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Queer Expertise:
Urban Policing and the Construction of Public Knowledge about Homosexuality, 1920–1970

A dissertation presented

by

Anna Lvovsky

to

The Committee on Higher Degrees in the History of American Civilization

in partial fulfillment of the requirements

for the degree of

Doctor of Philosophy

in the subject of

History of American Civilization

Harvard University

Cambridge, Massachusetts

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Queer Expertise: Urban Policing and the
Construction of Public Knowledge about Homosexuality, 1920–1970

Abstract

This dissertation tracks how urban police tactics against homosexuality participated in the construction, ratification, and dissemination of authoritative public knowledge about gay men in the United States in the twentieth century. Focusing on three prominent sites of anti-homosexual policing—the enforcement of state liquor regulations, plainclothes decoy campaigns to make solicitation arrests, and clandestine surveillance of public bathrooms—it examines how municipal police availed themselves of competing bodies of social scientific information about homosexuality in order to bolster their enforcement efforts, taking into account such variable factors as the statutes authorizing their arrests, the humors of the courts, and their need to maintain public legitimacy. Lending the authority of the state to their preferred paradigms for understanding sexual deviance, and attaching direct legal penalties to anyone who tried to disagree, the police influenced whether—and when—new scientific research about homosexual men reached the mainstream public and was embraced as authoritative. Even as vice squads' anti-homosexual campaigns allowed them to amass increasingly sophisticated and rarefied insights into the urban gay world, however, police officers consistently denied their reliance on any "expert" knowledge about homosexuality in court, legitimating their tactics on the basis of public's ostensibly shared knowledge about gay men. Tracking the history of urban vice policing alongside the shifting landscape of popular knowledge about homosexuality, this project examines both the ambivalent place of "expertise" in public debates about sexual deviance in the

United States, and the multifaceted origins and repercussions of the lay public's evolving knowledge about gay communities in the twentieth century.

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Introduction

I.

In the winter of 1940, the owner of a New York bar accused by the State Liquor Authority of serving alcohol to "homosexual, degenerate, and undesirable persons" tried to catch the policemen who testified against him off their guard. On several occasions over the past months, liquor agents visiting the Gloria Bar & Grill had reported a peculiar element among the regular crowd: men with bleached hair, rouged cheeks, and lipstick, swishing their hips as they passed between tables, calling each other effeminate names. All in all, the agents approximated, there were easily "over 100 fags" there.

Appearing before the SLA's commissioner, the bar's attorney tried to ferret out the scientific basis of such devastating testimony. "[Do] you know anything about degenerates?" he asked the witnesses. "Have you ever studied the psychology of homosexualism? . . . Have you read anything on it? . . . Have you ever seen an act of unnatural intercourse at any time, any place?" As the attorney explained to the confounded commissioner, the investigator on the stand had ventured to "testif[y] as to degenerates"; the defense "wanted to see if this man is an expert." But the lawyers for the state derided the very suggestion: "You don't have to be an expert to be able to see a homosexual."[1]

[1] Gloria Bar & Grill, Inc. v. Bruckman, Record on Review (1940), 113-15, New York Supreme Court Records, Civil Branch, New York County (New York, NY). For investigators' testimony against Gloria, see ibid., 148, 173, 296, 314-15, 335-36.

In the same years, others were growing less sure. In 1938, the Los Angeles Police Department launched a specialized Sex Bureau, devoted to catching sex criminals of all varieties and overseen by trained psychologist J. Paul de River. Always eager to enrich the government's enforcement efforts against homosexuality, de River was particularly outraged to discover, just one year after Gloria's ill-fated proceedings before the SLA, the large number of homosexual men arrested bearing draft cards from the Army. Insisting that the military's screening boards and recruits must be "taught how to recognize the sex pervert," the head of the LAPD's vice unit generously offered his own professional services for a formal "lecture course" on the subject.[2]

The history of law enforcement against homosexuality in the United States is a dynamic record. From civil licensing disputes to felony sodomy charges, the legal and political debates surrounding police campaigns against gay men in the twentieth century implicated numerous issues beyond simply innocence or guilt: the limits of police officers' investigative tactics, the proper role of the state in regulating private conduct, the underlying moral hazards of sexual deviance. As Gloria's revocation hearing and Dr. de River's professional aspirations suggested, however, they were also debates about *expertise*: the changing content of and shifting authority behind the accepted public knowledge about homosexuality.

This dissertation tracks how urban policing tactics against homosexuality participated in the construction, ratification, and dissemination of expert knowledge about gay men in the United States in the twentieth century. It examines how police departments eager to improve their arrest rates drew on competing bodies of lay and expert information about homosexuality to bolster their enforcement efforts, taking into account such variable factors as the statutes they enforced, the humors of judges supervising their arrests, and their concerns about preserving

[2] J. Paul de River, letter to Fiorella LaGuardia, April 5, 1941, Folder 10, Box 20, World War II Project Papers, GLBT Historical Society (San Francisco, CA).

public support. It examines how police departments, in turn, endorsed and promulgated their preferred paradigms for understanding sexual deviance among the general public, helping determine how—and when—new scientific insights about homosexuality reached the popular press and gained recognition as authoritative. It examines how, despite their growing sophistication regarding the urban gay world, police departments commonly downplayed their expertise in court, invoking the sufficiency of lay knowledge about gay men to legitimate their enforcement tactics. In doing so, the project also touches on a number of related stories: the multifaceted construction of popular stereotypes about homosexuality, the police's struggles for professionalization after the end of Prohibition, the unpredictable political valences of public curiosity about sexual deviance, the development of a cohesive sense of gay "identity" among American men.

Ultimately, the story told in the following chapters supports four broad claims. First, it suggests that between the 1930s and the 1960s, the growing centrality and sophistication of urban vice campaigns against gay men transformed municipal police officers into recognized authorities on the subject of homosexuality, rivaling medical or scientific "experts" as a voice of professional wisdom about the urban gay world. Second, it suggests that the police's expanding professional authority over urban homosexuality allowed policemen to act as key epistemological agents in the construction of popular knowledge about gay men. Lending the weight of the state to their preferred paradigms for understanding sexual deviance, demonstrating the pragmatic value of those paradigms, and attaching direct legal penalties to anyone who tried to disagree, the police's anti-homosexual campaigns primed the public's receptivity to evolving social and scientific insights into homosexuality. Third, it suggests that the public drive toward some more objective knowledge of homosexuality in these years—those intermittent bursts of

near-scientific curiosity partly fed, in the 1960s, by the police themselves—did not necessarily reflect a growing liberality toward gay communities. While undoubtedly helping to normalize gay men for many urban Americans, that pedagogical impulse advanced the project of anti-homosexual regulation itself, reassuring the public of its powers to identify gay men and expanding the reach of the police's anti-homosexual operations. Finally, it suggests that this broad regulatory project—the public quest for a type of epistemological mastery over urban homosexuality in the twentieth century—intrinsically resisted the very idea of "expertise" over certain modes of understanding sexual deviance. At a time when many Americans still regarded the homosexual with a mix of profound curiosity and profound aversion, defining homosexuality (and homosexual men) as something self-revelatory allowed the public to affirm its mastery over that unsavory phenomenon without ever having to compromise its distance from it. The police's careful cultivation of their "expert" credentials on homosexuality—their simultaneous development and denial of any unique professional insights into the urban gay world—reflects the complex politics of public knowledge about homosexuality in the mid-twentieth century: the discontinuity between "expertise" and "authority" on so taboo a subject as sexual deviance.

II.

The history of law enforcement against homosexuality in the United States extends far back beyond the twentieth century. Taking their lead from England, which enacted its first prohibition against "buggery" during the 1533 Reformation Parliament, the early states typically recognized sodomy as a crime at common law: a violation of (as local courts preferred) either the laws of God or the laws of nature. By the late nineteenth century, most states had adopted a more legislative approach, passing formal statutes against anal sex, or what most simply

designated as the abominable "crime against nature." Well through the nineteenth century, however, convictions under the sodomy statutes remained slim. Frustrated by the innate difficulties of investigating sex acts typically pursued in private among willing partners, sodomy prosecutions in these years focused almost exclusively on charges of violent rape and child molestation.[3]

Starting in the early twentieth century, the states' legal arsenal against homosexuality began to expand. To begin with, a national trend toward adding explicit prohibitions against oral sex to anti-sodomy statutes vastly broadened the scope of the states' sodomy prosecutions. Though never entirely escaping the evidentiary difficulties of anti-sodomy prosecutions, police departments learned to rely on clandestine surveillance and similar tactics to ferret out illegal sexual activity in semi-public sites like parks and public bathrooms. More significantly, state legislatures in these decades enacted or strengthened a series of misdemeanor statutes that empowered police to arrest homosexual men on the basis of far weaker evidence. Liquor regulations allowed state agents to raid and shut down licensed bars simply for serving homosexual patrons. Disorderly conduct and solicitation statutes authorized police to frequent popular cruising sites, waiting to arrest gay men for sexual advances. Laws against loitering invited officers to comb through popular parks and street corners, dispersing suspected gay men from public property.[4]

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[3] William N. Eskridge, Jr., "Law and the Construction of the Closet: American Regulation of Same Sex Intimacy, 1880-1946," *Iowa Law Review*, Vol. 82 (1997), 1011-16.

[4] For an overview of the expansion of misdemeanor and sodomy statutes during the first decades of the twentieth century, see Eskridge, "Law and the Construction of the Closet," 1011-52; Steven A. Rosen, "Police Harassment of Homosexual Women and Men in New York City, 1960-1980," *Columbia Human Rights Law Review*, Vol. 12 (1980), 159-90. For histories of sexuality including substantial overviews of police operations against gay bars, see John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (Chicago: University of Chicago, 1983); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (New York: Basic Books, 1994); Nan Alamilla Boyd, *Wide Open Town: A History of Queer San Francisco to 1965* (Berkeley: University of California Press, 2003); Lillian Faderman

Equipped with this growing set of legal tools, police departments soon found themselves with new incentives to use them. One major catalyst arose in the late 1930s, when a rash of highly publicized sex crimes spawned a national panic about "sexual psychopaths."[5] The prototypical attacks recounted in the press involved morbid assaults on young girls, but police departments pressured to crack down on sexual "degenerates" in American cities responded by revitalizing their operations against the easier target of homosexual men. The second shift was purely a Cold War invention. In the winter of 1950, just weeks after the conviction of Alger Hiss confirmed public fears about the infiltration of the U.S. government by communist operatives, Senate Republicans eager to discredit the Democratic Truman administration embarked on a vocal campaign against homosexual employees in the federal government. At a time when major newspapers still typically avoided overt discussions of homosexuality, the "lavender scare" sparked a broad debate about the risks posed by gay men to national security, and gave newfound significance to the police's anti-homosexual campaigns.[6]

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and Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (New York: Basic Books, 2006).

[5] The sex crime panic itself precipitated state legislatures to pass new criminal statutes, commonly known as "sexual psychopathy" laws. For the most part, however, these laws governed how states could treat and detain suspects *following* their arrests for alleged sex crimes, rather than provided new grounds for police officers to arrest gay men to begin with. For historical accounts of the sexual psychopath panic, see Estelle Freedman, "'Uncontrolled Desires': The Response to the Sexual Psychopath, 1920-1960," *Journal of American History,* Vol. 74, No. 1 (June 1987), 92-93, especially 83-84; Andrea Friedman, "Sadists and Sissies: Anti-Pornography Campaigns in Cold War America," *Gender and History*, Vol. 15, No. 2 (August 2003), 213-39; Stephen Robertson, *Crimes Against Children: Sexual Violence and Legal Culture in New York City, 1880-1960* (Chapel Hill: University of North Carolina Press, 2005), Chapter 10, especially 218; Chrysanthi S. Leon, *Sex Fiends, Perverts, and Pedophiles: Understanding Sex Crime Policy in America* (New York: New York University Press, 2001).

[6] For historical accounts of the lavender scare, see David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004); Robert D. Dean, *Imperial Brotherhood: Gender and the Making of Cold War Foreign Policy* (Amherst: University of Massachusetts Press, 2001); K.A. Cuordileone, *Manhood and American Political Culture* (New York: Routledge, 2005); Stacy Lorraine Braukman, *Communists and Perverts Under the Palms: the Johns Committee in Florida, 1956-1965* (Gainesville: University Press of Florida, 2012).

By the mid-1950s, the police's growing resources and pressures to patrol sexual degeneracy in American cities had combined into a robust regulatory apparatus against homosexual men. Uniformed officers frequented parks, streets, and restaurants, watching for any telltale signs of homosexual behavior. Plainclothes decoys emulated the speech and fashions of gay men, trying to elicit sexual advances in bars and cruising sites. In public bathrooms, vice officers perched behind peepholes, air vents, and two-way mirrors, waiting for unwitting cruisers to begin an act of sodomy before their eyes. Across the nation, police departments established registration systems to keep track of suspects arrested on homosexual charges, creating a police record that followed gay men throughout their lives.[7]

Not unreasonably to many of its victims, this looming state apparatus may have seemed like a concerted encroachment on the civil liberties of gay men during the Cold War. Yet the internal dynamics of anti-homosexual policing operations were far more complex. Gay men who frequented local bars, public parks, and cruising sites typically recalled experiencing the state's anti-homosexual campaigns through the figure of the policeman—as well as, among those unlucky enough to be arrested and face formal charges, through the courts. But the scope of law enforcement against gay men in the mid-twentieth century was the joint product of multiple

[7] In addition to these campaigns by police, these decades also witnessed a rise in state censorship against homosexuality in the United States, including an attempted ban of gay-related materials from the U.S. mail and crackdowns against "obscene" themes in theaters. Andrea Friedman, *Prurient Interests: Gender, Democracy, and Obscenity in New York City, 1909-1945* (New York: Columbia University Press, 2000); Martin Meeker, "Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s," *Journal of the History of Sexuality*, Vol. 10, No. 1 (January 2001), 78-116; Boyd, *Wide Open Town*, 172; Craig M. Loftin, ed., *Letters to ONE: Gay and Lesbian Voices from the 1950s and 1960s* (Albany: SUNY Press, 2012), 121. In these same years, the Motion Picture Association of American voluntary imposed a ban on depictions of homosexuality in film. Eskridge, "Law and the Construction of the Closet"; Vito Russo, *The Celluloid Closet: Homosexuality in the Movies* (New York: Harper Collins, 1987).

branches and agencies of government, each constricted by its own internal regulations and each motivated by its own institutional concerns.[8]

On the front end, naturally, were the legislatures. Charged with reflecting the people's will, professionally dependent on their constituents' favor, and well aware that a strict hand with sexual deviance generally won more votes than leniency, politicians throughout these years generally pushed for stricter regulations against gay men. Whether expanding the breadth of sodomy and misdemeanor laws in the early twentieth century, promulgating new anti-solicitation statutes during the Cold War, or superseding liberal court decisions through broader liquor regulations in the 1950s, state lawmakers consistently expanded the police's power to harass local gay communities. Legislatures were certainly not unilateral in their drive toward regulation—in 1960, for example, Illinois became the first state to decriminalize consensual sodomy—but they tended, unsurprisingly, to err on the side of enforcement.

On the other side, predictably, were the courts. Responsible both for interpreting state criminal laws as written and for vindicating the superior dictates of the state and federal Constitutions, courts commonly found themselves torn between respecting states' rights to outlaw objectionable sexual conduct and protecting individual rights. Often, the results of that calculation differed: in California, for example, courts adopting a robust reading of the state constitution invalidated liquor regulations that their colleagues on the East Coast readily enforced. In all states, however, judges tended to keep watch for police officers who overstepped their bounds in arresting gay men, throwing out evidence of sodomy procured

[8] For the significance of rejecting a monolithic conception of urban "policing" against gay men as the labor of unitary government entity, see also Christopher Agee, "Gayola: Police Professionalization and the Politics of San Francisco's Gay Bars, 1950-1968," *Journal of the History of Sexuality*, Vol. 15, No. 3 (September 2006), 462-89. Margot Canaday has suggested a similar theoretical framework regarding the federal government's and military's regulations of gay men and women in the twentieth century. Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth Century America* (Princeton: Princeton University Press, 2009).

through invasive clandestine surveillance stations, or finding informal ways to dismiss solicitation arrests by overly aggressive decoys. Beholden to a greater power than the public will—and, inversely, eager to shelter that innocent public from the states' regulatory excesses—courts frequently applied some downward pressure on the states' anti-homosexual campaigns.

The police had to mediate between these two groups. Tasked with executing the criminal laws enacted by the states but also subject to the scrutiny and censure of the courts, police departments had to find ways to enforce anti-homosexual laws that were rigorous, but not overzealous—effective, but not unlawful. Especially as the bulk of anti-homosexual enforcement fell to specialized investigative units—whether vice squads or state liquor agencies—those units strove to vindicate their institutional role by boosting the efficiency of their operations. Mastering gay men's insular cruising codes to entice solicitations, designing innovative surveillance stations to capture elusive evidence of sodomy, and conducting covert observations for signs of homosexuality in licensed bars, the police developed a set of increasingly rigorous tactics against gay men. Yet they remained mindful that becoming too clever in their investivative techniques could ultimately undermine their anti-homosexual operations, offending judges wary of enticement tactics, violating constitutional limitations on unreasonable searches, eliding statutory requirements of "knowing" misconduct, or simply raising public skepticism of police's dubious intimacy with a deviant underworld. The police's goal, in context, was not just to increase efficiency. It was to increase efficiency while maintaining some claims to public legitimacy.

As it happened, the police's concerns over the public legitimacy in the mid-twentieth century were hardly limited to the vice squad's operations against gay men. In fact, the rise of anti-homosexual policing in the 1950s occurred on the edges of a far broader preoccupation with

the institutional authority of the police: a deliberate campaign, peaking soon after World War II, to "professionalize" the American police force.[9] The roots of that campaign traced back to the turn of the century, when progressive reformers appalled by the unseemly influence of political machines over urban police departments lobbued for greater oversight of the police profession. The groundswell of political scrutiny met significant resistance from police departments themselves, but ultimately succeeding in inspiring police departments to place greater emphasis on scientific training: fingerprinting, polygraph tests, forensic laboratories, the debut of professional "criminology."[10]

The second wave of professionalization began in the late 1930s, and this time—far more effectively—it occurred under the helm of police departments themselves. A core catalyst behind the movement was the nation's experiment with Prohibition, which by the time of its repeal in 1933 had turned into a publicity disaster for local police departments, popularizing an (often accurate) impression of policemen as both corrupt and incompetent. Sensitive to the profession's flagging public image, the new proponents of reform continued the traditional emphasis on improving police efficiency, yet they were equally concerned with improving police prestige. While police departments had long charted their public role through something of a military analogy, in the late 1930s the International Association of Police Chiefs proposed reconceiving the policeman as a trained "professional." Over the next years, police departments focused their efforts on building—and advertising—their unique occupational qualifications.

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[9] For another account of the (sometimes counterintuitive) intersection between police professionalization and the history of anti-homosexual policing, arguing that the crackdown against gay bars in San Francisco in the 1960s did not necessarily reflect a deliberate anti-homosexual policy so much as a broad departmental drive against police bribery and corruption, see Agee, "Gayola," 462-89.

[10] For a comprehensive overview of first-wave police professionalization, see Samuel Walker, *Popular Justice: A History of American Criminal Justice* (New York: Oxford University Press, 1998), 164-65; Thomas J. Deakin, *Police Professionalism: The Renaissance of American Law Enforcement* (Springfield: Charles C. Thomas, 1988), Chapter 4; Robert M. Fogelson, *Big City Police* (Cambridge: Harvard University Press, 1977), 110-11.

Scientific crime labs and forensic technologies helped characterize police investigation as a technical skill. Training academies and university degrees in criminology portrayed police officers as certified professionals. The fragmentation of police departments into specialized units both increased the efficiency of urban policing and gave officers unique expertise over their fields. At the end of World War II, a national poll tracking professional prestige had identified police officers as semi-skilled laborers, alongside plumbers, mailmen, and mechanics. By the 1960s, it placed them alongside reporters, small businessmen, and bookkeepers in the bottom ranks of the "paraprofessionals."[11]

In many ways, the police's expanding operations against gay men fell directly within this narrative. Police campaigns against sexual deviance in the mid-twentieth century featured all the familiar emphases on standardization, specialization, and scientic training: sex registration systems to keep track of arrested gay men, discrete vice morals squads devoted to the problem of the sexual deviant, manuals and courses on the psychology of sexual predators.[12]

Yet at the same time, the history of anti-homosexual policing in the United States provides a useful study in the limitations of police professionalization. The second wave of reform in the mid-twentieth century generally sought to bolster the public authority of local police departments by emphasizing their unique skills, training, and experience—by casting the

[11] For the adverse effects of Prohibition, see Humber S. Nelli, "American Syndicate Crime: A Legacy of Prohibition," in *Law, Alcohol, and Order*, ed. David E. Kyvig (Westport: Greenwood Press, 1985), 128; Deakin, *Police Professionalism*, 109-10. For extensive histories of mid-century professionalization, see Samuel Walker, *A Critical History of Police Reform: The Emergence of Professionalism* (Lexington: Lexington Books, 1977), 139-66; Deakin, *Police Professionalism*, Chapters 14 and 15; Fogelson, *Big City Police*, 146-49, 155-64, 177-82; Christopher P. Wilson, *Cop Knowledge: Police Power and Cultural Narrative in Twentieth-Century America* (Chicago, University of Chicago Press, 2000), 18, 63-64. For the professional survey, see Fogelson, *Big City Police*, 234-35.

[12] One Sheriff's office in California tried to reduce its registration system into a scientific reference, creating an IBM file system that logged the personal information, identifying physical features, and modus operandi for all men arrested for any sexual offenses in the region. Searchable by hundreds of individual data points, the file system enabled investigators to narrow down suspects for each reported offense in a matter of minutes. "IBM File Does the Trick," *San Francisco Police and Peace Officer's Journal* (June-July 1957), 18.

police officer, not as a boorish foot soldier for the state, but as a trained expert in his field. But in the course of vice officers' more mundane attempts to vindicate themselves before the public and the courts, the decision of when—and how—to invoke the police officer's professional insights was far more complicated.

First, the legitimating force of the vice officer's unique exposure to the urban gay world depended on the legal framework at play: both the statutes he sought to enforce and the constitutional provisions implicated. Educational programs and criminological manuals commonly tutored vice officers on the nuances of detecting sexual deviants, yet police officers who accused licensed bars of "knowingly" serving homosexual patrons under the state liquor laws, or who defended their clandestine surveillance campaigns against Fourth Amendment challenges by insisting that the evidence they gathered was in "public view," had to deny any unusual insights into gay men's social codes and sexual practices to stay within the limits of those laws.

Second, both police officers' preliminary need to amass any unusual sophistication regarding urban homosexuality and their subsequent willingness to admit that sophistication in public depended on the pressures of the courts, including not simply judges' readings of the law but also their personal politics and humors. In the case of the police's plainclothes decoy operations, for example, judges' personal aversions to overly aggressive enticement tactics—even those technically within the law—precipitated both vice officers' growing fluency in the subtle structures of gay cruising culture in the late 1950s and their denials of that ethnographic fluency in court. Warned against engaging in any overt sexual enticements, plainclothes decoys learned to invite sexual advances through cruising signals sufficiently coded both to fool gay men and to evade judicial scrutiny.

Finally, vice officers' consistent denials of their growing professional intimacy with the urban gay world reflected the unique political considerations involved in claiming rarefied "expertise" around a subject like sexual deviance. As policemen were well aware, homosexuality in these years was simultaneously a broadly denounced social hazard and a self-censoring taboo: both a matter of substantial public stereotype, and one prone to draw skepticism onto anyone who revealed too thorough an acquaintance with it. Unsurprisingly, in context, when some vice officers finally ventured to claim public credit for their professional insights into the gay world in the 1960s, those hard-won accomplishments resulted in as much scandal for local police departments as public esteem. Initially embraced by reporters eager for authoritative information on the urban gay world, vice officers' professional intimacy with that sexual underground—the convincing camouflage, the mastery of cruising signals and flirtations, the peephole surveillance of gay sex—ultimately helped undermine popular support for the police's anti-homosexual campaigns.

In context, perhaps one reason that vice officers so consistently denied any uncommon familiarity with gay men in the twentieth century was the same reason that the lay public itself clung to its facile, flamboyant stereotypes of the homosexual fairy. Like the public's insistence on defining the homosexual as something overt, something conspicuous—something inherently *self-revelatory*—police officers' insistence that their arrests and disciplinary proceedings against gay men relied on commonplace lay knowledge may have anticipated the risk that any claims to rarefied expertise over the phenomenon of sexual degeneracy might attract aspersions of degeneracy itself. In this sense, squads' persistent efforts to defend their homosexual campaigns solely on the basis of lay knowledge were quite consistent with the broader goals of police professionalization in the mid-twentieth century: improving both police efficiency and public

standing. They simply reflected the insight that, with as delicate topic as homosexuality, professional "expertise" was not always coterminous with professional authority.

III.

Debates about professional expertise on homosexuality in the twentieth century, of course, hardly began or ended with the police. Before municipal vice squads ever turned their attentions to the project of policing urban gay men, doctors and scientific researchers had long laid claim to sexual deviance as the subject of their unique institutional authority.

The first attempts to colonize homosexuality for science arose in the mid-nineteenth century, when physicians broke from religious denunciations of sexual deviance as a moral failing and tried to see it as a disease: a behavioral symptom traceable to some more fundamental degeneration of the flesh. By the turn of the century, their search for the origins of sexual perversity in some malformed organ of the body—the genitalia, the brain—gave way to a more holistic theory of the congenital sexual deviant. Prominent sexologists like Magnus Hirschfeld and Havelock Ellis defined homosexual men as natural biological variations: the unavoidable, if perhaps unfortunate, products of enigmatic physiological or mental misalignments.[13] Commonly trained in more traditional medicine, sexologists presented themselves as unique authorities in the field of human sexuality, dominating popular discussion of homosexuality in Europe and the United State for decades to come.[14]

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[13] Individual sexologists adopted varyingly optimistic views of that curious phenomenon, whether a dangerous degeneration, an unfortunate biological defect, or a purely harmless human variant.

[14] For a history of preliminary mid-nineteenth medical studies of homosexuality, see Robert Beachy, "The German Invention of Homosexuality," *The Journal of Modern History*, Vol. 82, No. 4 (December 2010), 810-11, 814. Arnold I. Davidson, *The Emergence of Sexuality: Historical Epistemology an the Formation of Concepts* (Cambridge: Harvard University Press, 2001), 4-7; Gert Hekma, "A History of Sexology: Social and Historical Aspects of Sexuality," in *From Sade to De Sade: Moments in the History of Sexuality*, ed. Jan Bremmer (London: Routledge, 1989), 176-77. For a history of turn of the century sexology, see Hekma, "A History of Sexology"; Paul

By far the most influential "experts" on homosexuality in the twentieth century, however, emerged in the field of psychiatry. The psychiatric study of sexual deviance dated back to the late nineteenth century, when a group of German sexologists first proposed leaving behind the trappings of physical degeneration and seeing homosexuality as a sexual "psychopathology." It found its most popular incarnation in the psychoanalytic theories of Sigmund Freud, who imagined homosexuality as an adverse psychological reaction to any number of potential childhood traumas. Psychiatry in the United States first gained its professional footing in the early twentieth century, but it leapt to the forefront of public debates about sexual deviance after World War II. Enlisted by the military to help screen recruits during the draft, psychiatrists emerged from the war with a new level of public prestige, and they cemented their "expert" standing during the sexual psychopathy debates of the early 1950s. Individual doctors differed in their explanations of the most common origins of homosexuality, whether violent comic books or overbearing mothers, as well in their appraisals of the likelihood of cure. Yet even the most liberal doctors agreed that homosexuality was, at heart, a disease: the sign of an unstable personality at best, or a dangerous pathology at worst.[15]

Robinson, *The Modernization of Sex: Havelock Ellis, Alfred Kinsey, William Msters and Virginia Johnson* (Ithaca: Cornell University Press, 1976, 1989); Henry L. Minton, *Departing From Deviance: A History of Homosexual Rights and Emancipatory Science in America* (Chicago: University of Chicago Press, 2002); Jennifer Terry, "Anxious Slippages Between 'Us' and 'Them': A Brief History of the Scientific Search for Homosexual Bodies," in *Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture*, eds. Jennifer Terry and Jacqueline Urla (Bloomington: Indiana University Press, 1995). For an overview of influential scientific studies on homosexuality in the early twentieth century, see Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago: University of Chicago Press, 1999).

[15] For the early sexological roots of the psychological approach, see Hekma, "A History of Sexology," 179-81; Beachy, "German Invention of Homosexuality"; Davidson, *Emergence of Sexuality*, 12-19; Robinson, *Modernization of Sex*, 5-6; Beachy, "The German Invention of Homosexuality," 819. Terry, *An American Obsession*, 57. For the dominance of professional psychiatrists over public debates about homosexuality, see D'Emilio, *Sexual Politics, Sexual Communities*, 16, 144; Allan Bérubé, *Coming Out Under Fire: The History of Gay Men and Women in World War Two* (New York: Free Press, 1990); Terry, *An American Obsession*, 309-321, 265; Ellen Herman, *The Romance of American Psychology: Political Culture in the Age of Experts* (Berkeley: University of California Press, 1995); Naoko Wake, *Private Practices: Harry Stack Sullivan, the Science of Homosexuality, and American Liberalism* (Rutgers University Press, 2011), 217; Kenneth Lewes, *Psychoanalysis and Male*

The reign of expert psychiatrists over popular discussions of homosexuality would only meet genuine resistance in the 1960s. Partly responsible were gay men and women themselves, many of whom had long resisted the discipline's pathologizing rhetoric. Beginning in the early 1960s, a generation of newly vocal gay rights activists urged gay men to extract themselves from the clutches of "experts," shunning the presumptions of even the most liberal doctors to speak as scientific authorities on homosexuality. Also responsible, however, was the rise of a new scientific authority itself: an ethnographic approach to studying homosexuality, not as a mental disorder or moral failing, but as a robust minority culture. Embraced by older homophile activists who saw alliances with scientific "experts" as a way to boost their public credibility, the sociological study of homosexuality tended to eschew the moralizing tones of popular psychiatrists, encouraging the public to regard the homosexual with some measure of cultural relativism. By the end of the decade, these political and scientific advances helped challenge the prevailing view of homosexuality as a mental disease. In 1973, the American Psychiatric Association formally removed homosexuality from its list of recognized disorders.[16]

The history of scientific knowledge about homosexuality in the United States is, obviously, a story of competing paradigms: different scientific disciplines and medical authorities, often supported by different social and political allies, vying for supremacy as an expert voice on sexual deviance. In any field inspiring a modicum of public interest, after all, the

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Homosexuality (Northvale, N.J.: Jason Aronson, 1995); Minton, *Departing From Deviance*, 232-33; Ronald Bayer, *Homosexuality and American Psychiatry* (1987).

[16] For the activist turn against homophile alliance with expertise, see Minton, *Departing from Deviance*, 239-45; D'Emilio, *Sexual Politics, Sexual Communities*, 153. For the rise of sociological studies of homosexuality, see George Chauncey, Introduction to *Homosexuality in the City: A Century of Research at the University of Chicago*, by Chad Heap (Chicago: University of Chicago Library, 2000); Chad Heap, *Homosexuality in the City: A Century of Research at the University of Chicago* (Chicago: University of Chicago Library, 2000); John D'Emilio, *Sexual Politics, Sexual Communities*; Minton, *Departing From Deviance*. For the strategic embrace of sociology by homophile activists, see specifically Minton, *Departing from Deviance*, 239; D'Emilio, *Sexual Politics, Sexual Communities*, 109-17.

evolution of established "science"—that ostensibly most objective of all disciplines—never unfurls outside the field of politics, but is deeply implicated in far broader struggles over political and social power.[17] Indeed, historians of homosexuality have frequently examined how the shifting landscape of scientific authority influenced the American gay community's struggle for civil rights in the twentieth century. Retaining expert psychiatrists as expert witnesses at trial, collaborating with sociologists and liberal psychologists to challenge public stereotypes of gay men, and even spearheading their own empirical studies of sexual variation, homosexual men and women consistently invoked the legitimating imprimatur of "science" to boost their public credibility.[18]

The history of anti-homosexual law enforcement in the United States provides a different lens: not simply how social groups with different cultural and political commitments strive to legitimate themselves through the stamp of scientific authority, but how the recognition of certain scientific knowledge as "authoritative" depends on its alliance with different cultural and political groups. As the police's anti-homosexual campaigns suggest, public understandings of scientific expertise on homosexuality in the mid-century did not necessarily track the evolving landscape of scientific consensus on the subject. Rather, the determination of whether—and

[17] My thinking about the social valences of scientific research is deeply indebted to the history of science and science and technology studies, which has long sought to de-mystify the construction of scientific truth as a process emerging through a complex of social structures, allies, and public preconceptions. See, for example, David Bloor, *Knowledge and Social Imagery* (Chicago: University of Chicago Press, 1976); Barry Barnes, *Scientific Knowledge and Sociological Theory* (London: Routledge, 1974); Bruno Latour, *The Pasteurization of France* (Cambridge: Harvard University Press, 1988); Arnold I. Davidson, "Styles of Reasoning, Conceptual History, and the Emergence of Psychiatry," in *The Science Studies Reader,* ed. M. Biagioli (New York: Routledge, 1999); Kurt Danziger, *Constructing the Subject: Historical Origins of Psychological Research* (Cambridge: Cambridge University Press, 1990).

[18] Most prominently, Henry Minton has examined how homosexual scientists and heterosexual allies in the twentieth century pursued a project of "emancipatory research," marshaling scientific research to create a more benign public image for homosexuality. Minton, *Departing From Deviance*.

when—new insights into homosexuality were accorded the weight of scientific expertise depended on a number of cultural factors far outside the academy.[19]

First, the adoption of new scientific knowledge as an expert insight into homosexuality depended on the interplay between that novel information and the public's preexisting understanding of sexual deviance. In the context of homosexuality, as in many others, the public's embrace of "expert" contributions to public debate was often contingent on its ability and willingness to fit those contributions around its own common-sense perceptions. Lawmakers struggling to understand and constrain violent sex crime in the 1930s and 1950s turned to psychiatrists for their professional wisdom about the sexual predators, but investigators confident in their ability to recognize gay men through certain widely recognized physical tropes rebuffed psychiatrists' attempts to claim the identification of homosexuals as an "expert" field. Decoys frustrated by gay men's subtle cruising codes and journalists astounded that most men did not reflect the stereotype of the effeminate fairy in the 1960s keenly sought out more sophisticated ethnographic insights into the gay world, yet judges lacking any reason to know the

[19] In the broadest sense, of course, the state of accepted public knowledge about homosexuality in the twentieth century did not depend solely on prevailing medical or scientific beliefs, but arose through the contributions of numerous cultural fields, from news reportage to political debates to commercial entertainments. The widespread presumption of homosexual effeminacy in the 1930s stemmed both from elite sexological wisdom about homosexual inversion and from popular pansy spectacles; the view of homosexuality as a pathology in the 1950s reflected not only the writings of expert psychiatrists but also the journalistic coverage of the sex crime panic; popular stereotypes of gay men as emotionally unstable during the Cold War developed not only through psychological case studies of homosexual patients but also though political debates about security risks posed by gay federal employees. It would be naïve to believe that public knowledge about homosexuality—even "authoritative" knowledge—in the twentieth century was defined purely through the contributions of established medical or scientific experts.

Broadening our attention to all the many cultural and social authorities that influenced public knowledge about homosexuality in the mid-twentieth century would leave us with a bibliography too vast to list here. For simply a sampling of the diverse scholarship on those cultural influences, however, see Michael S. Sherry, *Gay Artists in Modern American Culture: An Imagined Conspiracy* (Chapel Hill: University of North Carolina Press, 2007) (theater and the arts); Harry M. Benshoff, *Monsters in the Closet: Homosexuality and the Horror Film* (Manchester: Manchester University Press, 1997) (popular films); K.A. Cuordileone, *Manhood and American Political Culture* (New York: Routledge, 2005) (political debates); Regina Kunzel, *Criminal Intimacy: Prison and the Uneven History of Modern American Sexuality* (Chicago: University of Chicago Press, 2008) (prison debates).

sophistication of gay bar culture dismissed any attempts to introduce sociological insights into that culture in court.

These divergences in the public's deference to scientific expertise were not simply a matter of the public accepting only what it wanted to hear about sexual deviance. Rather, the public's embrace of any scientific insights into homosexuality depended on its preliminary sense of whether those insights could meaningfully improve on its own common-sense perceptions: whether the subject to be clarified was one that lent itself to "expertise" to begin with, as one beyond the bounds of common knowledge. That preliminary assessment—the sense of a gap to be filled—did not neatly mirror the availability of new scientific knowledge, but rather reflected the independent interaction of numerous cultural influences, from popular media to political debates to individuals' personal experiences with gay culture. The internal evolution of scientific research into homosexuality in the twentieth century, in short, did not establish the terms of its own embrace by the public. It relied on a confluence of external, often arbitrary factors to raise the public's awareness of and interest in its insights.[20]

Second, the public's deference to novel scientific expertise on homosexuality depended on the active labor of numerous institutional actors outside the sciences themselves. Well beyond the police station, the promulgation of scientific knowledge about gay men in the twentieth century reflected the deliberate influence of a complex network of political and cultural

[20] The field of science and technology studies has yielded numerous fruitful meditations on the unstable politics of expertise and public deference, examining both the use of scientific expertise in bolstering government authority and the contingencies of marshaling support for "expert" authority among the lay public. See, for example, Brian Wynne, "Misunderstood Misunderstandings: Social Identities and Public Uptake of Science," in *Misunderstanding Science? The Public Reconstruction of Science and Technology*, eds. Alan Irwin and Brian Wynne (Cambridge: Cambridge University Press, 1996), 19-46; Michael Lynch, "The Discursive Production of Uncertainty," *Social Studies of Science*, Vol. 28 (1998), 829-67; Stephen Hilgartner, *Science on Stage: Expert Advice as Public Drama* (Stanford, CA: Stanford University Press, 2000); Sheila Jasanoff, "The Eye of Everyman: Witnessing DNA in the Simpson Trial," *Social Studies of Science* Vol. 28, No. 5/6 (1998), 713-40.

allies, each guided by their unique institutional interests.[21] In the interwar years, sexologists' broad consensus on the homosexual's innate effeminacy was popularized among the public largely through the commercial spectacles of pansy cabarets and drag balls. Beginning in the late 1940s, psychiatrists' stature as the foremost public "experts" on sexual deviance depended both on the military's endorsement of psychiatric screening boards and on state lawmakers' conscription of psychiatrists to help draft sexual psychopath laws—a deeply political process that, in many cases, characterized psychiatrists' professional abilities as far greater than doctors themselves were willing to claim.

Local police units emerged as particularly significant institutional allies in these epistemic debates. Policemen served as a crucial bridge between the gay world and the mainstream public: professional units that both labored in unique proximity to gay communities and carried behind them the authority of the state. Whether arresting gay men on the streets, defending their investigative tactics in the courts, or explaining their operations to the press, the police occupied a unique position both to rely on prevailing epistemic views of sexual deviance and to impose those views upon the general public. Rebuffing psychiatrists' "expert" claims about the difficulties of identifying gay men, liquor investigators both reinforced a widely medically discredited stereotype of homosexual effeminacy and effectively forced bar owners to subscribe to that same stereotype in order to protect their licenses. Training themselves in the nuances of urban gay culture, plainclothes decoys both demonstrated the utility of the

[21] In this matter, once more, my reasoning is deeply indebted to prior theoretical and narrative accounts in STS and the history of science, which have examined how the dissemination and public embrace of scientific and even technological advances frequently depend on the deliberate or circumstantial support of a complex network of self-interested (and sometimes deeply politicized) social allies. Latour, *Pasteurization of France*; Wiebe E. Bijker, *Of Bicycles, Bakelites, and Bulbs: Toward a Theory of Sociotechnological Change* (Cambridge: MIT Press, 1995); Michel Callon, "Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fishermen of St Brieuc Bay," in *Power, Action, and Belief*, ed. J. Law (London: Routledge, 1986); Nicholas Rose, *Governing the Soul: The Shaping of the Private Self* (New York: Routledge, 1990); Brian Wynne, "Misunderstood Misunderstandings."

burgeoning sociological recognition of American homosexuality as an organized community and, in the early 1960s, helped spread that insight to the mainstream public. The police, in short, emerged as leading agents in the formation of public knowledge about homosexuality. Choosing among competing epistemological models of homosexuality on the basis of their own professional needs and institutional concerns, the police helped shape the evolution of popular presumptions about gay men in the United States.

The intimate relationship between the police's anti-homosexual campaigns and public knowledge about homosexuality complicates a common view of the evolving public discourse on gay men in the United States. From the pansy craze to the media fascination with the gay world in the 1960s, the public's bursts of curiosity about the homosexual are often characterized as progressive steps in the story of gay liberation. By this account, the pansy craze was a moment of unique visibility for homosexual men, inviting the public to accept the antics of the homosexual fairy as a benign entertainment rather than a criminal display. Similarly, the discovery of the urban "gay world" in the 1960s supplanted the histrionics of prior press coverage with a newly even-handed discussion of homosexuality, providing American readers with a relatively diverse and representative account of urban gay life. The rise of homosexual sociology played no small role. Encouraging the public to view gay men on their own terms—not as criminals or lepers, but as members of a functional minority culture—ethnographic researchers helped lay an epistemological foundation for gay men's rising demands for tolerance in the 1960s.[22]

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[22] For a liberationist account of the pansy craze, see Chauncey, *Gay New York*; Chad Heap, *Slumming: Sexual and Racial Encounters in American Nightlife, 1885-1940* (Chicago: University of Chicago Press, 2009); Boyd, *Wide Open Town*. For a liberationist account of the 1960s media coverage of the gay world, see Faderman and Timmons, *Gay L.A.*, 136-37; Boyd, *Wide Open Town*; Edward Alwood, *Straight News: Gays, Lesbians, and the News Media* (New York: Columbia University Press, 1996). For liberationist accounts of the sociological study of homosexuality in the late 1950s and 1960s, see Minton, *Departing from Deviance*; D'Emilio, *Sexual Politics, Sexual Communities*; Chauncey, "Introduction"; Heap, *Homosexuality in the City*.

Tracking the evolution of public knowledge about homosexuality alongside the history of anti-homosexual policing, however, reveals a more complicated narrative.[23] Far from simply paving the path to social acceptance, these celebrated moments of public recognition for homosexuality played a significant role in the regulation of gay men in the United States. In the same years that doctors strove to reduce sexual degeneracy to a reassuring physical code, the pansy craze trained urban Americans to recognize homosexual men through a series of conspicuous, consistent visual codes, both comforting the public in its mastery over an unwanted social minority men and underwriting state liquor boards' campaigns against gay-friendly bars after the end of Prohibition. In later decades, as both vice officers and the lay public recognized

[23] While this dissertation may be the first to explore this principle from an archival historical perspective—not least, though the lens of the police—the basic insight that the project of collecting knowledge about gay men in the twentieth century carried a regulatory dimension is certainly not novel. In the broadest sense, that insight echoes a wide body of scholarship in political science and the history of science examining the utility of more sophisticated data collection and analysis in expanding the apparatus of the state. Theodore M. Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* (Princeton: Princeton University Press, 1995); Lorraine Daston, *Classical Probability in the Enlightenment* (Princeton: Princeton University Press, 1988); James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998). In the history of sexuality, of course, it may be traced more specifically to Michel Foucault's broad meditations on the regulation of sexual behavior through surveillance and classification, by state actors as well as less formal social authorities. Michel Foucault, *History of Sexuality, Volume 1: An Introduction* (New York: Random House, 1978); Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon Books, 1978).

In the past decades, literary critics and some historians have focused especially on the regulatory dimensions of visual surveillance over homosexual bodies, examining how scientists and the general public sought to control sexual deviancy by reducing it to a physical determinacy. Lee Edelman, *Homographesis: Essays in Gay Literary and Cultural History* (New York: Routledge, 1994); Terry, *An American Obsession*; Jennifer Terry and Jaqueline Urla, "Introduction: Mapping Embodied Deviance," in *Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture*, eds. Jennifer Terry and Jacqueline Urla (Bloomington: Indiana University Press, 1995); Terry, "Anxious Slippages Between 'Us' and 'Them.'" Critics have also examined how that the rise of gay "visibility" in popular culture—the increasing representation and recognition of gay men—often has harmful externalities on gay men themselves, perpetuating reductive or negative stereotypes and fostering a false sense of liberalism. Leo Bersani, *Homos* (Cambridge: Harvard University Press, 1995), 11-15; Suzanna Danuta Walters, *All the Rage: The Story of Gay Visibility in America* (Chicago: University of Chicago Press, 2001), 10, 13, 20; Kevin G. Barnhurst, "Introduction," in *Media/Queered: Visibility and Its Discontents*, ed. Kevin G. Barnhurst (New York: Peter Lang, 2007); Narisz Fejes and Andrea P. Balogh, *Queer Visibility in Post-Socialist Cultures* (Bristol: Intellect, 2013). Yet several scholars have ventured to explore how the broader project of gathering "knowing" about sexual deviance—primarily through the case study of "slumming" fads like the pansy craze—may have provided the public with a means to contain and control sexual deviance. Scott Herring, *Queering the Underworld: Slumming, Literature, and the Undoing of Lesbian and Gay History* (University of Chicago Press, 2007), Introduction; Heap, *Slumming*.

their relative ignorance about gay men, the ethnographic study of urban homosexuality helped reestablish their control over that elusive phenomenon, empowering plainclothes decoys to infiltrate an insular gay community and restoring the public's faith in its ability to classify gay men. In this sense, the public's intermittent bursts of quasi-scientific interest in the topic of homosexuality—those brief drives toward a more sophisticated, even more accurate understanding of the subject—did not necessarily help open the public's eyes toward a more pluralistic view of sexual difference. They also advanced the project of anti-homosexual regulation itself.

In the most concrete sense, of course, they did so by broadening the reach of the police's anti-homosexual enforcement efforts: by allowing police to conflate disorderly conduct with popular stereotypes of homosexuality, or to turn cruising codes developed to avoid the clutches of police against gay men themselves. In another crucial sense, however, the recurring drive toward a more sophisticated public understanding of homosexuality also reflected a broader regulatory impulse: a longstanding effort by the public to refine its knowledge of the sexual deviant, not to accept or tolerate him, but to reassert some sense of control over him. From the pansy craze to press coverage of the 1960s, public debates on homosexuality in the United States strove toward a kind of *epistemological mastery*: an attempt to bolster the public's sense of superiority over urban homosexuality through its discernment and understanding of that phenomenon. Whether by learning to recognize the homosexual body through its telltale visual cues or learning to recognize gay culture through its unique slang, fashions, and customs, the media's insistence on reducing the urban homosexual to an object of study—a curiosity to be scrutinized and ultimately mastered by the curious onlooker—helped a public fearful of sexual degeneracy infiltrating its cities diminish and constrain an unwanted social minority. Many of

the public's most deeply embraced beliefs about homosexual men in the twentieth century focused on the homosexual's innate inferiority: his effeminacy, his instability, his promiscuity. Yet in large part, the public's bid to establish control over homosexuality in these years may have depended less on the precise content of what it claimed to know about gay men than on its undying, unwavering prerogative to know it.

IV.

Having reviewed some things this dissertation aims to do, it makes sense to conclude with some explanation of how it intends to do them.

First, this dissertation focuses on three main areas of anti-homosexual law enforcement in the twentieth century: liquor board proceedings against licensed bars, plainclothes decoys campaigns against homosexual solicitation, and clandestine surveillance operations in public bathrooms. It does not attempt to tell a comprehensive history of policing against gay communities in these years. It does not, for example, examine the use of uniformed patrols in bars, the general harassment of gay men on city streets, or the legal debates surrounding sexual psychopath laws in the 1950s, not does it explore the purge of gay employees from the federal government or the military's many anti-homosexual campaigns. Instead, it focuses on licensing disputes, decoy enforcement, and clandestine surveillance as the three fields of enforcement that drew the most sustained use of police resources, left the most comprehensive records, and most profoundly colored the public's understanding of vice squads in the twentieth century.

Second, this dissertation focuses nearly exclusively on law enforcement campaigns against men. While lesbians hardly escaped the federal government's crusades during the Cold War, anti-homosexual campaigns by local police departments typically made little room for

women. For one thing, some of the leading social forces guiding the vice squads' crackdowns against homosexuality in these decades—the sexual psychopath panic, the influx of single men to coastal cities following WWII—focused specifically on public fears of male degeneracy. And whether from personal aversion or from broader social constraints against single women in the public sphere, lesbians tended to keep a lower urban profile than their male counterparts, eschewing the precarious world of parks and public bathrooms in favor of more private social settings. Unsurprisingly, the police's most prominent enforcement tactics targeted gay men.[24]

Third, this dissertation tracks the history of anti-homosexual policing in the United States from a national perspective. In part, this broad geographic scope is a matter of necessity: never famous for the thoroughness or accessibility of their historical archives, few police departments left extended records of their anti-homosexual campaigns. More significantly, however, the history of anti-homosexual law enforcement in the United States is in many ways a national story. Throughout the twentieth century, urban vice campaigns reflected a series of national media trends: the failure of Prohibition in 1933, the sexual psychopath scares of the late 1930s and early 1950s, the media discovery of the gay world in the early 1960s. Similarly, numerous judicial trends in the history of anti-homosexual policing echoed across state lines. In California, New Jersey, and New York, courts consistently tried to constrict the states' liquor regulations against gay bars in the early 1950s; from Washington to Los Angeles, judges adopted similar strategies for dismissing overly aggressive solicitation arrests in the Cold War; throughout the country, courts confronting Fourth Amendment challenges to clandestine surveillance tactics

[24] For the purge of lesbians from federal employment, see Johnson, *Lavender Scare*. For women's lesser participation in the public sphere, and consequently fewer encounters with urban police, see Faderman and Timmons, *Gay L.A.*, Part 1; Marc Stein, *City of Sisterly and Brotherly Loves: Lesbian and Gay Philadelphia, 1945-1972* (Chicago: University of Chicago Press, 2000), Part 1. In San Francisco, the close association between the city's prostitution rings and lesbian subculture in the mid-century did result in comparatively high police attention to gay women, though San Francisco's unique entertainment economy also resulted in unusually low levels of anti-homosexual enforcement against either gender. Boyd, *Wide Open Town*, especially Chapter 2.

relied on each other's opinions to form their own constitutional rules. This dissertation tracks these broad trends, examining how different police departments and courts handled similar social and legal pressures in the same years. While staying mindful of material differences among the states, and sometimes even among individual cities, it weaves a single narrative about the interplay of anti-homosexual policing and expertise in the twentieth century.

Finally, any narrative touching on the history of homosexuality presumes some shared concept of what "homosexuality" might mean. From the pansy craze through the sexual psychopath debates to the 1960s media coverage, the American public's understanding of the social, scientific, and even sexual dimensions of "homosexuality" underwent significant changes in the twentieth century. And even beyond the realm of public discourse, the private experiences and identities of the vice squad's targets—the flamboyant fairies spotted in homosexual bars in the 1930s, the gay men arrested for solicitation in the 1950s, the cruisers overseen in public bathrooms in the 1960s—shifted throughout these years. Not all of these men would have identified as "homosexual," as we might understand that term today, and few would likely have embraced that particular idiom.

Throughout the following chapters, this dissertation confines its terminology to either the terms used by police to describe their targets or, at the least, terms used by the general public to identify men with same-sex attractions at the time. In practice, this means that the early chapters primarily discuss "fairies," "degenerates," "deviants," or "homosexuals," while later chapters begin speaking of "gay men" and "gay communities" as such entities arise and become recognized by the police.[25] This approach obviously privileges the perspective of the police, sometimes at the cost of flattening or even flouting the self-understanding of the men they

[25] To avoid potential confusion or repetition with "deviant," I tend to eschew term "deviate," also commonly used throughout the mid-twentieth century.

tormented. Tracking how urban vice campaigns claimed and disclaimed authoritative knowledge about sexual deviance, this dissertation comes closer to a history of policing than a history of homosexuality. While it necessarily involves some inquiry into the behavior of gay men, whose many strategies of resistance helped shape the evolution of the police's tactics, the project's primary focus remains on how those tactics operated internally rather than how they affected the gay community itself.

Implicit in that story, however, are the ways the police's anti-homosexual campaigns helped shape the status and identity of the men they targeted.[26] By all accounts, the middle of the twentieth century witnessed a fundamental shift in the significance of same-sex behavior among American men: a novel recognition of same-sex desire, not simply as an erotic preference or practice, but as a stable and defining feature of the self. If same-sex eroticism in the 1920s was commonly seen as a transitory indulgence, performed by two partners occupying diametric social and sexual roles, by the 1960s it had become part of stable and cohesive personal *identity*, practiced largely among two self-identified members of the same sexual community.[27] Historians have attributed the consolidation of this modern gay identity to several factors: the legacy of World War II, which clustered gay men in major cities following the draft; the influence of prominent psychiatrists, who traced same-sex behavior to the inner psyche; the political strategies of homophile activists, who tried to define homosexuality as a minority status

[26] My framework for examining the social formation of gay identity is, of course, deeply indebted to literary and social critics who have de-essentialized the historical concept of the "homosexual," insisting on the interpolative role of shifting historical contexts and social pressures in shaping the identities and experiences of men and women engaging in same-sex practices. Foucault, *History of Sexuality*, especially Part I; Ian Hacking, "Making Up People," in *Reconstructing Individualism: Autonomy, Individuality, and the Self in Western Thought*, eds. T. Heller, et al. (Stanford: Stanford University Press, 1986); Davidson, *Emergence of Sexuality*; Joan W. Scott, "The Evidence of Experience," *Critical Inquiry*, Vol. 17 (1991), 773-79.

[27] David M. Halperin, "How to Do the History of Male Homosexuality," *GLQ: A Journal of Lesbian and Gay Studies*, Volume 6, Number 1 (2000), 87-122; Chauncey, *Gay New York*, 96, 358-59.

in order to improve their bids for tolerance; even the administrative arm of the federal government.[28]

This dissertation suggests that the emergence of a modern gay identity in the mid-twentieth century may also be attributed in large part to urban police campaigns against homosexual men.[29] Frequenting popular clubs and cruising sites, looking for any imprudent sexual displays in order to arrest gay men or shut down homosexual-friendly bars, vice officers directly instigated the development of the highly insular and coded culture that came to define the gay world by the 1960s. Urban gay men's convergence into discrete cultural communities—social units defined not merely by their shared sexual practices, but also by their own shared fashions, slang, social codes, and cultural conventions—did not merely feed gay men's much-needed sense of kinship in a hostile world, nor even help them evade the notice of potentially unfriendly neighbors. Most pragmatically, it allowed gay men to meet kindred spirits while evading the pervasive attention of the police. Gay men's broad turn toward searching for *like* companions in the mid-twentieth century—not simply partners in sex, but partners in a closed sexual community—was partly a response to urban police tactics that forced gay men to organize their social worlds around increasingly specialized cultural criteria.[30]

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[28] For the concentration of gay men and women in major cities after World War II and its effect on the formation of gay communities, see Bérubé, *Coming Out Under Fire*; D'Emilio, *Sexual Politics, Sexual Communities*; Boyd, *Wide Open Town*. For the influence of homophile activism and societies, see D'Emilio, *Sexual Politics, Sexual Communities*, Chapter 4; Boyd, *Wide Open Town*, Chapter 4; Meeker, "Behind the Mask of Respectability"; Martin Meeker, *Contacts Desired: Gay and Lesbian Communications and Community, 1940s-1970s* (Chicago: University Of Chicago Press, 2006); Daniel Hurewitz, *Bohemian Los Angeles and the Making of Modern Politics* (Berkeley: University of California Press, 2007); Marc Stein, *City of Sisterly and Brotherly Loves: Lesbian and Gay Philadelphia, 1945-1972* (Chicago: University of Chicago Press, 2000). For the influence of the psychiatric model of homosexuality, see D'Emilio, *Sexual Politics, Sexual Communities*. For the role of the federal government and military in interpolating homosexual subjects, see Bérubé, *Coming Out Under Fire*; Canaday, *Straight State*.

[29] Focusing on urban police practices, this argument provides builds on previous scholarship that has studied the role of the state in shaping gay identity though higher-level exercise of government power, including criminal statutes and federal policy. Canaday, *Straight State*; Eskridge, "Law and the Construction of the Closet."

[30] Scholars have of course tracked the significance of urban police techniques in the consolidation of gay *communities* in the United States, noting that homosexual men in the 1950s commonly bonded over their shared

This, then, is where the dissertation ends: with the emergence in the 1960s of a thriving gay community across the United States, organized against the backdrop of the vice squads' anti-homosexual campaigns, stepping ever more confidently into the spotlight of the popular press. But it begins decades earlier, in a handful of cosmopolitan centers like Chicago and New York, before the rise of any rigorous policing apparatus against homosexual men in the United States. And it opens, in the first chapter, with a different kind of spotlight entirely.

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fears of and vulnerability to police. Boyd, *Wide Open Town*; Brett Beemyn, "A Queer Capital: Lesbians, Gay, and Bisexual Life in Washington, D.C., 1890-1995 (Ph.D. dissertation, University of Iowa, 1997); Faderman and Timmons, *Gay L.A.*; Chauncey, *Gay New York*. My focus is instead on the role of urban policing in the emergence of an internal gay *identity*, including both the emergence of modern "gay" identity as a cultural practice and the perceived reciprocity of same-sex desire.

Part I. Before the Storm

1. The Laboratory, the Stage, and the Popular Construction of the Effeminate Fairy

"I wish the psychoanalysts and the physiologists would get together and find some way to take in a whole human being . . . so that you could see him complete and magnified, the way you see your bugs under the microscope . . ."[31] June Westbrook, the clear-hearted young heroine of Blair Niles's *Strange Brother*, admits to such a startling scientific ambition when she first spies the enigmatic Mark across the dim floor of a Harlem nightclub. From her first glance, there appears to be something slightly off about him. Mark, of course, turns out to be a homosexual, but not one nearly so obvious as the theatrical fairies who populate the novel. With their "carefully marcelled hair," "their eyebrows plucked to a finely penciled line," their "carmined lips" and "manicured nails," these homosexuals broadcast their degeneracy for all the world to see.[32] Mark, his companions archly observe, "can keep [his] trouble to [him]self."[33]

June's scientific determination to see into the heart of the sexual deviant was hardly unique in the early 1930s. In 1931, the same year that *Strange Brother* was published, a Chicago nightclub offered to treat its customers to a scholarly evening with "Europe's Greatest Sex Authority." The Dill Pickle Club, a venue popular with a bohemian crowd of intellectuals and homosexuals, and subsequently with a stream of slummers curious to see both, enlisted Magnus

[31] Blair Niles, *Strange Brother* (New York: Horace Liveright, 1931), 54.

[32] Ibid., 49.

[33] Ibid., 28.

Hirschfeld to present an academic lecture on the subject of "Homosexuality."[34] It was a shame that June wouldn't have been able to attend, because the good professor promised to fulfill her request for a microscopic illumination of the homosexual body. "Beautiful Revealing Pictures," advertised the minimalist posters.[35]

Hirschfeld's offer to illuminate the homosexual body for Chicago's more sophisticated public could not have come at a better time. As the Dill Pickle Club knew well, the early 1930s witnessed something of a "pansy craze" in the entertainment culture of America's major cities, as homosexual men and women stepped into the limelights of dance halls and nightclubs across the country.[36] In Philadelphia, Chicago, and New York, with "the knowledge and protection" of municipal authorities, hundreds of men gathered for annual drag balls attended by thousands of spectators.[37] On the stages of popular nightclubs in New York and Los Angeles, customers paid steep cover charges to drink their illegal gin while watching shows featuring flamboyant "pansy" entertainers.[38] From the *New York Amsterdam News* to the *Atlanta Daily World*, local papers

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[34] Chad Heap, *Slumming: Sexual and Racial Encounters in American Nightlife, 1885-1940* (Chicago: Chicago University Press, 2009), 162, 248.

[35] Ibid.

[36] The term "pansy craze" has been popularized among historians of sexuality largely by George Chauncey. George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (New York: Basic Books, 1994), Chapter 11. As Chauncey notes, however, the term was also used to describe the phenomenon at the time. Ralph Matthews, "Watching the Big Parade," *Baltimore Afro-American*, Dec 17, 1938, 14 ("When the pansy craze was the rage . . . ."); Ralph Matthews, "The Pansy Craze: Is It Entertainment or Just Plain Filth?", *Baltimore Afro-American*, Oct 6, 1934, 7.

[37] Myles Volmer, "The New Year's Eve Drag," 1, Folder 2, Box 140, Ernest W. Burgess Papers, University of Chicago Library; see also Edgar T. Rouzeau, "Snow and Ice Cover Streets as Pansies Blossom Out at Hamilton Lodge's Dance," *New York Amsterdam News*, Feb. 28, 1934, 1-2, 1; "'Pansies' Ball Shocks Staid Philadelphians," *New Journal and Guide*, Apr. 15, 1933, A8.

[38] Ralph Matthews, "Boys Will be Boys, But More Profitable Being Girls!", *Baltimore Afro-American*, Oct. 9, 1937, 11; "'Pansy Club' Now With Racket Getting Bolder," *Variety*, Dec. 17, 1930, 57.

regaled readers with detailed accounts of the antics of the "perverts," "pansies," and "lavender lads" on the cosmopolitan stages.[39]

The prominence of such fairy spectacles in the interwar years was simultaneously an outgrowth of and an anomaly amid the public's growing sensitivity to sexual deviance. In the years before World War I, one worried correspondent warned British sexologist Havelock Ellis that "[s]exual inversion is increasing among Americans—both men and women."[40] By the end of the war, his anxiety had turned into something of a nation-wide refrain. As the bureaucratization of the workforce undermined classical ideals of the self-made man, and as women lobbied for greater political and economic weight in the industrializing city, the homosexual emerged as just one troubling symptom of a far broader erosion of traditional manhood in America.[41] Some concerned observers responded by mounting an invigorated campaign on behalf of the traditional marital unit: the decades following the war witnessed a boom in therapeutic literature on marriage, love, and child-rearing.[42] Others resigned themselves

[39] "6,000 at Harlem Pansy Dance," *Atlanta Daily World*, Mar. 11, 1932, 2 ("White and colored alike rubbed shoulders with the charming (?) perverts, attended by their white esquires and vice versa."); Rouzeau, "Snow and Ice Cover Streets," 1; Matthews, "Boys Will be Boys," 11 ("[S]omeone thought it would be a good idea to bring the 'lavender lads' out into the open.").

[40] Havelock Ellis, *Studies in the Psychology of Sex, Vol. 1: Sexual Inversion* (Philadelphia: P.A. Davis Company, 1915, 2nd ed.); see also C.J. Bulliet, *Venus Castina: Famous Female Impersonators Celestial and Human* (New York: Covici, Friede Publishers, 1928), 3.

[41] For pervasive fears about the collapse of collapsing sexual norms, see Henry L. Minton, *Departing From Deviance: A History of Homosexual Rights and Emancipatory Science in America* (Chicago: University of Chicago Press, 2002), 52; Henry L. Minton, "Community Empowerment and the Medicalization of Homosexuality: Constructing Sexual Identities in the 1930s," *Journal of the History of Sexuality*, Vol. 6, No. 3, Jan 1998, 435-458, 454; Thomas Arthur Bolze, *Female Impersonation in the United States, 1900-1970* (Ph.D. dissertation, State University of New York, Buffalo, 1994), 187-90; Sharon R. Ullman, *Sex Seen: The Emergence of Modern Sexuality in America* (Berkeley: University of California Press, 1997), 48-49; John F. Kasson, *Houdini, Tarzan, and the Perfect Man: The White Male Body and the Challenge of Modernity in America* (New York: Hill and Wang, 2001), 11-12.

[42] Minton, "Community Empowerment," at 454. For a history of marital counseling in the early twentieth century, see Kristin Celello, *Making Marriage Work: A History of Marriage and Divorce in the Twentieth-Century United States* (Chapel Hill: University of North Carolina Press, 2009), 44-71; Christopher Lasch, *Haven in a Heartless World: The Family Besieged* (New York, 1977), 22-43; Paula Fass, *The Damned and the Beautiful: American Youth in the 1920s* (New York, 1979).

to the inevitable spread of sexual degeneracy. "[T]he army of freaks," cautioned the *Baltimore Afro-American*'s Ralph Matthews in 1934, "is growing to an alarming degree."[43]

Social authorities confronting the figure of the urban homosexual responded to the threat in different ways. In the medical sphere, as some of their colleagues labored over the ideal of the traditional marriage, many physicians and psychiatrists turned toward the study of sexual deviance itself. A subject of substantial scientific interest since the mid-nineteenth century, in the twentieth century homosexuality caught the attention of an increasingly diverse range of medical disciplines and ideologies. Psychologists and psychoanalysts insisted on the need for "a deeper and clearer knowledge of the . . . [homosexual's] psychosexual life"; endocrinologists examined the glandular and hormonal roots of same-sex erotic desire; physicians and psychiatrists measured the homosexual's limbs and genitals in search of an identifiable physiological type.[44] Whether mapping the homosexual's physique or tracking the effects of testosterone on his secondary sex characteristics, medical researchers in the interwar years raced to capture the sexual deviant—and especially the deviant body—as an object of scientific knowledge.[45]

While medical researchers turned a spotlight on the homosexual, civic authorities grappling with sexual deviance in the public sphere took another tack entirely: purging the phenomenon from sight. On the streets, police cracked down on overt displays of deviance, subjecting men who dared wear women's clothing or show any signs of effeminate grooming in

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[43] Ralph Matthews, "The Pansy Craze", 7.

[44] L. Pierce Clark, *A Critical Digest of Some of the Newer Work Upon Homosexuality in Man and Woman* (Utica, NY: State Hospitals Press, 1914), 1; Clifford A. Wright, "Further Studies of Endocrine Aspects of Homosexuality," *Medical Record*, Vol. 147 (May 1938), 449-52; George W. Henry & Hugh M. Galbraith, "Constitutional Factors in Homosexuality," *American Journal of Psychiatry*, Vol. 13 (1934), 1250.

[45] For an overview of the proliferating scientific and medical studies of homosexuality in the early twentieth century, see generally Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago: University of Chicago Press, 1999).

public to immediate arrest and up to months of forced labor.[46] And in the arts, arbiters of public taste denounced any audacious entertainers who tried to cater to the public's growing awareness of homosexuality. The most highbrow of the decade's offerings, Edward Bourdet's lesbian-themed play *The Captive*, was barely tolerated by critics in New York for its impressive literary treatment of a "revolting theme."[47] Others fared more poorly.[48] The press took especial offense when Mae West tried to tantalize the public with two bawdy homoerotic plays, full of drag hijinks and homosexual innuendo. Critics denounced West's offerings as a "disgusting theatrical challenge[s] to decency," "smeared from beginning to end with such filth as cannot possibly be described in print."[49] In late 1927, police officers following the special orders of Mayor Walker raided *The Captive* and two other productions in New York. Two months later, the state legislature approved a ban on any play "dealing with the subject of sex degeneracy, or sex perversion."[50]

Even absent the weighty arm of the state protecting the integrity of the American stage, critics presumed that the marketplace of popular taste would winnow the offending spectacles. In 1915, Havelock Ellis's American correspondent glibly insisted that "[e]veryone has seen

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[46] See, for example, "Citizens Claim That Lulu Belle Club On Lenox Avenue Is Notorious Dive," *New York Amsterdam News*, Feb. 15, 1928, 1; "Police Arrest Impersonator," *Atlanta Daily World*, Mar. 3, 1937, 4; "Female Impersonator Arrested After 'Ball,'" *Philadelphia Tribune*, Mar. 18, 1937, 4; "Two Eagle-Eyed Detectives Spot 'Pansies on Parade,'" *Inter-State Tattler*, Mar. 10, 1932, 2; "Male 'Lady' Jailed," *New York Amsterdam News*, June 4, 1930, 19; La Forest Potter, *Strange Loves: A Study in Sexual Abnormalities* (New York: Robert Dodsley Company, 1933), 184 ("Under ordinary circumstances, in most American cities, the 'fairy'—with plucked eyebrows, rouged lips, powdered face, and marcelled, blondined hair—who attempts to walk the streets, attired in woman's costume, is practically certain of arrest and severe punishment."). For a general account of police enforcement against public displays of degeneracy in these years, see William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge: Harvard University Press, 1999), 328-38.

[47] J. Brooks Atkinson, "The Play . . . Tragedy from the French," *New York Times*, September 30, 1926, 23.

[48] Kaier Curtin, *"We Can Always Call Them Bulgarians": The Emergence of Lesbians and Gay Men on the American Stage* (Boston: Alyson Publications, 1987), 111 (quoting a *Variety* review of *Sin of Sins*).

[49] Ibid., 70; Robert Littell, "The Play: They Don't Come Any Dirtier," *New York Evening Post*, Oct. 2, 1928, reprinted in full in Jon Tuska, *The Complete Films of Mae West* (New York: Citadel Press, 1992), 47.

[50] Chauncey, *Gay New York*, 313.

inverts and knows what they are," but most critics in the 1920s speculated that respectable audiences would hardly understand the deviant sexual themes paraded before them.[51] Reviewing *The Captive* in 1926, a contributor to the *Brooklyn Citizen* ventured that "a good percentage of the audience will fail to ascertain what it is all about."[52] A critic at an out-of-town production of *The Drag* reported that the "audience seemed to have been divided into two groups—those who fully understood the subject under discussion and those to whom the whole theme was a puzzle."[53] Should mainstream spectators have divined a play's foul sexual motifs, critics expressed confidence that "the average playgoer will stay away."[54] "Sex aberration" might be an acceptable subject matter "under proper treatment," acknowledged a review of Mae West's *The Drag* for the *Variety* in 1927—some scholarly vehicle through which "it could be brought into the open, examined and measured." Yet playwrights could hardly hope to capture a respectable audience through a "cheap and shabby appeal to sensationalism."[55]

The pansy craze that descended on American nightlife just a few years later would prove these critics wrong. By the early 1930s, the most sensationalistic spectacles of fairies and drag queens were drawing crowds of "respectable" spectators at banquet halls and night clubs across the nation. "Some people claim that it is a vulgar display, while others become very much incensed, but I cannot see it their way," wrote Romeo L. Dougherty of the *New York Amsterdam*

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[51] Ellis, *Sexual Inversion*, 351.

[52] Curtin, *"We Can Always Call Them Bulgarians,"* 56 (quoting an October 2, 1926 review of *The Captive* in the *Brooklyn Citizen*).

[53] Ibid., 82 (quoting a *New York Evening Post* review). For additional examples, see also ibid., 109 (quoting a *Herald Examiner* review of *Sin of Sins* predicting that "[t]here will be, doubtless, many who will see it and not know what it's all about, even in this very public age"); ibid., 111 (quoting a *Variety* review of *Sins of Sins* noting that "[i]t is safe to say that one-third of the first night house never understood what it was all about").

[54] Ibid., 111 (quoting a *Variety* review of *Sin of Sins*).

[55] "The Drag," *Variety*, Feb. 2, 1927, 49. When police arrested the cast of West's *Pleasure Man* on its opening night in 1928, audience members gathered to jeer the actors as they were escorted from the theater. Curtin, *"We Can Always Call Them Bulgarians,"* 130-32.

News; "to me it is amusing and I really cannot see what harm is being done."[56] Greeted by mainstream audiences as a thrilling novelty and accepted by most critics as a harmless entertainment, the pansy craze presented a sharp break from the critical opprobrium that had greeted Mae West's drag escapades. In a time when cross-dressers faced arrest for venturing onto the streets in drag, the public's embrace of pansy spectacles on stage appeared to mark a unique burst of tolerance toward sexual deviance among urban Americans—a short-lived moment when the public forgot its concerns about policing the fairy and allowed itself, however briefly, to be merely entertained by him.

Yet in fact, the spectacles of the pansy craze were far from a simple theatrical diversion—and far, too, from a simple triumph of "shabby appeals to sensationalism" over the more intellectual treatment demanded by more discerning critics. As Hirschfeld's professional engagement at the Dill Pickle Club in 1931 suggested, the popular nightclubs and dance halls of the pansy craze were, in their own strange way, a site where sensationalistic drag theatrics and respectable scientific forays into sexual deviance could find some common ground. Providing many theatergoers' first experience of the urban homosexual, the pansy craze did not simply introduce the sexual deviant to much of the mainstream public; it specifically introduced him as an inherently visual object—a body both available to optical analysis and marked by certain conspicuous, consistent visual codes. Growing intimately familiar with the homosexual body as a flamboyant attraction in a mainstream market for visual entertainment, many of the patrons who flocked to the fairy spectacles in America's major cities did not simply leave satisfied by an evening of novel amusements, or even proud of their cosmopolitan sophistication. Not unlike the doctors and anthropometrists racing to reduce the homosexual to some concrete physiological

[56] Romeo L. Dougherty, "My Observations: People of he Half-World and Other Things," *New York Amsterdam News*, Apr. 14, 1934, 6.

determinism, they also left confident in their newfound ability to use the visual codes of the nightclub pansy in order to recognize and classify the deviant body—on and off the stage.

It may seem facetious to compare the sensational, commercialized spectacles of the pansy craze with the contemporaneous mass of scientific research into sexual deviance in the interwar period. The farcical prototype of the pansy was a far cry from the empirics of a scientific diagnosis, and the bawdy settings of the Times Square cabaret a far way from the rigors of the medical examination room. Yet in the proliferating public discourse surrounding sexual deviance in the interwar years, the boundaries of commercial entertainment and scientific research were not always easy to define. At a time of diffuse fears about the spread of degeneracy in the American city, as physicians, endocrinologists, and psychiatrists struggled to codify the homosexual's singular physiology into visible form, the flamboyant entertainments of the pansy craze helped create and disseminate a widespread public belief in the homosexual body as a self-revelatory spectacle. Sensationalistic, exaggerated, and deeply commercialized, the drag balls and fairy cabarets of the pansy craze may have seemed far afield from Magnus Hirschfeld's scientific lectures. Yet they were, in their own right, a deeply pedagogical phenomenon: a training ground in which popular entertainment overlapped with social science in the construction, legitimation, and dissemination of authoritative social knowledge about sexual deviance in the early twentieth century.

The Pansy Craze

In 1928, a theater critic reviewing *Pleasure Man* found himself unsure how best to describe Mae West's bawdy exposé of Broadway life—complete with a drag ball in the third act—to a respectable readership. Hesitant to offend more delicate readers, Robert Littell settled

on observing that "nearly half the performers are cast in the role of what, for lack of a more printable term, may be called 'female impersonators.'"[57] In the coming years, local newspapers and tabloids like the *New York Amsterdam News*, *Baltimore Afro-American*, *Atlanta Daily World*, and Norfolk, Virginia's *New Journal and Guide* would decline to share Littell's prudery, abounding with any number of references to America's queer underworld: "fairies," "pansies," "she-men," "the third sex," even "perverts" and "queers."[58] By the early 1930s, it appeared, the reading public had been expected to diversify its vocabulary.

The popular interest in the fairy on the pages of America's penny press echoed a broader trend in the entertainment of the day. Beginning in the late 1920s, the mainstream public became preoccupied by theatrical attractions that put the sexual deviant on display. The most visible and by far the most widely attended queer attractions in the interwar years were the annual drag balls staged in American's major cities. In New York, Chicago, and Philadelphia, men and women who courted arrest most days of the year by walking the streets in drag were invited to appear in full costumed regalia at elaborate galas attended by a healthy crowd of heterosexual spectators.[59] As the *Baltimore Afro-American* reported of a Harlem ball in the winter of 1930, "every box, every loge, every stair and rail was covered with eager people who had come (as early as ten o'clock) to see men who out-womened women, and women who out-mened men."[60] In some cities, like Philadelphia, heterosexual crowds at the balls were relatively modest; in 1933,

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[57] Littell, "The Play."

[58] "Onlookers Eye Each Other With Suspicion At N. Y. 'Fairies Ball,'" *New Journal and Guide*, Mar. 7, 1936, 4; "'Pansies' Ball Shocks Staid Philadelphians," *NJG*, A8; "One-Man-Raid Battles Does a Carrie Nation," *New York Amsterdam News*, May 12, 1934, 1; "6000 at Harlem Pansy Dance," *Atlanta Daily World*, Mar. 11, 1932, 2; Evelyn Nesbit in the "Broadway Tattler," quoted in Potter, *Strange Loves*, 5 n.1; "The Third Sex Called 'Pansies,'" *Baltimore Afro-American*, Jul. 4, 1931, 20.

[59] "Commercialized Amusements," February 24, 1918, Committee of Fourteen Records, reprinted in Chauncey, *Gay New York*, 130.

[60] Gerry, "Men Tenors, Women Wear Tuxedos at Costume Ball," *Baltimore Afro-American*, Feb. 22, 1930, 5.

spectators were estimated at around two hundred people. Yet in Chicago and New York, popular enthusiasm for the events drew eager throngs of heterosexual spectators to numerous balls a year. By the early 1930s, Chicago's drag ball had become a semi-annual affair, while New York's homosexual men and women had their pick of drag balls in banquet halls throughout the city, from Webster Hall to Madison Square Garden to the Astor Hotel.[61]

Having made the trip out to the Hamilton Lodge or to Madison Square Garden just "to see men who out-womened women, and women who out-mened men," tourists self-consciously assumed their roles as spectators at a theatrical event.[62] Outside the banquet hall, crowds of observers pressed against police cordons to get a glimpse of the costumed fairies as they arrived.[63] Inside the galas, heterosexual crowds avoided the dance floor, retreating to the upstairs boxes, balconies, and stairways to observe and applaud the carousing fairies below.[64] At stadium venues like Madison Square Garden, attendees themselves could not help noticing the theatrical nature of the event. "[O]ut in the centre of a fighting arena with tiers of seats triangling upward, the affair [took on] a spectacle look," a reporter for *Variety* noted of a masquerade ball in 1930.[65] The contestants themselves often self-consciously accepted their roles as the attractions at a theatrical event, deliberately courting the fascination of the eager

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[61] On drag balls in Chicago, see Volmer, "The New Year's Eve Drag." On drag balls in Philadelphia, see "Police Keep Crowd of 200 from 3rd Sex," *Baltimore Afro-American*, Apr. 8, 1933, 1; "'Pansies' Ball Shocks Staid Philadelphians," *NJG*, A8. On the proliferation of drag balls around New York City, see "Madison Sq. Garden's 'Drag' Financial Bust—Navy Sends Two S. P.'s," *Variety*, May 21, 1930, 41; Potter, *Strange Loves*, 187; Chauncey, *Gay New York*, 310.

[62] Gerry, "Men Tenors, Women Wear Tuxedos at Costume Ball," 5.

[63] "Gracious Me! Dear, 'Twas To-oo Divine," *New York Amsterdam News*, Mar. 7, 1936, 8; Society Sees 3rd Sex Cavort at Harlem Ball," *Baltimore Afro-American*, Mar. 5, 1932, 3; Rouzeau, "Snow and Ice Cover Streets," 1.

[64] Potter, *Strange Loves*, 188; Floyd G. Snelson, "Strange 'Third' Sex Flooding Nation, Writer Reveals," *Pittsburgh Courier*, Mar. 19, 1932, 6. On the spatial segregation of the drag balls, see also Chauncey, *Gay New York*, 261; Heap, *Slumming*, 265.

[65] "Madison Sq. Garden's 'Drag' Financial Bust," *Variety*, 41.

crowds.[66] The least inhibited among them bowed, blew kisses, shimmied, and performed the hottest new dances for the appreciative crowds, drawing attention to both their costumes and the exaggerated femininity of their bodies.[67] One young guest at a party at the Roseland Ballroom recalled a particularly bold fairy who offered to show off his homemade stockings to the author's friends. The fairy proceeded to lift his skirts, revealing pink in-steps made of crepe de chine, held together by tape around his thighs. Appreciating the delicacy of the "fragile garment" at the time, years later the young observer would recall "something incredibly ludicrous and bizarre in a man of six feet standing exposed for a moment in girl's underwear."[68]

The crown jewel of annual drags was the Hamilton Lodge Ball in Harlem. Hosted at the Rockland Palace since 1869, in the early twentieth century the Ball became a port of call for queer men and women. By the 1930s, it was recognized across the country as a drag event: an annual masquerade for "[m]en and women . . . bedecked in the habiliments of the opposite sex."[69] Held in February each year, the Ball drew thousands of participants who came for a rare chance to show off their finest drag to friends and strangers in public. It also drew thousands of "respectable" spectators.[70] The Hamilton Lodge Ball proved a popular affair with the social luminaries of the day—"celebrities," "society people," and "lights of the literary and theatrical world" from New York patricians like the Vanderbilts to Hollywood starlets like Tallulah

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[66] Ibid., 41 (noting that contestants "were showing off without reserve" before the watching crowds); "Masquerade Ball Draws 5,000 People," *New York Amsterdam News*, Feb. 20, 1929, 2.

[67] "Hamilton Lodge Ball Draws 7,000," *NYAN*, 2 ("Bowing, throwing kisses, snake-hipping or Lindy-hopping as the mood struck them, nearly 100 of the more expensively costumed impersonators strode across an elevated platform and courted the favor of the crowd and judges.").

[68] Stephen Graham, *New York Nights* (New York: George H. Doran Company, 1927), 119, 130-31.

[69] "Society Sees 3rd Sex Cavort at Harlem Ball," *BAA*, 3.

[70] "Commercialized Amusements," reprinted in Chauncey, *Gay New York*, 130.

Bankhead.[71] Even as the crowds of celebrities dispersed in later years, "normal" New Yorkers continued to fill the balconies and hallways of Rockland Palace. Spectators unwilling or unable to purchase a ticket braved the winter cold outside, hoping to catch a glimpse of the fairies as they emerged from their cabs onto the streets.[72] And audiences unable to make the journey out to Harlem relived the evening's thrills vicariously through the next days' headlines, as local,



Figure I.1. Pansy entertainers in the popular press. From "The Pansy Craze: Is It Entertainment or Just Plain Filth?", Clothes Make the Woman as Well as the Man," *Baltimore Afro-American*, 1934.

[71] "3,000 Attend Ball Of Hamilton Lodge," *New York Amsterdam News*, Mar. 1, 1933, 2; Potter, *Strange Loves*, 188; Chauncey, *Gay New York*, 310.

[72] For contemporary coverage of the popularity of the Hamilton Lodge Ball through the early 1930s, see "Masquerade Ball Draws 5,000 People," *NYAN*, 2; "Mere Male Blossoms Out in Garb of Milady at Big Hamilton Lodge Ball," *New York Amsterdam News*, Feb. 19, 1930, 3; Gerry, "Men Tenors, Women Wear Tuxedos at Costume Ball," 5; Geraldyn Dismond, "New York Society," *Baltimore Afro-American*, Mar. 5, 1932, 3; Rouzeau, "Snow and Ice Cover Streets," 1; "Gracious Me! Dear, 'Twas To-oo Divine," *NYAN*, 8; "5,000 at N.Y. Pansy Ball," *Baltimore Afro-American*, Mar. 7, 1936, 1-2. For a general overview of the annual event, see Chauncey, *Gay New York*, 257-63.

predominantly black newspapers like the *New York Amsterdam News*, *Baltimore Afro-American*, *Pittsburgh Courier*, and *Atlanta Daily World* regaled their readers with detailed accounts of the most memorable costumes and contestants at each year's Ball.[73] "Mere Male Blossoms Out in Garb of Milady at Big Hamilton Lodge Ball," trumpeted one *Amsterdam News* headline in 1930 with the characteristic gentle mockery of the genre.[74] Where possible, tabloids and local papers attempted to share the remarkable visual experience of the female impersonator directly with their readers. Along with their written reports, the *New Journal and Guide*, *New York Amsterdam News*, and *Baltimore Afro-American* commonly ran full-page photographic montages of the previous evening's guests, capturing the details their flamboyant costumes and sly feminine postures for readers' enjoyment.[75]

Certainly the most eminent, drag balls were not the only fairy spectacles available to the urban public in the early twentieth century. For a time, audiences in American's major cities could satisfy their curiosity for the "intermediate sex" all year round, as mainstream nightclubs in the early 1930s embraced a brief-lived passion for pansy entertainments. As early as the turn of the century, affluent slummers in New York and Chicago had appeased their curiosity for the morbid underbelly of the American city by visiting homosexual-friendly dives, where fairies in female apparel sang for their customers' pleasure.[76] In New York, one early visitor to the

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[73] "6,000 at Harlem Pansy Dance," *ATW*, 2; "Lovely Ball," *Norfolk Journal and Guide*, Mar. 12, 1932, 10; Snelson, "Strange 'Third' Sex Flooding Nation," 6; "Society Sees 3rd Sex Cavort at Harlem Ball," *BAA*, 3; "Police Arrest Impersonator," *ADW*, 4; "Female Impersonator Arrested After 'Ball,'" *PT*, 4.

[74] "Mere Male Blossoms Out in Garb of Milady at Big Hamilton Lodge Ball," *NYAN*, 3.

[75] "When 'Odd Fellows' Cavorted: Ostrich Plumes and Blonde Wig Win 'Jean' Prize at Ball," *New York Amsterdam News*, Mar. 5, 1938, 2; "Annual 'Pansy' Ball Colorful," *Baltimore Afro-American*, Mar. 26, 1932, 12-13; "'Pansies' Ball Shocks Staid Philadelphians," *NJG*, A8; Ralph Matthews, "Clothes Make the Woman as Well as the Man," *Baltimore Afro-American*, Mar. 3, 1934, 7; Matthews, "The Pansy Craze," 7; Ralph Matthews, "Is the Reign of Harlem's Twilight Men at an End?", *Baltimore Afro-American*, Oct 5, 1935, 16; "The Third Sex Called 'Pansies,'" *BAA*, 20.

[76] Heap, *Slumming*, 43-44.

Bowery would later recall, with perhaps a touch of mnemonic exaggeration, seeing "hundreds of male inverts gathered" around the neighborhood's infamous dives.[77] Yet the phenomenon remained fairly un-commercialized until the 1920s, when cabarets in New York's Greenwich Village began featuring fairy performers on their stages primarily as a niche entertainment catering to a clientele of homosexuals themselves.[78] The fairy cabaret burst to the forefront of mainstream New York nightlife in the winter of 1930, when Jean Malin, darling of the Village cabarets, moved his act uptown to Times Square. Built around its host's ambiguously feminine affectations and sly innuendo, Malin's one-man floorshow turned the Club Abbey into one of the biggest draws in town.[79] In the lean economic times of the Depression, as filmmakers, playwrights, and nightclub owners all vied for a share of consumers' tightened budgets, his sheer sensationalism made the fairy performer a leading attraction. By the year's end, six other Times Square clubs had hired queer entertainers, and numerous venues across the city soon followed suit. On Broadway, pansies in flamboyant costumes entertained audiences at the Coffee Cliff, the Club D'Orsay, and the appropriately titled Pansy Club.[80] In Harlem, cross-dressing singers like Gladys Bentley and Gloria Swanson drew packed crowds to the Ubangi Club, the Jitter Bug, and the Brittwood Club.[81]

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[77] Mary Casal, *The Stone Wall: An Autobiography*, (Chicago: Eyncourt Press, 1930), 184.

[78] Chauncey, *Gay New York*, 314.

[79] "'Pansy' Places On Broadway," *Variety*, Sept. 10, 1930, 1; Chauncey, *Gay New York*, 318; Heap, *Slumming*, 87.

[80] Heap, *Slumming*, 87. For contemporary accounts, see "Night Club, Coffee Cliff," Dec. 2, 1930 (NYPL, Committee of Fourteen Records, Box 35, Investigators' Reports, 1923-1932); "'Pansy Club' Now With Racket Getting Bolder," *Variety*, 57.

[81] Roi Ottley, "This Hectic Harlem," *New York Amsterdam News*, Apr. 21, 1934, 9 (Ubangi Club); Matthews, "Boys Will be Boys," 11 (Ubangi Club); "One-Man-Raid Battles Does a Carrie Nation," *New York Amsterdam News*, May 12, 1934, 1 (Jitter Bug); Ralph Matthews, "Watching the Big Parade," *Baltimore Afro-American*, Dec. 17, 1938, 14 (Brittwood Cafe).



Figure I.2. Jean Malin at the Club Abbey. From Jerome, "Floor-Show," *Vanity Fair*, February 1931.

Nor was the pansy craze unique to New York nightlife. While Broadway's nightclub owners struggled to woo away the Club Abbey's clientele, dozens of clubs featuring fairy entertainers were sprouting around the entertainment districts of Chicago. Concentrated in Bronzville and the Loop, Chicago's cabarets entertained mainstream and queer audiences alike with their provocative floorshows, featuring jokes, songs, and sometimes even stripteases by the clubs' performers.[82] On the west coast, Los Angeles welcomed four new pansy clubs in 1932, including a new venture by Jean Malin himself, newly expatriated from his native New York.[83]

[82] Heap, *Slumming*, 83-84. For a first-hand account of the risqué entertainments in Chicago's fairy bars, see "Wednesday Nov. 22nd, 1933," Folder 3, Box 98, Ernest W. Burgess Papers, University of Chicago Library.

[83] "Hollywood Adds 21 New Nightery Spots," *Variety*, Sept. 27, 1932, 58.

In San Francisco, the popular Finocchio Club lured audiences with the promise of "wigged, gowned, rouged, lip-sticked, and mascara-ed" men transforming before their eyes into "singing, clowning, ravishing women."[84] In 1935, even provincial Cleveland saw the debut of a nightclub floorshow "made up entirely of femme impersonators." Initially operating out of Miami, Florida, before its voyage to the Midwest, the Torch Club promised to treat Cleveland audiences to a transgressive spectacle "still new in these green-eared parts."[85] In quick time, the fairy cabaret had become a sufficiently common phenomenon for the 1932 Hollywood film *Call Her Savage* to include a brief diversion to a pansy bar in Greenwich Village. A minor plot point in which the film's two protagonists went "slumming" in the big city, the scene depicted two effeminate, limp-wristed waiters wearing lace headdresses, maids' aprons, and aprons, singing a falsetto musical number before a room of rapt diners.[86]

Bourgeois slummers who visited the Bowery in search of sexual "inverts" at the turn of the century had approached their forays as rather ambivalent affairs: one-time brushes against the urban grotesque to educate themselves about the underbelly of the city. "The ugliness of the displays we saw as we hurried from one horrid but famous resort to another in and about the Bowery has no place here," recalled one early slummer, more than satisfied by her single excursion to the Lower East Side; "for many years I have tried to forget the sights I saw that night, so that I dislike even to try to recall them."[87] By the late 1920s and early 1930s, spectators unabashedly embraced the deviant body as a visual commodity in a competitive market for urban entertainment. The spectacular pleasures of the fairy were uniquely obvious in popular cabarets,

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[84] Jack Lord and Jenn Shaw, *Where to Sin in San Francisco* (San Francisco: Richard F. Guggenheim, 1939), 93.

[85] "Night Club Reviews," *Variety*, Aug. 21, 1935, 58.

[86] *Call Her Savage*, dir. John Francis Dillon, perf. Clara Bow, Gilbert Roland (Fox Film Corp., 1932).

[87] Casal, *Stone Wall*, 184.

where customers purchased the privilege of having homosexual performers parade their blondined hair, painted faces, and effeminate mannerisms beneath a spotlight for their entertainment. Pansy floorshows invited their patrons to scrutinize the bodies paraded before them intimately and at their leisure. In one nightclub in Chicago, a fairy performer treated his audience to a casual striptease in the middle of the dining room floor, peeling back his gown to reveal one ambiguous body part at a time to the curious crowd.[88] In San Francisco, an advertisement for the Finocchio Club featured a middle-aged couple straining their eyes to examine the adorned bodies intimated to appear beyond the page.[89] Patrons in the popular fairy



Figure I.3. Advertisement for Finocchio's drag spectacles in San Francisco. From Lord and Shaw, *Where to Sin in San Francisco* (1939).

[88] "Wednesday Nov. 22nd, 1933," Ernest W. Burgess Papers.

[89] Lord and Shaw, *Where to Sin in San Francisco*, 93.

cabarets of the decade purchased the spectacle of the deviant body in the same way that they purchased drinks and dinner: an object produced on demand to satisfy their appetite for entertainment.

The popularity of the fairy entertainer was hardly unprecedented. From the turn of the century well into the 1920s, cross-dressers had provided one of the most popular and reliable entertainments on the vaudeville stage.[90] For many young performers, female impersonation was the first step toward a more diverse theatrical career, a dependable crowd-pleaser to help establish them with vaudeville audiences.[91] For others, it was its own path to stardom. Through the 1910s, performers like Bothwell Browne, Karyl Norman, and Francis Renault drew large crowds—made up primarily of women—with their lavish costumes and feminine charms.[92] The most celebrated of America's female impersonators, Julian Eltinge, managed to turned his act into something of an entertainment empire, opening his own theater in 1912 and even publishing an eponymous magazine of feminine beauty tips.[93] In an industry often associated with salacious humor and crude innuendo, America's most popular female impersonators won the attentions of the audience for the dazzling authenticity of their costumes—the unbelievable sight of a bulky

[90] Marybeth Hamilton, "'I'm the Queen of the Bitches': Female Impersonation and Mae West's *Pleasure Man*," in *Crossing the Stage: Controversies on Cross-Dressing*, ed. Lesley Ferris (London: Routledge, 1993), 109; see also Ullman, *Sex Seen*, 50-51; Frank Cullen, *Vaudeville, Old & New: An Encyclopedia of Variety Performers in America*, Volume 1 (Florence: Psychology Press, 2007), 375-77; Anthony Slide, *The Encyclopedia of Vaudeville* (Jackson: University Press of Mississippi, 2012), 172-75; Boyd, *Wide Open Town*, 30-38.

[91] Boyd, *Wide Open Town*, 31.

[92] For a list of popular performers, see Cullen, *Vaudeville, Old & New*, 376. On Browne's unique popularity, see Boyd, *Wide Open Town*, 33-34.

