonsense and shared understanding of sex and gender. Senator Rick Scott, who chaired the Senate Republicans’ campaign operation, published an agenda leading up to the 2022 election stating that “[m]en and women are biologically different, ‘male and female He created them.’ . . . [T]here are two genders.”³⁷ The conservative-leaning Rasmussen Reports published a study that claims to find that “75% of American Adults agree that there are only two genders, male and female.”³⁸ Even assuming the survey accurately reflects the public’s views, the presumption that a shared understanding of gender exists undergirds attacks on transgender adolescents. This agenda prioritizes pandering to the lay public’s supposedly “commonsense” ideas and beliefs about the nature of gender identity over respecting the empirical realities of the lives of the individuals implicated.

Legislatures have also chosen to subordinate expertise in favor of what they see as commonsense conceptions of reality. To rationalize so-called papers-to-pee laws, which punish transgender individuals for using public restrooms that match their gender identities, legislatures fabricated the myth that heterosexual cisgender men often use trans-inclusive nondiscrimination law to enter women’s restrooms and prey on cisgender women and girls.³⁹ Kathryn Anthony, an expert in gender issues in architecture, clarifies that these claims are based on fear: “People are afraid because they’re exposed There’s a vulnerability we feel in public restrooms we don’t feel in other

34. See, e.g., JOAN ROUGHGARDEN, *EVOLUTION’S RAINBOW: DIVERSITY, GENDER, AND SEXUALITY IN NATURE AND PEOPLE* 23, 27 (2004); SALLY HINES, *TRANSFORMING GENDER: TRANSGENDER PRACTICES OF IDENTITY, INTIMACY AND CARE* 59–60 (2007).

35. *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 890–91 (E.D. Ark. 2021).

36. Brief of Amici Curiae American Academy of Pediatrics and Additional National and State Medical and Mental Health Organizations in Support of Plaintiffs-Appellees and Affirmance, *Brandt*, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (No. 21-2875).

37. 9. *Gender, Life, Science*, RESCUE AM., <https://rescueamerica.com/steps/9-gender-life-science> [perma.cc/38RV-YVF5].

38. *Most Americans Side with J.K. Rowling: Only Two Genders*, RASMUSSEN REPS. (Dec. 27, 2021), https://www.rasmussenreports.com/public_content/lifestyle/public_surveys/most_americans_side_with_j_k_rowling_only_two_genders [perma.cc/8UCP-9M8K].

39. See, e.g., Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 192–93 (2015); Carlos Maza, *Debunking the Big Myth About Transgender-Inclusive Bathrooms*, MEDIA MATTERS (Mar. 20, 2014, 10:01 AM), <https://www.mediamatters.org/fox-nation/debunking-big-myth-about-transgender-inclusive-bathrooms> [perma.cc/3FBL-N7RB].

places.⁴⁰ Far from justifying these laws, Anthony was instead explaining their origins. They are rooted in people's perception of shared cultural understandings about bathrooms, intimacy, and privacy.⁴¹ In that context, it doesn't matter that there is no evidence that gender-inclusive bathroom laws are associated with increases in bathroom assaults on women.⁴² Legislatures dismissed that data in favor of bias-confirming presumptions.

The pattern described in *Vice Patrol* is now on display in litigation over bans on gender-affirming hormone therapy. In its brief in *Brandt v. Rutledge*, a challenge to Arkansas's ban, the state argues, among other things, that "[r]egret following transition is not an infrequent phenomenon."⁴³ That conclusion is based on testimony from seven individuals.⁴⁴ Other testimony comes from ten parents who objected to their children receiving gender-affirming care.⁴⁵ One parent was "shocked"; another did "her own research" to conclude that hormone therapy causes "loss of bone density and diminished cognitive development."⁴⁶ Another parent who signed onto the brief was deprived of the ability to see his child because he opposed their gender transition; this parent also conducted his own research about the risks of hormones.⁴⁷ These arguments are based on fear- or ignorance-based perceptions of reality, not evidence.