[93] Ullman, *Sex Seen*, 50; Kasson, *Houdini, Tarzan, and the Perfect Man*, 95. For Eltinge's popularity, see also Daniel Hurewitz, *Bohemian Los Angeles and the Making of Modern Politics* (Berkeley: University of California Press, 2008), 26-27.

man transformed into the paragon of a beautiful woman.[94] Or, less charitably put, the sight of a man performing even a woman's most natural talents better than any natural woman could.[95] As *Variety* marveled of one of Eltinge's celebrated numbers, "no woman could have worn the dress to more perfect advantage."[96]

In some ways, the fairy spectacles of the pansy craze emerged as a natural extension of vaudeville's celebrated female impersonators. Like Julian Eltinge's many admirers, the mainstream spectators who crowded into the boxes of Rockland Palace were often enthralled by the beautiful gowns and delicate imitations of the ball's costumed participants. Most of the commentary surrounding drag entertainments converged on the tactile specifics of the fairies' physical appearance. One observer at a New Year's Day parade in Philadelphia recalled seeing a "homosexual dressed entirely in a gown of peacock and bird of paradise feathers," with "a fan and feather hat to match"—a "gorgeous creation . . . worn with a feminine *flair* that excited the admiration of even the most critical women spectators."[97] A journalist covering the Hamilton Lodge Ball in 1930 meticulously reconstructed the most impressive costumes from the previous night, lavishing praise upon Florenz, "resplendent in black sequins with clever inserts of red satin"; Jimmy, "in a white a green creation of satin and ostrich feathers"; Jean, "in a bouffant blue and silver"; and none other than Jean Malin, "who wore a magnificent and spectacular white

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[94] On the significance of authenticity to the popularity of female impersonation, see Marybeth Hamilton, "'I'm the Queen of the Bitches,'" 110-111; Ullman, *Sex Seen*, 50-52; Kasson, *Houdini, Tarzan, and the Perfect Man*, 93; Hurewitz, *Bohemian Los Angeles*, 27; Boyd, *Wide Open Town*, 37.

[95] Ullman, *Sex Seen*, 50-54 (arguing that a key attraction of female impersonation was the vision of a man wearing femininity better than any woman, thus revealing the constructed nature of "femininity," ibid., 53); Kasson, *Houdini, Tarzan, and the Perfect Man*, 98 (Julian Eltinge celebrated for "mastering" femininity); Untitled clipping, *The Toledo Blade*, Feb. 24, 1912, in Julian Eltinge Clippings File, Billy Rose Theatre Collection, The New York Public Library for Performing Arts (quoting Eltinge as observing, "If a mere man can look right in ten minutes—or a little more—why cannot a woman accomplish the same feat?").

[96] *Variety*, April 23, 1910, 12.

[97] Volmer, "The New Year's Eve Drag," 2; Potter, *Strange Loves*, 183.

cockfeathers headpiece and long train attached to white spangled trunks, red lace mits, red satins slippers, and chiffon handkerchief to match."[98] Spectators extolled the impressive realism of the female impersonators, whose expensive wigs and careful makeup rendered many into uncannily convincing visions of womanhood.[99] As a reporter for the *New York Age* noted of the Hamilton Lodge Ball, the participants "in their gorgeous evening gowns, wigs and powdered faces were hard to distinguish from many of the women."[100]

Yet in another crucial sense, the pansy spectacles that dominated American urban nightlife in the early 1930s were an entirely different genre from female impersonators like Eltinge and Brown. Popular with crowds across the nation, female impersonation in the United States was distinguished by its reputation as a relatively wholesome entertainment.[101] As *Variety* noted, the vaudeville revues that gave most female impersonators their homes were "entertainment for the masses, children and adults, to be given without bringing a blush or a shiver."[102] Admired for their uncanny realism, the cross-dressing acts of the vaudeville stage tantalized audiences primarily as an impressive sleight of hand: a skilled act of camouflage by the consummate masculine performer. Indeed, the most popular impersonators emphasized their

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[98] Gerry, "Men Tenors, Women Wear Tuxedos at Costume Ball," 5. For another careful survey of costumes present at the balls, see "Hamilton Lodge Ball Draws 7,000," *New York Amsterdam News*, Mar. 2, 1932, 2.

[99] "7,000, of 3 Sexes, at Hamilton Lodge Ball," *Baltimore Afro-American*, Mar 9, 1935, 12 ("The winner of the prize for costumes had, until the judging began, been generally mistaken for a woman."); Potter, *Strange Loves*, 183 ("The gorgeous creation was worn with a feminine *flair* that excited the admiration of even the most critical women spectators. . . . It was almost uncanny—his imitation was so perfect").

[100] "Hamilton Lodge Ball an Unusual Spectacle," *New York Age*, Mar. 5, 1926, 3.

[101] Hamilton, "'I'm the Queen of the Bitches,'" 107-11. In its relative wholesomeness, female impersonation in the United States aligned with the phenomenon in England, but differed from more risqué contemporaneous entertainers in France. For British drag spectacles, see Laurence Senelick, "Lady and the Tramp: Drag Differentials in the Progressive Era," in *Gender in Performance: The Presentation of Difference in the Performing Arts*, ed. Laurence Senelick (Hanover, NH: University Press of New England, 1992), 26-45. For popular French drag spectacles in these years, see Amy Lyford, "'Le Numero Barbette'" *The Modern Woman Revisited: Paris Between the Wars*, eds. Whitney Chadwick and Tirza True Latimer (New Brunswick: Rutgers University Press, 2003), 223-236.

[102] *Variety*, October 27, 1916, 3, quoted in Hamilton, "'I'm the Queen of the Bitches,'" 109.

untarnished masculinity in their personal lives, careful to ward off any suspicions of off-stage deviance.[103] Eltinge developed an especially widespread reputation as a quick fighter and an ardent lady's man, the romantic idol of girls and women across the nation.[104] "Julian Eltinge Isn't Effeminate When He Gets His Corsets Off," assured one press notice.[105] Transforming himself from a pugnacious athlete into a delicate damsel before the eyes of an awestruck public—and teaching women a few good lessons in femininity while he was at it—the female impersonator was a professional illusionist: a testament to the physical aptitude and skill of the male body.[106]

The fairy entertainers of the pansy craze offered a novel commodity: not merely realism, but reality itself. If the female impersonators of the vaudeville stage traded in camouflage and illusion, spectators at America's drag balls in the 1930s began to suspect that the elaborate costumes on display were less about disguise than disclosure: less the power of the skilled male body than the spectacle of embodied deviance.[107] Where the press had emphasized the astonishing divide between Eltinge's dainty on-stage performances and his virile off-stage persona, journalists reporting on Harlem's Hamilton Lodge Ball assumed that the contestants' costumes were the truest manifestation of their inner natures. As the *New York Amsterdam News*

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[103] Boy, *Wide Open Town*, 33-34. The public was far less favorable toward female impersonators considered "feminine" off as well as on the stage. *See* Ullman, *Sex Seen*, 58-60.

[104] Hurewitz, *Bohemian Los Angeles*, 30, 34-35; Ullman, *Sex Seen*, 47, 55-56; Hamilton, "'I'm the Queen of the Bitches,'" 116-17.

[105] Julian Eltinge Clippings File, Billy Rose Theatre Collection, The New York Public Library for Performing Arts.

[106] Hamilton, "'I'm the Queen of the Bitches,'" 111 (comparing Eltinge to Houdini as a performer popular for his impressive physical illusions); Kasson, *Houdini, Tarzan, and the Perfect Man*, 18-19 (arguing that performers like Eltinge, by bringing attention to impressive feats of the male body, helped shore up confidence in and supremacy of white masculinity in early twentieth century). For further discussion of how vaudeville drag spectacles provided an axis for men to establish their ascendancy over women, see M. Alison Kibler, *Rank Ladies: Gender and Cultural Hierarchy in American Vaudeville* (Chapel Hill: University of North Carolina Press, 1999).

[107] Hamilton, "'I'm the Queen of the Bitches,'" 115-16 (noting that, unlike female impersonators like Eltinge, "underworld" female impersonators were seen to reveal their inner self rather than to put on a camouflage).

and *Baltimore Afro-American* informed their readers, the drag gala was an "annual reversion to type" of men and women eager "to get off some of some of their abnormality in public."[108] And where reporters who had interviewed Eltinge assured readers that the admirably masculine "Julian [was] certainly all right," even the most cavalier journalists at Rockland Palace emphasized the intrinsic degeneracy of the costumed guests. The banquets, the *Baltimore Afro-American* and *New York Amsterdam News* noted, were "freakish" spectacles, havens for "the most notoriously degenerate . . . men in the city," whose "whose acts certainly class them as subnormal."[109] As Floyd G. Snelson warned in his column in the *Pittsburgh Courier*, "[t]hese dances should be stopped befor[e] our youth is [a]ffected with the virus of the perverted."[110] If female impersonation was a passing activity on the vaudeville stage—a first step to stardom for young men eager to capture an audience—the drag balls of Rockland Palace revealed something of a lingering disease.

The pansy cabarets, for their part, were even further removed from the costumed illusions of an Eltinge or Browne. Unlike both the drag balls and the vaudeville shows of previous decades, pansy cabarets did not revolve exclusively on female impersonation. While many performers in popular nightclubs, male and female, entertained their audiences in drag, many popular floorshows treated their customers to far more subtle displays of deviance. Jean Malin, the prototypical fairy performer, painted his hair and eyebrows but made his stage costume an immaculate tuxedo, building his name less on female impersonation than on bawdy banter and

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[108] "Society Sees 3rd Sex Cavort at Harlem Ball," *BAA*, 3; "Masquerade Ball Draws 5,000 People," *NYAN*, 2.

[109] Ralph Matthews, "31 Debutantes Bow at Local 'Pansy' Ball," *Baltimore Afro-American*, Mar 21, 1931, 1-2; "Society Sees 3rd Sex Cavort at Harlem Ball," *BAA*, 3; Rouzeau, "Snow and Ice Cover Streets," 1; "Masquerade Ball Draws 5,000 People," *NYAN*, 2.

[110] Snelson, "Strange 'Third' Sex Flooding Nation, Writer Reveals," *PT*, 6.

double entendres.[111] The pansy waiters in *Call Her Savage* abstained from the full drag of their turn-of-the-century forebears, wearing only lace headdresses and aprons over their servers' uniforms and relying on coy mannerisms to entertain the crowds.[112] In Chicago, comedian Roy Spencer Bartlett eschewed all signs of feminine garb or grooming and wore only a red tie to signal his deviance on stage.[113]

At a time when popular stereotypes of the "fairy" consisted primarily of his effeminacy, of course, it is unclear to what extent the audiences at Harlem's drag balls or Broadways' nightclubs associated their performers' flamboyance with homosexuality as such. The "abnormality" and "degeneracy" of which less generous critics of the pansy craze complained, after all, may as easily have referred to the performers' uncanny femininity as to their supposed sexual practices. Based on the press that surrounded the drag balls and pansy cabarets, however, the popular media fully understood that "pansies" were more than just female impersonators, and they tried to communicate that knowledge to their readers. Popular tabloids and newspapers alike often described the fairies spotted at drag bars and cabarets in jargon more closely associated with sexual transgression than gender inversion. Articles on pansy cabarets in New York abounded with coded references to "the secret carryings-on" of "twilight men" and

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[111] Julian Jerome, "Floor-Show," *Vanity Fair*, Feb. 1931, 68-69, 86.

[112] *Call Her Savage*, dir. John Francis Dillon.

[113] Heap, *Slumming*, 236; see also Bulliet, *Venus Castina*, 7 ("The comedians of the musical revues can hardly escape wearing a red necktie in some skit or other, with the broadest hints of its acquired significance . . . .").

At least one venue made the connections between the effeminate "fairy" of common parlance and some element of sexual abnormality explicit. One New York burlesque theater in the 1930s featured a skit about three men discovering an elixir to conjure "a beautiful fairy come to guide [him] to his port of happiness." After the first two men conjured beautiful women to guide them off the stage, the skit ended with the third man conjuring—and happily accepting—a "very nancy" young man. Andrea Friedman, *Prurient Interests: Gender, Democracy, and Obscenity in New York City, 1909-1945* (New York: Columbia University Press, 2000), 68-69.

"lavender lads," "those people of the half-world," the "gentlemen with a dash of lavender."[114] Perhaps playing to a lavender readership of their own, critics covering the Hamilton Lodge Ball dropped coy references to "twilight men and women" who "let their hair down."[115] "Hamilton Lodge outdid its gay self when to the call of the you-know-whats came flocking not less than 5,000 people to Rockland Palace," noted Geraldyn Dismond in a typical piece in the *Baltimore Afro-American*.[116] In Philadelphia in 1934, one journalist covering a local drag ball for the *Philadelphia Tribune* openly dismissed the crowd of "fairy" participants as a "public demonstration[] of sex perverts."[117]

Indeed, some commentators explicitly equated the fairy spectacles of the pansy craze with homosexuality. Certainly, specialized spectators like sociologists and doctors explicitly identified the entertainers at drag parades and pansy bars as "homosexual."[118] By the 1920s, some theater critics also felt comfortable assuming that the drag queens and effeminate cabaret performers on American stages were sexual deviants. "The stage is full of chorus men, with all the symptoms of homosexuality worn on the sleeve," observed art critic C.J. Bulliett in a 1928 monogram on female impersonation—alluding not only to drag performances but also to the popularity of red ties among cabaret comedians.[119] Appalled by a scene depicting a drag party in

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[114] Matthews, "Boys Will be Boys, But More Profitable Being Girls!", 11; Matthews, "Is the Reign of Harlem's Twilight Men at an End?", *BAA*, 16; Dougherty, "My Observations: People of the Half-World and Other Things," 6; Roi Ottley, "This Hectic Harlem," *New York Amsterdam News*, Apr. 21, 1934, 9.

[115] "Harlem and Park Avenues Step Out Together at Twilight Folks' Ball," *Baltimore Afro-American*, Mar. 5, 1938, 17.

[116] Dismond, "New York Society," *BAA*, 3.

[117] "The 'Fairies' Ball," *Philadelphia Tribune*, Mar 29, 1934, 4.

[118] "Wednesday Nov. 22nd, 1933," Ernest W. Burgess Papers ("In the middle of the floor, there was a homosexual dressed in a costume made entirely of paper."); Potter, *Strange Loves*, 183 (discussing "a homosexual, dressed entirely in a gown of peacock and bird of paradise feathers," at a Philadelphia parade).

[119] Bulliet, *Venus Castina*, 7.

Mae West's upcoming production of *The Drag*, a New York theater critic scoffed that "West . . . didn't have to work hard to complete the homosexual cast."[120] Even some stage performers addressing a popular audience treated the sexuality of their pansy colleagues with surprising frankness. In a loose memoir of his days on Broadway published in 1931, comedian Jimmy Durante discussed the matter with almost scientific precision, drawing on the lingering sexological jargon of the time: "It is not the Urning as a class that can be objected to, for he has suffered from an unkind quirk of nature. It is only those who flaunt and accent their mannerisms for pay that arouse the disgust of normal men."[121] In an interview with the tabloid *Broadway Tattler* around the same time, showgirl Evelyn Nesbit expressed herself somewhat less delicately: "Twenty years ago 'queers' were a rarity . . . . They are undoubtedly the heaviest drawing cards in the night clubs of today."[122]

Nesbit and Durante's blunt comments were the exception rather than the rule, and publications like *Broadway Tattler* reached only a select—and self-consciously "sophisticated"—readership.[123] Yet by the 1930s, at least some spectators at the drag balls and pansy cabarets had explicitly come to recognize the performers they observed, not simply as female impersonators, but as some manner of sexual deviants. "In preference, I would much rather go to a normal place to spend the evening, because after spending a while at these queer places you do not get a kick out of it," admitted a regular patron of pansy nightclubs in Chicago; "I pity them, the queer people."[124] And homosexual men in America's larger cities themselves

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[120] Untitled New York newspaper, dated Feb. 11, 1927, quoted in Kaier Curtin, *"We Can Always Call Them Bulgarians,"* 97 (emphasis added).

[121] Jimmy Durante and Jack Kofoed, *Night Clubs* (New York: Alfred A. Knopf, 1931), 35.

[122] Quoted in Potter, *Strange Loves*, pages 5-6 fn. 1.

[123] Ibid.

[124] Told to me by a Mr. X.," Folder 11, Box 98, Ernest W. Burgess Papers, University of Chicago Library.

came to assume that the general public associated the effeminacy of the pansy with some measure of homosexual behavior. "I do not like to be seen with Swishy bells on the street," one man reported to a sociology student in Chicago, "because people will think I am the same way and quite a few people are wise to cock suckers."[125] Far from the wholesome illusions of female impersonation on the vaudeville stage, by the 1930s the spectacle of the drag ball and the "pansy" cabaret had come to carry some whispers of their entertainers' inner deviance.

Unsurprisingly, like the theatrical representations of homosexuality in the previous decade, the newly authentic pansy entertainments of the 1930s drew their share of bitter detractors. Evelyn Nesbit accepted her new competition with relative forbearance, but other entertainers were less sanguine about sharing the spotlight with drag performers. "There is an unhealthiness about the whole thing," objected Durante. "A half naked prostitute becomes suddenly sweet and clean and virginal compared with them."[126] Conservative theater critics found themselves equally exasperated. "[I]s this tripe really entertainment?" Ralph Matthews demanded in the *Baltimore Afro-American*.[127] Ever eager to denounce the dangerous new trend in popular entertainment, Snelson warned that "the time must never come when a callous and cynical America will laugh at the horrid antics of such people."[128] On at least two occasions in Philadelphia and Washington, D.C., even policemen sent to guard their local drag balls reached the limits of their liberality and turned against the participants, arresting costumed men who left the safe confines of the banquet halls in drag or grew too merry inside the event.[129]

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[125] "6/29," Folder 2, Box 98, Ernest W. Burgess Papers, University of Chicago Library.

[126] Durante and Kofoed, *Night Clubs*, 34-35.

[127] Matthews, "The Pansy Craze," 7. See also Snelson, "Strange 'Third' Sex Flooding Nation," 6 ("These dances should be stopped befor[e] they become the usual thing and our youth is [a]ffected with the virus of the perverted").

[128] Snelson, "Strange 'Third' Sex Flooding Nation," 6.

[129] "The 'Fairies' Ball," *Philadelphia Tribune*, 4; "Police Block Pansies' Ball in Washington," *Baltimore*

For the most part, however, while the pansy craze lasted, critics and audiences alike were happy to accept its idiosyncratic amusements. In an age when most manifestations of homosexuality in popular culture were met by censorship and censure, drag balls and fairy cabarets gave the urban public a unique window into an otherwise unknown underworld: a brief, voyeuristic chance to stop decrying the sexual deviant and simply be entertained by him. For some audiences, indeed, the fairy spectacles in the early 1930s bred a taste for deviant spectacles that would survive long past the heyday of the pansy craze. Years after the demise of the drag ball and professional pansy cabaret, where queer men and women deliberately put themselves on public display, some daring city-dwellers would continue to treat themselves to the spectacle of the fairy in more spontaneous settings. Through the end of the decade, Chicagoans in search of a unique thrill visited popular queer bars, watching "with morbid interest" the provocative antics of their fellow patrons through the thick smoke and dimmed lights on the floor.[130] In New York, curious tourists descended on the handful of nightspots known for their queer clientele, eager for a chance to watch "the antics and gestures of the fags" as part of their "sight-seeing tour" of the metropolis.[131] Many urbanites' first introduction to the phenomenon of the fairy, the pansy craze of the early 1930s popularized the presumption of all sexual deviants as unique public spectacles: attractions open to the scrutiny and examination of the curious heterosexual spectator.

Afro-American, Feb 10, 1934, 1.

[130] Conrad Bingham, "Notes on the homosexual in Chicago," Folder 10, Box 146, Ernest W. Burgess Papers, University of Chicago Library.

[131] Gloria Bar & Grill, Inc. v. Bruckman, New York Supreme Court, Appellate Division, First Department, Record on Review (1940), 101, 182, New York Supreme Court Records, Civil Branch, New York County (New York, NY).

The Laboratory

Urban sophisticates, of course, were not the only ones examining deviant bodies in the interwar decades. Out of the theatrical limelight, homosexual men and women in these years frequently found themselves the subjects of eager examination in the laboratory room, as scientific researchers brought increasing attention to the physiology of the sexual deviant.

The physical body had long figured at the center of scientific research into homosexuality. In the mid-nineteenth century, breaking against the early authorities who identified homosexuality as a form of moral decadence, doctors began to examine the phenomenon of sexual perversion as a biological disease—a condition traceable to some physiological defect on the body. [132] In France, Claude Francois Michea explained homosexuality as the presence of female organs in male bodies. In the United States, G. Frank Lydston attributed sexual degeneracy to "the maldevelopment, or arrested development, of the sexual organs."[133] When the genitalia revealed no reliable signs of biological variation, neurologists like Wilhelm Griesenger turned to the brain—not for a psychological explanation of homosexuality, but rather in search of lesions and similar biological malfunctions on another somatic organ.[134] Even after professional "sexologists" like Magnus Hirschfeld and Havelock Ellis colonized the study of sexual deviance in the late nineteenth century, most of them continued to identify homosexuality as a congenital predisposition built into the physiology of

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[132] Robert Beachy, "The German Invention of Homosexuality," *The Journal of Modern History*, Vol. 82, No. 4 (December 2010), 810-11, 814.

[133] Arnold I. Davidson, *The Emergence of Sexuality: Historical Epistemology an the Formation of Concepts* (Cambridge: Harvard University Press, 2001), 6, 4-7; Gert Hekma, "A History of Sexology: Social and Historical Aspects of Sexuality," in *From Sade to De Sade: Moments in the History of Sexuality*, ed. Jan Bremmer (London: Routledge, 1989), 176-77.

[134] Davidson, *Emergence of Sexuality*, 7-12.

the deviant body.[135] "Sexual inversion," Ellis noted in his influential study *Sexual Inversion*, is a "sexual instinct turned by inborn constitutional abnormality toward persons of the same sex."[136]

At the same time, the work of sexologists like Ellis showed the increasing influence of a more psychological approach to sexual deviance. The trend began in the 1880s, as a generation of psychiatrists based primarily in Germany began to reconceptualize homosexuality as a sexual psychopathology rather than a somatic disease.[137] Disappointed in his search for neurological abnormalities, Griesenger turned to more behavioral explanations. Psychiatrists like Carl Friedrich Otto Westphal in Berlin and Jacques-Joseph Moreau in France identified homosexual behavior as the perversion of an intangible sexual instinct.[138] Richard von Krafft-Ebing, the foremost theorist of homosexuality of the late nineteenth-century, conceived of homosexuality as a woman's psyche in a man's body—a condition that may have had inherent genetic roots but was not manifest in the anatomy itself.[139] This gradual disembodiment of sexual perversion culminated in the work of proto-psychologists like Sigmund Freud, who famously theorized

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[135] Hekma, "A History of Sexology: Social and Historical Aspects of Sexuality," 180; Paul Robinson, *The Modernization of Sex: Havelock Ellis, Alfred Kinsey, William Msters and Virginia Johnson* (Ithaca: Cornell University Press, 1976, 1989), 5; Minton, *Departing From Deviance*, 11-13 (providing overview of development of sexological research on homosexuality, as a project that aimed to identify homosexuality as a product of natural *biological* variation); Jennifer Terry, "Anxious Slippages Between 'Us' and 'Them': A Brief History of the Scientific Search for Homosexual Bodies," 129-169, in *Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture*, eds. Jennifer Terry and Jacqueline Urla (Bloomington: Indiana University Press, 1995), 130-135 (noting that early sexological studies of homosexuality commonly posited the phenomenon as either a biological degeneration or a physiological "third sex" consisting of mixed biological characteristics).

[136] Havelock Ellis, *Studies in the Psychology of Sex, Volume 1: Sexual Inversion* (London: Wilson and MacMillan, 1897), 1. *Sexual Inversion* was reprinted numerous times in United States over the next decades. See, for example, Havelock Ellis, *Studies in the Psychology of Sex: Sexual Inversion* (Philadelphia: P.A. Davis Company, 1901; 2nd 2d. 1906; 3rd ed. 1915). Subsequent citations refer to the Wilson and MacMillan 1897 edition.

[137] Hekma, "A History of Sexology: Social and Historical Aspects of Sexuality," 179-81; t Beachy, "German Invention of Homosexuality," 801-838).

[138] Davidson, *Emergence of Sexuality*, 12-19; Hekma, "A History of Sexology: Social and Historical Aspects of Sexuality," 179-81.

[139] Davidson, *Emergence of Sexuality*, 17-18; Hekma, "A History of Sexology: Social and Historical Aspects of Sexuality," 181; Beachy, "German Invention of Homosexuality," 818.

homosexual conduct as the product of an unsuccessful resolution of the Oedipal crisis.[140] In the writings of Freud and his disciples, sexual perversion emerged as a mental distortion rather than a congenital anatomy—and, by implication, as a condition far less detectable than previously imagined.[141] By 1933, a treatise on homosexuality called *Strange Loves*, written for a general audience by the improbably named physician La Forest Potter, could insist as a matter "conceded by scientists who have made a study of the subject" that "there is, even in the most normal among humans, some touch of the sexually abnormal."[142]

By the end of the First World War, some researchers hoping for a greater sense of scientific certainty had had enough. The growing influence of psychoanalysis over medical understandings of homosexuality inspired a pushback from physicians and even some psychiatrists in the interwar years, who aimed to find a way to reconnect the vague phenomenon, once more, to a more definite marker on the deviant body. As psychiatrists George W. Henry and Hugh M. Galbraith announced in 1934, "our purpose at this time is to [examine] the constitutional and physiological factors in the adaptation of individuals whose psychosexual histories have been thoroughly investigated."[143]

Eager for a more definite physiological root, many turned to a leading new trend in biological research: endocrinology. Looking to hormones as the source of human sexual

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[140] Robinson, *Modernization of Sex*, 5-6; Beachy, "German Invention of Homosexuality," 819.

[141] Terry, *An American Obsession*, 57; David Abrahamsen, *Crime and the Human Mind* (New York: Columbia University Press, 1944), 119 ("There is probably no normal person who does not possess some unconscious homosexual tendencies."); Bingham, "Notes on the homosexual in Chicago," Ernest W. Burgess Papers (theorizing homosexuality as the continuing manifestation of a universal bisexual drive and noting that "conditioning and obvious approval [of homosexuality may] encourage those on the borderline to slip into this role of uncertainty"); Betram Pollens, *The Sex Criminal* (New York: Macaulay Company, 1938), 51 (noting that "environment influences" such as a homosexual seduction may "fixate[]" youths "in that direction").

[142] Potter, *Strange Loves*, v.

[143] George W. Henry and Hugh M. Galbraith, "Constitutional Factors in Homosexuality," *American Journal of Psychiatry*, Vol. 13 (1934), 1250.

development, endocrinology had emerged as a discrete medical field at the turn of the twentieth century.[144] After the war, research advances in organic and lipid chemistry had turned the field into a leading authority on sex differences and sexual development—including the study of same-sex behavior.[145] Beginning in the 1920s and continuing well into the 1940s, endocrinological methods pervaded the work of researchers examining homosexuality, from professional endocrinologists like Clifford A. Wright to trained criminologists like Julius Sauer and even psychiatrists like Hyman S. Barahal and Mary O'Malley.[146] By the 1930s, the field was so widely embraced that Potter's *Strange Loves* could include an overtly scientific chapter on "How the Endocrine Glands Determine Sexual Behavior."[147]

While endocrinologists looked beneath the flesh for some scientific insight into sexual deviance, anthropometrists and some psychiatrists turned to the surface of the homosexual body. Doctors studying the physiology of homosexuals in the twentieth century were the spiritual heirs of physicians like Lydston and Michea, but their methodology more closely resembled an intervening phenomenon: criminal anthropology. Popularized by Cesare Lombroso in the 1870s, criminal anthropology insisted that social delinquents, from serial murderers to petty pickpockets, could be distinguished by the visible stigmata of the body: the size of their ears,

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[144] Hekma, "A History of Sexology: Social and Historical Aspects of Sexuality," 20-21; Chandak Sengootpa, *The Most Secret Quintessence of Life: Sex, Glands, and Hormones, 1850-1950* (Chicago: University of Chicago Press, 2006).

[145] Hekma, "A History of Sexology: Social and Historical Aspects of Sexuality," 15-41. For a general overview of the rise of endocrinology, see Sengootpa, *Most Secret Quintessence of Life*; Nelly Oudshoorn, *Beyond the Natural Body: An Archeology of Sex Hormones* (London: Routledge, 1994), Chapter 2.

[146] Mary O'Malley, "Certain Pluriglandular Anomalous Functions Associated with Psychopathic Sexual Interests," *The Journal of Nervous and Mental Diseases*, Vol. 48, No. 1 (Jul. 1928), 1-35; Clifford A. Wright, "Further Studies of Endocrine Aspects of Homosexuality," *Medical Record*, Vol. 147 (May 18, 1938), 449-52; Hyman S. Barahal, "Testosterone in Psychotic Male Homosexuals," *Psychiatric Quarterly*, Vol. 14, No. 2 (1940), 319-30; Julius Baur, "Homosexuality as an Endrocrinological, Psychological, and Genetic Problem," *Journal of Criminal Psychopathology*, Vol. 2, No. 2 (1940), 188-97; S.J. Glass, H.J. Deuel, and C.A. Wright, "Sex Hormone Studies in Male Homosexuality," *Endocrinology*, Vol. 26 (April 1946), 590-94.

[147] Potter, *Strange Loves*.

height of the foreheads, the sharpness of their teeth.[148] Based on his own measurements of some reported thousands of criminal bodies, Lombroso felt confident placing the criminal as a class at a lower stage of the evolutionary scale from the normal human being. According to Lombroso, the delinquent's typically small brain suggested his intellectual stagnation; his long arms and low forehead recalled his primatial ancestors; his prominent teeth resembled the rodent.[149] Although data collected by criminal anthropologists in the nineteenth century undermined many of Lombroso's theories, the field remained influential in legal and penal circles up through the First World War.[150]

Familiar with Lombroso's influence, as well as that of more traditional comparative anthropologists, nineteenth-century sexologists like Ellis and Krafft-Ebing had frequently included a certain anthropometric attention to the homosexual body.[151] A paragon of the genre, Ellis's *Sexual Inversion* included a brief subsection on the "physical abnormalities" of the homosexual: his frequently underdeveloped or overdeveloped penis, his flabby testicles, the conspicuous "infantilism" of his body.[152] By the end of World War I, the United States military was also applying the lessons of physical anthropology in its campaigns to weed out sexual deviants. A handbook for Army medical officers published in 1918, and adopted as a formal Army Regulation in 1922, instructed military physicians to examine new recruits to look for the

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[148] Stephen Jay Gould, *The Mismeasure of Man* (New York: W.W. Norton & Co., 1981), 124-27.

[149] Ibid., 128-130.

[150] Ibid., 130-39, 165-69.

[151] For the intersection of sexology and criminal anthropology, see Siobhan Somerville, "Scientific Racism and the Emergence of the Homosexual Body," *Journal of the History of Sexuality*, Vol. 5, No. 2 (Oct. 1994), 248-53; Lucy Bland and Laura Doan, eds., *Sexology Uncensored: The Documents of Sexual Science* (Chicago: University of Chicago Press, 1999), 112; Britta McEwen, Se*xual Knowledge: Feeling, Fact, and Social Reform in Vienna, 1900-1934* (New York: Berghahn Books, 2012), 9. For the disconnect between Lombroso and English sexologists like Ellis, see Jane Caplan, "'Educating the Eye': The Tattooed Prostitute," in *Sexology in Culture: Labelling Bodies and Desires*, eds. Lucy Bland and Laura Doan (Chicago: University of Chicago Press, 1998), 100-115.

[152] Ellis, *Sexual Inversion*, 121-22.

"anatomical stigmata of degeneration." "[T]he degenerate physique as a whole is often marked by diminished stature and inferior vigor," the regulation advised; "males may present the general body conformation of the opposite sex, with sloping narrow shoulders, broad hips, excessive pectoral and pubic adipose deposits, with lack of masculine hirsute and muscular marking."[153]

Early sexologists admitted that their conclusions about the homosexual physiology were largely anecdotal. As Ellis disclaimed in his overview of the invert's abnormal physique, the methodology behind his case studies "often made information under this head difficult to obtain."[154] Yet beginning in the 1920s, a new generation of researchers began to apply a newfound rigor and systematicity to the measurement of homosexual bodies. In 1924, German anthropometrist Arthur Weil performed an extended study of the deviant physiology to help provide, in rough translation, some "anatomical foundations for the inherent nature of homosexuality."[155] Collecting detailed measurements of the body parts of 380 homosexual men, from the size of their legs to the girth of their hips, Weil compiled his results into a table juxtaposing the averaged data against a control group of heterosexual subjects, recorded to the closest millimeter.[156] A decade later, Henry and Galbraith applied a similar methodology on the other side of the Atlantic. Their first published collaboration, "Constitutional Factors in Homosexuality," duplicated an extensive "Form for Recording Physical Data," with a range of

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[153] Frank T. Woodbury and James Alfred Moss, *Manual for Medical Officers: Being a Guide to the Duties of Army Medical Officers* (Menasha, Wisconsin: George Banta Publishing Company, 1918). The manual was simultaneously distributed through multiple presses throughout the country, including the Army and Navy Register, and was re-released by the Government Printing Office in 1922. Army Regulation 40-105: Standards of Physical Examination for Entrance Into the Regular Army, National Guard, and Organized Reserves (Washington, D.C.: Government Printing Office, 1922), 25-26, available at Folder 19, Box 20, World War II History Project Papers, GLBT Historical Society (San Francisco, CA).

[154] Ellis, *Sexual Inversion,* 121.

[155] Arthur Weil, "Sprechen anatomische Grundlagen für das Angeborensein der Homosexualität?", *Archiv für Fruaenkunde und Konstitutionsforschung.*, Vol. 10 (1924), 23-51. The quotation is a rough translation of the title.

[156] Weil, "Sprechen anatomische," 33-41.

Tabelle III.

Konstanten der Schulter- und Hüftbreite.

	Schulterbreite		Hüftbreite	
	Homosexuell cm	Heterosexuell cm	Homosexuell cm	Heterosexuell cm
Mittelwert	38,19	39,0	32,26	31,41
und mittlerer Fehler .	± 0,095	± 0,06	± 0,09	± 0,05
Quartil	1,305	1,39	1,311	1,268
M Quartilkoeffizient . .	3,42	3,56	4,06	4,03
Mediane	38,19	38,9	32,14	31,31
Standardabweichung . .	± 1,82	± 1,89	± 1,850	± 1,583
und mittlerer Fehler .	± 0,067	± 0,033	± 0,067	± 0,035
Variationskoeffizient . .	4,76	4,85	5,78	5,04
und mittlerer Fehler .	± 0.177	± 0,108	± 0,296	± 0.159
Differenz d. beid. Mittelwerte	0,81	± 0,11	0,85	± 0,10

Figure I.4. Arthur Weil's tabulation of shoulder and hip widths for heterosexual and homosexual men. From Weil, "Sprechen anatomische," 35.

fields covering the most visible and the most private bodily characteristics, from hair density and jawline to testicles, thighs, and buttocks.[157]

Like Henry and Galbraith, researchers studying the homosexual body in the interwar years frequently received their formal training as psychiatrists. Yet they proved eager to join their colleagues in the more physiological subfields of medicine in directing their attention to the deviant anatomy. From physicians like Potter and urologists like Abraham Wolbarst to psychiatrists like Joseph Wortis and Hyman Barahal, researchers left few parts of the homosexual body unexamined. They measured the male homosexual's height, the length of his

[157] Henry and Galbraith, "Constitutional Factors in Homosexuality," 1251.

limbs, the width of his hips, the broadness of his shoulders.[158] They described the coarseness and the distribution of the hair on his face and around his armpits, genitals, and legs.[159] They noted the size and firmness of his muscles and looked for abnormal fat deposits around his breasts, hips, abdomen, and thighs.[160] The most comprehensive studies paid especial attention to their subjects' genitals: the size of the penis, the girth and firmness of the testicles, the presence or absence of a scrotal fold.[161] Eager to record the deviant body with utmost accuracy, some researchers supplemented their studies with nude photographs. Exposing the subjects' full naked bodies to view or showcasing notable anatomical regions like the genitals, the photographs captured the most private parts of the homosexual physiology for the scientific researcher's careful study.[162]

The most extended anthropometric study of homosexuality in these years was staged by the Committee for the Study for Sex Variants, a privately funded research coalition convened in New York in the spring of 1935 by gynecologist Robert Latou Dickinson.[163] Although its seventeen members ranged from psychologists and psychiatrists to endocrinologists and

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[158] Weil, "Sprechen anatomische," 33-41; Joseph Wortis, "A Note on the Body Build of the Male Homosexual," *American Journal of Psychiatry*, Vol. 93 (1936-1937), 1121-1125, 1123; Henry and Galbraith, "Constitutional Factors in Homosexuality," 1261; Potter, *Strange Loves*, 100; George W. Henry, *Sex Variants: A Study of Homosexual Patterns* (New York: Paul Hoeber Inc, 1941), 115.

[159] Barahal, "Testosterone in Psychotic Male Homosexuals," 322-24; Henry and Galbraith, "Constitutional Factors in Homosexuality," 1250, 1261; Henry, *Sex Variants*, 106.

[160] A.L. Wolbarst, *Sexual Perversion as a Scientific Problem* (Girard, Kansas: Haldeman-Julius Publications, 1947), 4; Potter, *Strange* Loves, 99-100; Henry and Galbraith, "Constitutional Factors in Homosexuality," 1250; Henry, *Sex Variants*, 255.

[161] Barahal, "Testosterone in Psychotic Male Homosexuals," 324; Henry and Galbraith, "Constitutional Factors in Homosexuality," 1250; Henry, *Sex Variants*, 106, 115, 125, 280, 255.

[162] See, for example, O'Malley, "Certain Pluriglandular Anomalous Functions" (photographs of nude bodies); Barahal, "Testosterone in Psychotic Male Homosexuals" (photographs of male genitals).

[163] For a general history of the Committee, see Minton, "Community Empowerment and the Medicalization of Homosexuality," 436-43; Terry, "Anxious Slippages Between 'Us' and 'Them,'" 138-41; Minton, *Departing From Deviance*, 33-57; Terry, *An American Obsession*, Chapter 6.

anthropologists, the coalition placed a special emphasis on anatomical examination. "The interest of this committee," Dickinson wrote to fellow board member Lewis M. Terman in 1935, "is that the physical aspects are not overlooked."[164]

Helmed by Henry himself with the assistance of Jan Gay, a lesbian researcher whose own work helped her recruit numerous willing subjects, the Committee's most lasting work involved two hundred case studies of homosexual men and women living in New York City. Like his earlier publications, Henry's research with the Committee placed a high priority on physical examination. In addition to personal interviews, the case studies included physical exams of each homosexual subject, x-rays of their heads, chests, and pelvises, and pelvic exams for the women. The published reports featured a minute level of physical detail, from the texture of a subject's skin and the length of his eyelashes to the condition of each testicle and size of his genitals to the nearest decimeter. A third of Henry's subjects also allowed themselves to be photographed in the nude.[165] "These photographs were inserted to facilitate the correlation of body form with behavior," Henry explained in his final published report. A collection of starkly lit bodies against a simple dark backdrop, their shoulders drawn back to expose the torso and their faces blurred for anonymity, the photographs presented the queer body as any other curiosity under a microscope: a passive object to be probed, measured, and scrutinized by the curious researcher.[166]

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[164] Robert L. Dickinson, letter to Lewis M. Terman, January 4, 1935, Folder 26, Box 12, Lewis M. Terman Papers, Stanford University Library (Stanford, CA).

[165] Henry, *Sex Variants*, xi.

[166] George W. Henry, *Sex Variants: A Study of Homosexual Patterns*, Vol. 2 (New York: Paul Hoeber Inc., 1948 ed.) 1041. Henry could not clear the legal rights to publish the images in his original 1941 publication, but would later include them in the 1948 reprint. For Henry's legal concerns about publishing the photographs, see Eugen Kahn, letter to Lewis M. Terman, June 6, 1938, Folder 26, Box 12, Lewis M. Terman Papers, Stanford University Library (Stanford, CA). ("The question of publishing these photographs with faces blocked out has been taken up with our legal counsel.").

At heart, anthropometric studies of homosexuality in the early twentieth century were all searching for signs of *difference*: some systematic way to recognize and to distinguish the deviant body. Beginning with the earliest sexologists, the physiological study of homosexuality did not simply attempt to locate the internal biological roots of sexual deviance; it reflected a nagging suspicion that sexual deviance was externally conspicuous, broadcast on the surface of the degenerate body.[167] In 1894, an American physician studying sexual deviants in American prisons had noted that "there was something in the physiognomy and manner of these unfortunates that was easily recognizable."[168] Among the most progressive sexologists of his day, Magnus Hirschfeld agreed that "[a] homosexual who was not distinguishable physically . . . from the complete man is a being I have not yet encountered."[169] When medical researchers began measuring the length of gay limbs and the curves of their hips in the interwar years, a core goal behind their tabulations was to substantiate this early intuition of the self-revelatory homosexual—to provide some reliable empirical grounding for the inherent difference of the queer body.

Some studies yielded disappointing results. In 1936, for example, psychiatrist John Wortis concluded that the relative widths of homosexual and heterosexual hips provided "no evidence that the male homosexual represents an intersexual physical type."[170] Yet in most cases, medical researchers succeeded in pinpointing some physiological difference between the homosexual body and its heterosexual counterpart. From devoted anthropometrists like Weil to

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[167] Somerville, "Scientific Racism and the Emergence of the Homosexual Body," 248-49 ("[S]exologists . . . assumed that the 'invert' might be visually distinguishable from the 'normal' body through anatomical markers, just as the differences between the sexes had traditionally been mapped upon the body.").

[168] Austin Flint, "A Case of Sexual Inversion, Probably with Complete Sexual Anesthesia," N*ew York Medical Journal*, Vol. 94, No. 23 (Dec. 2, 1911), 1111.

[169] Quoted in Potter, *Strange* Loves, 86.

[170] Wortis, "A Note on the Body Build of the Male Homosexual," 1125.

psychiatrists like Henry, researchers routinely noted the unusually close ratio between the average homosexual's hips and shoulders,[171] his atypical height and longer limbs,[172] the unusually sparse hair across his face and torso.[173] As Henry and his collaborators at the Sex Variants project confirmed, homosexuals "as a group appear to have an objective constitutional make-up which is recognizably different from a 'normal' group."[174]

The conception of homosexuality as a somatic or biological difference, intrinsic in the flesh of the deviant body, would one day of course present progressive voices in the struggle for homosexual civil rights with a core tool to demand greater tolerance from the public. Even at the turn of the century, liberal researchers like Magnus Hirschfeld insisted that the congenital origins of sexual inversion weighed in favor of accepting homosexuality as a benign natural variation.[175]

Unsurprisingly, most researchers' results did not simply bear out the homosexual's difference from the average heterosexual man. Like Lombroso's model of the bestial criminal, they consistently carried broad hints of physical inferiority. Early sexologists like Krafft-Ebing had conjectured that congenital homosexuality might be a lapse in the evolutionary advancement of the species; Henry would agree the homosexual's "immature form of skeletal development"

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[171] Potter, *Strange Loves*, 101; Henry, *Sex Variants*, 1045.

[172] Weil, "Sprechen anatomische Grundlagen für das Angeborensein der Homosexualität?".

[173] Henry and Galbraith, "Constitutional Factors in Homosexuality," 1255; Samuel Kahn, *Mentality and Homosexuality* (Boston: Meador Publishing Company, 1937), 71.

[174] George W. Henry, Robert P. Ball, and John R. Carty, "Internal Pelvic Dimensions of Sex Variants: A Comparative Study of Masculinity and Femininity as Revealed by Roentgen Anthropometry," in *Sex Variants: A Study of Homosexual Patterns*, ed. George H. Henry (New York: Paul Hoeber Inc., 1941), 1049; see also Eugen Kahn, *Psychopathic Personality*, trans. H. Flanders Dunbar (New Haven: Yale University Press, 1931), 127 (noting that " a group of homosexuals . . . show physical peculiarities").

[175] Ralf Dose, *Magnus Hirschfeld: The Origins of the Gay Liberation Movement* (New York: Monthly Review Press, 2014); Charlotte Wolff, *Magnus Hirschfeld: A Portrait of a Pioneer in Sexology* (London: Quartet Books, 1986).

suggested a regression toward "the species type."[176] Physicians and psychiatrists alike in the interwar years remarked on the fragility and weakness of the homosexual build: the invert's lighter bone structure, his rounded and narrow shoulders, his meager muscle mass.[177] They emphasized the awkwardness and unattractiveness of his body: the excess fat concentrated around his hips, his enlarged thighs, his unappealingly fleshy breasts.[178] Even Henry's case studies, whose sheer breadth yielded an inevitable variation among his subjects' builds, consistently stressed the bodily deficiencies of the average homosexual.[179] While many of his subjects were of the "athletic type," with broad shoulders and "large" genitals, the vast majority included some unmistakable elements of physical degeneration.[180] One unfortunate specimen who submitted his body to Henry's examination found his physique thoroughly excoriated: "Due to excess fat and poor muscular development Walter's body form is gently curved throughout. His breasts are noticeable, he has a distinct waist line, his thighs and hips are heavy, his pubic hair is feminine in distribution and he tends to be knock-kneed."[181] So very underimpressive to the medical professional, the homosexual body was presumed to be a source of embarrassment to some homosexual men themselves. "A small penis often gives rise of a marked feeling of

[176] Henry, *Sex Variants*, 1046; Henry and Galbraith, "Constitutional Factors in Homosexuality," 1260. For Krafft-Ebing's view, see Terry, "Anxious Slippages Between 'Us' and 'Them,'" 135 ("Krafft-Ebing saw sexual inversion as proof that homosexuals were less evolutionarily advanced that heterosexuals that their bodies were different because at a lower or less sophisticated stage of development . . . .").

[177] Wolbarst, *Sexual Perversion as a Scientific Problem*, 4; Potter, *Strange Loves*, 100.

[178] Wolbarst, *Sexual Perversion as a Scientific Problem*, 4; Potter, *Strange Loves*, 99; Henry, *Sex Variants*, 283.

[179] For an argument that the variation in Henry's case studies suggested the impossibility of distinguishing the homosexual body, see Terry, "Anxious Slippages Between 'Us' and 'Them,'" 151-53. By contrast, I argue that, despite Henry's acknowledgements of the masculine prototype of some homosexuals, his research consistently labored to reaffirm some underlying distinguishing feminine characteristics endemic to almost all homosexual bodies.

[180] For signs of athleticism among Henry's subjects, see Henry, *Sex Variants*, 106, 115, 125, 157. For concurrent signs of degeneration, such as delicate carrying angles the arm, "timid" builds, and their bloated fat deposits, see Ibid., 5; Henry and Galbraith, "Constitutional Factors in Homosexuality," 1255.

[181] Henry, *Sex Variants*, 283.

inferiority," Henry had noted in his early article with Galbraith.[182] Not only the doctor but the patient himself, it appeared, could be expected to understand where the homosexual stood in the physical spectrum of the species.

As with Henry's references to the homosexual's skeletal immaturity, doctors sometimes explained the homosexual's unique physiology as stunted evolution: the failure to develop the characteristics of either sex. Yet they usually put his difference in the terms of a marked femininity. [183] Written for a popular audience, Potter's *Strange Loves* emphasized the homosexual's "feminine facial appearance," his "gracefully rounded" curves, the "remarkable whiteness of [his] skin."[184] Addressing a more professional readership, urologist Abraham Wolbarst drew attention to such "signs of . . . effeminacy" as the homosexual's "softer, smoother, and less hairy" cheeks, the "typical enlargement of the . . . breasts, so that they resemble a woman," even "his genital anatomy."[185] The prototypical homosexual man, as he emerged from these pages, was conspicuously effeminate, marked on every pore of his surface by signs of some congenital gender inversion. Even if the homosexual's more intimate skeletal characteristics would rarely be made visible in public, doctors insisted that the innate femininity of his bodily structure broadcast itself through his reflexive physical mannerisms. The same psychiatrists and physicians who took minute quantitative measurements of the homosexual's limbs and genitals noted the "more evident" femininity of his "physical movements": his "prim,

[182] Henry and Galbraith, "Constitutional Factors in Homosexuality," 1261.

[183] Ibid., 1260 (concluding that "the homosexual male has remained nearer the species type rather than progressing to the highly differentiated adult masculine form").

[184] Potter, *Strange Loves*, 99-100.

[185] Ibid., 100; Wolbarst, *Sexual Perversion as a Scientific Problem*, 4.

affected gait," his "uncertain, mincing steps," "the girlish wriggling of his body," his "unclear, high-pitched voice."[186]

On this latter point, indeed, medical researchers well beyond the physiological disciplines could find some common ground. Even psychiatrists and social scientists who generally shied away from their colleagues' anthropometric studies of the homosexual body converged, by way of their own preferred methodologies, on the fundamental insight of the homosexual's intrinsic femininity. Two psychologists with the Sex Variants committee, Lewis M. Terman and Catharine Cox Miles, insisted that "the physical measurements of . . . male homosexuals do not differ markedly from those of army and college men," yet they conceded from their own experience that the passive homosexual "takes advantage of every opportunity to *make his behavior* as much as possible like that of women."[187] David Abrahamsen, a Columbia University psychiatrist who followed closely in Freud's psychoanalytic footsteps, confirmed that a "typical homosexual . . . behaves like a girl, walks like a girl, smiles like a girl."[188] Psychoanalyst Samuel Kahn provided a uniquely specific overview of the homosexual's characteristically feminine carriage. The average homosexual, Kahn wrote, "appears and acts effeminately . . . . He dresses unusually well, and if closely scrutinized, he may be found to wear a corset, female silk underwear, will have beautiful long hair, face powdered, and sometimes rouged."[189] Based on such telltale mannerisms, even some early sociologists agreed that the

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[186] Henry, *Sex Variants*, 283; Wolbarst, *Sexual Perversion as a Scientific Problem*, 4; Henry, *Sex Variants*, 242, 303.

[187] Lewis Terman and Catharine Cox Miles, *Sex and Personality: Studies in Masculinity and Femininity* (New York: Russell & Russell, 1936), 251, 248 (emphasis added).

[188] Abrahamsen, *Crime and the Human Mind*, 118-19. Although Abrahamsen never pursued any systematic studies of the homosexual physiology, he also echoed other psychiatrists' findings regarding the homosexual's soft skin and feminine hair distribution. His ultimate appraisal of the homosexual body, however, appears to rest on mannerism rather than anatomy. See also ibid., 118 (noting the homosexuals' "pleasant" manners").

[189] Kahn, *Mentality and Homosexuality*, 71.

homosexual's conduct tinged his body with some unmistakable vestiges of effeminacy. Although there were "no fast rules as to the physical characteristics of homosexuals," noted one sociology student at the University of Chicago in the 1930s, male homosexuals were frequently distinguished by their "effeminate movements, p[it]ch of voice and general youthful appearance."[190] One of her colleagues who visited a queer bar in 1933 felt confident diagnosing dozens of the bar's clientele as homosexual based on a sight alone: "From appearances one could judge some of the fellows queer."[191] In this sense, anthropometric studies of the likes of Weil and Henry were only the most literal of numerous scientific disciplines attesting to the innately effeminate homosexual in the early twentieth century.

To be sure, researchers who affirmed the conspicuous effeminacy of the homosexual body recognized that their findings were far from universal. Physicians like Potter and psychologists like Kahn acknowledged that the "effeminate" homosexual was only one among several core types, and that many male homosexuals manifested primarily or even exclusively masculine traits.[192] For his part, Henry conceded that much of the homosexual's congenital effeminacy could be masked through proper carriage and clothing. In Henry's own experience, a

[190] Pauline Redmond, "Term Paper, Homosexuality," Folder 7, Box 149, Ernest W. Burgess Papers, University of Chicago Library. Echoing the anthropometric studies of the day, she also noted that "sexual inverts . . . have considerable deposits of fat, causing a more rounded body, less powerful muscular system, clearer and whiter skins, rounded shoulders, and the same width of hips and shoulders and often luxuriant growth of hair." Ibid.

[191] "Ballyhoo Café, 11:30," Sept. 24, 1933, Folder 2, Box 98, Ernest W. Burgess Papers, University of Chicago Library.

[192] Potter, *Strange Loves*, 97 (noting that "there are two distinct types of homosexuals—the virile and the effeminate type"); Wolbarst, *Sexual Perversion as a Scientific Problem*, 4 (noting that homosexuals may be divided into "the effeminate and the virile urning"); Kahn, *Mentality and Homosexuality*, 70 ("Here we also have three main types, namely: first, the homosexual with female traits; second, the homosexual with no female traits, and lastly, the homosexual with both traits.").

homosexual whose natural effeminacy made him "one of the gayest of the 'queens'" in intimate company could "avoid being conspicuous with men" when he put his mind to it.[193]

Even so, however, most researchers concluded that femininity remained a reliable metric of sexual deviance. If not the exclusive category of sexual deviant, Kahn insisted, the effeminate homosexual was "the commonest" sort—especially, as Potter conveniently assured his American readers, in the United States, where "there is a decided preponderance of the feminine type of introvert."[194] And the weight of Henry's case studies suggested that, despite the possibility of temporary camouflage, even the most superficially masculine homosexual was ultimately powerless to prevent some telltale signs of femininity from creeping out. Michael D., from all public appearances an "[a]thletic masculine type," revealed his inner nature through "the feminine modulation" in his manner of speech.[195] Percival G., "in external form . . . an adult male," exposed himself as "a sissy" and "an 'aunty'" through his physical affectations and effeminate movements.[196] Rodney S., at first sight indistinguishable from "the average young man of twenty-five who has some athletic ability," betrayed his sexual inversion through his "pretty, unlined face," his "sensual mouth," his "delicate hands and well-kept fingers." "Those who know Rodney well," Henry concluded, "state that an air of effeminacy pervades all his actions and gestures, even the way he deals cards and ties a shoelace."[197] More than a conscious choice, a homosexual's feminine bearing and physical tics emerged as an irresistible compulsion: a physical instinct to be warded off only with most strenuous and exhaustive effort of the will.

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[193] Henry, *Sex Variants*, 303.

[194] Kahn, *Mentality and Homosexuality*, 70; Potter, *Strange Loves*, 99.

[195] Henry, *Sex Variants*, 144, 127.

[196] Ibid., 477.

[197] Ibid., 117-18.

As Henry observed of one subject, "now forty years old," the man was "no longer able to stave off the mannerisms" that made "middle-aged homosexual men" so very conspicuous.[198]

The key to recognizing the homosexual, it emerged from the Sex Variants study, was to know precisely what to look for—to be sufficiently well-versed in the signs of sexual difference and sufficiently eagle-eyed to spot them when they appeared. In the case of Rodney S., the homosexual's inevitable physical differences came through only "on closer inspection," to those who benefited from ample exposure to his movements.[199] In the case of Percival G., Henry conceded that anyone could recognize the basic effeminacy of his actions, but insisted that only "the discerning" would identify him "as an 'aunty.'"[200] Paul A., a young male homosexual with "an athletic build," may have thrown the specialized nature of Henry's fluency in homosexual signals into clearest relief. "[T]o the layman Paul's physical make-up probably would appear adequate for a male," Henry noted. By implication, a more expert eye was necessary to pick up on Paul's effeminate mouth, the "insecurity of his facial expression," and his "feminine" attention to grooming.[201] The characteristic visibility of the homosexual, Henry's case studies suggested, was both an inherent, inalienable trait of the queer body and one that required specialized training to detect. Like the sociologist convinced that he could spot dozens of homosexuals "[f]rom appearances" alone, practicing psychiatrists like Henry could take some professional pride in their proficiency in ferreting out the physical signs of sexual deviance, honed through ample practice and meticulous attention.[202]

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[198] Ibid., 268.

[199] Ibid., 117-18.

[200] Ibid., 477.

[201] Ibid., 219, 229.

[202] Kahn, *Mentality and Homosexuality*, 138 ("It must be kept in mind that a diagnosis of homosexuality is indeed a difficult and dangerous matter. It is difficult because some people may have some of the above characteristics, and

Anthropometrists studying the homosexual body in the interwar decades found themselves striving for a much-needed sense of certainty at an uncertain time. As psychoanalysts emphasized the frightening permeability of sexual deviance, physicians, urologists, and even some psychiatrists sought to restore a reassuring sense of determinacy to the figure of the sexual deviant.[203] In the face of the demonstrable variability and physical ambiguity of many homosexual subjects, these researchers routinely insisted on affirming some inherent physiological difference between the sexual deviant and his "normal" counterpart. And they insisted on affirming that physiological difference as inescapably, inevitably self-revelatory—destined to shine through despite the homosexual's strongest attempts at camouflage. The key to detecting the sexual deviant, it appeared, was a properly trained observer: one both accustomed to observing the homosexual body and cognizant of its most subtle, most reliable visual traces.

The Visible Fairy

In context, the fairy spectacles that tantalized audiences in the banquet halls and popular nightclubs of America's major cities might have had more in common with the medical examination room than just their spotlight on the deviant body. Back in the banquet halls and popular nightclubs of America's major cities, the pansy craze did not simply present the deviant

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yet not be homosexuals. It is a dangerous diagnosis, because it may result in insult, violence, and legal procedure."); see also Jacqueline Urla & Jennifer Terry, "Introduction: Mapping Embodied Deviance," *Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture*, eds. Jennifer Terry & Jacqueline Urla (Bloomington: Indiana University Press, 1995), 1-18, 11 (noting that the scientific project of examining deviant bodies turned embodied deviance into a visual trace that only specialized men of science could see).

[203] Terry, "Anxious Slippages Between 'Us' and 'Them,'" 138-39 (arguing that the Sex Variants study tried to create a visible homosexual body in order to reassure contemporary hygienic and health concerns that sexual perversion was an increasingly pervasive and untraceable phenomenon); Minton, *Departing From Deviance*, 51 (noting that Henry's "goal" in his close examinations of homosexuals was "classification, treatment, and especially prevention").

body as an object of scrutiny by curious observers. Like the scientific search for the determinate homosexual physiology, it also marked the deviant body as a highly conspicuous spectacle: something both intrinsically visual and inherently self-revelatory.

From the annual drag balls in Harlem and Chicago to the fairy cabarets of the theater districts, the sensational entertainments of the pansy craze branded the body of the sexual deviant with a set of highly flamboyant, highly consistent visual codes. Annual masquerades like the Hamilton Lodge Ball, after all, were defined in large part by the visual flamboyance of the fairy. Outfitting themselves in the most theatrical signs of femininity, participants donned extravagant feminine ball gowns, adorned their faces in elaborate makeup, and adopted the exaggerated movements and mannerisms of the opposite sex.[204] An observer at a Chicago ball described the participants as careful studies in conspicuous womanhood: "heavily powdered, with eye brows pencilled and rouged lips and cheeks, their arms and hands taking effeminate gestures."[205] The photographs of the balls that circulated through the popular press, too, emphasized the unabashed spectacularity of the contestants, magnifying their theatrical costumes, dramatic makeup, and affected postures.[206] More than simply visually accessible to heterosexual spectators, the bodies that thronged the popular drag balls frequently presented themselves as visually unavoidable, broadcasting their sexuality to everyone in the perimeter.

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[204] "Hamilton Lodge Ball an Unusual Spectacle," *NYAN*, 3 (noting the fairies' "gorgeous evening gowns, wigs and powdered faces"); "Society Sees 3rd Sex Cavort at Harlem Ball," *BAA*, 3 ("Men and women turned out bedecked in the habiliments of the opposite sex."); "Mere Male Blossoms Out in Garb of Milady," *NYAN*, 3 ("As usual, this ball provided an opportunity for that portion of the city's male population whose one and greatest secret ambition is to imitate the female by donning the most gorgeous of feminine attire.").

[205] Volmer, "The New Year's Eve Drag," 2.

[206] "When 'Odd Fellows' Cavorted," *NYAN*, 2; "Annual 'Pansy' Ball Colorful," *BAA*, 12-13; "'Pansies' Ball Shocks Staid Philadelphians," *NJG*, A8; Matthews, "Clothes Make the Woman as Well as the Man," *BAA*, 7; Matthews, "The Pansy Craze," 7; Matthews, "Is the Reign of Harlem's Twilight Men at an End?", 16; "The Third Sex Called 'Pansies,'" *BAA*, 20.

Similarly, in popular cabarets, the pansy entertainer confronted bourgeois audiences as a highly flamboyant phenomenon. "The stage is full of chorusmen, with all the symptoms of homosexuality worn on the sleeve," art critic Bulliett had remarked of the cabarets and musical revues that rose to prominence in the 1920s.[207] Some fairy cabaret featured homosexual performers outfitted in full drag regalia—"wigged, gowned, rouged, lip-sticked, and mascara-ed"—echoing the familiar visual spectacle of the drag balls.[208] Other venues provided a window into urban homosexuality that was more naturalistic but similarly visually conspicuous. Jean Malin conveyed his sexual difference to his patrons through his arresting blondined hair and penciled eyebrows.[209] The waiters in *Call Her Savage* proclaimed their deviance through their traipsing gaits, limp wrists, painted eyes, and high falsetto voices.[210] Should some more cynical spectators have doubted the exaggerated mannerisms of paid performers like Malin, bars that attracted a mixed clientele assured their heterosexual patrons that homosexual men shared the same visual idiosyncrasies on and off the stage. A sociology student visiting a gay bar in Chicago in the 1930s noted the flamboyant behavior of the patrons: "As the night w[ore] on," they "began to wear makeup" and revealed their "painted finger nails," some "going so far as to put on artificial lashes."[211] From outlandish female impersonators to elegant nightclub hosts to fellow patrons in queer bars, the spectacular human specimens of the pansy craze embodied sexual deviance as a distinctly visual phenomenon. Marked through some indelible combination

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[207] Bulliet, *Venus Castina*, 7.

[208] Lord and Shaw, *Where to Sin in San Francisco*, 93; see also "Wednesday Nov. 22nd, 1933," Ernest W. Burgess Papers (describing a drag queen performing at a gay bar in Chicago); "Night Club, Coffee Cliff," Dec. 2, 1930, Box 35, Committee of Fourteen Records, New York Public Library (describing a "fairy" "attired in woman's clothes" employed by a New York club).

[209] Jerome, "Floor-Show," 68-69.

[210] *Call Her Savage*, dir. John Francis Dillon.

[211] Bingham, "Notes on the homosexual in Chicago."

of blondined hair, powdered cheeks, painted lips, limping wrist, swinging hips, and theatric dress, the fairy broadcast his deviance through a set of discrete and consistent visual codes.

Like the doctors who made a life's work of studying the homosexual, most spectators at the drag balls and cabarets of the pansy craze acknowledged that the flamboyance of the participants was not a permanent characteristic. Indeed, a chief appeal of the annual drag masquerades was their uniquely vivid window into an urban phenomenon that was generally far less conspicuous. Drag balls, journalists speculated, provided men who spent most of the year masking their unusual inclinations with a rare "opportunity to appear in public as they want to."[212] As the *Atlanta Daily World* and *Pittsburgh Tribune*, with barely disguised contempt, the over-eager costumed guests at the Hamilton Lodge "could only dress like this once a year."[213]

Yet the popular press also echoed the intuition, so popular among medical researchers, that the homosexual body was marked by some intrinsic femininity that it could never quite erase. Even admitting that overt effeminacy of the contestants at the Hamilton Lodge Ball was a unique yearly spectacle, the public did not doubt that it was, at heart, their natural state. As the *Baltimore Afro-American* had put it, masquerade balls witnessed the "annual reversion to type" of men who spent most of the year hiding their inner natures.[214] Depicted by the popular press, the fairy's outrageous tactics at drag balls and nightclubs were not so much the product of conscious choice as of an irrepressible instinct. A critic reviewing Mae West's *The Drag* in 1927 had noted, with some disapproval, the playwright's good fortunes in filling the "homosexual cast": "The nature of these creatures is such that they will snap at a chance of

[212] "Society Sees 3rd Sex Cavort at Harlem Ball," *BAA*, 3; see also Masquerade Ball Draws 5,000 People," *NYAN*, 2 (characterizing the Ball as homosexuals' unique "opportunity . . . to get off some of their abnormality in public").

[213] "Female Impersonator Arrested After 'Ball,'" *PT*, 4; "Police Arrest Impersonator," *ADW*, 4.

[214] "Society Sees 3rd Sex Cavort at Harlem Ball," *BAA*, 3.

appearing in public."[215] Some years later, a reporter at the Hamilton Lodge confirmed that the drag contestant's "one and greatest secret ambition is to imitate the female by donning the most gorgeous of feminine attire."[216] When a young participant at the Hamilton Lodge was arrested one year for wearing his gown in the streets the following morning, newspapers around the country reported on his characteristic obstinacy. "[H]e was so pleased with his beautiful costume, he didn't want to take it off so soon," the papers mocked, noting that the occasion marked his eighth such arrest.[217]

Such was the fairy's intrinsic urge to broadcast his femininity that, even when he put his best efforts forward, he could not purge all signs of deviance from his body. A scene from Blair Niles's *Strange Brother* provides a useful window into the popular presumptions of the day: Midway through the novel, a sympathetic fairy last seen in the liberal atmosphere of a Harlem bar is arrested and brought to court for sentencing. Having washed away his makeup for the judge, clad in nondescript masculine clothing, and clearly terrified of the criminal proceedings before him, the unfortunate offender still cannot help betraying inner nature by wearing, as though through some illogical compulsion, a lone golden bangle underneath his cuff.[218] Encapsulated in the image of the nightclub performer, the common stereotype of the fairy that emerged in the 1930s was both visually flamboyant and irrepressibly self-revelatory. Driven by some profound inner urge toward the most spectacular displays of deviance, no matter the

[215] Untitled New York newspaper article, dated Feb. 11, 1927, reprinted in Curtin, *"We Can Always Call Them Bulgarians*," 97.

[216] "Mere Male Blossoms Out in Garb of Milady," *NYAN*, 3.

[217] "Police Arrest Impersonator," *ADW*, 4; "Female Impersonator Arrested After 'Ball,'" *PT*, 4.

[218] Niles, *Strange Brother*, 97-98.

incentive to remain discrete, the sexual deviant could not help broadcasting his difference for all to see.

Reassured by their encounters with the spectacular fairy, some members of the public grew comfortable applying the visual codes they learned beneath the spotlight of the pansy craze well beyond the stage. In the early 1930s, a homosexual man interviewed by a student at the University of Chicago provided a comprehensive insider guide on "how [to] spot a queen" from "appearances": "flashy clothes," an "effeminate" walk, a "high pitched" voice, fake eyelashes, plucked and penciled eyebrows, cosmetics on the cheeks.[219] Some heterosexuals soon grew fluent in these same signals. Perceptive cosmopolitans who set out to identify sexual deviants on the streets or in public parks watched for mascara-ed eyelashes, limp wrists, and blondined hair.[220] "[I can] tell them by the way they walk," explained one Chicagoan asked to explain how he identifies "punks" and "fruits" on the street: "the eyes, the way they act."[221] Explaining his facility with recognizing fairies, a fictional character in Niles's novel emphasized similar cues in strikingly similar language: "[I can] [t]ell by the way they cock their hats. Tell by their walk even . . . the way they swing their hips. A lot o' them are actually built like women."[222]

In the late 1920s, theater critics had questioned whether the average theatergoer would understand the perverse themes presented in Mae West's controversial, drag-centered productions.[223] By the early 1930s, both nightclubs and the popular press could presume that

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[219] "How I spot a queen, " Folder 4, Box 98, Ernest W. Burgess Papers, University of Chicago Library.

[220] Martin, "Death Knell of Degeneracy?", 10 (noting the influx of "professional pansies" with "pained faces and dyed hair" who "flaunt themselves" in a public park); see also Kahn, *Mentality and Homosexuality*, 217 (recounting story of two fairies recognized by policeman in a park through their tweezed eyebrows);

[221] "(Homosexual) Ferry's, Punks, etc," Jan. 8, 1937, Folder 18, Box 209, Ernest W. Burgess Papers, University of Chicago Library.

[222] Niles, *Strange Brother*, 96.

[223] Curtin, *"We Can Always Call Them Bulgarians,"* 56, 82, 109, 111.

many of their customers were familiar with the fairy and his telltale visual cues. The *New York Amsterdam News* ran cartoons of wilting men with plucked eyebrows, lipstick, and gelled hair, trusting their readership to recognize such inalienable physical markers of the urban fairy.[224] *Call Her Savage* could rely on its viewers to recognize a pansy bar through its waiters' familiar feminine affectations, from their limp wrists to their unusually swishing hips.[225] Written for a general readership, *Stranger Brother* alerted its readers of the arrival of a group of "degenerates" exclusively through a run-down of their unique physical characteristics:

> June gave a little gasp, for the five young men had carefully marcelled hair, all had their eyebrows plucked to a finely penciled line, all had carmined lips, all were powdered and rouged, all had meticulously manicured nails, stained dark red, all had high voices and little trilling laughs, and all expressed themselves in feminine affectations and gestures.[226]

Sophisticated audiences grew familiar with more oblique signifiers of homosexuality. Eschewing the broad embellishments of femininity, performers like Chicago's Roy Spencer Bartlett relied on subtle codes like wearing a red tie on stage to suggest their provocative sexuality to their audiences.[227] By 1932, at least one homosexual man felt the need to rebut the stereotypes: "It is not true that queers will wear Red nec[k]ties," he protested under hypnosis.[228] Yet other homosexuals acknowledged that the public's surging interest in the pansy in recent years had left many Americans familiar with the urban homosexual. The Chicagoan who avoided going out with "Swishy bells on the street" because "quite a few people [had grown]

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[224] "Bizarre Doings Friday At Hamilton 'Ball,'" *New York Amsterdam News*, Feb. 27, 1937, 1.

[225] *Call Her Savage*, dir. John Francis Dillon.

[226] Niles, *Strange Brother*, 49.

[227] Heap, *Slumming*, 236; see also Bulliet, *Venus Castina*, 7 ("The comedians of the musical revues can hardly escape wearing a red necktie in some skit or other, with the broadest hints of its acquired significance . . . .").

[228] "Under Hypnosis," Sept. 24, 1932, Folder 3, Box 98, Ernest W. Burgess Papers, University of Chicago Library.

wise to cock suckers," after all, was only too aware of the public's newfound sophistication in the ways of the fairy.[229]

In 1934, one homosexual man appalled by the physical caricatures that dominated the pansy craze wrote to the *Baltimore Afro-American* in defense of his brethren. "I speak for myself and others," Louis Diggs insisted, "when I cite the fact that physically we are as any normal male should be."[230] Yet most Americans were not interested in the correction. Inspired by the spectacular fairy of the pansy craze, indeed, some members of the public began to pride themselves on their facility in recognizing sexual deviants through their physical cues. When La Forest Potter first published his treatise *Strange Loves* in 1933, he explicitly attempted to attract lay readers by offering to refine their powers of perception over the sexual deviant. "Can you distinguish these men and women of the Shadow World?" queried an advertisement in the science fiction magazine *Wonder Stories* in 1934.[231] For some cosmopolitans, even absent Potter's expert scientific tutelage, the answer was apparently yes. "I never miss," boasted the Chicagoan so certain of his familiarity with the bodily signifiers of the homosexual; "I can spot one a block away."[232] Niles's fictional connoisseur echoed the sentiment: "I recognized it the moment I laid an eye on it. . . . Oh, I can spo' em! Can tell 'em as far as I see 'em."[233] In the medical community, of course, psychiatrists and psychoanalysts had emphasized the nuance and professional training necessary to identify a homosexual with any true certainty. "It must be kept in mind at a diagnosis of homosexuality is indeed a difficult and dangerous matter," warned

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[229] "6/29," Ernest W. Burgess Papers.

[230] Louis Diggs, "A Defense of Pansies by One of Them," *Baltimore Afro-American*, Oct. 13, 1934, 7.

[231] *Wonder Stories*, ed. Hugo Gernsback, August 1934, 256.

[232] "(Homosexual) Ferry's, Punks, etc.," Folder 18, Box 209, Ernest W. Burgess Papers, University of Chicago Library.

[233] Niles, *Strange Brother*, 96.

psychologist Samuel Kahn in 1937: "It is difficult because some people may have some [stereotypical effeminate] characteristics, and yet not be homosexuals."[234] Yet among the lay public, at least some urbanites were happy to assume that classifying "fruits" and "fairies" was a far more commonsensical endeavor. *Strange Brother*'s June Westbrook may have been befuddled by a group of fairies in a nightclub, but her more sophisticated cousin suggested that identifying a sexual deviant was hardly an imposing accomplishment for a self-respecting cosmopolitan: "Phil shrugged. 'They're degenerates, June. That sort of thing is degenerate.'"[235] Used to encountering deviant bodies in the flamboyant habits of the nightclub pansy, self-consciously sophisticated heterosexuals in the interwar years insisted that they could recognize all sexual deviants, in any setting, based on the familiar visual markers of the effeminate fairy.

By the mid-1930s, in short, some urban residents in America's major cities had honed their ability to ferret out the visual signifiers of sexual deviance. And they specifically honed that ability on the visual stereotypes and codes popularized through the pansy theatrics of the early decade. At the turn of the century in New York, the slummer who encountered "hundreds of male inverts" in the Bowery had remarked on the educational virtues of the experience: seeing so many inverts "gathered together in a group," she noted, "made it easy to recognize them on any occasion where we might meet or see them."[236] Spectators at Harlem's drag balls and Broadway's musical reviews availed themselves of a similar pedagogical environment. Across the nation, many urban Americans got their first look at the sexual deviant beneath the spotlight of the fairy cabarets, on the recessed dance floors of annual drag balls, and through the full-page photographs circulated by local papers like the *New York Amsterdam News*, *Baltimore Afro-*

[234] Kahn, *Mentality and Homosexuality*, 138.

[235] Niles, *Strange Brother*, 55.

[236] Casal, *Stone Wall*, 183, 184-85.

American, and *Norfolk Journal*. On the stage and in print media, they discovered the deviant body as an eager object for their visual dissection: a spectacle not simply available for scrutiny, but one that flaunted itself into the public's eye by its conspicuous, utterly consistent visual cues. If female impersonators like Julian Eltinge had tantalized crowds through the bewildering display of a male body performing illusions that had to be seen to be believed, the pansy performers entertained spectators largely by assuring them of their own visual authority over the performer—their prerogative to examine, analyze, and ultimately master the deviant body. In this sense, the popular pansy spectacles of the 1930s provided more than just a passing recreation. They provided a core training ground for the mainstream public's fluency in the phenomenon of the fairy: an educational space in which the curious layperson could learn to refine his or her eye for sexual deviance.

Science and Spectacle

In a characteristically toxic review of *The Drag* in 1927, a critic for *Variety* had contemplated the gaping chasm between the cheap sensationalism of Mae West's theatrics—all drag spectacle and bawdy innuendo—and the potential value of a truly enlightening treatment of homosexuality on the stage.

> This reporter . . . took the attitude that this subject of sex aberration was fair material for the theatre under proper treatment, the theory being . . . that if [sex perversion] could be brought into the open, examined and measured, it couldn't be any more pernicious a social horror than it was under the silent treatment. . . . But as treated in 'The Drag' it illuminates nothing, serves no decent purpose and is altogether vicious.[237]

Just a few years later, *Variety*'s critic might have been baffled by the crowds that flocked to the drag balls and pansy cabarets of America's major cities. From the thronging galas of the

[237] "The Drag," *Variety*, Feb. 2, 1927, 49.

Hamilton Lodge to Jean Malin's sly jokes in Times Square, drag spectacle and bawdy innuendo had apparently become the order of the day.

If our critic's prediction had been off the mark, however, his mistake may have lain less in the high pedagogical standards that made him disdain West's drag theatrics than in his assessment of the scientific pedigree of those drag theatrics themselves. The sensational excess of the pansy craze was, of course, far from the overt intellectual ambitions of the laboratory—that academic space where researchers like George Henry sought to unlock the mysteries of the sexual deviant. Yet as the rising specter of urban "degeneracy" in the 1930s captured the curiosity of medical researchers and the lay public alike, scientific studies of sexual deviance and popular pansy entertainments intersected and overlapped in the creation of authoritative social knowledge about the homosexual.

To begin with, if the theatrical prototype of the cabaret pansy defined the urban public's presumptions about the deviant body, it also loomed large in the imaginations of scientific researchers in the interwar period. City dwellers like any others, doctors and scientists were not immune from the spectacular draws of the drag balls and pansy cabarets that dominated urban nightlife in the early 1930s. Henry and the Sex Variants committee may have labored to recruit hundreds of case studies to obtain a holistic perspective on the urban homosexual, yet the commercialized spectacles of the pansy craze provided a recurrent theme in many medical experts' authoritative pronouncement on homosexuality. Addressing a popular audience, physician Potter emphasized "the peculiar, high-pitched tones of voice" used by effeminate homosexuals "both in speaking and in singing."[238] Sketching an outline of the average homosexual male, psychologist Samuel Kahn opined that "[o]n stage he becomes the best type of

[238] Potter, *Strange Loves*, 103.

female impersonator."[239] Describing one homosexual subject, Henry himself remarked on the "theatrical details" of his clothing and posture.[240] Framing their professional assessments in the openly theatrical terms of the stage fairy, medical researchers sometimes could not help embedding the popular spectacles of the pansy craze in their expert diagnoses of homosexuality. Indeed, some researchers made the pansy spectacles of the period the explicit settings for their scientific studies. When University of Chicago sociologist Ernest Burgess added the topic of sexual deviance to his graduate courses on social pathology, he encouraged students who were already frequenting Chicago's fairy bars as spectators to transform their recreational visits into formal research trips.[241] Filled with vibrant accounts of the fairies' "gorgeous evening gowns," delicate accessories and jewels, and graceful mannerisms, his students' sociological field reports were often indistinguishable from the popular accounts that circulated in the tabloids of the day.[242] "And both are men!" marveled Myles Volmer in an account that could easily have been published as an article in one of New York's local tabloids. "[H]eavily powdered, with eye brows penciled and rouged lips and cheeks, their arms and hands taking effeminate gestures, it is difficult to discern their true sex."[243]

In a time when the popular press abounded with stereotypically effeminate representations of the sexual deviant, many scientific researchers did not question or complicate the typology of the theatrical pansy. They reinforced that very species type. Physicians looking

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[239] Kahn, *Mentality and Homosexuality*, 71.

[240] Henry, *Sex Variants*, 477.

[241] Chad Heap, *Homosexuality in the City: A Century of Research at the University of Chicago* (Chicago: University of Chicago Library, 2000), 21-22. See also, for example, Bingham, "Notes on the homosexual in Chicago"; Myles Volmer, "The New Year's Eve Drag"; "Wednesday Nov. 22nd, 1933," Ernest W. Burgess Papers.

[242] Volmer, "The New Year's Eve Drag," 2.

[243] Ibid.

to diagnose the homosexual male emphasized the familiar characteristics of the fairy entertainer: his "swaying . . . hips," his "coy postures," his "high-pitched voice," and feminine "tastes in dress."[244] By the mid-century, a urologist writing for a specialized medical audience would naturalize the latter for his readers as the species "known to us in America as the pansy or the fairy."[245] If the flamboyant fairy that emerged on the popular stages of the 1930s turned the public's understanding of all sexual deviants into a cartoonish stereotype of theatrical effeminacy, the contemporary medical researchers of the interwar period affirmed that cultural prototype as a scientific truth.

If the medical study of homosexuality could not entirely divorce itself from the popular pansy spectacles of the early twentieth century, by the same token, the lay public's fascination with the homosexual body in the 1930s had a self-consciously scientific component to it. Alongside the more commercialized pansy spectacles of the Broadway stage, self-styled cosmopolitans provided a broad market for more rarefied "scientific" studies of homosexuality. The popular tabloids of the day may have expected their better-informed readers to have some fluency in the "insider" slang of the fairy spectacles, knowingly referencing the "gay" contestants who "let their hair down" at the balls or the "dash of lavender" in the chorus lines of fairy cabarets, yet the press also dropped casual references to established sexologists like Krafft-Ebing.[246] A *Chicago Times Tribune* critic reviewing a new play in 1933 summarily dismissed a homosexual character as "a dismal psychopath out of Krafft-Ebing's case book."[247] A tabloid

[244] Henry, *Sex Variants*, 303; Terman and Miles, *Sex and Personality*, 248; Wolbarst, *Sexual Perversion as a Scientific Problem*, 4; see also Potter, *Strange Loves*, 103.

[245] Wolbarst, *Sexual Perversion as a Scientific Problem*, 4.

[246] Dismond, "New York Society," 3; "Harlem and Park Avenues Step Out Together at Twilight Folks' Ball," *BAA*, 17; Ottley, "This Hectic Harlem," 9.

[247] Charles Collins, "New Play Has One Plot with Double Ending," *Chicago Daily Tribune*; Oct. 1, 1933, E2.

article on recent Hollywood features *A Man's Man* and *Woman Against Woman* suggested that its stars be cast next in a cinematic version of "that great thriller, 'Psychopathie Sexualis.'"[248] In practice, Krafft-Ebing's study was no doubt confined to a specialized medical readership, but its notoriety among the public allowed *Broadway Brevities* to lampoon the work in 1931 as "a best seller in all the drug stores nowadays."[249]

If Krafft-Ebing's purported mass readership was a recurrent joke in the press, some physicians and publishers genuinely tried to a capture a popular audience for their medical offerings. The best-received authority on the subject was Havelock Ellis, whose 1897 *Sexual Inversion* prompted a sensational obscenity trial in England but received a far more gracious reception in the United States.[250] Cautioned by his British experience, Ellis published *Sexual Inversion* with a specialized medical press in Philadelphia in 1901 and proceeded to build his reputation with the general public through a series of frank articles on sexual health in the popular press.[251] Havelock was best known for his tasteful endorsements of legalized birth control and sexual fulfillment in marriage, but by the 1930s the general reading public had also

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[248] "Strictly Confidential," *New York Brevities*, Nov. 16, 1931, 2; see also "The Captive," *Variety*, Oct. 6, 1926, 80 (noting, while reviewing the lesbian-themed play *The* Captive, *that* the "case of a married woman leaving her husband for another woman is recorded in Kraft Ebbing's book, 'Psychopathia Sexualis.'").

[249] "Strictly Confidential," *New York Brevities*, 2.

[250] For early bans on *Sexual Inversion*, see Beachy, "German Invention of Homosexuality," 826. For the warm reception of Ellis, see George Hamilton Fitch, "Sex and Society: Final Volume in Studies of Sex Psychology by Havelock Ellis," *San Francisco Chronicle*, Sep. 27, 1914, 29 (noting *Sexual Inversion* as among Ellis's classic publications, notes "enormous change in public opinion during the last decades" about receptiveness to books on sex); "Havelock Ellis on Love and Marriage," *Current Opinion*, Vol. 72, No. (Jun 1922), 788 ("And yet Mr. Ellis expresses himself with such good taste and intelligence that he is likely to receive a tribute of respect from even those who oppose his attitude."); Isaac Goldberg, "Youth of Havelock Ellis," *Forum and Century*, Vol. 74 (December 1925), 880 ("To his many admirers in the United States, Havelock Ellis seems to have been born into artistic maturity.").

[251] For an example of Ellis's publication history, see Theodore Hall, "On Havelock Ellis," *Washington Post*, Mar 8, 1936, B8. For his articles in the popular press, see "The Secret of Psychoanalysis as Havelock Ellis Reveals It," *Current Opinion*. Vol. 63, No. 4 (Oct. 1917), 265-66; Havelock Ellis, "The Future of Marriage," *The Living Age*, Jun. 1, 1927, 1010-14, Havelock Ellis, "Sex Bogey," *Forum*, Vol. 81 (Apr. 1929), 192-98.

come to recognize his more controversial writings.[252] As early as 1925, a contributor to the *Boston Daily Globe* could use Ellis's name as a shorthand to question the masculinity of a man a little too acquainted with the nuances of cooking: "I even suspect that probably it's a perversion, and if I had any of the works of Havelock Ellis I'd look it up."[253] In 1928, a *New York Times* review of a mainstream biography of Ellis emphasized his legal troubles over the publication of *Sexual Inversion*.[254] When Random House released a mass market edition of *Studies in the Psychology of Sex* in 1936, reviewers praised the new edition for making Ellis's more controversial studies available to a general readership.[255] "By far the largest page assignment in devoted to the special problems of the intimate sexual life and its aberrations," noted the *New York Times*.[256]

If Ellis chose a more gradual bid for the public's attention, by the 1930s some doctors succeeded in marketing their medical studies of homosexuality directly to a lay audience. Published in 1933, Potter's *Strange Loves* sought to tantalize the general reading public with a scientific account of homosexuality from a verified medical "expert"; while the title played to the public's morbid curiosities, the frontispiece listed the late Potter's extensive medical credentials and professional memberships. Advertised in commercial magazines like the scientific fiction anthology *Wonder Stories*, the book promised to bring "the meaning of many misunderstood subjects . . . under the searchlight of truth" through methodical examination by a "noted

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[252] For an example of Ellis's writings on marriage, see Ellis, "The Future of Marriage"; Ellis, "Sex Bogey"; "Havelock Ellis on Love and Marriage," *Current Opinion*.

[253] Heywood Broun, "It Seems to Me," *Boston Daily Globe*, Jun. 20, 1925, 12.

[254] R.L. Duffus, "The World Begins to Catch Up With Havelock Ellis," *New York Times*, May 20, 1928, 57.

[255] "Studies for All," *Time*, Mar. 9, 1936, 69-70; Hall, "On Havelock Ellis," B8; Joseph Wood Krutch, "Homage to Havelock Ellis." *Nation*, Mar. 35, 1936, 386-87.

[256] Joseph Jastrow, "Psychology of Sex: Studies in the Psychology of Sex," *New York Times*, Mar. 29, 1936, BR18.



Figure I.5. Advertisement for La Forest Potter's *Strange Loves*. From *Wonder Stories*, August 1934

authority." The book doubtlessly reached a far narrower audience than Times Square's noted pansy cabarets, but at least some readers were interested: *Strange Loves* went into four printings in its first year alone.[257]

Nor was the popular demand for scientific tutelage in sexual deviance confined to the library. In some cases, a more rarified scholarly curiosity invaded the popular entertainment spaces of the pansy cabarets and bars themselves. If the young sociologists who frequented Chicago's queer bars in the 1930s shared the lay public's recreational taste for the flamboyant spectacles they witnessed, lay spectators sometimes inversely engaged in a rather anthropological approach to their evening's entertainment. "Some of the customers are just there to . . . ridicule the homos," a sociology student in the 1930s observed: "They talk to them, ask them where their girls are meaning other homos."[258] Here the subjects of an aspiring sociologist's observations of Chicago nightlife, such spectators were in their own right, of course, making much the same use of the homosexual patrons as sociologists themselves. Like the University of Chicago students who flocked to the city's underworld bars to investigate the phenomenon of the homosexual, slummers saw their evening excursions into gay bars as an opportunity to interview and learn about the habits, dress, and mannerisms of Chicago's homosexual communities.[259]

Other venues catered even more overtly to their customers' scientific curiosity. The Dill Pickle Club's engagement of German sexologist Magnus Hirschfeld to deliver a lecture on

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[257] Potter, *Strange Loves*, front matter; *Wonder Stories*, 256. Undoubtedly, some of the book's customers were homosexual men and women themselves, but an extended review of *Strange Loves* in the liberal journal *Chanticleer* by early same-sex activist Henry Gerber suggested that Gerber, at least, expected the book to reach a broader audience. Henry Gerber, "More Nonsense about Homosexuals," *Chanticleer*, Vol. 1, No. 12 (Dec. 1934), 2-3.

[258] Bingham, "Notes on the homosexual in Chicago."

[259] See, for example, Bingham, "Notes on the homosexual in Chicago"; Volmer, "The New Year's Eve Drag"; "Wednesday Nov. 22nd, 1933," Ernest W. Burgess Papers.

sexual deviance in 1931 was perhaps the most conspicuous example. Scheduled for January of that year, at the very height of the pansy craze in Chicago and New York, the professor's presentation promised to treat the Dill Pickle Club's bohemian clientele to the latest scientific wisdom on the phenomenon of homosexuality, directly from the mouth of "Europe's Greatest Sex Authority."[260] Unfortunately, Hirschfeld never got a chance to address the Chicago public; the lecture was cancelled earlier that month for reasons that remain unknown.[261] Yet the Dill Pickle Club's attempts to lure audiences through an academic lecture on homosexuality reveals the extent to which the scientific study of sexual deviance circulated alongside the popular fairy spectacle as a desired form of urban entertainment.

Naturally, the mingling of rarified science and sensationalistic entertainment in the lay public's interest in sexual deviance went both ways. In some cases, the public's fascination with sexual deviance reflected a genuine academic interest. Ellis's work, for example, endowed the public discussion of sexual aberrations with a respectable intellectual pedigree. As the *Nation* observed on the occasion of Random House's mass-market edition of *Studies in the Psychology of Sex*, "[t]he sober brown bulk of the six original volumes occupied a prominent space on the book shelves of a whole generation of intellectuals."[262] "To profit, really to gain insight by the lore on sex which Ellis presents," cautioned the *Washington Post*, "demands a certain stature and finery of mind."[263] In many cases, however, the "scientific" study of sexual deviance among the lay public in the interwar years catered to a far lower-brow market for entertainment. *Wonder Stories*' promotions for Potter's *Strange Loves* may have trumpeted the book, somewhat

[260] Heap, *Slumming*, 248.

[261] Ibid.

[262] Wood, "Homage to Havelock Ellis," 386.

[263] Hall, "On Havelock Ellis," B8.

presumptuously, as fit for the "mature, sophisticated readers of this magazine only," but the adjacent ad for "Daring . . . Romantic . . . Thrilling . . . Absorbing" novels made clear that the book's core selling point was less its intellectual sophistication than its titillating subject.[264]

As scientific studies of sexuality went, indeed, *Strange Loves* was more popular than most. Yet at least one critic saw it as emblematic of an exploitative appeal that extended even to the most respectable sexological authorities. "[T]he book of Dr. Potter is just another instance of the morbid sex racket," denounced homosexual rights activist Henry Gerber in the *Chanticleer* in 1934, "a lurid description of sex abnormalities under the moral guise of condemnation . . . . Krafft-Ebing was perhaps the first author to start this racket and the volume in review is evidence of the sad fact that the end of it is not yet."[265] Reviewing Random House's mass-market edition of Ellis's magum opus, a critic for the *New York Times* would agree that the consumption of scientific sexology often mixed education with far grosser amusements. "[T]he taste for erotica is not an index of scientific zeal . . . and obsession with sex is not limited to psychoanalysts and their patients," warned Joseph Jastrow. "Inconsequential, indifferent novels raise their circulation highly by recounting unexpurgated intimacies, and the newsstands find the peddling of sexology profitable."[266] Just as doctors and sociologists repurposed the sensationalistic, commercial spaces of the pansy craze into a field for their professional research on homosexuality, lay readers repurposed the most rarefied scientific publications on sexual deviance into a source of sensationalistic, commercial amusement.

Ultimately, then, to separate the genuinely "scientific" space of the medical room from the bawdy popular arenas of the pansy craze would be to undersell the complex interactions of

[264] *Wonder Stories*, 256-57.

[265] Gerber, "More Nonsense about Homosexuals," 2.

[266] Jastrow, "Psychology of Sex," BR18.

pedagogy and entertainment in the public discourse about sexual deviance. Like the commercial spectacles of the pansy craze, scientific knowledge on homosexuality in the interwar years emerged as a highly marketable commodity. And in turn, the commercial spaces of the pansy craze emerged as a significant scientific resource: arenas that trained experts and lay spectators alike mined for raw data on the phenomenon of the sexual deviant. Coming out of the pansy craze, the broad cultural presumption of the flamboyant, self-revelatory deviant body that spread among both the expert and the lay public emerged as a hybrid product: a social fact produced through the joint labors of the scientific laboratory and the popular stage.[267] As scientific researchers and ordinary city dwellers both turned their attention to the specter of sexual degeneracy in the industrializing city, science and popular culture worked together to construct and to legitimate as settled fact the dogma of the deviant body as a visible object.

Conclusion

Sensationalist, bawdy, and spectacular, the drag balls and pansy cabarets that seized the urban public's attention in the early the 1930s provided spectators with a novel form of entertainment—a provocative new diversion at a time when many spectators could have used a distraction from the nation's troubles. Yet they also provided more. Presenting the homosexual body as an object of visual consumption for the heterosexual public—a commodity defined both by its inherent visual flamboyance and its discrete, reliable visual codes—the pansy craze that dominated night clubs and banquet halls in these years taught the heterosexual public to identify, examine, and comprehend the deviant minority within its midst. At a time of broad popular

[267] The popular trope of the visible homosexual body thus reached the status of an authoritative social fact as a matter of both common sense and scientific expertise—a truth simultaneously borne out by naked observation and legitimized through the imprimatur of medical expertise.

confusions and concerns about the rise of sexual degeneracy in the American cities, the pansy craze extended on the popular stage the contemporaneous scientific project of pinpointing sexual deviance as a matter of some stable physiological determinacy. More than providing a mindless entertainment for a jaded urban public, the fairy spectacles on Broadway's commercial stages worked in tandem with the scientific study of homosexuality to create an authoritative epistemology of sexual deviance in the interwar period.

By the end of the 1930s, of course, the last vestiges of the "pansy" craze had all but disappeared from the nightlife of America's cities. In the cultural hotbed of San Francisco, clubs like Finocchio's continued to entertain audiences with female impersonators well into the middle of the century, but most fairy cabarets did not live out the decade. Gladys Bentley and her "lavender lads" closed shop in Harlem. The Hamilton Lodge shut its doors to the annual masquerades. The Motion Picture Production Code, adopted in 1930 but not enforced in earnest until 1934, put an end to open depictions of homosexuality like those seen in *Call Her Savage.* Pushed out from the spotlight of the mainstream stage, homosexual men and women returned to a slightly less spectacular existence, frequenting in their own favorite bars, gathering in public parks, socializing on the streets. Yet they soon learned that the luxuries of the Greenwich Village fairy bars and the vice investigator happy to look the other way, too, were becoming a thing of the past. By the 1940s, the municipal police department and the alcohol control board were playing an increasingly central role in the daily life of the urban homosexual communities. As it turned out, the popular fairy spectacles of the last decade had set their efforts a convenient stage.

Part II. State Liquor Laws and the Unremarkable Visibility of the Homosexual Body

> Mr. Goldberg: Have you ever seen an act of unnatural intercourse at any time, any place? Witness: No, sir. I won't answer that question. . . .
> Mr. Goldberg: I think I am entitled to an answer. . . .
> Comm. Kaufman: I don't see what bearing it has on the case.
> Mr. Goldberg. I want to see if this man is an expert.
> Mr. Reinstein: There is no claim that this man is an expert psychologist.
> Mr. Goldberg: He has testified as to degenerates.
> Mr. Reinstein: You don't have to be an expert to be able to see a homosexual.
> – cross-examination of Investigator William E. Wickes, *In re Gloria Bar & Grill*

In 1922, a policeman in Brooklyn's Prospect Park stopped two effeminate young men out for a walk through the landscaped green. Hoping to avoid attention, the men wore hats to cover their flamboyant grooming, but the policeman was not so easily fooled. Removing their headwear to reveal the men's tweezed eyebrows, he immediately identified the pair as "fairies" and arrested them.[268] An experienced officer on the Brooklyn beat, the patrolman recognized the telltale signals of the sexual deviant when he saw them.

Years before the pansy craze introduced New York's and Chicago's cosmopolitan audiences to the fairy, policemen and other veterans of the streets had acquired a more than passing familiarity with the homosexual subcultures budding in the nation's cities.[269] Yet as a general rule, the fairy cabarets and drag balls of the early 1930s thrived in a period of minimal scrutiny by municipal authorities. While policemen kept an eye out for men loitering—among

[268] Kahn, *Mentality and Homosexuality* (Boston: Meador Publishing Company, 1937), 217.

[269] As early as the 1910s, an American informant to Havelock Ellis speculated that "police know of [bars catering to "sexual inverts"] and endure their existence for a consideration"). Havelock Ellis, *Studies in the Psychology of Sexuality, Vol. 1: Sexual Inversion* (Philadelphia: P.A. Davis Company, 2d. ed., 1915), 352 (quoting letter from American informant

other things—in public spaces like parks and public bathrooms, and while some drag contestants came to blows with local officers, private nightclubs and restaurants were left to conduct their business as they pleased.[270] In New York, for example, vice investigators well acquainted with the West Village and Harlem speakeasies that served as "hang out[s] for fairies" voiced few objections to such perverse crowds.[271] In 1928, an investigator with the Committee of Fourteen who witnessed 5,000 "fags" in full drag regalia (but no prostitutes) at the Hamilton Lodge Ball concluded that "remain[ing] here would be unproductive" and promptly departed.[272] Local policemen, too, accorded commercial fairy spectacles a surprising amount of latitude. Even after Mayor Walker moved to scourge pansy cabarets from Times Square in 1931, openly queer entertainers continued to perform for eager crowds in Harlem, as well as outside New York in cities like Chicago, San Francisco, and Los Angeles. At the height of the Prohibition era, when most nightclubs in the city bribed patrolmen to turn a blind eye to their stores of gin and whiskey, it took little to purchase the same policy for the clubs' choice of entertainment. The mere presence of a homosexual—or several—at a popular nightclub failed to register as a top police priority.[273]

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[270] For police campaigns against men wearing drag in public, see "Police Arrest Impersonator," *Atlanta Daily World*, Mar 3, 1937, 4; "Female Impersonator Arrested After 'Ball,'" Philadelphia Tribune, Mar 18, 1937, 4; "Male 'Lady' Jailed," *New York Amsterdam News*, June 4, 1930, 19. For campaigns against homosexuality in public spaces, see George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (New York: Basic Books, 1994), 196-198 (public bathrooms and loitering).

[271] For records of vice investigator's frequent encounters with homosexual bars, see Records dated January 2, 1924, April 9, 1924, and May 7, Reel 9, Box 26, Committee of Fourteen Collection, New York Public Library; June 1, 1925, Louis Restaurant, 41 West 49th Street, Box 35, Committee of Fourteen Collection, New York Public Library; Jan. 29, 1931, Gypsy Tavern, 64 Washington Square South, Box 35, Committee of Fourteen Collection, New York Public Library; October 5, 1931, SPEAKEASY, Eddie's, 244 Lenox Avenue, Committee of Fourteen Collection, New York Public Library; 108 West 137th Street. Apt. 2, May 25, 1928, Box 37, Committee of Fourteen Collection, New York Public Library.

[272] Commercialized Amusement, February 24, 1928, reprinted in Chauncey, *Gay New York*, 130.

[273] Chauncey, *Gay New York*, 306; Chad Heap, *Slumming: Sexual and Racial Encounters in American Nightlife, 1885-1940* (Chicago: Chicago University Press, 2009), 91-93. For the continuing popularity of fairy spectacles outside New York, see Jack Lord and Jenn Shaw, *Where to Sin in San Francisco* (San Francisco: Richard F.

By the end of the decade, all that would begin to change. In part, the police's dwindling tolerance of open displays of homosexuality in bars and restaurants reflected a broader social panic about sexual deviance in the late 1930s. Beginning roughly in 1937, a series of highly publicized assaults against young children launched a newfound preoccupation with sexual degeneracy in American cities. A citizens' meeting in New York demanded increased police attention to suspected sexual deviants. The New Jersey Parents and Teachers Congress urged the elimination of parole for all sex offenders. The mayor of Philadelphia suggested mandatory sterilization.[274] If sophisticated urbanites in the early 1930s embraced the fairy as a bemusing curiosity on the cabaret stage, the media's growing panic over a violent underbelly of sex perversion soon recast the male homosexual as just one denizen of a more sinister deviant underworld.

Yet the most direct cause of the police's accelerating crackdowns against homosexuality in urban nightspots was far more innocuous. On February 20, 1933, following years of rampant bootlegging, overflowing criminal dockets, and criticism from civic groups, Congress proposed to repeal the Eighteenth Amendment. On December 15, having been ratified by two thirds of the states, the Twenty-First Amendment formally sanctioned the consumption, production, and sale of alcohol across the nation.[275] The effect was immediate: long an illicit part of the urban nightlife, liquor now poured freely in clubs, bars, and restaurants. But the Twenty-First Amendment did not just bring alcohol back into American bars; it also brought the police. A

Guggenheim, 1939), 93; Heap, *Slumming*, 94-96; "Hollywood Adds 21 New Nightery Spots," *Variety*, September 27, 1932, 58.

[274] Estelle Freedman, "'Uncontrolled Desires': The Response to the Sexual Psychopath, 1920-1960," *Journal of American History,* 74: 1 (June 1987), 92-93.

[275] For an overview of the adoption of the Twenty-First Amendment, see generally Michael A. Lerner, *Dry Manhattan: Prohibition in New York City* (Cambridge: Harvard University Press, 2007), Chapter 12.

wildly profitable new commercial industry, the sale of intoxicating beverages was promptly subjected to robust regulations by state legislatures. While their colleagues continued to police public parks and city corners for sexual misconduct, plainclothes patrolman were now also responsible for making sure that private establishments conformed to the many pricing, service, and morals restrictions imposed by state law.[276] Nightclubs owners in the early 1930s had openly courted jaded customers through the lure of "pansy" entertainers, but bartenders who so much as served known homosexuals in their establishments now faced civil liability under a range of laws targeting "female impersonators" and "disorderly houses."[277]

If the states' liquor regulations after the end of Prohibition aimed in some sense to eradicate the liberal displays of sexual deviance that thrived during Prohibition, however, they were also profoundly indebted to them. Introducing much of the urban public to the phenomenon of the male sexual deviant, the fairy spectacles of the early 1930s would come to provide a core weapon in the states' arsenal against homosexual-friendly bars long after the pansy craze faded from nightclub marquee. Penalizing bartenders who "knowingly" catered to sexual "degenerates" on their premises, liquor control laws depended on two key presumption arising from the culture of the early 1930s: first, that the sexual deviant was inherently visible, demarcated through certain concrete, conspicuous visual codes; and second, that the average bartender could be trusted to be sufficiently familiar with those codes to identify the sexual deviant on sight. While bar owners questioned the credentials of ordinary laymen—themselves and policemen alike—to perform the complex task of diagnosing sexual deviants, liquor boards

[276] See generally State of New York, *Report of the State Liquor Authority, April 12, 1933 to December 31, 1934* (Albany: J.B. Lyon Company, 1935).

[277] In re Jessie Lloyd, State of New Jersey, Department of Alcoholic Beverage Control, Bulletin 1045, January 6, 1955, 11; Abrams v. Bruckman, 263 A.D. 593, 594 (N.Y. App. Div. 1942); Stoumen v. Reilly, 37 Cal. 2d 713, 715 n.1 (1951).

insisted that the average man's fluency in the visual signifiers of the fairy sufficed to alert him to the presence of homosexual patrons. In a period of increasing deference to medical and scientific experts on the subject of sexual deviance, alcohol control agencies, policemen, and even the courts rejected the suggestion that any "expert" could improve upon the layman's common-sense ability to classify a homosexual on sight.

Popularized through the joint efforts of popular commercial entertainment and rarefied scientific research in the 1920s, the stereotype of the self-revelatory homosexual body thus found a new and powerful ally in the late 1930s in the regulatory arm of the state. In 1922, an experienced policeman patrolling the city streets could claim some intimacy with the visual markers of the fairy. By the mid-century, liquor agencies could presume—and affirm—the average man's fluency in the semiotics of homosexuality as the primary building block in their efforts to patrol the nation's budding homosexual communities.

2. "You Don't Have to be an Expert to be Able to See a Homosexual": Repeal and the Dawn of Identification-Based Policing

The repeal of the Eighteenth Amendment marked the end of the nation's experiment with Prohibition, but it did not end the government's concerns about alcohol in America's cities. To the contrary, with thousands of bars and restaurants now openly pouring alcoholic libations, Repeal pushed the states to assume a bold role in regulating a profitable new industry.[278] Within a year of ratification, legislatures across the nation had passed alcoholic beverage control laws policing the sale of liquor in both retail and service establishments.[279] Some states created specialized agencies to oversee the issuance of commercial liquor licenses. Beginning in 1934, New York's State Liquor Authority, New Jersey's Department of Alcoholic Beverage Control, and Washington's Liquor Control Board employed small teams of investigators and commissioners dedicated exclusively to monitoring liquor sales.[280] Others enforced their regulations as tariffs administered through preexisting tax agencies, such as California's State

[278] *State of New York, Report of the State Liquor Authority, April 12, 1933 to December 31, 1934*, 9.

[279] See, for example, *State of New York, Report of the State Liquor Authority, April 12, 1933 to December 31, 1934,* 11; "History and Milestones of the State Board of Equalization," last visited March 11, 2015, http://www.boe.ca.gov/info/milestones.htm.

[280] *Report of the State Liquor Authority, April 12, 1933 to December 31, 1934*, 11; Chauncey, *Gay New York*, 336; In re Log Cabin Inn, New Jersey Alcoholic Beverage Control, Bulletin 279, November 10, 1936, 11. Washington also relied on a specialized Washington Liquor Control Board. Gary L. Atkins, *Gay Seattle: Stories of Exile and Belonging* (Seattle: University of Washington Press, 2003), 55.

This chapter focuses almost exclusively on California, New Jersey, and New York. This limitation is less a matter of narrative choice than of sources; the only trial records I have located for licensing proceedings relating to homosexuality-related charges involve these three states. It is unclear whether this is because New Jersey, New York, and California were the only states actively regulating the service of homosexuals in these years, or because other states handled their charges more exclusively through administrative channels.

Board of Equalization.[281] Regardless, the agencies and their investigators were responsible for implementing a host of new rules, from prohibiting sales to minors to imposing closing times and maintaining minimum food sales.[282] Not least, they were responsible for ensuring that places of public accommodation did not become havens for undesirable urban elements, including drug addicts, gamblers, prostitutes, and, certainly, homosexuals.

The alcoholic beverage laws enacted in the early 1930s rarely mentioned homosexuality by name, but agencies consistently interpreted the statutes to prohibit bar owners from serving homosexual customers. In New Jersey, the ABC relied on Rule 4 of Regulation 20, which prohibited licensed bars from hosting "any known . . . prostitutes, female impersonators, or other persons of ill repute."[283] "Female impersonators," the ABC commissioner found, was merely a "more polite[]" term for "fags" or "queers."[284] More commonly, investigators drew on statutory prohibitions targeting disorderly or disruptive conduct. In New York, subdivision 6 of section 106 of the Alcoholic Beverage Control Law forbade owners of licensed premises to "suffer or permit such premises to become disorderly."[285] Beginning in the 1930s, the SLA routinely read that prohibition to apply against bar owners who "permitted the license to become disorderly in permitting homosexuals, degenerates, and undesirable people to congregate on the premises."[286] Similarly, the SBE in California drew on Section 58 of the Alcoholic Beverage Control Act,

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[281] "History and Milestones of the State Board of Equalization," http://www.boe.ca.gov/info/milestones.htm.

[282] See generally *State of New York, Report of the State Liquor Authority, April 12, 1933 to December 31, 1934*.

[283] One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 50 N.J. 329, 331 (1967).

[284] In re Jessie Lloyd, NJ ABC Bulletin 1045, 11.

[285] Abrams v. Bruckman, 33 N.Y.S.2d 921, 922 (App. Div. 1942).

[286] Gloria Bar & Grill, Inc. v. Bruckman, New York Supreme Court, Appellate Division, First Department, Record on Review (1940), 7, New York Supreme Court Records, Civil Branch, New York County (New York, NY); Lynch's Builders Rest. v. O'Connell, 102 N.Y.S.2d 606, 607 (App. Div. 1951); Stanwood United, Inc. v. O'Connell, 306 N.Y. 749 (1954).

which imposed misdemeanor charges on any bar owner, agent, or employee who maintained "any disorderly house . . . to which people resort for purposes which are injurious to the public morals, health, convenience, or safety."[287] The Board deemed such disorderly houses to extend to any establishments that functioned as a "meeting place for known homosexuals."[288]

Despite the SBE's broad reading of Section 58, California's prohibition against homosexual-friendly bars lay fallow in the first decade after the end of Prohibition. A taxing agency concerned primarily with generating revenue for the state—and a famously disorganized one at that—the SBE may have hesitated to funnel its limited resources into a campaign against homosexual patrons in neighborhood bars.[289]

On the east coast, however, New York's and New Jersey's newly minted agencies promptly devoted themselves to enforcing their states' copious new commercial regulations—and they discovered that they needed some institutional help. Assigned to patrol liquor licenses across the entire state but equipped with relatively small staffs, alcohol control boards commonly relied on local police departments to alert them to offending establishments. After receiving initial reports that a bar was violating state regulations, the agencies then sent out their own investigators to gather further evidence.[290] Investigators typically visited bars in groups, with

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[287] Stoumen v. Reilly, 37 Cal. 2d 713, 715 fn. 1 (1951); Kershaw v. Dep't of Alcoholic Beverage Control of Cal., 155 Cal. App. 2d 544, 546 (1957).

[288] Stoumen v. Reilly, 222 P.2d 678, 680 (Cal. Ct. App. 1950).

[289] For disorganization and inefficiency in the SBE, see Christopher Agee, "Gayola: Police Professionalization and the Politics of San Francisco's Gay Bars, 1950-1968," *Journal of the History of Sexuality*, Vol. 15, No. 3 (September 2006), 474. For the increasing enforcement by SBE following WWII, see Nan Alamilla Boyd, *Wide Open town: A History of Queer San Francisco to 1965* (Berkeley: University of California Press, 2003), 110.

[290] Chauncey, *Gay New York*, 337; State of New York, *Report of the State Liquor Authority, January 1, 1935 to December 31, 1935* (Albany: J.B. Lyon Company, 1936), 9 ("[Because the SLA] is an administrative licensing body, and not a law-enforcement agency, it is evident that perfect administration of the liquor control statute is attainable only through the complete co-operation of all existing law-enforcement agencies."). For specific cases exemplifying this practice, see Fasone v. Arenella, 139 N.Y.S.2d 186, 187 (N.Y. Magis. Ct. 1954); Report of N. Kirschenbaum and John J. Tierney, November 30, 1938, in Times Square Garden & Grill v. Bruckman, Record on

observations lasting anywhere between a single night to many months before they finally brought formal charges.[291] Plainclothes agents would act like any other customers, buying drinks at the bar, making conversation with the bartenders, sometimes simply sitting back and watching the company around them.[292] In many cases, officers encouraged their fellow patrons' sexual proclivities, hoping to elicit a solicitation either on or off the premises.[293] In 1939, one SLA investigator reported visiting the Gloria Bar & Grill in midtown New York "on the invitation of [a] 'fag'" who, having introduced the officer to his friends, "proceeded to fondle [him] by rubbing his hand along the front of [the investigator's] trousers and attempting to open the fly."[294] In 1938, a local patrolman recounted accompanying a fellow patron to a hotel on Eighth Avenue, where the two men rented a room and the patrolman waited for his companion to make a more overt physical advance before placing him under arrest.[295] One of the SLA's agents was even more aggressive: entering the Times Square Garden & Grill, he approached the bar's floor manager and inquired where to go if he "wanted to have a good time with a 'fag.'"[296]

Review, Index No. 3897 (1939), 24-25, New York Supreme Court Records, Civil Branch, New York County (New York, NY).

[291] For the police practice of visiting bars in groups, see Gloria Bar & Grill, Record on Review, 69; In re Polka Club, Inc., State of New Jersey, Department of Alcoholic Beverage Control, Bulletin 1045, January 6, 1955, 8; In re Kaczka, New State of New Jersey, Department of Alcoholic Beverage Control, Bulletin 1063, May 24, 1955, 2. For the duration of observations, see Lynch's Builders Rest. v. O'Connell, 102 N.Y.S.2d 606, 607-08 (App. Div. 1951) (months-long span); In re Polka Club, Inc., NJ ABC Bulletin 1045, 8 (single night); In re Kaczka, NJ ABC Bulletin 1063, 2 (near-dozen observations).

[292] In re Polka Club, Inc., NJ ABC Bulletin 1045, 8; In re Kaczka, NJ ABC Bulletin 1063, 3; Chauncey, *Gay New York*, 337.

[293] Lynch's Builders Rest. v. O'Connell, 102 N.Y.S.2d 606, 607-08 (App. Div. 1951).

[294] Gloria Bar & Grill, Record on Review, 69.

[295] Times Square Garden & Grill, Record on Review, 25-26; see also Giovatto v. O'Connell, Record on Review, Index No. 4366 (1951), 27-30, 33-35, 40-41, New York Supreme Court Records, Civil Branch, New York County (New York, NY) (describing arrests made subsequent to solicitations at bars).

[296] Times Square Garden & Grill, Record on Review, 27.

Making their rounds with an eye toward lewd behavior, liquor agents sometimes brought charges solely on the basis of homosexual solicitations or other sexual conduct on the premises. In one popular Manhattan eatery, a local policeman who dropped in for a quick patrol at three o'clock in the morning reported being approached by a customer who, "in an ordinarily conversational tone," made him "an indecent proposal." The officer arrested the patron for criminal degeneracy and the SLA subsequently moved to revoke the owner's license under section 106.[297] In another case, a plainclothes patrolman who ordered a drink at Bernard's, a bar and grill in Manhattan's midtown west, observed ten male patrons hugging, calling each other endearing names, and "rubbing their knees and arms against [each other's] private parts." When the patrolman found the owner in the kitchen to express his dismay, the owner purportedly made no attempts to deny the charges. "Some guys run a whore joint, and I run this kind of joint," the officer reported him replying.[298]

While it was the rare case that did not involve some reports of sexual horseplay, however, overt sexual solicitations were rarely the sole or even the primary evidence behind the liquor authorities' charges. Well aware of agents making their rounds among neighborhood bars and eager to avoid the authorities' attention, bartenders made sure to keep their customers' more overt sexual displays—homosexual or otherwise—in check.[299] Even where some flagrant homosexual conduct slipped by, solicitations by aggressive patrons frequently supported individual charges of degeneracy under the penal code, but they were less helpful in establishing a case against the bar that housed them. Prohibiting bar owners from "suffering or permitting"

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[297] Stanwood United, Inc. v. O'Connell, 283 A.D. 79, 80-81 (N.Y. App. Div. 1953). At another bar at Third Avenue, the SLA filed a complaint after three patrolman with the New York Police Department reported being solicited for sexual acts on three separate occasions. Giovatto v. O'Connell, Record on Review, 27-41.

[298] Fasone v. Arenella, 139 N.Y.S.2d 186, 187 (N.Y. Magis. Ct. 1954).

[299] See, for example, Murphy's Tavern, Inc. v. Davis, 70 N.J. Super. 87, 92 (App. Div. 1961).

homosexual customers or from harboring "known" female impersonators, New York and New Jersey's alcoholic beverage control laws generally required some evidence that the bar's employees knew that they were serving homosexuals.[300] As the investigators recognized, gathering direct proof that a bartender deliberately served homosexual customers was often a difficult task. The state's burden of proof sometimes led investigators to rely on fairly dubious evidence. In the one case brought against a homosexual-friendly bar in Elizabeth, New Jersey, for example, the ABC's investigators tried to prove that the bartender deliberately accommodated known homosexuals through testimony that was equally convenient and unconvincing. "See these three guys coming in now?" the bartender purportedly told the agents. "They are all queers. . . . Look, I'm going to serve them now."[301] In context, the intermittent solicitation of a plainclothes officers in a bar's back corner, commonly pursued and consummated entirely off-premises, was rarely sufficiently conspicuous to put bartenders on notice of their customers' sexual vices.

Unable to rely on sexual conduct itself, liquor agents found themselves ferreting out congregations of homosexuals through a form of evidence that was simultaneously more subtle and more conspicuous: the flamboyant visual signifiers of the fairy. By the late 1930s, the homosexual male had acquired a distinct public image among urban Americans. Just a few years after Broadway's Pansy Club regaled audiences with flamboyant entertainers and Harlem's Rockland Palace drew thousands of spectators to its annual drag balls, many urbanites had internalized a profound link between the homosexual and the theatrical fairy of the popular

[300] For the statutory language, see Abrams v. Bruckman, 33 N.Y.S.2d 921, 922 (App. Div. 1942); One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 50 N.J. 329, 331 (1967).

[301] In re Jesse Lloyd, NJ ABC Bulletin 1045, 11.

stage.[302] While Broadway's most popular cabarets may never have identified their performers in such vulgar terms, the public soon came to associate all "fairies," "fags," and "degenerates" with the familiar visual codes of the female impersonator. As one New York investigator summarized in 1939, "one can tell that a person is degenerate" through a run-down of telltale physical clues: "his fingernails which are usually rouged," the "lips . . . rouged and faces powdered," the smell of "heavy perfume," the effeminate "tone of voice and . . . subject of conversation."[303]

Far from customers' furtive sexual advances, it was these flamboyant visual signifiers that most commonly helped the SLA establish that a bar's management had suffered homosexuals on its premises. Arriving at the Times Square Garden in 1939, for example, SLA investigator Harold Silver identified a crowd of homosexuals based on their "rouged" faces," "lipstick," "powder on their faces," and the "effeminate" "manner in which they spoke . . .[and] walked."[304] Patrolman Lawrence Corcoran echoed that he "kn[ew] [the patrons] to be degenerates" based on "their actions, rouge on face, lip stick on lips and their feminine manner

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[302] See generally Chapter 1.

[303] In the Matter of Gloria Bar & Grill, Minutes of Renewal Hearing, September 27, 1939, 3, in Gloria Bar & Grill v. Bruckman (1940) file, New York Supreme Court Records, Civil Branch, New York County (New York, NY).

The court records are rich with similar examples. Times Square Garden & Grill, Record on Review, 32 (Patrolman Daniel Linkers: "At the time about 75 other persons dressed in civilian attire, many of whom the officer knew to be 'fags' and degenerates by their feminine actions."); ibid., 35 (Patrolman Joseph Fleming: "There were about 60 men in the bar and grill at this time, dressed in civilian attire, 2/3rd's of whom the officer is of the opinion are 'fags'. And from his experience in the Police Dept. in making arrests of 'fags', by their demeanor, lip-stick on their mouths, and rouge on their faces."); ibid., 36 (Dudley Hanley: "All of the men in the company of the soldiers were apparently degenerates from their actions and manner of speech."); ibid., 42 (Arthur F. Gunther: "Many of the civilians by their actions and conversation were fairys and degenerates."); ibid., 54 (Captain Frank Fristensky: "I didn't speak with any of them, but from my general observation, I would surmise they were homosexuals. From my experience in the Police Department and coming in contact with the people, and from their mannerisms and conversation, I would term them homosexuals."); ibid., 73 (Patrolman Dudley Hanley: "The bar was completely lined from end to end with men, the majority of whom I recognizes [sic] after being in there awhile, from their actions and mannerisms, as homosexuals."); In the Matter of Gloria Bar & Grill, Minutes of Renewal Hearing, 4 (Chief Investigator McIlhargy: "The bar was quite crowded with men who had the appearance of what we generally know as 'fags'; very effeminate in their appearance and actions. In some instances they rouge their faces and lips. They have effeminate gestures and manner of speech.").

[304] Times Square Garden & Grill, Record on Review, 109.

of speech.[305] At the Gloria Bar & Grill, investigator Walter van Wagner promptly "classif[ied]" over one hundred of the bar's customers as "fags" based on their "feminine voices," "facial expressions, gait, attitude, gestures and actions."[306] His partner William Wickes provided a more specific overview: the customers wore lipstick and rouge, had bleached hair, moved their hands in "a very graceful motion," and walked with "a swaying movement of their hips"—"what is commonly called a swish in show parlance." Clarifying the source of his visual fluency with "fags," Wickes confirmed that he had previously worked "in show business," at which time he had ample "occasion to observe the actions, conduct, and demeanor of the parties" he now recognized as "homosexual and degenerates."[307] Yet while Wickes's intimacy with the world of theatrical fairies may have been unique, his observations were anything but. Just a few years after the pansy craze introduced much of the New York public to the phenomenon of sexual deviance, local policemen and specialized liquor agents alike found themselves identifying, charging, and prosecuting homosexual-friendly bars based on the familiar stereotypes of the fairy.

In New Jersey, the ABC followed a similar dynamic. In many ways, New Jersey's reliance on the stereotypes of the effeminate fairy to enforce Rule 4 was less remarkable: the rule explicitly prohibited "female impersonators" in licensed establishments. In some cases, indeed, the ABC enforced the prohibition on its most literal terms against bars that tried to revive the pansy craze of prior years. In one Newark bar, an investigator enticed by an advertisement for a "faggy" show—a spectacle in which "all the men change into women," explained the bar's

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[305] Ibid., 40.

[306] In the Matter of Gloria Bar & Grill, Inc., Certified Transcript of Minutes of Hearing Held January 8th, 1940, 75, in Gloria Bar & Grill v. Bruckman (1940) file, New York Supreme Court Records, Civil Branch, New York County (New York, NY); Gloria Bar & Grill, Record on Review, 174.

[307] Gloria Bar & Grill, Record on Review, 335-336, 296, 336, 333.

owner—reported numerous patrons wearing lipstick, rouge, and eye shadow, conspicuously adorned in women's blouses or even formal ball gowns.[308] More often, however, the ABC's agents enforced Rule 4 against more subtle displays of "female impersonation": telltale effeminate affections on the part of otherwise gender-conforming male customers. In 1936, the agency charged the Log Cabin Inn after an investigator witnessed two customers come in and order a drink at the bar. According to the investigator's report, the bartender had explicitly identified the two men as "fags," but the ABC's evidence at the hearing focused equally on their suspiciously high-pitched voices.[309] Similarly, at a nearby establishment, investigators found no evidence of feminine attire, but noticed a group of patrons "whose voices, gestures and actions were effeminate." After two subsequent visits during which agents observed the bar's male customers embracing and dancing together by the bar, the ABC charged the owner with serving female impersonators.[310]

In these early years of enforcement, indeed, investigators appeared to have some trouble separating between homosexuality as a sexual practice and female impersonation more broadly. In an age when sexologists like Havelock Ellis and Richard von Krafft-Ebing continued to provide the general readership's most authoritative information on homosexuality, many members of the public still understood the phenomenon through the broad prism of gender inversion.[311] Unsurprisingly, both the ABC's and the SLA's agents commonly conflated homosexuality and transvestism, using "fag," "fairy," and "female impersonator" interchangeably as synonyms distinguished only by their varying vulgarity. At the hearing for

[308] In re Polka Club, Inc., NJ ABC Bulletin 1045, 8-9.

[309] In re Log Cabin Inn, NJ ABC Bulletin 279, 11-12.

[310] In re M. Potter, New Jersey, Department of Alcoholic Beverage Control, Bulletin 474, Aug. 20, 1941, 1.

[311] See Chapter 1.

the Log Cabin Inn, for example, an ABC Commissioner who sought to clarify the bartender's reference to two high-pitched customers as "fags" deduced that the men were, "in a word, female impersonators."[312] In another case, the Commissioner observed that an errant bar owner had already been warned to keep an eye out for "female impersonators, often known as 'fags' and 'fairies.'"[313] In New York, too, some measure of verbal slippage pervaded the SLA's proceedings. Testifying at the revocation hearing for the Gloria Bar & Grill, Investigator van Wagner described a "fag joint" as an establishment "of any kind [in which men] act as females by gesture, voice inflection, manner or mode of speech, or walk, and in general impersonate all of the characteristics of a female that they can possibly assume."[314]

Crucially, however, investigators' understanding of the "fags" and "fairies" they policed involved some definite element of sexual misconduct. Asked to describe a "fag," the ABC investigator from the Log Cabin Inn defined the term as a curious combination of sexual and gendered vices: "a pervert having abnormal sexual relations with men and/or women, and who, by manner of speech, movement of the body and expression of the face[,] seeks to attract attention in a manner closely resembling that commonly attributed to females."[315] By the investigator's reading, the homosexual's feminine affectations were essentially secondary to his sexual predilections: one outward manifestation of his fundamental sexual degeneracy. On another occasion, the ABC's officers characterized homoerotic conduct itself as indirect evidence of gender inversion. Basing a Rule 4 suspension partly on reports that customers had kissed and danced together on the bar's premises, the Commissioner explained that "these

[312] In re Log Cabin Inn, NJ ABC Bulletin 279, 11.

[313] In re M. Potter, NJ ABC Bulletin 474, 1.

[314] Gloria Bar & Grill, Record on Review, 232.

[315] In re Log Cabin Inn, NJ ABC Bulletin 279, 1.

patrons disported themselves in manner entirely inconsistent with the normal conduct of men."[316] Still impressed by the medical model of homosexuality as a "third sex"—and navigating a regulatory scheme that explicitly targeted "female impersonation" rather than sexual deviance—the ABC's agents commonly found themselves struggling to reconcile homosexual conduct with some broader concept of gender inversion.

In New York, the SLA's agents frequently showed a more candid awareness of their targets' hidden sexual lives. Investigator van Wagner may loosely have defined a "fag joint" as a bar filled with female impersonators, but he soon qualified that the particular patrons he saw at Gloria were "sexual degenerates" or "homosexuals": "persons indulging in abnormal sexual practices."[317] Investigator Wickes similarly defined the "degenerates" he classified on sight as creatures who "are unnatural in their sexual intercourse."[318] From plainclothes patrolmen to specialized investigators, officers who identified homosexual patrons through their lipstick and swaying hips recognized that they were ultimately seeking out sexual rather than gender deviants. Indeed, many officers who recounted the painted faces and effeminate mannerisms in a bar also testified to more overtly homoerotic behavior among the customers, from casual embraces to explicit sexual conversations or even direct sexual solicitation.[319] In context, the officers' emphases on male patrons' flamboyant demeanor and feminine affections in homosexual-friendly bars did not reveal any confusion about the sexual aspects of

[316] In re M. Potter, NJ ABC Bulletin 474, 1.

[317] Gloria Bar & Grill, Certified Transcript of Minutes of Hearing Held January 8th, 1940, 57.

[318] In the Matter of Gloria Bar & Grill, Inc., Certified Transcript of Minutes of Hearing Held January 9th, 1940, 114, in Gloria Bar & Grill v. Bruckman (1940) file, New York Supreme Court Records, Civil Branch, New York County (New York, NY).

[319] Times Square Garden & Grill, Record on Review, at 61 (Captain Frank Fristensky, noting both feminine mannerisms and kissing and "goosing" by customers); ibid., 35 (Patrolman Joseph Flemming, noting both makeup and "demeanor" of customers and testifying to seeing men kissing one another); ibid., 81 (Patrolman Dudley Hanley, testifying both to the "effeminate manner" of homosexual patrols and recounting that one patron overtly looked at his genitals).

homosexuality. Rather, such officers emphasized homosexual patrons' conspicuous effeminacy as the most overt evidence of their hidden sexual proclivities.

Faced with investigators' overwhelming evidence of effeminate manners and behaviors among their customers, often from the mouths of numerous local and state officers, most bars accused of catering to homosexuals declined to contest the charges. Especially in New Jersey, where the ABC routinely rewarded bar owners who saved it the expense of litigation with substantially truncated sentences, the majority of establishments preferred to plead *non vult* and accept a temporary suspension of their licenses.[320]

Others, however, put up more resistance. Among those who did, the most common strategy was simply to claim ignorance. Because the SLA's and ABC's anti-homosexual provisions only penalized bar owners who "permitted" homosexuals or female impersonators to congregate upon their premises, defendants hoping to escape liability insisted that the offending displays reported by the state's agents had entirely escaped their attention. At New Jersey's Log Cabin Inn, the bartender accused of identifying two effeminate customers as "fags" denied both the conversation and the presence of any questionable characters in his establishment.[321] At the Times Square Garden & Grill in Manhattan, a waitress who had been asked if she would recognize "from [her] observation . . . what a person is who is called a homosexual" flatly refuted the charge.[322] Two male employees skirted around any such categorical denials, but insisted that they could not always "tell [homosexuals] when they walk in"—"some of them

[320] In re M. Potter, NJ ABC Bulletin 474, 1; In re Polka Club, Inc., NJ ABC Bulletin 1045, 8; In re Jessie Lloyd, NJ ABC Bulletin 1045, 10; In re Louise G. Mack, New State of New Jersey, Department of Alcoholic Beverage Control, Bulletin 1088, November 22, 1955, 3.

[321] In re Log Cabin Inn, NJ ABC Bulletin 279, 12.

[322] Times Square Garden & Grill, Record on Review, 171.

don't come out until they have a few drinks."[323] Even where investigators insisted that a bar's employees must have witnessed their customers' flamboyantly effeminate conduct, bar owners denied that their customer's physical eccentricities had alerted them to their patrons' sexual vices. At the Gloria Bar & Grill, owner Isidore Schwartz protested that he had never taken his feminine customers for sexual deviants. "How do I know which one is a degenerate?" he demanded. "I can't go up and ask a man if he is a degenerate or if he is a fairy."[324]

Bar owners who offered their word against the state investigators' reports faced an uphill battle. With numerous witnesses purporting to have recognized a bar's homosexual patrons immediately upon entering the premises, commissioners and judges alike hesitated to credit defendants' claims that they had overlooked the many pervasive and popular signals of the fairy. Nor did they look favorably upon defendants' suggestions that their employees simply failed to realize that their clientele's flamboyant mannerisms were markers of their sexual predilections. In the case of the Log Cabin Inn, for example, Commissioner D. Frederick Burnett was willing to countenance the bartender's denial that he had ever explicitly identified his customers as "fags." Yet when the bartender went one step further and denied knowing what a homosexual was altogether, Burnett could no longer suspend his disbelief. The bartender's defense, Burnett derided, "might have had more weight had the witness not professed to be ignorant of what a 'fag' was. With respect to the two men described by [the investigator], even he admitted that their voices were 'a little off tune.'"[325] Any bartender who heard a customer speak in a high-pitched voice, the Commissioner reasoned, could be trusted to recognize that unusual tenor as a

[323] Ibid., 204-05; ibid., 217.

[324] Gloria Bar & Grill, Certified Transcript of Minutes of Hearing Held January 9th, 1940, 61.

[325] In re Log Cabin Inn, NJ ABC Bulletin 279, 12.

hallmark of the sexual deviant. He did not take seriously the suggestion that a bartender with relatively sharp hearing might still be ignorant of either the fairy or his telltale cues.

The peculiar interplay of cultural prejudices and presumptions undergirding the liquor agencies' enforcement efforts in these years came into relief in the SLA's proceedings against two New York bars: the Times Square Garden & Grill and the Gloria Bar & Grill. Through the bars were charged with similar violations, Gloria and Times Square Garden's routes to a revocation hearing could hardly have been more different. In 1938, Times Square Garden had been operating for close to nine years under the management of Oscar Heimberg with relatively few objections by the SLA.[326] After the agency shut down a nearby bar for catering to



Figure II.1. Exterior of the Times Square Garden & Grill. From Times Square Garden & Grill, Record on Review, New York Supreme Court.

[326] Times Square Garden & Grill, Record on Review, 5-7. The bar had experienced only a few minor run-ins with the SLA, primarily for impermissibly advertising its drink prices in the windows and once for keeping unstamped liquor bottles at the bar. Ibid., 21-23.



Figure II.2. Interior of the Times Square Garden & Grill. From Times Square Garden & Grill, Record on Review, New York Supreme Court.

homosexuals, however, Times Square Garden inadvertently found itself the destination of a displaced clientele of homosexual patrons looking for a new favorite nightspot. Heimberg did not appreciate the extra business. After consulting with local police about how best to "abate the nuisance," Heimberg's bartenders embarked on a campaign to drive away their homosexual customers: watering their beer, dropping salt in their drinks, or else refusing to serve them entirely. None of the tactics worked.[327] In the late fall of 1938, the SLA's investigators found the bar teeming with effeminate, flamboyant patrons whom they promptly "recognized" as homosexuals and moved to revoke Heimberg's license under section 106.[328]

[327] Ibid., 29. See also Chauncey, *Gay New York*, 340-342.

[328] Times Square Garden & Grill, Record on Review, 73, 7-8.

If Times Square Garden found itself an unwilling participant in New York's queer nightlife, Gloria played an active role in attracting a certain "disreputable" clientele. Located on the corner of 3rd Avenue and 40th Street, Gloria styled itself as a popular spot for the city's sexual underground, not least by hiring Jackie Mason, a "well-known fag" from the West Village pansy scene, as its general manager.[329] On a typical night, Gloria welcomed over a hundred customers, including dozens of homosexuals and the intermittent heterosexual tourists who came to watch them.[330] Its colorful patrons had attracted the SLA's attention at least once before, when owner Isidore Schwartz applied to renew his liquor license in September of 1939. After the SLA's Chief Investigator testified that the restaurant was "crowded with men who [appeared to be] 'fags,'" but admitted that "the premises were conducted in an orderly manner" by Schwartz's staff, the SLA issued a renewal contingent on good behavior.[331] Unfortunately for Gloria, investigators who visited the bar only a few weeks later discovered the same effeminate displays: lipstick, rouge, effeminate gestures and voices among the crowd. Based on those observations, in December of 1939 the SLA charged Schwartz with permitting "homosexual, degenerate, and undesirable persons" on his premises in violation of the alcoholic beverage laws.[332]

In some ways, Gloria and Times Square Garden's respective histories left them in very different postures when it came time to defend themselves before the SLA. Despite its deliberate wooing of homosexual patrons, Gloria had far more leeway to deny the SLA's allegations than

[329] Gloria Bar & Grill, Certified Transcript of Minutes of Hearing Held January 8th, 1940, 5; see Chauncey, *Gay New York*, 337-38.

[330] For the size of Gloria's clientele, see Gloria Bar & Grill, Record on Review, 174, 333. For the bar's popularity with straight "sight-seers," see ibid., 182-84.

[331] Gloria Bar & Grill, Certified Transcript of Minutes of Hearing Held January 8th, 4, 7-8.

[332] Ibid., 3.

did Times Square Garden, whose good-faith requests for help from police ironically confirmed that Heimberg knew his business had attracted an illicit clientele. Unsurprisingly, then, when the two bars were brought before the SLA, Gloria disputed ever serving homosexual patrons, while Times Square Garden emphasized its honest efforts to purge all known homosexuals from its premises. Both defenses, however, ultimately came down to the same rough strategy: questioning the ability of the SLA's investigators—and their own employees—to recognize their "degenerate" customers to begin with.

To begin, Gloria and Times Square Garden both tried their hands at a bold argument: denying the popular stereotype of the flamboyant fairy altogether. The bars challenged the SLA's presumption that a patron's homosexual propensities could be identified through the effeminate stigmata on the surface of his body. "I hate to judge any man by his facial appearance, or by his walk or gait," protested Gloria's attorney, Clarence Goldberg, when the SLA's investigators attempted to describe the bar's feminine clientele: "We must have far more competent evidence that that."[333] The counsel for Times Square Garden, William Cohen, took a more nuanced approach. Cohen began by noting that effeminate behavior, in itself, did not fall under any legal definition of disorder. "Have you ever received instructions," he demanded of the SLA's officer, that "where you see a person with painted lips and polished hair that you could arrest him and charge him with disorderly conduct?"[334] Not only were the SLA's alleged signs of sexual degeneracy perfectly lawful, Cohen insisted, some of them were downright common. When an SLA investigator testified that several patrons wore small feathers on the sides of their hats, Cohen scorned the leap from the patrons' sartorial choices to their sexual

[333] Gloria Bar & Grill, Record on Review, 98.

[334] Times Square Garden & Grill, Record on Review, 77.

proclivities. "Did you ever see the hat store sell hats with small feathers in them?" he queried. "Would you say all the people with feathers in their hats are effeminates?"[335]

Cohen's offensive seized upon a danger imbedded at the heart of the SLA's claims to identify homosexuals by their deviant demeanor: the extent to which the agency's presumptions skirted a thin, often arbitrary line around what could be considered "normal" male behavior in any instance. The SLA's chosen markers of homosexuality, endorsed and codified as telltale signs of deviance through the agency's disciplinary actions, did not simply promulgate a popular stereotype of homosexual effeminacy. They also narrowed the realm of permissible behavior of all men in a bar's premises. In some cases, the visual distinctions between "regular" and homosexual men could become uncomfortably murky. As the bars' defense witnesses were well aware, nothing could derail an accusation of homosexuality by the SLA's officers like comparing the alleged homosexuals to the accusers themselves. When the SLA's counsel asked one of Times Square Garden's loyal customers to describe the bar's patrons, for example, she coyly characterized them as "[o]rdinary men, like yourself I imagine."[336] Reminded that one of Gloria's heterosexual patrons had assumed he himself was "queer," Investigator Wickes shot back that the confused patron "was balmy"—or, at the very least, that "I hope he was."[337]

Striking at a widespread and widely embraced stereotype about the male homosexual, Gloria and Times Square Garden's attempts to divorce homosexuality from some conspicuous bodily markers gained little traction with the hearing officers. Commissioner Kaufman summarily overruled Gloria's objections to van Wagner's testimony.[338] Time Square Garden's

[335] Ibid., 93.

[336] Ibid., 158.

[337] Gloria Bar & Grill, Record on Review, 321.

[338] Ibid., 98.

inquiries into the overlap between effeminacy and the New York Penal Code, Commissioner Sullivan dismissed, were "not within the issues here."[339] At a time when physicians and psychiatrists relied on their patients' physiology and mannerisms as material evidence of their sexual predilections, neither the SLA nor the courts were interested in challenging the public view of sexual degeneracy as a condition manifest on the external body.

Undeterred, the bars tried a more moderate strategy. Even assuming that homosexual men might be identifiable through some form of visual examination, they disputed that the SLA's agents were personally qualified to render any such diagnoses. In their initial testimony, the SLA's own witnesses frequently emphasized their ability to recognize homosexual men based on their experience as police officers. Patrolman Joseph Fleming credited his insight that a full two-thirds of Times Square Garden's patrons were homosexual to "his experience in the Police Dept. in making arrests of 'fags,' by their demeanor, lip-stick on their mouths, and rouge on their faces."[340] Captain Frank Fristensky corroborated that, "[f]rom my experience in the Police Department and coming contact with the people . . . I would term them homosexuals."[341] Meanwhile, an attorney cross-examining patrolman Frederick Schmitt at the proceeding against the Gloria seized on Schmitt's contention that, "based upon the official duties that [he] had or official investigation or arrests that [he] made in connection with homosexuals and degenerates," he was able to "tell whether a person is a homosexual or a degenerate." ("I am," Schmitt confirmed.)[342] Long familiar with Manhattan's underground communities through the regular

[339] Time Squares Garden & Grill, Record on Review, 115.

[340] Ibid., 35. Patrolman Lawrence Corcoran echoed that, "from my experience and from their actions . . . I kn[ew] them to be degenerates." Ibid., 40.

[341] Ibid., 54.

[342] Gloria Bar & Grill, Record on Review, 248.

course of their duties, the SLA's witnesses suggested, professional policemen were uniquely credentialed to classify sexual degenerates when they saw them.

Gloria and Times Square Garden begged to differ. While the NYPD's patrolmen and the SLA's investigators underscored their unique experience as police officers, the bars emphasized the gap between the witnesses' anecdotal encounters with homosexuals and any genuine expertise on the topic. Throughout his cross-examinations, Goldberg pressed Patrolman Schmitt and Investigators Wickes and van Wagner on the scientific pedigree behind their alleged fluency in homosexuality. "Have you ever studied the psychology of homosexualism?" he demanded. "Have you read on it? Are you a doctor? Have you ever testified in any court at any time in connection with homosexuals?"[343] With European sexologists like Ellis and Krafft-Ebing rising in prominence through the 1930s, both van Wagner and Wickes confirmed that they had read some scholarly articles on the subject, but they admitted that they had received no more rigorous training.[344] Hoping to trap the witnesses in their relative ignorance, Goldberg focused on the finer distinctions between homosexuality and degeneracy more broadly. "Is there any difference in your mind between a homosexual and a degenerate?" he demanded. "[I]s it possible for a homosexual not to practice degeneracy?"[345] Patrolman Schmitt initially stated that a homosexual was the same as a degenerate, but subsequently disclaimed that he "had never looked it up in the dictionary."[346] Pressed on whether all homosexuals "practiced degeneracy and perversion," van Wagner first testified that they did "to [his] knowledge," yet ultimately admitted that he did not

[343] Ibid., 141-42; see also ibid., 311; Gloria Bar & Grill, Certified Transcript of Minutes of Hearing Held January 9th, 1940, 56.

[344] Gloria Bar & Grill, Record on Review, 141, 311.

[345] Ibid., 144, 195.

[346] Gloria Bar & Grill, Certified Transcript of Minutes of Hearing Held January 9th, 1940, 56.

"associate" enough to know the intricacies of a homosexual's sexual practices. "But you would say a homosexual is identified by a high-pitched voice?" Goldberg derided.[347] Meanwhile, Wickes let himself walk right into Goldberg's trap. Venturing to explain the origins of homosexuality, the investigator mystically described the phenomenon as "an unnatural throwback" of "misconceived seed."[348] Based on the witnesses' conceded ignorance on the subject, Goldberg concluded, none of them was "qualified as an expert to tell us the type of individual . . . congregating at this place."[349]

If Goldberg expected the SLA to defend its witnesses' professional qualifications, however, the agency took precisely the opposite tack: it denied the need for any expertise or specialized training at all. The reason that their inferences about Gloria's customers were so credible, the investigators insisted on cross-examination, was because they were unremarkable—simple deductions that could be corroborated by any fellow patrons at the bar. For all Goldberg's demands that van Wagner "admit that you aren't an expert" on the subject of homosexuality, the officer was happy to concede the point. "I don't consider myself an expert," van Wagner agreed, "but I consider myself sufficiently versed that [I can tell] when I see a pansy or a degenerate."[350] Wickes was initially more defensive. Having already let himself be drawn into a dubious scientific discussion of the origins of homosexual desire, Wickes refused to

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[347] Gloria Bar & Grill, Record on Review, 195-96.

[348] Ibid., 311.

[349] Gloria Bar & Grill, Certified Transcript of Minutes of Hearing Held January 9th, 1940, 60. George Chauncey has noted that Gloria's counsel attempted to bolster the scientific credibility of his attack by invoking an unpublished copy of George Henry's *Sex Variants* study, citing Henry's research (somewhat misleadingly) to argue that true experts denied the SLA's facile connection between homosexuality and femininity. Chauncey, *Gay New York*, 339, footnote. Because the Record on Review available at the New York Supreme Court does not include any mention of this strategy and any records in the SLA's own archives, to which Chauncey gained access several decades earlier, have unfortunately been discarded, I do not rely on this fact in my own account.

[350] Gloria Bar & Grill, Record on Review, 142.

answer any of Goldberg's more probing questions about "act[s] of unnatural intercourse." Goldberg insisted that he was entitled to an answer: "I want to see if this man is an expert," he explained. But the SLA's counsel rejected the suggestion that Wickes's scientific credentials had any bearing ability to recognize sexual deviants. "You don't have to be an expert," he protested, "to be able to see a homosexual."[351] After the commissioner sustained the SLA's objection, Wickes was happy to confirm, acknowledging that he "fe[lt] that [he] could tell a degenerate" and a "homosexual when [he] saw one."[352] "But you admit that it is sometimes difficult to tell the difference between a homosexual and a normal man?" Goldberg pressed. "Hardly," Wickes replied.[353]

It did not help Gloria's attacks on the SLA's confidence in its ability to classify homosexual patrons that so many defense witnesses brought before the SLA touted a similar ability. When Times Square Garden called in a procession of customers to deny any disorderly conduct on its premises, each witness insisted that he or she could recognize a homosexual on sight. "[F]rom [his] observation," salesman Ario Hausman confirmed, he would "know a person who is a homosexual male."[354] Adolph Ott echoed that he "would . . . know from [his] observation what a person known as a homosexual male would be."[355] Asked if she had "ever seen any men who appeared . . . to be unnatural men," Eve Syred, a married woman and musician who worked at an establishment two doors down, admitted: "I have seen them. I know

[351] Ibid., 311-12.

[352] Ibid., 312.

[353] Ibid., 321.

[354] Times Square Garden & Grill, Record on Review, 196.

[355] Ibid., 187.

what you mean—yes."[356] Times Square Garden's customers, in short, did not deny that they—and, by implication, the bar's management—could recognize an alleged homosexual on sight, nor that physical effeminacy was the telltale sign of such clientele. They simply denied seeing such flagrantly effeminate creatures at Heimberg's bar. As one patron, pressed if he had ever seen "any men who appeared to have rouge on their faces," insisted: "Most definitely I have not; otherwise I wouldn't patronize the place."[357] Ario Hausman went one step further: "I dare say anyone I have seen in there looked rather manly than otherwise."[358] With the tables turned and the bar's witnesses affirmatively disputing the presence of homosexuals on the premises, the SLA ironically tried Goldberg's same tactic, questioning the lay witnesses' credentials to testify on the subject. "I object to this line of questioning," the SLA's attorney protested of Syred's alleged fluency in "unnatural men": "She isn't qualified as an expert on that question." But of course the SLA had provided the bar with its own defense: "She doesn't have to be."[359] Just a few years after the flamboyant figure of the fairy dominated night clubs and newspapers as the stuff of popular entertainment, the reasonably observant city-dweller could be expected to distinguish between a homosexual and a normal man without the benefit of any "expertise."

With the police and liquor agents' diagnoses of a bar's homosexual customers deemed a matter of common sense, Gloria and Times Square Garden's last-ditch protests that their own employees had failed to recognize their homosexual patrons fell on deaf ears. As one investigator noted in his report against Times Square Garden, filled with accounts of rouged and effeminate patrons: "From the above it is apparent that the proprietor of this bar and grill had

[356] Ibid., 160-61.

[357] Ibid., 182.

[358] Ibid., 196.

[359] Ibid., 160.

knowledge that degenerates frequent and loiter therein."[360] Sufficient to alert the investigator himself to the presence of homosexuals, the flamboyant mannerisms and effeminate behaviors inside Times Square Garden could support an inference of a similar awareness by the bar's management. Like Commissioner Burnett in the hearing for the Log Cabin Inn, the SLA's agents did not consider that a bartender confronted with a group of feminine, high-pitched customers might fail to interpret their unusual demeanor as a sign of their deviant sexual practice. Urbanites of ordinary sophistication, like the city's policemen and like their own regular patrons, bar owners and bartenders could be presumed to recognize the markers of a homosexual.

As it emerged from the SLA's and the ABC's hearings in the 1930s, the states' regulation of homosexual-friendly establishments after the end of Prohibition thus revolved on two inter-related assumptions: First, the stereotype that the homosexual body was identifiable through certain discrete, conspicuous visual codes, popularized by the figure of the flamboyant fairy who had so famously graced the cabaret stages and dance halls of prior years. And second, the presumption that the average bartender *knew* those cultural codes, privy to the sophisticated urbanite's presumed intimacy with the fairy's unique demeanor. Charged by their states' liquor laws with proving both the fact that homosexual patrons had gathered in a licensed bar and that the bar owner had knowingly welcomed them, liquor agents met both burdens by affirming the average layman's ability to recognize a congregation of homosexuals based on the familiar, theatrical tropes of the effeminate pansy.

It has been observed that liquor control boards in the 1930s, struggling with a heavy workload and limited manpower, expanded their enforcement efforts through a certain

[360] Ibid., 37.

privatization of their regulatory duties. Ostensibly punishing only those bars that knowingly permitted homosexuals on their premises, the agencies conscripted individual bar owners into the task of policing their customers' sexual conduct, forcing them to throw out any apparent homosexual patrons or else risk losing their source of livelihood.[361] Yet that was not the agencies' only demand of the reputable bar owner. Insisting that defendants were sufficiently familiar with the hallmarks of sexual deviance to know that they were serving homosexuals despite their own best claims of ignorance, the ABC and the SLA did not simply conscript bar owners into a certain level of disciplinary rigor, but also into a certain level of cultural sophistication. The legal obligations of the diligent bartender were not simply a duty to *act*—that is, to remain on the lookout for undesirable patrons and to take affirmative steps to eject them as they appeared. They were also a duty to *know*: to maintain a certain level of cultural fluency in the visual markers of the urban homosexual.

Of course, the liquor agents' task in these years was made easier by the fact that, stubborn bar owners aside, few voices in the 1930s challenged their stereotypes of the self-revelatory homosexual body. Despite the warnings of some proud professionals like George Henry that the homosexual's telltale feminine traces sometimes required a rarefied eye, even most "experts" in these years agreed that the sexual deviant was marked by some hallmark traces of overt effeminacy. Soon, as the cultural prototype of the pansy started to fade behind a more nuanced medical understanding of homosexuality, liquor agencies would need to decide how—and whether—to adjust their practices.

[361] Chauncey, *Gay New York*, 339, 341-42.

3. Sexual Psychopaths, Disorderly Conduct, and the Legal Battle over Expertise

From the early twentieth century, psychologists and psychiatrists had derided the suggestion that a homosexual might be recognizable through some markers of physical difference. "[T]here is no evidence that the male homosexual represents an intersexual physical type," Joseph Wortis insisted in 1936.[362] Thomas Moore confirmed that "any anatomical differences between homosexuals and normals are too slight and too inconstant to serve as a useful basis of judgment."[363] Even the most dubious psychiatrists, however, were willing to admit that most homosexuals were frequently identifiable through their conspicuous feminine demeanor. Many of Wortis's own subjects "were effeminate [based on] their tastes and manners"—a bearing, he surmised in his professional capacity, "attributable on close analysis to a wish to be a woman."[364] Moore agreed that "characteristics of dress, gait, and postures, or feminine 'airs' might well indicate that an individual is homosexual," insisting that these traits were "acquired by imitation" and not congenital on the body.[365]

By the late 1940s, the critique of the visible homosexual body had spread beyond the psychiatric community—and it targeted not only the homosexual's anatomy, but also the broad

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[362] Joseph Wortis, "A Note on the Body Build of the Male Homosexual," *American Journal of Psychiatry*, Vol. 93 (1936-7), 1123-25.

[363] Thomas V. Moore, "The Pathogenesis and Treatment of Homosexual Disorders: A Digest of Some Pertinent Evidence," *Journal of Personality*, Vol. 14, Issue 1 (September 1945), 61.

[364] Wortis, "A Note on the Body Build of the Male Homosexual," 1123-25.

[365] Moore, "The Pathogenesis and Treatment of Homosexual Disorders," 61. See generally Chapter 1, especially 71-75.

stereotype of homosexual effeminacy itself. The first major blow came in the United States during World War II, as the military's experiences screening recruits for homosexuality fractured medical stereotypes of the conspicuous sexual deviant. In the early twentieth century, the military had been a key subscriber of the effeminate homosexual body. During and after World War I, army regulations instructed physical examiners to weed out recruits based on "anatomical stigmata of degeneration": "sloping narrow shoulders, broad hips, excessive pectoral and pubic adipose deposits, with lack of masculine hirsute and muscular marking."[366] Unsurprisingly, when the war department released its Mobilization Instructions in 1942, it directed screening boards to filter out homosexual applicants based on much the same criteria. The Selective Service's initial screening procedures had actually made no mention of homosexuality, but both the Army and the Navy insisted on issuing separate directives adding sexual degeneracy as a disqualifying disorder.[367] The War Department's official "Standards of Physical Examination" instructed screening boards to identify "persons habitually or occasionally engaged in homosexual or other perverse sexual practices" through overt physical signs like "feminine bodily characteristics, effeminacy in dress or manner, or a patulous rectum."[368] Based on such

[366] Army Regulation 40-105: Standards of Physical Examination for Entrance Into the Regular Army, National Guard, and Organized Reserves (Washington, D.C.: Government Printing Office, 1922), 25-26, available at Folder 19, Box 20, World War II History Project Papers, GLBT Historical Society (San Francisco, CA); see also Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton: Princeton University Press, 2009), 62.

[367] For the history of psychiatric screening in induction statements, and especially the role of professional psychiatrists in their adoption, see Allan Bérubé, C*oming Out Under Fire: The History of Gay Men and Women in World War Two* (New York: Free Press, 1990), 9-12.

[368] Mobilization Regulations, Standards of Physical Examination During Mobilization, March 15, 1942, Folder 16, Box 20, World War II History Project Papers, GLBT Historical Society (San Francisco, CA); Bérubé, *Coming Out Under Fire*, 19.

effeminate signals, the induction station in New York reportedly rejected 1,200 out of 1,000,000 men screened "for being obvious and frank homosexualists."[369]

With its mobilization efforts for the war underway, however, the military soon discovered that screening potential homosexuals from its ranks was a more elusive goal than it might have imagined. As a logistical matter, once the United States fully entered the war in early 1942, the military's need for manpower trumped its distaste for homosexual recruits. The Selective Service eliminated psychiatric examinations entirely from its rosters. The military's internal examiners stopped scrutinizing bodies for the stigmata of degeneration and simply asked recruits outright about their sexual preferences.[370] In 1942, just months after the War Department issued its strict standards for physical examination, a New York applicant nervous that his bleached hair, effeminate walk, and "sissy" voices would "give [him] away" to the induction board found himself welcomed warmly to the Army. [371]

Even before the demands of the battlefield overwhelmed the military's induction procedures, however, its experiences screening homosexual applicants soon taught the military that classifying homosexuals was far more easily said than done. In April of 1941, psychoanalyst J. Paul de River wrote to New York mayor Fiorella LaGuardia, "amazed" at the number of arrested men who were "typed as homosexuals" and yet found to carry a draftee card. The military, de River insisted, should provide a lecture series to teach its medical examiners and officers "how to recognize the sex pervert."[372] After LaGuardia forwarded the letter to Colonel

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[369] Carleton Simon, "Homosexualists and Sex Crimes," September 21 to 25, 1947, 4, at the Kinsey Institute for Research in Sex, Gender, and Reproduction (Bloomington, IN).

[370] Bérubé, *Coming Out Under Fire*, 18-19, 22.

[371] Ibid., 8.

[372] J. Paul de River, letter to Fiorella LaGuardia, April 5, 1941, Folder 10, Box 20, World War II Project Papers, GLBT Historical Society (San Francisco, CA).

Samuel J. Kopetzky of the Army's Medical Division, the Colonel wrote back insisting that the Army's screening boards always investigated recruits in whom "the stigmata of degeneration are evident on examination."[373] The problem, the military found, was that such screening mechanisms were woefully unreliable. As evidenced by the voluminous arrests of soldiers and draftees in homosexual bars and cruising sites—as well as the military's own troubles patrolling soldiers' sexual behavior on its bases—the most physically inconspicuous recruit could still turn out to be a sexual degenerate.[374] By 1948, the Chief of Naval Personnel was warning officers and sailors alike about the unreliability of physical effeminacy as a marker of sexual difference. While many homosexuals "display effeminate mannerisms and characteristics," an indoctrination lecture cautioned new recruits, "sometimes there will be no outward signs at all." Nor was "a person who happens to have characteristics that might be considered effeminate . . . necessarily a 'homo.' Lots of upright young men have smooth skins and do not have to shave very often. Some people naturally have high squeaky voices."[375] Coming out of World War II, at least as far as the military was concerned, physical markers of femininity no longer justified an inference of homosexuality.

While the military reconsidered its procedures, the public witnessed another turning point in the national conversation about sexual deviance. In February of 1948, zoologist Alfred C. Kinsey ushered in a new era of debate about sexuality in America with the publication of his landmark study, *Sexual Behavior in the Human Male*. The Kinsey Report provided a meticulous scientific account of the sexual life of the "average" American, based on face-to-face interviews

[373] Samuel J. Kopetzky, letter to Dr. J. Paul de River, April 23, 1941, Folder 10, Box 20, World War II Project Papers, GLBT Historical Society (San Francisco, CA).

[374] Bérubé, *Coming Out Under Fire*, Chapter 6, esp. 171.

[375] Chief of Naval Personnel, Lecture to be Utilized in the Indoctrination of Recruits, January 12, 1948, Folder 3, Box 22, World War II Project Papers, GLBT Historical Society (San Francisco, CA).

with 5,300 white males.[376] Hailed as a "revolutionary," "extraordinary" work of "immeasurable influence," the Report soon drew the ire of more skeptical readers for its slanted statistical methods and bloodless disregard for traditional moral values.[377] Yet the work's popular stature was undeniable. Initially printed in a run of 5,000 copies, the Kinsey Report sold 185,000 copies within its first two weeks of publication and spent months on the *New York Times* bestsellers list.[378] Its chief author became a national icon. Kinsey lent his name to late-night jokes and limericks, racy advertising slogans ("a fictionalized Kinsey Report!"), and even radio songs ("The Kinsey Boogie").[379] "As a subject of conversation," *Life Magazine* noted in August 1948, "the Report can be depended on to nose out [presidential nominee Henry] Wallace, Russia, the elections and the high cost of living for the better part of an evening."[380]

Kinsey's statistics covered a variety of topics, from adolescent masturbation to adultery and bestiality in adulthood. Yet none of Kinsey's findings were as widely disseminated or as shocking as his statistics about homosexual behavior among American men. Based on his interviews, Kinsey concluded that at least 37% of American men could be expected to engage in

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[376] Alfred C. Kinsey et al., *Sexual Behavior in the Human Male* (Bloomington: Indiana University Press, 1948), 6.

[377] Albert Deutsch, "Kinsey, the Man and His Project," *Harper's*, Vol. 195, Dec. 1947, 495. James R. Newman, "The Proper Study of Mankind," *New Republic*, Vol. 118, Feb. 9, 1948, 26. Abraham Stone, "Eugenics," in *Saturday Review of Literature*, "The Kinsey Report and Related Fields," Vol. 31, Mar. 13, 1948, 18; *Reader's Digest*, "Must We Change our Sex Standards?" Vol. 52, June 1948, 1; For a thorough overview of statistical criticism against the first Report, see Erdman Palmore, "Published Reactions to the Kinsey Report," *Social Forces*, Vol. 31, No. 2, Dec. 1952, 165-72; Waldemar Kaempffert, "The Now Famous Kinsey report is Criticized on Statistical and Sociological Grounds," *New York Times*, Mar. 7, 1948, E9. For religious criticism of the Kinsey Report as undermining the nation's moral foundations, see also K.A. Cuordileone, *Manhood and American Political Culture in the Cold War* (New York: Routledge, 2005), 83; James Howard Jones, *Alfred C. Kinsey: A Life* (New York: W.W. Norton & Co., 2004), 576.

[378] John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (Chicago: University of Chicago Press, 1983), 34.

[379] Albert Deutsch, "The Kinsey Report and Popular Culture," in *Sexual Behavior in American Society: An Appraisal of the Two Kinsey Reports*, ed. Jerome Himelhoch and Sylvia Fava (New York: W.W. Norton, 1955), 384. For the popularity of the Kinsey Report, see also Jones, *Alfred C. Kinsey*, and Wardell Baxter Pomeroy, *Dr. Kinsey and the Institute for Sex Research* (New York: Harper and Row, 1972).

[380] Francis Sill Wickware, "Report on the Kinsey Report," *Life*, August 2, 1948, 87.

some homosexual experience to the point of orgasm between adolescence and old age. "This is more than one male in three of the persons that one may meet as he passes along a street," he emphasized.[381] If the numbers seemed shockingly high, it may have been because, contrary to popular opinion, homosexual activity was prevalent among numerous men who never gave off the slightest overt indication of sexual difference. "Fine skins, high-pitched voices, obvious hand movements, a feminine carriage of the hips, and peculiarities of walking gaits are supposed accompaniments of a preference for a male as a sexual partner," the Report observed.[382] In fact, homosexual behavior was frequently discovered "among persons whom [acquaintances might] ha[ve] known for years before [realizing] that they had had anything except heterosexual experience."[383] Kinsey's statistics exploded the popular stereotype of the male homosexual as a flamboyant fairy, all rouged lips and swishing hips and delicate wrists. By measuring "homosexuality" in terms of sexual contacts, the Report helped define the phenomenon as a matter of private erotic conduct rather than public gender presentation. And by implicating a full third of American men in some past homoerotic experimentation, it insisted that male homosexuals were far more pervasive than the public may have previously imagined.[384]

Confronted with such cold empirics, some legal authorities in the United States began to turn away from the familiar stereotype of the effeminate fairy. In 1950, a congressional committee assigned to investigate the prevalence of homosexual employees in the federal government warned that "in many cases there are no outward characteristics or physical traits

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[381] Kinsey, *Sexual Behavior in the Human Male*, 623.

[382] Ibid., 637.

[383] Ibid., 627.

[384] For the Kinsey Report's disruption of popular stereotypes of homosexuality, see D'Emilio, *Sexual Politics, Sexual Communities*, 35-36; Craig M. Loftin, "Unacceptable Mannerisms: Gender Anxieties, Homosexual Activism, and Swish in the United States, 1945-1956," *Journal of Social History*, Vol. 40, No. 3 (Spring 2007), 579.

that are positive identifying marks of the sex pervert." "Contrary to a common belief," the Hoey Commission insisted, "all homosexual males do not have feminine mannerisms, nor do all female homosexuals display masculine characteristics in their dress or actions."[385] Morris Ploscowe, a judge and leading legal commentator on the Kinsey Report, agreed that homosexuality "is not recognizable by physical signs alone." While "[e]ffeminacy sometimes characterizes the male homosexual," he conceded, "more often male and female homosexuals are indistinguishable in body structure, voice timbre, or general behavior from ordinary heterosexual individuals."[386] Indeed, the potential physical stealth of the homosexual was a core component of the Lavender Scare in the early 1950s: the broadly publicized—and broadly politicized—panic over suspected homosexuals in the State Department that led to the termination of hundreds of employees. Though the federal purge hardly divested itself of the lingering stereotypes of the effeminate fairy—in practice, indeed, investigations often focused on ferreting out *some* signs of non-gender-normative dress or behavior—the scandal suggested that many government officials, and many concerned voters, recognized that homosexual men could also be dangerously invisible.[387]

In 1951, even one New York court attempted, however briefly, to question the stereotype of the flamboyant homosexual. In 1950, the SLA had revoked the liquor license of Lynch's Builders Cafe after local policemen arrested two patrons for attempting to solicit them for homosexual acts.[388] One of the arrested men had openly boasted of his conquest to the

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[385] *U.S. Senate, Employment of Homosexuals and Other Sex Perverts in Government* (Washington, D.C.: U.S. Government Printing Office, 1950), 2.

[386] Morris Ploscowe, *Sex and the Law* (New York: Prentice Hall, Inc, 1951), back matter, 196.

[387] David K. Johnson, *Lavender Scare: Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2009), Chapter 5 and 6.

[388] Lynch's Builders Rest. v. O'Connell, 277 A.D. 705, 706 (App. Div. 1951).

bartender, although no evidence suggested that the bartender knew of his sexual predilections before that day, and the brazen customer promptly left.[389] The other patron was acquitted of all charges.[390] After the restaurant appealed its revocation, Judge van Hoorhis of the appellate division rejected the SLA's claim that the owner had knowingly countenanced homosexual prowling in his far. "Homosexuals are often difficult to identify," van Hoorhis insisted.[391] In fact, "homosexuals are harder to identify than prostitutes, since [apart from their sexual practices] they carry on normally in other branches of life." Mere evidence that the defendant had served a homosexual in his bar, the Judge concluded, did not support the SLA's presumption that the defendant had *known* he was a homosexual.[392]

Judge Van Hoorhis's theory of the unassuming deviant body was unprecedented in the courts, and it did not stay on the books for long. In January 1952, New York's highest court summarily reversed, noting that the customer's triumphant boast to the bartender sufficed to establish that the management knew that "that homosexual activities were being carried on in its premises." In light of the patron's flagrant admission of homosexuality, the vagaries of whether Lynch's bartenders should also have recognized his sexual proclivities on sight alone were immaterial.[393] As a general rule, indeed, both law enforcement officials and the courts proved quite resistant to the mounting evidence against the effeminate fairy in the 1950s. The military's failed experiences in identifying homosexual recruits did not quite make their way to domestic

[389] Ibid., 708.

[390] Ibid., 707.

[391] Ibid., 710.

[392] Ibid., 712.

[393] Lynch's Builders Rest. v. O'Connell, 303 N.Y. 408, 410 (1952).

police departments.[394] At a 1947 conference of the International Association of Chiefs of Police, an association generally recognized for its emphasis on scientific training and professionalism among police, criminologist Carleton Simon defended the reliability of the homosexual's physical stigmata as a screening tool during the recent draft. "There were . . . many examined whose mannerisms and definite secondary sex characteristics were decidedly effeminate, who denied sexual inversion abnormalities," Simon noted. "Unquestionably, in most of these cases the suspicions of the examining psychiatrists were well-founded."[395] Acknowledging that there were "some exceptions to th[e] rule of physical appearance," Simon admonished his audience to keep an eye out for the homosexual's telltale physical markers: "It is our belief that in the instance of the born male homosexualist, their minds are of female manifestation, [as are] their walk, their body contour, their voice, their mannerisms, the texture of their skin and their inhibitions. . . . They derive pleasure in dressing in female attire, using rouge and facial makeup."[396]

Simon's defense of the conspicuous homosexual could not have come at a better time for law enforcement agencies like the ABC and the SLA. If World War II had encouraged medical and military authorities to question the stereotype of the flamboyant fairy, the war's chief gift to state liquor boards was a spate of new regulatory work. The end of the conflict created a boom in the gay and lesbian subcultures of America's cities, as service members who found kindred

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[394] Nor did they translate in the popular press. Describing the army's screening procedures from the recent draft, for example, a 1947 articles in Newsweek reported that military interviewers "tried to detect [homosexuals] (1) by their effeminate looks or behavior and (2) by repeating certain words from the homosexual vocabulary and watching for signs of recognition. While inductions stations during the war were actually far more likely to rely on recruits' deliberate self-identification to identify potential homosexuals, popular reports like Newsweek's preferred to emphasize the inadvertently self-revelatory homosexual body. "Homosexuals in Uniform," *Newsweek*, June 9, 1947, 54.

[395] Simon, "Homosexualists and Sex Crimes," 4.

[396] Ibid., 3.

spirits in the diverse ranks of the military declined to return home and settled in urban centers to maintain their new communities. Rising to meet demand, homosexual-friendly bars and restaurants multiplied in major cities like New York and San Francisco and sprouted up in smaller urban hubs like Kansas City, Richmond, San Jose, and Cleveland.[397] Faced with a burgeoning new homosexual nightlife—and, in port cities like San Francisco, newfound pressure from the military disciplinary boards that had established a presence there during the war—liquor agencies had to expand their operations to keep up. Even California's State Board Equalization, which had kept a low profile through many of the pre-war years, found itself taking a newly active role in policing bars catering to suspected sexual deviants. With the Bay Area now home to both an influx of unattached military men and an Armed Forces Disciplinary Board eager to keep their seedier instincts in check, bar owners in San Francisco suddenly found that California's prohibition against "disorderly" conduct had grown some teeth.[398]

Loath to give up their most useful regulatory tool, investigators resumed their practice of identifying establishments that accommodated homosexual patrons based on the conspicuous visual markers of the fairy. In New Jersey, police witnesses before the ABC recounted crowds of customers "wearing mascara, lipstick, rouge, and eyebrow makeup," "walking . . . and moving their arms in a manner common to women," and "puckering their lips and speaking in high-pitched voices."[399] In New York, the SLA's investigators kept watch for patrons with

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[397] D'Emilio, *Sexual Politics, Sexual Communities*, 32; Bérubé, *Coming Out Under Fire*, 271.

[398] For the increasing rigor of the SBE's policing during and following WWII, see Boyd, *Wide Open Town*, 110. For the Armed Forces Disciplinary Board's continuing influence over the SBE, see ibid., 123-128.

[399] In re Kaczka, NJ ABC Bulletin 1063, 2; see also In re Jessie Lloyd, NJ ABC Bulletin 1045, 11 (finding that "defendant's licensed premises were, for a considerable period of time, a rendezvous for 'queers' or, more politely, 'female impersonators,' within the contemplation of Rule 4" where patrons greeted each other with endearments, gave each other female nicknames, and "otherwise acted in an effeminate manner"); In re Polka Club, Inc., NJ ABC Bulletin 1045, 8 (bringing charges under Rule 4 where "agents noticed a number of males wearing mascara, lipstick, rouge and eyebrow make-up and attired in shirts and 'slacks' of the type designed for women").

"pucker[ed]" lips," "effeminate" voices, "swaying . . . hips," powder and eye shadow, and wrists that moved "almost like a female"—the "type characteristic of homosexuals."[400] In California, the SBE adopted a similar approach. In the fall of 1948, for example, one officer with the San Francisco Police Department who visited the Black Cat Tavern estimated that the bar's clientele was "50 percent homos." Acknowledging that "there's fellows [he] would never be able to [tell]," Officer Frank Murphy nevertheless confirmed that he "can tell a homosexual sitting at a bar . . . like a woman, talking like a woman, and calling each other female names. . . . [T]he obvious homos who lets his hair down like in certain establishments . . . seem to want to outdo one another as far as attracting attention."[401] Murphy's partner confirmed that, "from [his] own observation," the crowd at the Black Cat was "materially different" from other bars in the city. "There's other bars you go in San Francisco you don't see these people supposed to be homosexuals," he insisted. "You don't see . . . so many of them in one particular place[,] anyway."[402]

State liquor boards' reliance on the visual signifiers of the fairy to police homosexual-friendly bars proved impressively resilient in the post-war years—not just against the growing body of researchers refuting such visual stereotypes, but even against the legal intervention of the courts. The judicial offensive against the liquor boards' enforcement of disorderly conduct statutes began with the Black Cat itself, which the SBE charged, on the basis of Officer Murphy's testimony, with permitting "persons of known homosexual tendencies [to] patronize[]"

[400] Salle de Champagne v. O'Connell, Record of Review, Index No. 3578 (1951), 20-22, New York Supreme Court Records, Civil Branch, New York County (New York, NY); Stanwood United v. O'Connell, Record on Review, Index No. 9751 (1953), 35, New York Supreme Court Records, Civil Branch, New York County.

[401] Stoumen v. Reilly, Brief for Respondents, August 31, 1950, 19, in Stoumen v. Reilly, Civ. No. 14666, Supreme and Appellate Court Records, California State Archive (Sacramento, CA) (all errors in original).

[402] Ibid., 22.



Figure II.3. The Black Cat Cafe on Montgomery Street, San Francisco. In the San Francisco History Center, San Francisco Public Library.

its premises.[403] Owner Sol Stoumen appealed the Black Cat's suspension all the way to the California Supreme Court, insisting that the SBE's speculative evidence about his patrons' physical appearances failed to establish any violation of the alcoholic beverage control laws.[404] In 1951, in *Stoumen v. Reilly*, the court agreed. Accepting at face value Murphy's inferences that the Black Cat's effeminate customers were in fact homosexual, Chief Judge Gibson found that the SBE's evidence nevertheless failed to establish a violation of California's liquor laws. Noting that section 58 prohibited bar owners from allowing their premises to be used as "disorderly" houses, "to which people resort for purposes which are injurious to the public

[403] Stoumen v. Reilly, 222 P.2d 678, 682 (Cal. Ct. App. 1950).

[404] For a brief history of the Black Cat litigation, see Boyd, *Wide Open Town*, 145-46.

morals," Gibson insisted that the plain language of the statute required evidence of some improper or immoral conduct. "Mere proof of patronage" by homosexuals, "without proof of the commission of illegal or immoral acts on the premises," he concluded, "is not sufficient to show a violation of section 58."[405]

Stoumen's rationale was soon echoed by a similar trend on the east coast. In New York, the courts first confronted the issue in 1954, when the SLA revoked the liquor license of Bernard's Bar & Grill based on a patrolman's testimony that groups of male patrons had embraced, caressed each other, and used "endearing terms" while seated at the bar.[406] Bernard's owner initially tried his hand at a familiar defense, insisting that, absent any sexual solicitations on the premises, "the police officer himself cannot say whether those present at the bar were homosexuals."[407] The court paid this claim little attention. It was, however, compelled by the argument that the SLA's evidence of congregating homosexuals failed to establish that Bernard's owner had permitted his bar "to become disorderly" in violation of section 106. Turning to the dictionary for guidance, Magistrate Judge Ringel noted that "disorderly" was defined as "not observing the requirements of law and public order," being "lawless," or "violating moral order, constituted authority, or recognized rule or method."[408] That statutory term, Ringel concluded, required some illegal behavior among customers before subjecting a bar owner to civil penalties: patrons committing "lewd and indecent acts" on premises, for example, or soliciting others for

[405] Stoumen v. Reilly, 37 Cal. 2d 713, 716 (1951)

[406] Fasone v. Arenella, 139 N.Y.S.2d 186, 187 (N.Y. Magis. Ct. 1954).

[407] Ibid., 188.

[408] Ibid.

the same. But "the mere fact that homosexuals patronized the place," no matter how clearly identifiable as such, "would not make the premises 'disorderly.'"[409]

New Jersey switched its regulatory practices in the same year—not by fiat of any court, but through an internal policy change by the ABC. While the agency had historically regulated homosexual-friendly bars through Rule 4, banning crowds of "female impersonators" in licensed bars, the state's liquor laws had long featured their own disorderly conduct provision. Prohibiting licensees from conducting their premises "in such a manner so as to become a nuisance," Rule 5 was explicitly amended in 1936 to cover "lewdness" and "immoral activities," and again in 1950 to prohibit "foul, filthy, indecent or obscene" conduct.[410] Beginning in 1954, the ABC began bringing disciplinary hearings against homosexual-friendly bars under both provisions.[411] By 1956, the agency had abandoned Rule 4 entirely. No longer simply pursuing bars whose effeminate patrons could be seen to qualify as "female impersonators," the ABC now brought charges against bars whose homosexual customers created a nuisance by "conducting themselves in a manner offensive to common decency and public morals."[412]

Clustered in a relatively short period of time, this rash of cases and regulations raising the evidentiary standard on state liquor boards' proceedings against homosexual-friendly bars might have signaled a sea change in the states' police practices. In California, in fact, the supreme

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[409] Ibid., 189. While *Fasone* itself was issued by a magistrate judge and consequently had little binding power over other New York courts as a matter of law, its principle that "disorderly conduct" had to involve some offensive behavior beyond the "mere congregation of homosexuals" consequently became common among higher courts. See, for example, Fulton Bar & Grill, Inc. v. State Liquor Auth., 205 N.Y.S.2d 37, 38 (1960); Kerma Rest. Corp. v. State Liquor Auth., 278 N.Y.S.2d 951, 952 (S. Ct. App. Div. 1967).

[410] One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 50 N.J. 329, 331 (1967).

[411] Ibid., 332 (discussing the ABC's change in practice). For examples, see In re Polka Club, Inc., NJ ABC Bulletin 1045, 8; In re Louise G. Mack, NJ ABC Bulletin 1088, N2; In re Jessie Lloyd, NJ ABC Bulletin 1045, 10; In re Kaczka, NJ ABC Bulletin 1063, 1.

[412] Paddock Bar, Inc. v. Div. of Alcoholic Beverage Control, 46 N.J. Super. 405, 407 (App. Div. 1957); Murphy's Tavern, Inc. v. Davis, 70 N.J. Super. 87, 89 (App. Div. 1961)

court's requirement of actual "disorderly conduct" to support the SBE's charges proved to have some bite. In the years following *Stoumen*, the agency found its capacity to suspend or revoke the licenses of bars catering to homosexual patrons drastically curtailed. As the Armed Forces Disciplinary Control Board acknowledged with some frustration, despite its dutiful attempts to maintain lists of "hang-outs for homos" around the city, *Stoumen* had established that the "mere congregating of such persons was not sufficient" for the SBE to initiate charges.[413] In 1955, the state legislature attempted to take matters into its own hands, replacing the notoriously disorganized SBE with the more robust Alcoholic Beverage Control, and passing a new regulatory provision that sanctioned disciplinary proceedings against any establishment that served as "a resort for . . . sexual perverts."[414] Section 24200(e) aimed to resurrect California's ban on mere crowds of homosexual patrons, but the courts would not allow the legislature to overturn *Stoumen* so easily.[415] The appellate division initially chose to interpret section 24200(e) as codifying, not eliminating, *Stoumen*'s requirement of disorderly behavior.[416] In 1959, the California Supreme Court rejected that reading, noting that Section 24200(e)'s intention to

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[413] Fred C. Franke, Supplemental Report on the Senior Armed Forces Disciplinary Control Board Meeting, March 30, 1955, 3, in F3718: 341a, Department of Alcoholic Beverage Control Appeals Board Records, California State Archive (Sacramento, CA). For the Armed Forces Disciplinary Board's frustration with the new restrictions, see Boyd, *Wide Open Town*, 123.

[414] For the creation of the ABC, see Boyd, *Wide Open Town*, 134; Agee, "Gayola," 473. For the passage of section 24200(e), see Nickola v. Munro, 162 Cal. App. 2d 449, 454 (1958).

[415] For the ABC's attempts to enforce Section 24200(e) based on presence alone, see Benedetti v. Dep't of Alcoholic Beverage Control, 187 Cal. App. 2d 213, 214 (1960); Vallerga v. Dep't of Alcoholic Beverage Control, 53 Cal. 2d 313, 315 (1959).

[416] Kershaw v. Dep't of Alcoholic Beverage Control of Cal., 155 Cal. App. 2d 544, 550-51 (1957) ("It would seem a fair inference to conclude that in making that amendment the Legislature acted in the light of and consistently with the rule of the Stoumen case, by inference excluding from the coverage of subdivision (e) the type of conduct which the Supreme Court had declared harmless and not inimical to public welfare or morals."); Nickola v. Munro, 162 Cal. App. 2d 449, 455 (1958) ("We do not think that section 24200(e) was passed by the Legislature to repeal or to change the rule of the Stoumen case to the effect that improper or illegal or immoral conduct must occur on the premises before discipline of the licensee is permitted, but was passed with the Stoumen case in mind to clarify the rule of that case.").

broaden *Stoumen* was too "clear and unambiguous" to deny—and subsequently invalidated the provision as unconstitutional.[417] Absent a pattern of ongoing solicitations or other lewd behavior on a bar's premises, the California ABC's remedies against even the most avowedly homosexual-friendly establishments were reduced to posting identifying codes on their windows and letting business continue as usual.[418]

On the east coast, however, both New York's and New Jersey's new legal requirements made surprisingly little difference for the liquor agencies' practices. Well beyond the end of the decade, New York's SLA insisted that bar owners had tolerated "disorderly" behavior by their customers on the basis of evidence that looked suspiciously like that used to establish the mere congregation of homosexuals in earlier decades. In 1959, investigators testifying against the Fulton Bar & Grill reported that the bar's male patrons "w[ore] tight fitting trousers," walked "with a sway to their hips," spoke "in high pitched effeminate tones," and "gesture[d] with limp wrists."[419] Based on these observations, the SLA revoked Fulton's liquor license for catering to "homosexuals and degenerates who conducted themselves in an offensive and indecent manner."[420] Some years later, the SLA concluded that another bar's homosexual customers had behaved "in an offensive and indecent manner" based on a police officer's testimony that patrons wore "makeup," "mascara," and "lipstick," sported "hip hugger pants," "addressed each other in

[417] Vallerga v. Dep't of Alcoholic Beverage Control, 53 Cal. 2d 313, 317-18 (1959).

[418] Boyd, *Wide Open Town*, 128.

[419] Chauncey, *Gay New York*, 344, 454-55.

[420] Fulton Bar & Grill, Inc. v. State Liquor Auth., 205 N.Y.S.2d 37, 38 (1960). On appeal, a New York trial court annulled the SLA's revocation on the grounds that Fulton's managers had no alleged knowledge of any illicit solicitations on premises, but the appellate division reversed. Even absent solicitation, the court found, "a consideration of the entire record" disclosed "that the evidence is amply sufficient" to support the SLA's charges. Ibid.

endearing terms," and sometimes sat in each other's laps.[421] While conceding that "the mere congregation of homosexuals . . . does not make the premises disorderly," the appellate division affirmed.[422] Chief among its evidence, it noted that the patrons in this case did not merely congregate, but also "exhibited characteristics and mannerisms which evidenced homosexual propensities."[423] As interpreted by the SLA, and as affirmed by the New York courts, evidence of "disorderly" conduct under section 106 did not require a bar's patrons to engage in any illegal or even lewd sexual behavior, but simply to conduct themselves in a way that might disclose their homosexual propensities. If section 106 demanded something more than the mere presence of homosexual patrons at a licensed establishment, in short, it appeared to demand nothing more than the presence of *recognizable* homosexuals—a fact easily established by the familiar visual codes and signifiers of the fairy.[424]

In New Jersey, the ABC's turn to Rule 5 proved equally toothless. While the language of Rule 5 prohibited bar owners from condoning any "lewdness," "immoral activity," "filthy or obscene . . .conduct," or "nuisance" on their premises, the ABC's charges under the provision explicitly conflated a "nuisance" with any identifiable markers of homosexual men. As the agency explained, a bar conducted its place of business "in such a manner as to become a nuisance" whenever it "allowed, permitted, and suffered . . . persons who *appeared to be homosexuals* in and upon [the] licensed premises."[425] As a result, the vast majority of charges

[421] Kerma Rest. Corp. v. State Liquor Auth., 21 N.Y.2d 111, 115-16 (1967).

[422] Ibid., 114.

[423] Kerma Rest. Corp. v. State Liquor Auth., 278 N.Y.S.2d 951, 952 (N.Y. App. Div. 1967).

[424] Chauncey, *Gay New York*, 343-46.

[425] In re Polka Club, Inc., NJ ABC Bulletin 1045, 8; In re Jessie Lloyd, NJ ABC Bulletin 1045, 10; Paddock Bar, Inc. v. Div. of Alcoholic Beverage Control, 46 N.J. Super. 405, 407 (App. Div. 1957); One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 50 N.J. 329, 332 (1967) (emphasis added)

initiated under Rule 5 did not allege that the defendants tolerated specific acts of solicitation, lewdness, or immoral sexual conduct, but merely charged them with serving "apparent homosexuals." In 1955, for example, the ABC's proceedings against the Entertainer's Club in Atlantic City included evidence of one solicitation and some salacious conversations at the bar, but focused primarily on the patrons' "swaying" hips, "high-pitched voices," "tight-fitting dungarees," and "false eyelashes."[426] Similarly, the case brought against Manny's Den included "no charge[s] or substantial evidence" of lewd or immoral conduct, consisting exclusively of testimony that male patrons had "convers[ed] . . . in a lisping tone of voice," "used limp-wrist movements," laughed and "giggled" at the bar, "extended their pinkies in a very dainty manner" while drinking, and would "swish and sway" as they walked down the bar.[427]

The ABC's reading of Rule 5 reached its logical conclusion in the proceedings against the Paddock Bar in 1956. In the spring of that year, undercover investigators noted the curious effeminacy of the Paddock Bar's clientele: customers spoke "in a noticeably effeminate pitch of voice," addressed each other with endearments like "dearie," "manipulated their cigarettes, giggled, and rocked and swayed their posteriors in a maidenly fashion."[428] The ABC suspended the bar's liquor license, and on appeal the Superior Court of New Jersey affirmed. Even acknowledging the complete absence of "licentious solicitations on the premises," or even any conclusive evidence that "the specified patrons of the tavern were in actuality homosexuals," the court insisted that the officers' observations sufficed to support a charge under the state liquor

[426] In re Louise G. Mack, NJ ABC Bulletin 1088, 3-4.

[427] One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 50 N.J. 329, 333-34 (1967). Manny's Den's appeal of its charges was consolidated with the appeals of two other bars, Val's Bar and Murphy's Tavern, and ultimately reached the Supreme Court of New Jersey in 1967.

[428] Paddock Bar, Inc. v. Div. of Alcoholic Beverage Control, 46 N.J. Super. 405, 409 (App. Div. 1957).

laws.[429] Based on the language of the SLA's complaint, it noted, the Paddock Bar was not charged with catering to actual homosexuals, but merely with catering to a crowd of "persons who conspicuously displayed by speech, tone of voice, bodily movements, gestures, and other mannerisms the common characteristics of homosexuals." Consequently, even if the record "failed adequately to prove that the described patrons were in fact homosexuals, it certainly proved that they had the conspicuous . . . *appearance* of such personalities."[430] As the case of the Paddock Bar demonstrated, far from limiting the ABC's reliance on superficial stereotypes of homosexual men to penalize congregations of homosexual patrons in licensed bars, the ABC's turn to Rule 5 actually lowered the evidentiary standard for disciplinary proceedings. Extending the definition of "nuisance" to include any gatherings of "*apparent* homosexuals," the ABC's reading of Rule 5 neutered not simply the provision's own requirement of illicit sexual conduct, but even Rule 4's requirement of actual presence. Regardless of patrons' true sexual identities, the ABC's charges under Rule 5 penalized bars for serving any customer who so much as resembled a homosexual—who conformed to the layman's popular stereotypes of what a typical homosexual looks like. As the judge in the Paddock Bar's proceedings had noted: "It is often in the plumage that we identify the bird."[431]

New York's and New Jersey's failed transitions to a legal standard of "disorderly conduct" reveals the centrality of popular stereotypes of homosexual men to the liquor boards' anti-homosexual campaigns in the post-war years. Technically requiring some illicit, lewd, or "offensive" sexual conduct by a bar's patrons before initiating disciplinary proceedings, both the SLA and the ABC found evidence of such outrageous conduct in the visual signs of the

[429] Ibid., 408.

[430] Ibid., 408-09 (emphasis added).

[431] Ibid.

effeminate fairy: a glimpse of a mascaraed eye, a limp wrist, swaying hips, or a high-pitched voice in the most quiet and civil homosexual crowd. If, as Magistrate Ringel had suggested, "disorderliness" were defined as a disruption of legal order or moral sensibility, the SLA's and ABC's enforcements efforts confirmed that the respectable public's sensibilities needed no disturbance greater than the reception of a sexual deviant in its surroundings. Unsurprisingly, by this reading, a homosexual clientele's most quintessentially disruptive conduct under the liquor laws did not consist of any specific acts of solicitation or sexual affection—acts that were, inconveniently, often rather discreet. Rather, it consisted of any identifiable physical clues that the public would be expected to recognize as the hallmarks of sexual deviance. The disorderliness of any given crowd of homosexual patrons, in short, became as much the product of the men's actual behavior on the barroom floor as of the mainstream public's familiarity with the codes and signifiers of urban homosexuality.

The Expert Wars

Despite the liquor agencies' best efforts, of course, the empirical pedigree of many of its favored codes and signifiers was waning. In addition to the language of the statutes they enforced, the ABC's and SLA's continued reliance on the popular trope of the effeminate fairy flew in the face of mounting expertise on the nature of the homosexual psychology and physiology. The agencies did not pay the experts much attention—but defendants did.

Unsurprisingly, the new wave of enforcement by state liquor authorities against homosexual-friendly bars following WWII led to a new wave of resistance by bar owners trying to defend their sources of livelihood. Like their predecessors, some bar owners charged with serving homosexuals tried to deny any knowledge of the homosexual crowds they had

purportedly welcomed on their premises. They generally met the same levels of skepticism. In 1955, New Jersey's ABC suspended Jesse Lloyd's license after investigators reported that patrons "called each other by women's names" and "otherwise acted in an effeminate manner" in her bar.[432] Considering the evidence that the customers "openly conducted themselves in the manner hereinabove described," the Commissioner found that "it would be inconceivable that [Lloyd] was ignorant of their proclivities."[433] Similarly, after agents commenced proceedings against Hazel's Bar in Sharp Park, California, owner Hazel Nickola "admitted that there was considerable dancing of men with men" among her customers, but insisted that "it never occurred to her that they might be homos."[434] The ABC's lawyers dismissed Nickola's contentions as "incredulous[]," and the state court agreed. Based on the record, the judge concluded, "[m]any of the patrons of this tavern . . . committed acts that should have informed the licensee that they were sex perverts."[435]

One bar in Newark, NJ, tried to find strength in numbers. When Murphy's Tavern found itself fighting to defend its license against charges that it had served customers with "marked feminine characteristics," it introduced a parade of witnesses to chip away at the ABC's leap from its patrons' alleged effeminacy to the bar's knowing tolerance of sexual deviants.[436] Customer William R. Peters admitted that many of his fellow patrons at the bar "had fairly high

[432] In re Jesse Lloyd, NJ ABC, Bulletin 1045, 10.