The district court found the state's justifications "pretextual," in part because they were based on unsound science.⁴⁸ But *Vice Patrol's* lessons about how structures of power choose to validate certain perceptions of reality over others and insulate them from actual evidence aptly diagnoses the state's strategy. It is a strategy that, in effect, asks the law to choose to flatter or vindicate a constituency's feelings about women and LGBTQ+ individuals rather than recognize the scientific reality of the lives the law affects. And, as we have seen,

40. German Lopez, *Myth #3: Letting Trans People Use the Bathroom or Locker Room Matching Their Gender Identity Is Dangerous*, VOX (Nov. 14, 2018, 4:09 PM), <https://www.vox.com/identities/2016/5/13/17938102/transgender-people-bathrooms-locker-rooms-schools> [perma.cc/XUS9-AA32].

41. For more on privacy as intimacy, see, for example, Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870 (2019); JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* (1992); JEFFREY ROSEN, *THE UNWANTED GAZE* 8 (2000); DANIELLE KEATS CITRON, *THE FIGHT FOR PRIVACY* (2022).

42. See, e.g., Maza, *supra* note 39.

43. Brief of Defendants-Appellants at 10, *Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022) (No. 21-2875).

44. Brief of Amici Curiae for Keira Bell et al. as Amici Curiae in Support of Defendants, Supporting Reversal, *Brandt*, 47 F.4th 661 (No. 81-2875).

45. Brief for Yaacov Sheinfeld et al., as Amici Curiae in Support of Defendants-Appellants, Supporting Reversal, *Brandt*, 47 F.4th 661 (No. 21-2875).

46. *Id.* at 10–12.

47. *Id.* at 13–14.

48. *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 891 (E.D. Ark. 2021).

it is not an isolated tactic. Civil rights are at risk when law subordinates evidence-based descriptions of reality to presumptions about cultural norms shared by the traditional cultural and political establishment.

III. CODING FOR SEX

As we have seen, one of the core presumptions of liquor authorities' approach to regulating vice was that anyone could identify gay people on sight from a list of telltale physical characteristics. No one needed training; anyone could see the signs. This presumption allowed those in power to assign blame to bar owners: if homosexuality was so obvious, bar owners *had* to know they were serving gay people in violation of the law.

The previous Part discussed how this deference to shared understandings of homosexuality resisted contrary scientific evidence, tracing that pattern through some of today's civil rights struggles. This Part focuses on another way the anti-vice era's presumptions about expertise and sexuality remain in effect today: in the regulation of online sexual content by private social-media companies. The world of social media today may seem like a far cry from the regulation of gay bars in the 1940s and 1950s. But online social platforms' regulation of sexual content may be the clearest analog to that history, directly continuing the anti-vice tradition of the midcentury. Sexual content moderation presumes that there exist shared cultural understandings about what distinguishes appropriate from inappropriate sexual expression, such that human moderators can quickly and easily tell the difference, and that sexuality can be reduced to or quantified in an algorithm. But in doing so, sexual content moderation empowers moderators to rely on their own (subjective and often uneducated) beliefs about "offensive" sexual conduct to shut down important sites of queer sociality and community.

Sexual content moderation is the organized practice of administering, screening, evaluating, categorizing, and approving (or removing) sex-related user content posted to Internet sites "in order to determine the appropriateness of the content" for that site.⁴⁹ It is an assemblage of background law, discursive rationales, political and economic considerations, platform design, algorithmic technologies, and people that together make normative choices about permissible and impermissible content.⁵⁰ Like liquor authorities, who insisted that anti-vice laws made choices about sexual expression to achieve society's (moral) goals, sexual content moderation rules reflect platforms' choices about the kind of sexual expression appropriate for achieving their (profit-making) goals.⁵¹ In addition, both systems implicitly rely on the notion that just about anyone can spot offending behavior.

49. Ysabel Gerrard & Helen Thornham, *Content Moderation: Social Media's Sexist Assemblages*, 22 *NEW MEDIA & SOC'Y* 1266, 1267 (2020).

50. *Id.* at 1269.

51. Although platforms may deny it, content moderation is a way for platforms to ensure that their services "align[] . . . with the interests of advertisers." Niva Elkin-Koren, Giovanni De

Vice Patrol describes a regime that presumed that no one needed unique expertise to identify gay people.⁵² Indeed, it specifically rejected the role of expertise, tying the liquor boards' enforcement power to the public's lay intuitions about what qualified as "queer" or "disorderly" and should therefore be banished from the public sphere. Like anti-vice policing, sexual content moderation relies on the presumption of lay expertise in both human and algorithmic moderation. And, through the enforcement of more conservative (and supposedly shared) social norms, it also results in the disproportionate targeting of queer sexual expressions for removal as "offensive" or otherwise "inappropriate."

Take the example of human moderation. Platforms keep the details of moderator training a secret, but we know that commercial content moderators usually find their jobs through outsourcing firms. Once they pass a written test and an interview, they start working from home in several-hour shifts almost immediately.⁵³ And although human moderators are based all over the world, many of those moderating U.S. content are located in the Philippines because platforms presume that decades of U.S. colonial influence have accustomed Philippine citizens to U.S. sensibilities.⁵⁴ Like anti-vice policing, which presumed most people had access to a shared sensibility about sexual differences (p. 96), the mechanics of content moderation implicitly relies on two related presumptions—namely, that there is shared understanding of what people in the U.S. find offensive and that anyone vaguely cognizant of U.S. norms can apply that shared understanding to sexual content. This may not have been at front of mind when platforms were first designing the machinery of content moderation. Nor was this likely the primary reason for outsourcing moderation. But platforms' choice of commercial content moderators from cultures they presume are similar to those whose content they are moderating implicitly suggests that all moderators need is a shared understanding about sex that ostensibly comes from general cultural familiarity.

Algorithmic moderation also relies on lay expertise. Technical expertise in building algorithms should not be confused with expertise in the substance of

Gregorio & Maayan Perel, *Social Media as Contractual Networks: A Bottom Up Check on Content Moderation*, 107 IOWA L. REV. 987, 990 (2022).

52. See *supra* Part I.

53. Adrian Chen, *Inside Facebook's Outsourced Anti-Porn and Gore Brigade, Where 'Camel Toes' Are More Offensive Than 'Crushed Heads,'* GAWKER (Feb. 16, 2012, 3:45 PM), <https://gawker.com/5885714/inside-facebooks-outsourced-anti-porn-and-gore-brigade-where-camel-toes-are-more-offensive-than-crushed-heads> [perma.cc/6YAM-MCPA]. See generally SARAH T. ROBERTS, BEHIND THE SCREEN: CONTENT MODERATION IN THE SHADOWS OF SOCIAL MEDIA (2019); Sarah T. Roberts, *Digital Detritus: 'Error' and the Logic of Opacity in Social Media Content Moderation*, 23 FIRST MONDAY (2018), <https://doi.org/10.5210/fm.v23i3.8283> [<https://perma.cc/LEJ2-4J3D>]; Sarah T. Roberts, *Commercial Content Moderation: Digital Laborers' Dirty Work*, in THE INTERSECTIONAL INTERNET: RACE, SEX, CLASS AND CULTURE ONLINE 147 (Safiya Umoja Noble & Brendesha M. Tynes eds., 2016).

54. Adrian Chen, *The Laborers Who Keep Dick Pics and Beheadings Out of Your Facebook Feed*, WIRED (Oct. 23, 2014, 6:30 AM), <https://www.wired.com/2014/10/content-moderation/> [perma.cc/2E68-BPVC].

what those algorithms are moderating. Algorithms are models that rely on heuristics, proxies, and independent variables; they are trained on material that has been associated with previously moderated content.⁵⁵ Therefore, algorithmic moderation presumes that there are some characteristics common to “offensive” sexual content, that those characteristics are evident, and that they can be programmed into machines by engineers with no meaningful experience with the underlying content. As Frank Pasquale has argued, even if an engineer could neatly code rules and their attendant human judgments into a machine, the machine would necessarily lack the “[q]ualitative evaluation[] and . . . humble willingness to recalibrate and risk-adjust quantitative data” that come with human experts.⁵⁶ Therefore, algorithmic moderation embodies an epistemic assumption that sexual content is reducible to factors that AI can identify. Put another way: “Sex: There’s an App for That.” It requires no contextual or nuanced understanding of sex, let alone an appreciation for queer or nonnormative culture.