[433] Ibid., 11.

[434] Nickola v. Munro, Respondent's Brief, February 28, 1958, 16, in Nickola v. Munro, Civ. No. 18014, Supreme and Appellate Court Records, California State Archive (Sacramento, CA).

[435] Ibid., 25; Nickola v. Munro, 162 Cal. App. 2d 449, 447 (1958).

[436] Murphy's Tavern, Inc. v. Davis, 70 N.J. Super. 87, 89, 90 (App. Div. 1961). For evidence of the customers' feminine affectations, see ibid., 89-93.

Although the investigators' reports included numerous instances of often-explicit homosexual conduct, the ABC's charges did not bother alleging "any immoral activity or lewdness itself." One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 50 N.J. 329, 333 (1967).

voices," but insisted that "he did not perceive any homosexuals" among them.[437] Bartenders Carmen Lubertazzi and Joseph Yeachschino acknowledged that "persons with feminine characteristics frequented the tavern," but they "denied that any of them were, to [their] knowledge, homosexuals."[438] Manager Jack Trachtenburg conceded the presence of "customers with effeminate characteristics," but protested that "the only way" to determine whether a patron was homosexual was "to be approached by one or to actually see them do something."[439] The court was unimpressed. The "concentrated mingling of persons manifesting these characteristics," the appellate division insisted of Murphy's customers' feminine demeanor, "is sufficient foundation for an inference as to their actual condition and tendencies." The effeminate "dress, mannerisms, speech, and gestures" of Murphy's patrons, in short, were more than enough to have alerted the bartenders to the presence of a degenerate clientele.[440]

With bar owners who denied their intimacy with the visual markers of homosexuality faring little better than their pre-war compatriots, defendants increasingly turned to a new tactic. If courts accorded little credibility to their own testimony questioning the stereotype of the self-revelatory homosexual body, bar owners surmised, perhaps they might listen to more established expert authorities on the subject. And fortunately for defendants, the nation's leading experts on homosexuality were increasingly willing to support their controversial claims.

From the military's experiments with psychiatrist screenings to the publication of the Kinsey's shocking statistics on American sexual conduct, the growing visibility of scientific researchers on homosexuality in the late 1940s did not simply disrupt the public's popular

[437] Murphy's Tavern, Inc. v. Davis, 70 N.J. Super. 87, 91 (App. Div. 1961).

[438] Ibid., 91-92.

[439] Ibid., 92.

[440] Ibid., 95.

presumptions about sexual deviance. It also expanded the prestige of those researchers themselves. Although the military's induction stations failed at screening out suspected homosexuals, its collaboration with professional psychiatrists nevertheless brought newfound attention to a class of specialists in the subject of sexual deviance.[441] "As a result of the war," observed William Menninger, psychiatric adviser to the surgeon general of the army, in 1948, "the public interest in the profession of mental health and illness and the challenge of that interest to professional psychiatry is at an all-time high."[442] The Kinsey Report only corroborated the public's growing conception of sexuality as a matter of professionalized study. Bloodlessly empirical and rife with discoveries that contradicted readers' common assumptions about sex, Kinsey helped recharacterize human sexuality from a purely private concern to "a fit subject of scientific investigation."[443] By the dawn of the Cold War, American sexual behavior—not least, sexual deviance—was increasingly being claime as expert territory.

For many law enforcement agencies, the growing industry of experts on the social problem of degeneracy could not have come at a better time. Beyond the new regulatory arm of the state liquor boards, police departments in the 1950s witnessed an expansion in specialized vice squads and sex details assigned to ferret out sexual deviance in the nation's cities. Inspired largely by the prominent media coverage of violent assaults in the late 1930s, the initial trend began in 1937 in New Jersey, where the State Superintendent organized a bureau to tackle the "increasing prevalence of sex crimes," and spread quickly following WWII, as waves of

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[441] D'Emilio, *Sexual Politics, Sexual Communities*, 17.

[442] William C. Menninger, *Psychiatry in a Troubled World* (New York: Macmillan Company, 1948), vii, quoted in D'Emilio, *Sexual Politics, Sexual Communities*, 17. See also George Chauncey, "The Postwar Sex Crime Panic," in *True Stories from the American Past*, ed. William Graebner (New York: McGraw Hill, Inc., 1993), 166.

[443] D'Emilio, *Sexual Politics, Sexual Communities*, 37. For the conflicted public response to the Kinsey report, including some readers' resistance against its claims of authority, see Sarah E. Igo, *The Averaged American: Surveys, Citizens, and the Making of a Mass Public* (Cambridge: Harvard University Press, 2008), Chapters 5 and 6.

unattached men—homosexual and otherwise—scattered into urban centers across the nation.[444] San Francisco debuted a specialized "Sex Detail" in 1948 under the helm of none other than the Black Cat's chief investigator, Frank Murphy.[445] Los Angeles gained national prominence for its specialized "Sex Crimes Bureau," headed for many years by the ever-helpful J. Paul de River.[446] Other cities were soon happy to join, adding vice units alongside less salacious niche departments in their police force.[447]

Eager to improve both their efficiency and prestige, local police departments supplemented the new emphasis on specialization with an increasing rigor in officer education.[448] The years after WWII witnessed an explosion in training academies and university programs devoted to criminology, police science, and law enforcement. By the end of the 1940s, nearly every police department in the nation maintained a dedicated training facility for its recruits. A decade later, 77 academic institutions across the country offered specialized programs in criminology and criminal justice.[449] The priority placed on expert training extended to the newly minted sex details. In October of 1953, the Philadelphia Police Association retained an FBI agent to research and compile a nine-hour course on the subject of "Sex Crimes

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[444] "Sex Crime Bureau Set up By Jersey," *New York Evening Post*, December 20, 1937.

[445] "S.F.P.D. Has New Inspectors Detail," *San Francisco Police and Peace Officer's Journal*, December 1948, 19.

[446] Chrysanthi S. Leon, *Sex Fiends, Perverts, and Pedophiles: Understanding Sex Crime Policy in America* (New York: New York University Press, 2001), 38-40.

[447] For general spread of specialized units in the 1950s, including sex crimes units, see Robert M. Fogelson, *Big City Police* (Cambridge: Harvard University Press, 1977), Chapter 7.

[448] For the preoccupation with boosting police efficiency, see Samuel Walker, *A Critical History of Police Reform: The Emergence of Professionalism* (Lexington: Lexington Books, 1977), 141-43; Thomas J. Deakin, *Police Professionalism: The Renaissance of American Law Enforcement* (Springfield: Charles C. Thomas, 1988), Chapter 15. For the industry's preoccupation with prestige, see Christopher P. Wilson, C*op Knowledge: Police Power and Cultural Narrative in Twentieth-Century America* (Chicago, University of Chicago Press, 2000), 63-64; Fogelson, *Big City Police*, 147-48.

[449] Walker, *A Critical History of Police Reform*, 161-62; Fogelson, *Big City Police*, 182; Deakin, *Police Professionalism*, 208.

Investigations." After the program played with resounding success for 4,000 officers across the state, the association looked into preparing an "advanced course" for the coming year, focusing especially on the "homosexual ramifications" of sex crimes.[450] In the summer of 1954, the roster of training courses listed by the San Francisco Police and Peace Officers Association included a ten-hour class on "methods of investigating reported sex crimes."[451] By 1958, Bay Area officers were expected to have a rough familiarity with the taxonomy of the sexual deviant; a multiple choices quiz in the Association's monthly journal tested its readers on the definitions of "Masochism" and "Necrophilia" alongside questions on ballistics and the post-mortem lividity of corpses.[452]

Unsurprisingly, where police required more substantive insight into sexual degeneracy, they found themselves turning to the most prominent new social authorities on the topic: professional psychiatrists. The growing partnership between law enforcement and professional psychiatry in the mid-twentieth century emerged perhaps most conspicuously in a wave of controversial new legislation targeting "sexual psychopathy." The phenomenon first emerged in the late 1930s, when a spike in media coverage of violent sex crimes—though not, most likely, in the incidence of violent sex crimes themselves—created a public outcry for more stringent policing against sexual predators. As in the case of New Jersey's sex crime bureau, public officials felt the need to respond quickly, but not all were sure that the police's existing resources were up to par. Struggling to comprehend the gruesome attacks and sensitive to the difficulties of convicting sex offenders, whose victims were often unable or unwilling to testify, lawmakers

[450] John W. Watahovich, "A Training Program for Sex Crime Investigation," *San Francisco Police and Peace Officer's Journal*, September 1954, 16-17.

[451] "Police Officer's Training," *San Francisco Police and Peace Officer's Journal*, July 1954, 50.

[452] "Helpful Questions for Examinations," *San Francisco Police and Peace Officer's Journal*, February-March 1958, 4.

turned to the rising field of psychiatry for guidance.[453] By the early 1950s, numerous state and local legislatures had convened formal commissions of psychiatrists and criminologists to help formulate new laws tailored to the special problems of violent sex offenders.[454] As one psychologist enlisted by the Detroit police force would later surmise, faced with the specter of the sexual criminal, "the police investigator feels insecure and welcomes the advice and assistance of the skilled psychologist or psychiatrist."[455]

Their efforts led to the creation of a new legal category disguised as a medical one. The "sexual psychopath," as he came to be known, was a psychological prototype characterized by severe "psycho-sexual immaturity," unable to control his basest and most basic sexual instincts.[456] Defined by his stunted emotional health, the psychopath was best entrusted to the wisdom of the medical profession. The typical sexual psychopath law drafted in these years authorized indefinite psychiatric confinement for any suspected sex offenders considered to pose a high risk of recidivism—even absent a formal conviction.[457] First adopted by California and a

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[453] For a history of the sex crime panic, see Freedman, "'Uncontrolled Desires,'" 83-106, especially 92-94; Stephen Robertson, *Crimes Against Children: Sexual Violence and Legal Culture in New York City, 1880-1960* (Chapel Hill: University of North Carolina Press, 2005), Chapter 10.

[454] Freedman, "'Uncontrolled Desires,'" 94; Robertson, *Crimes Against Children*, 205; Leon, *Sex Fiends*, 25-53. For examples of the states' collaborations with psychiatrists, see Joint State Government Commission, Pennsylvania General Assembly, Sex Offenders: A Report of the Joint State Government Commission to the General Assembly of the Commonwealth of Pennsylvania (Harrisburg, 1951); Paul W. Tappan, The Habitual Sex Offender: Report and Recommendations of the Commission on the Habitual Sex Offender, New Jersey (1950); Bernard C. Glueck, Jr., Final Report: Research Project for the Study and Treatment of Persons Convicted of Crimes Involving Sexual Aberrations, June 1952 to June 1955 (Albany, 1965).

[455] Alan Canty, "Sex Deviation and Crime!," *San Francisco Police and Peace Officer's Journal*, April-May, 1957, 37.

Warden Richard McKee, of New York's Riker's Island Penitentiary, corroborated that officials hoped "draw out from the eminent psychiatrists . . . some advice as to how to treat the ingrained offender." Robertson, *Crimes Against Children*, 205.

[456] Betram Pollens, *The Sex Criminal* (New York: Macaulay Company, 1938), 39. See also Freedman, "'Uncontrolled Desires,'" 90-91; Robertson, *Crimes Against Children*, 209-10.

[457] Freedman, "'Uncontrolled Desires,'" 83-84; Robertson, *Crimes Against Children*, 218; Pennsylvania Joint State Government Commission, Sex Offenders, 4.

handful of Midwestern states in the late 1930s, by the mid-1950s sexual psychopath laws had entered the books in over twenty states.[458]

Medical professionals initially welcomed the chance to bring some greater scientific enlightenment to the state's treatment of sex offenders. "Science must come to the rescue!" declared criminologist Bertram Pollens in 1938.[459] Proper treatment of sexual offenders, psychologist Sheldon Glueck agreed, required "intense psychological, psychiatric, and social examinations of each offender."[460] As sexual psychopath laws spread through the nation, however, professionals grew increasingly uncomfortable with the public's inflated trust in a psychiatric solution to the violent sex offender. Critics objected to the vagueness of the "sexual psychopath" as a medical category. They denounced the draconianism of confining suspects without the procedural protections of a criminal trial.[461] And they questioned whether psychiatric therapy could genuinely provide an antidote to the recidivist offender.[462] In practice, indeed, there was little evidence that sexual psychopath laws helped prevent the types of crimes that had outraged the public: most frequently, they were enforced against minor offenders and non-violent homosexuals.[463] Proliferating despite professional psychiatrists' own skepticism, the sexual psychopath laws passed in the post-war period were thus a distinctly popular creation: a

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[458] Freedman, "'Uncontrolled Desires,'" 92, 97; William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge: Harvard University Press, 1999), 42, 60-61.

[459] Pollens, *The Sex Criminal*, 13.

[460] Sheldon Glueck, "Sex Crimes and the Law," *The Nation*, September 25, 1937, 320.

[461] Joint State Government Commission, Sex Offenders, 5, 11; see also Freedman, "'Uncontrolled Desires,'" 98; Robertson, *Crimes Against Children*, 217, 222.

[462] Freedman, "'Uncontrolled Desires,'" 95; Robertson, *Crimes Against Children*, 207.

[463] As numerous historians have noted, while the sensational assaults that motivated sexual psychopath legislation were almost exclusively heterosexual, the core effect of the new legislation was to provide the public with a newly sinister framework for understanding—and fearing—the nonviolent urban homosexual. Freedman, "'Uncontrolled Desires,'" 94, 103-04; Andrea Friedman, "Sadists and Sissies: Anti-Pornography Campaigns in Cold War America," *Gender and History*, Vol. 15, No. 2, August 2003, 213-239, 205-06; Robertson, *Crimes Against Children*, 215-16.

reflection of the public's and the justice system's embrace of scientific expertise as a tool to refine law enforcement against sexual deviance. The sexual psychopath debates revealed a growing acceptance of human sexuality, and deviant sexual behavior specifically, as a realm to be illuminated and explained by specialized medical authorities.[464]

The development did not go unnoticed by bar owners. While defendants charged with serving homosexual patrons in the 1930s had largely relied on common sense to challenge the states' evidence against them, bar owners seeking to discredit the popular stereotype of the self-revelatory homosexual now found themselves armed with a new body of scientific expertise supporting their claims. And they started, unsurprisingly, with the most prominent authorities available.

Not long after Alfred Kinsey's empirical study of sexual behavior invaded bookstores across the nation, the Kinsey Report began to provide an attractive tool for defendants seeking to defray allegations that they welcomes homosexual patrons on their premises. When California's SBE initiated disciplinary proceedings against the Black Cat in 1949, for example, a core debate in the litigation centered on the bar's attempts to introduce the Kinsey Report as expert authority on its behalf. Appending a copy of *Sexual Behavior in the Human Male* for the court's perusal, the Black Cat's briefs relied on an extended discussion of the Kinsey Report to question the weight of the SBE's evidence. "On the basis of the most recent and authoritive [sic] studies on the subject," insisted attorney Morris Lowenthal, an informed reader would question both the existence of "exclusively homosexuals" and "whether, even to the most trained observer, such a

[464] Leon, *Sex Fiends*, 42-43.

person can be identified."[465] Lowenthal took particular objection to the testimony of Officer Murphy, whose casual diagnosis of 50% of the Black Cat's patrons as sexual deviants flew in the face of more reliable data coming from the nation's leading expert on human sexual behavior. The naïve officer, Lowenthal derided, "fell into the category of persons claiming to identify [homosexuals] by their 'effeminate' appearance, something that Kinsey says cannot be done."[466] At a time when sexual deviance had become recognized as the subject of increasingly sophisticated and nuanced medical study, Lowenthal concluded, courts must not "accept the wholly erroneous judgment of an untrained police officer in place of scientific or actual facts on the subject."[467]

The SBE derided the suggestion that the Kinsey Report had any bearing on its disciplinary proceedings. Reminding the court that a revocation proceeding "was not a medical clinic, nor a sociological seminar," the agency was content to let Lowenthal's "presumptuous[]" demands that a court wade through reams of statistics on homosexual behavior in order to adjudicate a license suspension "fall on their own weight."[468] In the case of the Black Cat, that weight ultimately proved insignificant. The trial court summarily excluded Lowenthal's scientific evidence and the appellate division affirmed, both tribunals finding it "not . . . necessary give that phase of petitioner's argument any extended consideration."[469] And when

[465] Lowenthal also appended related articles by Morris Ernst and other scholars. Stoumen v. Reilly, Opening Brief for Appellant, 82-84, 98, in Stoumen v. Reilly, Civ.No. 14666, Supreme and Appellate Court Records, California State Archive (Sacramento, CA). For a brief history of the Black Cat case, see Boyd, *Wide Open Town*, 145-46.

[466] Stoumen v. Reilly, Opening Brief for Appellant, 100.

[467] Ibid., 97.

[468] Stoumen v. Reilly, Brief for Respondents, 89.

[469] Ibid., 31-e-f (quoting the trial court); Stoumen v. Reilly, 222 P.2d 678, 683 (Cal. Ct. App. 1950) (adopting opinion of trial court). Notably, unlike in New Jersey and New York, where defendants first defended their license suspensions before an internal panel before appealing to a state court, SBE prosecuted its charges directly before a trial court.

the *Stoumen* case reached the California Supreme Court, it declined to address the issue altogether. Reversing the bar's suspension on the grounds that section 58 required some additional evidence of disorderly conduct, rather than the mere presence of homosexual patrons, the state's highest court avoided wading into the scientific pedigree of Officer's Murphy's homosexual diagnoses.[470] (The parties, for their part, never abandoned the debate. When the newly formed ABC brought a second set of charges against the Black Cat in 1956, claiming that Stoumen's customers had solicited several policemen at the bar, Morris Lowenthal tried another shot at his original defense, insisting that the Kinsey Report rebutted the ABC's suggestion that Stoumen should have recognized his homosexual clientele. Defending the charges to the press, California's deputy attorney general disagreed: "It is our contention that anyone can tell a homosexual," he maintained.)

If the science of identifying homosexuals ultimately dropped out of the California courts, it hardly faded from the landscape of state liquor board prosecutions in the coming decade. On the east coast, where agencies like New Jersey's ABC and New York's SLA continued to suspend and revoke licenses on the basis of visual identification alone, bar owners persistently sought to introduce expert witnesses to challenge charges that they, like the states' investigators, should have recognized the homosexuals gathering on their premises. After its procession of lay witnesses failed to sway the ABC, for example, Murphy's Tavern introduced a psychiatrist from an Army Induction Center during the recent war to prove that the ABC's reports of high pitched voices and effeminate mannerisms among its customers provided "no direct proof of [their] homosexual nature." Based on his professional experience in that uniquely illuminating position, the doctor confirmed that "the determination of a homosexual cannot be made from

[470] Stoumen v. Reilly, 37 Cal. 2d 713, 717 (1951) (finding "it unnecessary to pass upon the other contentions made by the plaintiff with respect to the propriety of the board's action").

appearances" alone.[471] Meanwhile, Val's Bar in Atlantic City followed in the Black Cat's footsteps. After ABC's investigators relied on the flamboyant "behavioral characteristics" of Val's customers to class them as apparent homosexuals, Val's owners enlisted Wardell B. Pomeroy, principal researcher at the Kinsey Institute and author of several books on homosexuality, to lend some scientific credibility to their defense. At trial, Pomeroy discussed Kinsey's published studies on male and female sexual behavior, emphasizing the notorious statistics that a full 37% of American men had engaged in some homosexual activity. With regard to the ABC's evidence, he dismissed the suggestions that laymen like the agency's investigators could be trusted to classify homosexual men on sight. While conceding, in his own professional opinion, that the quirks described by the ABC's investigators led him to suspect that Val's patrons were "apparent homosexuals," Pomeroy nevertheless insisted that it "could not be said from mere observation that any given individual was a homosexual."[472]

Even in California, where *Stoumen* restricted the ABC's ability to rely on visual evidence against homosexual-friendly bars, it did not tarnish the appeal of the expert witness. While their counterparts on the east coast challenged state liquor agents' classifications of their allegedly homosexual patrons, California bar owners prosecuted for permitting lewd and perverse conduct on their premises introduced expert testimony to challenge the ABC's assessment of "perversion" itself. The Black Cat itself rehearsed an early iteration of the argument, deriding the "common and popular error" that a group of homosexual patrons might carry with them some intrinsic "potentialities for evil and immorality."[473] Recently described "by leading

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[471] Murphy's Tavern, Inc. v. Davis, 70 N.J. Super. 87, 95, (App. Div. 1961); "Three Taverns Challenge ABC Homosexual Rulings," Asbury Park Press, August 27, 1967, "Bars" Folder, Ephemera Collection, International Gay Information Center, New York Public Library.

[472] One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 50 N.J. 329, 334-35 (1967).

[473] Stoumen v. Reilly, Opening Brief for the Appellant, 81-82.

anthropologists . . . as one of the greatest contributions to science of all time," Lowenthal reminded the court, the Kinsey Report denounced the facile supposition that a "mere meeting" of homosexuals "would of necessity have any consequences of an evil nature."[474] Other defendants in the coming years would took up a similar refrain, whether under the short-lived section 24200(e) or the prohibition on "disorderly houses."[475] After the ABC suspended Hazel Nickola's license for providing a "resort for . . . sexual perverts" under section 24200(e), Nickola insisted that the men allegedly dancing together in her tavern failed to qualify as "perverts" under the act.[476] The ABC had made no claims that her customers had engaged in any illegal sexual acts on her dance floor, Nickola protested, nor had it presented any "testimony as to . . . [their] psychological make-up." Lacking a more rigorous understanding of "what constitutes a homosexual," the ABC's case fell far short of demonstrating that her patrons could be classed under the rubric of "perversion."[477] The owners of San Francisco's 585 Club took Nickola's argument one step further. After the ABC revoked their license based on evidence of male patrons kissing, holding hands, and otherwise "acting in an effeminate manner," Alice and William Morell offered to introduce a professional psychologist to testify on the disjunctions between sexual "perversion," properly understood, and the harmless horseplay witnessed among

[474] Stoumen v. Reilly, Appellant's Petition for a Rehearing by the Supreme Court, 72, in Stoumen v. Reilly, Civ.No. 14666, Supreme and Appellate Court Records, California State Archive (Sacramento, CA).

[475] Although section 58, prohibiting bar owners from operating disorderly houses, was codified and primarily enforced in the 1950s as section 25601 of the Business Code, for convenience I continue to refer to it by its section number in the Alcoholic Beverage Control Act.

[476] Nickola v. Munro, Appellant's Opening Brief, 12. in Nickola v. Munro, Civ. No. 18014, Supreme and Appellate Court Records, California State Archive (Sacramento, CA). For the facts of the case, including the ABC's evidence against Nickola, see Nickola v. Munro, 162 Cal. App. 2d 449, 451-52 (1958).

[477] Nickola v. Munro, Appellant's Opening Brief, 15.

their customers.[478] The ABC objected: because the witness was not present at the 585 Club at the time of the events, her purely theoretical testimony was irrelevant to the case.[479] Yet the Morells insisted that the hazy "boundaries of moral conduct" involved in diagnosing sexual perversion justified the input of an expert witness. Absent such professional guidance, persons untrained in the psychology of sexual deviance—including the ABC's agents and, by extension, the judges of the court—were unqualified to distinguish the truly perverse from the "innocuous and equivocal."[480]

Understandably, at a time when police departments across the nation actively enlisted professional psychiatrists to help identify the sexual psychopath, bar owners may have hoped that courts would likewise place the diagnosis of homosexuals into expert hands. Yet defendants who anticipated a similarly warm reception to their expert witnesses were in for a disappointment. Lawmakers and policemen during the sex crimes panic may have been happy to invoke the expertise of medical professionals to expand their enforcement efforts against suspected sexual predators. But both investigators and the courts proved far more resistant when bar owners invoked the authority of medical expertise to curtail their anti-homosexual campaigns.

Perhaps most obviously, the California courts took poorly to bar owners' reliance on expert testimony to complicate the moral status of homosexuality. After all, bar owners'

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[478] Morell v. Dep't of Alcoholic Beverage Control, 204 Cal. App. 2d 504, 515-16 (1962). The Morells' psychologist was prepared to testify that "homosexual behavior is not uniquely different" from heterosexual intimacy, and consequently that the 585 Club's displays of homoerotic affection were not necessarily lewd, obscene, or "acts of perversion" within the meaning of the alcoholic beverage laws.

For the ABC's evidence against the bar, ibid., 508. For the Morells' attempts to introduce the psychiatrist, see ibid., 506-10.

[479] Ibid., 515.

[480] Ibid., 516.

attempts to turn the morality of homosexuality into an expert question contradicted the very purpose of morals legislation: to define the outer boundaries of social behavior tolerated by the general public. That public, defendants were reminded, still chose to criminalize homosexual behavior as a felony. As the court of appeals noted in *Stoumen*, "the views of the citizens . . . on [the] subject [of homosexuality] are to be found in Sections 286 and 288a of the Penal Code."[481] Hazel Nickola's and Alice and William Morell's hermeneutic debates about the meaning of a "sexual pervert" fared no better. The appellate division dismissed the suggestions that the term "pervert" was too vague to provide the basis of a criminal statute. Just like "obscenity," the subject of a recent landmark ruling by the Supreme Court, the term "'sex pervert' ha[d] a core meaning to the average person."[482] And there was no doubt that homosexual activity—a practice deemed "aberrant . . . by the great majority of people—fell "well within the core of meaning of th[at] term."[483] In context, the court reviewing Nickola's appeal did "not find it necessary to discuss the psychological aspects of homosexuality."[484] Similarly, the judge presiding over the 585 Club's proceedings agreed that Morell's expert testimony aiming to "contradict the clear, certain, and commonly accepted understanding of [homosexual] behavior was immaterial."[485] For all their medical training and experience, professional psychiatrists simply lacked authority to weigh in on a moral judgment defined, intrinsically, by lay consensus rather than rarified expertise.

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[481] Stoumen v. Reilly, 222 P.2d 678, 683 (Cal. Ct. App. 1950).

[482] Nickola v. Munro, 162 Cal. App. 2d 449, 456 (Cal. Ct. App. 1958) (quoting Kershaw v. Dep't of Alcoholic Beverage Control of Cal., 155 Cal. App. 2d 544, 549 (1957)).

[483] Ibid.; Morell v. Dep't of Alcoholic Beverage Control, 204 Cal. App. 2d 504, 517-18 (1962)

[484] Nickola v. Munro, 162 Cal. App. 2d 449, 457 (Cal. Ct. App. 1958).

[485] Morell v. Dep't of Alcoholic Beverage Control, 204 Cal. App. 2d 504, 518 (1962).

California's rejection of expert testimony may have been a foregone conclusion, yet courts' resistance to the input of expert researchers extended far beyond the inherently democratic debates over the citizen's sexual mores. Even with regard to the more empirical issue of the homosexual's physical demeanor, liquor boards and appellate courts refused to acknowledge the purported wisdom of expert witnesses over the commonplace assumptions of lay officers. In New Jersey, Wardell Pomeroy's testimony on the hazards of identifying homosexual men on sight made few inroads with the court: the judge credited the ABC's evidence that Val's Bar's customers sported telltale "behavioral characteristics" and affirmed its suspension.[486] The Army psychiatrist who appeared on behalf of Murphy's Tavern was no more persuasive. "It should not be thought that the court is callous to the problem of the homosexual, medically or socially," disclaimed the appellate division. Yet the enforcement of New Jersey's Alcoholic Beverage Act, that crucial bulwark of morality and decency in places of public accommodation, occasioned "neither the curative approach of the physician nor the analytic view of the sociologist."[487] Whatever the social value of professional research into the nuances of the deviant psychology, the significance of the homosexual's flamboyant physical demeanor was far too well established to require expert intervention.

The ABC's skepticism of purported "experts" in the task of identifying homosexuals emerged in full relief in the agency's proceedings against the N.Y. Bar in 1955. Operated by Adele Kaczka in Paterson, New Jersey, the N.Y. Bar became the subject of an extended

[486] See One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 50 N.J. 329, 330 (1967) (hearing the case on appeal from the lower court's affirmance).

[487] Murphy's Tavern, Inc. v. Davis, 70 N.J. Super. 87, 96 (App. Div. 1961).

surveillance campaign by the ABC in the spring of 1954.[488] Between March and December of that year, six investigators visited the bar almost a dozen times, arriving at night and sometimes staying well into the early mornings. In their hours under Kaczka's roof, the ABC's agents observed a range of suspicious conduct among the bar's predominantly male patrons. The men embraced, held hands at the bar, and danced "ballroom" style by the jukebox in the bar's back room. They were also conspicuously feminine. Investigators reported that "60% to 90%" of the bar's male patrons "conducted themselves in an effeminate manner, walking, talking and moving their arms and bodies in a manner common to women, puckering their lips and speaking in high-pitched voices."[489] Faced with such damning evidence, Kaczka initially pleaded *non vult* to charges under Rule 4 and Rule 5. Soon, however, Kaczka changed her mind. Dismissing her original attorney and retaining the zealous Leo J. Berg, she pleaded not guilty to both charges.[490]

At the hearing before the ABC, Kaczka's defense consisted of three witnesses. Taking the stand herself, Kaczka denied seeing any overly lascivious conduct on the barroom floor. Explaining that her bar was popular with "dancing teachers" who congregated to "teach each other different steps, Kaczka insisted that she saw "nothing wrong with males dancing together" in a public establishment.[491] A female bartender named Ester corroborated her testimony, claiming total ignorance of the overly erotic conduct investigators alleged occurred beneath her nose.[492] Dubious that the two women's testimony would prevail against the words of six

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[488] At the start of the proceedings, the bar was owned and defended by both Adele Kaczka and Angelina C. Trobiano, but the business partnership dissolved and Trobiano dropped out of the proceedings partway through. For convenience I identify the owner simply as Kaczka. In re Kaczka, NJ ABC Bulletin 1063, 1.

[489] In re Kaczka, NJ ABC Bulletin 1063, 1-4.

[490] Ibid., 2. For the identity of Kaczka's counsel, see ibid., 1.

[491] Ibid., 4.

[492] Ibid.

investigators, however, Berg also enlisted the aid of a more prestigious authority: a professional psychiatrist called as an expert witness.[493]

Having never visited the N.Y. Bar himself, the psychiatrist did not try to rebut the investigators' claims about the Kaczka's customers' effeminate demeanor. Instead, he insisted that the agents' observations, credited as true, could not have reasonably alerted Kaczka and her staff to the presence of homosexual men on their premises. Establishing his credentials on the subject, the psychiatrist began by offering a definition of homosexuality not unlike the popular paradigm of the sexual psychopath: the homosexual, he testified, was an individual who "has not progressed to the so-called mature level of sexual adjustment in our society, namely, the heterosexual level." Because the homosexual was defined by stunted psychosexual development, rather than any intrinsic femininity, and because there was "no direct correlation between a man's psychological makeup and his physical makeup," the homosexual did not typically reveal his erotic predilections through any outward physical signs. Kaczka's psychiatrist emphasized the medical expertise needed to accurately diagnose a man of homosexuality: although some stereotypically flamboyant behavior could certainly raise a suspicion of sexual deviance, true "detection would be difficult for an untrained person."[494] On this basis, Berg concluded that the ABC's six investigators failed to make out a case for suspending Kaczka's license. Laymen untrained in the nuances of sexual deviance, the agents "were not qualified" to testify that the N.Y. Bar's patrons were homosexual.[495]

On cross-examination, ABC attorney Edward Ambrose presented Kaczka's expert witness with a hypothetical. Ambrose summarized the bulk of the investigators' testimony

[493] Ibid.

[494] Ibid., 4-5.

[495] Ibid., 5.

against Kaczka's patrons: the dancing, the swishing walks, the high-pitched voices, the puckered lips. Given these facts, Ambrose demanded, would the witness himself consider the patrons to be "apparent homosexuals or apparent female impersonators or both"?[496] In his direct testimony, the psychiatrist had decried the facile stereotype, so misleading in the hands of layman, of the self-revelatory homosexual. Yet much like Pomeroy at the proceedings for Val's Bar, he retained a certain hubris in his own professional judgment. If *he personally* had witnessed the facts described at the hearing, he acknowledged, he would suspect that the men around him were indeed homosexually inclined.[497]

The witness had presumably intended to contrast his professional diagnosis against the investigators' more primitive speculations, but as far as the ABC's hearing officer was concerned, that concession doomed the case. How could Berg plausibly maintain that the ABC's agents were "unqualified" to identify Kaczka's patrons as homosexuals, demanded director William Howe Davis, when his own professional psychiatrist had reached the same conclusion on the basis of the same visual evidence? "In light of the answer to the hypothetical question . . . given by the defendant's own expert witness," Davis concluded, "Counsel's contention is unsound."[498]

Davis's point may have been that Berg's attack on the investigators' credentials to diagnose homosexual men was irrelevant because, in the case at hand, those diagnoses turned out to be correct. If Kaczka's own expert witness confirmed that she had welcomed a regular crowd of homosexuals, after all, then she could hardly quibble with the sufficiency of the ABC's evidence against her. Yet what Davis's decision actually did was to deny the very possibility of

[496] Ibid. For the identity of the ABC's counsel, see ibid., 1.

[497] Ibid., 5.

[498] Ibid.

expertise in the task of identifying homosexuals. If a trained professional could diagnose a homosexual men based on a set of visual and behavioral characteristics, Davis suggested, a layman could necessarily do just as well. The director apparently refused to consider the possibility that, faced with the same evidence, a trained professional could draw a more sophisticated diagnosis of a man's sexual desires than could a police investigator.

Davis's dismissiveness toward the idea of a meaningful hierarchy in the science of homosexual detection would be echoed just a few years later in the case against the Paddock Bar. Insisting that the physical flamboyance of the Paddock Bar's regular customers should have alerted bartenders to their inner erotic deviance, the court observed that laymen were hardly alone in depending on such outward proxies to classify undesirables: "The psychiatrist," it noted, "constructs his deductive conclusions largely upon the ostensible personality behavior and unnatural mannerisms of the patient."[499] By the court's reading, the psychiatrist's professional inferences, drawn from his visual and behavioral observations of a patient in close quarters, were of a kind with a bartender's presumed ability to infer his customers' sexual preferences from their outward demeanor at a bar. At a time when politicians and police departments across the country touted—often against their own protests—the unique competence of medical professionals over the diagnosis and treatment of sexual deviance, regulatory agencies and courts continued to balk at the suggestion that an expert could improve upon the layman's ability to identify a homosexual on sight. The ability to detect homosexual men based on their public conduct and demeanor, it appeared, was an entry-level skill.

State liquor boards' persistent characterization of homosexual identification as an intrinsically lay talent presented an aberration within a general trend of professionalization

[499] Paddock Bar, Inc., 46 N.J. Super. 405, 408-09 (N.J. Super. Ct. App. Div. 1957).

among American police departments in the 1950s. Badly damaged by the nation's failed experience of Prohibition, which revealed municipal police departments as bastions of corruption and incompetence to much of the urban public, police agencies in the mid-twentieth century sought to improve their social standing by recasting law enforcement as a rarefied profession. Led by the IACP, with its emphasis on laboratory work and specialization, police departments commonly drew attention to the patrolman's forensic training and honed powers of observation in order to bolster their authority before the public.[500] In the case of the alcoholic beverage laws, however—at least as far as ferreting out homosexuals was concerned—the trend was inverted. Far from defending the investigation of homosexuality in popular bars and restaurants as a task for trained professionals, liquor boards denied both the need and even the possibility of professional "expertise" in the task of detecting alleged sexual degenerates. As bar owners challenged their competence to bring charges against bars that allegedly served or tolerated any "disorderly" conduct among their homosexual patrons, liquor agencies like New Jersey's ABC and New York's SLA legitimated their actions, not by claiming any unique fluency in the markers of sexual deviance, but by invoking the public's shared wisdom about the nature of the deviant body. And they insulated themselves from negative comparison against a recognized class of social "experts" by endorsing the credibility of that popular wisdom: by defending the public's common-sense knowledge about homosexuality against the disruptive, counterintuitive interventions of scientific and medical researchers.

No matter how anomalous against the backdrop of the police's professionalization efforts in the mid-twentieth century, however, liquor agencies' rejection of the very possibility of expertise in the field of classifying homosexuals was an equally expedient and inevitable

[500] See Introduction, especially 10-12.

outgrowth of the state's disorderly conduct laws in these years. With professional psychiatrists and statisticians joining the ranks of the certified social experts in the early 1950s, after all, liquor agencies could not realistically have pitted their police witnesses against such credentialed authorities and emerged victorious; in a direct contest of expertise, the investigators would undoubtedly have lost. Conveniently, however, neither the SLA or the ABC had to confront that challenge, because their enforcement of disorderly conduct laws—prohibiting bar owners from "permitting" lewd conduct on their premises or catering to "known" sexual degenerates—had long centered on the assumption that identifying homosexuals was an unremarkable lay skill. Long before an industry of psychiatrists and statisticians began to question the public stereotype of the self-revelatory homosexual body, liquor agencies had both relied on that stereotype to initiate charges against delinquent bar owners and, through the body of their growing precedent, codified that stereotype into law. By the time that bar owners like Adele Kaczka tried to produce "expert" witnesses to question the layman's purported mastery over identifying crowds of homosexual patrons, the presumption had become far too ingrained—and far too central—in the agencies' legal regime to brook serious contention in the courts.

In this sense, the ABC's and the SLA's reliance on the popular stereotype of the self-effeminate homosexual body may have had an effect well beyond the agency's disciplinary hearings. In the early twentieth century, the stereotype of the effeminate homosexual fairy was a social truth disseminated by a combination of scientific and popular cultures—the joint efforts of doctors like George Henry and commercialized entertainments like the pansy cabaret. Following the end of Prohibition, that social truth was sustained partly through the operations of state law enforcement agencies like the SLA and the ABC. Having first endorsed the paradigm of the flamboyant homosexual in the 1930s as a core tool in their enforcement efforts against wayward

bar owners—a helpful presumption to meet their otherwise demanding statutory burdens—state liquor boards helped buffer that paradigm in the 1950s when it came under "expert" attack by a competing body of scientific authority, penalizing any bar owners who dared question its scientific pedigree. As a new industry of experts tried to raise a national debate over the true medical and social nature of homosexuality, in short, the police powers exercised by the states' liquor agencies provided a compelling ally for one—more populist and more conservative—side. In the early twentieth century, the popular prototype of the homosexual fairy was a fact promulgated among the American public by the leisurely spectacles of drag balls and fairy cabarets. For many business owners and employees in the mid-twentieth century, it was a fact confirmed, on pain of crippling civil penalties, by the regulatory arm of the state.

Conclusion

By the time the Twenty-First Amendment swept state-sanctioned alcohol—and the state—back into urban American nightlife, the fairy spectacles of prior years had faded from the nation's most popular marquees. With the end of World War II, as the military's disciplinary boards clung to their expanded role in regulating coastal cities, state liquor agencies launched an increasingly enthusiastic campaign to purge the visible signs of homosexuality from the public sphere.

Yet as bar owners and homosexual patrons themselves soon learned, the season for fairy-watching in the metropolis was hardly over. Far from insulating the respectable public from any exposure to scandalous spectacles of the pansy craze, the campaigns launched by agencies like New York's SLA, New Jersey's ABC, and California's SBE crucially depended on the public's lasting intimacy with those flamboyant entertainments and their telltale visual clues. In the 1930s, alcohol control boards relied on the ordinary man's presumed fluency in the telltale signs of homosexuality to demonstrate when bars "knowingly" catered to a homosexual clientele. In the 1950s, they used that same fluency as a barometer of when a homosexual crowd in a bar had turned "disorderly." Regardless of the legal framework at play, one trend remained the same: the lay public's intimacy with the visual signifiers of homosexuality—first developed as internal codes within certain homosexual subcultures and then popularized among the American public through the 1930s pansy craze—provided a central tool in the state's campaigns against homosexual-friendly bars following the end of Prohibition. And that intimacy provided a central

tool, moreover, in the state's efforts to *legitimate* those campaigns before the public and the courts. At a time when credentialed experts and professionals gained increasing currency in the public debates over sexual deviance, state liquor boards justified their regulatory efforts by defending the detection of homosexuals as a matter of uniquely lay competence. What testimony could be more reliable in the courtroom, after all, than the democratic truth: that which everyone already knew?

Eventually, investigators would find that their appeals to common sense would lose their persuasive power. Under the dim lights of the barroom, the states' investigators may have found it convenient to defend the layman's competence to recognize a homosexual on sight. Yet on the streets, officers assigned to protect the urban public from the corrupting influence of sexual degeneracy soon realized that the democratic eye of the average man was not always equipped to get the job done.

Part III. Decoy Enforcement and the Rise of Ethnographic Expertise

"The language of homosexual life has in it an element of cant—
the keeping in secrecy from the out-group that which is clear to the in-group."
– Donald Webster Cory, *The Homosexual in America*, 1951[501]

In 1967, sociologists Donald Black and Maureen Mileski alerted their colleagues to an "unexploited" new strategy for the study of homosexual communities: "passing as deviant." Wary of social disapproval or legal sanction, most anathematized subcultures like urban homosexuals tried to "control information about themselves so that it [was] more or less unavailable to outsiders." Yet with a bit of methodological innovation, the very "social organization of deviance [that] hinders the investigator . . . can be mobilized . . . in the interests of his research." The key to entry was learning to blend into the scenery: to use the very ethnographic knowledge gathered by the competent sociologist to infiltrate the community he hoped to study.[502]

Black and Mileski's intervention was well timed. Long dominated by physicians, physiologists, and, most recently, expert psychiatrists, by the end of the 1950s the scientific debate on homosexuality increasingly welcomed the input of a trained class of sociologists and ethnographers. Drawing its earliest roots from the 1920s, when Professor Ernest W. Burgess first introduced the study of sexual deviance into his graduate seminars on social pathology at the

[501] Donald Webster Cory, *The Homosexual in America: A Subjective Approach* (New York: Greenburg, 1951), 103.

[502] Donald J. Black and Maureen A. Mileski, "Passing as Deviant: Methodological Problems and Tactics," Center for Research on Social Organization, Department of Sociology, University of Michigan, Working Paper #36 (November 1967), 2, 5.

University of Chicago, and subsequently taken up by homophile researchers themselves, the systematic analysis of the social structures of gay life became a prominent scientific endeavor with Evelyn Hooker, a trained psychologist introduced by a close friend to the world of the Los Angeles Mattachine Society.[503] In 1956, Hooker broke ground with her "Preliminary Analysis of Group Behavior of Homosexuals," which dared examine homosexual men not as a medical anomaly but as a social "minority": a "world [with] its own language . . . literature, group ways, and code of conduct."[504] At a time when even the most "enlightened" medical discussions of homosexuality often relied on the pathologizing rhetoric of psychological illness, Hooker's proposal to view homosexual men as members of a functional urban community helped open the door to a uniquely tolerant scientific discourse on sexual deviance.[505]

By the 1960s, Hooker's "ethnographic field study" of homosexuality had been taken up by sociologists across the nation, who focused on excavating not the origins or illnesses but the codes and group dynamics of homosexual life. Some included homosexuality as one case study

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[503] On Burgess's sociological study of homosexuality at the University of Chicago, see Chad Heap, "The City as a Sexual Laboratory: The Queer Heritage of the Chicago School," *Qualitative Sociology*, Vol. 26, No. 4 (Winter 2003), 467; Chad Heap, *Homosexuality in the City: A Century of Research at the University of Chicago* (Chicago: University of Chicago Library, 2000), 9-11. For insider cultural accounts by homophiles, of varying scientific bent, see Cory, *The Homosexual in America*; David L. Freeman, "The Homosexual Culture," *ONE*, Vol. 1, No. 5 (May 1953), 8-11 (defining "homosexual culture" as "the manner of speaking and thinking, the beliefs, traditions, and attainments of the homosexual minority"); Helen P. Branson, *Gay Bar* (San Francisco: Pan-Graphic Press, 1957); Susanne Prosin, "The Homosexual Minority," *ONE*, Vol. 10, No. 6 (June 1962), 9-10; Donald Webster Cory and John P. LeRoy, *The Homosexual and his Society: A View From Within* (New York: Citadel Press, 1963). Cory, whose true name was Eward Sagarin, would become trained as a proefssional sociologist—and grow increasingly conservative—in the 1960s. Martin B. Duberman, *Left Out: The Politics of Exclusion* (Cambridge: South End Press, 2002), 59-94, esp. 83. For Hooker's introduction to the Mattachines, see Henry L. Minton, *Departing from Deviance: A History of Homosexual Rights and Emancipatory Science in America* (Chicago: University of Chicago, 2002), 220-226.

[504] Evelyn Hooker, "A Preliminary Analysis of Group Behavior of Homosexuals," *Journal of Psychology*, Vol. 42 (1956), 221. Later influential publications and presentations included Evelyn Hooker, "The Adjustment of the Male Overt Homosexual," *Journal of Projective Techniques*, Vol. 21 (1957), 18-31; Evelyn Hooker, "The Homosexual Community," in *Sexual Deviance*, eds. John H. Gagnon and William Simon (New York: Harper & Row Publishers, 1967), 167-84.

[505] For the warm reception to and widespread influence of Hooker's studies, see Minton, *Departing from Deviance*, 229; John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (Chicago: University of Chicago, 1983), 141.

in a broader sociology of marginalized groups.[506] Others narrowed in, focusing on gay men's interactions with heterosexual "hustlers" or, as in Laud Humpheys's infamous *Tearoom Trade*, cruising in public bathrooms.[507] Most researchers simply tried to understand the gay world as its participants experienced it: the proliferating jargon bandied among friends and strangers, the demographics and social protocols of gay bars, the increasingly subtle codes and physical gestures exchanged by men trying to make new "contacts."[508]

Gathering this information was not always an easy task. Like all good ethnographers, social scientists studying the homosexual world strove to get an inside look at their subject, but they soon discovered that the sexual subcultures thriving in American cities had developed methods of excluding outsiders.[509] As sociologist Maurice Leznoff observed in an early study, the very codes that so fascinated sociologists also helped insulate homosexual groups from prying eyes, permitting the homosexual "to recognize, communicate with and reveal himself to

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[506] For an example, see Edwin M. Schur, *Crimes Without Victims: Deviant Behavior and Public Policy: Abortion, Homosexuality, Drug Addiction* (Englewood Cliffs: Prentice Hall, 1965). For a broader overview of generalist sociologists, see D'Emilio, *Sexual Politics, Sexual Communities*, 142-43.

[507] Albert J. Reiss, Jr., "The Social Integration of Queers and Peers," *Social Problems*, Vol. 9, No. 2 (Fall 1961), 102-120 (sociology of heterosexual "trade"); Michael Schofield, *Sociological Aspects of Homosexuality: A Comparative Study of Three Types of Homosexuals* (Boston: Little Brown, 1965) (focusing on convicts and non-convicts); Laud Humphreys, *Tearoom Trade: Impersonal Sex in Public Places* (Chicago: Aldine Publishing Company, 1970) (gay cruising); Barry M. Dank, "Coming Out in the Gay World," *Psychiatry*, Vol. 34 (May 1971), 180-197 (sociology of "coming out").

[508] Maurice Leznoff, "The Homosexual in Urban Society" (M.A. thesis, McGill University, 1954); Maurice Leznoff and William A. Westley, "The Homosexual Community," *Social Problems*, Vol. 3 (1956), 257-63; R.E.L. Masters, *The Homosexual Revolution: A Challenging Expose of the Social and Political Directions of a Minority Group* (New York: Julian Press, Inc., 1962); Sheri Cavan, "Interaction in Home Territories," *Berkeley Journal of Sociology*, Vol. 8 (1963), 17-32; Martin Hoffman, *The Gay World: Male Homosexuality and Social Creation of Evil* (New York: Basic Books, Inc., 1968); Carol Warren, *Identity and Community in the Gay World* (New York: John Wiley & Sons, 1974); Mary McIntosh, "The Homosexual Role," *Social Problems*, Vol. 16, No. 2 (1968), 182-92.

[509] For the significance of "insider" sociological research on gay culture, including interviews or personal observations, see Hooker, "The Homosexual Community," 169; Cavan, "Interaction in Home Territories," 22, footnote; Maurice Leznoff and William A. Westley, "The Homosexual Community," in *Sexual Deviance*, eds. John H. Gagnon and William Simon (New York: Harper & Row Publishers, 1967), 186.

[other] homosexuals, while at the same time concealing his identity from heterosexuals."[510] While homophile groups like the Mattachine Society cooperated with select allies like Hooker by opening their "respectable" membership to empirical observations, gathering data in worldlier environments like bars and cruising zones presented more barriers to entry.[511]

Here was where Black and Mileski hoped to make a difference. Beginning with Ernest Burgess's graduate seminars, resourceful researchers had tried appropriating homosexual cruising signals as tools for approaching their research subjects—asking a stranger for a cigarette, for instance, to initiate a personal interview.[512] Sociologists who hoped to gather meaningful information on homosexual groups in the 1960s, Black and Mileski insisted, had to adopt a similar strategy. Dropping "a bit of argot in one's speech," to take one example, could grease a sociologist's entry into a homosexual crowd.[513] In restaurants and nightspots, "sitting with one's back to the bar and facing the customers"—a basic cruising signal among gay men in these years—was "de rigueur."[514] Faced with the unique hurdles of gathering intimate information about a guarded sexual minority, the competent sociologist had to learn to "dress the

[510] Leznoff, "The Homosexual in Urban Society," 157; see also Cory, *Homosexual in America*, 103.

[511] Humphreys, *Tearoom Trade*, 24 ("Acceptance does not come easy, and it is extremely difficult to move beyond superficial contact in public places to acceptance by the group and invitations to pirate and semiprivate parties.").

[512] Heap, *Homosexuality in the City*, 23. For homophile cooperation with progressive researchers like Hooker, see Minton, *Departing from Deviance*, 239; D'Emilio, *Sexual Politics, Sexual Communities*, 117.

[513] Black and Mileski, "Passing as Deviant," 7. See also Leznoff, "The Homosexual in Urban Society," 19 ("Once the distinctive homosexual argot was acquired by the interviewer it was employed at all times. This was found to be the most effective technique for breaking down natural reserve and it eliminated the respondent's fears of shocking or embarrassing the interviewer."); Humphreys, *Tearoom Trade*, 23 (noting that Humphreys "learned to 'speak their [homosexuals'] language" as a seminarian in a queer-prevalent parish in Chicago).

[514] Black and Mileski, "Passing as Deviant," 7; see also Humphreys, *Tearoom Trade*, 27 (emulating signs of "watch queen," such as looking out the windows and nodding "when the coast was clear," to blend into tearooms).

part, use the cosmetics, and assume the 'body idiom' of the typical participant" to gain acceptance by the group.[515]

Black and Mileski's intervention claimed to be a novel methodological proposal: the type of crucial "intelligence advance" out of which innovative sociology was born.[516] Yet in fact, by 1967, "passing as deviant" inside the urban homosexual community was hardly a scientific innovation—and not simply because of Burgess's precocious students. As Black and Mileski cursorily acknowledged, sociologists who adopted the codes and signifiers of contemporary homosexuals to gather their data on gay groups were not the first, or even the most prominent, interlopers blending into urban cruising life in the 1960s. Rather, they were trying on a cultural camouflage worn long and well by far less academic trespassers: the police.

In 1951, homophile author Donald Webster Cory had cautioned that the "secretive and fraternity-like language" of the homosexual had its risks. Developed by gay men to test each other on the streets, the code fell easily in the hands of the "probation officer or detective" who, "interrogating a suspect, use[d] the inner-group language likewise to trap."[517] By the end of the decade, adopting the social codes and cruising signals of the homosexual had become a favorite tool in the hands of the vice squad—not least, the police's own professional undercover investigator: the plainclothes decoy. A mainstay of vice bureaus in major American cities, the decoy officer had long swelled the police's arrest rates by enticing homosexual cruisers with his sexual flirtations. By the early 1960s, however, the courts' growing scrutiny of aggressive decoy tactics—and gay men's own attempts to develop increasingly subtle cultural codes—turned the decoy into something like a professional ethnographer. Adapting to the homosexual

[515] Black and Mileski, "Passing as Deviant," 6.

[516] Ibid., 1.

[517] Cory, *Homosexual in America*, 109.

community's increasingly insular cruising signals by mastering those signals themselves, from gay men's newly conservative fashion choices to the unique spatial organization of gay bars, police decoys emerged as the decade's leading students of the codified gay world that sprang up in American cities following the war. And in doing so, they solved both of their problems at once. Adopting a cultural language developed by a guarded sexual minority to help its members find each other while remaining invisible to strangers, the vice squad's increasingly well-trained decoys frequently managed to invite homosexual proposals in the field while flying beneath judicial scrutiny in the courtroom. Following Repeal, plainclothes patrolmen testifying before state liquor boards had bolstered their accusations against homosexual-friendly bar owners by denying the need for any expertise they lacked in the signs and signifiers of queer bodies. Appearing now before the trial courts, decoy officers defended their arrests of gay men by downplaying the expertise they in fact amassed in the signs and signifiers of queer culture.

The sociological study of homosexual communities has long held a privileged place in the history of the gay liberation movement. Breaking from the pathologizing rhetoric of prominent psychiatrists and revealing the sheer breadth of the urban gay world, the startling epiphany that homosexuals might be a minority "culture" rather than a psychological disease or a physiological deficiency provided the gay community with a powerful institutional aid in the fight for decriminalization.[518] Yet, as the vice squad's plainclothes operations against gay men in the 1960s suggests, that epiphany was just as useful in the hands of a far less progressive project. Well before trained sociologists began mapping the contours of the organized "gay world," with its own language and fashions and social protocols, those same ethnographic

[518] For analyses of the sociological study of homosexuality in the mid-twentieth century as a partner in the fight for gay liberation, see Heap, *Homosexuality in the City*, 34; Minton, *Departing from Deviance*, 239; George Chauncey, "Introduction" to *Homosexuality in the City: A Century of Research at the University of Chicago*, by Chad Heap (Chicago: University of Chicago Library, 2000), 7.

insights provided the police with one of its most powerful tools for constricting the personal and sexual freedoms of American gay men. By the time that professional sociologists in the 1960s turned their attentions to the urban homosexual, their ethnographic reconstructions may have done less to discover a secret culture that the public never knew existed than to authenticate a secret language that the police had long gotten away with denying.

4. "Keeping Up the Old Quota": Plainclothes Decoys and the Problem of Entrapment in the Cold War

A favorite tool in the hands of the vice squad, the police decoy—a plainclothes officer set out as bait for criminal activity—was part of a broad system of undercover investigation in the modern police bureau.[519] In Europe, that system traced to the early nineteenth century, when a French criminal named Eugene Vidocq turned detective and organized a squad of ex-convicts to infiltrate the Parisian underworld.[520] In the United States, it had a more recent pedigree. Initially dubious of even a uniformed police force as a dangerous concentration of municipal power, the American public remained resistant to undercover detectives well through the Civil War. The detective did not become widespread among urban police departments until the early twentieth century, when the diversifying ethnic profile of the American city and a swath of anti-vice legislation strained the competence of the uniformed police force. Under pressure from private reform agencies, which often hired their own undercover agents to investigate enclaves of urban vice, local police departments established specialized units targeting narcotics, liquor sales, and immigrant disputes.[521] Plainclothes detectives, they immediately realized, were especially useful

[519] Harriet F. Pilep, "Sex vs. the Law," *Harper's Magazine*, January 1965, 39 ("Deliberate entrapment is, of course, a usual technique of the vice squad, not confined to their war against homosexuals.").

[520] Cyrille Fijnaut and Gary T. Marx, "Introduction," in *Undercover: Police Surveillance in Comparative Perspective*, eds. Cyrille Fijnaut and Gary T. Marx (Nowell: Kluwer Academic Publishers, 1995), 5.

[521] Fijnaut and Marx, "Introduction," 11; Gary T. Marx, *Undercover: Police Surveillance in America* (Berkeley: University of California Press, 1988), 24-30. For innovations of the reform societies, see Jennifer Fronc, "'I Led Him On': Undercover Investigation and the Politics of Social Reform in New York City, 1900-1919" (Ph.D. dissertation, Columbia University, 2005).

for enforcing morals regulations—crimes that, carried out in private places and involving consensual parties, often evaded detection by conventional police tactics.[522]

Homosexual men first encountered the undercover officer following Repeal, when state liquor authorities dispatched plainclothes agents to patrol disorderly conduct and other licensing violations in popular bars. At gay-friendly venues, as anywhere else, the liquor agents and police recruits carried out their tasks by fading into the crowds: sitting down by the counter, buying drinks, and fraternizing with the patrons around them.[523] In many cases, they found themselves on the receiving end of homosexual advances; beginning in the 1930s, liquor board records abound with tales of undercover agents fondled by flamboyant customers or propositioned for illicit sex acts near the bar.[524] While they often arrested the offending customers, however, agents in these years remained more concerned with enforcing the states' liquor regulations than their sodomy laws. Tales of flagrant sexual misconduct may have helped bolster the liquor board's evidence against "disorderly" establishments, but most officers did not go to homosexual-friendly bars aiming to invite a solicitation. And they certainly did not try to pass for the effeminate fairies they described in their reports. As Officer van Wickes insisted at the

[522] Daniel L. Rotenberg, "The Police Detection Practice of Encouragement," *Virginia Law Review*, Vol. 49, No. 5 (June 1963), 873-74.

[523] See In re Polka Club, Inc., State of New Jersey, Department of Alcoholic Beverage Control, Bulletin 1045, January 6, 1955, 8; In re Kaczka, New State of New Jersey, Department of Alcoholic Beverage Control, Bulletin 1063, May 24, 1955, 3; George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (New York: Basic Books, 1994), 337. See generally Chapter 2.

[524] Gloria Bar & Grill, Inc. v. Bruckman, Record on Review (1940), 69, New York Supreme Court Records, Civil Branch, New York County (New York, NY); Times Square Garden & Grill v. Bruckman, Record on Review, Index No. 3897 (1939), 25-26, New York Supreme Court Records, Civil Branch, New York County; Lynch's Builders Rest. v. O'Connell, 277 A.D. 705, 707 (N.Y. App. Div. 1951); Giovatto v. O'Connell, Record on Review, Index No. 4366 (1951), 27-41, New York Supreme Court Records, Civil Branch, New York County; Stanwood United, Inc. v. O'Connell, 283 A.D. 79, 80-81 (N.Y. App. Div. 1953).

hearing for the Gloria Bar & Grill, any man who took him for a "queer" would have had to be drunk to make the mistake.[525]

Following World War II, the face of the plainclothes agent began to change. By the early 1950s, the sex crime panic that gripped the nation led every major American city—and many smaller ones—to adopt a specialized "sex detail" or "morals squad."[526] Frequently responsible for investigating both sex offenses and a variety of other crimes, from prostitution to drug trafficking and gambling, vice squads fluctuated in size both by city and by season.[527] In Washington, D.C., the police department in the early 1960s made do with an all-purpose Morals Squad staffed by four to six undercover agents year-round.[528] In San Francisco, the SFPD established a four- or five-man "sex detail" in the 1950s assigned to patrol the city's violent and non-violent sexual crimes.[529] Meanwhile, beach cities around Los Angeles drastically increased their manpower during summer months to handle the most popular waves of tourism. One community vice squad deployed four to five plainclothes officers for most of the year, but expanded to twelve to fifteen officers on weekends during the summer season.[530] No longer the accessories of the state liquor boards, these plainclothes units were independent task forces

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[525] Gloria Bar & Grill, Record on Review, 321.

[526] See Chapter 3; William N. Eskridge, Jr., "Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961," *Florida State University Law Review*, Vol. 24 (1997), 718.

[527] "The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration Techniques in Los Angeles County," *UCLA Law Review*, Vol. 13 (1966), 687 fn. 11 [herein after "*UCLA Law Review* Study"].

[528] Jean M. White, "Those Others IV: 49 States and the District Punish Overt Homosexual Acts as Crimes," *Washington Post*, February 3, 1965, A19 (six men); Guarro v. United States, Brief for Appellant, 2, Index. No. 12,844, Record Group, 276, Box 5, Stack Area 14E2, Row 2, Shelf 1, National Archives (Washington, D.C.) (four plainclothesmen and several uniformed patrolmen).

[529] Christopher Agee, *The Streets of San Francisco: Blacks, Beats, Homosexuals, and the San Francisco Police Department, 1960-1968* (Ph.D. dissertation, University of California, Berkeley, 2005), 186-87.

[530] *UCLA Law Review* Study, 687 fn. 12.

dedicated to investigating sex crimes, from violent assaults and child molestation to prostitution and sexual degeneracy. And their productivity was, for the most part, measured by their rates of arrest.[531] In many cities, vice captains were widely believed to hold their officers to strict nightly minimums for misdemeanor charges.[532] While vice detectives seldom acknowledged the rumors in public, numerous men charged with homosexual offenses insisted that their arresting officers admitted to operating under a "quota."[533]

Luckily for the vice squads struggling to meet this burden, resourceful officers in these years could arrest homosexual men based on a number of grounds. The harshest penalties attached to charges of sodomy, typically defined to include oral and anal intercourse and still considered a felony offense in every state. Yet sodomy laws were notoriously hard to enforce, plagued by all the evidentiary problems of a crime typically committed indoors and between willing participants.[534] More helpful, and far more commonly enforced, were the panoply of misdemeanor charges that could be brought against homosexual men for loitering or simply proposing an illicit sexual act in public.[535] The precise charges varied by state. California enacted a specialized lewdness and vagrancy law, criminalizing the solicitation of any "lewd or dissolute conduct in any public place."[536] New York relied on a broader disorderly conduct

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[531] Eskridge, " Privacy Jurisprudence and the Apartheid of the Closet," 718.

[532] Albert Deutsch, *The Trouble with Cops* (New York: Crown Publishers, Inc., 1968), 86; Cory and LeRoy, *The Homosexual and his Society*, 117.

[533] Dale Jennings, "To Be Accused, Is To Be Guilty," *ONE*, Vol. 1, No. 1 (January 1953), 12; People of New York v. Marshall Greenberg, Brief for Defendant-Appellant, 5, Folder 30, Box 3, Reel 10, Mattachine Society Collection, International Gay Information Center, New York Public Library.

[534] Practically speaking, the vice squad's only way to bring sodomy charges was through clandestine surveillance of public homosexual acts. See Chapters 6 and 7.

[535] See Eskridge, "Privacy Jurisprudence and the Apartheid of the Closet," 720.

[536] Sultan Turkish Bath, Inc. v. Bd. of Police Comm'rs of City of Los Angeles, 169 Cal. App. 2d 188, 197 (1959); People v. Mesa, 265 Cal. App. 2d 746, 748 (1968).

statute, read to encompass frequenting a public place "for the purpose of committing a crime against nature or other lewdness."[537] Washington, D.C., alternated between a statute targeting "lewd and immoral" solicitations and, in cases involving uninvited physical contact, its general law against simple assault.[538] In practice, the provisions all functioned similarly, penalizing a broad range of sexual conduct, from indecent exposure and public lasciviousness to loitering and solicitation.

For the same reasons they were so helpful to regulating prostitution and narcotics, police decoys were all but essential to enforcing the state's misdemeanor laws against homosexuals. While police could certainly have waited for the intermittent complaint from an innocent citizen propositioned at a cruising ground, a decoy in the right place at the right time could elicit a solicitation "in a matter of minutes."[539] One autumn in 1948, a decoy officer stationed in D.C.'s Franklin Park arrested six men in a single evening.[540] In 1953, the city's Morals Squad reported arresting 250 men a year on charges of lewd solicitation, all against plainclothes officers.[541] Unsurprisingly, given these unprecedented success rates, plainclothes vice officers soon descended on suspected cruising sites across America's major cities. Decoys patronized popular bars, restaurants, and theaters; they clustered along highly trafficked parks, streets, and bus

[537] People v. Humphrey, 111 N.Y.S.2d 450, 452-53 (Co. Ct. 1952); People v. Feliciano, 10 Misc. 2d 836, 836 (N.Y. Magis. Ct. 1958).

[538] For the lewd solicitation statute, see Reed v. United States, 93 A.2d 568, 569 (D.C. Jan. 6, 1953); Bicksler v. United States, 90 A.2d 233, 233 (D.C. July 25, 1952). For the assault statute, see Dyson v. United States, 97 A.2d 135, 136 (D.C. May 29, 1953); McDermett v. United States, 98 A.2d 287, 288-89 (D.C. July 14, 1953).

[539] *UCLA Law Review* Study, 687 fn. 8; see also Eskridge, "Privacy Jurisprudence and the Apartheid of the Closet," 720 ("Decoys frequently operated as the sole method for enforcement of the most popular anti-homosexual misdemeanor laws . . . .").

[540] Kelly v. United States, 194 F.2d 150, 152 (D.C. Cir. 1952).

[541] Philip Dawson, "Controversy Flares Over Morals Cases," *Washington Post*, Apr. 5, 1954, 17.

terminals; they loitered in public bathrooms, bathhouses and gyms.[542] In San Francisco, one gay man recalled, "the Morals Squad was everywhere," combing through "the streets, the parks and . . . numerous public places."[543] In Los Angeles over one five-month period, two to five decoys attended every single movie screening in a popular theater.[544] In D.C. in the early 1950s, the six-man Morals Squad traversed the city's parks and public bathrooms "every night" looking for homosexual suspects.[545] Indeed, the nation's capital developed something of a reputation for its anti-homosexual campaigns. At a time when the federal government pursued a public campaign to "purge" suspected homosexual employees as security risks, the Morals Squad's pettiest misdemeanor charges took on a certain national significance. Under the auspices of Lieutenant Roy Blick, an aggressive vice crusader who saw the Lavender Scare as an opportunity to enhance the bureau's professional prestige, the Morals Squad's prolific arrests of homosexual men—many of them government employees—saturated the local papers in the early 1950s.[546]

The precise methods of arrest in the early years following World War II were fairly straightforward. Officers were chosen to act as homosexual decoys on the basis of two factors:

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[542] Harold Jacobs, "Decoy Enforcement of Homosexual Laws," *University of Pennsylvania Law Review*, Vol. 112, No. 2 (December 1963), 259 (parks, transportation terminals, public bathrooms); "Donaldson, Smith, Leighton and May v. City and County of San Francisco," 1, Folder 11, Box 46, Evander Smith Papers, Gay and Lesbian Center, San Francisco Public Library ("streets, restaurants, bars, and public facilities such as parks and beaches"); *UCLA Law Review* Study, 691 fn. 31 (public toilets, bars, bathhouses, gymnasiums, massage parlors, parks, beaches, theatres, coffee houses, and street locations); Roger S. Mitchell, *The Homosexual and the Law* (New York: Arco Publishing Co., 1969), 35 (bars, department stores, and bathhouses, public restrooms, street corners).

[543] Quoted in Christopher Lowen-Engel Agee, *The Streets of San Francisco: Blacks, Beats, Homosexuals and the San Francisco Police Department, 1950-1968* (Ph.D. dissertation, University of California, Berkeley, 2005), 188.

[544] Tarbox v. Bd. of Sup'rs of Los Angeles Cnty., 163 Cal. App. 2d 373, 375 (1958).

[545] Guarro v. United States, Brief for Appellant, 2.

[546] David K. Johnson, *Lavender Scare: Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2009), 85-87, 154, 174. For press reporting on arrests, see "Senator's Son Convicted on Morals Charge," *Washington Post*, Oct. 7, 1953, 11; "U.S. Employee Cleared in Morals Case," *Washington Post*, May 19, 1954,17; "Rule Of Thumb Is Given With Morals Conviction," *Washington Post*, Apr. 2, 1954, B1; "Usefulness of Sex Squad Questioned by Kronheim," *Washington Post*, Jun 5, 1954, 21; "Alexandrian Loses Appeal Of Conviction," *Washington Post*, Feb 17, 1951, B1.

age and physical attractiveness.[547] One gay man from Los Angeles recalled developing a particular image of plainclothes policemen: "very attractive men walking around in tight blue jeans."[548] In Philadelphia, the Morals Squad made do with two "specially selected" men for all their decoy assignments, both under thirty, "good-looking," and neatly dressed.[549] (One, apparently the heir to highly favorable genes, was a brother of popular rock'n'roll singer Dick Lee.)[550] "The man selected for homosexual enforcement must be of the type reasonably attractive to homosexuals," the squad explained, "since any solicitation must come from the homosexual and not from the policeman."[551] Some homosexual men thought the departments used a slightly higher bar. "Often the most handsome, hung, desirable-looking cops were used for these plainclothes operation," noted one man in San Francisco. "I often wondered who did the selecting."[552]

Once selected for the task, decoys would frequent suspected cruising sites, trying to present themselves like any man looking for a sexual partner. In bars, they walked in at late hours, purchased drinks at the bar, and made new friends.[553] Taking their cue from the liquor agents, some decoys sat by and waited to be approached by more intrepid customers. In New

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[547] Jess Stearn, *The Sixth Man: A Startling Investigation of the Spread of Homosexuality in America* (New York: Doubleday, 1961), 144.

[548] Transcript of interview of "Tex or JR" by Len Evans, undated, 24, Oral History Project, GLBT Historical Society (San Francisco, CA).

[549] Richard H. Elliott, "Control of Homosexual Activity by Philadelphia Police: A Study of Enforcement and the Enforcers," University of Pennsylvania Law School (Dec. 4, 1961), 15. Manuscript in possession of the author.

[550] Gaeton Fonzi, "The Furtive Fraternity," *Greater Philadelphia Magazine* (December 1962), 49.

[551] Elliott, "Control of Homosexual Activity by Philadelphia Police," 4.

[552] Michael Rumaker, *Robert Duncan in San Francisco* (San Francisco: City Lights Books, 2013), 16.

[553] Giovatto v. O'Connell, Record on Review, Index. No. 4366 (1951), 27-41, New York Supreme Court Records, Civil Branch, New York County (New York, NY); Lynch's Builders Rest. v. O'Connell, 277 A.D. 705, 707 (N.Y. App. Div. 1951); Stanwood United, Inc. v. O'Connell, 283 A.D. 79, 80-81 (N.Y. App. Div. 1953); In re Louise G. Mack, NJ ABC Bulletin 1088, 3-4 (1955).

York in April 1953, for example, police officer Howard Koch reported sitting alone at Diamond Jim's Bar & Grill when Vincent Pleasant and Bobby Shadforth came up to him and invited him back home for "a few beers" and "some fun."[554] Increasingly, however, plainclothes officers took an active role in seeking out acquaintances, striking up conversations or inviting homosexual men to drink with them. In Los Angeles, undercover vice officers were given $5 a night, a sizeable budget, to buy beer for themselves and for their new acquaintances.[555]

For the most part, however, vice officers in the early 1950s left the bars to the liquor boards and focused on more public cruising sites. Decoys loitered on public streets and corners, introducing themselves to passers-by and waiting for the inevitable invitation.[556] In parks, they sat on unoccupied benches, watching men walk by or sit beside them.[557] Frequently, just waiting on a park bench late at night was enough to catch a cruiser's eye, but in many cases the officers themselves approached suspected homosexuals or invited apparent cruisers to come sit beside them. After a plainclothes officer arrested Donald Brenke in D.C. in 1951 for solicitation in a public park, Brenke insisted that officer had walked up to him and proposed that the two men go out for "a good time."[558] The following summer in D.C.'s Lafayette Park, a notorious cruising area, Ed Wallace recalled being approached by a blond officer who "began to ask a lot of questions." "Where were you before you came here?" the young man pressed. "Why'd you come out?" Contrary to the department's calculations, the fresh-faced blond officer was not

[554] People v. Pleasant, 23 Misc. 2d 367, 368-69 (N.Y. Magis. Ct. 1953).

[555] Interview of Herb Selwyn by John D'Emilio, October 25, 1976, A00450, International Gay Information Center, New York Public Library.

[556] Brenke v. United States, 78 A.2d 677, 677-78 (D.C. Feb. 16, 1951); People v. Humphrey, 111 N.Y.S.2d 450, 452-53 (Co. Ct. 1952); People v. Feliciano, 10 Misc. 2d 836, 836 (N.Y. Magis. Ct. 1958).

[557] Kelly v. United States, 194 F.2d 150, 151 (D.C. Cir. 1952); Elliott, "Control of Homosexual Activity by Philadelphia Police," 5.

[558] Brenke v. United States, 78 A.2d 677, 678 (D.C. Feb. 16, 1951).

Wallace's type, but when he tried to walk away the officer followed, continuing to ask where Wallace might be headed next.[559]

In bathrooms, police decoys settled on a more established pattern. From hotels to theaters to public parks, plainclothes officers first tried to single out a likely homosexual—some tending to classify their targets on sight, others waiting for a suspect to expose himself or to begin masturbating in a nearby stall. Instead of interrupting or moving to arrest, they would then start up a casual conversation. When the man turned to leave the restroom, the decoy followed him out; if he made no signs of going, the officer made the first move, stepping outside and then waiting for the target by the wall outside.[560] Sometimes, a few minutes of conversation were all it took. In D.C. in 1952, when vice officer John Costanzo saw a man masturbating in a downtown movie theater and followed him to a nearby stairway, the man immediately asked if Costanzo had "a place to go" before offering to have sex in his car outside.[561] In other cases, an arrest could take some time. Not long after Costanzo's encounter, another policeman on the D.C. squad witnessed much the same scene in another downtown theater. After the suspect covered up, Officer Klopfer exchanged some words with him about the movie, waited for him outside the theater, and subsequently took him on a stroll around the neighborhood, talking about the weather and the Army, until they reached another men's room in a nearby hotel. From start to finish, the encounter lasted over forty minutes.[562] Almost invariably, officers hoping to elicit a

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[559] Brett William Beemyn, "A Queer Capital: Lesbian, Gay, and Bisexual Life in Washington, D.C., 1890-1955" (Ph.D. dissertation, University of Iowa, 1997), 211-12. I adopt the pseudonym "Ed Wallace" from Beemyn, to whom I am indebted for unearthing this material.

[560] Bicksler v. United States, 90 A.2d 233, 234 (D.C. July 25, 1952); Jennings, "To Be Accused, Is To Be Guilty," 11-12; Henderson v. United States, 117 A.2d 456 (D.C. Oct. 27, 1955); McDermett v. United States, 98 A.2d 287, 289 (D.C. July 14, 1953); Guarro v. United States, 237 F.2d 578, 579 (D.C. Cir. 1956); Dyson v. United States, 97 A.2d 135, 136 (D.C. May 29, 1953).

[561] Bicksler v. United States, 90 A.2d 233, 234 (D.C. July 25, 1952).

[562] McDermett v. United States, 98 A.2d 287, 288-89 (D.C. July 14, 1953).

sexual advance in a public bathroom found some way of exposing themselves to the suspect, either pretending to use a urinal or, at the very least, parting their coats to draw in the suspect's eye.[563] It was only when Klopfer unzipped his pants in the second bathroom that his target took the bait and reached down to touch him.[564]

While most officers opted for relatively straightforward tactics, confident that a friendly conversation or an overt sexual gesture would suss out a solicitation from a likely cruiser, some tried their hand at a more complicated masquerade. As Donald Webster Cory observed in 1951, homosexual men meeting each other on the street commonly relied on telltale touches of effeminacy to reassure each other of their common purpose: "a softness of the tone, an overenunciation of word sounds, an affection in the movement of the hands."[565] Especially in D.C., some decoys similarly tried to lure in homosexual cruisers by adopting the stereotypical affectations of the fairy. In the spring of 1954, patrolman Dante A. Longo arrested twenty-five year old Paul Ross for solicitation after Longo's "flirtatious and suggestive" feminine gestures "inflamed [Ross] beyond his capacity to resist." Longo's charade was so thoroughly convincing that Ross, disarmed by "the officer's change of deportment" following arrest, inadvertently confessed the offense at the station.[566] On another night in Lafayette Park, John Costanzo arrested Lester C. Hunt after catching Hunt's eye with his flamboyant stroll through the park. The plainclothesman, Hunt recalled, "swaggered" across the public green as through "trying to attract my attention."[567] (Costanzo may have attracted more attention that he'd bargained for:

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[563] Seitner v. United States, 143 A.2d 101, 102 (D.C. June 20, 1958); Guarro v. United States, 237 F.2d 578, 579 (D.C. Cir. 1956); McDermett v. United States, 98 A.2d 287, 289 (D.C. July 14, 1953).

[564] McDermett v. United States, 98 A.2d 287, 289 (D.C. July 14, 1953).

[565] Cory, *Homosexual in America*, 117.

[566] "Rule Of Thumb Is Given With Morals Conviction," *WP*, B1.

[567] "Senator's Son Convicted on Morals Charge," *WP*, 11.

Hunt was the son of Lester C. Hunt, Sr., the Democratic senator from Wyoming, and his arrest became a dagger in the hands of Hunt's political enemies. Republican senators ensured that the younger Hunt went to trial and then threatened to drag the charges through the press if his father ran for re-election. The elder Hunt shot himself in his Senate office.[568])

Most decoys trying to impersonate the urban homosexual relied on a simpler form of signaling: popular gay slang. Beginning in the early twentieth century, in fact, academic researchers studying homosexuality had taken a particular interest in homosexual argot. In 1933, Burgess's student Myles Vollmer had compiled a "Glossary of Homosexual Terms" from his forays in Chicago, ranging from common synonyms for the pansy ("queen," "fairy") to cruising terms ("trade," "tea room") to raunchy sexual slang.[569] When George Henry published *Sex Variants* in 1941, the tome included a chapter on "The Language of Homosexuality" by cultural critic Gershon Legman.[570] By World War II, the military's psychiatrists relied on their knowledge of popular gay argot to identify homosexual recruits. When one twenty-one-year-old soldier tried to evade service by confessing his homosexuality, he was "amazed" to discover that the psychiatrist who interviewed him "knew all the gay language from A to X, didn't hesitate to use it and knew the answers before I had a chance to get them out."[571]

The average policeman may have not shared the psychiatrist's encyclopedic knowledge, yet by the mid-twentieth century most officers deployed to gay bars or cruising sites were familiar with homosexual slang. As early as 1936, a liquor agent testifying before the New

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[568] Johnson, *Lavender Scare*, 140-41.

[569] Myles Vollmer, "Glossary of Homosexual Terms," Folder 8, Box 145, Ernest W. Burgess Papers, University of Chicago Library. See also "Untitled (list of gay slang)," Folder 3, Box 98, Ernest W. Burgess Papers, University of Chicago Library.

[570] Gershon Legman, "The Language of Homosexuality," in George Henry, *Sex Variants: A Study of Homosexual Patterns* (New York: P.B. Hoeber, Inc., 1941), 1149.

[571] "David—Age twenty-one," 12, Folder 8, Box 128, Ernest W. Burgess Papers, University of Chicago Library.

Jersey Alcoholic Beverage Control had found himself translating terms like "fag" for the commissioner's benefit.[572] By the 1950s, vice officers commonly relied on more popular jargon to arrest homosexual suspects. In 1951, Cory described how police detectives dropped popular words like "gay" and "queer" into their interrogations to "trap" careless targets: "'This man who you were out with tonight—you know he's gay?' A denial brings a torrent of new questions: what do you understand by the question?—did you understand it to refer to his being queer?—how do you know that's what the word means?"[573] Such codes were no less popular among plainclothes decoys, who commonly found ways to work terms like "gay" into their banter to elicit a suspect's trust.[574] Alternately, decoys listened for popular cruising terms to use as smoking guns against defendants, waiting for a man to "say the magic word" before arresting him for solicitation.[575] At the trial of the patron who solicited John Costanzo in the D.C. theater, for example, both Costanzo and a fellow officer testified that the defendant "had used terms which . . . have special significance among sexual deviates" when they brought him in for booking.[576] Meanwhile, the decoy who approached Ed Wallace in Lafayette Park both dropped and listened for Wallace's use of gay argot. Asking Wallace where he'd come from and why he had "come out," the officer arrested Wallace only after he casually mentioned the "bitches" at a popular D.C. gay bar.[577]

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[572] In re Log Cabin Inn, New Jersey Alcoholic Beverage Control, Bulletin 279, November 10, 1936, 11.

[573] Cory, *Homosexual in America*, 109.

[574] Edward F. Kelly v. United States, Joint Appendix, 33, Index No. 10,639, Record Group 276, Stack Area 14E2A, Row 2, Compartment 31, Shelf 5, Box 1390, National Archives (Washington, D.C.).

[575] "Usefulness of Sex Squad Questioned by Kronheim," *WP*, 21.

[576] Bicksler v. United States, 90 A.2d 233, 234 (D.C. July 25, 1952).

[577] Beemyn, "A Queer Capital," 212.

Among the squads as among any police unit, of course, some investigators were always more zealous than others, and decoy assignments were especially ripe for abuse. Eager to arrest homosexual cruisers, certain decoys in the early 1950s grew quite aggressive in their tactics. In D.C., Louis Fochett earned a reputation for his uniquely effective strategies in public bathrooms. A career man with the Morals Squad, Fochett joined the force in 1946 and served there until his early death in 1968.[578] In his personal life, Fochett was a father, a Catholic, and a coach in the local elementary school's physical fitness program, but in his career—as a young man, at least—he was "out every night" catching homosexuals for the Morals Squad.[579] Fochett developed a consistent, almost trademark tactic. Having spotted a likely homosexual in a public bathroom, he would exchange glances with the other man and then head outside, leaning on the wall by the men's room long enough for the suspect to spot him. Sometimes, Fochett would unbutton his coat; if he were still inside the men's room, he would expose himself by unzipping his pants. When the suspect reached out to touch him, Fochett would ask if he "wanted to take it"—and, receiving an affirmative response, promptly make his arrest. Fochett's combination of enticing body language and aggressive sexual banter was responsible for numerous homosexual arrests around D.C. in the 1950s.[580]

Even Fochett's most aggressive encounters, however, paled in comparison to Dale Jennings's infamous encounter in the men's room of Los Angeles's Westlake Park. A founding member of the Mattachine Society, Jennings had always thought it took a certain sloppiness to

[578] "Police Lt. Louis Fochett, Served in Morals Unit," *Washington Post*, Apr. 16, 1968, B; "White House Screening," *Washington Post*, Oct 18, 1964, E6.

[579] For Fochett's personal life, see "Police Lt. Louis Fochett, Served in Morals Unit," *Washington Post*, B. For the frequency of Fochett's arrests, see Guarro v. United States, Brief for Appellant, 2.

[580] Henderson v. United States, 117 A.2d 456, 456 (D.C. Oct. 27, 1955); Guarro v. United States, 237 F.2d 578, 579 (D.C. Cir. 1956); Thomas v. United States, 129 A.2d 852, 854 (D.C. Mar. 4, 1957); Philip G. Seitner v. United States of America, Brief for Appellant and Joint Appendix, No. 14,547, Record Group 276, Stack Area 14E2A, Row 3, Compartment 5, Shelf 3, Box 1890, National Archives (Washington, D.C.).

fall prey to the police department's roving decoys.[581] The story he told, however, was enough to change more minds than just his own. According to Jennings, he was looking for a movie to "fill an empty evening" in the spring of 1952 when he stopped in to use the men's room in a public park.[582] Inside, he may or may not have exchanged some words with a policeman. The officer may or may not have put his hand on Jennings's crotch.[583] Regardless, although Jennings insisted that he was not interested, the officer followed him out the lavatory, dragged out a "one sided conversation," and accompanied Jennings over a mile to his home. The officer insisted on coming in and, once admitted, strolled to the bedroom, unbuttoned his shirt, and sprawled on the mattress. He urged Jennings to "let down [his] hair" and reminisced about his days in the Navy, where "all us guys played around." When Jennings refused to take the bait, frightened now that the man had come to rob him, the officer tried pushing Jennings's hand on his own crotch. Only then, Jennings recalled, did the officer identify himself and make the arrest.[584]

One of the systematic perks of the vice squad's decoy arrests was that they required little follow-up. Terrified of public exposure, most homosexual men who had the misfortune of flirting with a plainclothes policeman simply pled guilty and paid the fine.[585] Even suspects who swore they made no sexual advances were sometimes so intimidated by the arresting officers that they found it easier to sign a false confession.[586] More interested in arrest quotas than courtroom

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[581] Dale Jennings, "To Be Accused, Is To Be Guilty," 11 ("There is a certain smugness in many of our own number regarding arrest—which I myself shared until that badge loomed in my face and the handcuffs locked my wrists together.").

[582] Ibid.

[583] For the dueling versions of Jennings' arrest, see C. Todd White, *Pre-Gay L.A.: A Social History of the Movement for Homosexual Rights* (University of Illinois Press, 2009), 24-25.

[584] Jennings, "To Be Accused, Is To Be Guilty," 11-12.

[585] Branson, *Gay Bar*, 15.

[586] Beemyn, "A Queer Capital," 212.

appearances, decoys themselves encouraged suspects to settle the matter administratively, assuring them that a guilty plea would let them avoid jail time or permanent records of any sort.[587] The vast majority of arrests arising from plainclothes decoys, both in the 1950s and well into the following decade, never saw trial.

As the vice squads' arrest rates mounted in the early 1950s, however, the police's more aggressive tactics began to stir some outrage—both among their victims and men who heard about them second-hand. Exasperated by decoy officers' often aggressive tactics, the defendants caught by the vice squads' undercover operations found themselves increasingly willing to contest their charges in court. "Entrapment" became the word of the day.

Entrapment and the Limits of the Courts

Entrapment in the 1950s was a relatively young defense. Dismissed by early American courts as a sophistry denounced by God himself in the parable of Eve, the legal doctrine was first recognized in 1915 by a federal court.[588] By the mid-twentieth century, it had won acceptance throughout the federal system and in forty-eight states, with only Tennessee and possibly New York declining to participate.[589] Even in jurisdictions that honored the doctrine, however, the bar for entrapment was high. Under the test developed by the Supreme Court in 1932, the

[587] People v. Greenberg, Brief for Defendant-Appellant, 5.

[588] As one New York judges noted in 1864, Eve's defense that the "serpent beguiled me and I did eat" was "overruled by the greater Lawgiver." Bd. of Commissioners v. Backus, 29 How. Pr. 33, 42 (N.Y. Gen. Term. 1864). For the initial recognition of the doctrine, see Richard C. Donnelly, "Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs," *Yale Law Journal*, Vol. 60 (1951), 1098-99.

[589] Richard S. Whitesell, Jr., "The Doctrine of Entrapment and Its Application in Texas," *Southwestern Law Journal*, Vol. 9 (1955), 464; Rotenberg, "The Police Detection Practice of Encouragement," 890-91; "The Serpent Beguiled Me and I Did Eat the Constitutional Status of the Entrapment Defense," *Yale Law Journal*, Vol. 74 (1965), 955 fn. 4. The status of the doctrine in New York remained ambiguous until the New York legislature formally implemented the doctrine in 1967. "State Estopped to Prosecute Criminal Conduct Suggested by Police," *Harvard Law Review*, Vol. 81 (1968), 899 fn. 1; W. Amon Burton, Jr., "Criminal Law Entrapment," *Texas Law Review*, Vol. 45 (1967), 585 fn. 3.

defense demanded not only evidence of egregious police misconduct, but also proof that the defendant had no preexisting predisposition to commit the crime. "The controlling question," the Court explained, is whether the government sought to prosecute an "otherwise innocent" person for crime produced by "the creative activity of its own officials."[590] While a vocal minority of the Court protested the steep standard, the majority's two-part test became the template for state courts across the nation.[591] Unsurprisingly, by the 1950s, defendants who claimed police entrapment in court rarely found the defense successful.[592]

Homosexual solicitations presented a particularly difficult case. Entrapment required proof that a defendant had no "preexisting disposition" toward a crime, but, as homosexual defendants and their lawyers were well aware, homosexuality was essentially defined as a preexisting disposition.[593] As *ONE* explained to its readers in April 1954, entrapment by a vice decoy was near-impossible to prove: "If the officer 'picks up' the defendant, gains his acquaintance, proposes the act, and proceeds to overcome the defendant's genuine reluctance and unwillingness, [entrapment exists] IF, AND ONLY IF the defendant was in fact unwilling, and the officer's appeals were such as to leave no doubt that he was the procuring party."[594] Measured against that bar, the fact that an officer loitered in a public park, or struck up a

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[590] Sorrells v. United States, 287 U.S. 435, 451 (1932); see also Paul W. Williams, "The Defense of Entrapment and Related Problems in Criminal Prosecution," *Fordham Law Review*, Vol. 28 (1959), 399-418; Rotenberg, "The Police Detection Practice of Encouragement," 892. The Court later confirmed this approach in Sherman v. United States, 356 U.S. 369, 372-73 (1958).

[591] Donnelly, "Judicial Control of Informants," 1106; Whitesell, "The Doctrine of Entrapment and Its Application in Texas," 465-66; "Entrapment," *Harvard Law Review*, Vol. 73 (1960), 1335.

[592] Donnelly, "Judicial Control of Informants," 1104-05 ("Rarely do the United States Courts of Appeals reverse on the ground of entrapment."); see also "The Serpent Beguiled Me and I Did Eat," 955 fn. 4.

[593] Council on Religion and the Homosexual et al., *The Challenge and Progress of Homosexual Law Reform* (San Francisco, 1968), 22; State v. Trombley, 3 Conn. Cir. Ct. 28, 32-33 (1964); Willis v. Unoted States, 198 A.2d 751, 752 (D.C. 1964).

[594] "The Law: A Discussion of Entrapment," *ONE*, Vol. 2, No. 4 (Apri 1954), 9.

conversation in a bathroom, or even played the part of a stereotypical fairy was certainly insufficient. In D.C. in 1953, Lester Hunt's testimony about John Costanzo's sexual swagger—conspicuous enough that Hunt insisted he thought Costanzo "was soliciting [him]"—did not stop the court from convicting Hunt of solicitation.[595] Nor did Cecil McMillan's testimony that he only approached Louis Fochett outside Lafayette Park one April evening because "he thought Fochett was a homosexual."[596] As one trial judge explained, even granting Paul Ross's testimony about Dante Longo's "flirtatious and suggestive" charade, Longo's sexual affectations were "so patently in accord with the procedures of detection [that the Supreme Court] authorized that one could almost assume that he held the legal opinion in one hand while he made effeminate gestures with the other."[597]

While they could not quite transpose the law of entrapment to cases of homosexual solicitation, however, courts were sensitive to the more flagrant abuses that emerged from the vice squads' decoy arrests in the early 1950s. As homosexual men lured in by plainclothes officers challenged their arrests in court, judges who shared their consternation about police departments' increasingly aggressive tactics found other means to dismiss the most egregious charges.

In California, the case of Dale Jennings represented the beginning and, in many ways, the limits of gay men's legal struggles against police enticement. For all its outrageous detail, it did not truly matter whether Jennings' story was entirely true. As to some details, Jennings admitted, even his closest friends in the Mattachine reserved some doubts.[598] What mattered was

[595] "Senator's Son Convicted on Morals Charge," *Washington Post*, Oct. 7, 1953, 11.

[596] "Usefulness of Sex Squad Questioned by Kronheim," *Washington Post*, Jun. 5, 1954, 21.

[597] "Rule Of Thumb Is Given With Morals Conviction," *WP*, B1.

[598] White, *Pre-Gay L.A.,* 24-25.

that the tale, in all its disgraceful particulars, resonated with the countless stories of police persecution and harassment circulating among gay men in Los Angeles in the early 1950s. Still an underground organization shy about negative publicity, the Mattachine Society mobilized around Jennings's arrest, spinning off the Citizens' Committee to Outlaw Entrapment as an ancillary group to combat the police's dubious antics. The Committee turned Jennings's trial into a cause célèbre in Los Angeles's gay circles, spreading flyers to publicize the case and raising significant funding for his defense.[599] At trial, Jennings took the unusual step of admitting his homosexuality, but he denied any willing participation in the officer's extended sexual flirtations. The case came down to Jennings's word against the officer's—and, shockingly, Jennings won. The jury came back hung after eleven members voted for acquittal but the twelfth refused to budge, and the city agreed to dismiss the case.[600]

Jennings's victory was, in some ways, a landmark in the story of gay men's legal struggles in America—direct evidence for the novel proposition that an admitted homosexual could win a courtroom to his side. Yet it was also a narrow triumph. Because Jennings denied any sexual advances on his part, portraying himself as the perfect martyr to the vice squad's decoy operations, his trial did little to address the problem of gay men who succumbed—however gradually or reasonably—to a policeman's sexual enticements. As ACLU attorney Herb Selwyn recalled, the California courts after the Jennings case remained merciless with homosexual defendants who admitted to having made sexual advances, refusing to provide relief when the men failed to meet the improbable legal bar for entrapment. Like Jennings, defendants

[599] D'Emilio, *Sexual Politics, Sexual Communities*, 70-71; see generally Douglas M. Charles, "From Subversion to Obscenity: The FBI's Investigations of the Early Homophile Movement in the United States, 1953-1958," *Journal of the History of Sexuality*, Vol. 19, No. 2 (May 2010), 262-87.

[600] Jennings, "To Be Accused, Is To Be Guilty," 12-13; D'Emilio, *Sexual Politics, Sexual Communities*, 71.

who hoped to escape a solicitation conviction in California had to deny having engaged in any sexual improprieties and hope that they sounded credible to a jury.[601]

In other states, some judges took a more proactive approach. In New York, the first case to attack the problem of the overzealous decoy arose shortly before the Jennings trial. On January 21, 1951, a group of police officers in the Village of Endicott spotted Frank Humphreys sitting suspiciously close to a partially unclothed friend in his car during a routine traffic stop. Instead of making any arrests, officer Robert Shepard—an old acquaintance of Humphreys's from a prior job—had his colleagues drop him off on the street outside Humphreys's home. When Humphreys returned, Shepard greeted him by his first name and told him that he "want[ed] to see [him] tonight." After a few minutes, Humphreys invited Shepard to his apartment for "some beer, candy, and for some fun." Shepard accepted and, following a more explicit proposal upstairs, made his arrest. At trial, Humphreys denied the entire story, but the judge credited Shepard's testimony and convicted Humphreys of disorderly conduct.[602]

On appeal, the county court accepted the trial judge's findings regarding Humphreys's invitation on the streets and his subsequent statements in his home. Yet even granting the police witness's version of events, in light of Shepard's outrageous arrest tactics, the court reversed. Far from importuning Shepard with any illicit solicitation, Judge Brink censured, Humphreys himself was "accosted" by a police officer on the street. If Shepard "had not followed him and spoken to him, he would have gone home, minding his own business." The facts, taken by themselves, suggested outright "entrapment."[603] Yet in the absence of any such defense among New York courts, Judge Brink hung his reversal on a statutory point: Humphreys's brief

[601] Author's interview with Herb Selwyn, July 12, 2014.