The result is a double attack on queer expression: content moderation disproportionately shuts down and limits opportunities for authentic queer voices and cuts off queer people’s access to a full range of information about queerness.⁵⁷ That is because social media platforms and their content moderation rules—just like police in the anti-vice era—play critical roles in the production and dissemination of knowledge about queer social practices.

As Lvovsky argues, during the height of anti-vice policing, when queer expression was removed from media, banned in the mail, and pushed off the streets, anti-vice officers gathered knowledge about queer life because they “spent their nights patrolling bars and cruising grounds” (p. 16). Naturally, the quality of this knowledge was itself worth questioning. As important, however, was how officers related that knowledge to—or withheld it from—others. Sometimes, investigators chose to share selective visions of gay life with the public: interviewed by reporters about “gay life” in the 1960s, police often recited simplistic and sinister stereotypes of queer life, which were then disseminated through the media (pp. 14–18). But they also strategically chose to

55. See Robert Gorwa, Reuben Binns & Christian Katzenbach, *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance*, BIG DATA & SOC’Y, Feb. 28, 2020, at 1, 3–5, <https://doi.org/10.1177/2053951719897945> [<https://perma.cc/T5Y4-8KKV>].

56. Frank Pasquale, *Professional Judgment in an Era of Artificial Intelligence and Machine Learning*, BOUNDARY 2, Feb. 2019, at 73, 74; see also FRANK PASQUALE, *NEW LAWS OF ROBOTICS* 1–11 (2020); Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, 87 GEO. WASH. L. REV. 1 (2019); Ari Ezra Waldman, *Outsourcing Privacy*, 96 NOTRE DAME L. REV. REFLECTION 194, 208 (2021).

57. One could call this a “straight space.” Cf. Elijah Anderson, “*The White Space*,” 1 SOCIO. RACE & ETHNICITY 10, 10 (2015). Although not using the phrase “straight space,” Yoel Roth has argued that supposedly queer spaces like Grindr, the geosocial dating and hookup app used mostly by gay and bisexual men, still marginalize queerness and keep “[n]onnormative practices—fetishistic, ‘unsafe,’ or highly visible sexualities, for instance— . . . consistently hidden from view.” Yoel Roth, “*No Overly Suggestive Photos of Any Kind*”: *Content Management and the Policing of Self in Gay Digital Communities*, 8 COMM’N, CULTURE & CRITIQUE 414, 429 (2015).

withhold their knowledge of gay life to help prove cases against bar owners charged with “knowingly” serving gay customers—as well as, in later years, to avoid skepticism of their manipulative entrapment tactics (pp. 16–17).

Similarly, dominant social media platforms are becoming the arbiters of queer expression,⁵⁸ even if what they show is a highly curated and limited slice of the real thing.⁵⁹ If queer adolescents want to learn how to put on makeup for their first drag show, they go to YouTube. If someone wants to learn the best way to come out to their parents as bisexual, they join a Facebook group or watch videos on TikTok. Without enough doctors trained in queer sexuality,⁶⁰ adolescents turn to Google to learn how to safely engage in intimacy.⁶¹ Social media are today’s gatekeepers of queer knowledge for many young people, and, as Michel Foucault predicted, their continued repression of the queer experience establishes a skewed, heteronormative baseline understanding of what it means to be queer.⁶²

This perpetuates stigmatization and discrimination. At midcentury, asymmetrical enforcement of disorderly conduct or solicitation laws against queer people branded queerness as “degenerate” or “lewd” or “disorderly,” justifying denial of services in areas beyond urban nightlife.⁶³ As George Chauncey argued, the sexual repression typified by anti-vice policing also trivialized queer

58. See generally Brady Robards et al., *Twenty Years of ‘Cyberqueer’: The Enduring Significance of the Internet for Young LGBTIQ+ People*, in *YOUTH, SEXUALITY AND SEXUAL CITIZENSHIP* 151 (Peter Aggleton et al. eds., 2018); Jon M. Wargo, “Every Selfie Tells a Story . . .”: *LGBTQ Youth Lifestreams and New Media Narratives as Connective Identity Texts*, 19 *NEW MEDIA & SOC’Y* 560 (2015).