[602] People v. Humphrey, 111 N.Y.S.2d 450, 452-53 (Co. Ct. 1952)

[603] Ibid., 455.

conversation with Shepard outside his apartment hardly amounted to "loitering" in public, and his offer of "beer, candy, and some fun" was too vague to establish a lewd sexual purpose. Based on the record, the court concluded, the prosecution simply had not carried its evidentiary burden.[604]

Over the next few years, a number of New York courts followed Judge Brink's example. Where the state's prosecutions against homosexual men offended a judge's sense of justice, judges found creative ways to dismiss the charges, from statutory quibbles about the definition of "disorderly conduct" to their fundamental discretion in finding guilt beyond a reasonable doubt. Some years following *Humphreys*, one magistrate judge uncommonly inclined toward lenience acquitted a defendant who walked up to an officer on St. Marks Place and tendered a sexual proposal so explicit that the court declined to reprint it.[605] Avoiding any speculation as to how long Benito Feliciano had been on the street or for what purpose, the judge insisted that his brief exchange with the officer neither extended into "loitering," nor—being neither "loud" nor "boisterous[]" but "rather friendly" in tone—suggested any intention to breach the peace.[606] More commonly, judges adopted a policy of evidentiary clemency in the presence of dubious police conduct. As veteran defense attorney Irwin D. Strauss assured a new colleague in the 1960s, while "entrapment at present does not constitute a legal defense in the case of solicitation, . . . most of our judges upon a recital of facts showing entrapment dismiss the case . . . on the ground of having a reasonable doubt of the defendant's guilt."[607] In plenty of cases, of course,

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[604] Ibid., 454-55.

[605] People v. Feliciano, 10 Misc. 2d 836, 837 (N.Y. Magis. Ct. 1958).

[606] Ibid., 838.

[607] Irwin D. Strauss, letter to Raul L. Lovett, September 10, 1965, Folder 30, Box 3, Reel 10, Mattachine Society Collection, International Gay Information Center, New York Public Library.

judges convicted homosexual men of disorderly conduct no matter how briefly they stayed at the scene of the crime, how politely they spoke with a decoy, or how strenuously they denied any sexual advances.[608] But where a plainclothes decoy exceeded a particular judge's estimation of desirable police tactics, the New York courts frequently found ways to acquit.

The most intense—and certainly the most circuitous—battles between the vice squad and the courts occurred in Washington, D.C. In 1952, in perhaps the earliest recorded case of a defendant fighting a solicitation charge, a federal court strictly curtailed the Morals Squad's powers under the D.C.'s lewd solicitation laws.[609] The case traced back to Franklin Park on September 18, 1948, where in the late hours of the night a twenty-three-year-old officer named Frank Manthos sat on an empty bench within eyesight but not earshot of his partner. At around 1 a.m., forty-one-year-old Edward Kelly entered the park; Manthos recalled immediately noticing Kelly's "peculiar walk."[610] Kelly sat on the bench beside Manthos and a casual conversation ensued. Manthos introduced himself as "Gaynor," said he was a plastics salesman from Atlanta, and asked Kelly "what a person d[id] around here for excitement." Kelly told him that the bars were closed this time of night, compared the D.C. nightlight unfavorably to the "gay parties" in Hollywood, and (according to Manthos) lamented that the law in California was far laxer for "two men to get together and have a good time." Eventually, Manthos and Kelly agreed to

[608] Willis v. United States, 198 A.2d 751, 752 (D.C. 1964) (convicted despite very brief encounter); People v. Pleasant, 23 Misc. 2d 367, 368-69 (N.Y. Magis. Ct. 1953) (convicted despite friendly and brief proposal).

[609] Kelly v. United States, 194 F.2d 150 (D.C. Cir. 1952).

[610] Edward F. Kelly v. United States, Joint Appendix, 3-4, No. 10,639, Record Group 276, Stack Area 14E2A, Row 2, Compartment 31, Shelf 5, Box 1390, National Archives (Washington, D.C.).

return to Kelly's apartment for a drink and (according to Manthos) "a lot of fun." When they got to Kelly's car, Manthos identified himself and placed Kelly under arrest.[611]

The moment he was taken into police custody, Kelly threatened to fight the charges, and he remained true to his word.[612] At trial, his version of the events was somewhat different. Kelly recounted that he was passing through the park after a late meal, having spent most of the evening at home with a (concededly platonic) lady friend.[613] He insisted that he sat on a park bench first and Manthos only then came up to him (though he curiously recalled Manthos's first words as importuning him to "sit down" if he was "not in a big hurry").[614] He flatly denied sharing any legal opinions about Los Angeles, and swore that Manthos invited himself over, asking if the two could "go to your place for a drink." Certainly, he disputed having made any comments about "fun" or any of the bawdier phrases Manthos attributed to him. If he accepted the young man's request, Kelly explained, it was only because he was "feeling congenial" from a pleasant, and mildly alcoholic, evening.[615]

The chastity of Kelly's account merits some skepticism. As historian David K. Johnson has noted, heterosexual forty-one-year old men rarely invited attractive twenty-three-year-old from D.C.'s most popular cruising areas to their apartments at one-thirty in the morning, and

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[611] Kelly v. United States, 194 F.2d 150, 151 (D.C. Cir. 1952); Kelly v. United States, Joint Appendix, 10, 33-35; Edward F. Kelly v. United States, Transcript of Record, 5-6, No. 10,639, Record Group 276, Box 1832, Stack Area 14E2, Row 12, Compartment 13, Shelf 3, National Archives (Washington, D.C.).

Unsurprisingly, many of the facts on record were in dispute. In compiling this general narrative, I draw either on undisputed testimony or on one witness's account where the other's is clearly self-contradictory.

[612] Kelly v. United States, Transcript of Record, 35.

[613] Ibid., 168.

[614] Ibid., 32-33.

[615] Ibid., 34.

Kelly's own testimony featured some dubious contradictions.[616] Unsurprisingly, even as Kelly denied any sexual overtones in his conversation with Manthos, his attorney effectively tried to impeach Manthos on the grounds of entrapment. Why would Manthos have continued talking to Kelly about Hollywood's "gay parties" and where he could find a drink, the attorney implied, if he didn't have some ulterior motive in setting Kelly up for arrest?[617] Manthos had apparently found Kelly's comment sufficiently incriminating to include in his notes, and even incorporated the term into his fake name, but on the stand he suddenly denied knowing that "gay" might have any suspicious connotations. The reason he hadn't asked Kelly to clarify what he meant by a "gay party," Manthos testified, was that the "accepted meaning" of the word "was fairly clear": it meant a "wild" or "anything goes" party, filled with "drinking, smoking . . . or gambling."[618]

In fact, it came out over the course of the litigation that Manthos had some experience with gay parties and defendants. Dubbed the "one-man vice squad," Manthos had been responsible for 150 vice convictions in just eight months on the force.[619] The same evening that he arrested Kelly, he had arrested six other men for solicitation (though he failed to recall any of them on the stand).[620] Not long before, he had made headlines for breaking ranks with fellow officers in an SLA proceeding against a local bar; Manthos had actually testified in favor of the

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[616] Johnson, *Lavender Scare*, 175.

[617] Kelly v. United States, Transcript of Record, 76 ("Well, why didn't you leave at that time? . . . You were still trying to encourage him into committing a crime, were you?").

[618] Ibid., 77.

[619] Edward F. Kelly v. United States, Brief for Appellant and Joint Appendix, 3,No. 10,369, Record Group 276, Stack Area 14E2A, Row 2, Compartment 31, Shelf 5, Case 10639, Box 1390, National Archives (Washington, D.C.); Kelly v. United States, Transcript of Record, 5.

[620] Kelly v. United States, Brief for Appellant and Joint Appendix, 3; Kelly v. United States, 194 F.2d 150, 152 (D.C. Cir. 1952).

bar, but Kelly's attorney insisted that it showed an inclination toward "self-aggrandizement."[621] Manthos, the attorney suggested, was essentially the D.C. police force's equivalent of a bounty hunter—and the suggestion got some traction. Having initially convicted Kelly of lewd solicitation in September of 1948, Judge Fennell vacated the judgment based on Manthos's record of "false testimony."[622] After a new judge convicted Kelly of the same charge a year later, the appellate court reversed. Looking at all the evidence, including Kelly's immediate protests of innocence and numerous character witnesses, as well as Manthos's dubiously prolific history of homosexual arrests, the panel concluded that the facts fell "short of the proof required for conviction."[623] Considering the "destructive" nature of the homosexual charge leveled by Manthos—ripe for blackmail and other police abuses—the court urged fellow judges to practice at least three basic safeguards in all homosexual solicitation cases: receiving a single police witness "with great caution," giving special deference to character witnesses, and demanding at least some corroboration of a decoy's testimony.[624]

The *Kelly* case ushered in a sharp drop in convictions for homosexual offenses in Washington, D.C. The month following the decision, the district attorney's success rate on perversion charges fell from 63% to 19%.[625] After the initial shock, the numbers crept back up,

[621] Kelly v. United States, Transcript of Record, 7; see also "Grill Owners Framed, Policeman Testifies At Liquor Hearing," *Washington Post*, Nov. 11, 1948, 1, 20. For the attorney's reading, see Kelly v. United States, Transcript of Record, 5.

[622] Kelly v. United States, Brief for Appellant and Joint Appendix, 2, 7.

[623] Kelly v. United States, 194 F.2d 150, 155-56 (D.C. Cir. 1952).

[624] Ibid., 154-55.

[625] "Sex Case Convictions Show Sharp Decline," *Washington Post*, Feb. 24, 1952, M13; "2 Acquittals Follow Court Morals Ruling," *Washington Post*, Jan. 13, 1952, M11.

but judges continued to hold *Kelly*'s three rules as a shadow over homosexual prosecutions.[626] Frustrated by the low numbers, Leo A. Rover, the district attorney for Washington, D.C., tried to intervene personally on his office's behalf. At a closed door meeting with local judges on March 23, 1954, Rover denounced the shoddy conviction rates, then followed up by sending the judges a twenty-five page memorandum analyzing the *Kelly* rules.[627] One municipal judge, Milton Kronheim, openly denounced Rover's attempts to influence the judiciary's conviction rates, but Chief Judge Leonard P. Walsh defended Rover's actions as "entirely proper."[628]

Unfortunately for Rover, however, *Kelly* was not the extent of the vice squad's problems under the lewdness statute. Setting aside the problem of false accusations, some trial judges in D.C. shared their New York colleagues' hesitations about overly aggressive enticement tactics, and as in New York, they looked for opportunities to acquit. In the district, the charge was led by Judge Kronheim. A stickler for the *Kelly* rules and a public critic of Blick's Morals Squad, Kronheim had little patience for the creativity of officers like Dante Longo and Louis Fochett.[629] In May 1954, just two months after Rover's rebuke, Kronheim acquitted a federal employee of all charges arising from encounter with Longo in the men's room of a YMCA. Longo testified that Walter Cox had engaged him in some pleasantries, walked with him to G Street, and then asked if he could "come up" to Longo's room. Cox apparently admitted the charge, but testified

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[626] "Single Witness Held Insufficient For Lewd Charge," *Washington Post*, Feb. 12, 1955, 24. The conviction rate eventually came to hover around 37%. J. Philip Dawson, "Rover Sends Judges Views on Morals Cases," *Washington Post*, May 7, 1954, 21.

[627] "Instructing Judges," *Washington Post*, Apr. 1, 1954, A14; Dawson, "Rover Sends Judges Views on Morals Cases," 21. On the executive end, Rover then scheduled a conference with the chief of the Morals Squad and the district's prosecutors to discuss strategies for "strengthening cases of this type." J. Philip Dawson, "Rover's Statistics Draw Fire of Judge," *Washington Post*, Apr. 1, 1954, B1.

[628] Dawson, "Rover's Statistics Draw Fire of Judge," B1; J. Philip Dawson, "Controversy Flares Over Morals Cases," *Washington Post*, Apr. 5, 1954, 17.

[629] For Kronheim's open criticism of the Morals Squad, see "Usefulness of Sex Squad Questioned by Kronheim," *WP*, 21. For his deference to the Kelly rules, see "Former Court Clerk Freed in Sex Case," *Washington Post*, May 21, 1954, 31; Dawson, "Rover's Statistics Draw Fire of Judge," B1.



Figure III.1. Patrolman Frank N. Manthos of the Morals Squad. From *Washington Post*, November 12, 1948.



Figure III.2. D.C. Municipal Court Judge Milton S. Kronheim. From *Washington Post*, January 22, 1950.

that Longo's behavior was so suggestive that he only made his proposition after asking Longo if the officer was soliciting *him.* "This is a different thing from a solicitation," Kronheim concluded, "and I have no choice but to dismiss."[630] A year and a half later, Kronheim dismissed an indecency charge based on one of Fochett's arrests in a public men's room. According to Fochett, a young Army lieutenant had touched him after the two men "exchanged looks" at the Capital Theater. Dubious of Fochett's methods, Kronheim found that Fochett had "encouraged the act" and acquitted.[631] Kronheim did not doubt that these defendants had, as charged, made

[630] "U.S. Employee Cleared in Morals Case," *Washington Post*, May 19, 1954, 17.

[631] "Court Frees Vice Suspect; Hits Arrest," *Washington Post*, Nov. 27, 1956, B4.

homosexual overtures toward the officers, nor did he pretend that "encouragement" was a legal defense under the lewdness statute. Yet he refused to give the Morals Squad's more sordid tactics—effectively inviting a homosexual advance and then arresting the man who predictably accepted—the sanction of his courtroom.

Frustrated by their dwindling convictions under the solicitation statute, the district's prosecutors soon turned to a new weapon. If a decoy officer could only get a suspect to touch him before making an arrest, prosecutors realized, they could avoid the judicial pitfalls of the *Kelly* rules and simply charge him with assault.[632] When the prosecutor's office first debuted its new tactic in 1953, defendants (and some judges) attacked the notion that the general assault statute could cover a homosexual advance. "[T]he defendant used no violence and the officer admitted that he was not physically hurt," protested one judge in an early case. "He did not intimate that he was shocked, shamed, humiliated, or even surprised."[633] But for the most part, courts acknowledged that a physical homosexual overture counted as an offensive touching under the law. "If it is an assault to touch a woman unlawfully in the expression of a lustful instinct," reasoned Judge Quinn on the municipal court of appeals, "then surely it is just as much an assault for one man to fondle another without his consent." The police victim may not have been "shocked" by the indecent action, but "the legal principle involved is not affected . . . by the fact (if it be a fact) that the person assaulted was a case-hardened police officer."[634]

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[632] Henderson v. United States, 117 A.2d 456, 458 (D.C. Oct. 27, 1955). For examples of assault prosecutions, see Dyson v. United States, 97 A.2d 135, 136 (D.C. May 29, 1953); McDermett v. United States, 98 A.2d 287, 288-89 (D.C. July 14, 1953); Guarro v. United States, 237 F.2d 578, 579 (D.C. Cir. 1956).

[633] Dyson v. United States, 97 A.2d 135, 138 (D.C. May 29, 1953) (Hood, J., dissenting).

[634] Ibid., 136 (majority opinion).

The district's new strategy reinvigorated its homosexual prosecutions.[635] Yet, as vice officers and prosecutors soon discovered, the assault statute came with its own limitations. While judges like Kronheim squinted to import "encouragement" as a defense against the solicitation statute, after all, the common law of assault had always come with an embedded safeguard: consent. The first successful defense raised to the district's assault charges involved Officer Klopfer's forty-minute dalliance with a patron named McDermett in a downtown movie theater. As the court summarized, Officer Klopfer had all but arranged the defendant's fateful caress in that case. Having first watched McDermett masturbate, Klopfer struck up a friendly conversation, waited to leave the theater with him, and walked with McDermett for seven city blocks before reaching a nearby hotel, where (in the court's words) Klopfer "led the way . . . to the men's room and exposed himself in front of a urinal."[636] Uninvited and unconsented to, the court admitted, a homosexual advance may certainly have qualified as an offensive touching.[637] But this case, where a plainclothes police officer "by his own insidious conduct, by patient and clever encouragement," led a defendant reasonably to believe that he would welcome a sexual advance—this case was not it. "Courts are not so uninformed," Judge Clayton observed, "as not to be aware that there are such things as flirtations between man and man. And when flirtation is encouraged and mutual, and leads to a not unexpected intimacy . . . such cannot be classified as an assault."[638]

The D.C. courts' reading of consent clamped down on the Morals Squad's more aggressive tactics—though it may have taken some time for them to agree on what qualified as

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[635] Johnson, *Lavender Scare*, 176.

[636] McDermett v. United States, 98 A.2d 287, 289 (D.C. July 14, 1953).

[637] Ibid.

[638] Ibid., 290.

aggressive enough. When Louis Fochett tried his typical technique against 22-year-old Ernest Guarro in the Keiths Theater in 1955, for example, the trial judge convicted Guarro of assault, and the same appellate panel that had just acquitted McDermett chose to affirm.[639] Certainly, Fochett's actions were not as objectively egregious as Klopfer's: Fochett waited for Guarro to approach instead of starting the conversation; he unbuttoned his coat jacket rather than unzipping his pants; the entire encounter lasted a period of minutes rather than over a half-hour.[640] Yet the next highest court found Fochett's physical enticements and trademark invitation sufficient to dismiss the charges. "Considering the totality of the policeman's conduct, including his inviting inquiry to the defendant," the federal court of appeals concluded, "we cannot say that the evidence is more consistent with an assault than with an act induced in part by apparent consent."[641] When nearly the same fact pattern reached the municipal panel some months later, it deferred to the federal court's more generous view. "As to the merits of the appeal," the court noted, in light of the recent reversal in *Guarro* "little need be said."[642] Whether he followed a suspected homosexual for forty minutes or for four, the D.C. courts suggested, a vice officer's job was to reduce the pandemic of sexual perversion in the district. It was not, through enticing physical signs and verbal vulgarities, to extend his own sexual invitation.

This is not to say, of course, that courts were always willing to police the vice squad's tactics. *Kelly*'s exhortations notwithstanding, D.C. judges typically deferred to police witnesses when they took the stand.[643] After his experience with Ernesto Guarro, for example, Fochett's

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[639] Guarro v. United States, 116 A.2d 408, 409-10 (D.C. Aug. 2, 1955).

[640] Guarro v. United States, 237 F.2d 578, 581-82 (D.C. Cir. 1956).

[641] Ibid., 582.

[642] Thomas v. United States, 129 A.2d 852, 854 (D.C. Mar. 4, 1957).

[643] Council on Religion and the Homosexual, *The Challenge and Progress of Homosexual Law Reform*, 22 ("In court, judges and juries almost without exception believe the decoy's version of what happened.").

methods may not have changed, but his testimony did. One rainy afternoon some years after the *Guarro* trial, Fochett noticed Philip Seitner in a men's room at George Washington University.[644] According to Seitner, Fochett smiled, walked up to the urinal, exposed himself, and, after Seitner reached down to touch him, asked if Seitner "wanted to take it."[645] At trial, Fochett insisted that Seitner spontaneously approached him, made a remark about the weather, and, absent any further statements from Fochett, reached for the officer's penis.[646] In light of the conflicting evidence, the court sided with Fochett. In previous cases, the panel explained, "the policeman's conduct was for the most part not disputed . . . [But] on the foregoing testimony we cannot hold . . . that there was actual or apparent consent."[647]

Even in cases explicitly governed by *Kelly*, the bar for corroboration could dip fairly low. Some years after the case came down, a young black officer met sixty-six-year-old Warren Wildeblood at a bus station on 12th Street. They spoke for a few minutes and then took a short walk toward Wildeblood's apartment.[648] On that basis, Wildeblood was convicted of solicitation. While the officer's partner had not heard the conversation, the fact that he saw the two men leave together and that Wildeblood tried to bar testimony about their conversation provided "ample corroboration" for the appellate panel.[649] (The trial court's explanation may have been more to the point: "I can't imagine any credible reason why a white man meeting a

[644] Seitner v. United States, 143 A.2d 101, 102 (D.C. June 20, 1958); Philip G. Seitner v. United States of America, Brief for Appellant and Joint Appendix, 3.

[645] Seitner v. United States, Brief for Appellant and Joint Appendix, 2, 16-17.

[646] Seitner v. United States, 143 A.2d 101, 103 (D.C. June 20, 1958).

[647] Ibid., 102-03.

[648] Wildeblood v. United States, 284 F.2d 592, 598 (D.C. Cir. 1960); Warren O. Wildeblood v. United States, Memorandum in Support of Petition for Leave to File Appeal, No. Misc. 1456, 4, Record Group 276, Box 87, Stack Area 14E2, Row 8, Compartment 1, Shelf 2, National Archives (Washington, D.C.).

[649] Wildeblood v. United States, 284 F.2d 592, 598 (D.C. Cir. 1960).

colored man as a stranger in front of a bus station at that time of night, should walk away from the bus station toward his house . . . other than such as has been suggested here for the officer.")[650]

Yet in D.C., as in states like New York and California, the courts signaled that some limits were in place. Judges could not dismiss vice squads' seedier methods as "entrapment," whether a plainclothes decoy lured in a homosexual suspect by affecting a limp wrist or exposing himself at a urinal. But where they felt a vice officer exceeded the boundaries of proper police conduct, whether by his overt sexual enticements, or by the time he spent stalking his prey, or by the sheer connivance of his trap, judges across state lines were willing to find other paths toward clemency. By the 1960s, vice squads had come to feel the weight of the courts' scrutiny. In Philadelphia, the Morals Squad's decoys tried to "avoid [any] overt encouragement" of homosexual cruisers on their patrol "in order to rule out any basis for a claim of entrapment" in court.[651] In Los Angeles, vice officers conceded that an "unequivocal oral solicitation" of a suspect, for example, could amount to entrapment by police.[652] The aggressive techniques of men like Fochett started to seem like they did more harm than good.

The Gay World

The growing suspicions of the courts, however, may have been the least of the vice squad's concerns. As stories of plainclothes decoys' more outrageous methods made their rounds among friends and acquaintances, the police's more pressing problem may have been the growing suspicions of gay men themselves.

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[650] Wildeblood v. United States, Memorandum in Support of Petition, 5.

[651] Richard H. Elliott, "The Morals Squad," *DRUM* (September 1967), 11.

[652] *UCLA Law Review* Study, 704 fn. 119.

As police were well aware, whispers of entrapment were not limited to the courtroom in the 1950s. From D.C. to Chicago to San Francisco, the specter of the police decoy became a widespread concern among homosexual men in the nation's cities. In Los Angeles, men told stories of attractive officers "teasing" potential partners in cruising sites.[653] In Chicago, they spoke of decoys who "entrapped you and . . . shook you down" to cover up the charges.[654] "The entrapment of gay males in the streets, the parks and in numerous public places," recalled one man living in San Francisco, "was a constant fear."[655] Their sense of suspicion was actively encouraged by the homophile societies and publications of the day. The Mattachine Society warned its members to avoid cruising sites and aggressive strangers.[656] For those who did not listen, one of the Society's most popular projects in the 1950s was a pocket manual entitled "Know Your Legal Rights," drafted by a Los Angeles attorney to advise homosexual men on how to handle the inevitable arrest.[657] Meanwhile, when the Mattachine's more radical members (including Jennings) launched *ONE* magazine in the winter of 1953, the publication made it a priority to keep its readers apprised of the police's decoy methods.[658] "[T]he Vice Squad detail of our law enforcement body resort[s] to unscrupulous methods of deliberate entrapment," decried George Henry Mortenson in the May 1953 issue. "These men . . . present under sacred oath such fabrications, distortion, and willful lies, that were they not officers of the law, they

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[653] Transcript of interview of "Tex or JR" by Len Evans, 24.

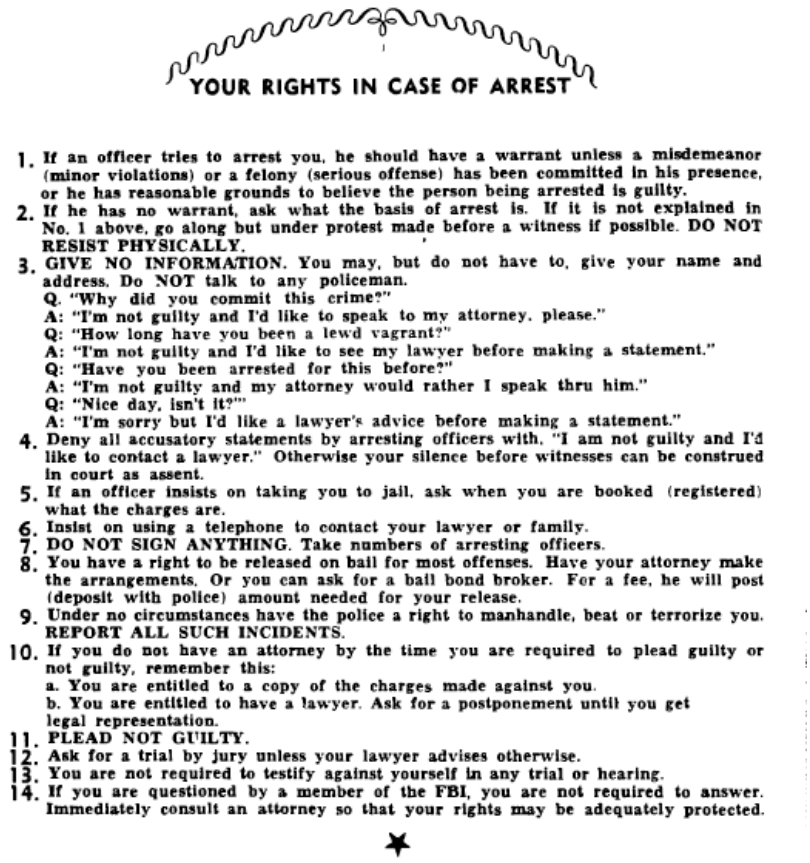
[654] Transcript of interview of Samuel Steward by Len Evans, July 2, 1983, 20, Oral History Project, GLBT Historical Society (San Francisco, CA).

[655] Rumaker, *Robert Duncan in San Francisco*, 16.

[656] Interview of Herb Selwyn by John D'Emilio, NYPL.

[657] Vern L. Bullough, "Herb Selwyn," in *Before Stonewall: Activists for Gay and Lesbian Rights in Historical Context,* eds. John Dececco et al., (New York: Routledge, 2014), 149. See also James Melvin Reinhardt, *Sex Perversions and Sex Crimes* (Springfield: Charles S. Thomas, 1957).

[658] Charles, "From Subversion to Obscenity," 269.



YOUR RIGHTS IN CASE OF ARREST

1. If an officer tries to arrest you, he should have a warrant unless a misdemeanor (minor violations) or a felony (serious offense) has been committed in his presence, or he has reasonable grounds to believe the person being arrested is guilty.
2. If he has no warrant, ask what the basis of arrest is. If it is not explained in No. 1 above, go along but under protest made before a witness if possible. DO NOT RESIST PHYSICALLY.
3. GIVE NO INFORMATION. You may, but do not have to, give your name and address. Do NOT talk to any policeman.
   Q. "Why did you commit this crime?"
   A: "I'm not guilty and I'd like to speak to my attorney, please."
   Q: "How long have you been a lewd vagrant?"
   A: "I'm not guilty and I'd like to see my lawyer before making a statement."
   Q: "Have you been arrested for this before?"
   A: "I'm not guilty and my attorney would rather I speak thru him."
   Q: "Nice day, isn't it?""
   A: "I'm sorry but I'd like a lawyer's advice before making a statement."
4. Deny all accusatory statements by arresting officers with, "I am not guilty and I'd like to contact a lawyer." Otherwise your silence before witnesses can be construed in court as assent.
5. If an officer insists on taking you to jail, ask when you are booked (registered) what the charges are.
6. Insist on using a telephone to contact your lawyer or family.
7. DO NOT SIGN ANYTHING. Take numbers of arresting officers.
8. You have a right to be released on bail for most offenses. Have your attorney make the arrangements. Or you can ask for a bail bond broker. For a fee, he will post (deposit with police) amount needed for your release.
9. Under no circumstances have the police a right to manhandle, beat or terrorize you. REPORT ALL SUCH INCIDENTS.
10. If you do not have an attorney by the time you are required to plead guilty or not guilty, remember this:
    a. You are entitled to a copy of the charges made against you.
    b. You are entitled to have a lawyer. Ask for a postponement until you get legal representation.
11. PLEAD NOT GUILTY.
12. Ask for a trial by jury unless your lawyer advises otherwise.
13. You are not required to testify against yourself in any trial or hearing.
14. If you are questioned by a member of the FBI, you are not required to answer. Immediately consult an attorney so that your rights may be adequately protected.

Figure III.3. Legal tutorial "Your Rights in Case of Arrest." From *ONE*, March 1953, 16.

would be confined to mental institutions."[659]

It said something about the resources available to gay men in these years, of course, that organizations like *ONE* and the Mattachine Society were there to provide them with both outrage and paternal guidance. Not coincidentally, the increased awareness of the police's decoy campaigns came as many homosexual men came together into something resembling organized urban communities. Simultaneously a symptom and a catalyst of that cohering sense of group identity, homophile societies like the Mattachine helped forge a national communications network among gay men. Based in major urban centers like Los Angeles, San Francisco, and

[659] George Henry Mortenson, "To be Accused Is To Be Guilty: Casual Death Sentence," *ONE*, Vol. 1, No. 5 (May 1953), 12.

New York, the Mattachine engaged in public awareness campaigns and organized meetings to draw together local gay men.[660] Publications like *ONE* and the *Mattachine Review* spread among homosexual readers in midwestern towns and cities, introducing them to the social resources and cultural codes awaiting them in larger gay communities.[661]

Despite homophile organizations' expanding urban operations, of course, the majority of local gay men shied away from any active political participation. Dubious about the optics of an organized homosexual lobby, some opposed the very principles of organizations like the Mattachine—or, at the very least, feared forming any personal ties to them. Others were simply uninterested, declining to turn their personal lives into a political platform.[662] Even among gay men who avoided the homophile movement, however, a robust sense of community soon sprouted in a worldlier setting: the bars and clubs where they came to drink, flirt, and mingle in their leisure hours. Bars catering to homosexuals had proliferated in coastal cities following World War II, but as the years progressed they grew increasingly insular. As Nan Boyd has noted of San Francisco, gay bars "took on an insider quality in the 1950s."[663] Where homosexual men in prior decades routinely mingled among heterosexual tourists and bohemians, they now clustered in their own exclusive establishments, catering to a self-selected group of

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[660] D'Emilio, *Sexual Politics, Sexual Communities*, Chapter 4; Boyd, *Wide Open Town*, Chapter 4; Martin Meeker, "Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s," *Journal of the History of Sexuality*, Vol. 10, No. 1 (January 2001), 78-116.

[661] Martin Meeker, *Contacts Desired: Gay and Lesbian Communications and Community, 1940s-1970s* (Chicago: University Of Chicago Press, 2006), Part I.

As one contemporary observer would remark, based on the readers' letters published in *ONE*, a core function of the magazine was to give even "homosexuals in smaller cities who tend to feel more isolated" a sense of kindred community with gay men in neighboring towns. William J. Helmer, "New York's 'Middle-Class' Homosexuals," *Harper's Magazine* (March 1963), 92.

[662] Ibid.

[663] Boyd, *Wide Open Town*, 125.

regulars and the friends they brought with them.[664] In these all-gay spaces, patrons practiced their own language, built their own social hierarchies, and enforced their own social protocols, from the acceptable greetings for old friends to the proper ways of flirting with a stranger at the bar.[665] Gay bars were, of course, only one nexus of homosexual life in American cities in the 1950s—one that many self-consciously "respectable" homosexuals avoided altogether. Yet as the most visible and the most popular grounds of urban homosexuality, bars were a crucial space for breeding and transmitting the developing contours of a gay community: what sociologists would soon refer to as a distinct "gay world," with "its own language, . . . group ways, and code of conduct."[666]

One key characteristic of that world was its suspicion of strangers. As Evelyn Hooker noted in 1961, a core benefit of the increasingly robust homosexual culture was its function as a compass for gay men looking to find kindred spirits; "experienced homosexuals" in a new town could gain entry to the community simply by following a "fairly standard" "community map."[667] Anyone who stumbled into the exclusive spaces of the gay community without the proper passkey, however, was sure to be summarily evicted. In bars, employees and customers eager to preserve the comfort of their exclusive venues developed a set of defenses to keep outsiders away. Bartenders served customers they did not recognize warm beer or turned off the heating system to freeze them out.[668] They hung shades over their windows so that the patrons already

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[664] Ibid.; D'Emilio, *Sexual Politics, Sexual Communities*, 33.

[665] D'Emilio, *Sexual Politics, Sexual Communities*, 32; Boyd, *Wide Open Town*, 125.

[666] Hooker, "A Preliminary Analysis of Group Behavior of Homosexuals," 221. For rhetoric of gay "world" in urban spaces, see also Masters, *The Homosexual Revolution*.

[667] Hooker, "The Homosexual Community," 172.

[668] *UCLA Law Review* Study, 689-90 fn. 24; Branson, *Gay Bar*, 58.

inside could scrutinize new arrivals before their eyes adjusted to the dark.[669] In one bar in San Francisco, waiters who noted the arrival of unwelcome guests—heterosexual couples or groups of women looking for an evening's companion in the wrong place—would usher them to the center of the floor, where old-timers showered them with ribald comments until they simply embarrassed the intruders into leaving.[670]

The real shadow overhanging gay communities in the 1950s, of course, was not the errant single woman, but the police. While gay bars often provided an oasis from pressures of the outside world, they never erased the specter of the vice squad.[671] Particularly as stories of clever decoys spread among gay men, one of the constant features of gay nightlife—inside and outside the bar scene—was the danger of accidentally making the wrong acquaintance. In 1953, Dale Jennings had the luxury of assuming that the persistent stranger he met at a urinal was a robber. As the years went on, gay men found themselves acutely aware that any new acquaintance was far more likely to be a cop. Every new meeting or conversation at a bar or a cruising site, Ed Wallace recalled, became a type of dual screening process: "You had to be careful what you said. You laughed and you tried to pick up on bodily language, verbal language and all kinds of cues whether this person was really gay or not. You didn't want to end up walking out . . . and finding yourself under arrest."[672] Avoiding the attentions of an undercover cop became a shared cultural skill. As sociologists later observed, "ways of recognizing vice-squad officers" were among the first morsels of wisdom passed down to younger homosexuals by their elders when

[669] Boyd, Wide *Open Town*, 126-27.

[670] Sheri Cavan, "Interaction in Home Territories," 26-27.

[671] Boyd, *Wide Open Town*, 126 (describing bar "self-management"); Johnson, *Lavender Scare*, 150-51 (noting that Lavender Purge heightened sense of solidarity around gay bars).

[672] Beemyn, "A Queer Capital," 232.

they came out into the gay community.[673] The goal was to create a unique social language that allowed homosexual men to communicate their identities and desires to potential partners without veering into any indiscretions that might let plainclothes decoys claim they had solicited them. Or, as Donald Webster Cory put it in an early issue of *ONE*: "to develop such signs of recognition as will lead members of this marginal society to each other without exposing them to the outside and usually hostile world."[674]

To negotiate this treacherous terrain, gay men cultivated a set of codes that would, in later years, become a primary subject of fascination for the sociological researchers who descended upon them. In theory, this development was nothing new: homosexual men in the United States had long used internal codes to find each other in the crowds. The fairy's rouged cheek, the sloping wrist, the cheeky phrases and magic words that police used to trap gay men after World War II—these were all part of a language meant to help men signal their sexual interest to potential friends and partners. As Cory put it in 1951, the homosexual language had "in it an element of cant—the keeping in secrecy from the out-group that which is clear to the in-group."[675] Yet many of these early codes, developed in a time of far less prevalent police harassment, involved a self-conscious theatricality. The man who blondined his hair or dropped a limp wrist by the bar accepted a certain amount of bemusement from his neighbors in exchange for finding kindred spirits—or, in some cases, wore the markers proudly as a gesture of defiance. The unique codes and social habits that sprang up in the later 1950s were designed to avoid any such conspicuous shows of difference. They aimed to attract attention—and often to extend a sexual offer—precisely by avoiding attention.

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[673] Hooker, "The Homosexual Community," 179.

[674] Donald Webster Cory, "Can Homosexuals be Recognized?", *ONE*, Vol. 1, No. 9 (September 1953), 10.

[675] Cory, *Homosexual in America*, 103.

Among the simplest, yet most robust, of the gay community's codes was the matter of dress. Far from the flamboyantly feminine stylings of the fairy, the majority of gay men in these years developed a rather innocuous uniform: tailored slacks, often tending toward a light color; pullover sweaters or button-down shirts; sport coats or short jackets.[676] And last, but certainly not least, the footwear: instead of lipstick or swishing hips, the most reliable sign of a homosexual, for those who knew, became the tennis shoe.[677] The new dress code was self-consciously respectable and middle-class—the type of clothing, as one observer in a New York gay bar would remark, worn by "dashing young men in college sportswear advertisements," or, among the more casual crowds, what "an average college undergraduate might wear."[678] Yet the fashions were remarkably pervasive, dotting gay bars and popular cruising sites alike, and they carried a good deal of symbolic weight. Among gay men themselves, a pair of tight slacks and a sport shirt were enough to "arouse[] suspicions of homosexuality" in a stranger.[679] By the mid-1960s, the tennis shoe had become such a paradigmatic symbol of young urban homosexuals that one leather bar in San Francisco, hoping to dissociate itself from the city's more stereotypical gay culture, derisively hung a cluster of sneakers from the ceiling.[680]

In bars themselves, the tenor of gay nightlife frequently grew more subdued. Naturally, as the homosexual bar scene diversified in late 1950s, catering to a broad range of ages, professions, and sexual habits, no single code of conduct emerged to govern every space. In

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[676] Leznoff, "The Homosexual in Urban Society," 164; Hoffman, *The Gay World*, 55; Paul Welch, "The 'Gay' World Takes to the City Streets," *Life*, June 26, 1964, 68.

[677] Leznoff, "The Homosexual in Urban Society," 164; Hoffman, *The Gay World*, 55; Welch, "The 'Gay' World Takes to the City Streets," 68.

[678] Helmer, "New York's 'Middle-Class' Homosexuals," 86; Hoffman, *The Gay World*, 55.

[679] Leznoff, "The Homosexual in Urban Society," 164.

[680] Welch, "The 'Gay' World Takes to the City Streets," 68.

some establishments, a more old-fashioned—and often poorer—clientele continued the tradition of the fairy's tongue-in-cheek flamboyance, swishing around the bar, waving cigarettes, and greeting friends with feminine endearments.[681] Starting in the 1960s, bars popular with younger men also sometimes tolerated a different display of conspicuous queerness, operating dance floors for homosexual couples in their back rooms.[682] For the most part, however, "respectable" gay bars frowned on any traces of the stereotypical fairy, and overt shows of homosexual affection were limited to the company of friends and lovers.[683] In pickup bars where gay men came to meet new sexual partners, customers typically signaled their availability through a more complex interplay of physical and spatial codes. As Mileski and Black would observe, any homosexual man looking for a new partner at a bar knew to stay on the outer edges, standing or sitting with his back against the wall and scanning his fellow patrons.[684] Eyeing another customer from the walls of the bar sufficed to communicate a type of silent sexual invitation. "If one watches carefully, and knows what to watch for in a 'gay' bar," Evelyn Hooker would note, "one observes that some individuals are apparently communicating with each other without exchanging words, but simply by exchanging glances . . . It is said by homosexuals that if another catches and holds the glance, one need know nothing more about him to know that he is one of them."[685] Meanwhile, in mixed bars where patrons could not rely on such rarefied signals, gay men still sometimes dropped gay slang to identify a likely partner, but they also

[681] Ibid.

[682] Helmer, "New York's 'Middle-Class' Homosexuals," 86.

[683] Ibid, (noting that "the better class of gay bar usually discourages conspicuous homosexuals").

[684] Hooker, "The Homosexual Community," 175; Black and Mileski, "Passing as Deviant," 7; Welch, "The 'Gay' World Takes to the Streets," 68.

[685] Hooker, "The Homosexual Community," 175; Welch, "The 'Gay' World Takes to the Streets," 68.

turned to increasingly ambiguous verbal codes.[686] One frequent traveler swore he could always find an evening's company in a new town by finding an upscale hotel bar, striking up a casual conversation with a likely homosexual, and simply asking "where the action [was]."[687]

Even beyond the bars, in the cruising sites shunned by many members of the gay community, men developed increasingly stealthy means of extending sexual invitations. In the early 1950s, police officers in parks and public bathrooms routinely enticed solicitations simply by starting up a conversation with a stranger, but by the 1960s such an obvious opening gambit rarely worked. In his first month on the job, one decoy assigned to a local park in Illinois reported that three-fourths of his flirtations with suspected homosexuals led to dead ends: while he was fairly confident about their intentions, the vast majority were "too round-about in their proposals" to give him any grounds for an arrest.[688] Meanwhile, veteran cruisers in public bathrooms stopped speaking to strangers altogether. Instead, they relied on subtle movements of the eyes, catching a fellow patron's gaze for an extended look or glancing from his genitals directly to the eyes before beckoning their heads toward a private corner of the lavatory.[689] Others turned to more specialized codes, jingling keys or change in their pockets, or tapping their feet in a bathroom stall.[690] Where someone had cut a hole in the partition, they would insert a finger through the opening and wait for the other man to show his finger in return.[691] Some

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[686] Stearn, *Sixth Man*, 55, 59-60 (noting highly subtle cultural inside jokes).

[687] Ibid., 55.

[688] Ed Pound, "Alton Police Decoy Nabs Sex Deviates in Park," *Alton Evening Telegraph*, April 3, 1965, 1.

[689] Humphreys, *Tearoom Trade*, 64.

[690] Ibid., 65; *UCLA La Review* Study, 692 fn. 5.

[691] Florida Legislative Investigation Committee, "Homosexuality and Citizenship in Florida," Tallahassee, Florida, January 1964 ("Why be Concerned?"). Because this pamphlet has no page numbers, all citations refer to the relevant section title.

cruisers, of course, could be less cautious, sticking their tongues through a glory hole or passing notes to their neighbors.[692] But for the most part, researchers and homophile allies remarked on the near-invisible nature of homosexual solicitations. "These overtures are often so subtle that a casual observer could not recognize them," insisted lawyer Harold Jacobs in 1963; "Indeed, in some cases the ability to recognize a veiled overture almost amounts to a 'sixth sense.'"[693]

There would come a point when police agencies would echo the same insight. "[M]ost homosexuals who are 'cruising' for partners do not brazenly solicit the first available male," a poll of police agencies in the Los Angeles area would report in 1966; "rather, they will employ glances, gestures, dress and ambiguous conversation" before making any "unequivocal" proposals.[694] But this grain of wisdom was years into the future. In the mid-1950s, while most police officers were still just coming to terms with the fact that not all homosexual men fit the mold of the effeminate fairy, the emergence of an organized homosexual culture occurred essentially beneath the police's noses. Veteran officers might have recognized slang words like "queen" as telltale drops of homosexual argot, but asking them to define what the term meant led to some interesting results. In Miami in 1954, police detectives who heard a witness in a murder case call the victim a "queen" assumed he was the leader of a secret homosexual colony.[695] In 1955, the chief of San Francisco's sex crimes squad defined a "queen" as a homosexual "who

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[692] Humphreys, *Tearoom Trade*, 65.

[693] Jacobs, "Decoy Enforcement of Homosexual Laws," 259; see also Council on Religion and the Homosexual, *The Challenge and Progress of Homosexual Law Reform*, 21 ("Rather, researchers have found that solicitation tends to be discrete and unnoticeable to a disinterested party . . . .").

[694] *UCLA Law Review* Study, 699 fn. 84.

[695] Jim Kepner, "Hurricane Force," *NewsWest*, April 1977, 26, in "Bar Raids" Folder, Ephemera Collection, International Gay Information Center, New York Public Library. For a historical overview of the event, see Edward Alwood, *Straight News: Gays, Lesbians, and the News Media* (New York: Columbia University Press, 1996), 3

wears female garb to trap a soldier or sailor who's imbibed too much" and then rob him.[696] Interviewed by *Men* magazine, Lieutenant Eldon Bearden appeared to envision the homosexual underworld as a pulp criminal syndicate. In one anecdote, a homosexual cruiser turned on a policeman "knife in hand," "slashing" away with a "vicious swing." In another, a vice officer found himself in a fistfight with a 220-pound homosexual in a public bathroom: "The two men began pounding one another with head-busting blows."[697]

If these accounts sounded sensationalized for the press, the daily reality was hardly better. Beginning in April of 1955, after a vice officer reported a spike in "homosexual activities" around the Bay area, San Francisco's Police Chief Cahill authorized a formal investigation into the city's burgeoning gay community.[698] Headed by a single plainclothes detective, who signed his name simply as "X.," the investigation produced numerous reports over several years, and it did gather some useful information. X. built a topography of San Francisco's gay bar scene, including the names of popular venues, their shifting geographic sprawl, and the demographics of their clientele.[699] He kept a fairly accurate report on the Mattachine Society, listing its gathering places and its activist projects.[700] Confirming a common rumor among the gay community, he also put substantial effort into compiling a list of known and suspected homosexuals in the city, including names, addresses, telephones, and

[696] Lt. Eldon Bearden, "Don't Call Us 'Queer City,'" *Men*, April 1955, 60.

[697] Ibid., 12.

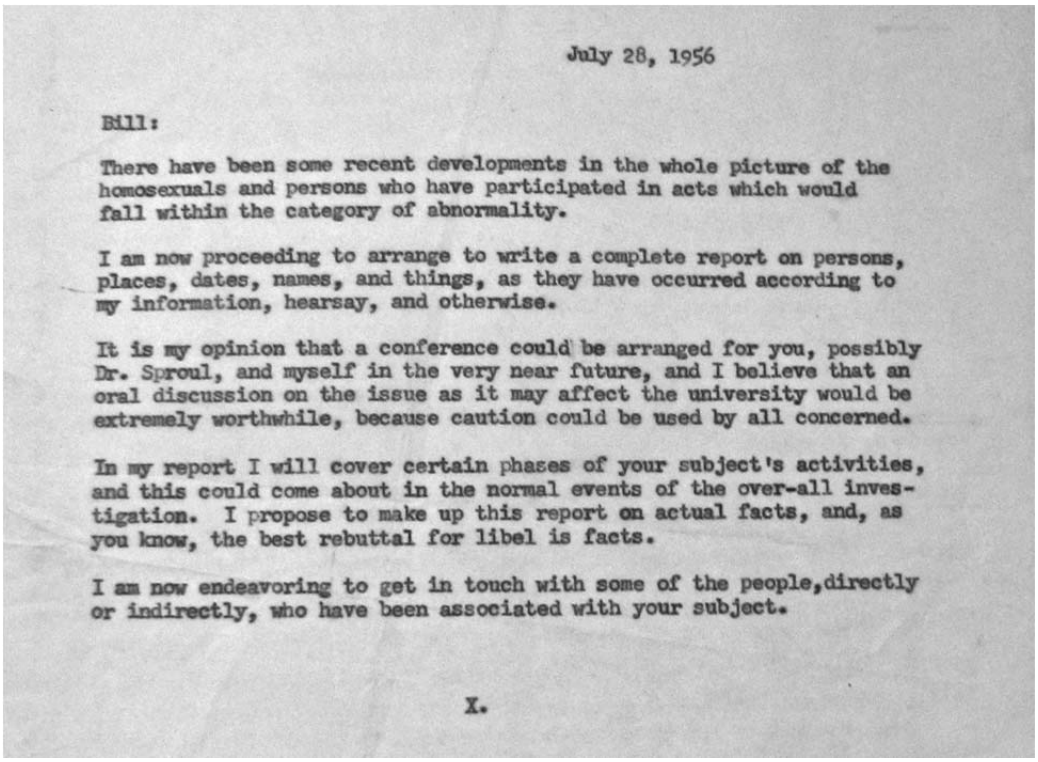
[698] Memorandum, April 5, 1955, Folder 3, Box 1, Thomas J. Cahill Papers, San Francisco Public Library; Memorandum, July 31, 1956, Folder 17, Box 1, Thomas J. Cahill Papers, San Francisco Public Library.

[699] Memorandum to Front Office, March 15, 1956, Folder 12, Box 1, Thomas J. Cahill Papers, San Francisco Public Library; Memorandum, July 31, 1956, Thomas J. Cahill Papers.

[700] Memorandum, July 31, 1956, Thomas J. Cahill Papers; Memorandum to Front Office, March 25, 1956, Folder 13, Box 1, Thomas J. Cahill Papers, San Francisco Public Library

occupations.[701] Insisting that the data "might be of value to corporations, banks, and federal agencies," by 1958 he had recorded some 1,500 names—not least, numerous officers of homophile organizations like the Mattachine Society and Daughters of Bilitis.[702]

For the most part, however, X.'s survey of San Francisco's sexual underground revealed an almost comic ignorance about the gay nightlife that burgeoned there. Gathering his information primarily through a young prostitute who came to his attention through the department's investigation of notorious madam Mabel Malotte, X. brought back a marginal and highly biased view of his subject.[703] His earliest report consisted primarily of voyeuristic



July 28, 1956

Bill:

There have been some recent developments in the whole picture of the homosexuals and persons who have participated in acts which would fall within the category of abnormality.

I am now proceeding to arrange to write a complete report on persons, places, dates, names, and things, as they have occurred according to my information, hearsay, and otherwise.

It is my opinion that a conference could be arranged for you, possibly Dr. Sproul, and myself in the very near future, and I believe that an oral discussion on the issue as it may affect the university would be extremely worthwhile, because caution could be used by all concerned.

In my report I will cover certain phases of your subject's activities, and this could come about in the normal events of the over-all investigation. I propose to make up this report on actual facts, and, as you know, the best rebuttal for libel is facts.

I am now endeavoring to get in touch with some of the people,directly or indirectly, who have been associated with your subject.

X.

Figure III.4. Note from San Francisco vice investigator "X.," July 28, 1956. From Thomas J. Cahill Papers, San Francisco Public Library.

[701] Report from X., October 16, 1956, Folder 18, Box 1, Thomas J. Cahill Papers, San Francisco Public Library.

[702] Memorandum to Chief of Police Frank Ahern, January 20, 1958, Folder 19, Box 1, Thomas J. Cahill Papers, San Francisco Public Library.

[703] X.'s most common informant in these memos was Yola Boles, a prostitute who also appears in the lists of San Francisco "queers and characters." See, for example, Memorandum to Front Office, March 25, 1956, Thomas J. Cahill Papers.

anecdotes of alleged orgies run by prominent transvestites: Shell Oil vice president Frank Rehm, who "commissioned certain prostitutes . . . to purchase for his escapades certain female wearing apparel"; office manager Frederick Devia, who liked to draw "designs on or about the body of the prostitute and himself through the use of lipstick"; Sir Henry, Count Vasco de Gama, a supposed nobleman who "procure[d] lesbians and . . . cheer[ed] on, 'I say, old girl'" while watching them have sex.[704] Later reports took an even more exaggerated tone. The mission behind his research, X. announced in December 1955, was "to form a more perfect union between pimps, prostitutes, con men, stick-up men, freaks, homosexuals, Vasco Da Gama, Professor William K. Schmelzle, and . . . other appropriate agents and agencies."[705] The investigator envisioned the city's gay culture as part of a teeming criminal syndicate, sharing meeting grounds with Malotte's prostitution racket, responsible for burglaries resulting "in the loss of one-half million dollars" to the city's merchants, and populated by a host of mafia-like characters like Devia, "The Lipstick Man," and Burton Stenberg, "known in the trade as 'Dorothy the Fruit.'"[706] The Mattachine Society and its members, as they emerged from his reports, fit indiscriminately somewhere among these criminal elements.[707] Biased by his sources, and all too happy to flatten San Francisco's gay community onto the petty criminals who occupied the rest of his department's time, even the SFPD's most careful student of the city's thriving gay world came away with a picture few of its members would have recognized.

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[704] Memorandum, April 5, 1955, 7-9, Folder 3, Box 1, Thomas J. Cahill Papers, San Francisco Public Library.

[705] Memorandum to Front Office, December 27, 1955, Folder 3, Box 1, Thomas J. Cahill Papers, San Francisco Public Library.

[706] Memorandum to Front Office, March 15, 1956, Thomas J. Cahill Papers; Memorandum, July 31, 1956, Thomas J. Cahill Papers.

[707] Memorandum to Front Office, March 25, 1956, Thomas J. Cahill Papers (mixing names of Mattachine officers and criminals working with Malotte).

The vice squads' operations against homosexuals in the early 1950s were not seen as the most demanding assignments. Decoys selected for the job had to be young, attractive, and unembarrassed at the prospect of flirting with other men, but that was about it. Any special tricks of the trade—Longo's effeminate gestures, Fochett's "enticing inquiry"—were up to the individual officer. By the end of the decade, however, as vice squads struggled to deal both with the courts' distaste for their more aggressive methods and with homosexual men's increasingly coded cruising culture, they began to realize that a bit more sophistication was in order. If entry to the gay community had come to depend on a specialized internal language, the police would have to learn to speak it.

5. "Passing as Deviant": Gay Cruising Culture and the Rise of the Invisible Police Ethnographer

In 1957, while Chief Cahill's anonymous detective was still delving into San Francisco's sexual underground, criminologist James Melvin Reinhardt published his own foray into the urban gay world. Funded by the Nebraska Police Officer's Association for a readership of "officers, investigators, judges, and prosecutors," Reinhardt's *Sex Perversion and Sex Crimes* was one of the first in its field: a "socio-cultural" examination of sex deviation.[708] A trained sociologist, Reinhardt was particularly interested in the problem of homosexuality, devoting his first three chapters to an extended investigation of the life of America's gay men and women.[709] His centerpiece chapter presented a scientific investigation of a gay community in his Nebraska town: a "sociological study of a homosexual 'group' in what may be called a 'natural setting.'"[710] Like the researchers who came after him, Reinhardt was keenly aware of his methodological limitations. "An investigator, totally on the outside of 'the life,' faces some imponderable difficulties in the attempt to gain insight into [the gay world]," he noted.[711] Fortunately for Reinhardt, two students at the University of Nebraska, a gay man and a woman friendly with the local group, agreed to serve as his "interpreters," distributing questionnaires

[708] James Melvin Reinhardt, *Sex Perversions and Sex Crimes* (Springfield: Charles S. Thomas, 1957), vii-viii.

[709] Ibid., Chapters 2-4. Chapter 1 was a general introduction on "Perversion and the Norm."

[710] Ibid., 36 ("Chapter 3: The 'Life' at Anchor").

[711] Ibid.

and helping arrange interviews with some of its 100 members.[712] The results, as presented in Reinhardt's book, presented a wide-ranging cultural account of the small-town homosexual, from his experience "coming out" ("a period of personal tension"), to his relationship with his parents (mixed), the possibility of long-term attachments ("possible, but not probable"), and his "missionary" work in introducing new converts to the group.[713]

Not least, Reinhardt was interested in the internal codes that gay men and women used to communicate with each other in public. "Homosexuals have developed an extensive means of identification," he reported.[714] Familiar words like "fag" or "gay" were enough to "strike responsive recognition from" a fellow homosexual. Less famously, popular songs like "Margie," sung or whistled by a woman, "would immediately arouse suspicion and excite recognition" in a lesbian.[715] The coded nature of the gay world's internal semiotics created some room for confusion: "If inadvertently a 'normal' person uses some of the expressions or mannerisms characteristic of the 'gay world," Reinhardt noted, "it is assumed that the individual is a homosexual."[716] Yet, as Reinhardt's manual suggested, such uses did not have to be inadvertent. In addition to dropping common gay slang throughout his chapters, Reinhardt included a "Gay Glossary" for readers curious about the homosexual community's signaling mechanism. Ranging from the most common homosexual slang ("gay," "queer," "come out") to lesser-known jargon ("jam," "cruise") and obscure sexual phrases ("bagpipe," "flute," "swing"), it also included popular interjections like "coo" and "get you!", some with a guide to proper

[712] Ibid., 36-37.

[713] Ibid., 37-43.

[714] Ibid., 45.

[715] Ibid., 45-46.

[716] Ibid., 45.

pronunciation.[717] "Whoops," Reinhardt noted, as one example, should be "[p]ronounced with a rising inflection and as if it were spelled 'Woo!' . . . One can whoops another or be whoopsed."[718] Offering to educate law enforcement agents on America's gay world, Reinhardt did not simply gather together a stationary body of information for his readers. A sociologist foreshadowing Black and Mileski's model, he provided them with the tools for further investigation, teaching them not only to recognize but also to speak the language of the gay underground.

An overtly scientific endeavor, Reinhardt's sociological introduction to the modern homosexual may have drawn more academic than practical interest. Yet over the next decade, Reinhardt's pedagogical impulse began to crop up in law enforcement manuals throughout the country. When the Los Angeles Police Department increased its drive against the city's gay men in the early 1960s, it prepared its officers by distributing a seven-page pamphlet called "Some Characteristics of the Homosexuals."[719] Around the same time, a legislative committee in Florida released an investigative report entitled "Homosexuality and Citizenship in Florida."[720] Written primarily for government "administrators and personnel officers" charged with purging suspected homosexuals from employment, the report warned that "there is no single identifying characteristic of the homosexual, nor can they be stereotyped."[721] Yet based on its extensive research into the problem, it assured readers that the gay "world" came "replete with its own

[717] Ibid., 47-49.

[718] Ibid., 49.

[719] Welch, "The 'Gay' World Takes to the City Streets," 72.

[720] Florida Legislative Investigation Committee, "Homosexuality and Citizenship in Florida." For a general history of the project, see Stacy Lorraine Braukman, *Communists and Perverts Under the Palms: the Johns Committee in Florida, 1956-1965* (Gainesville: University Press of Florida, 2012).

[721] Florida Legislative Investigation Committee, "Homosexuality and Citizenship in Florida" ("Preface," Who and How Many Are the Homosexuals?").

language [and] customs," from which it was possible to identify "some common characteristics"—not least, homosexual men's patronage of exclusive "gay" bars and secret "cruising" practices like glory holes.[722] Similar to Reinhardt's study, the pamphlet ended with a detailed "Glossary of Homosexual Terms and Deviate Acts," teaching readers how to pronounce phrases like *chi-chi* ("she-she") and use phrases like *do you* ("said as, 'I'd like to . . .'").[723] A year after its publication, chairman R.O. Mitchell boasted that the manual had been adopted by police training programs in at least eight cities and was used as a textbook by the Florida Law Enforcement Academy.[724] By the end of the decade, indeed, at least one nationally distributed manual for vice squads featured a set of "Guidelines for Recognizing Active Homosexuals."[725] Telltale signs included using "slang terminology relating to other homosexuals," "giv[ing] prospects the 'eye'" in public bathrooms, and "playing 'footsie' in a 'tearoom.'"[726] (Other ostensible signals, like a homosexual's penchant for "openly proclaim[ing] he is searching for a penis model" and getting into "frequent, violent arguments . . . which result in slapping and scratching each other," were likely less helpful.)[727] The *Handbook of Vice Control* even came with helpful illustrations: one black and white photograph of a man eyeing a prospective partner by the urinal, another of two feet tapping in a toilet stall.[728]

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[722] Ibid, ("The Special World of Homosexuality," "Who and How Many Are the Homosexuals," "Why be Concerned?").

[723] Ibid, ("Glossary of Homosexual Terms and Deviate Acts").

[724] R.O. Mitchell, Report of the Florida Legislative Investigation Committee (February 1965), 2-3.

[725] Denny F. Pace, *Handbook of Vice Control* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1971), 55.

[726] Ibid., 55-57.

[727] Ibid., 55-56.

[728] Ibid., 55-57.

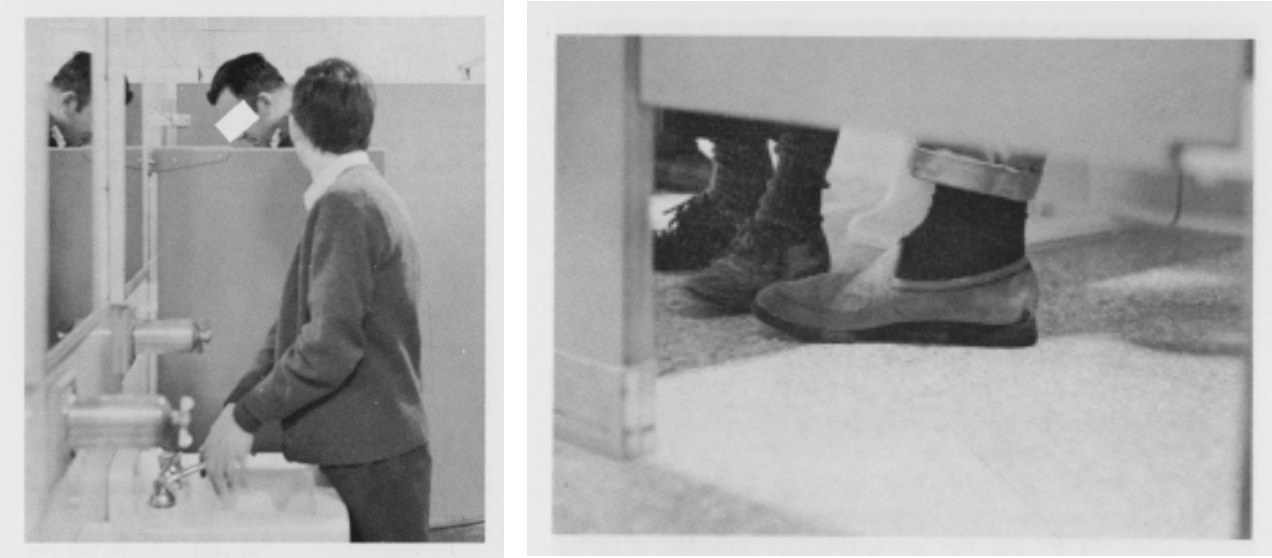


Figure III.5. Telltale cruising techniques in a vice manual. Pace, *Handbook of Vice*, 56-57.

The extent to which vice agencies relied on such formal instruction to refine their anti-homosexual campaigns remains unclear. Beginning in the late 1950s, however, it became widely rumored that vice officers sent out as decoys in the field were first "trained" in the codes and contours of the gay community. As early as 1957, Helen P. Bramson, the matronly owner of a gay bar in San Francisco, insisted that the "young and good-looking policemen" who tried to arrest her customers were "coached in terms of speech" and dressed as "'gay' as they know how."[729] By the early 1960s, her remark had become a common refrain among both homosexuals and the social researchers who studied them. In 1962, R.E.L. Masters's study *The Homosexual Revolution* reported that the vice squads' "standard operating procedure" was to send officers who "ha[d] been given formal instruction" in common gay mannerisms to bars in order to lure in homosexual patrons.[730] In 1963, Donald Webster Cory—soon to be a certified sociooloigst in his own right—insisted that plainclothes officers in bars were "instructed in the

[729] Branson, *Gay Bar*, 42.

[730] Masters, *The Homosexual Revolution*, 168.

lingo of the homosexual."[731] In 1964, a University of Chicago sociologist claimed that the typical Chicago decoy arrested homosexuals by "learn[ing] the language, behavior and dress of the homosexual group" and then "pretend[ing] that he is one of them in order to solicit a 'pass.'"[732]

A number of police departments openly reported that some training did take place. In 1961, the *San Francisco Examiner* reported that the Norbert Falvey, city supervisor for the Alcoholic Beverage Control board, had started recruiting local police officers to help patrol gay bars after the crowds there learned to recognize the ABC's own agents. To acclimate the recruits to their task, "Falvey's State Liquor agents train the young policemen, instructing them on what to look for, and how to act and dress while in 'gay' bars."[733] Some years later, vice officers with the Los Angeles Police Department confirmed that the LAPD systematically sent out "officers dressed to look like homosexuals" as part of an "undercover operation" against the group.[734] Similarly, a researcher who trained the Philadelphia Morals Squad on its anti-homosexual arrests reported that the Philadelphia police—as, "with some minor variation, . . . most other metropolitan police departments"—relied on a consistent set of signals to attract homosexual men in parks and public bathrooms, and that they were "trained to give no indication . . . of either encouragement or disgust" to potential suspects.[735] The sheer consistency of the police's tactics by the early 1960s gave some onlookers cause for pause. "Hundreds of police reports,

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[731] Cory and LeRoy, *The Homosexual and his Society*, 117. For Cory's sociologist training in the 1960s, see Duberman, *Left Out*, 83.

[732] Achilles, Nancy, "The Homosexual Bar" (M.A. thesis, University of Chicago, 1964), 59.

[733] "Special Cops for 'Gay' Bars," *Mattachine Review*, November 1961, 4, reprinting Ernest Lenn's article in *San Francisco Examiner*, Oct. 12, 1961.

[734] Welch, "The 'Gay' World Takes to the City Streets," 72.

[735] Elliott, "Control of Homosexual Activity by Philadelphia Police," 5.

you have similar techniques by the officers," observed defense attorney Herb Selwyn of his work with homosexual clients in Los Angeles: "So although I can't prove it, I certainly suspect that they have an unofficial vice manual or they have some training sessions, where they show them exactly how to do it."[736]

Yet the starkest signs of change came in the police's techniques themselves. Whether or not police decoys received formal training in making homosexual arrests, there was no question that by the early 1960s their methods had grown far more specialized and far more stealthy. As gay cruising practices in American cities became increasingly oblique and homosexual communities more structured, police officers soon found, like the sociologists after them, that the only way to get close to their targets was to learn to recognize and imitate the language of the target group—to "dress, walk, talk, and act as . . . homosexuals do" in order to blend in among them.[737]

Among the first and most conspicuous changes was the clothing worn by vice officers. In the 1950s, the vice squads' attractive young decoys had sometimes dressed to accentuate their better features—the tight blue jeans, for example, that one gay man remembered on Hollywood police.[738] Yet even dedicated officers like Louis Fochett did not wear any particular or symbolically "homosexual" styles. As late as 1958, when Fochett arrested Philip Seitner in a men's room at George Washington University, he reported wearing simply a raincoat and a

[736] Interview of Herb Selwyn by John D'Emilio, NYPL.

[737] Council on Religion and the Homosexual, *The Challenge and Progress of Homosexual Law Reform*, 21; see also "Donaldson, Smith, Leighton and May v. City and County of San Francisco," 1, Evander Smith Papers ("The defendant police use a method of enticement where the police feign a homosexual.").

[738] Transcript of interview of "Tex or JR" by Len Evans, 24.

suit.[739] By the early 1960s, the plainclothes decoy sent into gay cruising zones had acquired a professional uniform. From New York to Chicago and Los Angeles, vice officers wore slacks, brightly colored sport shirts or fuzzy sweaters, jackets or sport coats, and—of course—the telltale tennis shoes.[740] On Sunset Boulevard one evening, a plainclothes decoy fished for cruisers by the stoplights in tight jeans, white sneakers, and a short jacket.[741] In a movie theater in Philadelphia, a gay man looking for a partner one Saturday night found a decoy in the fourth row wearing a sport coat.[742] In a Chicago bar one quiet weeknight, a gay man recalled being approached at the counter by a young officer sporting "a bright shirt and slacks and tennis shoes—the whole bit."[743] Police officers admitted that their seemingly causal fashion choices were in fact deeply strategic: a necessary first step toward infiltrating the bars and parks popular with gay men in the 1960s.[744] As one New York officer explained, he wore white pants, light colored sneakers, and polo shirts to gay bars in Greenwich Village to try to "be in with" the homosexual crowds there.[745]

Clothing, however, was only the beginning. Beginning in the early 1950s, some decoy officers had lured in their targets by mimicking the homosexual's stereotypical affectations. By

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[739] Seitner v. United States, Joint Appendix, 5, No. 14,547, Record Group 276, Stack Area 14E2A, Row 3, Compartment 5, Shelf 3, Box 1890, National Archives (Washington, D.C.).

[740] Steven A. Rosen, "Police Harassment of Homosexual Women and Men in New York City, 1960-1980," *Columbia Human Rights Law Review*, Vol. 12 (1980), 166; *UCLA Law Review*, 692 fn. 37; Eric Pace, "Garelik Urges Public to Report Police Trapping of Homosexuals," *New York Times*, Apr. 2, 1966, 60; "Pablo Mojica—from Queens—student at or from Columbia—accent," Folder 30, Box 3, Reel 10, Mattachine Society Collection, International Center, New York Public Library; Welch, "The 'Gay' World Takes to the City Streets," 72.

[741] Welch, "The 'Gay' World Takes to the City Streets," 72.

[742] Fonzi, "Furtive Fraternity," 22.

[743] Achilles, "The Homosexual Bar," 59.

[744] Welch, "The 'Gay' World Takes to the City Streets," 72 (noting police operation in "which officers dressed to look like homoseuxals—tight pants, sneakers, sweaters or jackets").

[745] People of the State of New York v. Francis Robillard et al., Defendants' Brief to the Supreme Court of New York, 2, Docket Nos. C 9847-9/65 (1966), New York Civil Liberties Union (New York, NY).

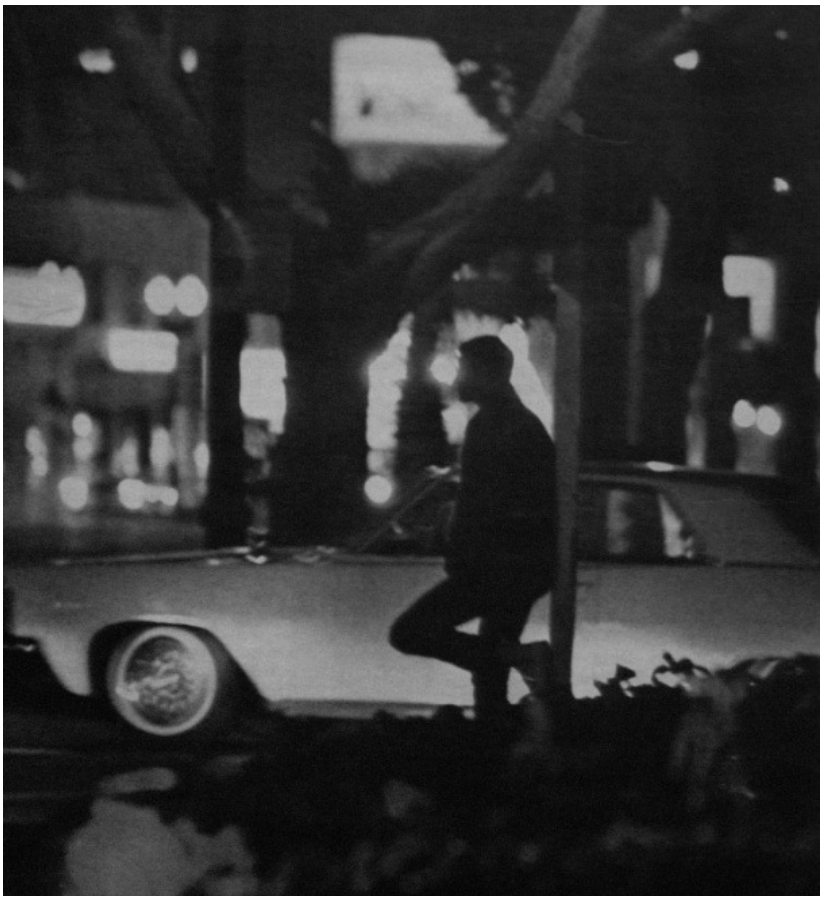


Figure III.6. A decoy officer "undercover" in tight jeans, cropped jacket, and tennis shoes. From *Life*, Jun. 24, 1964, 72.

the early 1960s, "swishing" to attract homosexual attention had become a common practice among vice officers. Much like in the gay community itself, swishing was not as popular or as universal a homosexual camouflage as decoys' collegiate fashions, but it remained a helpful tool inside a city's campier gay bars or in its public restrooms. In Los Angeles, one officer admitted swinging his hips effeminately when he entered public bathrooms looking for gay cruisers, while several of his colleagues reported "affecting the manner of a homosexual by 'swishing' in bars."[746] In D.C., the members of the Morals Squad habitually "'camped it up'—dress[ing] and

[746] *UCLA Law Review* Study, 692 fn. 37; ibid., 796.

act[ing] like stereotype homosexuals to tempt suspects and provoke advances."[747] In bars across the nation, R.E.L. Masters concluded in 1962, plainclothes officers "behave[d] as swishily as they know how" to help facilitate arrests.[748]

As far back as the 1930s, sexologists and even journalists had recognized that the conspicuous effeminacy of the prototypical fairy was, at heart, a self-conscious performance. Yet well up to the Second World War, the homosexual's feminine affectations were nevertheless seen to reflect some incontrollable instinct toward inversion—to be the outward traces of a condition intrinsic to the sexual deviant. Circulating among gay bars following Repeal, police officers and liquor board agents accepted the attentions of the effeminate crowds, but—like Officer van Wickes at New York's Gloria Bar & Grill—they maintained a strict distinction between their bodies and effeminate fairies around them.[749]

By the mid-1960s, the policemen who testified against gay-friendly bars before the state liquor boards had transformed into something like professional models of the homosexual gesture. At a proceeding against Julius's Restaurant in New York SLA, Officer Stephen Chapwick emphasized the delicacy with which Julius's customers held their cigarettes—"very loosely and limply"—by demonstrating the gestures from the stand.[750] In a hearing against the Handlebar in San Francisco, a state witness struggling to describe the "limp wrist gestures" of the crowd supplemented his testimony by flitting about his own hands. "Are you indicating, for the record, that you are waving your wrist back and forth?" the state attorney prompted.

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[747] White, "Those Others IV," A19.

[748] Masters, *The Homosexual Revolution*, 167-68; see also Mitchell, *The Homosexual and the Law*, 35 (noting that an officer "may dress, speak, and gesture effeminately"); Jacobs, "Decoy Enforcement of Homosexual Laws," 259-60.

[749] See Chapter 1, especially 74-75, 79-80**;** Chapter 2, especially 119**.**

[750] F&C Holding Corporation v. State Liquor Authority, Record on Review, Index No. 7349-66 (1966), at 46-47, New York Supreme Court Records, Civil Branch, New York County (New York, NY).

"Waving from the wrist down," Agent Alexander Ralli corrected; "It isn't a motion."[751] By the middle of the decade, in short, the swaying hips and limp wrist of the homosexual were no longer simply the physiological stigmata of the deviant body, alien to the healthy heterosexual male. They were a physical performance that could be played just as fluently by the sufficiently observant heterosexual himself.

With these basic tools of homosexual camouflage, vice officers learned to navigate the diverse landscape of the cruising world. In livelier bars, decoys wearing sweaters and sports coats mingled by the counter, exchanging friendly banter with their fellow patrons, ordering drinks or offering to treat their new companions.[752] With customers increasingly on guard for undercover officers, the police's erstwhile boasts that a decoy arrest could be elicited "in a matter of minutes" often proved fanciful. A decoy could pursue a patron into the late hours of the night, trying to extract an offer from a timid partner or to convince a wary customer of his own sexual intentions. One evening, a plainclothes officer engaged a suspected homosexual in four hours of friendly banter—all, the officer admitted, of a "non-homosexual nature"—before broaching any more incriminating topics.[753] In New York, one decoy spent over two hours flirting with a patron whom the bartender had recently warned to be wary of undercover officers.[754]

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[751] Orrin v. Department of Alcoholic Beverage Control, Trial Transcript, 34-35, File No. 38055, Reg. No. 12711 (1960), F3718:391, AB-1736, Department of Alcoholic Beverage Control Appeals Board Records, California State Archive (Sacramento, CA).

The police officer's confidence in impersonating the homosexual could reach some limits. When the liquor authority's counsel asked Ralli's colleague to demonstrate the "high pitch" of the patrons' speaking voices, the agent balked: "I am afraid I can't duplicate what I heard." Ibid., 82.

[752] Rosen, "Police Harassment of Homosexual Women and Men in New York City," 166; Mitchell, *The Homosexual and the Law*, 35-36; *UCLA Law Review* Study, 693; Lois Wille, "Police Watch Homosexuals' Hangout Here," *Chicago Daily News*, June 22, 1966, 4.

[753] Ralph Slovenko, ed., *Sexual Behavior and the Law* (Springfield, IL: Charles C. Thomas, 1965), 430.

[754] F&C Holding, Record on Review, 16.

In many bars, of course, simply starting up a conversation with a stranger went against the increasingly codified nature of gay cruising. Officers hoping to make an arrest in such exclusive venues turned to subtler methods of enticement, adopting the tacit spatial and bodily codes of experienced cruisers. Attuned to the significance of eye contact among homosexuals, officers sent lingering looks to fellow patrons across the bar.[755] Accommodating the unique structure of the pickup bar, they sat against walls and watched incoming customers, wordlessly inviting new arrivals to approach them. At the Mug Bar in California one evening, a plainclothes officer seated himself at the farthest end of the bar, his back against the wall and his knees opening onto the barroom floor. When Gilbert Mesa walked inside, Officer Ricketts watched him scan the room for potential partners before—presumably resting his eyes on the attentive policeman—Mesa came up to lean against him and eventually put his hand on Ricketts's thigh.[756]

In public bathrooms, too, decoys learned the coded, often subtle exchanges used by veteran cruisers to identify willing partners. Decoys loitered for extended periods in men's rooms, idling by the sinks and urinals or sitting in the toilet stalls.[757] In Philadelphia, one homosexual man was arrested after approaching an undercover policeman who had lingered in the lavatory for forty-five minutes. ("I realize that I'm hardly in a position to discuss the morality of the situation," he later protested, "but it seems to me that it's vicious and cruel for a police officer whose job it is to prevent situations like this to deliberately create them merely for

[755] Mitchell, *The Homosexual and the Law*, 36; *UCLA Law Review*, 693.

[756] In Ricketts's hands, the same cruising tricks that would later help Black and Mileski infiltrate gay bars for research also helped the police lure in gay men for arrest. People v. Mesa, 265 Cal. App. 2d 746, 747-48 (1968).

[757] *UCLA Law Review* Study, 691-92; Mitchell, *The Homosexual and the Law*, 36; Stearn, *Sixth Man*, 168.

the sake of an arrest.")[758] As in parks and on streets, some officers jingled loose change or keys as a sign of sexual interest, or tapped their feet in toilet commodes.[759] At least one agency in the Los Angeles area insisted that its officers never initiated such sexual signaling, tapping their feet only after receiving the first sign from the neighboring stall, but some decoys admitted to using the gesture to lure out suspected homosexuals.[760] In Ohio, one police department grew to rely so heavily on the cruising signal to identify gay suspects that it did not wait for much more before making an arrest. In the summer of 1966, a twenty-two-year-old in a men's room at the Ohio State University tapped his foot in a toilet stall next to a Columbus police officer. After tapping his own shoe in return, the officer waited only for the youth to push his foot beneath the partition before arresting him for disorderly conduct.[761] In an unusual case, a trial judge who would later publicly advocate against homosexual law reform convicted the youth. Even absent an overt sexual advance, he found, the defendant's cruising signals constituted a "nuisance" under the law.[762]

Like homosexual cruisers themselves, decoys commonly used eye contact to invite sexual advances without having to engage in any more overt communication. In Philadelphia, decoy officers watched suspected homosexuals as they stood by the urinals, either using the facilities or, according to officers, exposing themselves to their neighbors. Instructed "to give no indication by facial expression" of either sexual interest or aversion, the decoys nevertheless

[758] Fonzi, "The Furtive Fraternity," 50.

[759] *UCLA Law Review* Study, 692 fn. 37; Mitchell, *The Homosexual and the Law*, 36.

[760] For agencies claiming that their officers do not initiate, see *UCLA Law Review* Study, 692 fn. 40. For decoys admitting that they tap their feet, see ibid., 706.

[761] "Playboy Forum," *Playboy*, August 1966, 144-45.

[762] Ibid., 145.

used their looks to make "it apparent to the homosexual that he has been noticed."[763] In Los Angeles, police decoys also admitted eyeing potential homosexuals in public bathrooms. If done correctly, one officer insisted, an exchange of looks could be as effective as an "outright solicitation" in drawing out a sexual advance.[764] A shared glance could help set the stage for a friendly conversation, but many officers avoided even that much overt initiative.[765] The Philadelphia Morals Squad insisted that eye contact alone was enough to lure the suspects to make the first overt move. After exchanging glances, in their experience, "the homosexual will usually follow the policeman, who has left the men's room to loiter outside."[766] Similarly, some officers on D.C.'s Morals Squad came to rely on a subtler version of the technique perfected by Louis Fochett in earlier years. On September 21, 1960, patrolman Robert D. Arscott, a relatively recent recruit who soon became one of the vice squad's most visible officers, arrested J.B. Beard, a decorated Army officer just a year short of retirement, in the men's room of a YMCA. In town for a two-day conference at the Pentagon, Beard had used the restroom and was on his way out when he spotted Arscott staring at him in the lobby. After Arscott "made a hardly perceptible nod in the direction of the stairs," the two headed below and engaged in some innocuous conversation until, apparently unable to escape Fochett's example, Arscott used some "rather vulgar phraseology" that led Beard to touch his genitals.[767] Arrested for solicitation, Beard

[763] Elliott, "Control of Homosexual Activity by Philadelphia Police," 5.

[764] *UCLA Law Review* Study, 692 fn. 37.

[765] For eye contact used as a precursor to direct conversation, see *UCLA Law Review* Study, 691-92 & fn. 37.

[766]. Elliott, "Control of Homosexual Activity by Philadelphia Police," 6.

[767] Beard v. Stahr, 200 F. Supp. 766, 768 (D.D.C 1961); "Officer's Bad Discharge Upheld," *Washington Post*, Dec. 19, 1961, B7.

avoided any criminal consequences, but was dismissed from the Army for "conduct unbecoming an officer." [768]

The D.C. Morals Squad's continuing lapses of vulgarity notwithstanding, the language decoys used to entice homosexual men also came to reflect a greater ambiguity. Officers continued to drop homosexual jargon as a signaling mechanism, slipping in words like "gay" or "straight" and inviting new acquaintances out for "some fun."[769] Aiming for a bit more subtlety, some officers also began to imbed those passwords into more equivocal turns of phrase. In 1960,

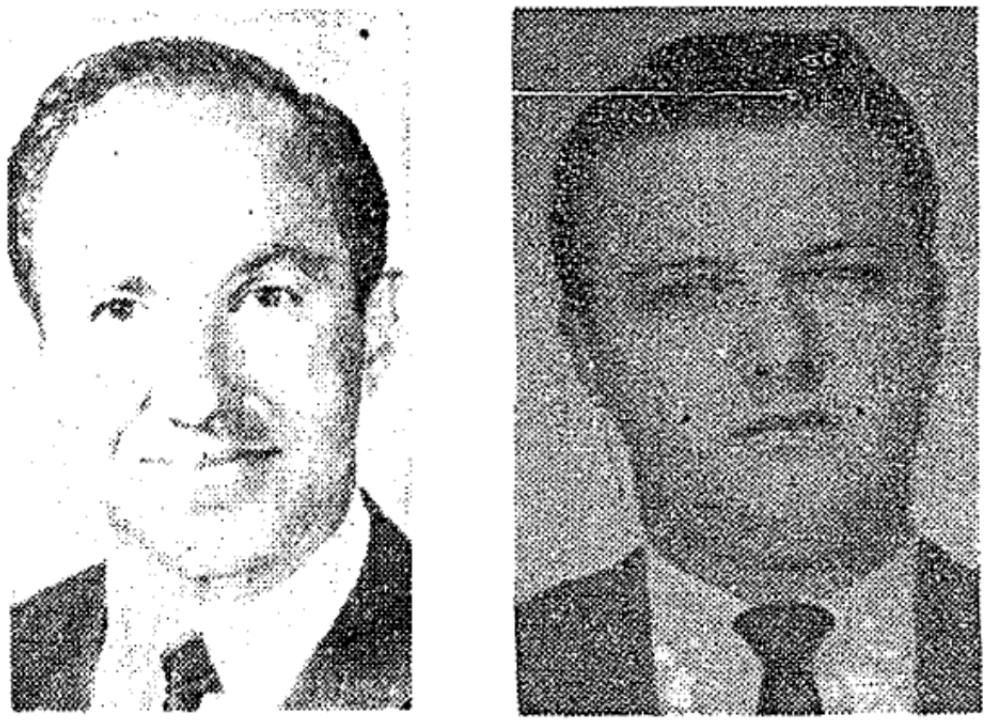


Figure III.7. Louis A. Fochett and Robert D. Arscott in their later years with the Metropolitan Police Department. From *Washington Post*, Apr. 16, 1968, B8; *Washington Post*, Jan. 4, 1973, A1.

[768] "Officer's Bad Discharge Upheld," *Washington Post*, B7. It remains unclear whether charges were ever brought or dismissed after the fact. Although Beard appealed his discharge from the Army all the way to the Supreme Court, there are no records of any appeals from a criminal conviction, nor do the discussions of his discharge mention any criminal charges.

[769] James F. Kearful, "The New Nazism," *ONE*, Vol. 11, No. 5 (May 1963), 7-8; Jacobs, "Decoy Enforcement of Homosexual Laws," 260; Frank. C. Wood, Jr., "The Homosexual and the Police," *ONE*, Vol. 11, No. 5 (May 1963), 21; Robert Veit Sherwin, "Sodomy," in *Sexual Behavior and the Law*, ed. Ralph Slovenko (Springfield, IL: Charles C. Thomas, 1965), 430.

after hearing rumors that Calvin Rittenour offered lodging to stray men passing through D.C. in exchange for homosexual favors, Arscott called Rittenour posing as a potential guest. Claiming that he had just been released from the Navy and did not have much money, Arscott repeatedly told Rittenour that he was "down and out" and looking for a place to stay.[770] Others borrowed the technique used so efficiently by the gay traveler who liked to frequent hotel bars. In Los Angeles, a "standard procedure" among plainclothes decoys was to approach suspected homosexuals, claim to be new in town, and ask "Where's the action?" Receiving an encouraging response, the officers consistently proceeded to a more suggestive question, asking a suspect "what he liked to do" and hoping for an overtly sexual response. [771]

As among cruisers themselves, most conversations between decoy officers and their targets came to hang on an extended verbal game, each trying to elicit a sexual advance without saying anything overtly sexual himself. Invited to a suspect's home, an officer would ask what the two would do once they were there. Hearing an ambiguous answer like "anything you want," he would keep pressing for a more specific proposition.[772] Decoy squads instructed their officers to keep pushing at resistant cruisers, playing naïve about their insinuations or continuing to flirt to extract a more direct advance.[773] At all times, their conduct was supposed to match that of their targets: as one manual would observe, "a smile in return for a smile, a word for a word."[774] In 1964, a reporter with *Life* magazine witnessed a conversation that exemplified the verbal

[770] Rittenour v. D.C., 163 A.2d 558, 559 (D.C. Aug. 19, 1960).

[771] *UCLA Law Review* Study, 695 fn. 60. For officers asking similar questions, see also Achilles, "The Homosexual Bar," 59; Interview of Herb Selwyn by John D'Emilio, NYPL.

[772] Interview of Herb Selwyn by John D'Emilio, NYPL.

[773] Elliott, "Control of Homosexual Activity by Philadelphia Police," 6.

[774] Lawrence P. Tiffany et al., *Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment* (Boston: Little, Brown, 1967), 234.

obstacles negotiated by an effective decoy. Striking up a conversation with a driver at a streetlight on Sunset Boulevard, a plainclothes officer with the LAPD needed only a few minutes of "idle conversation" before the cruiser suggested heading home to the officer's apartment. But when the decoy tried to draw out a more explicit statement, the exchange grew more delicate:

> "What's on your mind after we get home? That's what I want to know."
> "Well, what's on your mind?"
> "I don't know . . . . I was just wondering . . . what else you had in mind . . ."
> "At this point I don't care."
> "Well, I don't exactly know how to take that."
> "Well . . . how do you want it to go?"
> "Like I say, it's up to you."
> "Well, you call it . . . I'm your guest."
> "I know but . . . I wouldn't want to be a presumptuous host."[775]

Continuing for some time afterward, the conversation finally got too long for comfort; the two decided to part ways, one wary of a potential arrest, the other insufficiently sure of it.[776] But other targets were not as tenacious, succumbing to an officer's flirtations.

To be sure, not all decoys in the nation's vice squads learned such professional subtlety. In the 1960s as in the previous decade, some officers were always over-eager in their pursuit of suspected homosexuals, licking their lips outside gay bars, rubbing themselves in movie theaters, or openly asking strangers about their favorite sexual positions.[777] One bar owner in California overheard an officer tell a fellow customer that he had an erection he wanted "taken care of."[778]

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[775] Welch, "The 'Gay' World Takes to the City Streets," 72-73.

[776] Ibid., 73.

[777] *UCLA Law Review* Study, 706; Fonzi, "The Furtive Fraternity," 49. For further examples of overt sexual behavior by police, see People of the State of New York v. Marshall Greenberg, Respondent's Brief, Folder 30, Box 3, Reel 10, Mattachine Society Collection, International Gay Information Center, New York Public Library (officer asking suspect "what the sexual preferences of the appellant were"); "Pablo Mojica—from Queens—student at or from Columbia—accent," NYPL (officers asking suspect "if he sucks").

[778] *UCLA Law Review* Study, 706.

As late as 1966, Dick Leitsch, the president of the Mattachine Society of New York, wrote to the *Fire Island News* denouncing "the practice of some officers to caress their pubic regions, simper, wink, try to be seductive and, occasionally, fondle or appear to fondle one another's genitals in public places." Considering that such practices were "not at all common in the homosexual community," Leitsch insisted, the police "create[d] more danger of breaching the public peace than do homosexuals."[779]

For the most part, however, homosexual men in the 1960s admitted that the vice squad's methods had grown far more sophisticated. In the years following the war, many gay men had developed a certain pride in their ability to pick out kindred spirits from a crowd. "The rapidity with which homosexuals recognize one another," Donald Webster Cory had insisted in 1951, "could only be contrasted with their success in remaining unrecognized by those outside the group."[780] Two years later, Dale Jennings confirmed with somewhat less confidence that many men betrayed "a certain smugness . . . regarding arrest": they assumed "that no police officer could ever break into their social circle" and "that officers can always be spotted" by the careful victim.[781] By the 1960s, the gay community had recognized that the lines between its members and the officers who tried to impersonate them had become far less clear. Explaining his constant fear of undercover officers, one gay man in New York warned that "you can generally tell by a look, but not always."[782] Another stressed the hidden danger of exchanging even the most coded cruising signals with a stranger: "Even if you've figured it out right," he cautioned,

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[779] Dick Leitsch, letter to Editor, *Fire Island News*, August 23, 1966, 1, Folder 7, Box 6, Reel 15, Mattachine Society Collection, International Gay Information Center, New York Public Library.

[780] Cory, *Homosexual in America*, 80.

[781] Jennings, "To Be Accused, Is To Be Guilty," 11; see also Robert C. Doty, "Growth of Overt Homosexuality In City Provokes Wide Concern," *New York Times*, Dec 17, 1963, 33 ("Some homosexuals claim infallibility in identifying others of their kind 'by the eyes.'").

[782] Stearn, *Sixth Man*, 141.

"you can still be wrong if the 'right' man turns out to be a cop."[783] By 1965, a paper by the Mattachine Society of New York warned that it did not "matter how 'queer' he may look"—anyone who tried to pick up a gay man in public "could possibly be a disguised police officer."[784]

Recognizing their customers' vulnerability, the staff in many gay bars took it upon themselves to keep track of the vice squad's more prolific plainclothes officers. Some bar owners learned to recognize popular police decoys by face, interrupting ignorant customers in the middle of a new flirtation to whisper warnings in their ears.[785] Others flashed warning lights to warn regulars when they realized a cop, plainclothes or otherwise, was entering the premises.[786] Many bartenders and bouncers were less discriminating, keeping a spare eye out on all new customers for any shows of unusual persistence. As New York's Julius's Restaurant discovered one night in 1965, even their most diligent efforts did not always work. On the evening of November 12, Peter Hughes approached Stephen Chapwick at Julius's counter.[787] Hughes wore slacks, a white shirt, a sport jacket, and tie; Chapwick wore slacks, a sport shirt, a sweater, and no tie.[788] After a half hour of conversation, a bartender who recognized Hughes as "one of our regular customers" interrupted the men and asked Hughes if he knew Chapwick. Learning of their recent acquaintance, he warned, "Don't talk to him—maybe he is a cop."[789]

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[783] Ibid., 55.

[784] "The Right of Peaceable Assembly: A Position Paper of the Mattachine Society Inc. of New York on Public Accommodations," Folder 30, Box 3, Reel 10, Mattachine Society Collection, International Gay Information Center, New York Public Library.

[785] Cory and. LeRoy, *The Homosexual and his Society*, 117.

[786] Achilles, "The Homosexual Bar," 57; Doty, "Growth of Overt Homosexuality," 33.

[787] F&C Holding, Record on Review, 46-47.

[788] Ibid., 47, 58.

[789] Ibid., 48.

The interruption put a damper on the conversation; Hughes appeared to leave. In his absence, Chapwick was drawn into a conversation with the man beside to him. The man told Chapwick that he was originally from Boston. He said that he was passing through the city. A bouncer soon came over and asked Chapwick if he knew the visitor. "Don't speak with him," he cautioned, "he may be a cop."[790] Chapwick broke off the conversation and eventually Hughes wandered back to resume their chat. The two men spoke for at least another hour until around 1 a.m., when Hughes allegedly offered to give Chapwick a blowjob and the two left the bar—and Chapwick arrested Hughes for disorderly conduct.[791] Explicitly warned by the staff to avoid Chapwick's company, Hughes may have been guilty of some carelessness. Yet, as the bouncer's own confusion about the officer suggests, Hughes's error also revealed how easily even gay men wary of police agents mistook decoys for genuine homosexuals.

Sometimes, in fact, police decoys' affectations may have been too convincing. Like all undercover agents, vice officers accepted certain physical risks as part of their jobs. In 1957, a cruiser who invited Louis Fochett home only to learn, to his dismay, that Fochett wanted to arrest him responded by hitting Fochett on the head with a kettle.[792] A year later, a gay man in Lafayette Park punched Robert Arscott in the stomach when the officer tried to book him for solicitation.[793] In addition to outraged suspects, however, the vice squad's plainclothes decoy also courted a unique set of professional hazards. In February of 1960, Arscott was attacked "without provocation" by five young men as he walked into Lafayette Park; the gang was looking "to make trouble for some 'defenseless homosexual'" and thought Arscott was the

[790] Ibid.

[791] Ibid., 48-49.

[792] "Morals Squad Detective Attacked Arresting a Suspect in Apartment," *Washington Post*, Jan. 25, 1957, A3.

[793] "Suspect Held In Assault On Officer," *Washington Post*, May 16, 1958, D2.

perfect target.[794] A few months later, Arscott was patrolling the park for cruisers with Fochett and another colleague when a member of the Park Police, taking the three men for homosexuals themselves, tried to take them into custody. When the vice officers resisted, patrolman James Thomas flipped them on their backs in the park shrubbery.[795] Meanwhile, in New York, two plainclothes dispatched to investigate an "invert take-over" of a local YMCA ended up trying to arrest each other for solicitation.[796] Idling in popular cruising places dressed in the popular fashions and physical habits of the urban homosexual, decoys sometimes stepped tightly into the shoes of the men they policed: not all of the attention that their codes attracted received came from gay men themselves.

However embarrassing or bruising at the time, of course, such tales of mistaken identity only underscored the plainclothes decoy's professional specialization within the urban police department. As police officers generally recognized, decoys who wore light-colored trousers and sport coats to popular cruising zones, or tapped their feet in public bathrooms, or stood against the walls at gay bars, relied on their professional fluency in a cultural language that most Americans did not even know existed. And some of them came to take some pride in it. Developed in the late 1930s as rarefied divisions trained in the unique problems of the sexual psychopath, vice squads had always been seen to require a unique level of sophistication from their officers. In 1949, D.C.'s vice chief Roy Blick boasted that "no field of law enforcement . . . calls for more careful training, the exercise of better judgment or . . . greater knowledge and

[794] "$2500 Bond Fixed for 5 In Assault on Policeman," *Washington Post*, Feb. 24, 1960, A3.

[795] "Lafayette, Here We Come," *Washington Post*, Nov. 16, 1960, A16; Leslie H. Whitten, "Well-Patrolled Park Leads to Police Fight: Long Investigation Ends," *Washington Post*, Nov. 13, 1960, A3.

[796] Masters, *The Homosexual Revolution*, 190.

understanding than the field of vice."[797] Over the next decade, of course, the vice squad's officers spent far less time investigating intricate sex crimes than arresting gay men in bars and public parks, but many decoys came to see their talents at luring in homosexuals as a similar professional skill. In 1958, after Louis Fochett arrested Philip Seitner in the men's room at George Washington University, Seitner protested that he had been sure that Fochett had welcomed his advance. Fochett laughed: "Well, this is what I am paid to do, you know," he replied.[798] In Florida in the early 1960s, one veteran vice officer emphasized his unique intimacy with the homosexual underground against the ignorance of the general public. Wary of raising public awareness about his "gay world," he insisted, the homosexual was particularly "afraid of the police officer, because he feels the police officer can see through him a lot easier than anyone else."[799] By the early 1960s, the New York Police Department had broadly come to recognize the decoy's work as requiring a specialized expertise. Charged with infiltrating a "wary . . . 'fraternity'" of urban homosexuals, plainclothes officers who frequented gay clubs and bars to elicit homosexual solicitations were known in the department as "actors."[800]

As his job description emerged in these years, in short, the plainclothes decoy was no longer simply a fresh face sent to loiter on the benches of the local parks. Like the social scientists who would soon join him in the field, he had become—and saw himself as—a skilled professional tasked with infiltrating a guarded deviant community. Beginning in the 1930s, police officers and liquor agents had patrolled the nation's gay bars by relying on a set of visual

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[797] J. Paul de River, *The Sexual Criminal* (Springfield: Charles C. Thomas, 1949), 315.

[798] Seitner v. United States of America, Brief for Appellant and Joint Appendix, 2-3, No. 14,547, Record Group 276, Stack Area 14E2A, Row 3, Compartment 5, Shelf 3, Box 1890, National Archives (Washington, D.C.).

[799] Florida Legislative Investigation Committee, "Homosexuality and Citizenship in Florida" ("What To Do About Homosexuality").

[800] Doty, "Growth of Overt Homosexuality," 33.

stereotypes about the homosexual body that any moderately worldly urbanite could know. By the early 1960s, the vice squads' plainclothes decoys policed gay communities by relying on their unique ethnographic intimacy with a sexual subculture that most of the American public did not even begin to imagine.

The increasingly sophisticated tactics of the plainclothes decoy in the new decade, of course, did not simply reflect the growing exclusivity of how gay men looked for sexual partners in the early 1960s. It also reflected a growing exclusivity in who precisely they were looking for. In the early 1950s, one reporter in D.C. quite memorably quipped, decoys trying to make homosexual arrests had only to come to a suspected cruising site, "wave their tallywackers around and see if anybody was interested."[801] By the dawn of the new decade, the competent vice officer could no longer catch gay cruisers simply by indicating his interest in a sexual encounter. Whether through his telltale clothing, slang, and body language in gay bars or his subtle glances, nods, and tapping feet in public bathrooms, he had to rely on his rarefied knowledge of gay signals to demonstrate his membership in an select cultural group.

It has long been remarked that the "gay" culture emerging in the United States in the mid-twentieth century featured two characteristics separating it from earlier same-sex practices. First, it featured a notion of group identification: a sense of one man's homosexuality as a matter not merely of private erotic practice, but of public cultural identity. And second, it involved a notion of reciprocity: a sense in which homosexual sex emerged as a phenomenon practiced not among intrinsically disparate partners, but among two men with a shared sexual identity.[802] By the 1960s, even as many men continued to live double lives as husbands or fathers, and even as the

[801] Charles Kaiser, *The Gay Metropolis, 1940-1996* (New York: Houghton Mifflin, 1997), 71.

[802] David M. Halperin, *How to Do the History of Homosexuality* (Chicago: University of Chicago Press, 2002), 133-34; George Chauncey, *Gay New York*, 96.

market in heterosexual "trade" persisted on the fringes, the gay communities that had sprung up across the nation had generally come to define homosexuality as a lifestyle shared by a set of in-group members.

The vice squad's decoy operations in the 1960s reveal how the state's regulation of homosexual men in the mid-century may have facilitated the emergence of that particular sexual framework. Fearful of the plainclothes officers loitering around their bars and cruising sites, homosexual men looking for new sexual contacts learned to limit their searches to men who wore the subtle, highly insular codes of the cruising "world." They began to look for partners who could not simply evince a shared sexual desire, but also demonstrate the hard-earned traces of an extensive common background in their city's homosexual underground. Against this backdrop, the competent decoy hoping to trap a gay cruiser into a sexual solicitation had to don an increasingly holistic camouflage. Mirroring the changing status of the American homosexual himself, a vice officer hoping to find a sexual partner in the urban cruising world often could not simply present himself as an attractive evening's companion; he had to prove his authentic claim to a marginal sexual identity.

The Invisible Expert

It may have been only a final perk of the vice squad's growing expertise in the gay world's subtle cruising codes in the 1960s that those codes, so useful for arresting gay men in the field, remained all but invisible in court.

The new decade did little to appease the courts' concerns about overly aggressive plainclothes decoys. Like their predecessors, some judges in the new decade showed themselves quite willing to dismiss cases where the sheer flagrancy of a vice officer's trap for a homosexual

defendant affronted their sense of moral justice. In New York, as attorney Irwin Strauss had gratefully remarked, trial courts consistently found that aggressive enticement techniques by plainclothes officers created a "reasonable doubt" as to a defendant's guilt.[803] After several midwestern states codified new anti-entrapment statutes in the mid-1950s, a researcher soon found a similar pattern.[804] In Michigan, courts chose to read the state's ban on "accost[ing], solicit[ing], or invit[ing] another to engage in a lewd or immoral act" as targeting only aggressive solicitation, systematically dismissing any charged brought by police decoys who engaged in "overly active encouragement."[805] In Wisconsin, which enacted a far broader prohibition against "any solicitation" to commit a felony, judges nevertheless threw out charges where the facts suggested than an officer was "so active that he, rather than the suspect, d[id] the soliciting."[806]

The paradigmatic case of police aggression in the new decade was Robert Arscott's arrest of Calvin Rittenour—an arrest made after Arscott found Rittenour's number, called to invite himself over, and finally elicited a sexual "assault" in Rittenour's kitchen.[807] Facing the testimony of both Arscott and Fochett, who had accompanied Arscott to corroborate, Rittenour did not try to deny his sexual advance against Arscott in his apartment.[808] But he did raise two facts to the court's attention. First, he questioned the applicability of the lewd solicitation statute to a sexual encounter as private as his, unfolding entirely in the confines of his apartment after Arscott asked to meet him there. And second, he noted the sheer malevolence of Arscott's trap:

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[803] Irwin D. Strauss, letter to Raul L. Lovett, September 10, 1965, NYPL.

[804] Wisconsin adopted its new statute in 1958 and Michigan did so in 1954. Tiffany, *Detection of Crime*, 232.

[805] Ibid., 232, 236.

[806] Ibid., 236.

[807] Rittenour v. D.C., 163 A.2d 558, 559 (D.C. Aug. 19, 1960).

[808] Rittenour did not present any evidence on his behalf. Ibid., 558.

first reaching out to him, a total stranger, to all but offer a sexual transaction, then coming to his home, repeating his proposal, and finally arresting him when he accepted the proposal. The court, for its part, was convinced by the first argument: "[A]n act done privately in the presence of another person who . . . consented to the act," it agreed, did not fall within D.C.'s statutory scheme.[809] Yet while it could have stopped there, the panel made a point of reaching Rittenour's second argument, "perhaps [the] more important" of his claims. "It is very plain from the officer's own admission," the D.C. court decried, that Arscott "went to the house to 'investigate' a suspected homosexual . . . trapped the suspect into making a homosexual proposal and then arrested him." His conduct amounted to entrapping Rittenour simply because he was a homosexual—and "under our law homosexuality is a not a crime."[810]

The *Rittenour* decision was widely reported, no doubt in large part because it involved a particularly outraged appellate opinion and particularly outrageous facts. Yet trial courts in these years, often excused from having to explain their rationale and subject to little oversight for their acquittals, did not always require Arscott's level of ingenuity to dismiss a charge. In many cases, simply spending an extended period of time eliciting a homosexual solicitation could keep an officer from closing a conviction. In the case against Peter Hughes from Julius's Restaurant, for example, the prosecution presented relatively strong evidence that Hughes solicited Chapwick by the bar: in addition to Hughes's alleged proposition, Chapwick testified that the bar was filled with "wiggling," swishy customers, and Julius's own staff itself found Hughes's flirtation with Chapwick sufficiently incriminating to warn him against a possible arrest.[811] Yet after reviewing all the evidence—not least, Chapwick's admission that he had spoken to Hughes

[809] Ibid., 559.

[810] Ibid., 560.

[811] F&C Holding, Record on Review, 46, 48-49.

for nearly two hours—a New York trial judge dismissed the charges based on reasonable doubt.[812] Similarly, one court in Michigan openly dismissed a solicitation case when it learned that a police decoy spent over two hours with a homosexual man before finally effecting an arrest.[813] Another judge went even further, adopting a policy of acquitting any homosexual charges where an officer flirted with a suspect for longer than three or four minutes; any further conversation, he found, was "enticement per *se*."[814] As many of these judges acknowledged, their rulings did not follow the strict contours of "entrapment" as a legal doctrine. But they did reflect the judges' refusal to abide by what they viewed as "undesirable encouragement practices" by municipal vice squads.[815]

Fortunately for the police, however, many of their tactics for arresting gay men in the 1960s involved nothing so outrageous. For the most part, decoys called as witnesses in court did not testify that they spent hours flirting with a suspect in a bar, or that they phoned him to invite themselves to his apartment, or that they exposed themselves or asked about his favorite sexual positions or any of the other facts that managed to galvanize courts in earlier years. In most cases, they testified that the solicitations were simply spontaneous.[816] They insisted, as in the charges against Warren Wildeblood, that the defendant began talking to a stranger at a bus stop

[812] Ibid., 16.

[813] Tiffany, *Detection of Crime*, 236.

[814] Ibid., 238.

[815] Ibid.

[816] For examples, see Willis v. United States, 198 A.2d 751, 751 (D.C. 1964) (testifying that defendant came up to cop's car in middle of night and proposed sexual acts); New York v. Marshall Greenberg, Respondent's Brief, 1-2 (testifying that defendant came up to stopped car, asked to get inside, and proposed a sexual act); New York v. Harold Branson, Trial Transcript, No. C-1660 (1966), 5-6, MssCol 18787, International Gay Information Center, New York Public Library (testifying that defendant sat down beside cop at bar, introduced himself, and soon proposed going back to "your place"); People v. Feliciano, 10 Misc. 2d 836, 836 (N.Y. Magis. Ct. 1958) (testifying that defendant walked up to cop spontaneously on street).

and proposed to have sex back in his apartment.[817] Or, as in the case against Gilbert Mesa, that the defendant walked up to the officer in a crowded bar, stood between his legs, and began massaging his inner thigh.[818] Interviewed by journalist Jess Stearns in 1961, vice officers in the New York Police Department reported that their tactics for making solicitation arrests were "often passive, with plainclothesmen patiently waiting around for the suspect to make an advance."[819] By the end of the decade, the *Handbook of Vice Control* assured new investigators that "techniques for apprehending overt homosexuals are quite simple." "Merely being 'one of the group,'" the manual explained, "is sufficient in places where homosexuals congregate."[820]

In some cases, the officers' claims may have been accurate. Undoubtedly some men, reflecting a human urge hardly unique to homosexual cruisers, were always willing to take risks in making new acquaintances.[821] In other cases, the decoys probably lied or exaggerated. In 1965, for example, New York patrolman Martin Sweeney arrested school counselor Harold Bramson for solicitation at an Upper West Side Bar, claiming that Bramson sat down at his table and offered to "go down on" him. Bramson denied both the approach and the offer, and managed to convince a trial judge to acquit him of all charges. Years later, he admitted that he had invited the officer to have sex with him, but insisted that Sweeney had come up to him.

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[817] Wildeblood v. United States, 284 F.2d 592, 598 (D.C. Cir. 1960); Wildeblood v. United States, Opposition to Petition for Leave to Prosecute Appeal in Forma Pauperis, No. Misc. 1456 (1960), 3, Record Group 276, Box 87, Stack Area 14E2, Row 8, Compartment 1, Shelf 2, National Archives (Washington, D.C.).

[818] People v. Mesa, 265 Cal. App. 2d 746, 747 (1968).

[819] Stearn, *Sixth Man*, 168.

[820] Pace, *Handbook of Vice Control*, 58.

[821] Author's interview with Herb Selwyn, July 12, 2014.

Initially mistrustful of the stranger, Bramson had opened up only after a half hour of conversation about the Peace Corps and the middle schools where the two grew up.[822]

In many instances, however, the officers were neither exactly lying nor telling the truth. For even many of the most seemingly "spontaneous" solicitations that filled police records in the 1960s—the sudden approaches, the wordless caresses, the vulgar proposals—hardly appeared out of thin air. Without the benefit of any enticing words or vulgar gestures from the officers, those solicitations were often the bounty of deliberate, specialized codes that gay men had developed precisely to identify willing sexual partners in a crowd. When Gilbert Mesa walked up to Officer Ricketts at the Mug Bar, he was not approaching an anonymous stranger in public. He was approaching a fellow patron at a gay bar who had used classic cruising signals to advertise his sexual availability: sitting with his back against the wall, watching for new arrivals, keeping his eyes on Mesa as he scanned the room.[823] Mesa's sexual advance may have been somewhat aggressive, but there was nothing spontaneous about it. Considered carefully, indeed, police reports in these years abounded with tales of seemingly unprompted homosexual solicitations that were actually part of an established cruising culture. In Philadelphia, one gay man touched the thigh of a police officer who had come to a theater popular with gay men one Saturday night wearing the classic collegiate style. After his arrest, the man did not remember what movie was playing, but he did remember the sport coat.[824] Similarly, the many Philadelphia men who propositioned a Morals Squad officer after he watched their penises following department procedure—"giv[ing] no indication . . . of either encouragement or

[822] Harold Bramson, letter to Mimi Bowling, December 7, 1994, 3, MssCol 18787, International Gay Information Center, New York Public Library.

[823] People v. Mesa, 265 Cal. App. 2d 746, 747 (1968).

[824] Fonzi, "The Furtive Fraternity," 22.

disgust" but making it "apparent to the homosexual that he has been noticed"—may not have seen themselves as the sole initiators of the transaction.[825] As sociologist Laud Humphreys would detail in his study of bathroom cruising, keeping one's eyes on another man's penis or looking from his penis directly up into his eyes—precisely with a neutral expression—was one of the most "encouraging" signals a cruiser could give.[826] In context, there was more than a little irony in *Handbook of Vice Control*'s assurance that eliciting homosexual solicitations was "quite simple" for any officer who posed as "one of the group" in a popular cruising site. As officers themselves sometimes acknowledged, being "in" with a homosexual group often required mastering a wide and often rarefied range of physical, sartorial, and spatial signals.[827]

Used in the right way, those signals could be as manipulative or as aggressive as the most overt sexual enticements decried by the courts. Developed to help gay men recognize friends and sexual partners in otherwise hostile settings, the physical signs and cultural protocols that decoys borrowed to "blend in" at bars and cruising sites were a silent language that could nevertheless send a very strong message. As Laud Humphreys would observe, many of the seemingly "passive" methods used by police decoys in public bathrooms—tapping their feet, swishing by the urinals, making meaningful eye contact—were, to those who spoke the language, open invitations for a sexual advance. "The decoy approached after such signaling," Humphreys insisted, "has already indicated his willingness to play the game."[828] Privately, vice officers even admitted as much. As one decoy in Los Angeles acknowledged in 1965, his

[825] Elliott, "Control of Homosexual Activity by Philadelphia Police," 5.

[826] Humphreys, *Tearoom Trade*, 64.

[827] Robillard, Defendants' Brief to the Supreme Court of New York, 2 (deliberately selecting dress to be "in" with homosexual bar).

[828] Humphreys, *Tearoom Trade*, 87.

department's routine practice of making "eye-to-eye contact" with suspected cruisers was "often tantamount to an outright solicitation."[829] If, unlike in the case thrown out by Judge Kronheim in D.C. in 1954, most men who propositioned plainclothes decoys in gay bars and bathrooms did not begin by asking if the officers were soliciting them, it was because they did not need to.

Unsurprisingly, in context, homosexual men in the 1960s did not see decoys who deliberately emulated gay fashions or mannerisms in pickup bars as merely acting like "one of the group." They saw them as essentially proposing sexual encounters. As a study of Los Angeles-area vice squads reported in 1966, while officers themselves drew the line of dubious police tactics at making outright solicitations, "homosexuals consider any dress, gestures, or language that tends to affect the character of a homosexual as entrapment."[830] Entrapment, echoed a Chicago sociologist reporting on gay men's experiences of police harassment in 1964, "is a system whereby an officer learns the language, behavior, and dress of the homosexual group . . . in order to elicit a sexual 'pass.'"[831] Their accusations were, of course, far from the legal definition of the term. But their broad point was one that many judges had embraced for years: that a police officer who enticed a sexual overture through conduct that any homosexual defendant would reasonably have taken as a sexual advance should not then be allowed to arrest the defendant for responding in kind. Considered in their cultural context—as the highly obscure, rarefied sexual codes of an insular urban community—the fashions, body language, and physical codes adopted by resourceful decoy officers should have been seen by courts as deliberate invitations for a sexual advance.

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[829] *UCLA Law Review* Study, 692 fn. 37.

[830] Ibid., 704 fn. 119.

[831] Achilles, "The Homosexual Bar," 59. See also Council on Religion and the Homosexual, *The Challenge and Progress of Homosexual Law Reform*, 22; Council on Religion and the Homosexual, *A Brief of Injustices* (Los Angeles: Pan-Graphic Press, 1965), reprinted in *ONE*, Vol. 13, Issue 10 (October 1965), 9.

The courts were unimpressed. Back in the early 1950s, homosexual defendants who decried vice officers' effeminate camouflage found little success in court. Vice officer John Costanzo's "swagger" did not clear the younger Lester Hunt of solicitation charges; officer Dante Longo's "effeminate gestures" did not get Paul Ross acquitted at trial.[832] When Cecil McMillan propositioned Louis Fochett in Lafayette Park, having assumed based on his behavior "that Fochett was homosexual," even Judge Kronheim had to convict.[833] Willing to wield their judicial discretion against overt sexual advances or overzealous traps laid out by officers, judges did not consider merely impersonating a homosexual to be the kind of enticement that required the intervention of the courts. In the 1960s, their colleagues agreed. In New York, the New York Civil Liberties Union's protests that the vice squad entrapped gay men by sending out undercover officers "dressed in tight pants, sneakers, and polo sweaters" received little recognition from the courts.[834] In California, as Herb Selwyn recalled, some homosexual defendants certainly tried attacking the vice squad's enticements, but a defense based on what a policeman wore, or where he sat inside a gay bar, could be a long shot even in cases involving the most established cruising signals.[835] When Gilbert Mesa challenged his arrest at the Mug Bar, his defense did not breathe a word about Ricketts's enticing posture against the bar or the looks exchanged by the men before Mesa began his approach, relying only on a statutory quibble about whether Mesa's offer of sex back in his apartment counted as a "public" proposition for a

[832] "Senator's Son Convicted on Morals Charge," *WP*, 11; "Rule Of Thumb Is Given With Morals Conviction," *WP*, B1.

[833] "Usefulness of Sex Squad Questioned by Kronheim," *WP*, 21.

[834] Pace, "Garelik Urges Public to Report Police Trapping of Homosexuals," 60.

[835] Author's interview with Herb Selwyn, July 12, 2014.

lewd act.[836] By the time Mesa tried raising an additional "constitutional" objection on appeal, the court considered the argument waived.[837]

One case did try to raise the defense squarely. *Robillard v. New York* traced back to the early morning of May 23, 1965, when at approximately 2 a.m. patrolman Anthony De Greise of the NYPD walked into the crowded Harbor Bar in Greenwich Village. Wearing white pants, light-colored sneakers, and a polo shirt, De Greise ordered a beer and sat down by a pool table where Francis Robillard was shooting billiards with John Wrenn and Leroy Snowden. After a couple of minutes, Robillard asked the officer for a light and, when De Greise lit his cigarette, introduced him to his friends. The men spent five or six minutes in friendly banter of a non-sexual nature. Finally, Robillard asked if De Greise visited "this type of bar" often and De Greise said yes; Wrenn asked if he wanted to come to a "party," and the officer again agreed. At that point, the conversation turned more graphic. Having speculated on the likely size of De Greise's "joint," the three friends took turns providing graphic descriptions of how they planned to have sex with him, two with a distinctly sadomasochistic bent. When the four left to go to De Greise's car outside, he identified himself as an officer and arrested them.[838] He had made nine other similar arrests over the last fifteen weeks.[839]

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[836] People v. Mesa, 265 Cal. App. 2d 746, 748 (1968).

[837] Ibid., 751. See also Tiffany, *Detection of Crime*, 236 (noting that, due to difficulty of defense, "entrapment" has rarely been raised at trial in Michigan, Wisconsin, or Kansas).

[838] Robillard, Defendants' Brief to the Supreme Court of New York, 2-3; People of the State of New York v. Francis Robillard, et al., Respondent's Brief in Opposition to Petition for Writ of Certiorari before the Supreme Court, Docket No. 447 (1966), 3-4, Harvard University Library.

[839] Francis Robillard et al. v. People of the State of New York, Petition for a Writ of Certiorari before the Supreme Court, Docket No. 447 (1966), 3, Harvard University Library. There is some inconsistency in the record about whether De Greise had been on vice duty for fifteen weeks or fifteen months. See Robillard, Defendants' Brief to the Supreme Court of New York, 2, 18, 19. At least one clerk at the Supreme Court concluded that it was only a matter of weeks. Lewis Merrifield, memo on Robillard v. New York, 1966 Term, Docket No. 447, 1, Box 1380, Papers of William O. Douglas, Library of Congress.

Represented by the New York Civil Liberties Union, Robillard, Snowden, and Wrenn at first denied the entire charge. Testifying before the criminal court, Robillard and Snowden insisted that De Greise had approached them to ask for a light; that he had invited them to his apartment for a drink; that after Robillard declined—claiming that he was just about ready to head home—De Greise insisted until he had convinced them to come along.[840] The defendants recounted, in short, a story very similar to the bar set by *ONE* magazine in 1954 for a successful entrapment claim: an aggressive police officer whose sheer persistence overwhelmed a genuinely reluctant defendant. Predicting—correctly—that their modest story might not sway a judge, however, their defense attorneys also insisted that De Greise's dress and conduct had invited any sexual advances the defendants made. As the officer himself testified, he lit Robillard's cigarette for him, hinted that he came to gay bars often, and made no objections when Robillard first touched his thigh. The defense specifically pushed De Greise to admit that he tried to dress "like a homosexual," but the trial judge refused to allow the question; instead, the officer conceded that his clothing was deliberately chosen to help him "be in with the patrons of" a Greenwich gay bar.[841] The defense team's cross-examination was initially meant to make a statutory point, of the precise kind that some generous New York courts had long embraced: Robillard and his friends' scandalous sexual offer could hardly have risked breaching the peace if it was made to someone who had given every indication that he would welcome the invitation. Yet at sentencing, the defense team turned the same evidence into an entrapment claim: Providing the

[840] Robillard, Defendants' Brief to the Supreme Court of New York, 4; Robillard, Respondent's Brief in Opposition, 4. For the identities of their counsel, see Robillard, Defendants' Brief to the Supreme Court of New York, 21.

[841] Robillard, Defendants' Brief to the Supreme Court of New York, 2-3.

necessary groundwork for the defendants' sexual advances, De Greise's flirtatious conduct had essentially created the circumstances of the offense.[842]

The criminal court was not convinced. Without issuing an opinion, it convicted Robillard, Snowden, and Wrenn of disorderly conduct, sentencing each to 30 days in the workhouse.[843] None of the men ever actually served the time, but, eager to expunge their criminal records and recognizing a potential test case, the NYCLU appealed to the New York Supreme Court's appellate division.[844] This time, the defense attorneys conceded De Greise's version of events, assuming that Robillard had initiated both the conversation and the sexual invitation as described. But they emphasized the power of De Greise's own silent signals during the encounter. Even if the officer did not make the first invitation, Shirley Fingerhood and Henry di Suvero insisted, "sexual behavior is known to consist of more than words." Courts had long accepted that a prostitute who "dresses in the garb of her trade and takes an appropriate stance" is guilty of "soliciting even though the customer is the one who speaks the words of invitation." Similarly, De Greise's coded fashions, warm response to Robillard, and coy admissions about "types" of gay bars were all signals "designed to invite sexual overtures" from the defendants.[845]

Once more without opinion, the court affirmed, and having exhausted all its state options, the NYCLU tried a final hand with the Supreme Court of the United States.[846] Newly helmed by

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[842] Robillard, Petition for a Writ of Certiorari, 5. For an overview of the statutory argument, see Robillard, Defendants' Brief to the Supreme Court of New York, 8-9.

[843] Robillard, Appellant's Brief, 1.

[844] Robillard and Snowden received suspended sentences, and Wrenn obtained a stay with leave of the district attorney. Robillard, Petition for a Writ of Certiorari, 5.

[845] Robillard, Defendants' Brief to the Supreme Court of New York, 19.

[846] Robillard, Petition for a Writ of Certiorari, 1. The NYCLU also sought review in the New York Court of Appeals, the state's highest court, but the Court of Appeals denied the request to appeal. Ibid., 2.

Morton P. Cohen, the defense tried to alert the Court to the latest research on the symbolic significance of gay cruising signals. Sexual advances in the gay world, Cohen quoted from a recent law review article on consensual homosexual conduct, are typically tendered "only if the other individual appears responsive," based on "quiet conversation and the use of gestures and signals having significance only to other homosexuals." As a consequence, any adoption of specialized gay cultural signals by plainclothes decoys—"*any* dress, language or gestures" that "indicate a desire for a homosexual relationship"—should be recognized in their unique cultural context as overt offers of sexual availability.[847] Absent De Greise's deliberate fashions and subtle signs of sexual interest, Cohen suggested—obscure codes developed and used only by a self-selected sexual minority to discern partners in a crowd—cruisers like Robillard, Wrenn, and Snowden would never even have considered approaching him with their offer.[848]

Opposing the petition, district attorney Frank S. Hogan rejected Cohen's nuanced sociological analysis. As to the disorderly conduct statute, Hogan noted that a homosexual solicitation was obviously liable to incite a reasonable man toward violence, "implying, as it does, that the addressee is a pervert."[849] As to entrapment, the doctrine was hardly a constitutional matter, and even if it were, it certainly did not apply to De Greise's arrests at the Harbor Bar. As defined by the Supreme Court itself, Hogan recalled, entrapment still required proof of both a "persistent" policeman and an "innocent" defendant.[850] In this case, the defense had neither: Happy to invite a stranger home after "an innocuous five minute conversation

[847] Ibid., 8, 10-11.

[848] Ibid., 11. Since New York did not recognize entrapment, Cohen also had to urge the Court to recognize a broader, constitutionally mandated entrapment doctrine. Ibid., 9-10.

[849] Robillard, Respondent's Brief in Opposition, 9.

[850] Ibid., 3, 11.

devoid of any conversation concerning sex," Robillard, Wrenn, and Snowden clearly had a predisposition toward homosexual advances, and De Greise himself, merely by sitting in a crowded bar and engaging in friendly banter, did nothing that might reasonably have invited a sexual advance.[851]

Having weighed the two sides, the Justices refused to hear the case.[852] One law clerk was compelled by Cohen's argument that the decoy officer's subtle camouflage precluded application of New York's disorderly conduct laws. Granting that "the average person would be tempted to hit a person who made homosexual advances," Lewis Merrifield noted to Justice Douglas, "I doubt that this can be said of a person who has gone to a homosexual bar, dressed as a homosexual."[853] Yet his colleagues refused to read as much significance into the cultural intricacies outlined in Cohen's brief. Even if De Greise's "special attire" and friendly banter suggested his "willingness to participate in homosexual activity," Chief Justice Warren's law clerk concluded, nevertheless "all of the advances were initiated by" the defendants, who must have known that "a total stranger might react violently to their proposals."[854] Similarly, Justice Fortas's clerk denounced the suggestion that merely by coming to a gay bar dressed as a homosexual, De Greise could be seen as having invited a sexual advance. "If that's entrapment," Daniel Levitt observed, "then banks 'entrap' bank robbers by virtue of their very existence."[855]

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[851] Ibid., 12.

[852] Robillard v. New York, 385 U.S. 928, 928 (1966).

[853] Lewis Merrifield, memo on Robillard, 2, Library of Congress.

[854] Douglas Kranwinkle, memo on Robillard v. New York, 1966 Term, Docket No. 447, 3-4, Box 387, Papers of Earl Warren, Library of Congress.

[855] Daniel Levitt, memo on Robillard v. New York, 1966 Term, No. 447, 2, Box 23, Series 1, MS 858, Abe Fortas Papers, Yale Univeristy Manuscripts and Archives. Levitt also echoed Kranwinkle's point that, regardless of the homosexual's general discretion in selecting potential partners, the defendants' sexual invitation was likely to cause a breach of the peace "if addressed to a reasonalbe heterosexual, which is what the patrolman was despite his attire." Ibid.

Characterizing the defendants' vulgar sexual offer as a spontaneous invitation made to a "total stranger," the clerks acknowledged neither the extent to which De Greise's subtle cruising codes helped veteran cruisers like Robillard, Snowden, and Wrenn select particularly willing partners, nor the extent to which those codes could start a sexual negotiation before any overt words were spoken.

The Supreme Court's memoranda in *Robillard* reveal the cultural myopia persisting among courts in the 1960s regarding the insular codes and customs that had developed among urban gay communities in the mid-century. Back in 1958, a D.C. trial court dismissed the suggestion that recognizing a solicitation in a public bathroom might involve some specialized analysis outside the realm of the judge's common sense. Defending himself from charges of assault after his encounter with Louis Fochett at a George Washington University men's room, Philip Seitner recounted how Fochett lingered around the bathrooms stalls, watched Seitner urinate, looked into Seitner's eyes, and eventually unzipped his trousers by the urinals. "Finally it was obvious to me what he wanted," Seitner began to explain, but the trial judge cut him off. "Just tell us what you did," the court insisted; "Never mind about what was obvious."[856] Similarly, at a liquor board proceeding in San Francisco in 1960, one of the Alcoholic Beverage Control Board's trained police officers tried to testify that the effeminate patrons at the Handlebar used words with "very commonly understood meanings among homosexuals." The hearing officer struck the testimony, agreeing that the vagaries of "what words mean what to certain people" were conclusory testimony by the witness.[857] Such instructions reflected a common evidentiary principle among trial courts, barring witnesses from sharing personal

[856] Seitner v. United States, Joint Appendix, 17.

[857] Orrin v. Department of Alcoholic Beverage Control, Trial Transcript, 83.

conclusions or interpretations about matters properly left to the factfinder. Yet in applying that principle, the courts presumed that the gay world's slang and cruising patterns were ordinary matters within the factfinder's common experience, requiring no expertise or specialized credentials to understand. As in the case of *Robillard*, judges and clerks who confronted charges of homosexual solicitation relied on their own readings of a set of signals that often had significantly different connotations within the gay community itself. Looking at the record of De Greise's actions in the Harbor Bar, Kranwinkle and Levitt saw at, most, a gay man drinking a beer and answering some casual questions by a pool table. They did not consider that Robillard, Snowden, and Wrenn, taking De Greise's fashions, eye contact, and euphemistic banter into account, may have seen anything else.

In this sense, the vice squad's growing professional intimacy with the insular codes and structures of the gay world in the 1960s helped resolve both of the obstacles facing its officers in the previous decade. Luring in homosexual solicitations by emulating a subtle, often tacit language developed within an exclusive sexual community, plainclothes decoys managed simultaneously to evade the gay men's internal defenses against strangers and to escape the courts' antipathy to aggressive enticement tactics. Vice officers who changed into sneakers and sweaters before heading down to Greenwich Village, or who leaned against the walls in gay bars, or who openly watched suspected cruisers in public bathrooms, did not simply infiltrate a cultural space that gay men did not always imagine they knew. They infiltrated a cultural space that judges and juries often did not imagine at all.

The history of the vice squads' decoy campaigns against homosexual men complicates the conventional narrative of the ethnographic discovery of the gay world in late 1950s. Embraced and encouraged by the homophile movement as a tool of social enlightenment, the

sociological excavation of the group dynamics, codes, and customs of urban gay communities found many of its first practitioners among police departments charged with keeping those communities in their place. In the years following World War II, before professional sociologists descended on the sexual deviant, clever policemen emerged as the closest heirs of Ernest Burgess's sociology students, borrowing the documented slang and outward mannerisms of the homosexual to trap suspected cruisers. In the late 1950s, while Evelyn Hooker was exhorting her colleagues to consider the "group behavior" of gay men, criminologists like James Melvin Reinhardt conducted their own sociological forays into the social hierarchies and cultural codes of their local gay communities. By the mid-1960s, when trained researchers like Black, Mileski, and Humphreys confronted the paradox of gathering first-hand observations in exclusive gay bars and cruising sites, many vice officers had already mastered the art of "mobilizing" the slang, clothing, and body language of the deviant community against itself. Perhaps novel to their academic colleagues, the semiotics and social structures of the "gay world" uncovered by sociologists in the 1960s were hardly news to many police officers.

For all their professional insights into the nuances of urban gay culture, however, vice officers' ethnographic wisdom remained a largely unclaimed expertise. Mastering the gay world's insular codes and customs to arrest gay men in the streets—and often priding themselves on that mastery—police nevertheless defended their arrests at trial by downplaying the existence of any such specialized cultural language. While defendants often recognized the vice decoy's uncommon, impressive intimacy with gay cruising culture, plainclothes decoys themselves essentially echoed the same modesty rehearsed by liquor agents investigating gay bars following Repeal. In those cases, the state's attorneys had denied the need for any expertise in the signs and habits of homosexuality that defendants claimed urban policemen lacked. In these, they

denied the very existence of an expertise in the codes and customs of gay cruising culture that defendants insisted urban policemen possessed. But the upshot remained the same.[858] Even as vice officers developed a unique sophistication in the signs and structures of gay culture, and even as that sophistication magnified the efficiency of their campaigns, the legitimacy of the police's operations against gay men continued to depend on the far less sophisticated understanding of the general public.

[858] The differences revealed both the genuine shifts in the vice squad's cultural sophistication and the varying requirements of statutory schemes in question—in the case of the liquor boards, the problem of sufficiency of the evidence; in the case of solicitations, the shadow of police enticement.

Conclusion

In *The Homosexual in America*, Donald Webster Cory noted the vulnerability of the unique jargon shared by homosexual men in the early 1950s: its intrinsic, impossible dependence on confidentiality. If the language of the urban homosexual ever becomes popularized to a broader readership, Cory warned, "its secret character, and the advantages derived therefrom, are to a certain extent vitiated."[859]

As the vice squad's decoy campaigns in the 1950s and 1960s made clear, however, the greatest danger to the integrity of the gay world's insular language was not the risk that its codes might become known to the broader public. It was that some particularly antagonistic members of that public might learn its signals while the general population remained ignorant. This was the precise risk that vice squads in the early 1960s learned to exploit so well in their operations against homosexual men. Chafing against both the courts' aversion to overly aggressive decoy tactics and the gay community's increasingly guarded cruising patterns, plainclothes decoys maintained their arrest rates by learning the obscure, exclusive codes of the gay world: by luring in arrests through the very subtleties and signals that gay men had developed to avoid it. Relying on their uncommon insight into a highly subtle and highly insular urban subculture, vice officers often managed to invite sexual advances from the most experienced cruisers, all while plausibly denying having made any overt enticements. Vice officers in the 1960s forged a unique professional expertise in the codes and nuances of the urban gay world, and they often grew

[859] Cory, *Homosexual in America*, 103.

quite confident in their specialized ethnographic wisdom. Yet they continued to count on the layman's widespread ignorance of that robust urban underworld to legitimate their anti-homosexual campaigns to the courts.

If plainclothes decoys' efforts to deny their rarefied professional insights into the gay world reflected the personal humors of liberal trial judges, of course, some of their colleagues faced more intractable legal constraints. Decoys frequenting gay bars and parks could simply hope that their subtle enticement tactics would slip past the courts' attentions, but vice officers assigned to more intrusive surveillance campaigns in gay cruising sites found their testimony subject to increasingly vocal constitutional attack. As police departments frustrated by the inherent difficulties of enforcing sodomy statutes began experimenting with stealthy new surveillance posts—and, in many cases, expressing some pride in their hard-won investigative accomplishments—the task of downplaying the vice squads' professional sophistication fell to the joint efforts of the police, the prosecutors, and the courts themselves.

Part IV. Clandestine Surveillance and the Sufficiency of the Common View

> "[I]t would have been easy for any member of the public to see the offense. Any member of the public could have peered over the door, or the side partitions, or under either, or pushed open the door."
>
> – *Smayda v. United States*, Ninth Circuit Court of Appeals

> "In seeking to honor reasonable expectations of privacy through our application of search and seizure law, we must consider the expectations of the innocent as well as the guilty."
>
> – *People v. Triggs*, California Supreme Court

In 1938, not long after the American public first discovered the sexual psychopath, Bertram Pollens published the first criminological study of the species type. Senior psychiatrist at the sex clinic at the New York City Penitentiary, Pollens wrote *The Sex Criminal* as a guide to the psychic origins of homosexuals and other deviants: a promise to "take a few cases into our laboratory and . . . find out what has made them what they are."[860] For all Pollens's careful psychological analysis, however, the most memorable parts of the monograph may have been the photographs: black and white prints following nameless suspects on their journeys through the penitentiary system. The first two showed the men stripped down for security and medical examination, their faces covered or averted, their naked bodies exposed to the cold glare of the overhead lights and the prison staff. In each, a young guard, wearing his dark pressed uniform and burnished badge, can barely hide a smile beneath his visor.[861]

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[860] Bertram Pollens, *The Sex Criminal* (New York: Macaulay Company, 1938), 133. For Pollens's credentials, see Havelock Ellis, "Crime and Society," *The Rotarian*, February 1940, 19.

[861] Pollens, *Sex Criminal*, Image 2 and Image 3.



Figure IV.1. "Changing clothes and inspection," from Pollens's *Sex Criminal*.

A novelty for many readers, Pollens's monograph actually replicated a fairly common view of urban homosexuality. Throughout the twentieth century, while state liquor agents and plainclothes decoys watched homosexual men for their telltale signs of physical and cultural deviance, there was another sense in which the state was inspecting homosexuals. Like the homosexual patients in the physician's examination room, suspects brought to police stations on sodomy or solicitation charges were subject to an array of invasive booking procedures that exposed their bodies to the scrutiny of the prison staff. The gay man's inherent criminality, like any other criminal offense that justified incarceration, stripped him of his right to privacy, permitting police wardens and doctors to subject him to the most intimate, undignified disclosures.[862]

[862] For booking procedures in both the early- and mid- twentieth century, see Amos O. Squire, "Hospital Care at Sing Sing," *The Modern Hospital*, Vol. XVIII, No. 6 (June 1922), 509; American Correctional Association, *The State of Corrections*, Vol. 90 (1960), 112.

This was, of course, a very different form of "watching homosexuals" than that practiced by sharp-eyed plainclothes decoys, or even by liquor agencies after Repeal. However much Pollens's nude illustrations may have recalled George Henry's studies with the Sex Variants committee, there was a clear distinction between looking at deviant anatomies and looking for deviant codes—between the ability to identify homosexual people and the prerogative to watch homosexual bodies. And yet in some crucial sense, the numerous attempts to reduce the homosexual body to a determinate code in the twentieth century—whether by the medical establishment, the media, or the police—all came down to a fundamental debate about privacy: the rights of homosexual men in urban America to enjoy some measure of cover from the disapproving public around them. In the 1930s, Broadway's popular cabarets turned the fashions and mannerisms of the fairy into a public spectacle, drawing deviant bodies from out of their bohemian enclaves in Greenwich Village and the Bowery and into the spotlight of the mainstream stage.[863] After Repeal, state liquor boards invited—and, indeed, commanded—bar owners to watch their customers for stereotypical signifiers of deviance, transforming the private conversations and ironic visual codes exchanged by homosexual men into a public record readable by the sophisticated urbanite.[864] Throughout the mid-century, plainclothes decoys infiltrated homosexual bars, restaurants, and cruising sites, emulating the dress and cruising signals of homosexual men in order to earn their misdirected trust.[865] Police officers and laymen alike, in short, usurped the spaces and social signals developed as internal codes within the gay

[863] See Chapter 1. In some early pansy displays, of course, such as drag balls, the homosexual participants themselves pursued publicity. Drag balls provide a helpful example of how homosexual men and communities themselves sometimes contributed to the heterosexual public's trend of publicizing homosexual bodies, setting up systems of codes and signals that the state could later use against them.

[864] See Chapters 3 and 4.

[865] See Chapters 5 and 6.

community—a way for its members to speak among themselves without alerting outsiders—into a way to force that community to reveal itself to the public.

Of all the police's confrontations with the urban homosexual in these years, none raised the issue of privacy as clearly as clandestine surveillance of cruising sites. Long before any organized gay "communities" sprang up in major cities, "cruising" for sex in public spaces had allowed men attracted to other men to find like-minded sexual partners. At a time when many gay men dreaded alerting their families and neighbors to their illicit practices by bringing sexual partners home, as historian George Chauncey has observed, many men found that "privacy could only be had in public."[866] Common in highly trafficked spaces like parks, bus stops, and public bathrooms, the practice of homosexual cruising did not go unnoticed by local police. Especially after the advent of specialized vice squads opened up police resources to develop an increasingly elaborate set of surveillance tactics, police departments marshaled their manpower and investigative expertise to gain a specialized, intimate window into the insular world of homosexual cruising. From peepholes carved in bathroom walls to false air vents overhanging enclosed stalls, the police's secret observation stations gave the state a profoundly close look into many gay men's most intimate moments.[867] More than any other policing tactic in the twentieth century, clandestine surveillance took a man's decision to engage in deviant sexual acts to justify exposing him to the most startling, most searching public scrutiny.

Unsurprisingly, the tactic spawned acute concerns among both gay men and other citizens—not least, because the police's hidden peepholes often exposed the embarrassing acts of not only homosexual cruisers, but also innocent heterosexuals themselves. Beginning in the

[866] George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (New York: Basic Books, 1994), Chapter 7, especially 202.

[867] See, for example, People v. Norton, 209 Cal. App. 2d 173, 174 (1962); Smayda v. United States, 352 F.2d 251, 252 (9th Cir. 1965).

early 1960s, defendants arrested on the basis of clandestine surveillance evidence began taking advantage of the courts' expanding Fourth Amendment protections to challenge their arrests in court. And the courts' reactions may have sounded familiar. Under the parameters of the "plain view" doctrine, which granted no constitutional protections to evidence left open to the public, the legality of the police's surveillance evidence came down to whether a cruiser's sexual encounter could also have been spotted by the casual passerby. As with the state liquor boards, with their reliance on the layman's visual acuity to justify their charges against homosexual-friendly bars, the legitimacy of the state's surveillance tactics reduced to whether the police's observations were such as any member of the public *could* have made.[868]

On this, judges splintered. Like so many courts encountering dubious police enticement tactics in these same years, the first courts to consider Fourth Amendment challenges to clandestine surveillance erred on the side of generosity to the defendants. Applying a rigorous reading of the plain view standard, they denounced the police's right to spy on public bathrooms from any vantage points that would not have literally been accessible to ordinarily members of the public—forcing professional police officers, in some cases quite strictly, to stand in the shoes of the average man. Almost immediately, however, more pragmatic courts grew worried that this strict prescription would curtail the police's laudable efforts to stem the tide of homosexual misconduct. Even as police turned to increasingly sophisticated, stealthy surveillance tactics to catch homosexual cruisers in the act—even as they admitted, indeed, that more public observations were useless in collecting evidence—these courts insisted that any homosexual cruiser who pursued his illicit sexual acts in a public bathroom deliberately and readily exposed himself to public view. The police's most rarefied, most intimate clandestine surveillance

[868] Compare, for example, Bielicki v. Superior Court of Los Angeles County., 57 Cal. 2d 602, 607 (1962) (not plain view), with People v. Hensel, 233 Cal. App. 2d 834 (1965) (plain view).

campaigns against gay men, it appeared—not unlike their liquor investigations and even their decoy arrests—found validity in the courts based on the presumed effortlessness of their operations.

The uneven legal history of the police's clandestine surveillance campaigns in the twentieth century suggests more than simply the inherent subjectivity of constitutional analysis. It reveals how courts' very understanding of "privacy" in the context of the Fourth Amendment, as a legal concept emerging in the 1960s, depended as much on their moral commitments as on their doctrinal ones. The law has long recognized that judges' assessments of prevailing social mores—not least, regarding sexual practice—have defined the meaning of "privacy" as a substantive due process right since the Supreme Court first articulated the term in 1965.[869] Far less recognized is the extent to which these same moral considerations spilled into courts' development of search and seizure law in the same years. Guided by pragmatic anxieties about constraining the urban blight of homosexual cruising, courts that dismissed Fourth Amendment challenges against the police's clandestine surveillance practices beginning in the 1960s did not simply decry the dangers of public homosexuality. They suggested that men indulging in such illegal sexual activity actually had lesser legal rights to privacy against the state: that homosexual cruisers, by the very virtue of their deviance, were simply entitled to fewer constitutional protections against police surveillance than were members of the ordinary public.

[869] The emergence of personal "privacy" as a constitutional right in the 1960s is most closely associated with the 1965 case *Griswold v. Connecticut*, affirming an adult's right to access contraceptives. G. Sidney Buchanan, "The Right of Privacy: Past, Present, and Future," *Ohio Northern University Law Review*, Vol. 16 (1989), 403-510. Since then, the substantive due process right to privacy has factored significantly into debates surrounding morals regulation and anti-homosexual laws, most recently with the Supreme Court's invalidation of anti-sodomy laws in *Lawrence v. Texas*, 539 U.S. 558 (2003). Sonu Bedi, "Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete," *Cleveland State Law Review*, Vol. 53 (2006), 450; Ann B. Goldstein, "History, Homosexuality, and Political Values: Searching for the Hidden Determinants of *Bowers v. Hardwick*," *Yale Law Journal*, Vol. 97 (1988), 1078-79, 1091-98; David A.J. Richards, "Constitutional Privacy and Homosexual Love," *Review of Law and Social Change*, Vol. 14 (1986), 895-905. Yet the moral implications of Fourth Amendment privacy have rarely been discussed.

In this sense, the legal debates surrounding the police's clandestine surveillance campaigns had more in common with the states' liquor regulations and solicitation arrests than a shared reliance on the presumed competency of the layman to legitimate the state's anti-homosexual campaigns. Moving one step past the liquor boards' proceedings against gay-friendly bars and vice squads' plainclothes operations against gay cruising sites, the police's clandestine surveillance operations in public bathrooms in the 1960s translated into constitutional terms the vernacular project of inscribing the homosexual body as a singularly self-disclosing object. Thrusting himself in the "plain view" of the public despite his best efforts at discretion, lacking any entitlements to privacy even where other men could fall back on their legal rights, the homosexual cruiser emerged from these cases as a constitutionally public spectacle: a deviant specimen bound to reveal itself, not merely physically but also legally, to the eyes of the world.

6. Cruising in Plain View: Clandestine Surveillance and the Eye of the Common Man, 1900-1962

By the time the courts turned to the police's clandestine surveillance campaigns against homosexual cruising sites in the early 1960s, neither homosexual trysts in city toilets nor the police's furtive observations of those trysts could be considered novel phenomena. Indeed, it would not be entirely facetious to say that men began using public restrooms for sexual encounters as soon as there were public restrooms. In Paris, officials found themselves facing an unforeseen pandemic of public homosexuality soon after construction of their public urinals began in the mid-nineteenth century.[870] In Toronto, a mass effort to expand the city's lavatories in the early 1900s led to a dramatic rise in the incidence of—and complaints about—sodomy in public.[871]

The United States was no different. In New York City, the first reports of men having sex in public restrooms dated back as early as 1896—right after the first facilities opened in City Hall and Battery Park.[872] After the city made toilets available in its subway stations, they became an especially popular destination for anonymous encounters. By the end of the 1910s, over a third of all homosexual arrests in the city occurred in subway bathrooms.[873] A vice

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[870] Andrew Israel Ross, "Dirty Desire: The Uses and Misuses of Public Urinals in Nineteenth-Century Paris," *Berkeley Journal of Sociology*, Vol. 53 (2009), 64.

[871] Steven Maynard, "Through a Hole in the Lavatory Wall: Homosexual Subcultures, Police Surveillance, and the Dialectics of Discovery, Toronto, 1890-1930," *Journal of the History of Sexuality*, Vol. 5, No. 2 (October 1994), 214.

[872] Chauncey, *Gay New York*, 196 & fn. 60.

[873] Ibid., 198.

inspector making his rounds in 1927 expressed no surprise when "two sets of legs in [the] toilet enclosure" led him to discover two men "committing an act of perversion" in a Harlem subway station.[874]

A practice that arose long before the emergence of distinct gay "communities" in the nation's cities, cruising in public bathrooms in many ways remained separate from mainstream urban gay life throughout the next decades. Despite the Mattachine Society's secret support of Dale Jennings' defense in 1953, most homophile groups shunned both the convention of public sex and its attendant legal struggles, which hardly aided their attempts to recast the gay man's popular image from a "deviant" into a respectable, law-abiding citizen. Even the more casual, commonly lower-class communities that sprouted around popular bars and nightclubs in major cities—often themselves deemed insufficiently respectable by homophiles for their relative flamboyance and overt sexuality—often looked down on bathroom cruising as the very nadir of the homosexual social hierarchy.[875] Nor did bathroom cruisers necessarily seek recognition or affinity from the organized "gay" world. The gay bar scene commonly encouraged a more robust sense of cultural identity among its regular participants, yet in a time when social stigma led some men to downplay their homosexual practices not simply to others but even to themselves, many men who looked for anonymous sexual partners in public bathrooms declined

[874] "May 19, 1927, Miscellaneous, 6:15 P.M.," Box 35, Committee of Fourteen Records, New York Public Library. For evidence of similar expectations in Chicago, see "Queers—Hangouts, Jan. 6, 1937," 3, Folder 18, Box 209, Ernest W. Burgess Papers Addenda, University of Chicago Library.

[875] John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (Chicago: University of Chicago, 1983), Chapters 5 and 6; Martin Meeker, "Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s," *Journal of the History of Sexuality*, Vol. 10, No. 1 (January 2001), 78-116; David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004), Chapter 8; Nan Alamilla Boyd, *Wide Open Town: A History of Queer San Francisco to 1965* (Berkeley: University of California Press, 2003), Chapters 3 and 4; Marc Stein, *City of Sisterly and Brotherly Loves: Lesbian and Gay Philadelphia, 1945-1972* (Chicago: University of Chicago Press, 2000), Chapter 8.

to identify as "homosexual" in their daily lives.[876] This may have been particularly true of the most committed bathroom cruisers—not self-identified gay men like Jennings, who may have picked up an evening's companion in a public bathroom just as they would in a public park or bar, but those men who preferred to consummate the entire anonymous encounter in a bathroom stall, declining to bring lovers back home to their apartments. As late as the end of the 1960s, indeed, sociologist Laud Humphreys found that a majority of tearoom cruisers were married and living with their wives, dismissing their intermittent homosexual encounters as a sinful habit.[877] An article in the gay magazine *DRUM* in 1967 confirmed that "most persons who cruise public places do not regularly associate with other homosexuals."[878]

Yet while the cruising scene may have differed from the "gay" world of popular bars and neighborhoods, over the course of the twentieth century homosexual cruising itself cohered into a more established and systematized sexual culture. As in gay bars and in the popular parks where gay men came to find an evening's companion, men looking for quick sexual exchanges in public bathrooms developed internal codes to identify each other. Anyone familiar with his city's homosexual enclaves in the mid-century would know that a stranger who made extended eye contact or jingled the keys or loose change in his pockets was on the market for a sexual partner.[879] Other cues were more specific to the setting. A man inside a toilet stall could tap his

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[876] Stacy Lorraine Braukman, "Anticommunism and the Politics of Sex and Race in Florida, 1954-1965" (Ph.D. dissertation, University of North Carolina at Chapel Hill, 1999), 141.

[877] Ibid.; Laud Humphreys, *Tearoom Trade: Impersonal Sex in Public Places* (Chicago: Aldine Publishing Company, 1970), 105.

[878] Richard H. Elliott, "The Morals Squad," *DRUM*, September 1967, 28.

[879] The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration Techniques in Los Angeles County," *UCLA Law Review*, Vol. 13 (1966), 692 fn. 37 [herein after "*UCLA Law Review* Study"]; Daniel Webster Cory, *The Homosexual in America* (New York: Greenberg, 1951), 117-118; Chauncey, *Gay New York*, 188.

foot to signal his interest in oral sex.[880] Where previous cruisers had cut glory holes in the partitions—the better both to case potential partners and to hide their sexual acts from others—inserting a finger through the opening was a universal advertisement for a sexual act.[881] Some signals were even more covert: nodding one's head toward a bathroom stall, for instance, or quickly looking from a stranger's exposed penis into his eyes.[882]

As local vice squads hoping to entrap homosexual cruisers would soon learn well, these codes were both strategic and defensive, aiming to let cruisers find willing sexual partners while slipping beneath the notice of antagonistic strangers like the police. In many cases, however, cruisers developed additional signals aimed purely at avoiding accidental exposure to any passersby. Positing themselves by lavatory windows or listening to the sounds of clanging doors, washroom regulars waited for any signals of a stranger's approach to cut short their trysts.[883] Around particularly trafficked cruising sites, they enlisted third parties to act as "lookouts" outside the entrance.[884] Indeed, as sociologist Laud Humphreys would recount, cruisers typically selected their favorite facilities based on their relative difficulty of access—both a lavatory's geographic isolation away from mainstream crowds and any physical quirks that gave away when others were approaching, such as creaking entrances, sticky doors, or open windows.[885] Even having picked a relatively safe location and watching for approaching

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[880] *UCLA Law Review* Study, 692 fn. 40.

[881] Humphreys, *Tearoom Trade*, 65; Florida Legislative Investigation Committee, "Homosexuality and Citizenship in Florida," Tallahassee, Florida, January 1964 ("Why Be Concerned?").

[882] Humphreys, *Tearoom Trade*, 64.

[883] Ibid., 75; For examples in case law, see People v. Lynch, 179 Mich. App. 63, 70 (1989) (doors); State v. Jarrell, 24 N.C. App. 610, 614 (1975) (windows).

[884] Humphreys, *Tearoom Trad*e, 74-75.

[885] Ibid., 7-8.

strangers, experienced cruisers stayed vigilant, keeping their clothing as unperturbed as possible in order to be able to cover their illicit activities at a moment's notice.[886] As a result, researchers who studied homosexual cruising in the 1960s consistently reported that the practice was impressively discreet, both initiated through subtle signals and "abruptly discontinued at the approach" of any unknown person.[887] Humphreys himself noted the difficulty of spotting any homosexual encounters in public bathrooms even when he tried: even when he successfully walked in on pairs whom he believed to be two cruisers, by the time he entered they had typically abandoned any incriminating acts.[888]

These defensive stratagems came none too soon. Like homosexual men themselves, vice squads assigned to weed out sexual deviance in American cities recognized public bathrooms' unexpected allure for certain brands of antisocial behavior. As early as the 1910s, public bathrooms became a routine checkpoint for plainclothes patrolmen, who stationed themselves at lavatories throughout the city to watch for any homosexual advances—and often to invite them.[889] In light of cruisers' development of more discrete internal codes, however, police agencies also turned to a stealthier strategy. Beginning in the early twentieth century, police departments in major cities had commonly sent officers to watch for sexual misconduct from secret cavities and peepholes in public restrooms. Patrolmen in New York crouched in service

[886] Ibid., 70, 78-79.

[887] Council on Religion and the Homosexual, *The Challenge and Progress of Homosexual Law Reform* (San Francisco, 1968); see also Humphreys, *Tearoom Trade*, 28, 70-71.

[888] Humphreys, *Tearoom Trade*, 28, 80.

[889] Policemen in public toilets typically waited for their neighbors to start up a conversation, before intimating their own interest in a sexual encounter and arresting their expectant partners once the deed began. See, for example, McDermett v. United States, 98 A.2d 287 (D.C. App. Ct. 1953); Guarro v. United States, 237 F.2d 578 (D.C. Cir. 1956). The practice came into use as early as 1914. Chauncey, *Gay New York*, 198.

closets and perched behind grills in subway stations from Harlem to the Financial District.[890] Officers in Boston loitered in waiting rooms inside the city's train stations, watching through peepholes for "open and lascivious" activities.[891] In 1912, the Pennsylvania Railroad even had its agents drill a hole in the ceiling of the men's room in Cortland Street Ferry Station, stationing its officers to observe any illicit sexual encounters from above.[892]

Initially clustered around the east coast, the police's reliance on clandestine surveillance boomed following the end of World War II, as homosexual communities thickened in cities across the nation. In Los Angeles and San Francisco, two of the nation's biggest military ports during the recent war, cases against men arrested in public restrooms multiplied in the early 1950s.[893] By the early 1960s, surveillance had become a common police practice from cosmopolitan hubs like New York, Philadelphia, and Washington, D.C., to beach cities like Long Beach and Palo Alto, to southern and midwestern towns in Kansas, Georgia, and Ohio.[894] The use of clandestine observation was particularly prevalent around leisure sites like public parks

[890] Chauncey, *Gay New York*, 198 fn. 63.

[891] Commonwealth v. Cummings, 273 Mass. 229, 230-31 (1930).

[892] Chauncey, *Gay New York*, 198.

[893] For Los Angeles, see People v. Sellers, 103 Cal. App. 2d 830, 831 (1951); People v. Bentley, 102 Cal. App. 2d 97, 98 (1951); People v. Mason, 130 Cal. App. 2d 533, 534 (1955); People v. Strahan, 153 Cal. App. 2d 100, 101 (1957). For San Francisco, see People v. Norton, 209 Cal. App. 2d 173, 174 (1962); "Senior Armed Forces Disciplinary Control Board Meeting Minutes," January 24, 1951, 10, F3718:341a, Department of Alcoholic Beverage Control Appeals Board Records, California State Archive (Sacramento, CA). The cases listed above reflect the rate of appeals, not of initial prosecutions, but their dramatically rising rates in the 1950s suggest that prosecutions themselves were also on the rise.

[894] People v. Sanabria, 249 N.Y.S.2d 66, 67 (App. Term 1964) (New York); Gaeton Fonzi, "The Furtive Fraternity," *Greater Philadelphia Magazine* (December 1962), 23; Jean White, "Those Others IV: 49 States and the District Punish Overt Homosexual Acts as Crimes," *Washington Post*, Feb. 3, 1965, A19 (Washington); Bielicki v. Superior Court of Los Angeles County, 57 Cal. 2d 602, 604 (1962); Byars v. Superior Court of Los Angeles County, 57 Cal. 2d 869 (1962) (Long Beach); Dal McIntire, "Tangents: News & Views," *ONE*, Vol. 4, No. 4 (April-May 1956), 14 (Palo Alto); Britt v. Superior Court of Santa Clara County, 58 Cal. 2d 469, 470-71 (1962) (Santa Clara, CA); Dal McIntire, "Tangents: News & Views," *ONE*, Vol. 6, No. 2 (February 1958), 15 (Oklahoma City, Kansas); Johnson v. State, 96 Ga. App. 682 (1957) (Columbus, Georgia); Poore v. State of Ohio, 243 F. Supp. 777, 779 (N.D. Ohio 1965) (Mansfield, Ohio).

and beaches, where loitering men could blend into the scenery while searching for a partner.[895] Yet the practice also reached into a broad range of public and private commercial areas. Responding to complaints by private citizens or concerned businessmen, police departments instituted clandestine surveillance in train stations and municipal piers, department stores and restaurants, amusement parks and gas stations.[896] The technique even made its way onto military grounds. As early as 1958, investigators with the Department of Defense maintained an observation post in the ceiling of the men's room on the second floor of the Pentagon to photograph any illicit homosexual activity. While no agency ever publicly claimed responsibility for the operation, the Office of Naval Intelligence admitted that the Navy found the photographs useful in investigating homosexuality among its own officers.[897]

The duration and density of a city's anti-cruising operation depended on the size of its vice department. Wary of siphoning off limited police resources for any extended duration, smaller cities frequently opted for briefer but more intense surveillance campaigns, creating a rash of highly publicized arrests to disperse especially problematic cruising sites.[898] By contrast, police departments in coastal cities with more robust homosexual communities frequently manned the same observation posts for months or even years. At least as far as they were willing to admit, officers in these cities could afford to spend only so much time on clandestine

[895] *UCLA Law Review* Study, 707.

[896] Ibid. For examples, see People v. Sanabria, 249 N.Y.S.2d 66, 67 (App. Term 1964) (subway station); Kroehler v. Scott, 391 F. Supp. 1114, 1119 (E.D. Pa. 1975) (train station); State v. Coyle, 181 So. 2d 671, 672 (Fla. Dist. Ct. App. 1966) (municipal pier); Britt v. Superior Court of Santa Clara County, 58 Cal. 2d 469, 470-71 (1962) (department store); People v. Strahan, 153 Cal. App. 2d 100, 101 (1957) (department store); Bielicki v. Superior Court of Los Angeles County, 57 Cal. 2d 602, 604 (1962) (amusement park); People v. Norton, 209 Cal. App. 2d 173, 174 (1962) (movie theater); Shaw v. Pitchess, 324 F. Supp. 781, 782 (C.D. Cal. 1969) (restaurant).

[897] Jim Hoagland, "Hidden Cameras Used in Pentagon Toilets," *Washington Post,* Dec. 17, 1966, C7.

[898] In Palo Alto in 1956, police mounted an intense two-week surveillance campaign of a public restroom in a train depot. McIntire, "Tangents," May-April 1956, 14. In Mansfield, Ohio, police poured their resources into a high-tech camera surveillance campaign of a particularly infamous public lavatory during the summer of 1962. Clare W. Kyler, "Camera Surveillance of Sex Deviates," *Law and Order*, Vol. 11 (November 1963), 16-18, 20.

surveillance on a given shift. In Los Angeles, patrolmen were instructed to spend no more than ten to fifteen minutes at an observation post before moving to the next location. An unnamed official in Washington, D.C., insisted that the city's police spent only five or ten minutes monitoring public restrooms at a time. "Our officers . . . don't sit by hours at peepholes," he protested: "They don't have the time."

Other departments made time. Policemen assigned to monitor two public bathrooms in sleepy Lancaster, Pennsylvania, on various days over the course of one year spent up to nine hours a day watching for homosexual activity.[899] In Long Beach, surveillance assignments went out "a lot of times" each week and were often indefinite: one officer deployed to the rooftop of an amusement park testified that his colleagues manned their stations "[u]ntil we make an arrest, or until we see that we can't make an arrest."[900]

In many ways, clandestine surveillance was a less convenient tool than others available to the police in the mid-twentieth century. The construction of an effective observation post required more time, research, and resources than simply sending in a decoy officer or uniformed patrolmen—resources that would be entirely wasted once word about a particular surveillance site got out.[901] And because efficient surveillance itself consumed a substantial amount of time, the practice was generally worthwhile only in highly trafficked cruising sites that invited continuous waves of homosexual encounters.[902] To the extent that the vice squads' goal around popular cruising sites was *preventing* illicit sexual encounters rather than capturing cruisers in

[899] Lancaster itself was a small town, but chose to follow a hybrid strategy, mounting several days of full-day observations spread out over a year. Kroehler v. Scott, 391 F. Supp. 1114, 1119 (E.D. Pa. 1975).

[900] Bielicki v. Superior Court of Los Angeles Cnty., 57 Cal. 2d 602, 604 (1962).

[901] *UCLA Law Review* Study, 717.

[902] Ibid., 687 fn. 8.

the act, there was no doubt that plainclothes decoys and uniformed patrols provided the police a more effective prophylactic.

Yet at the same time, clandestine surveillance boasted some unmatched advantages for local vice squads. Despite the police's common reliance on plainclothes officers to infiltrate popular parks and restrooms, clandestine surveillance often yielded far better results in a city's most incorrigible cruising zones—veteran areas where, for example, washroom regulars learned to recognize the vice squad's decoys, or where they developed warning systems to alert each other about approaching strangers.[903] More significantly, clandestine surveillance was the vice squad's only realistic tool for implementing the harshest, most impressive tool in their state's legal arsenal against gay men: the sodomy charge. While plainclothes officers commonly elicited indecent proposals or *solicitations* for sex from their homosexual targets, leading to misdemeanor charges for lewdness or disorderly conduct, such patrols were near useless for bringing felony charges for illicit sexual conduct itself. As one study of the Los Angeles Police Department reported in the 1960s, while misdemeanor charges continued to comprise the vast majority of homosexual arrests, clandestine surveillance was responsible for a full 93% of all felony indictments brought throughout the greater Los Angeles area.[904] Sensitive to the resources necessary to mount an effective surveillance campaign, police departments that chose to forge ahead were often amply rewarded for their efforts. A single observation post in a highly trafficked Long Beach restroom led to charges against seventy homosexual men over the space of a year.[905] A two-week campaign in a railway station in Palo Alto yielded criminal charges

[903] Ibid., 708 fn. 141; see also Kyler, "Camera Surveillance of Sex Deviates," 16.

[904] *UCLA Law Review* Study, 707 & fn. 133.

[905] Ibid., 716 fn. 192. Two weeks of clandestine observation at a public park in Mansfield, Ohio, caught sixty-five men in homosexual acts, leading to the prosecution of thirty-seven men for sodomy. Kyler, "Camera Surveillance of Sex Deviates," 20.

against twenty-three suspects, eight for sodomy and fifteen for various misdemeanors.[906] A single sting at the Lincoln Park Zoo in Oklahoma City led to ten homosexual arrests, including four felony charges.[907]

Eager to capitalize on such uniquely effective anti-homosexual campaigns, in the years following World War II vice squads developed an increasingly sophisticated range of clandestine surveillance techniques. In the early 1950s, when the practice first spread to keep pace with the nation's growing homosexual communities, police officers kept their patrols relatively simple, relying on natural openings or hiding places scattered around the facilities. In California in 1951, one police officer observed two men engage in oral sex from a pair of open windows on the east and west ends of the lavatory.[908] In Columbus, Georgia, a patrolman hoping to make an arrest climbed to a canopy roof abutting a men's room and looked through an open window straight inside.[909] Others hid behind unfinished walls or doors held ajar. Two Los Angeles officers in 1951 stationed themselves in a vacant space behind a public restroom, lifting aside a detachable segment of the wooden wall to look inside.[910] A policeman assigned to the second floor of a May Company department store observed shoppers through a partition from an adjacent utility room.[911]

As the decade progressed, however, both the advent of specialized vice squads and the growing popular demand for stricter law enforcement against sexual "degeneracy" in American

[906] McIntire, "Tangents," May-April 1956, 14.

[907] McIntire, "Tangents," February 1958, 15.

[908] People v. Bentley, 102 Cal. App. 2d 97, 98 (1951).

[909] Johnson v. State, 96 Ga. App. 682, 682 (1957).

[910] People v. Sellers, 103 Cal. App. 2d 830, 831 (1951).

[911] People v. Strahan, 153 Cal. App. 2d 100, 101 (1957).

cities led to a boost in police operations against non-violent offenders like homosexual cruisers. Pressed to demonstrate their efficiency through more arrests, and frequently armed with greater police resources for minor vice crimes, many vice squads began to take a more active approach to their surveillance campaigns. From California to New York, officers drilled peepholes opening directly onto public toilet stalls. In one lavatory in Los Angeles, officers stationed in an adjacent chamber could walk the length of the men's room, alternating among a line of eyeholes to watch acts of oral sex in the stalls opposite the wall.[912] In New York, an officer hidden in the pipe-chamber of the West 4th Street subway station watched for lascivious conduct among errant commuters through a set of openings in the wall.[913] When private businesses grew concerned about their customers abusing their facilities, they were often happy to help with the planning. In San Francisco, the proprietors of the Silver Rail Restaurant took it upon themselves to install "a system of 'peepholes'" to allow employees and police officers to monitor the interior for suspected homosexuals.[914] The owners of the city's Paris Theatre, a Market Street establishment known for its provocative cinematic offerings, drilled "observation holes" through the marble wall right behind the toilet, offering policemen a particularly intimate perspective onto their customers' erotic encounters.[915]

Other departments introduced a higher level of camouflage into their observation stations. Providing a relatively wide view into a restroom's interior, louvered doors and screens emerged as one common alternative to conventional peepholes. In St. Petersburg, Florida, a slatted door

[912] People v. Mason, 130 Cal. App. 2d 533, 534 (1955).

[913] People v. Sanabria, 249 N.Y.S.2d 66, 67 (App. Term 1964). For other examples, see Kroehler v. Scott, 391 F. Supp. 1114, 1115-16 (E.D. Pa. 1975) (peepholes drilled in ceilings); People v. Roberts, 256 Cal. App. 2d 488, 490 (1967) (peepholes drilled in wall).

[914] "Senior Armed Forces Disciplinary Control Board Meeting Minutes," January 24, 1951, 9-10, California State Archives.

[915] People v. Norton, 209 Cal. App. 2d 173, 174 (1962).

installed for the purpose of police surveillance opened directly onto a line of toilets in a municipal pier.[916] In a department store in California, patrolmen observed homosexual activities from behind the wooden blinds of a service closet door.[917] Hoping for a greater degree of insulation, other squads opted for air vents and ventilation screens. In one public park in Los Angeles, a metal vent covered by wire mesh and hardware cloth hung on the wall dividing the men's lavatory from a neighboring toolshed; officers inside the shack could move the cloth aside to watch the toilets on the other side.[918] In an Emporium department store in Santa Clara, two air vents on the ceiling connected the men's room to the passage upstairs, allowing patrolmen armed with radio transmitters and video cameras to look into the four enclosed toilet stalls below.[919] The doorman in a movie theater in Los Angeles gave police officers permission to climb through the plumbing access hole above the men's room and watch the stall below through the screen covering their entrance.[920] Enjoying such a tantalizing second life as a tool of anti-homosexual surveillance, false air vents soon began appearing in men's restrooms purely as a camouflage for police observations.[921]

Some police departments were especially resourceful. In 1962, the owner of the Nu-Pike Amusement Park in Long Beach enlisted the local police to "do something in regard to the homosexual activity going on inside the toilets." With the manager's permission, policemen

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[916] State v. Coyle, 181 So. 2d 671, 672 (Fla. Dist. Ct. App. 1966).

[917] People v. Metcalf, 22 Cal. App. 3d 20, 22 (Ct. App. 1971).

[918] People v. Young, 214 Cal. App. 2d 131, 133 (1963).

[919] Britt v. Superior Court of Santa Clara County, 58 Cal. 2d 469, 470-71 (1962).

[920] People v. Maldonado, 240 Cal. App. 2d 812, 813-14 (1966). For other examples, see State v. Bryant, 287 Minn. 205, 206 (1970); People v. Hensel, 233 Cal. App. 2d 834, 836 (1965).

[921] Smayda v. United States, 352 F.2d 251, 252 (9th Cir. 1965) (cutting mock air vents in the ceiling of a men's restroom in Yosemite National Park); Shaw v. Pitchess, 324 F. Supp. 781, 782 (C.D. Cal. 1969 (installing fake air ventilator in men's room of a Santa Monica restaurant).

installed a foot-long pipe through the roof of the men's room, centered directly over the partition between two toilet stalls; looking through the narrow tube, the officers could observe an area extending 18 inches into each enclosure. Capped when not in use to avoid letting through light or rain, the pipe allowed the officers to arrest numerous pairs who engaged in intimacies through a glory hole in the partition.[922] Meanwhile, a surveillance campaign launched collaboratively by the Philadelphia police and a local chapter of the YMCA proved less creative but far higher-tech. After consulting the police about curtailing sexual improprieties in its washrooms, the YMCA invested nearly two thousand dollars in video surveillance equipment. Mounted behind one-way aluminum screens to camouflage their locations from unsuspecting users, the cameras transmitted live footage of homosexual encounters directly to the building's in-house security detail.[923]

Used intermittently since the early twentieth century, by the early 1960s photo and video technologies played an ever-greater role in clandestine surveillance.[924] Sensitive to future legal challenges to a single policeman's eyewitness evidence, officers in service closets and overhead compartments commonly photographed the sexual activities they observed to bolster their testimony.[925] Where their budgets allowed—most commonly during shorter stints targeted at particularly high-volume cruising sites—officers brought along video cameras, capturing colored

[922] Bielicki v. Superior Court of Los Angeles County., 57 Cal. 2d 602, 604 (1962); see also Byars v. Superior Court of Los Angeles County, 57 Cal. 2d 869, 869 (1962).

[923] Fonzi, "The Furtive Fraternity," 23.

[924] For uses of photography in clandestine surveillance stations going back to the early twentieth century, see Maynard, "Through a Hole in the Lavatory Wall," 222-29. For a contemporary overview of camera surveillance technologies available in the 1960s, see Alan F. Westin, "Science, Privacy, and Freedom: Issues and Proposals for the 1970s, Part 1: The Current Impact of Surveillance on Privacy," *Columbia Law Review*, Vol. 66 (1966), 1006.

[925] Smayda v. United States, 352 F.2d 251, 253 (9th Cir. 1965); People v. Roberts, 256 Cal. App. 2d 488, 490 (1967).

film of their targets' sexual transgressions.[926] By the end of the 1960s, several locations in popular beach sites like Miami, Florida, and Laguna Beach, California—as well as the less exotic Lake Milton, Ohio—were following the Philadelphia YMCA's lead and turning to closed circuit television systems in problematic men's rooms.[927] Opting for a less sordid alternative, other departments kept their cameras out of the restroom stalls. In Monterey County in 1966, for example, the sheriff's office declined to photograph any actual sex acts inside a public bathroom, photographing each user of the restroom as he entered and exited the facilities in order to facilitate future identifications.[928]

In terms of their sheer time and investigative sophistication, of course, many of the police's clandestine surveillance campaigns against public restrooms in the 1960s would have been impracticable in previous decades. The vice squad's sodomy arrests in public men's rooms were not, as in the early twentieth century, simply a matter of arresting obvious cross-dressers spotted on the city street, but rather of channeling police departments' municipal resources and professional innovation into novel and ever-changing windows into their local cruising cultures. Charged with the task of restricting homosexual activity in their cities, vice squads were happy to invent increasingly sophisticated clandestine surveillance stations in order to increase their records of arrest. And local prosecutors, responding to many of the same pressures, were happy to accept the influx of new cases.

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[926] William F. McKee, "Evidentiary Problems—Camera Surveillance of Sex Deviates," *Law and Order*, Vol. 12 (August 1964), 72-74; Fonzi, "The Furtive Fraternity," 23; see also Britt v. Superior Court of Santa Clara County, 58 Cal. 2d 469, 470-71 (1962).

[927] Humphreys, *Tearoom Trade*, 85.

[928] People v. Roberts, 256 Cal. App. 2d 488, 490 (1967).

In most cases, indeed, district attorneys were indiscriminate in bringing charges against men caught by the police's surveillance campaigns, eager to convict any cruisers on hand.[929] Sometimes, however, the factors that influenced a district attorney's decision of whether—and whom—to prosecute reached beyond guilt alone. In one movie theater in San Francisco, police officers behind a shuttered hiding space watched seven patrons engage in acts of oral sex beside the urinals in the men's lavatory: one Puerto Rican man and one black man, both servicing a "young Caucasian" with "long blond hair," and two white suspects whose partners remained unidentified.[930] The police made no efforts to apprehend the passive partners, arresting only the four men observed administering the sexual acts. When the cases came before the same trial judge, he dismissed the complaints against the two white defendants and proceeded to convict the black and Puerto Rican suspects.[931] On appeal, the two challenged their prosecutions as racially motivated, but the court of appeals dismissed their arguments. "The fact that some wrongdoers are proceeded against while others, equally suspect[,] are not," the panel insisted, "does not, of itself, amount to illegal discrimination."[932]

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[929] See, for example, Kyler, "Camera Surveillance of Sex Deviates," 20 (prosecuting all identified suspects); McIntire, "Tangents," May-April 1956, 14 (charging all suspects).

[930] People v. Maldonado, 240 Cal. App. 2d 812, 814, 815 (1966).

[931] Ibid., 815.

[932] Ibid., 816.

For many municipalities and private business owners concerned about the effects of homosexual cruising on their property, the effects of such targeted surveillance campaigns were dramatic. Not long after installing the closed circuit television system in the Philadelphia YMCA, the Y's executive secretary enthusiastically recounted the success of the organization's financial investment. Confirming, based on the copious surveillance footage, that the location's "reports [of homosexual activities] . . . were not exaggerated," Norman Fuller reported that "[t]his equipment has served not only to give us a liberal education . . . [b]ut has reduced traffic in these washrooms by 50%." The organization was so impressed by the reduction in illicit activities that it declined to press charges or participate in any prosecutions against the cruisers apprehended in its lavatories. Fonzi, "The Furtive Fraternity," 23.

The men convicted of sodomy through the police's surveillance campaigns faced a variety of penalties. The coastal states were on the generous extreme: In California, men brought in on felony charges typically received one year's imprisonment and hardly ever went to prison; their sentences were almost invariably reduced to probation.[933] Defendants who actually served time there and in New York received far shorter sentences: often a month or two in the county jail or local workhouse.[934] In the midwest and the south, however, defendants were rarely so lucky. Men convicted of sodomy in Texas were sentenced to five years in prison well into the 1960s.[935] In Ohio, they faced up to twenty years with no chance of probation and were automatically branded as "sexual psychopaths," often spending years in a mental ward even before their convictions.[936] More lasting than the prison time was the mark that a felony charge left on a homosexual man's record. Defendants prosecuted for sexual sodomy in the mid-century were required to register as sex offenders by the police and permanently listed on a roster of suspects for sex crimes investigated in their area.[937] And town newspapers commonly printed the names and addresses of local defendants, along with the details of their alleged offenses—including, in some instances, charges ultimately dismissed by the jury.[938] Well in advance of

[933] Shaw v. Pitchess, 324 F. Supp. 781, 782 (C.D. Cal. 1969); People v. Strahan, 153 Cal. App. 2d 100, 101 (1957); People v. Norton, 209 Cal. App. 2d 173, 174 (1962); People v. Maldonado, 240 Cal. App. 2d 812. 813 (1966); People v. Roberts, 256 Cal. App. 2d 488, 489-90 (1967); People v. Hensel, 233 Cal. App. 2d 834, 835-36 (1965).

[934] People v. Young, 214 Cal. App. 2d 131, 132-33 (1963) (sixty days in jail); People v. Sanabria, 249 N.Y.S.2d 66, 67 (App. Term 1964) (thirty days in jail).

[935] Buchanan v. State, 471 S.W.2d 401, 403 (Tex. Crim. App. 1971).

[936] McKee, "Evidentiary Problems," 72.

[937] *UCLA Law Review* Stud, 736 fn. 294.

[938] See, for example, "Sent to Pen," *Mansfield News Journal*, Jun. 25, 1963, 11; "Jury Finds Man Guilty," *Mansfield News Journal*, Oct. 6, 1965, 23; "Found Guilty By Jury of 1962 Morals Charge," *Mansfield News Journal*, Mar. 31, 1965, 13; "Admits He Killed Girl," *Mansfield News Journal*, Jan. 4, 1966, 1; "18 Facing Trial Here Next Week," *Pennsylvania Stimpson's Daily Leader-Times*, Sept. 15, 1960, 1; "Sixth Sodomy Charge Filed in Under Month," *Iowa City Press-Citizen*, Aug. 21, 1968, 12; "Plea is Changed on Sodomy Count," *Lincoln Star*, Dec. 10, 1959, 17;

their trials, men caught in the police's surveillance campaigns risked having the secrets of their sexual lives revealed to family members, neighbors, and employers.

Squaring off against the word of an officer, and perhaps eager to minimize any further publicity, few cruisers charged with sodomy based on the police's surveillance campaigns appealed their convictions. Many pled guilty to avoid trial altogether. Some, however, fought back in court.

In Plain View: Surveillance in the Courts

As soon as clandestine surveillance entered the police's arsenal against homosexuality in the twentieth century, the practice drew its share of challengers. As early as 1930 and with increasing frequency through 1950s, men captured in the police's pervasive surveillance campaigns challenged their arrests on a variety of grounds.[939] Suspects intimidated into confessing their transgressions charged that their statements were involuntary.[940] Those fortunate—or wealthy—enough to have character witnesses appear on their behalf defended the wholesomeness of their sexual lives. One New York man accused of engaging in sodomy in a downtown subway station offered to have his wife describe their healthy marital life.[941] In Los Angeles, one defendant retained a neurologist as an expert witness to refute the suggestion that he was "to any extent a homosexual."[942]

"Sodomy Charge Pleas Conflict," *Lincoln Evening Journal*, Dec. 7, 1959, 13. For papers reporting on the trials of men later acquitted of all charges, see "Acquitted by Jury," *Mansfield News Journal*, Mar. 23, 1963, 10.

[939] The earliest appellate challenge to a sodomy conviction based on clandestine surveillance goes back to at least 1930. Commonwealth v. Cummings, 273 Mass. 229, 231-32 (1930).

[940] People v. Maldonado, 240 Cal. App. 2d 812, 817 (1966); see also Hoagland, "Hidden Cameras Used in Pentagon Toilets," C7.

[941] People v. Sanabria, 249 N.Y.S.2d 66, 67 (App. Term 1964).

[942] People v. Sellers, 103 Cal. App. 2d 830, 831 (1951).

Most commonly, the men caught up in the police's surveillance operations simply questioned whether the police's evidence was sufficiently reliable to prove their guilt beyond a reasonable doubt.[943] Where the police could spare only one officer to man their observation stations, defendants invariably demanded some objective corroboration of the witness's testimony.[944] Others were more creative. After an officer standing outside an open window accused Paul Bentley of having oral sex through a glory hole between two stalls, Bentley decried the officer's testimony as "inherently improbable": based on the angle of window and the dim light of the afternoon, the officer could hardly have gotten a reliable view inside the toilet.[945] When a Los Angeles police officer crouching by a peephole behind the back wall of the stall claimed to catch Alfred Mason performing oral sex on Rodney Owens, Owens turned the very proximity of the officer's observation post into a cause to doubt his testimony. Considering the officer's own statement that Owens "stood up and the codefendant immediately started copulating his penis," the defendant insisted, his back would have blocked the officer's view of the alleged act.[946]

Now and then, a defendant accused of cruising in a public sex even won over the court.[947] In November of 1958, for example, New York City police officer Richard Roskell arrested an

[943] See, for example, Johnson v. State, 96 Ga. App. 682, 862 (1957) (challenging conviction "on general grounds only"); People v. Sanabria, 249 N.Y.S.2d 66, 67 (App. Term 1964) (challenging conviction on the grounds that defendant's "guilt was not proven beyond a reasonable doubt").

[944] People v. Sellers, 103 Cal. App. 2d 830, 831 (1951); People v. Bentley, 102 Cal. App. 2d 97, 98 (1951); People v. Strahan, 153 Cal. App. 2d 100, 102 (1957).

[945] People v. Bentley, 102 Cal. App. 2d 97, 98-99 (1951).

[946] People v. Mason, 130 Cal. App. 2d 533, 534-35 (1955).

[947] Successful challenges typically involved some constitutional infirmity in a defendant's trial procedures—most commonly, an improper confession admitted into evidence. People v. Maldonado, 240 Cal. App. 2d 812, 817 (1966); Hoagland, "Hidden Cameras Used in Pentagon Toilets," C7 (involuntary confessions).

out-of-town visitor in the restroom of a Manhattan subway station.[948] A respected schoolteacher and newly minted mayor of upstate Oswego, Vincent Corsall did not fit the profile of the typical cruiser.[949] By his own account, indeed, Corsall was simply using the one toilet stall stocked with paper when his younger codefendant reached inside for some sheets to dry his hands. Nevertheless, Roskell testified that Corsall and the younger man engaged in "indecencies" for nearly half an hour, which Roskell had overheard in detail through a peephole on the opposite wall. Courts generally deferred to police witnesses, but in this case Roskell's graphic account of the alleged dalliance raised the judge's suspicions. Pressed on how he could have overheard the defendants' conversation from his hiding spot, Roskell admitted that the dialogue was mainly out of earshot but insisted he could lip-read. Invited to demonstrate the skill in court, he failed. Sensitive to the "very sharp conflict of testimony" in the case—and, undoubtedly, to Corsall's respected status back home—the judge acquitted both defendants of all charges.[950]

More often, defendants' challenges fell on deaf ears. Faced with charges of lewd solicitation in these same years, D.C. courts following *Kelly* emphasized both the unreliability of uncorroborated testimony and the value of character witnesses for the defense, but judges evaluating the far seedier charges of public sodomy declined to observe any such precautions. In California, courts refused to require corroboration of a single police officer's surveillance testimony.[951] On both coasts, judges took poorly to defendants' attempts to "mitigate" the police's accounts of their alleged homosexual exploits through testimony of their heterosexual

[948] McInctire, "Tangents," *ONE*, Vol. 6, No. 12 (December 1958), 13.

[949] "Who's Whose Boss in Oswego? Teacher Faces School Board That Fired Him When He Became Mayor," *Life*, Jan. 20, 1958, 46.

[950] McInctire, "Tangents," *ONE*, Vol. 6, No. 12 (December 1958), 13.

[951] People v. Sellers, 103 Cal. App. 2d 830, 831 (1951); People v. Bentley, 102 Cal. App. 2d 97, 99 (1951); People v. Strahan, 153 Cal. App. 2d 100, 102 (1957).

prowess outside the public bathrooms. As a district court in Los Angeles noted, "The law does not make a distinction as to the type of person who may commit the act charged . . . whether the person is normal or abnormal."[952] And, given the choice between rival testimony from local police officers and defendants, most courts deferred to the police's version of events.[953] As one appellate judge emphasized, police witnesses were "under oath and subject to cross-examination"; as such, they were entitled to the confidence of the court.[954] In some cases, trial judges did subject an officer's claims to greater scrutiny. During Paul Bentley's trial in 1951, at Bentley's own request, the judge visited the crime scene, "stood in the positions occupied by the officer" by the windows, and tried his hand at peering at the toilet stalls inside. Based on his observations, he concluded that "[what] the officer said he did see was, in fact, possible to be seen."[955]

None of these challenges, of course, questioned the legality of the police's observation posts themselves. Indeed, at no point in the 1950s did the men caught in the police's surveillance campaigns dispute the state's constitutional prerogative to spy on citizens inside a public toilet.[956] All that changed in the early 1960s. In 1961, the Supreme Court in *Ohio v. Mapp* held that the Fourth Amendment forbade states from using at trial evidence obtained

[952] People v. Sellers, 103 Cal. App. 2d 830, 831 (1951). In New York, the trial court agreed that a "natural marital relationship between the defendant and his wife would neither prove nor disprove his ability or inclination to perform unnatural acts." People v. Sanabria, 249 N.Y.S.2d 66, 67-68 (App. Term 1964).

[953] People v. Sanabria, 249 N.Y.S.2d 66, 68 (App. Term 1964); Johnson v. State, 96 Ga. App. 682, 682 (1957).

[954] People v. Mason, 130 Cal. App. 2d 533, 535 (1955).

[955] People v. Bentley, 102 Cal. App. 2d 97, 99 (1951).

[956] Del McIntire, "Tangents," *ONE*, Vol. 10, No. 6 (June 1962), 17 (noting that defendants before 1962 "had either pled guilty or defended themselves unsuccessfully simply against the acts charged," but had "not troubled with the unreasonable search angle").

through an illegal search of the defendant.[957] The "exclusionary rule" was first announced back in 1914, but at that time the principle, like the Fourth Amendment itself, applied only to the federal government.[958] In 1949, as part of its broad trend of "incorporating" fundamental constitutional rights against the states under the liberal Chief Justice Warren, the Court extended the Fourth Amendment's prohibitions to bear against state police.[959] Yet it demanded nothing with regard to remedies, and most states declined to adopt the exclusionary rule and suppress the fruit of illegal searches from trial.[960] Unsurprisingly, surveying the landscape of the states' criminal trials a decade later, the Court decided that the states' common law remedies had failed to protect defendants' Fourth Amendment rights against abuses by the police. "[A]ll evidence obtained by searches and seizures in violation of the Constitution is," the Court concluded in *Mapp*, "by that same authority, inadmissible in a state court."[961]

Mapp elevated the constitutional bar on "unreasonable searches" to the heart of legal debates surrounding clandestine surveillance of cruising sites.[962] Perhaps confusingly for state

[957] Mapp v. Ohio, 367 U.S. 643, 654-55 (1961); Sina Kian, "The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded," *New York University Law Review*, Vol. 87 (2012), 176-77; Christian Halliburton, "Leveling the Playing Field: A New Theory of Exclusion for A Post-Patriot Act America," *Missouri Law Review*, Vol. 70 (2005), 529.

[958] Halliburton, "Leveling the Playing Field," 527.

[959] Kian, "The Path of the Constitution," 177; Bernard Schwartz, "Chief Justice Warren and 1984," *Hastings Law Review*, Vol. 35 (1984), 984; Jerold H. Israel, "Criminal Procedure, the Burger Court, and the Legacy of the Warren Court," *Michigan Law Review*, Vol. 75 (1977), 1412.

[960] Halliburton, "Leveling the Playing Field," 528-29; Kathryn R. Urbonya, "Fourth Amendment Federalism? The Court's Vacillating Mistrust and Trust of State Search and Seizure Laws," *Seton Hall Law Review*, Vol. 35 (2005), 920, 929. Some states, including California, did adopt the exclusionary rule prior to *Mapp*. See Elkins v. United States, 364 U.S. 206, 224 (1960) (listing state rules).

[961] Mapp v. Ohio, 367 U.S. 643, 654-55 (1961).

[962] By its language, the Fourth Amendment protected the "right of the people to be sure in their persons, houses, papers, and effects, against unreasonable searches and seizures"—understood presumptively to include any searches conducted without a warrant. David A. Sklansky, "The Fourth Amendment and Common Law," *Columbia Law Review*, Vol. 100 (2000), 1741; "Administrative Searches," *Harvard Law Review*, Vol. 92 (1978), 210. A warrant, in turn, requires police to describe in some detail place, allege crime, and individual suspect to be searched.

courts, however, the precise parameters of what constituted an unreasonable search—or, for that matter, a "search" at all—was undergoing a gradual shift in the 1960s. The leading Supreme Court decision at the time, *Olmstead v. United States*, defined a "search" quite narrowly, requiring police to literally "trespass" on some physical property owned by the defendant.[963] Dissenting from that opinion, the famously progressive Justice Brandeis had read the Fourth Amendment to encompass a broader claim to privacy: a "right to be let alone" from state intrusion.[964] As police departments over the course of the Cold War developed increasingly sophisticated surveillance technologies, many of Brandeis's colleagues began to agree.[965] A "search," a California court suggested in 1956, is best characterized as a "prying into hidden places for that which is concealed[,] . . . hidden or intentionally put out of the way."[966] Regardless of the role "privacy" played in defining the scope of the Fourth Amendment, however, courts generally agreed that a defendant's expectations of privacy marked the *limits* of its protections. By the 1960s, it was beyond dispute that the Constitution did not forbid police searches of items or persons left in the "plain view" of the general public.[967] Where a defendant

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Intended to flush out particular cruising sites rather than to apprehend specific defendants, the police's clandestine surveillance posts rarely if ever operated under a warrant. *UCLA Law Review* Study, 709 & fn. 147.