59. See generally Wargo, *supra* note 58.

60. E.g., Julie Beck, *What Doctors Don’t Know About LGBT Health*, *ATLANTIC* (Nov. 15, 2014), <https://www.theatlantic.com/health/archive/2014/11/what-doctors-dont-know-about-lgbt-health/382792> [perma.cc/RQU7-YG7C].

61. There are indeed some areas of queer life where we should want empowered medical professionals and scientific evidence to inform legal rules and personal behavior. Gender-affirming hormone therapy is a good example. Medical expertise can also help prepare young people to engage in and enjoy intimacy, especially since social media is full of misinformation about HIV and anal sex. See, e.g., *Anal Douching: How to Safely Clean for Anal*, *BESPOKE SURGICAL*, <https://bespokesurgical.com/education/anal-cleansing/> [perma.cc/ELD3-TLBY]; Evan Goldstein, *How Often Should You Use An Enema?*, *BESPOKE SURGICAL* (Oct. 5, 2020), <https://bespokesurgical.com/2020/10/05/how-often-should-you-use-an-enema/> [perma.cc/9XCL-M8B5]. But it is not obvious that medical expertise is always necessary since communities can help each other in more supportive, joyous, and democratic ways.

62. See MICHEL FOUCAULT, *THE ARCHEOLOGY OF KNOWLEDGE & THE DISCOURSE ON LANGUAGE* 88–105 (A.M. Sheridan Smith trans., 1972); Stuart Hall, *The West and the Rest: Discourse and Power*, in *FORMATIONS OF MODERNITY* 277 (Stuart Hall & Bram Gieben eds., 1992); see also William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 *HOFSTRA L. REV.* 817, 836 (1997) (noting that controlling knowledge and discourse can determine the course of changing attitudes and law).

63. See, e.g., CHAUNCEY, *supra* note 7, at 2. Anti-vice laws are, of course, not the only examples of this. For instance, persistent antisodomy laws, even when they were rarely enforced, not only categorized all gay people as presumptive criminals, but also justified many other forms of discrimination. See, e.g., Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened*

people's experiences, justifying institutional and social discrimination long after Stonewall and the systematic dismissal of queer dignity during the AIDS Crisis.⁶⁴ For queer people in general, then, rules that put their experiences on the "wrong" side of the sexual hierarchy are first steps in a larger anti-queer agenda.⁶⁵ Sexual content moderation is just the latest effort in that campaign. Dominant platforms' tendency to only make accessible a sanitized version of queer life stigmatizes nonnormative expressions of sex, sexuality, and gender identity, giving space for discrimination on the basis of those characteristics and behaviors.

CONCLUSION

History tells us that those with power will never stop policing sexuality. The exact contours of its effort will change over time, but the goal is often the same: maintaining a particular (inevitably conservative) view of public morality. Each new assault on abortion, on trans people's right to exist, and on joyous and authentic queer expression brings a renewed sense of hopelessness that the law will ever protect those of us with stigmatized sexual identities. But these struggles are not new. Nor are the risks posed by hostile exercises of power. This Review has argued that *Vice Patrol's* exploration of the production of legal knowledge about homosexuality, and the subsequent regulations that incorporated this homophobic animosity, can explain much about the foundations and trajectories of legal fights over abortion and LGBTQ+ rights. In all of these contexts, those in power choose a certain type of knowledge—supposed commonsense, but nevertheless skewed feelings about sexuality over more rigorous scientific knowledge—to make policy that undermines freedom, democracy, and autonomy. Therefore, in an era of platform power and rampant misinformation, that fight over knowledge construction is at the core of civil rights advocacy today.

Scrutiny, 102 MICH. L. REV. 1528, 1536 (2004); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 103 (2000).

64. See CHAUNCEY, *supra* note 7, at 9.

65. Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in CULTURE, SOC'Y AND SEXUALITY 150, 152–55 (Richard Parker & Peter Aggleton eds., 2006).