[963] Olmstead v. United States, 277 U.S. 438, 465-66 (1928); Quin M. Sorenson, "Losing a Plain View of Katz: The Loss of A Reasonable Expectation of Privacy Under the Readily Available Standard," *Dickinson Law Review*, Vol. 107 (2002), 182-83; "Electronic Surveillance," *Harvard Law Review*, Vol. 82 (1968), 188-89.

[964] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[965] "Electronic Surveillance," *HLR*, 189 ("Since the development of the trespass rule in Olmstead, however, there has been a sharper focus on simply the 'right to be secure' and hence on the interests in personal privacy involved in search and seizure problems. A more functional approach, balancing the relevant public and private interests, has increasingly become the test of the scope of the fourth amendment's protections."); "Eavesdropping Orders and the Fourth Amendment," *Columbia Law Review*, Vol. 66 (1966), 357-58; Anspach v. United States, 305 F.2d 960, 960 (10th Cir. 1962) (Ritter, J., dissenting) (arguing for Fourth Amendment violation for eavesdropping in hotel room); People v. W., 144 Cal. App. 2d 214, 219 (1956).

[966] People v. W., 144 Cal. App. 2d 214, 219 (1956).

[967] See, for example, People v. Roberts, 47 Cal. 2d 374, 379 (1956); People v. Rayson, 197 Cal. App. 2d 33, 39 (1961); Burt v. United States, 139 F.2d 73, 76 (5th Cir. 1943); Cradle v. United States, 178 F.2d 962, 963-64 (D.C. Cir. 1949).

left evidence so publicly available that "[a]ny member of the public could have seen the same thing," whether by walking down the street or looking in an open window, the courts could hardly require the police "to blind themselves" to the evidence.[968]

The first court to consider a Fourth Amendment challenge to the police's clandestine surveillance of cruising sites had to decide how to fit the practice within these competing theories. That court was the Supreme Court of California ("SCC"), with a pair of landmark opinions published in close succession in 1962.[969] The defendant in the first case, Robert Bielicki, had fallen prey to the Long Beach Police Department's rooftop observation post at the Nu-Pike Amusement Park, where late one evening Officer Hertzel caught Bielicki and another man having sex through a glory hole between the stalls. Charged with sodomy, Bielicki moved to strike the state's key evidence as an affront to the Fourth Amendment.[970] Bielicki could certainly claim no proprietary right over the bathroom where he was found; as in most cases arising on private property, the Nu-Pike's actual owners had fully consented to the police's operations.[971] Yet while Bielicki's case ran headlong against *Olmstead*'s trespass requirement, the SCC preferred to adopt a more expansive reading of the defendant's rights. "There would appear to be no doubt," the court presumed, "that the acts of Officer Hertzel constituted a 'search'": per California's own earlier definition, a "prying into hidden places" by the agents of the state.[972] Nor could the police benefit from any specific exceptions like the plain view doctrine. Though Bielicki had committed his offense in a public facility, the court noted, that

[968] Burt v. United States, 139 F.2d 73, 76 (5th Cir. 1943); People v. Roberts, 47 Cal. 2d 374, 379 (1956).

[969] Bielicki v. Superior Court of Los Angeles County, 57 Cal. 2d 602 (1962); Britt v. Superior Court of Santa Clara County, 58 Cal. 2d 469 (1962).

[970] Bielicki v. Superior Court of Los Angeles County, 57 Cal. 2d 602, 604-05 (1962).

[971] Ibid., 604.

[972] Ibid., 605.

fact alone was insufficient to trigger the principle. In all past cases where the plain view doctrine applied, state agents had "entered upon premises open to the general public" in order to espy incriminating evidence "as any member of the public could also have seen" it.[973] By contrast, in this case, Officer Hertzel had used an overhead vantage point that was "not . . . open to the general public" and espied an enclosed toilet stall "hidden from all but the type of exploratory search conducted here."[974] Helping the police to a view hidden from any casual passerby, the Long Beach Police Department's surveillance campaign fell directly within the "unreasonable searches" forbidden by the Fourth Amendment.[975]

Presuming that Bielicki's tryst was entirely hidden from the eyes of the public, the SCC did not directly address the significance of Hertzel's hidden surveillance post. A few months later, however, it had an opportunity to clarify its reasoning. In that case, the defendant, Paul Britt, was caught engaging in oral sex in the men's room of a department store in Santa Clara—not by way of any glory hole between the stalls, but in the foot of open space between the floor and the stall door.[976] This, the prosecution insisted, was a case for the plain view doctrine. Unlike the closet-like stalls at the Nu-Pike, where Bielicki's closed door had effectively shielded any sexual acts performed through the glory hole, Britt's sexual indiscretions in the open space beneath the stall would have been "clearly observable to any person of the general public who might have entered the men's room."[977] Dismissing the state's argument, the SCC floated a new wrinkle to the plain view doctrine: that the contours of an "unreasonable search" did not depend

[973] Ibid., 606.

[974] Ibid., 607.

[975] The search was unreasonable because it was instigated with no warrant and no meaningful suspicion against Bielicki or his partner. Ibid., 605-06.

[976] Britt v. Superior Court of Santa Clara County, 58 Cal. 2d 469, 470-71 (1962).

[977] Ibid., 472.

simply on where the police gathered its evidence, but also on how the police gathered it. The crux of its reasoning in *Bielicki*, the court explained, was "neither the manner of observation *alone* nor the place of commission *alone*, but rather the manner in which the police observed a place . . . which is ordinarily understood to afford personal privacy to individual occupants."[978] The SCC did not dispute the police's prerogative to conduct clandestine surveillance in spaces so quintessentially public that they could allow no hope of privacy from prying eyes: public streets, public hallways, and the like.[979] Yet when a citizen retreated to a space as sensitive as a toilet stall, he had a right to presume that no hidden spies were watching him from above. Even if Britt's floor-level sexual acts "might possibly have been visible . . . *had* the officer been observing from a public, common use portion of the restroom," the court concluded, "the fact remains that he was *not* so stationed and the subject evidence was *not* so obtained."[980] That Britt had knowingly risked exposing himself to a fellow customer using the urinals did not mean that he had knowingly exposed himself to a policeman crouching above the ceiling. Like trial courts faced with particularly wily plainclothes decoys, the SCC essentially drew a limit on the levels of police connivance it would sanction in a public bathroom: even where the defendants were undoubtedly guilty, and where they left their guilt open for the world to see, the court refused to give the vice squad's most egregiously invasive tactics the imprimatur of law.

Bielicki and *Britt* immediately reined in the police's use of clandestine surveillance to monitor public bathrooms in California.[981] In the greater Los Angeles area, fifteen local police

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[978] Ibid.

[979] Ibid.

[980] Ibid., 473.

[981] The court's holdings in Bielicki and Britt also had an impact beyond the realm of anti-homosexual policing—most prominently, on the police's gathering of evidence in narcotics cases, which had also frequently relied on clandestine surveillance of public restrooms. See, for example, People v. Holloway, 230 Cal. App. 2d 834, 839

agencies interviewed after *Britt* came down all reported altering their methods to comply with the court's holdings—though the vagaries of their responses suggested some confusion about the precise contours of the SCC's legal rationale. Three agencies interpreted *Britt* to forbid police officers from observing public bathrooms under any circumstances, relying exclusively on plainclothes decoys or uniformed patrols stationed outside the doors to patrol the phenomenon of homosexual cruising.[982] Opting for a more moderate approach, six agencies abandoned the practice of surreptitious surveillance, but took *Britt* to sanction "public observations" by police officers. Instead of hiding behind peepholes or air vents, plainclothes officers in these jurisdictions waited outside the entrances to public restrooms. When they spotted "suspicious looking persons" entering the facilities, the officers gave them some moments of privacy before walking into the common area, just like any other member of the public, to catch them in the act.[983] Meanwhile, those departments that continued to use clandestine techniques adapted their tactics to accommodate the SCC. Some vice squads asked city officials to remove the doors from toilet stalls in public bathrooms, a move that they assumed would expose the activities within to "plain view." Others tried to avoid spying on innocents by trying to gather some evidence against specific cruisers before retreating to their hidden peepholes.[984] Regardless, police agencies agreed that the SCC's decisions had taken much of the efficiency out of clandestine surveillance in California: all fifteen departments reported shifting their resources to plainclothes officers to patrol popular cruising sites in these years.[985]

(1964) (citing Bielicki to find inadmissible evidence of narcotics use gathered through the clandestine surveillance of an enclosed toilet stall).

[982] *UCLA Law Review* Study, 714 and fn. 176.

[983] Ibid., 714 fn. 177, 716, 716 fn. 189.

[984] Ibid., 714, 715 fn. 181.

[985] Ibid., 687 fn. 10.

Even outside California, *Britt* and *Bielicki* had an impact on the police's anti-homosexual surveillance campaigns. Perhaps the SCC's most careful student, in fact, came far from the coastlines of Los Angeles and Long Beach, in the industrial midwestern town of Mansfield, Ohio. Mansfield's experiment with clandestine surveillance began in the summer of 1962, after a twenty-year-old assaulted a teenage boy at gunpoint in a local park. During the interrogations that followed, the suspect confessed that he himself was thrown "along the path of sex deviation" when he was forced to receive a blow job inside the men's restroom in the city's Central Park.[986] A basement facility in the middle of Mansfield's business district, the Central Park bathroom had a reputation as an area entered at one's own risk: according to police records, a "frequent[] . . . site of beatings and robberies."[987] Armed with this disturbing new evidence of the lavatory's seedier uses, the Mansfield Police Department embarked on a rigorous campaign to restore some order. Initially, it limited itself to decoy enforcement, sending plainclothes officers to loiter around the park in order to ferret out any lascivious behavior. That strategy yielded disappointing returns. Concluding that mere plainclothes patrols "proved fruitless" against Mansfield's inveterate cruisers, Police Chief Claire Kyler turned to clandestine surveillance as "the only type of investigation that would be of any use."[988]

As the district attorney acknowledged, going into the operation Mansfield's police department and district attorney were well aware of the SCC's recent limitations on clandestine

[986] Kyler, "Camera Surveillance of Sex Deviates," 16. While many accounts suggest that the Mansfield operation was spurred by the murder of two young girls, Kyler clarifies that police were inspired by two separate sex crimes: the murder of a seven-year-old and a nine-year-old by one teenage defendant, and the molestation of a fourteen-year-old at gunpoint by a twenty-year-old suspect. It was the latter suspect who mentioned the Central Park restroom in his statement to police. Ibid.

[987] Ibid.

[988] Ibid.; see also McKee, "Evidentiary Problems," 72.

surveillance evidence.[989] Considering the harsh penalties for sodomy in Ohio—between one and twenty years in prison, as well as a mandatory psychiatric examination—the attorney anticipated that any cruisers caught in Central Park would "strenuously argue" against the constitutionality of their arrests.[990] To avoid any unforeseen complications, the Mansfield Police Department worked carefully with the district attorney to plan a surveillance station that came as close as possible to a "plain view" observation of the men's room.[991] Prior to the investigation, a paper towel dispenser with a small mirror had hung at approximately eye level over a service closet on one side of the bathroom. Over a weekend of advertised "renovations," the police replaced the mirror with a two-way glass and hollowed out the dispenser to fit a camera into the container.[992] The plan was to station one officer inside the service closet, instructed to film only those men seen "acting suspiciously or committing acts of sexual perversion." Two colleagues outside the restroom, armed with transmitter radios, would then try to identify the suspects as they exited.[993] The Mansfield police took every precaution to make their observation post as effective as possible. Officers repainted the walls of the bathroom a lighter shade of gray and installed brighter light bulbs to ensure maximum film quality.[994] They installed an exhaust fan to cover

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[989] McKee, "Evidentiary Problems," 72. The Mansfield operation began following *Bielicki* but before *Britt*, although *Britt* had come down by the time the arrested men went to court and figured prominently in their defenses. While the district attorney's office referred to two recent California cases, it likely meant *Bielicki* and its companion case, *Byars v. Superior Court of Los Angeles County*, 57 Cal. 2d 869 (1962).

[990] McKee, "Evidentiary Problems," 72.

[991] Ibid., 72-73 (noting that police and prosecution officials "closely examined" the California cases in order to work crucial "distinguishing circumstances" into the Mansfield campaign).

The police also hoped to argue that the testimony of a "convicted deviate" identifying the restroom as a frequent site for homosexual cruising would provide sufficient evidence for initiating a search under the Fourth Amendment. Ibid., 72.

[992] Kyler, "Camera Surveillance of Sex Deviates," 18.

[993] Ibid., 18, 20.

[994] Ibid., 17.

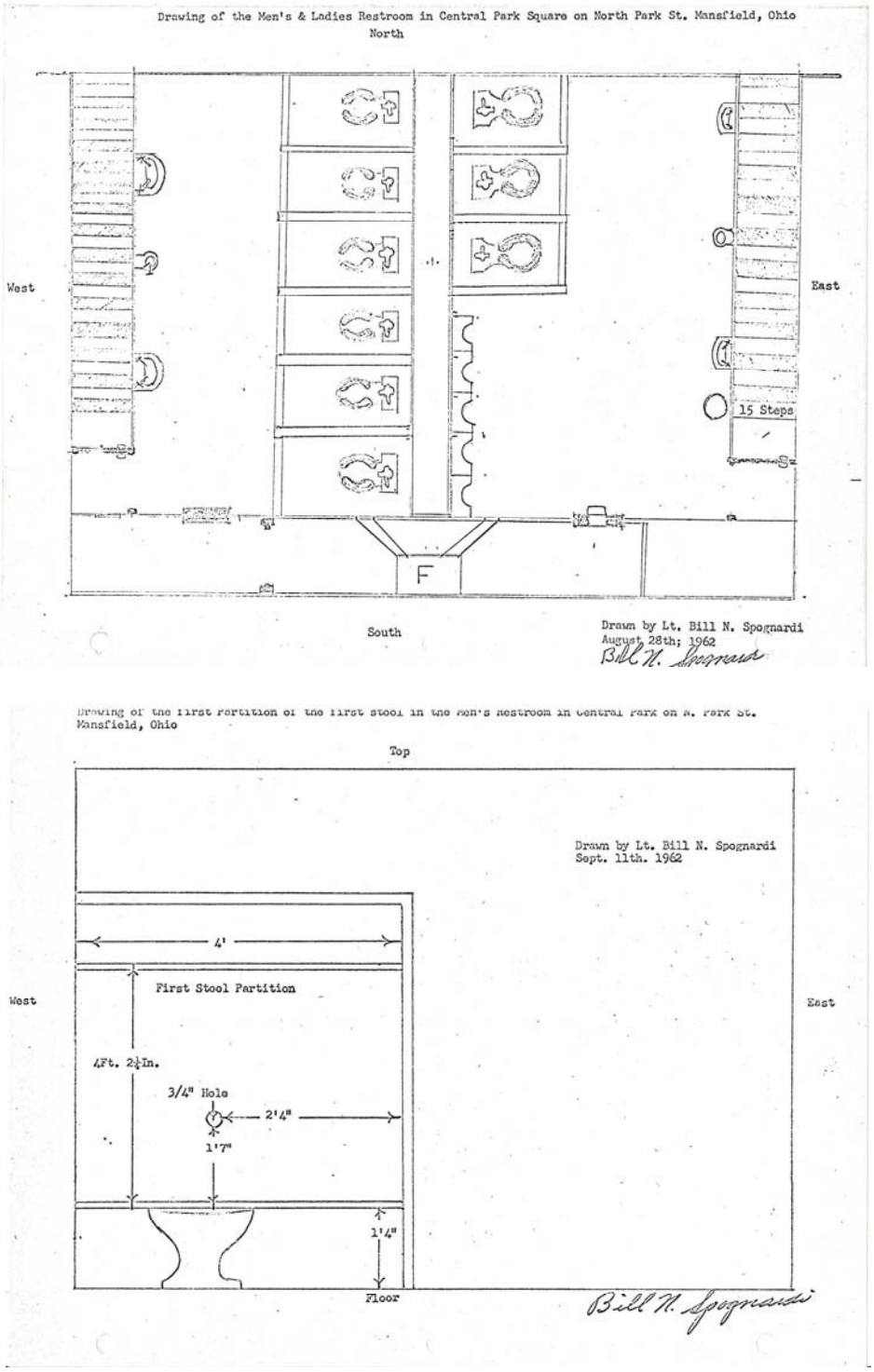


Figure IV.2. Police diagrams of the men's room in Mansfield's Central Park, in preparation for the 1962 surveillance campaign. From Douglas T. Hazen, "Camera Surveillance," Kinsey Institute.

the vibrations of the running camera and padlocked the service closet to ward off curious intruders. Wary of raising suspicions among the public, they even equipped the hidden officer with a stack of paper towels to periodically refill the dispenser's drastically reduced capacity.[995] Once the finishing touches were set, Lieutenant Bill N. Spognardi, a key architect of the campaign, and two of his colleagues took turns manning the observation post for a trial period of seven days in July, before breaking for a week to analyze the footage. Originally intended to last throughout the summer, Mansfield's surveillance operation was cut short after two weeks of filming, when a man who tried exposing himself to a teenager in the bathroom forced Spognardi to break his cover and effect an immediate arrest.[996]



Figure IV.3. Bill Spognardi demonstrating his camerawork in the service closet. "Police Surveillance" video still, extracted by William E. Jones, www.williamejones.com.

[995] Ibid., 18.

[996] Ibid., 20; see also Donn Gaynor, "Hidden Movie Camera Used by Police to Trap Sexual Deviates at Park Hangout," *Mansfield News Journal*, Aug. 22, 1962, 2. According to Gaynor, Mansfield police operated the surveillance station for nearly two months before ending the campaign. Gaynor, "Hidden Movie Camera Used by Police," 2. I choose to credit Chief Kyler's more specific account of the campaign regarding these details.

With the operation at a close, the Mansfield Police Department found itself in possession of some 1,700 feet of film, capturing at least sixty-five men engaging in sexual misconduct in the stalls and on the open floors of the Central Park men's room.[997] Of those five dozen suspects, thirty-seven were identified by the police and charged with sodomy.[998] Others—deemed to have "act[ed] suspiciously," but who committed no technical crime—were fingerprinted and released with a warning.[999] Despite the prosecution and the police's meticulous planning, the surveillance operation did not yield a perfect conviction rate. A local jury acquitted at least one defendant due to insufficient evidence, while a judge overturned the conviction of another after the police violated his procedural rights during his arrest.[1000] Yet the rash of prosecutions was a coup for the Mansfield Police Department, turning the sting operation into something of a media sensation. In the four years that followed, the pages of the *Mansfield News-Journal* swelled with accounts of the trials, convictions, and sentences handed down against the men captured on Spognardi's camera.[1001] Police Chief Kyler himself fed the public interest, adroitly playing on the public's lingering concerns over sexual psychopaths to aggrandize his department's efforts: while in a professional journal he admitted that his interest in the Central Park men's room traced to a defendant accused of molesting a teenage boy, he informed the *Mansfield News-Journal* that

[997] Kyler, "Camera Surveillance of Sex Deviates," 20.

[998] Ibid.

[999] Ibid.

[1000] "Acquitted by Jury," *MSJ*, 10; "Conviction on Sodomy Overruled," *Mansfield News Journal*, Sept. 26, 1963, 2.

[1001] See, for example, "4 Sentenced to Ohio Penitentiary," *Mansfield News Journal*, Mar. 4, 1963, 9; "Sent to Pen," *Mansfield News Journal*, Jun. 25, 1963, 11; "Found Guilty By Jury of 1962 Morals Charge," *Mansfield News Journal*, Mar. 31, 1965, 13; "Admits He Killed Girl," *Mansfield News Journal*, Jan. 4, 1966, 1. For initial coverage of the operation, see also Donn Gaynor, "Hidden Movie Camera Used by Police," 1-2.

he was in fact inspired by the ""brutal murder of two little girls." "Any sex deviate," he explained, "may be a potential killer."[1002]

As the district attorney had expected, many of these men challenged the video evidence as a violation of their Fourth Amendment rights. As soon as they were arrested, most suspects moved to exclude the footage from the evidence submitted to the grand jury. When that failed and their charges proceeded to trial, they renewed the motions before the court.[1003] Some appealed all the way to the state supreme court.[1004] Yet, as the district attorney had hoped, the challenges were futile. The trial judge overruled the motions in each case.[1005] Based on the unique circumstances of the Mansfield surveillance station, the Supreme Court of Ohio agreed that "no substantial constitutional question [was] involved."[1006]

Three men waged an especially tenacious defense. Like other suspected cruisers caught by Mansfield's surveillance campaign, Ralph Poore, Newton Townsend, and Edward Nixon moved to suppress Spognardi's surveillance evidence and dismiss their indictments before the Richland County Court.[1007] When that court decided against them and set the cases for trial, they petitioned for a writ of prohibition blocking it from hearing their cases.[1008] Denying the petitioners' request, the Supreme Court of Ohio chided them for trying to "obtain an advance

[1002] Gaynor, "Hidden Movie Camera Used by Police," 2.

[1003] McKee, "Evidentiary Problems," 73.

[1004] See, for example, State v. Glass, 176 Ohio St. 325 (1964); State ex. rel. Poore v. Mayer, 176 Ohio St. 78 (1964).

[1005] McKee, "Evidentiary Problems," 73.

[1006] State v. Glass, 176 Ohio St. 325, 325 (1964).

[1007] *Poore*, 176 Ohio St. at 78-79. For Edward Nixon's name, see "Rauscher Pleads Innocent," *Mansfield News Journal,* June 11, 1965, pg. 2.

[1008] State ex. rel. Poore v. Mayer, 176 Ohio St. 78, 78-79 (1964).

ruling" on the merits of their Fourth Amendment claim before the case even went to trial.[1009] If the trial court had erred in admitting Spognardi's video footage, the higher court insisted, the defendants would have a chance to challenge that decision on appeal.[1010]

While their state claims went forward, Poore, Townsend, and Nixon filed a simultaneous action in federal court seeking to remove the cases, to enjoin the state trials, and to strike Spognardi's surveillance evidence. Anticipating that the district court would rule against them, they also moved to stay their trials pending review by the federal Court of Appeals. The District Court for the Northern District of Ohio summarily dismissed the petitioners' first three claims, noting its lack of authority to meddle in the evidentiary proceedings of a state trial.[1011] Turning to the petitioners' motion for a stay pending appeal, however, the court had to confront their Fourth Amendment argument head on. Authorized to issue a stay only if the petitioners had "probable grounds" for their appeal, the district court concluded that the Mansfield Police Department's surreptitious recordings could not plausibly qualify as an unconstitutional search.[1012] As the court observed, by mounting their camera behind the service closet mirror, the Mansfield police "necessarily place[d] the officer's view at the eye level of one who would be standing in the open part of the lavatory," allowing him the same perspective "afforded any member of the public who might have walked [inside]."[1013] The court contrasted Spognardi's eye-level observations against *Britt* and *Bielicki*'s rooftop espionage, in which the officers' hidden peepholes gave them an "elevated" vantage point into a space shut off from public

[1009] Ibid., 79.

[1010] Ibid. The Supreme Court of the United States denied cert on the issue. Poore v. Mayer, 379 U.S. 928, 928 (1964).

[1011] See generally Poore v. State of Ohio, 243 F. Supp. 777 (N.D. Ohio 1965).

[1012] Ibid., 782 (quoting Shinholt v. Angle, 90 F.2d 297, 298 (5th Cir. 1937)).

[1013] Ibid.

view.[1014] Recording the defendants at eye-level from the entrance of the lavatory, Spognardi and his colleagues did not conduct any illicit "searches," but merely "availed themselves of a view which any member of the public entering the washroom might have had."[1015] As such, they fell into the paradigmatic example of the permissible surveillance operation described in *Britt*: an open spectacle observed from a common-use portion of the restroom.

The Northern District of Ohio's opinion effectively foreclosed the defendants' further Fourth Amendment claims. As promised, Poore, Townsend, and Nixon appealed the decision, but the Court of Appeals summarily affirmed.[1016] Meanwhile, the men's criminal trials proceeded in the Richland County Court, which admitted Spognardi's camera recordings and convicted all three of sodomy.[1017] By the time they went back, as instructed, to appeal their convictions with Ohio's higher courts, the district attorney felt confident simply quoting the Northern District of Ohio to make the government's case for it. "[T]he State," he explained, "finds it impossible to improve upon the reasoning set forth by Judge Connell's opinion."[1018]

Traveling through two separate appeals up the Ohio court system, a separate federal claim going up to the Court of Appeals, and even, at one point, a petition of certiorari to the Supreme Court of the United States, Poore, Townsend, and Nixon's case represented the apex of the legal debates surrounding the Mansfield Police Department's 1962 campaign. From their arrests to the final decree, these most tenacious challengers to Mansfield's surveillance project

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[1014] Ibid., 783.

[1015] Ibid., 784.

[1016] Townsend v. State of Ohio, 366 F.2d 33, 33-34 (6th Cir. 1966).

[1017] State's Reply Brief on Appeal, in Douglas T. Hazen, "Camera Surveillance," Kinsey Institute for Research in Sex, Gender, and Reproduction (Bloomington, IN) (reprinting State's Reply Brief on Appeal for a conviction arising out of the Mansfield, Ohio, surveillance campaign); "Rauscher Pleads Innocent," *MSJ*, 2.

[1018] State's Reply Brief on Appeal, 3, Kinsey Institute.

spent over four years fighting their charges.[1019] They were each sentenced to one to twenty years in the Ohio State Penitentiary, Nixon having already spent close to two years between the county jail and a state-operated mental institution.[1020]

Reflecting back on Mansfield's surveillance campaign some years later, a lawyer for the city would emphasize the value of the police's meticulous planning in securing the wide-ranging prosecutorial triumphs that followed. In light of cases like *Bielicki*, warned assistant prosecutor William F. McKee, "[n]o [surveillance] investigation should be conducted unless . . . preliminary planning is made with a view to avoiding the legal pitfalls involved."[1021] Fortunately, however, "cooperation and planning between the police and the prosecuting attorneys may circumvent search and seizure questions and may properly make available as evidence the results of clandestine observation."[1022] The Mansfield Police Department's surveillance operation was indeed painstakingly plotted from start to finish, from the clearest lighting conditions to the stealthiest camerawork to Spognardi's plainclothes reinforcements in the park. It was a perfect example of the innovativeness and the sheer capacity of police departments dedicated to stamping out urban homosexuality in the 1960s: vice squads' increasing ability, following the war, to corral an impressive array of technological and human resources in order to keep close watch over their local cruising cultures. As Police Chief Kyler boasted of Spognardi and his

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[1019] The petitions were indicted in October 1962 for sodomy; the Sixth Circuit decisions denying removal came down in September 1966. Townsend v. State of Ohio, 366 F.2d 33, 33-34 (6th Cir. 1966). The final date of the state appeals remains unknown, though the initial conviction for at least one of the three key petitioners was passed down in June 1965. "Rauscher Pleads Innocent," *MSJ*, 2.

[1020] "Rauscher Pleads Innocent," *MSJ*, 2 (noting that, at the time of his state conviction, Nixon had "spent more than 22 months in county jail or Lima State Hospital"). Townsend was released on probation for medical reasons soon following his sentencing. "Placed on Probation as Morals Charge Reduced," *Mansfield News Journal*, Dec. 6, 1966, 11.

[1021] McKee, "Evidentiary Problems," 74.

[1022] Ibid., 73.

colleagues to the Mansfield press, the Central Park operation was "one of the best investigations I have ever seen in over 30 years of police work."[1023] The FBI agreed; in 1963, it reprinted Kyler's insider account of the surveillance operation for distribution to police departments across the country.[1024]

Among all its professionalized innovation and specialized technology, however, the most crucial detail in the Mansfield Police Department's careful planning in the summer of 1962 was the nature of Spognardi's observation post itself. Mounted at exactly eye-level on the wall adjacent to the bathroom door, Spognardi's hidden camera avoided any constitutional concerns in the courts by replicating the plain, unaided view of any stranger entering the men's room. The product of profound patience, meticulous research, and substantial police resources, Mansfield's surveillance campaign survived *Bielicki* and *Britt*'s constitutional bar because—as the Northern District of Ohio had it—it captured nothing that a member of the public could not as readily have seen.

One may detect a certain paradox in the legal regime inherited from the California Supreme Court—in Kyler's and McKee's boasts about the "cooperation and planning" necessary to record a spectacle that was freely available to the naked eye. And the honest reply, of course, would have been that no such naked view was ever available. For all the Northern District of Ohio's insistence that Spognardi's hidden camera merely replicated the casual observations of "any member of the public," the only reason Mansfield ever embarked on its surveillance campaign in the summer of 1962 is that casual observations were not getting the job done. As Police Chief Kyler had explained, after all, plainclothes officers passing through Central Park

[1023] Gaynor, "Hidden Movie Camera Used by Police," 2.

[1024] Humphreys, *Tearoom Trade*, 85.

were "fruitless" at collecting conclusive evidence of homosexual cruising.[1025] Even when plainclothes officers deliberately combed the park in hopes of "stumbling" upon an illicit act, the men who used the underground facilities for homosexual cruising consistently managed to halt or hide their activities from anyone who entered. The Mansfield Police Department's genuine attempts to "avail[] themselves of a view which any member of the public entering the washroom might have had," in the police department's own experience, "produced no results."[1026]

Whatever evidence Spognardi captured on his camera during his two weeks crouching in the service closet, in short, it was certainly not evidence that any member of the public may have observed in "plain sight." On the contrary, Spognardi's recordings relied on the sophisticated surveillance techniques and unique resources of the Mansfield Police Department to capture a visual spectacle that, for all practical purposes, would never have been accessible through other means. Like the states' liquor board proceedings following Repeal and the vice squads' plainclothes decoy arrests in the late 1950s, the trials arising out of Mansfield's clandestine surveillance campaign presented as effortless police investigations that in fact depended on extensive planning, professional skill, and dedication. Even as growing public attention to the problem of urban homosexuality, coupled with the expanding police resources available to combat that problem, led police to develop even more extended, innovative, and rarefied glimpses into their local homosexual cultures, the Mansfield prosecutions exemplified the extent to which police continued to legitimize those campaigns through the presumptive competence of the common man to see the same thing. In this sense, William McKee was right to boast of the

[1025] Kyler, "Camera Surveillance of Sex Deviates," 16.

[1026] McKee, "Evidentiary Problems," 72.

district attorney's and the police department's investigative triumphs in the summer of 1962. That small team of the innovative and dedicated police professionals succeeded in building from scratch the "plain view" to which five dozen Mansfield men so disastrously exposed themselves that July.

While the Mansfield team basked in its hard-fought investigative labors, however, it soon turned out not everyone was eager to put in the same amount of work. Even as Chief Kyler and district attorney McKee plotted to outstep the strict legal prescriptions of the SCC in the summer of 1962, some lower courts soon grew concerned about the heavy burdens that decisions like *Britt* and *Bielicki* cast on local vice squads trying to stamp out public degeneracy. And they quickly went on the retreat.

7. "The Peril to the Immature and Innocent Youth": Reasonable Expectations of Privacy and the Unique Publicity of the Deviant Body

The next phase of the legal debate surrounding anti-homosexual surveillance began, once more, in California, with a pair of opinions published in close succession by the state's Court of Appeal. The first, decided just weeks after *Britt*, involved an arrest in San Francisco's Paris Theatre, where police officers monitored the men's room from a marble wall behind the toilets. After Officer Yasinitsky witnessed Lynn Norton and Franklin Strong having oral sex "almost directly in front of [his eyes]," both men were arrested and convicted under section 286a, though only Norton chose to appeal his conviction.[1027] The second case, decided some months later, involved a men's room in a Los Angeles public park, where patrolmen behind a mesh-covered vent watched Robert Young obtain "some relief sexually" from an anonymous partner in a toilet stall.[1028] The facts surrounding both arrests were roughly analogous to those in *Britt* and *Bielicki*, with one crucial difference: neither of the toilet stalls used by Norton or Young had a closing door.[1029]

On the basis of this fact, the California Court of Appeal reached the entirely opposite result. Like the SCC, the appellate panel did not make much of *Olmstead*'s trespass requirement: at no point did the court protest that Young and Norton lacked any property interest in the public toilets they used. What they lacked was privacy. By choosing to pursue a sexual

[1027] People v. Norton, 209 Cal. App. 2d 173, 174-75 (1962).

[1028] People v. Young, 214 Cal. App. 2d 131, 133 (1963).

[1029] People v. Norton, 209 Cal. App. 2d 173, 174 (1962); People v. Young, 214 Cal. App. 2d 131, 134 (1963).

encounter in a doorless toilet stall—a vestibule "open to . . . anyone entering the toilet area"—Norton and Young walked straight into the purview of the plain view doctrine.[1030] Eliding the SCC's emphasis on both the place and "manner" of the officer's clandestine observations, the Court of Appeals insisted that the determinative consideration in cases like *Bielicki* was simply the physical characteristics of the toilet stall. By having oral sex through the partition of an enclosed toilet stall, Bielicki and his partner had taken refuge in a place "that no other member of the public could have seen," which "by its very physical appointments provided privacy to its occupant."[1031] No such privacy attached to the doorless stalls of the Paris Theatre or the park lavatory, where Norton and Young opened their transgressions to the view of any fellow patrons using the facilities.[1032] Under these circumstances, the Court of Appeal concluded, no amount of investigative guile could turn the police's observations into a "search." Even if the officers who arrested Norton and Young happened to watch the defendants from the unlikely camouflage of a marble wall or grated air vent, the fact remained that, "*had* the police the police entered the public part of the restroom they could have observed such activities in the same way as any member of the public."[1033] Under these circumstances, the police committed no constitutional sin when they chose to gather evidence that would have been visible in any case from a concealed vantage point that allowed "a more effective vigil."[1034]

In a sense, of course, the Court of Appeal's reasoning could be seen as entirely consistent with *Bielicki* and *Britt*. The crux of those cases, after all, was the promise of privacy created by

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[1030] People v. Young, 214 Cal. App. 2d 131, 134 (1963); see also People v. Norton, 209 Cal. App. 2d 173, 176 (1962).

[1031] People v. Norton, 209 Cal. App. 2d 173, 175-76 (1962).

[1032] People v. Young, 214 Cal. App. 2d 131, 134 (1963); People v. Norton, 209 Cal. App. 2d 173, 176 (1962).

[1033] People v. Norton, 209 Cal. App. 2d 173, 176 (1962).

[1034] Ibid., 176-77; see also People v. Young, 214 Cal. App. 2d 131, 135 (1963).

the four walls of an enclosed toilet stall. Only in context of that uniquely confidential setting did it make sense for the SCC to parse which precise types of observation invaded the defendants' right to solitude. Where a stall gave its occupants no hope of shielding their intimate activities from public view, by contrast, it raised no initial expectations of privacy *to be* violated by the police's observations, no matter how openly or surreptitiously obtained.

Yet at the same time, the appellate court's holdings in *Norton* and *Young* directly refuted a principle woven through the SCC's precedent: its suggestion, articulated most directly in *Britt*, that the Fourth Amendment touched not only places, but perspectives—not merely where a man could be watched by the police, but also *how* he could be watched there. Despite the appellate court's emphasis on the unique visibility of Norton's and Young's tryst, after all, the SCC in *Britt* had also presumed that anyone in the bathroom's common space would have been able to see Britt's amorous encounter in the space beneath the stall.[1035] Yet it still insisted that the arresting officer had no right to catch that semi-public deed through any means except the common space itself, disdaining the state's claims that it could spy on toilets surreptitiously precisely because it could as easily have gathered the same evidence through public observation. In the case of Mansfield, too, many of the sexual acts caught on Spognardi's camera spilled out beyond the stalls, into the open spaces of the men's room.[1036] But the Ohio courts nevertheless hung their holdings on the naturalistic vantage point of Spognardi's hideout, which "necessarily

[1035] Britt v. Superior Court of Santa Clara County, 58 Cal. 2d 469, 473 (1962) (acknowledging that "the act committed in the present case might possibly have been visible—at least to some extent—had the officer been observing from a public").

[1036] Based on the angle of the Spognardi's observation post, looking out past the urinals and onto the outer wall of the first stall, it is doubtful that many encounters committed entirely within the confines of the stalls would have been visible to the camera. Mansfield Police Department, "Camera Surveillance" (videorecording) (1962), Kinsey Institute for Research in Sex, Gender, and Reproduction (Bloomington, IN).

placed [his] view at the level of one . . . standing in the open part of the lavatory."[1037] Footage "taken *from that position*," the Northern District of Idaho had insisted, "cannot be said" to violate the defendant's right against unreasonable searches.[1038] Based purely on the theory of "plain sight" articulated in *Bielicki* and *Britt*, in short, it was unclear that the mere absence of a door gave the police a blank check to conduct surreptitious surveillance inside the intimate spaces of a public bathroom. In later years, indeed, the Court of Appeal itself admitted that its holdings in *Norton* and subsequent cases departed from the SCC's precedent, shrinking away from that more liberal standard. By failing to overrule those narrower decisions, the court speculated, the SCC itself had presumably "acquiesced in th[eir] position and retreated from its position expressed in *Britt*."[1039]

If the Court of Appeal's decisions refused to heed the SCC's binding precedent, however, they did respect a more pragmatic consideration. Based on its reasoning in *Norton* and *Young*, the appellate panel appeared less concerned by the doctrinal nuances of the SCC's plain view doctrine than by the practical harms wrought by that doctrine on California's policing efforts. Reiterating *Norton*'s newly restrictive view of an unconstitutional search, the court in *Young* primarily echoed *Norton*'s legal reasoning, but it did, by way of explanation, add one important paragraph—a passage that would become a rallying cry for courts dismissing challenges to surveillance evidence for years to come. It was not an argument raised by the state. Yet, taking the uncommon step of importing his own experiences to testify in favor of the prosecution, Judge Jefferson stressed the folly of handicapping the police in their war against the epidemic of public

[1037] Poore v. State of Ohio, 243 F. Supp. 777, 782 (N.D. Ohio 1965).

[1038] Ibid., 784. For subsequent cases entrenching the court's position in *Norton*, see People v. Hensel, 233 Cal. App. 2d 834, 836-37 (1965); People v. Maldonado, 240 Cal. App. 2d 812, 814 (1966); People v. Roberts, 256 Cal. App. 2d 488, 494 (1967).

[1039] People v. Crafts, 13 Cal. App. 3d 457, 459 (1970).

homosexuality. "Judges can take judicial knowledge from the case files in their own courts," Judge Jefferson insisted,

> that public toilets in metropolitan parks, terminals, theaters, department stores and in similar places, frequented daily by masses of people, are often the locale of vice of many kinds such as sexual perversion, sale of narcotics, petty thefts, robbery and assaults. To hold that the public areas of such toilets are to be "off limits" from clandestine surveillance by police would be to encourage the use of such places by perverts, panderers, pickpockets, addicts and hoodlums. . . . [T]he peril to immature and innocent youth would be increased immeasurably. . . . Parents would not rest secure that their youngsters could use such facilities without the fear that they would witness scenes of shocking adult degeneracy such as witnessed by the police in the instant case.[1040]

Filled with the dread of exposing innocent minors to such shocking sexual activity, Judge Jefferson managed to turn even the care that some cruisers took to ensure their privacy in public bathrooms into evidence of their intentions to corrupt the young. "By leaving a 'spotter' or 'lookout' at the door to warn other perverts or degenerates of the approach of police," he warned, "such immoral persons could conduct their illicit activities in full view of impressionable youths."[1041] Judge Jefferson presumed that homosexual men would assiduously avoid observation by the police but not the general public—a presumption that went against the experiences of most cruisers and police departments alike. After all, the precise reason that police departments had such trouble capturing evidence through plainclothes patrols—the reasons that many, like the Mansfield police, turned to clandestine surveillance to begin with—was that most men who resorted to public toilets for sex used whatever resources they had to limit their exposure to the public.[1042] Judge Jefferson's denunciation of the exhibitionistic degenerate hardly provided a realistic assessment of homosexual cruising patterns in the 1960s. It did, however, neatly bolster his reading of cruising as a criminal pathology in need of

[1040] People v. Young, 214 Cal. App. 2d 131, 135 (1963).

[1041] Ibid.

[1042] McKee, "Evidentiary Problems," 72; Humphreys, *Tearoom Trade*, 70-71.

expansive police surveillance. And it explained his eagerness to provide the police with whatever tools they needed to perform their jobs with utmost efficiency. Homosexual acts carried out in public bathrooms, Judge Jefferson implied, simply posed too great a moral hazard for the court to extend them any constitutional protection.

Like *Bielicki* and *Britt*, the Court of Appeal's holdings had an impact well beyond California. In 1964, for example, two Florida police officers hiding behind a louvered door arrested Hugh Coyle for committing "an act against nature" in an open toilet stall in St. Petersburg's Municipal Pier.[1043] Relying on the California Supreme Court, Coyle protested that the officer's secret observations violated the search and seizure provisions of the Florida constitution, and the trial court agreed.[1044] Yet the Florida District Court of Appeal reversed.[1045] Citing *Norton* and *Young* as the more analogous authority, Judge Kanner agreed that Coyle's choice to pursue his sexual encounter in a doorless stall rendered his constitutional claim irrelevant. "The place utilized for the commission of the offense," the court noted, was "an area that would have been easily seen by other members of the public who entered the public restroom." As such, it ran directly against the principle that "observ[ing] that which is open and patent is not a search" under the Constitution, federal or otherwise.[1046] If that doctrinal caveat did not end matters, however, the Florida Court of Appeal took a cue from Judge Jefferson and clarified the public policy behind its holding. "Without proper police vigilance," Judge Kanner explained,

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[1043] State v. Coyle, 181 So. 2d 671, 672 (Fla. Dist. Ct. App. 1966).

[1044] The relevant provision of the Florida Constitution track the language of the federal Constitution.

[1045] Ibid., 675-76.

[1046] Ibid., 673.

> perverts and criminals could turn more and more to such facilities, particularly those in populous areas, as retreats or trysting places for commission of crime. That which the police saw from their place of concealment was also seen by them upon their re-entry into the interior of the public restroom, where anyone who might have entered could have become witness to the same sight."[1047]

Endorsing the police's surreptitious tactics precisely because the evidence observed would have been so very visible without them, Judge Kanner's coda exemplified the central rationale behind the plain view doctrine. Yet it also revealed the extent to which the sheer blatancy of cruisers in open stalls struck courts as not merely a constitutional consideration, but a moral one. The police *had* to retain the right to use clandestine surveillance to prevent homosexual trysts in open stalls, Judge Kanner implied, not merely because the publicity of those trysts assuaged any constitutional concerns, but also because it rendered police intervention all the more critical. If, as the Court of Appeals later admitted, it ventured to break away from the SCC to restrict cruisers' Fourth Amendment rights in public bathrooms, it was in service of a worthier goal.

It would take a federal court, however, to reveal just how far a panel was willing to stretch its analysis to sanction the police's clandestine surveillance efforts. *United States v. Smayda*, the rare federal case to tackle the problem of anti-homosexual law enforcement, traced back to the summer of 1963, when the manager of Camp Curry, a privately operated resort in Yosemite National Park, began receiving complaints that a men's room on his property had turned into a "hangout" for gay men.[1048] Together with Ranger Twight, a "law enforcement specialist" at Yosemite, the manager confirmed that someone had cut waist-high holes in the partitions between the toilet stalls, and that men "whose appearance suggested homosexuals" loitered around the premises with suspicious frequency. The toilet stalls in question were, in

[1047] Ibid., 675.

[1048] Smayda v. United States, 352 F.2d 251, 252 (9th Cir. 1965). Anti-homosexual law enforcement was generally a criminal concern left to the state courts. In this case, because the offense took place on federal lands, it fell under federal jurisdiction under the Assimilative Crimes Act. Ibid., 251-52.

fact, enclosed, their walls beginning eighteen inches above the ground and extending to a height of about six feet. Nevertheless, on Ranger Twight's advice, the manager installed a wire screen cut to resemble an air vent in the ceiling above each stall. Starting at roughly 11:00 each night, Twight and a photographer used those vents to monitor the toilets from the attic. They were watching one night when Joseph Smayda and Wendell Gunther entered adjacent toilets, pulled the doors closed behind them, and engaged in an act of oral sex through the partition.[1049]

Subject to federal jurisdiction but California criminal law, Smayda and Gunther were convicted of sodomy in violation of the California Penal Code, and they promptly appealed, protesting that the SCC's holdings in *Britt* and *Bielicki* flatly proscribed the clandestine surveillance of enclosed stalls like those at issue here.[1050] Combing through federal and state precedents, however, the Court of Appeals for the Ninth Circuit disagreed. First, recalling the Supreme Court's "trespass" theory in *Olmstead* that California state courts were so happy to forget, it insisted that Ranger Twight committed no search under the Fourth Amendment because he effected no "actual physical invasion" of the defendants' property. Since neither Smayda nor Gunther owned the public bathroom where they were espied, neither was entitled to raise a Fourth Amendment claim.[1051]

Even setting aside the trespass issue, however, the court insisted that Smayda and Gunther could hope for no relief. Assuming, for the sake of argument, that Ranger Twight's observations qualified as a search under the Fourth Amendment, defendants who had sex in a space as public as the Camp Curry men's room forfeited any rights against police

[1049] Ibid., 252-53.

[1050] Ibid., 251.

[1051] Ibid., 256. The trespass issue was actually the second point addressed by the court, but is presented here first as the less contentious ground.

surveillance.[1052] Unlike the California courts, the Ninth Circuit refused to abide by a hardline rule that a door on a public toilet stall automatically entitled its occupants to privacy against police surveillance. Instead, it preferred the more flexible rule that "[e]very person who enters an enclosed stall in a public toilet is entitled to . . . the modicum of privacy that its design affords."[1053] In this particular case, the immodest construction of Camp Curry's toilet stalls precluded their closed doors from affording Smayda and Gunther even the barest constitutional protections. As the trial judge had observed, "When Mr. Twight could testify from out in the lobby that he could tell whether the man had his pants up or down in the customary fashion, a great deal of the privacy certainly is gone from the transaction."[1054] Built to be "wide open for three feet at the top and . . . approximately 18 inches at the bottom," the Ninth Circuit agreed, the stalls "were, in essence, a public place."[1055] Accordingly, the surreptitious nature of the officer's overhead recordings—so crucial to the California Supreme Court in *Britt*—ceased to have any constitutional significance. "By using a public place appellants risked observation," the Ninth Circuit insisted, "and they have no constitutional right to demand that such observation be made only by one whom they could see."[1056]

The majority's analysis went against the government's own reading of the record. For once, in fact, the prosecution appeared to be willing to credit the role of the police's specialized skills and insights in capturing sexual degenerates like the defendants. As the government flatly admitted at trial, Ranger Twight could never have spotted Smayda and Gunther's sequestered

[1052] Ibid., 254-55.

[1053] Ibid., 257.

[1054] Ibid., 254.

[1055] Ibid., 254-55.

[1056] Ibid.

sexual encounter absent the camouflaged air vents installed by Camp Curry's manager—precisely because of the stall's modest design. "Because of the physical set-up in the restrooms themselves," the government's counsel explained, the park rangers "couldn't physically observe this activity. So they undertook to cut holes in the ceiling and watch from up there."[1057] Yet the Ninth Circuit found a way to way to disagree. Based on the imperfect cover provided by the toilet's construction, the panel insisted, "it would have been easy for any member of the public to see the offense. . . . Any member of the public could have peered over the door, or the side partitions, or under either, or pushed open the door."[1058] Working from that rather unusual model of restroom etiquette, it concluded that the enclosed toilet stalls occupied by Smayda and Gunther for their sexual encounter were effectively open space, into which Ranger Twight's overhead surveillance afforded no clearer view than that freely available to any passerby. Much like the Mansfield campaign, Ranger Twight's sly surveillance operation in Camp Curry drew on the police's most deliberate, specialized investigative resources to capture visual evidence unavailable through any other means—only to have their efforts be legitimated as no more intrusive than the average man's "plain view."

The dissenting judge was aghast. Setting aside the Ninth Circuit's dubious reading of the record, the majority itself had stated that a toilet stall's occupant was entitled to the "modicum of privacy" that its design afforded. Yet the whole point of Ranger Twight's surveillance operation in this case, Judge Browning protested, was to overstep whatever modest protections Camp Curry's wooden stalls allowed. The rangers "did not confine their observation to what might have been seen over or under the doors or side partitions from the public area of the toilet. Their

[1057] Ibid., 260 (Browning, J., dissenting).

[1058] Ibid., 255 (majority opinion).

search extended to every corner of the stalls' interiors."[1059] The majority opinion, in Judge Browning's view, was treating an individual's sense of privacy as an all-or-nothing affair: an entitlement sacrificed the moment a man revealed any part of his body to a stranger. Yet "less than complete privacy is not the equivalent of no privacy at all"; rather, "the Fourth Amendment protects such privacy as a reasonable person would suppose to exist in given circumstances."[1060] Even if Smayda and Gunther had risked that some fellow patrons at Camp Curry would see whether they had their "pants up or down" beneath the partition of the stalls, the dissent concluded, they hardly invited Ranger Twight to record their sequestered activities from above. Nor, certainly, had the "forty innocent men" who had used the stalls for their proper purpose, never suspecting they were exposing their private moments to the park's police photographer.[1061]

To be sure, the majority shared Judge Browning's unease at invading the privacy of innocent men in the intimate spaces of a bathroom. "We are made as uncomfortable as the next man," the court confided, "by the thought that our own legitimate activities in such a place may be spied upon by the police."[1062] Yet the panel remained convinced that such discomfort was a small price to pay to help the police curb the spread of public homosexuality. In an opinion almost entirely lacking in precedential quotations, the Ninth Circuit began its discussion by quoting in full Judge Jefferson's lengthy stricture on the dangers of homosexual cruising. [1063] The California Court of Appeal's refusal to facilitate the "scenes of shocking adult degeneracy"

[1059] Ibid., 260 (Browning, J., dissenting).

[1060] Ibid., 259-60 (Browning, J., dissenting).

[1061] Ibid., 262 (Browning, J., dissenting).

[1062] Ibid., 257 (majority opinion).

[1063] Ibid., 254-55 (quoting People v. Young, 214 Cal. App. 2d 131, 135 (1963)). The only other quotations in Smayda are the record citations to the lower court's opinion and *Norton*'s statement that, "if appellants had any right of privacy they certainly wa[i]ved it." Ibid., 255.

that abounded absent vigilant policing, the panel explained, "is, we think, persuasive here."[1064] Certainly, that rationale appeared to be more persuasive than a genuine appraisal of the crime scene, or even the government's own version of the facts. Sensitive to the social and moral stakes of the police's surveillance campaigns, the first federal court to confront the issue appeared willing to bend its reasoning to let the police to use whatever tools they chose to battle the blight of public homosexuality.

Stretching the plain view doctrine to its outer extreme, *Smayda* was the apex of the judicial surge to neutralize the SCC's generous grant of Fourth Amendment protections in *Bielicki* and *Britt*. Yet, as appellate decisions from California to Florida in the 1960s reveal, it was not unprecedented. Alarmed by the growing prevalence of homosexual cruising and attuned to the difficulties of policing such behavior under a restrictive "plain view" analysis, several pragmatically-minded courts did their best to loosen the SCC's liberal groundwork. While often claiming to follow *Bielicki* and *Britt*, these appellate panels subtly shifted the analysis, eliminating *Britt*'s emphasis on the nature of surveillance tactics so as to sanction the police's use of the most effective, most intrusive techniques against popular gay cruising sites. In doing so, they effectively denied that cruisers retained any protections against state surveillance in the interior of a public bathroom—certainly not in open toilets, and perhaps not even within the four walls of an enclosed stall.

The uneven legal status of the police's clandestine surveillance efforts from *Bielicki* to *Smayda* suggests the inherent flexibility of the Fourth Amendment's protections, even when administered under a metric as allegedly impartial as the plain view doctrine. Asking the court to predict what an average member of the public could have observed in a given place, the plain

[1064] Ibid., 254.

view doctrine purported to be an objective standard, but the doctrine enabled judges in the 1960s to ascribe widely varying levels of privacy to men sharing much the same spaces.[1065] It allowed a sexual act consummated on the bathroom floor to qualify as private because the police did not watch it from the lavatory entrance, and it allowed the inside of an enclosed stall to be a "public place" because a (very tall, very agile, or very rude) patron could have leered over the walls, stuck his head beneath the door, or simply pushed his way inside. The plain view standard bent around any number of variables—including, in the case of homosexual cruising, considerations strictly off the legal record. Dismayed by the social and moral hazards of inhibiting the police's surveillance campaigns, some courts found that they could easily conserve on homosexual defendants' Fourth Amendment rights to pay for a reduction in public degeneracy.

Driven as they were by greater social dilemmas, these courts had little regard for the fact that they were effectively stretching the "plain view" of any meaning. As many judges appeared to recognize, after all, the mythic "plain view" to which homosexual cruisers so brazenly exposed themselves would often never have occurred absent the painstaking planning, professional resources, and experience of local police. From Long Beach to Mansfield to Yosemite, police officers' clandestine observation stations did not merely replicate the eye of the average member of the public entering a restroom; they produced visual evidence that would never have become available through more casual means. In this sense, the court's treatment of the police's clandestine surveillance efforts echoed a broad theme in the states' campaigns against homosexuality in the mid-twentieth century. Like during the states' liquor proceedings

[1065] For the objective nature of the traditional plain view doctrine, see Kate Brueggemann Ward, "The Plain (or Not So Plain) View Doctrine: Applying the Plain View Doctrine to Digital Seizures," *University of Cincinnati Law Review*, Vol. 79 (2011), 1171; Richard S. Frase, "What Were They Thinking? Fourth Amendment Unreasonableness in *Atwater v. City of Lago Vista*," *Fordham Law Review*, Vol. 71 (2002), 388; Eric B. Liebman, "The Future of the Fourth Amendment After *Minnesota v. Dickerson*—A 'Reasonable' Proposal," *DePaul Law Review*, Vol. 44 (1994), 180.

against homosexual-friendly bars and the vice squad's solicitation charges against gay men, states that prosecuted homosexual cruisers on the basis of the police's clandestine surveillance evidence—and the courts that endorsed their practices—bathed the vice squads' rarefied investigative techniques in the sheen of a uniquely democratic legitimacy: a legitimacy based on the police's presumptive similarity to the average man. Insisting, sometimes through the police witnesses' own testimony, that any layperson could have spotted what the officers saw in the same setting, they invoked the eye of the layman to legitimate the police's most surreptitious, most invasive observations as evidence that intrinsically thrust itself into public view. And, like the liquor boards, they held that public eye to an extremely high bar, enforcing a generous—perhaps even willful—presumption of what an average man *could have* seen in order to expand the reach of their own enforcement efforts. In the case of states' disorderly conduct laws, the courts insisted on the common man's visual acuity to defend the reliability of the liquor boards' evidence; in the case of clandestine surveillance, they invoked it to defend the fairness of introducing the police's evidence at trial. In both instances, state courts denied the very existence or the need for any specialized professional insights underlying the vice squads' anti-homosexual campaigns in order to justify the state's slyest and most strategic operations against urban homosexuality.

Reasonable Expectations of Privacy: Clandestine Surveillance after *Katz*

The moment it came down, the Ninth Circuit's decision in *Smayda* was reviled for its poor reasoning: the unrealistic assessment of privacy, the simplistic treatment of waiver, the "anachronis[tic]" revival of the trespass requirement.[1066] And the holding did not last long.

[1066] For criticism of the privacy analysis, see "Fourth Amendment Application to Semi-Public Areas: *Smayda v. United States*," *Hastings Law Journal*, Vol. 17 (1966), 838; "From Private Places to Personal Privacy: A Post-*Katz*

Despite the exhortation of one Justice, who saw *Smayda* as further evidence of the disturbing totalitarianism permeating modern police work, the United States Supreme Court refused to weigh in on the case.[1067] Yet one year later, the Court would revisit the issue in a seminal case that would eviscerate the trespass requirement and conclusively revise the meaning of a "search" under the Fourth Amendment.

Katz v. United States involved not a toilet stall, but a telephone booth. A bookie by trade, Charles Katz made the mistake of placing bets from a set of public phones along Los Angeles's Sunset Boulevard. Unknown to him, federal agents had wiretapped the booths and recorded a week's worth of Katz's conversations, which gave the government more than sufficient grounds to charge him with illegal wagering in violation of federal law.[1068] Throughout his trial, Katz protested that the agents' eavesdropping had violated his Fourth Amendment rights.[1069]

Katz certainly did not own the phone booths that he briefly occupied, so the trespass theory offered him no relief. In 1967, however, a majority of the Court resuscitated Justice Brandeis' dissent in *Olmstead* and held that "the Fourth Amendment protects people, not places."[1070] Under *Katz*'s more generous reading, the Fourth Amendment did not merely safeguard individuals from invasions of their physical space or personal property. As anticipated by the SCC and its progeny, it secured them against the state's intrusions on—as the iconic

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Study of Fourth Amendment Protection," *New York Law Review*, Vol. 44 (1968), 974; "Constitutional Law—Clandestine Surveillance of Public Toilet—Not an Unreasonable Search," *Vanderbilt Law Review*, Vol. 19 (1966), 951. For criticism of the waiver analysis, see *UCLA Law Review* Study, 713. For criticism of the trespass requirement, see "Constitutional Law—Clandestine Surveillance of Public Toilet," *VLR*, 950.

[1067] David Alan Sklansky, "'One Train May Hide Another': *Katz*, Stonewall, and the Secret Subtext of Criminal Procedure," *University of California-Davis Law Review*, Vol. 41 (2008), 891-92. Justice Douglas supported granting cert. Ibid.

[1068] Katz v. United States, 369 F.2d 130, 131-32 (9th Cir. 1966).

[1069] Katz v. United States, 389 U.S. 347, 349-50 (1967).

[1070] Ibid., 351; see also Scott E. Sundby, "'Everyman''s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?", *Columbia Law Review*, Vol. 94 (1994), 1756.

phrase came down—their "reasonable expectations of privacy."[1071] Drawn from Justice Harlan's concurrence in the case, the standard for a search under the Fourth Amendment split into two questions: First, did the defendant have an actual, subjective expectation of privacy where he was found? And second, was that expectation "one that society is prepared to recognize as 'reasonable'"?[1072]

In large part, of course, the standard built directly on the plain view doctrine developed by the courts in prior decades: the more directly a defendant placed himself in "plain sight" of the public, the less "reasonable" were his hopes of privacy. Yet *Katz* shifted the terms of the inquiry. The relevant question—and the metric to be reconstructed in good faith by the courts—was no longer the presumptive scope of a passerby's objective ability to see the defendant, but rather the defendant's *own* reasonable understanding of his freedom from sight.

The "reasonable expectations of privacy" test eliminated the first of the Ninth Circuit's grounds in *Smayda*: that Smayda and Gunther had no ownership interest in the bathroom stalls where they were overseen. And in the coming years, courts applying *Katz* to the clandestine surveillance of public bathrooms repudiated the other half of *Smayda*'s analysis, holding that the two men also had no expectations of privacy there. From coastal states like California and New York to midwestern Michigan and Minnesota and southern strongholds like North Carolina and Texas, courts uniformly found that a man who retreated to the inside of an enclosed toilet stall

[1071] Katz v. United States, 389 U.S. 347, 353 (1967) ("Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."); Sundby, "'Everyman''s Fourth Amendment," 1756; Max Guirguis, "Electronic Visual Surveillance and the Reasonable Expectation of Privacy," *Journal of Technology, Law, and Policy*, Vol. 9 (2004), 154; Sorenson, "Losing a Plain View of *Katz*," 183; Carlos A. Ball, "Privacy, Property, and Public Sex," *Columbia Journal of Gender and Law*, Vol. 18 (2008), 34-35 (2008); Sklansky, "'One Train May Hide Another,'" 882-83.

[1072] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); see also Guirguis, "Electronic Visual Surveillance," 154; Sorenson, "Losing a Plain View of *Katz*," 183-84.

"could be said to have some reasonable expectation of privacy" from police observation.[1073] As the Supreme Court of Minnesota concluded, as far as reasonable expectations of privacy went: "We think those using the facilities . . . in a proper manner would have been quite shocked to know that they were under surveillance."[1074] Later courts did find some value in *Smayda*'s legal reasoning—most notably, the court's conception of the "modicum of privacy" created by a toilet's design.[1075] But they rejected the Ninth Circuit's application of its own standard to the facts. In 1968, a Maryland court confronted *Smayda*'s paradigmatic example of tearoom curiosity: a police officer who entered the common area of public restroom and casually stuck his head over the closed door of a toilet stall.[1076] Turning the Ninth Circuit's reasoning in on itself, the court insisted that "a person who enters an enclosed stall in a public toilet . . . is entitled, at least, to the modicum of privacy its design affords, *certainly* to the extent that he will not be joined by an uninvited guest or spied upon by probing eyes in a head physically intruding into the area."[1077] None of these cases meant to impugn the gravity of the police's efforts to staunch criminal activities in public bathrooms—whether homosexual cruising or any other offense. Yet, like the Minnesota Supreme Court, they insisted that "the rights of the innocent may not be sacrificed" to grease police enforcement efforts.[1078]

[1073] Buchanan v. State, 471 S.W.2d 401, 404 (Tex. Crim. App. 1971); see also State v. Bryant, 287 Minn. 205, 211 (1970); People v. Heath, 266 Cal. App. 2d 754, 757 (1968); Brown v. State, 3 Md. App. 90, 93-94 (1968) (narcotics); Kroehler v. Scott, 391 F. Supp. 1114, 1117 (E.D. Pa. 1975); State v. Jarrell, 24 N.C. App. 610, 613 (1975); People v. Anonymous, 415 N.Y.S.2d 921, 924 (Just. Ct. 1979); People v. Dezek, 107 Mich. App. 78, 84 (1981).

[1074] State v. Bryant, 287 Minn. 205, 211 (1970).

[1075] For later courts borrowing *Smayda*'s phrase, see Buchanan v. State, 471 S.W.2d 401, 404 (Tex. Crim. App. 1971); Brown v. State, 3 Md. App. 90, 94 (1968); Kroehler v. Scott, 391 F. Supp. 1114, 1119 (E.D. Pa. 1975).

[1076] Brown v. State, 3 Md. App. 90, 93-94 (1968). This case involved an arrest for narcotics possession, not sodomy.

[1077] Ibid., 94 (emphasis added).

[1078] State v. Bryant, 287 Minn. 205, 211 (1970).

To be sure, these courts did not suggest that a man's expectations of privacy in an enclosed toilet stall were absolute. Like the Ninth Circuit, state judges recognized that some aspects of a man's private activities—the glimpses of his feet over the floor, or any slivers of activity visible through the cracks of the stall door—could always theoretically be seen from the lavatory's common spaces.[1079] Yet courts dismissed the suggestion that such limited, unavoidable exposures to fellow patrons using a public bathroom deprived a toilet stall's occupant of all privacy. As the Supreme Court in *Katz* insisted, a defendant's "expectation of privacy may be partial and yet receive constitutional protection."[1080] A defendant inside a public restroom could hardly expect that parts of him protruding from beneath the stall's partitions would be free from scrutiny, by the general public or the police. But "he did have an actual, subjective"—and reasonable—"expectation that he would not be viewed from overhead."[1081]

If clandestine surveillance operations in enclosed stalls inspired little controversy following *Katz*, police campaigns in open toilets engendered somewhat more debate. Much like courts' disputes over the plain view doctrine in prior years, that debate came to center on whether a defendant's reasonable expectations of privacy depended purely on the physical nature of the setting or also on the *manner* of police observations. Echoing *Young* and *Norton*, some judges concluded that once the doors came off a stall, its occupants waived all rights to privacy. The California Court of Appeal continued on its well-worn path. When a man commits "an act of sexual perversion in a doorless commode stall . . . exposed to the full view of any member of

[1079] People v. Dezek, 107 Mich. App. 78, 85 (1981). Courts generally limit an occupant's Fourth Amendment rights to observations from clandestine vantage points, not natural observations from a common space. See, for example, In re Deborah C., 30 Cal. 3d 125, 138 n.9 (1981); United States v. Delaney, 52 F.3d 182, 188 (8th Cir. 1995); United States v. Lewis, 83 F.3d 416 (4th Cir. 1996); Barron v. State, 823 P.2d 17, 20 (Alaska Ct. App. 1992); State of Ohio v. McClung, No. 810299, 1982 WL 4678 (Ohio Ct. App. Mar. 3, 1982); United States v. White, 890 F.2d 1012, 1015 (8th Cir. 1989).

[1080] People v. Dezek, 107 Mich. App. 78, 85 (1981).

[1081] People v. Kalchik, 160 Mich. App. 40, 48-49 (1987).

the public," the court reaffirmed under *Katz*, a police officer's observations of that public spectacle, through whatever means, simply "do not constitute an unreasonable *search*."[1082] Even evidence gathered "from a vantage point not open to the public," the court insisted, was admissible so long as the criminal acts "*could* have been observed *had* the officer been in an area open to the public."[1083]

The California court's reasoning was soon echoed by courts in Texas, New York, and Ohio.[1084] Approving the Dallas police's overhead surveillance of a men's room in Reverchon Park, the Texas Court of Criminal Appeals agreed that commodes that "had no doors and were visible to all in the general restroom area" created no reasonable expectations of privacy.[1085] The Texas court acknowledged that similar surveillance evidence gathered from an enclosed stall would violate the Fourth Amendment. Yet it insisted that the constitutional difference came down purely to the design of the stalls. "While the method of the alleged clandestine surveillance [i]s identical" whether the stall had a door or not, it acknowledged, a man could reasonably expect no privacy "under the circumstances" in the Reverchon Park facility, "where no doors were provided for the stalls."[1086] The Ohio Court of Appeals agreed. Where a man pursued his sexual gratification in a doorless stall, "the interior of which was plainly visible from the public area of the restroom," it concluded, the fact that "the police observed his activity from

[1082] People v. Heath, 266 Cal. App. 2d 754, 754 (1968).

[1083] People v. Crafts, 13 Cal. App. 3d 457, 459 (1970) (emphases added).

[1084] Buchanan v. State, 471 S.W.2d 401, 404 (Tex. Crim. App. 1971); State v. Thurman, No. C-790398, 1980 WL 352928, at *3 (Ohio Ct. App. Apr. 30, 1980); see also People v. Anonymous, 415 N.Y.S.2d 921, 924 (Just. Ct. 1979) (analyzing expectations in open spaces of bathroom).

[1085] Buchanan v. State, 471 S.W.2d 401, 404 (Tex. Crim. App. 1971).

[1086] Ibid.

a concealed location" was "constitutionally immaterial."[1087] As far as these courts were concerned, an individual's reasonable expectation of privacy was a threshold issue based entirely on the setting: a man could rely on his physical location to secure him either from all visual intrusions—by whatever source or angle or device—or from none. They declined to speculate that a man's "reasonable expectations" of privacy in the toilet stall of a public restroom, with its unique social interplay of intimacy and exposure, could encompass privacy from one type of observation but not another.

Like Judge Jefferson and the Ninth Circuit, state courts in the years following *Katz* understood that they did not operate in a legal vacuum. At a time when gay communities were starting to claim an increasingly public presence in major American cities, judges from California to New York remained acutely sensitive to the moral threat posed by the nation's sexual subcultures. "This court recoils from the possibility, nay the probability that members of the public should walk into these public restrooms and view the complained of tableau," decried a justice of a New York trial court—not least, "infants of tender years sent [in] unaccompanied by their female parent."[1088] Switching momentarily from assessing the reasonable expectations of homosexual defendants to addressing those of heterosexual parents, Justice White insisted that the community's mothers "reasonably could expect that this sort of prohibited behavior was not to be observed in a public restroom."[1089] Compared to parents' legitimate reliance on the police to protect their children from scandalous sexual spectacles, homosexual cruisers' reliance on any rights to privacy within a public bathroom was purely fantastical—a self-serving desire, shared by all criminals, to avoid the consequences of their illicit deeds. As the California Court of

[1087] State v. Thurman, No. C-790398, 1980 WL 352928, at *3 (Ohio Ct. App. Apr. 30, 1980).

[1088] People v. Anonymous, 415 N.Y.S.2d 921, 924 (Just. Ct. 1979).

[1089] Ibid.

Appeal acknowledged in 1968, "[w]ith the exception of those who intentionally commit acts of indecent exposure, it may well be that persons who engage in various forms of prohibited sexual perversion would *prefer* that their conduct escape detection by anyone and certainly by the police." Yet "[t]o date [that preference] has not been deemed worthy of constitutional protection."[1090] In the handful of years since *Young*, apparently, Judge Jefferson's colleagues had come to entertain the prospect that veteran cruisers would use their experience to screen their sexual encounters from all onlookers, patrolmen and laypersons alike. Yet they refused to extend Fourth Amendment privileges to a defendant's desire to engage in homosexual activities in a public bathroom.

Other judges saw the issue somewhat differently. For one thing, these judges looked beyond the cautionary tale—the innocent man who walks in on an act of sodomy in plain sight in a public bathroom—to a far more common statistic: the innocent man who walks into an empty bathroom and occupies the stall himself. That man certainly had to recognize that he was opening himself up to other men like himself: ordinary citizens who stepped into a public lavatory to share its partial privacy for their most personal bodily functions. Yet surely, some courts conjectured, he could justifiably presume that he would not be secretly espied in that singularly intimate space by hidden officers of the state.

The trend began, a final time, in California—this time with the legislative branch. When the state legislature had intervened in the California courts' struggles with gay bars in the 1950s, it had moved to expand the state's police powers over unwanted gatherings of homosexuals, but now it found itself far more concerned with the civil freedoms of the general public. Alarmed by the commercial sales of increasingly sophisticated surveillance technologies, accessible to

[1090] People v. Heath, 266 Cal. App. 2d 754, 758 (1968).

policemen and private citizens alike, in 1969 the California state legislature enacted section 653n of the California Penal Code, making it a misdemeanor for anyone to install a two-way mirror in private areas like bathrooms, locker rooms, and hotels.[1091] By its terms, section 653n had no effect on the majority of the police's surveillance campaigns in California; despite the success of the Mansfield police department's operations, most police departments staking out popular cruising zones were far likelier to use peepholes and artificial screens than two-way mirrors. Yet in 1971, a panel of the California Court of Appeal chose to read section 653n as a barometer of the public's sentiments about hidden invasions of public bathrooms. The defendant in that case, Frank Metcalf, was caught receiving a blowjob in an open toilet stall inside a Los Angeles department store by a police officer hiding behind a louvered door.[1092] Metcalf's sexual encounter was clearly exposed to the public, visible to any other customers who happened to walk in, but the officer's surreptitious surveillance station gave the court pause. "We believe that the enactment of section 653n," Judge Aiso explained, "enunciates a public policy against clandestine observation of public restrooms and renders it reasonable for users thereof to expect that their privacy will not be surreptitiously violated." Regardless of whether the officer's observation post had violated the statute *per se*, it "violate[d] the spirit" of the law and consequently "should not be given this court's sanction."[1093]

[1091] Cal. Penal Code § 653n (enacted 1969) ("Any person who installs or who maintains after April 1, 1970, any two-way mirror permitting observation of any restroom, toilet, bathroom, washroom, shower, locker room, fitting room, motel room, or hotel room, is guilty of a misdemeanor."). For contemporary concerns about available surveillance technologies, see generally Westin, "Science, Privacy, and Freedom," *CLR*.

[1092] People v. Metcalf, 22 Cal. App. 3d 20, 22 (1971).

[1093] Ibid., 23.

Judge Aiso's holding at first seemed destined to remain an outlier, rejected by another panel of the California Court of Appeal a year later.[1094] This time, however, the Supreme Court of California intervened. Contrary to the Court of Appeal's wayward presumptions over the past decade, the SCC protested, its failure to overrule *Norton* or its progeny was hardly "a sub silentio overruling" of *Bielicki* and *Britt*.[1095] Consistent with those earlier cases, the SCC reaffirmed in *People v. Triggs* that "[m]ost persons using public restrooms have no reason to suspect that a hidden agent of the state will observe them"—an expectation that "is not diminished or destroyed because the toilet stall being used lacks a door."[1096] Even men who knowingly exposed themselves to a handful of fellow patrons, the court concluded, could have a reasonable expectation against being spied on by policemen while performing their most intimate bodily functions.

Other states soon followed California's lead. In Pennsylvania, a federal court encountered the issue on an uncommon set of facts. After the Lancaster Police Department drilled holes in the ceilings of the men's rooms in a popular park and a central rail station, a pair of local men brought a class action to enjoin the surveillance program on behalf of all Lancaster residents "who have used or desire in the future to use facilities in public restrooms."[1097] Granting the injunction in full, the Eastern District of Pennsylvania held that an individual's constitutional right against surreptitious spying by the state extended to enclosed and open stalls alike. Citing the California Supreme Court's reasoning in *Triggs*, the court concluded that the occupant's expectation of privacy in the intimate setting of a public restroom "is generated by

[1094] People v. Triggs, 26 Cal. App. 3d 381 (Cal. Ct. App. 1972).

[1095] People v. Triggs, 8 Cal. 3d 884, 891 (1973).

[1096] Ibid.

[1097] Kroehler v. Scott, 391 F. Supp. 1114, 1115 n.1 (E.D. Pa. 1975).

the nature of the activity involved, rather than the precise physical characteristics of the stall."[1098] Whether or not a toilet stall opened onto the common spaces of the lavatory, the delicate nature of that facility entitled its occupants "to be free from governmental intrusion in the form of clandestine observation."[1099] No doubt the success of the Lancaster challenge was aided by the fact that it was brought by a pair of innocent men claiming to speak for the public, rather than by convicted cruisers trying to appeal their convictions on a procedural point.[1100] Like many of its more conservative predecessors, the Eastern District of Pennsylvania did not ignore the social costs of its holding: "We are neither unmindful of the numerous complaints" against lascivious activities in public restroom, it noted, "nor critical of police motivations" to eradicate them, the court explained.[1101] Yet the police department's surveillance campaign," the court explained, did not merely expose the misconduct of homosexual cruisers; it "swept [up] . . . countless innocent and unknowing persons who reasonably expected and were properly entitled to a modicum of privacy." Whatever its sympathies for the police's intentions, the court felt itself bound to uphold the privileges of the Fourth Amendment, "particularly as they pertain to innocent and law-abiding citizens."[1102]

The controversy surrounding the police's clandestine surveillance of open stalls complicates a common criticism leveled against *Katz*. Drawing on the Supreme Court's plain

[1098] Ibid., 1118 fn. 4.

[1099] Ibid., 1116.

[1100] It is of course entirely possible that the class representatives were themselves homosexual, but their sexual identities were not part of the record considered by the court.

[1101] Kroehler v. Scott, 391 F. Supp. 1114, 1119 (E.D. Pa. 1975).

[1102] Ibid. Some years later, an Ohio court would make the point eve more explicitly. State v. Holt, 291 Or. 343, 348 (1981) ("One who chooses to use a doorless stall . . . accepts a limited risk of observation as a consequence of the limitations of the physical structure," but "he does not necessarily accept or reasonably expect . . . exposure to *concealed* viewers.").

view doctrine, *Katz*'s "reasonable expectations of privacy" standard has been castigated as an all-or-nothing affair. Stripping defendants of all reasonable expectations against police surveillance so long as their conduct could, in theory, have been viewed by the public—no matter how obscure or unforeseeable the police's actual recordings may have been—that standard has been accused of ignoring the singular privacy concerns raised by the state's developing surveillance technologies.[1103] It has also drawn fire for discounting the concept of "limited" privacy, conflating an individual's revelation of intimate information to a small, often unavoidable audience with an intentional exposure to the eyes of the world.[1104]

Many courts evaluating Fourth Amendment challenges to the police's clandestine surveillance of homosexual cruising in the 1960s and 1970s shared those failings. Like the California Court of Appeal, these courts insisted that the police's particular methods of clandestine surveillance made no constitutional difference to a homosexual cruiser's reasonable expectations of privacy in a public toilet stall.[1105] Others, however, adopted a more nuanced view. Perhaps inspired by the uniquely intimate nature of the setting, some state and federal courts following *Katz* read the Fourth Amendment to grant even men in open toilet stalls—plainly exposed to any member of the public passing by—some right to privacy against

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[1103] For analyses of *Katz*'s refusal to take into account the foreseeability of vantage point, see Sam Kamin, "The Private Is Public: The Relevance of Private Actors in Defining the Fourth Amendment," *Boston College Law Review*, Vol. 46 (2004), 110; Guirguis, "Electronic Visual Surveillance," 156-57; Timothy Casey, "Electronic Surveillance and the Right to Be Secure," *Univerisity of California-Davis Law Review*, Vol. 41 (2008), 1028. For criticism, see Guirguis, "Electronic Visual Surveillance," 158; Sherry F. Colb, "What Is A Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of A Remedy," *Stanford Law Review*, Vol. 55 (2002), 122-23, 137-38.

[1104] Colb, "What Is A Search?," 122; Kamin, "The Private Is Public," 101; Alan F. Westin, "Science, Privacy, and Freedom: Issues and Proposals for the 1970s, Part II: Balancing the Conflicting Demands of Privacy, Disclosure, and Surveillance," *Columbia Law Review*, Vol. 66 (1966), 1211.

[1105] People v. Norton, 209 Cal. App. 2d 173, 176-77 (1962); State v. Thurman, No. C-790398, 1980 WL 352928, at *3 (Ohio Ct. App. Apr. 30, 1980); Buchanan v. State, 471 S.W.2d 401, 404 (Tex. Crim. App. 1971); Smayda v. United States, 352 F.2d 251, 255 (9th Cir. 1965).

surreptitious surveillance by the state. As framed by Justice Harlan in *Katz* and as applied by lower courts in the years following, the "reasonable expectations of privacy" standard allowed judges to account for the particular methods as well as the settings of the police's surveillance campaigns.

If, in context, courts evaluating the police's operations against popular homosexual cruising sites sometimes chose a narrower reading, that choice may have owed less to the conceptual limitations of *Katz* than to more pragmatic policy considerations. Like the courts applying the plain view doctrine before them, judges assessing a defendant's "reasonable expectations of privacy" were not merely sensitive to the police officer's specific observation tactics; they were also sensitive to what precisely those officers observed. And they were consistently more apt to indulge in the doctrinal nuances of *Katz* when the privacy they saw themselves protecting belonged to upright citizens rather than inveterate homosexual cruisers. It was one thing to use the judiciary's vested powers to prevent the police from embarrassing "innocent and law-abiding citizens" inside the vulnerable spaces of a public bathroom.[1106] It was quite another to facilitate "persons who engage in . . . prohibited sexual perversion" in their bid to "escape detection" by the state.[1107]

Nor was this variance merely a matter of rhetoric. Courts' shifting appraisals of the constitutional rights of homosexual cruisers and heterosexual innocents suggested that a cruiser's reasonable expectations of privacy in a public toilet stall actually differed from those of ordinary users. As the California Supreme Court insisted in *Triggs*, seeking to justify its bold holding: "In seeking to honor reasonable expectations of privacy . . . we must consider the expectations of the

[1106] Kroehler v. Scott, 391 F. Supp. 1114, 1119 (E.D. Pa. 1975).

[1107] People v. Heath, 266 Cal. App. 2d 754, 758 (1968).

innocent as well as the guilty."[1108] Whether or not a cruiser who had sex in an open toilet stall could expect its three walls to afford him any degree of privacy from the police, the court implied, an innocent man inside the same stall was entitled to that precise belief. Other judges made the implication more explicit. After a majority of the Minnesota Supreme Court imagined the "shock" of patrons using a public restroom "in a proper manner" to realize they were being watched by the police, three justices objected that the majority's concededly valid conjecture should not extend to the homosexual defendant in this case. Granting that the police's surveillance campaign violated the privacy of the restroom's typical users, Justice Sheran insisted in dissent, "persons who use places of this kind for illegal activities . . . should not be allowed to shield their perversions by appealing to the court's proper concern for the rights of others."[1109] By these courts' reasoning, an individual's reasonable expectations of privacy in a public bathroom did not attach simply to the design of the stall, nor even to the foreseeability of the police's surveillance tactics. They also attached to the acts he chose to perform there. As the New York trial court that recoiled against exposing minors to a "tableau" of deviance candidly remarked, an occupant's expectations of privacy in the open spaces of a public bathroom are "reasonably limited to the performance of excretionary and ablutional acts indigenous to a restroom, never for sexual acts of any nature."[1110] Some year later, in a rare case dismissing a defendant's Fourth Amendment challenge to his arrest even in an enclosed toilet, the Ohio Court of Appeals agreed: While most courts had stopped even questioning a man's reasonable expectations of privacy inside a closed stall, the panel refused to "recognize as reasonable an expectation of privacy of people engaging in sexual acts in a public outhouse with no lock on the

[1108] People v. Triggs, 8 Cal. 3d 884, 893 (1973).

[1109] State v. Bryant, 287 Minn. 205, 212 (1970) (Sheran, J., dissenting).

[1110] People v. Anonymous, 415 N.Y.S.2d 921, 923 (Just. Ct. 1979).

door."[1111] Cases like these suggested that, even where judges agreed that the average citizen entertained a reasonable expectation of privacy against surreptitious surveillance, cruisers who resorted to public bathrooms for their illicit sexual encounters required a separate—and less generous—constitutional calculation. The very fact of engaging in prohibited sexual behavior in an otherwise protected toilet stall, it appeared, rendered the homosexual body that occupied it singularly susceptible to the prying eyes of the public and the state.[1112]

To be sure, the courts' greater enthusiasm for safeguarding innocents rather than convicted cruisers against clandestine surveillance in public bathrooms was hardly an unprecedented development. In fact, a widely held theory of the Fourth Amendment, well recognized by the time of the Supreme Court's holding in *Katz*, claims that the constitutional bar against unreasonable searches and seizures properly affords greater protections to the rights of the innocent than the guilty.[1113] Consistent with the common law of searches at the time of the Constitution's drafting, the "innocence theory," as it came be known, had received broad support from scholars and from jurists in the nation's highest courts long before homosexual cruisers began challenging their arrest in public bathrooms.[1114] It was the precise principle invoked by

[1111] State v. Johnson, 42 Ohio App. 3d 81, 83 (1987).

[1112] To be sure, the language used by these courts did not to target homosexuals per se. After all, the exact act that triggered the police's right of surveillance was not just homosexual sodomy, but specifically sodomy in public. Furthermore, both the New York and the Ohio court denounced all improper sex acts in public bathrooms, not simply homosexual ones. In practice, however, the police's campaigns against sex in public bathrooms centered almost exclusively on homosexual defendants, and the exact laws being enforced remained anti-sodomy laws rather than public indecency laws. Especially considering the centrality of cruising to homosexual men who had fewer institutionalized ways of meeting romantic or sexual partners in the mid-twentieth century, the courts' pronouncements on the constitutional rights of homosexual cruisers effectively singled out homosexual men.

[1113] By this theory, the sole rationale behind the Constitution's guarantee against unreasonable searches is to protect innocent citizens from inference by the state, with any benefits reaped by the guilty merely collateral costs along the way. Sherry F. Colb, "Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence," *Columbia Law Review*, Vol. 96 (1996), 1476-77.

[1114] For the strong judicial and history support of the innocence theory, see Colb, "Innocence, Privacy, and Targeting," 1460; ibid., 1525 (gathering sources); Arnold H. Loewy, "The Fourth Amendment as a Device for

Judge Browning in *Smayda* when, aghast at Ranger Twight's overhead recording of an enclosed stall, he insisted that the "ultimate object of the Fourth Amendment is protection of the innocent."[1115]

Yet in the context of the police's enforcement efforts against urban homosexuality in the twentieth century, state courts' reduced enthusiasm for granting Fourth Amendment protections to homosexual cruisers may have had a more particular resonance. By the time that state and federal judges began to ratify the police's clandestine surveillance efforts in the 1960s, after all, gay men and communities across the United States had long borne the brunt of a certain presumption, shared by the public and the police alike, that their bodies were uniquely open to public inspection. It was the presumption that fueled the pansy craze of the early 1930s, when urban nightclub owners transformed the figures and fashions of sexual deviants into visual commodities for their sophisticated clientele. It was the presumption that underwrote state liquor boards' enforcement of their disorderly conduct laws following Repeal, when many state investigators insisted that all bar employees could and *should* examine the gay patrons on their premises for any telltale signs of deviance. It was the presumption that underlay the vice squads' plainclothes campaigns, where undercover officers invaded the most secretive and subtle enclaves of the urban gay world in order to trick gay men into revealing themselves to hostile strangers. And it was the presumption that pervaded the booking stations and examination rooms of local jails, where, as in Bertram Pollens' 1938 monograph, deviant bodies were stripped of all dress and dignity and laid bare to the scornful eye of prison guards. By the early 1960s, the history of anti-homosexual law enforcement had long been a history of forced

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Protecting the Innocent," *Michigan Law Review*, Vol. 81 (1983), 1229; William J. Stuntz, "Waiving Rights in Criminal Procedure," *Virginia Law Review*, No. 75 (1989), 766, 780-82.

[1115] Smayda v. United States, 352 F.2d 251, 262 (9th Cir. 1965) (Browning, J., dissenting).

disclosure: a joint effort by commercial entertainers, social researchers, and state regulators to circumscribe homosexuality—and the homosexual *body* specifically—as an object of public scrutiny.

The clandestine surveillance of homosexual cruising sites in the mid-twentieth century presented another step in this broader pattern of police practices. More literally than most, the tactic stripped homosexual men of the privacy to which most members of the public were entitled, suggesting that a man's decision to engage in deviant sexual acts opened him up to unique levels of inspection by the police and the public. Like the liquor boards' proceedings against gay-friendly bars, it posited the homosexual body as something intrinsically *public:* a spectacle that could be exposed by the police's most intrusive tactics precisely because it as easily invited any layman to watch it in plain sight. And not merely intrinsically public, but unilaterally so: a visual object entitled, by its innate deviant nature, to be seen by the curious onlooker but not to see in turn. The concealed nature of the police's observations had no bearing on a cruiser's Fourth Amendment rights, the Ninth Circuit had insisted in ratifying Ranger Twight's concealed surveillance station, because the defendants had no "right to demand that [their] observation be made only by one who they could see."[1116] Having courted public observation in an open bathroom, echoed one North Carolina court, they had no right to expect that "such observation be made only by some person of whose presence they were aware."[1117] These and similar statements were consistent with a Fourth Amendment doctrine developed largely outside the sphere of anti-homosexual policing. Yet within a rich regulatory and cultural traditional of submitting homosexuals to the leisurely inspection of the public and the state, they

[1116] Ibid., 255 (majority opinion).

[1117] State v. Jarrell, 24 N.C. App. 610, 614 (1975).

echoed a widespread presumption of the homosexual body as a uniquely visible, uniquely public object.

Of course, it is important not to exaggerate the prominence of the police's surveillance campaigns against public bathrooms in the experiences of all gay men in the 1960s. At a time when many men affiliated with the nation's more "respectable" gay communities shunned the practice of tearoom cruising—even as many others continued, if perhaps secretly, to indulge it—cruisers' experiences with clandestine surveillance cannot be generalized to the gay world's broader confrontations with the police in these same years, whether through liquor agents, decoy officers, or uniformed patrols. Nor did the courts' selective applications of the Fourth Amendment to tearoom cruising in these years target gay men or the gay community *per se*, despite their overtly restrictive ramifications for homosexual cruisers. Even those courts that explicitly differentiated between the permissible "excretionary and ablutional" functions in a public bathroom and more illicit degenerate displays, after all, technically sanctioned the police's surveillance against *all* improper sex acts in public bathrooms, not simply homosexual ones. And even those judges who most vocally objected to the spread of "homosexual" degeneracy did not necessarily object to all cases of homosexual sodomy, but only to displays of sodomy in public.

Yet there was no question that the courts' lowered Fourth Amendment protections for illicit sexual acts, in a time when the police's campaigns against public sex centered almost exclusively on gay cruising sites, applied disproportionately to homosexual men. And as the legal debates over clandestine surveillance gained increasing prominence as a cornerstone of vice squads' restrictions against gay men's civil freedoms in the 1960s, those debates helped explain the sensitivity that developed among some gay men to the police's more public harassment

tactics against gay bars and homophile groups. At the very dawn of the decade, one man who openly identified with New York's gay community—though did not disclose whether he also indulged in tearoom cruising, or would have done so absent the specter of police surveillance—questioned the unusual intrusiveness of the NYDP's techniques against homosexual cruisers. "Who else," he demanded, "is spied on like this?"[1118] By the middle of the decade, this resentment of the police's seemingly unique disrespect for the privacy of gay men had gained support on both coasts. In January of 1965, some years after the California courts' conservative turn in *Norton* but a few months before the Ninth Circuit's opinion in *Smayda*, the San Francisco Police Department sparked an outrage when it sent thirteen uniformed police officers to a benefit ball thrown by the aggressively respectable Council on Religion and the Homosexual. The officers did not initiate any arrests, nor did they stop or interfere with any of the participants, but they did bring floodlights and two cameramen to snap pictures of the men as they entered and exited the venue.[1119] The guests were furious. Considering that the SFPD made no pretense at actually arresting any attendees, one man wrote to gay rights attorney Evander Smith about the event, "there seems to have been not the slightest element of law enforcement to the proceedings, nor even a pretense of the maintaining of order," but simply an attempt to harass gay men with police cameras.[1120] Those cameras likely alarmed the participants for a variety of grounds: the blemishes on their police files, the threat of unsolicited disclosure to co-workers and friends.[1121]

[1118] Stearn, *Sixth Man*, 172.

[1119] "Cops Invade Homosexual Benefit Ball," *San Francisco Chronicle*, Jan. 2, 1965, 12; "Judge's Q. and A. On Raid: Why Did Cops Take Cameras?" *San Francisco Examiner*, Feb. 11, 1965. The officers did arrest several homosexual lawyers who attempted to prevent them from entering the hall. For a general history of the Council on religion and the Homosexual, as well as the 1965 ball, see Boyd, *Wide Open Town*, 231-36.

[1120] Jacques D. Huss, memo, Clippings 1964-65 File, Box 46, Evander Smith Papers, Gay and Lesbian Center, San Francisco Public Library.

[1121] For a list of grievances, see Council on Religion and the Homosexual, *A Brief of Injustices* (Los Angeles: Pan-Graphic Press, 1965), reprinted in *ONE*, Vol. 13, No. 10 (October 1965), 10; see also Boyd, *Wide Open Town*, 234.

Yet some of the ensuing outcry centered on a more curious concern. As one participant later noted, tensions at the event were particularly high because at a gay Halloween ball thrown a few months earlier, the SFPD had "abused [the attendees] by taking pictures indiscriminately to the annoyance of everyone, while they, the police, would not in turn allow their photograph to be taken."[1122] In addition to their well-founded anxieties about their personal safety and professional reputations, it appeared, some members of city's homosexual community took particular affront to the police's presumption that homosexual men—and they alone—were the acceptable objects of public scrutiny.

In this sense, even as the clandestine surveillance of public bathrooms remained far removed from the bars and nightclubs where most homosexual men came to mingle (and be monitored), it may nevertheless have cast a shadow across many of the homosexual community's experiences with the police during the mid-twentieth century. The police's surreptitious observations of public men's rooms did not perpetuate the same disdainful visual stereotypes that came out of the liquor boards' prosecutions following Repeal, nor did they co-opt the same cultural cues and physical tics that facilitated the police's increasingly sophisticated decoy operations. Yet in its way, the practice epitomized the core of anti-homosexual law enforcement in the mid-twentieth century. Clandestine surveillance reinforced the wide-reaching prerogative of the public and the state to scrutinize the homosexual as a uniquely conspicuous attraction in the urban landscape: to rely on the singular publicity of the deviant body to combat the specter of sexual degeneracy in the nation's cities.

[1122] Evander C. Smith and Herbert Donaldson, "Chronology of Events Occurring in Connection with the Arrest of Above Individuals on January 1, 1965," 4, Folder 4, Box 46, Evander Smith Papers, Gay and Lesbian Center, San Francisco Public Library.

Conclusion

When *United States* v. *Katz* came down in 1967, shifting the Fourth Amendment's scope from protecting personal property to respecting individual privacy, the case was met as an expansion of the liberties protected by the Bill of Rights.[1123] At a time when racial minorities and other marginalized groups bore the brunt of the police's more draconian techniques, *Katz*'s eye to a defendant's "reasonable expectations of privacy" helped guard the nation's least as well as most powerful communities against police abuse.[1124] Yet, as critics have noted, that speculative standard would soon invite lower courts to restrict the scope of Fourth Amendment rights. Tying the Constitution's safeguards to a judge's estimate of which areas and which activities are commonly deemed "private" in light of changing social and technological norms, *Katz* would come to exclude numerous intrusive police tactics from scrutiny.[1125]

The police's surveillance campaigns against public restrooms in the twentieth century provides a case study in how *Katz*'s standard allowed courts not only to immunize offensive police tactics from the Fourth Amendment, but also to do so selectively—taking into account not only where a "reasonable" man happened to find himself, but also who that man happened to be. Willing to recognize a reasonable expectation of privacy for innocent men in settings where a homosexual cruiser could expect no such protections, lower courts in the late 1960s and 1970s

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[1123] For interpretations of the standard as an expansion of the Fourth Amendment, see Sundby, "'Everyman''s Fourth Amendment," 1756; Ball, "Privacy, Property, and Public Sex," 34-35; Sklansky, "One Train May Hide Another," 882-83.

[1124] Sklansky, "One Train May Hide Another," 895-96.

[1125] See, for example, Colb, "What Is A Search?," 120-21; Sundby, "'Everyman''s Fourth Amendment," 1757-58.

used *Katz*'s malleable definition of a search to continue the social and legal marginalization of homosexual men, according them uniquely impoverished constitutional rights against the state. Clandestine surveillance against homosexual cruising exposed both the inherent pliability of the reasonable-expectation-of-privacy test and its vulnerability to selective enforcement against unpopular defendants.

At the same time, the example of clandestine surveillance shows how little most criticisms of *Katz* can be limited to *Katz* itself. Well before the Supreme Court tied the definition of a "search" to shifting social conceptions of privacy, state and federal courts alike managed to stretch the Fourth Amendment both to endorse the most unlikely surveillance tactics by the state and to accommodate judges' personal aversion to the blight of public homosexuality. Beginning with the "plain view" doctrine, with its ostensibly more rigid inquiry into what the public could actually *see*, some courts approved the police's stealthiest observation posts by ascribing an unrealistic visual acuity to passersby witnessing a homosexual act. Fearful of dulling the police's most effective tools against homosexual cruising, judges stretched their analyses to find that cruisers in the most isolated, even sequestered toilet stalls had placed themselves within easy public view. In context, any doctrinal differences introduced by *Katz* were negligible. Before 1967, courts legitimated the police's hidden observation posts by overestimating the public's eye view; afterward, they did so by underestimating the cruiser's reasonable expectations of solitude. In both cases, courts dismissed the stealth and innovativeness of the police's professional investigative tactics in order to deny homosexual cruisers any Fourth Amendment protections against the state's most intrusive observations.

By the middle of the decade, of course, the courts were not the only ones starting to scrutinize the vice squad's tactics against homosexuals in the United States. Beginning in the

early 1960s, the popular media began to rediscover the curious urban phenomenon of the homosexual—and the police who spent their working hours surveying and patrolling his hidden enclaves. As readers vied to learn more about the hidden gay communities that had sprung up beneath their noses in the nation's cities, the vice officer's professional insights into that underworld suddenly became a matter of public interest.

Part V. Policing and Popular Culture

8. Queer Expertise: Rediscovering the Homosexual and the Vice Squad in the Popular Press

In April of 1954, Los Angeles newscaster Paul Coates broke a media taboo when he aired the first televised program on homosexuality in the United States.[1126] Host of the Emmy-winning late-night talk show *Confidential File*, Coates was no stranger to controversy, tackling a roster of human dramas that included drug addiction, prostitution, and molestation.[1127] Convinced that "information properly presented is the basis for a good show," Coates hoped that his program could do its part to redress the "general ignorance . . . of the layman" on the subject of homosexuality.[1128] And to that end, in the spring of 1954 he offered his viewers three authorities on the American homosexual: a psychiatrist, a practicing homosexual, and a police captain.[1129]

[1126] Edward Alwood, *Straight News: Gays, Lesbians, and the News Media* (New York: Columbia University Press, 1996), 31-32. On the radicalism of the program, see Interview of Herb Selwyn by John D'Emilio, October 25, 1976, A00450, International Gay Information Center, New York Public Library. For the sound recording of the program, see Paul Coates, "Confidential File" (sound recording), Kinsey Institute for Research in Sex, Gender, and Reproduction (Bloomington, IN).

[1127] For Coates's record of awards, see "Paul Coates' KTTV Show Wins Award," *Los Angeles Times*, Mar. 17, 1957, 1A; Paul Weeks, "A New Paul Coates? He's Same Old Guy," *Boston Globe*, Feb. 19, 1967, 79; Barbara B. Jamison, "'Confidential File' Has Unusual Guest Stars," *New York Times*, May 29, 1955, 59. For controversial guests, Barbara B. Jamison, "'Confidential File' Has Unusual Guest Stars," 59; "Thursday TV Highlights," *Washington Post*, Dec. 4, 1955, J9.

[1128] Paul Fink, "Big, Varied File Filled by Coates," *Chicago Daily Tribune*, Mar. 13, 1956, A4; Coates, "Confidential File," Kinsey Institute.

[1129] For a transcript, see Coates, "Confidential File," Kinsey Institute.

Coates's intervention did not quite spark the interest he sought. At a time when the sexual psychopath still dominated public debates about sexual deviance, Coates's willingness to let an avowed homosexual speak for himself on national television may have been too experimental for the public's taste.[1130] Just ten years later, however, when the popular media finally caught up with him, Coates's early tutorial on the ways and wants of the American homosexual would prove quite prescient—not only in its choice of subject matter, but in its approach.

Beginning in the early 1960s, after years spent perfecting their cruising customs and patronizing their bars in benign secrecy, homosexual men in America reemerged as startlingly public figures. As reported in outlets ranging from newspapers like the *New York Times* and *Washington Post* to national magazines like *Life*, the homosexual had become "such an obtrusive part" of the American city that he simply "need[ed] public discussion."[1131] Yet journalists were bewildered to discover that this conspicuous new denizen of the urban landscape was not the familiar "fairy" of prior years. He did not sway his hips or drop his wrist. He did not speak in a particularly high-pitched voice. Walking among the public, the modern homosexual often appeared to be "the most masculine person in the world."[1132] Having withstood decades of

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[1130] While *Confidential File* was generally a darling of the press, Coates's 1954 program did not earn so much as a mention in the television guides of the day. Interestingly, however, another program focusing exclusively on the psychology of homosexuality two years later was singled out as recommended viewing in the press. "Television Programs," *New York Times*, Sept. 16, 1956, X14 (listing a Saturday, September 22, 1956 feature on "Homosexuality: The Psychological Approach" on the program "The Open Mind").

[1131] For the quotation, see Robert C. Doty, "Growth of Overt Homosexuality in City Provokes Wide Concern," *New York Times*, Dec. 17, 1963, 33. For examples of media coverage, see also Paul Welch and Ernest Havemann, "Homosexuality in America," *Life*, Jun. 26, 1964, 66-74, 76-80; Jean M. White, "Those Others: A Report on Homosexuality," *Washington Post*, Jan. 31, 1965, E1, E3; "Homosexual in America," *Time*, Jan. 21, 1966, 40-41.

[1132] Jess Stearn, *The Sixth Man* (New York: Doubleday, 1961), 39. For other examples, see Jean M. White, "Those Others III: Homosexuals Are in All Kinds of Jobs, Find Place in Many Levels of Society," *Washington Post*, Feb. 2, 1965, A1; Bob "Whearley, "'Militant Minority' Poses Serious Problem for Society," *Denver Post*, Feb. 14, 1965, 26; Lois Wille, "Chicago's Twilight World: The Homosexuals—A Growing Problem," *Chicago Daily News*, Jun.

attacks by psychologists, sexologists, and defendants in the courts, it appeared, the myth of the effeminate fairy was finally meeting its death in the popular press.

Many readers and reporters did not take the news lightly. Experiencing the newfound invisibility of the homosexual as a direct challenge to an urban public that still prided itself on its ability to see straight through him, the mass media in the 1960s took Coates's lead and embarked on a campaign to educate the average American about the sexual deviant.[1133] As journalists warned the public, the modern homosexual was part of his own "secret world," a "separate homosexual community," a minority "subculture"—or, according to writers who preferred more overtly parasitical metaphors, a "swarm" setting up "colonies" in America's unsuspecting cities.[1134] Accordingly, reporters hoping to help their readers "understand" this thriving urban underground borrowed an ethnographic approach and tried charting the contours of the gay community itself: its favored neighborhoods and professions, its mating rituals and social castes, its unique dress and exclusive slang. And fortunately for their purposes, they discovered early on that their tutorials could rely on a useful professional guide: not the psychiatrists who had long reigned as the nation's foremost "experts" on sexual deviance, nor even the sociologists who busied themselves tracking the contours of the gay world in the 1960s, but the police. Interviewing vice inspectors on the inner dynamics of gay cruising culture, trailing police officers around popular gay bars and parks, and detailing plainclothes officers' impressive

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20, 1966, 4; Willam J. Helmer, "New York's 'Middle-Class' Homosexuals," *Harper's Magazine*, March 1963, 86; Welch and Havemann, "Homosexuality in America," 66.

[1133] Welch and Havemann, "Homosexuality in America," 66. *Life*'s exposé involved two separate articles by Welch and Havemann, but included a single introduction. While further citations to the introduction will use this same citation style, references to Welch's and Havemann's individual features will treat them as independent articles.

[1134] Welch and Havemann, "Homosexuality in America," 66; Helmer, "New York's 'Middle-Class' Homosexuals," 85; Jack Star, "The Sad 'Gay' Life," *Look*, Jan. 10, 1967. 31; Paul Welch, "The 'Gay' World Take to the City Streets," *Life*, Jun. 26, 1964, 68; White, "Those Others," E1.

mastery of the gay world's curious codes and fashions, the popular press presented vice officers as professional authorities on the urban gay communities they patrolled. At a time when social scientists and doctors labored alongside homophile organizations to educate the public on the diversity and breadth of the gay community, the most prominent face of that ethnographic project emerged, for most mainstream Americans, as the policeman.

The mainstream public's recognition of gay men as an urban "minority" in the 1960s has traditionally been viewed as a key step in its growing tolerance toward sexual deviance: a shift away from the pathologizing rhetoric of deviance and femininity toward a more nuanced understanding of homosexuality as one gradient in a diverse cosmopolitan landscape.[1135] Yet the popular media's preoccupation with the "gay world" in these years suggests that the ethnographic discovery of the American homosexual in the 1960s buried neither the regulatory impulse of the medical model nor even the reassuring reductivism of the effeminate fairy. Alarmed by the public's distressing new blindness to the gay body, the press enlisted local police departments to help restore its fluency in gay culture, reducing the "gay world" to an object of scientific curiosity and mastery by sophisticated Americans. Introduced to the public, first and foremost, as a tool in the hands of a professional vice force, the "cultural" recognition of homosexuality retreated from treating homosexuality as a disease within the purview of trained doctors only to recharacterize it as an urban pathology within the jurisdiction of the police.

[1135] For works of history emphasizing the utility of sociological study of homosexuality to gay liberation efforts in the midcentury, see Henry L. Minton, *Departing from Deviance: A History of Homosexual Rights and Emancipatory Science in America* (Chicago: University of Chicago, 2002), 239; John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (Chicago: University of Chicago, 1983), 109-17; George Chauncey, "Introduction" to *Homosexuality in the City: A Century of Research at the University of Chicago*, by Chad Heap (Chicago: University of Chicago Library, 2000), 7; Chad Heap, *Homosexuality in the City: A Century of Research at the University of Chicago* (Chicago: University of Chicago Library, 2000), 34.

Yet at the same time, the vice squad's professional mastery over the obscure and novel contours of the gay "world" did not simply elevate the policeman's status as a public authority on sexual deviance. While some journalists presented the plainclothes officer's unique insights into the customs of the gay cruising world as a model of the cultural sophistication to which their readers should aspire, civil libertarians and other critics of the state's anti-homosexual campaigns seized on the policeman's uncommon intimacy with the sordid homosexual underground to question the vice officer's own professional "preoccupation" with sexual deviance. Infiltrating a deviant community defined by its exclusive customs and perverse sexual desires, the vice officer's near-native fluency in the language of urban homosexuality was not only an impressive professional skill. It was also a source of embarrassment. Ultimately, the media backlash against the vice officer in the 1960s uncovered a tension persisting throughout the public's claims of cultural mastery over the homosexual in the twentieth century: the intrinsic paradox of bolstering the public's claims to social status and sophistication on the basis of its intimacy with the socially abnormal.

The Invisible, Visible Homosexual

The 1960s were, by all accounts, a time of rising prominence for gay men in American culture. After years of silence or, at best, sly insinuations in the popular arts, playwrights like Eugene O'Neill and Howard Pinter filled theaters with thinly veiled homosexual characters and themes.[1136] On screens, the repeal of the Hays Code gave Hollywood studios newfound latitude in exploring sexuality in popular films.[1137] In bookstores across the nation, readers could pick

[1136] Howard Taubman, "Modern Primer," *New York Times*, Apr. 28, 1963,. 125.

[1137] Murray Schumach, "Films Challenge Censorship Code," *New York Times*, Aug. 21, 1961, 18; Eugene Archer, "Code Amended to Allow Films To Deal With Homosexuality," *New York Times*, Oct 4, 1961, 41; Charles Kaiser,

among a growing bibliography by homophiles, psychologists, and lawyers, from Donald Webster Cory's *Homosexual in America* to psychoanalyst Edmund Bergler's blistering (but best-selling) *Counterfeit Sex*: *Homosexuality, Frigidity, Impotence*.[1138]

Nor was the homosexual limited to the evening's entertainment. On city streets, the gay communities that came together in the 1950s settled into their favorite neighborhoods. Greenwich Village, the Lower East Side, and the Upper West Side developed into havens for gay men in New York.[1139] In Philadelphia and Los Angeles, homosexual men gathered around Rittenhouse Square and Hollywood Boulevard.[1140] By 1964, San Francisco alone boasted at least thirty gay bars.[1141] Outside the cruising culture of the streets, homophile organizations like the Mattachine Society and *ONE,* as well as vocal new groups like Philadelphia's Janus Society and the Homosexual League in New York, made their presence known in major cities.[1142] Once nearly considered contraband by the postal service, copies of *ONE* and the *Mattachine Review*

The Gay Metropolis, 1940-1996 (New York: Houghton Mifflin, 1997), 155; Michael S. Sherry, *Gay Artists in Modern American Culture: An Imagined Conspiracy* (Chapel Hill: University of North Carolina Press, 2007), 107.

[1138] Donald Webster Cory, *The Homosexual in America: A Subjective Approach* (New York: Greenberg, 1951); Edmund Bergler, *Counterfeit-Sex: Homosexuality; Impotence; Frigidity* (New York: Grune and Stratton, 1951 [2nd. ed. 1958; 2nd print, New York: Grove Press, 1961]). Other books included Edmund Bergler, *Homosexuality: Disease or Way of Life* (New York: Hill and Wang, 1956); Aron Krich, *The Homosexuals, As Seen by Themselves and Thirty Authorities* (New York: Citadel Press, 1954); John Tudor Rees, *They Stand Apart: a Critical Survey of the Problems of Homosexuality* (New York: Macmillan, 1955); Charles Berg and Clifford Allen, *The Problem of Homosexuality* (New York: Citadel Press, 1958); Alfred Gross, *Strangers in Our Midst: Problems of the Homosexual in American Society* (Washington: Public Affairs Press, 1962); Donald James West, *The Other Man: A Study of the Social, Legal, and Clinical Aspects of Homosexuality* (New York: Whiteside and Morrow, 1955); and, of course, Alfred C. Kinsey et al., *Sexual Behavior in the Human Male* (Bloomington: Indiana University Press, 1948).

[1139] Whearley, "Militant Minority," 26.

[1140] Doty, "Growth of Overt Homosexuality," 33; "The Ostrich in Our Midst," *West Side News*, Jul. 12, 1962, Folder 4, Box 4, Reel 11, Mattachine Society Collection, International Gay Information Center, New York Public Library.

[1141] Gaeton J. Fonzi, "The Furtive Fraternity," *Greater Philadelphia Magazine*, December 1962, 20; Marc Stein, *City of Sisterly and Brotherly Loves: Lesbian and Gay Philadelphia, 1945-1972* (Chicago: University of Chicago Press, 2000), 212; Welch, "The 'Gay' World Takes to the City Streets," 68.

[1142] For Mattachine and *ONE*, see generally Welch, "The 'Gay' World Takes to the City Streets," 71. For the Janus Society, see Fonzi, "Furtive Fraternity," 53-54; Stein, *City of Sisterly and Brotherly Loves*, 207-10.

cropped up on corner newsstands across the nation.[1143] From Chicago to San Francisco, the Mattachine Society's regional offices focused their efforts on public education, inviting prominent lawyers and psychiatrists to deliver lectures on the plight of homosexual men and women.[1144] In Los Angeles, *ONE*'s Institute of Homophile Studies offered courses "to give parents, ministers, doctors, lawyers, psychologists, sociologists and the public an understanding of homosexuality."[1145] In New York, the Homosexual League's Randolfe Wicker promoted himself as a speaker on public panels on sexual deviance, even organizing an hour-long program on a local radio station.[1146]

It was not long before the media took notice. The first major investigative report on the American homosexual came in 1961, when journalist Jess Stearn, formerly of the *New York Daily News* and *Newsweek*, published a book-length investigation of New York's gay community. Taking its title from the rumor that gay men comprised one-sixth of the city's population, *The Sixth Man* was venomously contemptuous of the "glittering make-belief world" it uncovered but found a substantial readership.[1147] Over the next two years, a number of

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[1143] Whearley, "Militant Minority," 26. For the Mattachine Society's struggles against the postal service, see Martin Meeker, "Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s," *Journal of the History of Sexuality*, Vol. 10, No. 1 (January 2001), 78-116l; Boyd, *Wide Open Town*, 172; Craig M. Loftin, ed., *Letters to ONE: Gay and Lesbian Voices from the 1950s and 1960s* (Albany: SUNY Press, 2012), 121.

[1144] For San Francisco, see Welch, "The 'Gay' World Takes to the City Streets," 70; Nan Alamilla Boyd, *Wide Open Town: A History of Queer San Francisco to 1965* (Berkeley: University of California Press, 2003). For New York, see Helmer, "New York's 'Middle-Class' Homosexuals," 92. For Chicago, see Wille, "Chicago's Twilight World," 4.

[1145] Welch, "The 'Gay' World Takes to the City Streets," 71; see also Lillian Faderman and Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (New York: Basic Books, 2006), 120-21.

[1146] Alwood, *Straight News*, 47. For more on the Homosexual League, see ibid., 45-46; Helmer, "New York's 'Middle-Class' Homosexuals," 92.

[1147] Stearn, *Sixth Man*, 13 ("It is a glittering make-believe world—at times tragic, sometimes ludicrous, even comical."). For additional discussion of the media's often acerbic tone, see Sherry, *Gay Artists in Modern American Culture*, 105.

magazines took up the same subject. In the *Greater Philadelphia Magazine*, star reporter Gaeton Fonzi published a sympathetic twenty-page study of Philadelphia's gay population in December of 1962.[1148] In *Harper's Magazine* in March of 1963, William J. Helmer revisited Stearn's territory with his own, far more nuanced eight-page account of "New York's Middle Class Homosexuals." Aimed at a sophisticated audience, Helmer's article featured some unusually subtle social analysis, including the relationship between wealth, education, and status in gay groups and the socio-economic dimensions of "swish" affectation.[1149]

It was only in the winter of 1963, however, that the homosexual became front-page news. The trend began with a *New York Times* article entitled, in a particularly apt example of the performative utterance, "Growth of Overt Homosexuality in City Provokes Wide Concern."[1150] The article was the brainchild of executive editor Abe Rosenthal, a former international correspondent who, while apartment-hunting in Manhattan after a long stint abroad, was startled by the sight of homosexual couples on the street.[1151] Rosenthal assigned Robert C. Doty to write a comprehensive investigation, and Doty in turn looked to the Homosexual League's Randolfe Wicker for his source material. Wicker hoped for a sympathetic article, something in line with the *New York Times*'s recognized liberalism toward the city's racial and religious minorities.[1152] But the piece Doty sent to press took a more apocalyptic tone. "Sexual inverts have colonized three areas of the city," he warned in the *Times* on December 17, 1963. "The city's homosexual

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[1148] Fonzi, "Furtive Fraternity." For the mixed reception of Fonzi's piece, Stein, *City of Sisterly and Brotherly Loves*, 217-18.

[1149] Helmer, "New York's 'Middle-Class' Homosexuals," 88-90.

[1150] Doty, "Growth of Overt Homosexuality," 1, 33.

[1151] Alwood, *Straight News*, 44-45; Kaiser, *Gay Metropolis*, 156.

[1152] Alwood, *Straight News*, 48; Kaiser, *Gay Metropolis*, 157.

community acts as a lodestar, attracting others from all over the country."[1153] Tackling a scandalous subject on the first page of one of the nation's most prominent newspapers, Doty's article was widely read and widely praised, becoming enough of a cultural watershed to merit its own coverage in *Newsweek*.[1154]

Not even the *New York Times*, however, could have anticipated the attention that would descend on the gay world in June of 1964, when *Life* magazine dispatched a two-part study of the American homosexual into living rooms across the nation.[1155] Co-written by Paul Welch and Ernest Havemann and illustrated by photojournalist Bill Eppridge, "Homosexuality in America" tried to restore some calm to the discussion, gently mocking Doty's histrionic dread in the face of the homosexual invasion (as ventriloquized by Havemann: "Do the homosexuals, like the Communists, intend to bury us?").[1156] Drawing many of its sources from *ONE*'s Don Slater and featuring extensive photographs of the gay bar scene, the article was embraced by homophile organizations, lauded as a "milestone" publication "unlike anything ever done on the subject in modern mass media."[1157] Yet it was not entirely sympathetic. As *Life* noted by way of introduction—almost apology—for the frank discussion that followed, the "social disorder" of homosexuality was a "problem" that a naturally reticent public was now forced to confront.[1158] Indeed, while some readers praised *Life*'s attempt to "foster public enlightenment," others did

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[1153] Doty, "Growth of Overt Homosexuality," 33.

[1154] "City Side," *Newsweek*, Dec. 30 1963, 42. For further discussion of the impact of the *New York Times* article, see Kaiser, *Gay Metropolis*, 157.

[1155] Welch and Havemann, "Homosexuality in America".

[1156] Ernest Havemann, "Why?", *Life*, Jun. 26, 1964, 76; see also Welch and Havemann, "Homosexuality in America," 66.

[1157] Alwood, *Straight News*, 51-52.

[1158] Welch and Havemann, "Homosexuality in America," 66.

not appreciate the effort.[1159] "Your report on the problem of homosexuality in this country was not, in my opinion, appropriate for a family magazine," objected one New York woman.[1160] A Brooklyn reader and self-proclaimed world traveler who was no "prude" to the ways of the world confessed that *Life*'s "article on homosexuals nauseated [him]."[1161]

Despite the mixed reactions, *Life*'s coverage cemented a newfound media interest in homosexuality. Over the next two years, the popular press filled with high-profile, extended forays into the nation's gay communities: a five-day series in the *Washington Post*, a six-part study in the *Denver Post*, a seven-day exposé in the *Atlanta Constitution*, and a four-part series in the *Chicago Daily News*, as well as features in magazines like *Time* and *Look*.[1162] Even the most self-consciously "progressive" publications found themselves following the lead of the mainstream press. Hardly one to shy away from matters of sex, Hugh Hefner's *Playboy* was silent on homosexuality before *Life*'s "Homosexuality in America." Three months later, Hefner extensively cited Welch's "excellent article" in a segment of his "Playboy Philosophy," and the magazine's Forum soon came to feature a robust debate among readers about homosexuality.[1163] By 1966, indeed, it was rare for journalists to join the debate on homosexuality without some preliminary observations on the prominence of that debate itself. "It used to be 'the abominable

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[1159] Meta Kassell, "Letters to the Editor: Homosexuality," *Life*, Jul. 17, 1964, 28.

[1160] Mrs. Donald J. Rice, "Letters to the Editor: Homosexuality," *Life*, Jul. 17, 1964, 28.

[1161] Arthur E. Demeritt, "Letters to the Editor: Homosexuality," *Life*, Jul. 17, 1964, 28.

[1162]White, "Those Others," E1 (first in series); Whearley, "Militant Minority," 26 (first in series); Dick Hebert, "They Meet Without Fear in 'Gay' Bars Around the City," *Atlanta Constitution*, Jan. 3, 1966, 1, 10 (first in series); Wille, "Chicago's Twilight World," 3-4 (first in series); "Homosexual in America," *Time*, 40-41; Star, "The Sad 'Gay' Life," 31-33.

[1163] For Hefner's discussion of "Homosexuality in America," see Hugh M. Hefner, "Playboy Philosophy," *Playboy*, September 1964, 71-74, 161-68. For examples of ensuing discussion of the subject in the Forum, see "Playboy Forum," *Playboy*, October 1964, 63-64; "Playboy Forum," *Playboy*, February 1965, 38-39, 140; "Playboy Forum," *Playboy*, January 1967, 55; "Playboy Forum," *Playboy*, April 1967, 51-54, 170.

in crime not to be mentioned,'" noted *Time* in 1966. "Today it is not only mentioned; it is freely discussed and widely analyzed."[1164]

Unsurprisingly, one of the recurring motifs in the media's coverage was the startling new prominence of the American homosexual. "The overt homosexual," Doty had insisted in the *New York Times*, "has become such an obtrusive part of the New York scene that the phenomenon needs discussion."[1165] In larger cities, *Life* echoed that homosexuals "are discarding their furtive ways and openly admitting, even flaunting, their deviation."[1166] Gay men in America were coming "out of the shadows," "emerging openly in the city as never before," "becoming so shrilly obvious that the average person can no longer close his eyes."[1167] Whether or not there were actually more specimens to be found in the nation's cities, concluded the *Washington Post*'s Jean White in 1965, "they certainly are more visible."[1168]

Yet at the same time, the American homosexual was becoming, paradoxically, uncomfortably *in*visible. Psychologists and sociologists had long disdained the stereotype of the effeminate fairy, but well into the 1960s, decades after the pansy craze of the early 1930s, the average American's stereotype of homosexual men continued to revolve around what the *Washington Post* described as the 'limp wrist' stereotype."[1169] Scientific strides on the matter notwithstanding, Havemann noted in *Life*, most of the public still believed that "all homosexuals

[1164] "Homosexual in America," *Time*, 40. For other examples, see White, "Those Others," E1 ("[F]ive years ago . . . a frank and open discussion of homosexuality would have been impossible."); Shel Silverstein, "Shel Silverestein on Fire Island," *Playboy*, August 1965,. 121 ("Homosexuality is openly discussed and defended in the mass media.").

[1165] Doty, "Growth of Overt Homosexuality," 33.

[1166] Welch and Havemann, "Homosexuality in America," 66.

[1167] Doty, "Growth of Overt Homosexuality," 33; Whearley, "Militant Minority," 26; Wille, "Chicago's Twilight World," 3.

[1168] White, "Those Others," E1.

[1169] White, "Those Others III," A1.

have effeminate, 'swishy' manners and would like nothing better . . . than to dress like women, pluck their eyebrows and use lipstick."[1170] Now, reporters tasked with investigating the urban homosexual were taken aback by the deviant's outward normalcy. "Effeminate features or mannerisms, I learned, do not necessarily signify homosexuality," Stearn reported in 1961.[1171] When Helmer visited his first gay bar, he recalled being far less "surprised" by the displays of homoerotic affection than "to see no one who 'looked' homosexual."[1172] By the middle of the decade, the revelation of the homosexual's startling lack of physical stigmata recurred in the press with almost obsessive frequency. As journalists echoed, only "a small minority of homosexuals emerge as 'feminine,'" many "are athletic and virile-looking without a trace of femininity," "most of them are not 'sissyish' at all," the majority "look and act very much like other men."[1173] "[T]he male homosexual is popularly thought to be effeminate and sissyish," psychiatrist Irving Bieber informed the readers of the *New York Times Magazine* in the summer of 1964. "The confusing and uncomfortable truth is that only a minority of homosexuals conform to these stereotypes."[1174]

[1170] Havermann, "Why?", 77. For an earlier example, see Nate Haseltine, "One City's Homosexuals Called Disease Carriers," *Washington Post*, Sept. 6, 1962, A3 (noting "rather common concepts" that "homosexuals are 'obvious'").

[1171] Stearn, *Sixth Man*, 39.

[1172] Helmer, "New York's 'Middle-Class' Homosexuals," 86.

[1173] Star, "The Sad 'Gay' Life," 31; White, "Those Others III," A1; Havermann, "Why?", 77; Wille, "Chicago's Twilight World," 4. For other examples, see Whearley, "Militant Minority," 26 ("The tight pants, the raised pinky, the falsetto voice—these are the marks of a minority within a minority."); Henry J. Taylor, "Government Security Practices Are Strict but Very Necessary," *Los Angeles Times*, Oct. 30, 1964, A5 (noting that government officers are "often amazed by the complexity of detection"); Haseltine, "One City's Homosexuals," A3 (suggesting that "contrary to a rather common concepts . . . only a small minority of homosexuals are 'obvious'"); Milton Bracker, "Life on W. 42d St.: A Study in Decay," *New York Times*, Mar. 14, 1960, 26 ("[I]t is impossible to equate the way a man dresses and speaks with a behavior pattern that is against the law.").

[1174] Irving Bieber, "Speaking Frankly on a Once Taboo Subject," *New York Times Sunday Magazine*, August 23, 1964, 75.

This truth was so confusing and uncomfortable because it challenged a central tenet of the urban public's relationship with the homosexual in the twentieth century: its confidence that it could easily recognize the sexual deviant, conspicuous in his effete physical difference from the regular man. Styling the homosexual male as a natural exhibitionist—an "effeminate individual whose every gesture and mannerism clamors for attention"—many Americans developed a certain arrogance toward the homosexuals lurking among them.[1175] "Most normal persons believe they have [an infallibility] in spotting deviates," Doty observed in the *New York Times*.[1176] People assume, agreed the *Washington Post*'s Jean White, that "they can spot a homosexual every time."[1177] As late as 1967, one reader confident in his visual sophistication wrote to *Playboy* dismissing the suggestion that there might be anything ambiguous about identifying homosexuals: "every one of them is as effeminate as a soprano and can be spotted 20 feet away by any sophisticated student of psychology."[1178]

Now, it turned out that Americans who were so complacent in their visual mastery over the homosexual had, to put it bluntly, been duped. The average American's presumption that he could recognize the homosexual, the press emphasized, was a "widespread misconception," a "mistaken notion," a myopic "self-delusion."[1179] As Jean White warned in the *Washington Post*, "Those of us who think they can spot a homosexual usually are wrong."[1180] Far from a talent shared by the layman, the identification of homosexuals was a feat that evaded even trained

[1175] Alfred Gross, "Foreword" to *The Sixth Man*, by Jess Stearn (New York: Doubleday, 1961), 6.

[1176] Doty, "Growth of Overt Homosexuality," 33.

[1177] White, "Those Others III," A1.

[1178] "Playboy Forum," *Playboy*, September 1967, 81.

[1179] Bieber, "Speaking Frankly," 75; Havermann, "Why?", 77; "Playboy Forum," *Playboy*, September 1967, 184.

[1180] White, "Those Others III," A1.

professionals. "Skilled Kinsey investigators, trained in the social sciences," could identify only a small fraction of the homosexuals they studied.[1181] Officials with the Civil Service Commission, tasked with weeding out homosexual employees, were "often amazed by the complexity of detection."[1182] "Fully 85% or more of homosexuals," Havemann reported in *Life*, "cannot be spotted for certain even by experts."[1183]

This newfound stealth of the modern homosexual struck many reporters as something of a problem. The traditional concern, long rehearsed in criminological circles and perfected during the sex crime panic, was of course the threat to the nation's children. As James Reinhardt had warned in *Sex Perversions* in 1957, while America's parents were distracted by the "feminism" of the stereotypical fairy, the "far more serious masculine looking" homosexual was busy preying on young boys with impunity from public scrutiny.[1184] Some journalists appeared to echo Reinhardt's suspicions. The "problem" of homosexuality, noted the introduction to *Life*'s exposé, was an issue with which "parents especially are concerned."[1185] Even relatively sympathetic journalists like Helmer at *Harper's* and the *Washington Post*'s White remarked on the ostensibly high premium homosexuals placed on youth among their sexual partners.[1186]

Just as commonly, the press emphasized the danger to another vulnerable population: the women fooled by the invisible homosexuals in their lives. Gay men frequently led "double

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[1181] "Playboy Forum," *Playboy*, September 1967, 184.

[1182] Taylor, "Government Security Practices," A5.

[1183] Havermann, "Why?", 77; see also Bracker, "Life on W. 42d St.," 26 ("It becomes swiftly apparent to an inquirer that even the neighborhood 'experts' are not of one mind as to who is a homosexual.").

[1184] James Melvin Reinhardt, *Sex Perversions and Sex Crimes* (Springfield: Charles S. Thomas, 1957), 11-12.

[1185] Welch and Havemann, "Homosexuality in America," 66.

[1186] White, "Those Others III," A12; Helmer, "New York's 'Middle-Class' Homosexuals," 90; see also Whearley, "Militant Minority," 26.

lives," reporters warned, marrying and having children as a screen to shield their disreputable sexual desires.[1187] Paul Welch interviewed one young gay executive who commonly spent his evenings going to "regular" bars and luring attractive women away from their dates. "I couldn't be less interested in the girl," he admitted, "but it's a way of getting even."[1188] An older "suburban husband," having thrown himself into the smokescreen of family life, went out on late nights cruising around Chicago's gay havens. "These guys tell their wives they're just going to the corner for the evening paper," an officer on the city's vice squad explained.[1189] The homosexual's talent for disguise could apparently exact a heavy emotional toll. As *Time* warned in 1966, "psychoanalysts are busy treating wives who have suddenly discovered a husband's homosexuality."[1190]

Yet the media was not simply concerned by the homosexual's threat to women and children. Especially in larger cities, with their self-consciously sophisticated readers, journalists lamented the loss of cultural status signaled by the public's startling naiveté toward homosexual men. When Donald Webster Cory first remarked in *The Homosexual in America* that "the rapidity with which homosexuals recognize one another could only be contrasted with their success in remaining unrecognized by those outside the group," sensitive readers might have detected a note of smugness in his claim.[1191] In 1957, Reinhardt confirmed that homosexuals relied on "the ignorance of the general public" to infiltrate America's cities. (Throwing down the proverbial gauntlet, one gay man interviewed by the professor allegedly declared, "We're

[1187] White, "Those Others," E1.

[1188] Welch, "The 'Gay' World Takes to the City Streets," 70-71.

[1189] Ibid., 68.

[1190] "Homosexual in America," *Time*, 40-41.

[1191] Cory, *Homosexual in America*, 80.

safe in this town.")[1192] When the popular press turned to the urban gay world in the early 1960s, the gay community's arrogance about its ability to evade the public became another common theme. The *Washington Post* opened one column with an implicit challenge from gay men to straight readers: Janus Society's Clark Polak betting reporters that "if someone came through the door right now . . . you couldn't tell if he was one of us."[1193] In the *Chicago Daily News*, Lois Wille interviewed a gay minister who had pulled off the ultimate feat of blending into the Christian clergy. "He says he no longer fears detection," Wille recounted. "His masquerade is too good for that."[1194] Having grown increasingly bold on the city streets, it appeared, homosexuals were also growing increasingly haughty at the public's blithe ignorance of their numbers.

Nor was the public's inability to spot the modern homosexual the only problem. Having slumbered while gay men organized into robust communities, with their own fashions, slang, and entertainments, the mainstream public now found itself blind to the numerous markers of sexual deviance embedded in their daily lives. In theaters, *New York Times* critic Harold Taubman lamented the invasion of the American stage by sly winks and nods to homosexual themes by clever playwrights. "Do you realize how often [the subject] has recurred on and off-Broadway?" he demanded. Anyone "so literal-minded and unsophisticated as to assume that characters and situations are what they seem" would miss entirely the meanings of the plays they paid to see.[1195] Meanwhile, on the streets, in coffee shops, and in cafes, heterosexual men and women could apparently scarcely have a conversation without opening themselves up to the mockery of

[1192] Reinhardt, *Sex Perversions and Sex Crimes*, 47.

[1193] White, "Those Others III," A1.

[1194] Lois Wille, "Homosexual Clergyman Tells Of His Bizarre Double Life," *Chicago Daily News*, Jun. 21, 1966, 3.

[1195] Taubman, "Modern Primer," 125.

passing homosexuals. Noting the proliferation of coded gay slang in American cities, Doty speculated that homosexual men "would speak of a 'gay bar' or a 'gay party' and probably derive amusement from innocent employment of the word in its original meaning by 'straight'—that is, heterosexual—speakers."[1196] When *Life* followed the *Times*'s article with its own exposé some months later, it only confirmed Doty's suspicions. The same issue that offered to educate readers on the contours of the "'Gay' World" also ran an advertisement for Betty Crocker cake mixes blithely hoping to entice shoppers with "their gay yellow New! Improved! tags."[1197]

To be sure, not everybody was overly concerned by the public's ignorance of the urban gay world. As the scandalized world traveler reminded *Life*'s editorial board, homosexuality was a topic that most "folks never discuss in polite society."[1198] In the *Denver Post*, journalist Bob Whearley echoed the paradox of gathering information on "respectable" homosexuals: "historically, nice people just don't talk about homosexuality."[1199] Still at the height of the Cold War, at the tail end of a decade preoccupied with wholesome ideals of suburban domesticity, many Americans considered keeping their distance from such sordid sexual matters a mark of respectability.[1200]

Yet at the same time, the popular press suggested that truly sophisticated readers kept themselves apprised of the homosexual subculture dotting their cities. When conservative readers lashed out against Doty's article in the *New York Times*, Rosenthal responded by

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[1196] Doty, "Growth of Overt Homosexuality," 33.

[1197] Advertisement in *Life*, June 24, 1964, 6.

[1198] Demeritt, "Letters to the Editor: Homosexuality," 28.

[1199] Whearley, "Militant Minority," 26; see also Bieber, "Speaking Frankly," 75 ("Until recently, homosexuality was a taboo subject in most households.").

[1200] See, for example, Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (New York: Basic Books, 1988)

stressing the presumed cosmopolitanism of his New York readership: "This is a sophisticated city," he told *Newsweek* reporters, "a buoyant city. And this is an important part of that city."[1201] Indeed, the press implied that sufficiently erudite urbanites should not even have found its investigations into the American homosexual especially newsworthy. Anxious about the average man's embarrassing misuse of gay jargon, Doty carved a preemptive exception for his New York City readers: "[O]nce intelligible only to the initiate," he noted, "homosexual jargon"—not least, the word *gay* itself"—"[wa]s now part of New York slang."[1202] In *Life*, too, Havemann drew a distinction between the average readers to whom he and Welch addressed their articles, and the "observant person walking around cities like New York and Los Angeles," to whom he presumed the emerging subculture should have been obvious.[1203]

With many urban Americans still clinging to outdated stereotypes of the effeminate homosexual, however, such urbanity had become an increasingly rare commodity. To stop its fitful slide into ignorance, what the American public needed was some remedial tutorial on the contemporary homosexual—a guide to help it regain its sense of control over the deviant minority creeping up beneath its nose. "The myth and misconceptions with which homosexuality has so long been clothed must be cleared away," *Life* magazine insisted in the summer of 1964—"not to condone it but to cope with it."[1204]

[1201] "City Side," *Newsweek*, 42.

[1202] Doty, "Growth of Overt Homosexuality," 33.

[1203] Havemann, "Why?", 79.

[1204] Welch and Havemann, "Homosexuality in America," 66. For additional examples of similar rhetoric, see Whearley, "Militant Minority," 26 ("But when it reaches the proportions that raise it from the individual to the community level, calling for thought and action from our cities and public officials, The Post beliefs the topic must be openly considered, and herewith offers a balanced but forthright series of articles, of which this is the first."); Bieber, "Speaking Frankly," 75 "Uncomfortable as people feel when the problem is talked about, nothing less than our self-interest as parents and enlightened citizens demands it."); Gross, "Foreword," 6 ("If society is to solve what is called the problem of homosexuality, then it is first necessary to become accurately informed as to the causes and conditions thereof.").

Popular Tutorials

In order to educate the public about the American homosexual, of course, the press first had to gather some superior wisdom on the subject. In 1930s, pansy craze enthusiasts hoping to learn more about the sexual invert had turned to expert sexologists like Havelock Ellis and Magnus Hirschfeld to "illuminate" the mystery of homosexuality.[1205] Now, the journalists presented with rival authorities from psychiatrists to sociologists to homophile organizations themselves had to select some preferred source of expertise.

The most obvious authorities were professional psychiatrists like Irving Bieber. Catapulting to professional prestige during World War II and cementing their authority during the sexual psychopath debates, psychiatrists and psychoanalysts entered the 1960s as the nation's foremost "experts" on sexual deviance.[1206] Unsurprisingly, when the popular press began its extended forays into the world of the American homosexual, psychiatrists were by far the most commonly cited authorities in their reports. Doty and nearly every reporter after him turned to Bieber to explain the homosexual's "neurotic" fears of female sexuality.[1207] Liberal writers like White and Helmer cited Sigmund Freud's early writings on homosexuality, including a letter to a concerned mother assuring that her son's sexuality was "nothing to be ashamed of."[1208] Nearly every newspaper to run a multi-part series included at least one installment devoted to the

[1205] See generally Chapter 1.

[1206] See generally Chapter 3; D'Emilio, *Sexual Politics, Sexual Communities*, 17.

[1207] Doty, "Growth of Overt Homosexuality," 33; Havemann, "Why?", 76; Jean M. White, "Those Others II: Scientists Disagree on Basic Nature of Homosexuality, Chance of Cure," *Washington Post*, Feb. 1, 2965, A1; Lois Wille, "Is Homosexuality a Sickness? The Deviates Maintain It Isn't," *Chicago Daily News*, June 23, 1966, 4; Star, "The Sad 'Gay' Life," 31.

[1208] Helmer, "New York's 'Middle-Class' Homosexuals," 89; White, "Those Others II," A1.

psychology of sexual deviance, while Havemann's article in *Life*'s "Homosexuality in America" was entlrey devoted to examining the latest scientific insights on "the nature, cause and extent of homosexuality."[1209] No matter how dutifully detailed, however, the psychiatrist's insights hardly helped the media redress the American public's uncertainties about the modern homosexual. To the extent that journalists hoped to help their readers "cope" with urban homosexuality, after all, psychiatrists admitted that they were not policymakers. "Psychiatry does not have 'The Answer,'" insisted one doctor interviewed by Dick Hebert for the *Atlanta Constitution*, "only more questions."[1210]

To help readers regain some control over the distressing gay world, journalists did not simply want to illuminate where the homosexual came from, or whether he could be cured. They wanted show what he was simply like. As Jess Stearn explained in *The Sixth Man*, the goal was to expose the "everyday aspects of the homosexual's world—his social adjustment to himself, his job, friends, and family."[1211] If the public found itself so hopelessly naïve in the face of the growing homosexual community—the haughty "gay world" invading the streets, scenery, and slang of the American city—the media had to restore its cultural savvy by teaching it the central features of that community itself.

Drawing on interviews with practicing homosexuals and first-hand observations of their habitats, journalists around the country thus tried their hand at a more ethnographic approach and presented their readers with a comprehensive map of the homosexual world. They reported where gay men could typically be found: Rittenhouse Square and Spruce Street in Philadelphia,

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[1209] Havermann, "Why?"; White, "Those Others II"; Wille, "Is Homosexuality a Sickness?"; Dick Hebert, "They're Insecure, Unhappy and Emotionally Immature," *Atlanta Constitution*, Jan. 7, 1966, 1, 9.

[1210] Dick Hebert, "Psychiatry Has No Answer—It's Society's Decision," *Atlanta Constitution*, Jan. 3, 1966, 1.

[1211] Stearn, *Sixth Man*, 16; see also Helmer, "New York's 'Middle-Class' Homosexuals," 85 (noting his goal "to write an objective study of their way of life").

Bughouse Square in Chicago, Hollywood Avenue in Los Angeles, Civic Center in Denver.[1212] (In New York, Doty noted, each neighborhood catered to its own subset of the gay society: the bohemians in Greenwich Village, the "middle-class" homosexuals on the Upper East Side, the younger "drifters" on the Upper West.[1213]) They recounted where gay men typically worked: fashion, hairdressing, interior design, and other "arty" professions like dance and theater.[1214] (In many of these industries, warned White, homosexuals commonly "hire[d] their own kind and set up a 'homosexual closed shop.'"[1215]) They informed the public where gay men usually vacationed: New York's Fire Island, which had apparently become "the more or less exclusive domain of the gay crowd," with its own "bikinis" and "swimming bre[e]ches."[1216]

The press taught the American public how gay men spoke. As though seeking to ensure that no readers of theirs would make Doty's embarrassing stumble into the gay world's unique lexicon, reporters embedded and often defined common gay slang words in their articles, instructing readers in terms like "gay" and "straight," "camp" and "drag," "flaming" and "faggot," "cruising" and "rough trade."[1217] By 1965, the public curiosity about gay vocabulary

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[1212] For New York, see Stearn, *Sixth Man*, 51-53; Doty, "Growth of Overt Homosexuality," 33. For Philadelphia, see generally Fonzi, "Furtive Fraternity"; Stein, *City of Sisterly and Brotherly Loves*, 212. For Chicago and Los Angeles, see Welch, "The 'Gay' World Takes to the City Streets," 68. For Denver, see Whearley, "Militant Minority," 26.

[1213] Doty, "Growth of Overt Homosexuality," 33.

[1214] Welch, "The 'Gay' World Takes to the City Streets," 68; Stearn, *Sixth Man*, 76; Helmer, "New York's 'Middle-Class' Homosexuals," 90; White, "Those Others III," A12.

[1215] White, "Those Others III," A12.

[1216] Helmer, "New York's 'Middle-Class' Homosexuals," 86; see also Doty, "Growth of Overt Homosexuality," 33; Stearn, *Sixth Man*, 76.

[1217] Helmer, "New York's 'Middle-Class' Homosexuals," 85-88 (gay, straight, gay trade, camp it up, fruit stand, drag, fairy, swish, pansy, fairy); Doty, "Growth of Overt Homosexuality," 33 (gay, queens, fag); Welch, "The 'Gay' World Takes to the City Streets," 68 (straight, gay, cruising, drag, queers); White, "Those Others," E1, E3 (flaming, cruising, straight, pass, drag); "Homosexual in America," *Time*, 40-41 (straight, camp); Star, "The Sad 'Gay' Life," pgs. 31-33 (straight, gay).

culminated in the publication of two extended "glossaries" of homosexual slang: one in *Fact*, a general-interest magazine from adult publisher Ralph Ginzburg, and a more comprehensive offering from the Guild Press, primarily known for publishing men's physique magazines.[1218]

Painstakingly, journalists instructed the public on the how the urban homosexual dressed. Starting with Doty's piece in the *New York Times*, and continuing with remarkable uniformity over the next three years, journalists catalogued gay men's preferred sartorial stylings: the short-cut coats; the close-tailored jeans or slacks; the sport shirts; the "fluffy," "baggy," or "blousy" sweaters; the sneakers or tennis shoes.[1219] Conveniently for the American public, the urban gay community's fashion choices turned out to be almost disarmingly consistent. Even the journalists who emphasized the varied castes within the gay community—especially the "leather" crowd, with its leather jackets, chains, and motorcycles—seemed to present those deviations as the exception that proved the rule.[1220] As the owner of one San Francisco leather bar confided to *Life*'s Welch, niche establishments like his were a haven against the "fuzzy sweaters and sneakers . . . you see in the other bars."[1221]

Wading into a field of somewhat greater ethnographic nuance, the press surveyed the homosexual's increasingly systematized bar culture. "Sociologists," *Time* remarked in 1966, "regard the gay bar as the center of a kind of minor subculture with its own social scale and class

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[1218] A. F. Niemoller, "A Glossary of Homosexual Slang," *Fact*, Vol. 2 (January-February 1965), 25-27; *The Guild Dictionary of Homosexual Terms* (Washington: Guild Press Ltd., 1965).

[1219] Fonzi, "Furtive Fraternity," 21; Helmer, "New York's 'Middle-Class' Homosexuals," 86; Doty, "Growth of Overt Homosexuality," 33; Welch, "The 'Gay' World Takes to the City Streets," 68, 69; White, "Those Others," E1; Bob Whearley, "Militant Minority," 26; Hebert, "They Meet Without Fear in 'Gay' Bars," 10; Wille, "Chicago's Twilight World," 3-4.

[1220] White, "Those Others – III," A1; Star, "The Sad 'Gay' Life," 31. An extended investigation of Philadelphia's gay world published several years before the more systematic coverage of the mid-1960s, Fonzi's "Furtive Fraternity" did note the variety of social roles and dress styles within the gay community. Fonzi, "Furtive Fraternity," 20-21, 53-54.

[1221] Welch, "The 'Gay' World Takes to the City Streets," 68, 70.

warfare."[1222] In almost every city, homosexual men had their choice of drinking venues: "mixed" bars, welcoming gay men and women alike; "drag" bars, where drag performers entertained devoted crowds and customers still treasured the familiar remnants of the fairy; cocktail bars catering to a "cuff-linky" or "professional elegant" clientele, where no drops of effeminacy were tolerated; "leather" or "S&M" bars, popular with the homosexual world's more aggressive fringes; dance bars where friends and lovers went to have a good time. And, of course, there were the "cruising" bars, where gay men came to pick up new sexual partners.[1223]

Particularly as the media's fascination with homosexuality continued, the gay world's anonymous cruising culture became a central fixture in its vision of gay life. Early reporters like Fonzi and Helmer, as well as some later voices like the *Denver Post*'s Whearley, qualified that most homosexuals "have never been to a gay bar"—that some, in fact, "have little or nothing at all do with gay society."[1224] But flagship publications like the *New York Times* and *Life* soon standardized a different narrative. Aspirations for a meaningful, long-lasting relationship, they insisted, were a rarity among the gay community—in Doty's words, an "Impossible Dream."[1225] Slinking from pickup bars to darkened city streets, the average homosexual could expect a parade of anonymous sexual partners—obsessed with youth, always chasing the next encounter,

[1222] "Homosexual in America," *Time*, 40-41; see also Hebert, "They Meet Without Fear in 'Gay' Bars," 1 ("These bars are the center of the 'gay' social life.").

[1223] Hebert, "They Meet Without Fear in 'Gay' Bars," 1; Fonzi, "Furtive Fraternity," 20, 52-53; Helmer, "New York's 'Middle-Class' Homosexuals," 86; Welch, "The 'Gay' World Takes to the City Streets," 68; Wille, "Chicago's Twilight World," 4; "Homosexual in America," *Time*, 40-41.

[1224] Fonzi, "Furtive Fraternity," 53; Helmer, "New York's 'Middle-Class' Homosexuals," 86; Bob Whearley, "Minority On Increase Affects All Citizens," *Denver Post*, Feb. 19, 1963, 12.

[1225] Doty, "Growth of Overt Homosexuality," 33; see also White, "Those Others III," A12; Welch, "The 'Gay' World Takes to the City Streets," 68, 71.

always at risk that his "promiscuous" tendencies would throw him in the path of the police.[1226] In "Homosexuality in America," Welch opened his own investigation of the "gay world" with a startlingly clinical account of the homosexual's compulsive mating patterns:

> In Hollywood, after the bars close for the night, Selma Avenue . . . becomes a dark promenade for homosexuals. Two men approach one another tentatively, stop for a brief exchange of words, then walk away together. . . . [T]he vignette is repeated again and again until the last homosexual gives up for the night.[1227]

With a tone more befitting a nature documentary than a popular magazine, Welch recounted a similarly desperate scene in bars: "Throughout the evening there is a constant turnover of customers as contacts are made and two men slip out together . . . . As closing time—2 a.m.—approaches, the atmosphere grows perceptibly more tense. It is the 'frantic hour,' the now-or-never time for making a contact."[1228] On these pages, the homosexual emerged less as a human being than a member of an alien ecosystem—some animal organism destined for an inevitable exchange of late-night partners. By 1966, the *Atlanta Constitution* could profile two "quiet" homosexual young men, both respectable professionals by day, both disdaining the homosexual community's more flamboyant elements, who nevertheless spent most of their leisure time in homosexual bars around the city. "It is loneliness," Hebert reported, that one man "says . . . drives him and other homosexuals to their 'gay' bars."[1229]

As the press openly admitted, its intimate investigations of the gay world were, at heart, a remedial measure. Cataloguing the homosexual's favorite neighborhoods, professions, and slang, the press's comprehensive surveys compensated for the newfound stealth of the individual

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[1226] Doty, "Growth of Overt Homosexuality," 33; see also White, "Those Others – III," A12; Hebert, "They Meet Without Fear in 'Gay' Bars," 1.

[1227] Welch, "The 'Gay' World Takes to the City Streets," 68.

[1228] Ibid.

[1229] Dick Hebert, "2 in a 'Straight' Society Lead a Quiet Double Life," *Atlanta Constitution*, Jan. 6, 1966, 15.

gay body by training the public in the increasingly diverse, holistic semiotics of gay culture itself. If the American public's outdated stereotypes of the fairy had left it blind to the gay communities invading its cities, the media's tutorials would rebuild the public's mastery by teaching it all there was to know about those gay communities: by reducing the urban "gay world" itself, like the body of the 1920s pansy, to an object of academic scrutiny and understanding. In this sense, the self-conscious tone of empricism that underlay so many media reports on homosexuality in the 1960s did not necessarily break from the moralism of the outraged readers who denounced their subject matter, nor even provide a mask for the deeply rooted antipathy that shone through in numerous accounts.[1230] In some cases, that aggressively academic tone reflected a genuine preoccupation with learning the contours of the modern gay world as an overt tool for controlling it. Nor did the ironic simplification that often invaded the media's account of the American homosexual—popular journalists' common reduction of the many social tiers, professional classes, and sexual subcultures of the gay world into a digestible set of deviant stereotypes—necessarily reveal any bad faith behind the media's self-consciously academic project. Rather, it reflected an instinct and investment at the very heart of that academic project to reduce the urban gay world, once more, to something traceable and transparent for the mainstream public.

There was no better example of this instinct than the media's coverage of the homosexual's most overt physical signals: his clothes. Beginning with Doty and Welch, journalists pointedly alerted their readers to the homosexual's reassuringly consistent dress style. Yet as the modern gay man made his rounds among the popular press, his fashions did not

[1230] For argument that the media's empirical tone provided a smokescreen for many journalists' underlying homophobia, see Mark Caldwell, *New York Night: The Mystique and Its History* (New York: Scribner, 2005), 317 ("In the 1960s homophobia often took on a tone of academic pseudo-impartiality, in which the writer is pained to contemplate the sad depravity of the man who desires other men.").

simply emerge as *consistent*; the nature of those fashions themselves began to change. In early 1963, when *Harper*'s James Helmer first noticed the gay man's "slim-cut and youthfully styled" clothing, he had to remark on just how unremarkable it was. Despite a few patrons who were "a little too well-groomed or elegant in their behavior," Helmer observed during an evening scouting New York's gay nightlife, no one in the bar he visited "'looked' homosexual."[1231] Taken on their own, indeed, the sport coats, sweaters, and tailored slacks that would soon become the homosexual's telltale uniform were entirely nondescript: the "style of dress that an average college under-graduate might wear," as one researcher observed, or what Helmer himself likened to the "dashing young men in college sportswear advertisements."[1232]

Only after the popular press began training its readers in the signs of the American homosexual did such fashions suddenly start to emerge as somehow noteworthy. When Doty introduced the *New York Times*'s readership to the American homosexual in 1963, he presented the gay man's "tight slacks" and "short-cut coats" as one of the many unknown eccentricities of the urban gay world, directly alongside its secret bar scene and exclusive "jargon."[1233] Hoping to help the average American "understand" homosexuality six months later, Welch repeatedly drilled his readers in the gay community's favored fashions, emphasizing the "tight pants, baggy sweaters, and sneakers" seen in Greenwich Village, the "tight pants, sneakers, sweaters or jackets" sported by undercover decoys, the "fluffy-sweatered" youth in local parks.[1234] Bill

[1231] Helmer, "New York's 'Middle-Class' Homosexuals," 86.

[1232] Ibid.; Martin Hoffman, *The Gay World: Male Homosexuality and Social Creatio of Evil* (New York: Basic Books, Inc., 1968), 55; Helmer, "New York's 'Middle-Class' Homosexuals," 86. See also Whearley, "Militant Minority," 26 (describing patrons at gay bar, wearing "sweaters, sport shirts, khaki slacks and tennis shoes," as "not what the average person might think of as troublemakers").

[1233] Doty, "Growth of Overt Homosexuality," 33.

[1234] Welch, "The 'Gay' World Takes to the City Streets," 68, 72, 69.

Eppridge's urban photography even provided a visual guide, inviting readers to detect the subtle sartorial patterns in a spontaneous array of gay men captured on the city streets: the consistently slim taper of the trousers, the short jacket, or—to those who thought to look down—the telltale tennis shoes with high white socks.[1235] Going one step further than Doty, Welch did not simply describe these common fashions as uniquely "homosexual." He characterized them as somehow overtly "feminine." The tennis shoe, Welch explained, was a "favorite footwear for many homosexuals with feminine traits." Visiting one leather bar, he noted the owner's insistence that his bar was "a place for men," without "all those screaming faggots, fuzzy sweaters and sneakers."[1236]

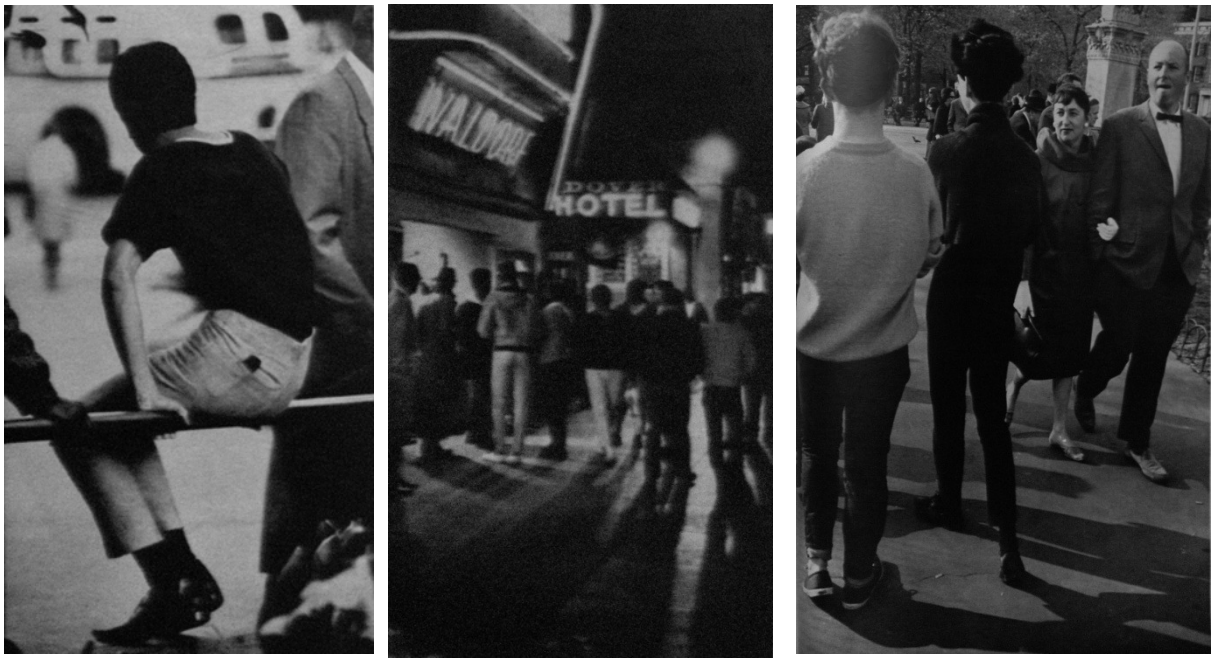


Figure V.1. Bill Eppridge's photographs of urban gay life in *Life*.
From *Life*, Jun. 26, 1964, 68-69, 74.

[1235] Ibid., 68-69, 72-74.

[1236] Ibid.,. 69, 70. For an analysis of Welch's article as reducing the homosexual body to a flamboyant or visual code, see Lee Edelman, "Tearooms and Sympathy, or, The Epistemology of the Water Closet," in *The Lesbian and Gay Studies Reader*, eds. Henry Abelove, et al. (New York: Routledge, 1993).

Within a year, at least in the coastal cities, Welch's lesson had taken root. Clearly a fan of Welch's piece, having gone so far as to transcribe several sentences verbatim, by January 1965 Jean White trusted the *Washington Post*'s readers to recognized the homosexual's telltale clothing as a sign of deviance. "In the larger cities, she observed in her inaugural installment, "avowed homosexuals . . . walk along the streets in tight-cut pants, with long hair and short jackets, and unabashedly declare their homosexuality for the world to see."[1237] Similarly, when the *Atlanta Constitution* published its series on homosexuality in 1996, Dick Hebert explicitly identified such fashions as the markers of the city's "'nelly,' effeminate" homosexuals. "In the bars, you can tell the types by their dress and mannerisms," he explained, with the feminine homosexuals wearing the "accepted 'queen' clothes—blousy sweaters, tight jeans, tennis shoes."[1238] By that spring, legal groups like the New York Civil Liberties Union could presume that the public understood tennis shoes, sweaters, and tapered pants as the red flags of the homosexual. Denouncing the NYPD's practice of enticing gay men to the press, the NYCLU had only to remind journalists "that a large number of police spend their duty hours dressed in tight pants, sneakers, and polo sweaters."[1239] The *Wall Street Journal* would later summarize its arguments as charging the city with sending "effeminately dressed New York police" to gay bars.[1240] By the middle of the decade, in short, the same casual fashions that had confounded journalists looking for conspicuous gay men just a few years earlier could be invoked as the uncontested markers of the flagrant homosexual. More than simply trying to compensate for the

[1237] White, "Those Others," E1.

[1238] Hebert, "They Meet Without Fear in 'Gay' Bars," 10.

[1239] Eric Pace, "Garelik Urges Public to Report Police Trapping of Homosexuals," *New York Times*, Apr. 2, 1966, 60.

[1240] Norman Sklarewitz, "Caught in the Act: Police Don Disguises To Capture Criminals," *Wall Street Journal*, Apr. 18, 1967, 1.

loss of the flamboyant, self-revelatory homosexual body, some of the popular media coverage of homosexuality in these years, at least inasmuch as it related to the gay man's most overt physical characteristics, helped restore that body's self-revelatory flamboyance itself.

In this sense, the popular press's rediscovery of the American homosexual in the 1960s hardly destroyed the myth of the self-revelatory sexual deviant fairy, readily identifiable by the average urbanite through his irrepressible external stigmata. It updated that stereotype for a new era. Alarmed by the fading visibility of the homosexual body, the media blizzard that descended on the gay world in the 1960s redefined the "overt" homosexual from the cabaret pansy—all limp wrist, high voice, and swishing hips—to the Greenwich Village barhopper, reassuringly uniformed in his tight slacks, tennis shoes, and fluffy sweaters. To a degree, of course, the markers of the modern homosexual may genuinely have been more obscure than the familiar codes of the effeminate fairy. Developed in an era of far less systematic regulation, the fairy's fashions and affectations were often self-consciously theatrical, aimed at advertising—and sometimes celebrating—his sexual difference in a crowd.[1241] By contrast, the gay communities that emerged in the nation's cities following World War II had grown far more cautious about attracting unwanted attention from the public, and they adapted their favored fashions and cruising signals accordingly.[1242] Whatever their expressive value to those in the know, after all, wearing denim jeans and tennis shoes certainly departed less clearly from the masculine ideal than affecting a limp wrist and wearing lipstick.

Yet this distinction was, in the end, one of degree only. Even the "obviousness" of the effeminate fairy, after all, was almost entirely a media construct: an amalgam of codes, manners,

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[1241] See generally Chapter 1; George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (New York: Basic Books, 1994).

[1242] See generally Chapter 4.

and fashions that most Americans encountered only through a short-lived entertainment fad. When *Stranger Brother*'s June Westbrook first espied a flock of fairies entering a popular nightclub—their blondined hair, their rouged cheeks, their high-pitched voices—she did not intuitively read their flamboyant behavior as the trace of their deviant sexual practices. It was only June's more jaded cousin who informed her—and doubtless many of the novel's readers—that these strange specimens were "degenerates."[1243] For most of the public in the 1930s, as for June, the color of a man's hair, the curve of his brow, or the angle of his wrist did not become clear windows into his erotic proclivities until the pansy craze identified them as such. In this sense, the American public's embrace of the fairy's flamboyant effeminacy as the hallmark of homosexuality in the 1930s was not fundamentally different from its recognition of the gay man's fitted slacks and sweaters as a homosexual code in the 1960s. As the shift from the *New York Times* to *Life* and the *Atlanta Constitution* revealed, after all, once you learned to recognize them, even a sweater or a pair of tennis shoes could become the red flags of the "'nelly' queens" and "screaming faggots."

As careful readers may have noted, the popular press's unprecedented coverage of homosexuality in the 1960s revolved around a core contradiction about the gay man's semiotic status. Gay men were growing bolder, more visible, "more in evidence" than ever before—but the media still had to teach its readers where to go and how to spot them. "Overt" homosexuals were flooding metropolitan centers, "flaunting" their deviation, "forcing" themselves into the public eye—but the press had to explain the fashions and behaviors that made them overt to

[1243] Blair Niles, *Strange Brother* (New York: Horace Liveright, 1931), 55.

begin with.[1244] For all their ostensible outcry about the brazen visibility of the sexual deviant, publications like the *New York Times* and *Life* played a large role in opening the average American's eyes to the "flagrant" homosexual who forced themselves within them. Systematically training the American public in the cultural significance of such previously nondescript items as tennis shoes, sport coats, sweaters, and white socks, the mainstream press essentially produced the visibility that it then denounced through its own campaigns to help the mainstream public understand and master the gay world.

The media coverage of homosexuality in the 1960s confirms the extent to which the notorious "overtness" of the "overt" homosexual in American popular culture—from the interwar years and beyond—was not always a badge adopted deliberately, or even self-consciously, by the gay men accused of bearing it. Undoubtedly, as gay communities grew more established in cities across the nation, many of their members deliberately claimed a bolder presence in the streets. Wearing tights jeans or brightly colored sweaters in local parks, or even unabashedly strolling the streets with their partners, some of the flagrant men about whom the press complained self-consciously proclaimed their difference in the face of a hostile public. Yet particularly in those historical moments when the public's stereotypes shifted to catch up with new codes first developed in the safety of the gay community, that badge may also have been imposed on men with no particular aim to advertise themselves to the mainstream public. Just like the definition of "disorderly conduct" in the bars policed by state liquor authorities—a legal standard often resting less on the behavior of the homosexual crowd than on the mainstream public's familiarity with its mannerisms—the "flagrancy" of the gay man was always a label that

[1244] See also Sherry, *Gay Artists in Modern American Culture*, 108, 118 (noting the paradox that the 1960s media represented gay men as forcing themselves into the public eye, while "the media did most of the 'forcing,'" ibid., 108).

depended as much on how the public expected a gay man to look as on how he chose to present himself. [1245]

Police Expertise

The media's holistic investigations into the urban "gay world" in the 1960s were, of course, hardly unprecedented. From the gay man's vocabulary to his clothing, his mating patterns, and the sociological significance of his bar culture, the media's investigations of American homosexuality were strikingly similar to the more professional accounts published by social scientists around the same years. By the time the *New York Times* discovered the American homosexual, after all, the ethnographic "field study" of gay men had found its niche among trained sociologists, who turned their professional analytic techniques on the internal dynamics of the urban homosexual's social and cruising culture.[1246] Indeed, *Times*'s nod to the "social scale and class warfare" of the gay bar—as well as more glancing references by journalists like Stearn and Fonzi—suggested that the reporters in these years were aware of their more academic counterparts.[1247] As *Newsweek* noted in commending Doty's seminal article in

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[1245] For the circumscription of disorderly conduct around public stereotypes of homosexuality, see Chapters 2 and 3.

[1246] See, for example, Evelyn Hooker, "A Preliminary Analysis of Group Behavior of Homosexuals," *Journal of Psychology*, Vol. 42 (1956), 221. Later influential publications included Evelyn Hooker, "The Adjustment of the Male Overt Homosexual," *Journal of Projective Techniques*, Vol. 21 (1957), 18-31; Evelyn Hooker, "The Homosexual Community," in *Sexual Deviance*, eds. John H. Gagnon and William Simon (New York: Harper & Row Publishers, 1967), 167-84; Maurice Leznoff, "The Homosexual in Urban Society" (M.A. thesis, McGill University, 1954); Maurice Leznoff and William A. Westley, "The Homosexual Community," *Social Problems*, Vol. 3 (1956), 257-63; R.E.L. Masters, *The Homosexual Revolution: A Challenging Expose of the Social and Political Directions of a Minority Group* (New York: Julian Press, Inc., 1962); Sheri Cavan, "Interaction in Home Territories," *Berkeley Journal of Sociology*, Vol. 8 (1963), 17-32; Martin Hoffman, *The Gay World: Male Homosexuality and Social Creation of Evil* (New York: Basic Books, Inc., 1968); Carol Warren, *Identity and Community in the Gay World* (New York: John Wiley & Sons, 1974); Mary McIntosh, "The Homosexual Role," *Social Problems*, Vol. 16, No. 2 (1968), 182-92.

[1247] "Homosexual in America," *Time*, 40; see also Stearn, *Sixth Man*, 16 (noting the existence of "many books on homosexuality—by sociologists, psychologists, clergymen, and homosexuals themselves, but all with their own

the *New York Times*, Doty's style of journalistic coverage brought a "sociological" approach to public debate on the American homosexual.[1248]

For all their deference to more professional psychiatrists when it came to discussing the homosexual's psychic origins, however, journalists made little use of expert ethnographers in conducting their cultural investigations into the gay world. For the first half of the decade, the popular press's sole reference to the professional sociologists studying gay community dynamics consisted of a 1962 report on venereal diseases in the *Washington Post*, which cited Dr. Ralph Sachs, head of the Los Angeles health department, for the wisdom that homosexuals concentrated in urban centers to "build acceptability within their own large group." (The article also quoted Evelyn Hooker—here, "Hoker"—for the still-novel insight that "only a small minority of homosexuals are 'obvious.'")[1249] When major newspapers and magazines turned more directly to the problem of homosexuality, their only recognition of social scientists like Hooker focused on Hooker's early study on psychological adjustment, finding thirty well-educated homosexuals to be as highly functioning as their heterosexual peers.[1250] Only in 1967, when *Look* ran its rather belated overview of "The Sad 'Gay' Life," did the press discover Hooker's ethnographic work on urban homosexual enclaves: what reporter Jack Star now characterized, borrowing her professional jargon, as "near communities" with their own "specialized institutions."[1251]

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special approach"); Fonzi, "Furtive Fraternity," 21 ("[The homosexual] is the subject of a good deal of disagreement and befuddlement among psychiatrists, psychoanalysts, physiologists and sociologists.").

[1248] "City Side," *Newsweek*, 42.

[1249] Haseltine, "One City's Homosexuals," A3.

[1250] Helmer, "New York's 'Middle-Class' Homosexuals," 89; Havemann, "Why?", 79; White, "Those Others II," A16; "Homosexual in America," *Time*, 40-41.

[1251] Star, "The Sad 'Gay' Life," 31.

This was not to say, however, that the media saw its ethnographic decryption of the urban gay world as breaking entirely new ground. While professional sociologists played little role in the journalists' cultural surveys—and the homophiles who shepherded reporters through their local communities were nearly expunged from the final pages—reporters seeking to educate their readers in the homosexual's exclusive social codes found some much-needed guidance in another professional group: the police.[1252]

At the start of the 1960s, journalists investigating the urban homosexual had commonly turned to their local police as authorities over their cities' sexual underground. Reporting on the growing lawlessness of Times Square—the crowds of drug addicts and prostitutes, as well as sexual "degenerates"—*New York Times*'s Milton Bracker relied on the police for his most nuanced analysis of neighborhood's gay population. Although "homosexuality appears to have 'increased,'" one high-ranking police official clarified, displaying the precise cultural awareness that the popular media would soon try to cultivate, "the 'flagrant' deviates . . . had decreased."[1253] When Jess Stearn began gathering data for *The Sixth Man*, he interviewed, and ultimately quoted at length, a New York vice officer with a wide-ranging intimacy with the quirks and trends of gay bar culture. "Mabel and Flo are common names for the passive type," the inspector informed Stearn: "Some of these boys—the ones homosexuals refer to as 'she' and 'her'—try to emulate stars like Katharine Hepburn, Bette Davis, and Mae West."[1254] Effortlessly dropping gay slang in his speech, the officer rattled off anecdotes about the "rough trade" that

[1252] See generally Doty, "Growth of Overt Homosexuality"; Welch, "The 'Gay' World Takes to the City Streets." As discussed above, Doty drew his sources from Randolfe Wicker, while Welch relied on Don Slater.

[1253] Bracker, "Life on W. 42d St.," 26.

[1254] Stearn, *Sixth Man*, 147.

hung around some street corners, a hustler killed "in a tizzy" by a "queen," and the tendency of some homosexuals to "be very bitchy."[1255]

Even *Greater Philadelphia Magazine*'s Fonzi, more skeptical than many journalists of the police's anti-homosexual campaigns, acknowledged the Philadelphia Morals Squad's unique familiarity with the city's gay community. Trained vice squad men deployed as decoys to popular cruising grounds, Fonzi informed his readers, always left their guns and handcuffs at home, since it was "known that an experienced cruiser will subtly frisk a potential partner."[1256] Notably, one of Fonzi's key sources for the piece was a recent study of the Morals Squad by a local law student, which itself exemplified the extent to which police in these years helped parlay insider information about the gay community to the lay public. Having learned about gay cruising culture almost exclusively through his observations of the Morals Squad, the student identified the term "cruisers" as "police parlance" for homosexuals in search of sexual partners.[1257]

When the popular media seized upon the American homosexual at the end of 1963, reporters like Doty and Welch took much the same approach. In the *New York Times*, Doty framed his article—actually inspired by Rosenthal's benign observations on the streets—around the SLA's recent crackdown on two gay bars, opening the piece with the warning that New York's homosexuals were drawing "increased attention by the State Liquor Authority and the Police Department." He subsequently devoted nearly half the front page to quoting Police Commissioner Michael J. Murphy, who confirmed that while "the underlying factors in

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[1255] Ibid., 146, 152.

[1256] Fonzi, "Furtive Fraternity," 23.

[1257] Richard H. Elliott, "Control of Homosexual Activity by Philadelphia Police: A Study of Enforcement and the Enforcers," University of Pennsylvania Law School (Dec. 4, 1961), 3. Manuscript in possession of the author.

homosexuality are . . . medical and sociological in nature," frequently "persons of this type . . . do come within our jurisdiction."[1258] The next page emphasized the local vice squad's frequent encounters with the city's gay cruising culture, in venues ranging from homosexual clubs and restaurants to public toilets and bathhouses. While the average American apparently still gauchely misused words like "gay," "specialists known in the department as 'actors'" learned to infiltrate gay bars and nightclubs to make arrests.[1259] New York's police officers, and especially the vice squad's plainclothes decoys, Doty implied, were professional masters of the gay fashions and cultural habits that the lay public barely knew existed.

In *Life*, Welch's article went one step further, adopting the policeman as both a source and a model for its own tutorial in urban gay culture. Starting with one vice inspector's estimate that Los Angeles's 3,069 annual arrests were "barely scratching the surface of the problem," Welch noted the police department's unique professional insights into the city's homosexual community.[1260] The LAPD, Welch reported, had compiled its own manual on the codes and customs of the urban gay world, "an 'educational' pamphlet for law enforcement officers" titled "Some Characteristics of the Homosexual."[1261] The scare quotes—and Welch's subsequent characterization of the manual as "strongly opinionated"—may have implied some skepticism, but the next two pages revealed the effectiveness of the LAPD's training program at work. To prevent homosexual men from becoming public nuisances, readers learned, policemen patrolled public bathrooms, popular bars, and other "known loitering places" tracked by the

[1258] He subsequently devoted nearly half of his front page to quoting Police Commissioner Michael J. Murphy, who confirmed that while "the underlying factors in homosexuality are . . . medical and sociological in nature," frequently "persons of this type . . . do come within our jurisdiction." Doty, "Growth of Overt Homosexuality,"1.

[1259] Ibid., 33.

[1260] Welch, "The 'Gay' World Takes to the City Streets," 72.

[1261] Ibid.

department.[1262] To make arrests, they ran "an undercover operation in which officers dressed to look like homosexuals—tight pants, sneakers, sweaters or jackets—prowl[ed] the streets and bars."[1263] Shadowing a plainclothes decoy on a generic evening around Hollywood Boulevard, Welch presented the youthful officer—outfitted in tight jeans, a short-cropped jacket, and the telltale white sneakers—as something of a master in the camouflage of urban homosexuality.[1264] "A policeman in tight-pants disguise waits on a Hollywood street to be solicited," read the caption to one photograph. The image demonstrated both the permeability of the homosexual's sartorial cues—easily replicated by the trained police officer—and, inversely, their reliability as a homosexual signal—sufficing, it appeared, to "disguise" the officer through a pair of jeans and sneakers. And that image ironically emerged as one of *Life*'s more distinct visual exemplars of the 1960s homosexual's trademark fashions.[1265] The next page provided a transcript of the

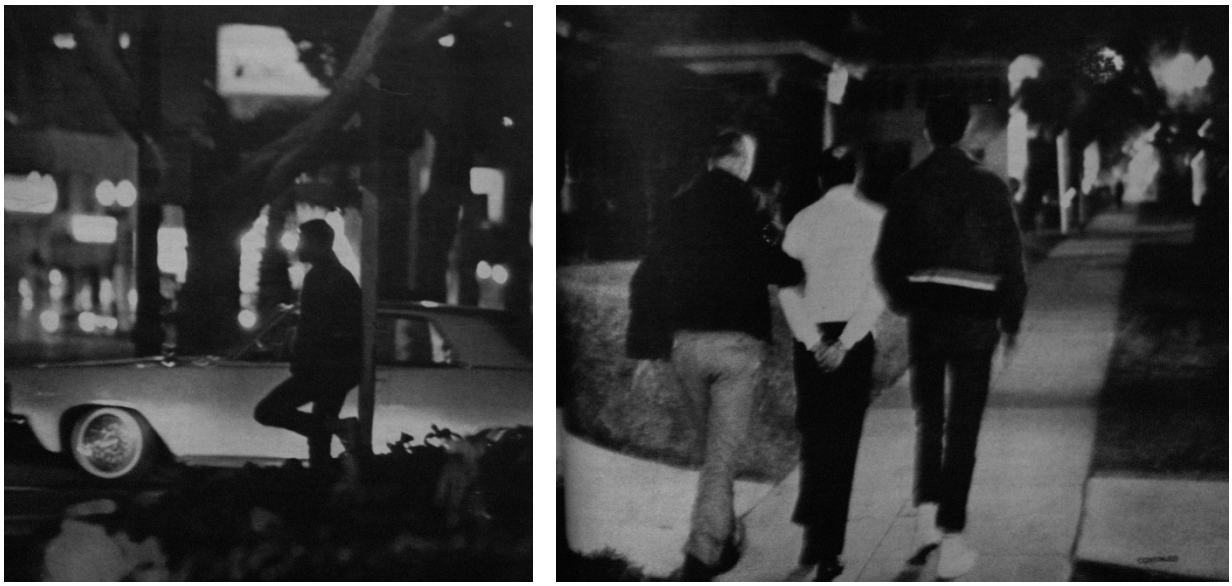


Figure V.2. Tracking a Los Angeles decoy officer on the job. From *Life*, Jun. 26, 1964, 72-73.

[1262] Ibid.

[1263] Ibid.

[1264] Ibid., 72-73.

[1265] Ibid., 72.

decoy's conversation with a homosexual cruiser: a slow, repetitive exchange in which the officer tried to draw out what the suspect might have "on [his] mind" after the two got home. Like many anonymous gay pick-ups at the time, the conversation contained no obvious homosexual slang, but it demonstrated the officer's intimacy with the etiquette as well as the geography of gay cruising culture.[1266] A graduate of the LAPD's professional training in the characteristics of the modern homosexual, the plainclothes decoy knew where to go, how to dress, and what to say in order to infiltrate the hidden "gay world."

If the LAPD's pamphlet on homosexuals was unique, the press soon confirmed that the department's specialized insights into gay culture were anything but. From the *Atlanta Constitution* to the *Chicago Daily News*, journalists who trained their sights on the American homosexual in the 1960s confirmed that vice officers' daily encounters with their local gay communities gave them unique expertise in the customs and habits of the mysterious "gay world." Summarizing the Atlanta vice squad's techniques for keeping homosexuals "on edge," Sergeant H.L. Whalen informed Dick Hebert that his unit had "six men who know how to handle these cases." Wearing casual clothing, the officers concentrated around "known homosexual hangouts"—most notably, the public bathrooms in Piedmont Park—trying to "make themselves available to homosexuals." Based on the complaints lodged with the city police, Whalen explained, "We know where they hang out."[1267] Meanwhile, when the *Denver Post*'s Bob Whearley attempted to infiltrate Denver's gay bar scene, he literally found himself following in the footsteps of the vice bureau. Two of the bars he visited, Whearley reported, had been the sites of recent arrests by undercover police officers. Curious about a Valentine's Day pageant at

[1266] Ibid., 73.

[1267] Dick Hebert, "Detectives Watch Hangout and Curb Some of Activity," *Atlanta Constitution*, Jan. 4, 1966, 1, 6.

the popular Tick Tock Inn, he found two vice inspectors already there as spectators. Detailing a trip to another popular establishment, Whearley noted that he was escorted by "a detective-friend." Lacking a homosexual insider like Don Slater or Randolfe Wicker to shepherd him through Denver's gay nightlife, Whearley had found a more than adequate tour guide in the vice squad.[1268]

In the ase of the *Chicago Daily News*, the head of the Chicago's prostitution and obscenity detail provided Illinois readers with a more colorful overview of the customs of gay cruising culture. "Our detectives pretend they're queer, or a straight (nonhomosexual) out for a one-night fling," Lieutenant James O'Grady informed Lois Wille, who helpfully translated his casual gay jargon for her readers. "They go into one of the fag bars and order a drink. Pretty soon you see the bartender passing a slip of paper to a customer, and the customer starts kissing the bartender. There are a lot of notes passed back and forth. Some just say 'fruit' or 'freak.' They seem to get a kick out of that."[1269] O'Grady's puerile account of the gay bar scene was more than a little dubious, supported by no contemporary accounts of gay communities in Chicago or anywhere else. But in context of Wille's article, his observations provided the Chicago public its most direct, detailed window into the gay world's cruising culture. Working a job that put them in intimate contact with the homosexual underworld, some vice officers presented themselves to reporters as professional authorities on the gay communities sprouting up across their cities. As one "veteran" police officer in D.C. insisted to the *Washington Post*'s Jean White: "People can't understand a problem they don't see. We see them."[1270]

[1268] Bob Whearley, "Clientele Feels Safer in 'Gay Bars,'" *Denver Post*, Feb. 16, 1965, 15.

[1269] Lois Wille, "Police Watch Homosexuals' Hangout Here," *Chicago Daily News*, June 22, 1966, 4.

[1270] Jean M. White, "Those Others IV: 49 States and the District Punish Overt Homosexual Acts as Crimes," *Washington Post*, Feb. 3, 1965, A19.

In a sense, of course, the police's superior insights into the contemporary gay world were nothing new. From the first decades of the twentieth century, policemen who patrolled the city streets often boasted a greater intimacy with their local subcultures—sexual and otherwise—than the mainstream public. The Brooklyn officer who recognized two "fairies" through their tweezed eyebrows in 1922, after all, displayed a cultural fluency in the signs of homosexuality that most people—even in cosmopolitan New York—would not develop for another decade.[1271] And in the state liquor boards' proceedings against homosexual-friendly bars in the 1930s and 1940s, even as the states' lawyers assiduously denied the need for any "expertise" to recognize homosexuals patron in local bars, some police witnesses instinctively invoked their professional "experience" in diagnosing apparent degenerates.[1272]

Yet when the 1930s public first turned, en masse, to the enigma of the homosexual, no one paused to consider that deviant specimen to be a matter of police expertise. Curious for some "authoritative" information about sexual deviance, the public looked to the medical publications of a Sigmund Freud or a Havelock Ellis. Eager to "illuminate" the mystery of the fairy, the Dill Pickle Club engaged sexologist Magnus Hirschfeld for a lecture on the subject.[1273] To the extent that the public even recognized police's duties patrolling homosexuals in the 1930s, those duties appeared to involve roughly the same intimacy with the deviant underworld as the pansy craze itself. At drag balls, police officers and security guards circulated among the costumed crowds, sharing the audience's amusement at the contestants' theatrically feminine

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[1271] Samuel Kahn, *Mentality and Homosexuality* (Boston: Meador Publishing Company, 1937), 217.

[1272] See generally Chapter 3. For specific examples, see, Times Square Garden & Grill v. Bruckman, Record on Review, Index No. 3897 (1939), 35, 40, New York Supreme Court Records, Civil Branch, New York County (New York, NY); Gloria Bar & Grill, Inc. v. Bruckman, Record on Review (1940), 248, New York Supreme Court Records, Civil Branch, New York County.

[1273] See Chapter 1.

antics.[1274] On the streets, as the press frequently reported, police did arrest men who ventured to wear their drag costumes outside the halls of the galas—but, much like the astounded spectators at those galas, the officers had trouble distinguishing the fairies from real women.[1275] In these years before the sex crime panic turned the homosexual into a police concern, in short, no one in the mainstream media assumed that the police deployed to guard drag balls had any unique exposure to—or professional insight into—the curious phenomenon of the urban homosexual.

By the 1960s, that assumption had changed. As a factual matter, urban police departments had spent decades cultivating a more intimate relationship with their local gay communities. From the police's renewed oversight of gay bars and nightclubs following repeal of Prohibition to the advent of specialized "vice squads" in response to the sex crime panic, patrolling of deviant sexual behavior had pushed its way squarely onto police departments' daily agendas. In the case of the vice officer, specifically, his professional identity became more or less defined by his superior knowledge about homosexuals and other sexual degenerates—the unique insight into urban vice that the public paid him to gather. Simply put, the reason that the press so automatically embraced the police officer as an authority on the American homosexual in the 1960s is that the public itself, through its high-profile sex crimes legislation and demands for stricter enforcement, had ordained the officer as such. As Bob Whearley observed in the *Denver Post*, long ago criminalized and now rigorously enforced in "the name of people," homosexuality in the 1960s was, first and foremost, "a police problem."[1276]

[1274] Myles Volmer, "The New Year's Eve Drag," 4, Folder 2, Box 140, Ernest W. Burgess Papers, University of Chicago Library.

[1275] "Two Eagle-Eyed Detectives Spot 'Pansies on Parade,'" *Inter-State Tattler*, Mar. 10, 1932, 2.

[1276] Whearley, "Minority on Increase," 12; see also Editorial Board, "Homosexuals in Denver," *Denver Post*, Feb. 25, 1965, 18 (noting that the problem of homosexuality "is now being examined frankly by police authorities, doctors, lawyers, and other experts").

In context, it should have come as no surprise that officers like Jean White's "veteran" investigator and the "actors" in New York City's vice squad grew increasingly self-aware—and increasingly public—about their relative expertise about the gay world. From states' liquor board proceedings to their clandestine surveillance and plainclothes decoy operations, police officers had long legitimated their arrests before the courts by disclaiming any unusual intimacy with the urban homosexual. Yet as police departments assumed greater responsibility for regulating homosexual enclaves on the streets, the vice officer's *public* legitimacy came to depend precisely on his professional authority over the sexual deviant.

At the same time, the vice squad's emergence as a leading authority on the urban homosexual did not simply reflect the shifting public image of the police officer. It also reflected the shifting social status of the homosexual. Beyond confronting the public with the sudden epiphany of a secret "gay world," the popular media's rediscovery of the American homosexual in the 1960s also culminated a more gradual shift in the public's perceptions of homosexuality: its growing classification of the phenomenon, not simply as a moral outrage or a medical curiosity, but as a criminal concern. Anti-sodomy laws had, of course, been on the books long before the advent of the vice squad.[1277] Yet only in the mid-twentieth century, as the growth of gay communities in major cities after World War II gave vice squads an easy way to fill their arrest quotas, did the media begin to discuss the non-violent homosexual as a penal concern. Now, as the public learned of the thriving, organized homosexual minority that had sprung up in major cities—and of the police's daily campaigns against it—homosexuality no longer appeared to be a personal misfortune, best left to the ministrations of a therapist. It had become an urban pathology within the purview of the police.

[1277] See generally William N. Eskridge, Jr., "Law and the Construction of the Closet: American Regulation of Same Sex Intimacy, 1880-1946," *Iowa Law Review*, Vol. 82 (1997), 1007-1136.

The public's recognition of the homosexual as a member of an urban "culture," organized around its own structures, patterns, and customs, has traditionally been seen as a significant step in the gay community's push for liberation and civil rights in the 1960s—a path toward reconceptualizing homosexual men, not as isolated specimens of sexual perversion or as discrete cases studies in moral deviance, but as members of a functional urban community.[1278] For many Americans, however, the epistemological shift from seeing homosexuality as a disease to regarding it as a "subculture" may have been far from a liberal impulse. As the vice officer's prominent role in this story suggests, the ethnographic study of the gay world in the 1960s did not simply provide a counternarrative to the disease model of homosexuality, nor did it simply help the public accept homosexuality as a benign variation in a pluralistic metropolis. Rather, that ethnographic epiphany itself emerged as a key tool in the regulation of sexual deviance in the mid-twentieth century. On the streets, beginning in the 1950s, the vice squad's rarefied insights into urban gay culture provided one of its most powerful weapons against gay men, allowing police officers to infiltrate the exclusive, highly codified communities that those men had built precisely as an oasis against state intrusion.[1279] And in the press, as publications from the *New York Times* to *Life* to the *Denver Post* frankly acknowledged, the ethnographic study of urban gay culture emerged as a self-consciously regulatory measure: an attempt to give a public that had lost its grasp over the sexual deviant a new way of isolating, scrutinizing, and, once more, mastering an unwelcome urban phenomenon.

[1278] Chauncey, "Introduction," 8; Heap, *Homosexuality in the City*, 34. For homophiles collaborating with sociologists as part of liberationist strategy, see Minton, *Departing from Deviance*, 239; D'Emilio, *Sexual Politics, Sexual Communities*, 109, 117.

[1279] See Chapter 4.

This regulatory drive emerged in numerous ways in the press's proliferating sociological tours of the nation's gay communities. It emerged through the reassuring reductivism with which the media soon ironed out the complexities of the urban gay world, turning the gay bar from just one narrow window into the homosexual's lifestyle to the cornerstone of the "lonely gay life," recharacterizing the homosexual's preferred fashions from a "surprisingly" masculine choice to the hallmark of a "screaming faggot."[1280] It emerged in the self-consciously scientific tone that some journalists brought to their investigations—some, like *Life*'s Welch, going beyond the ethnographic to the near-zoological in their attempts to dissect the homosexual's alien lifestyle.[1281]

It emerged, not least, in the policeman's new role as a poster child of the media's ethnographic investigations of urban gay culture. While professional sociologists and researchers analyzed the gay world in a more scientific setting, it was the police officer who helped the press announce the existence of an urban gay "community," and the police officer who helped introduce the slang, fashions, and social customs that bound that community together. Modeled by the vice officer whom the public paid to master the codes and structures of the urban gay world in order to constrain it, the ethnographic study of homosexuality emerged the 1960s as part of a broad reclassification of homosexuality as an urban pathology: a

[1280] In 1962, for example, William Helmer, disclaimed in *Harper's Magazine* that "the varieties of actual behavior among homosexuals are endless and I have undoubtedly oversimplified them here." Helmer, "New York's 'Middle-Class' Homosexuals," 85. By 1966, when *Time* queried "whether there is such a thing as a discernible homosexual type," it briefly noted Evelyn Hooker's insistence to the contrary before informing its readers that the late Edmund Bergler "found certain traits present in all homosexuals, including inner depression and guilt, irrational jealousy and a megalomaniac conviction that homosexual trends are universal." "Homosexual in America," *Time*, 40-41.

[1281] For a discussion of how the media's self-consciously "objective" tone helped disguise its underlying moral judgments about the gay world, see Caldwell, *New York Night*, 317 ("In the 1960s homophobia often took on a tone of academic pseudo-impartiality, in which the writer is pained to contemplate the sad depravity of the man who desires other men.").

dysfunction with which public officials and police chiefs, and not simply private therapists or clergymen, should be concerned.

It may have been only a final irony for the nation's vice squads that the newfound media attention, so eager to emphasize the police's impressive expertise with the contours of urban gay culture, may have ultimately brought as much scrutiny on the vice officer as on the homosexual himself. Early reporters may have emphasized the vice officer's impressive intimacy with urban gay culture as a mark of professional authority, but the police soon discovered that some members of the public, long suspicious of self-proclaimed "expertise" on deviant sexual practices, met the vice squad's intimate anti-homosexual campaigns with a bit more skepticism.

Backlash

By the mid-1960s, the nation's police departments were no strangers to the scrutiny of the popular press. Deeply implicated in the civil rights movement, concerns over excessive police power first came to the public's attention through the Southern police's brutal treatment of black demonstrators early in the decade, as raw footage of Bull Connor unleashing dogs and firehouses on black schoolchildren and Jim Clark corralling peaceful marchers with bullwhips and barbed wire horrified citizens across the nation.[1282] The ensuing debates began by focusing on local police squads' distressing patterns of racial inequity, and often remained tethered to the racial tensions of the day, but they soon grew to include a far-reaching indictment of police abuses.[1283] The *Los Angeles Times* attacked the governments' growing reliance on wiretapping

[1282] "Support for Police Seen at Low Point," *New York Times*, Feb. 4, 1966, 38; "Civil Rights Commission Lashes at Police Brutality," *New York Herald Tribune*, Nov. 17, 1961, 10; see also Corinna Barrett Lain, "Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution," *University of Pennsylvania Law Review*, Vol. 152 (2004), 1414-15.

[1283] Andrew T. Darien, "Patrolling the Borders: Integration and Identity in the New York City Police Department, 1941-1975" (Ph.D. dissertation, New York University, 2000), 8.

technology as a shadow of "the excesses of totalitarian government."[1284] The American Civil Liberties Union questioned the "stop and frisk" laws adopted in New York and Chicago as an "unclear and disturbing" authorization of police detention.[1285] When New York's new Mayor John Lindsay instituted a drive to clean up Times Square and Greenwich Village, sending out two dozen plainclothes officers to weed out "undesirables" like alcoholics and the homeless, the organization's New York branch denounced the police for trying to "serve as arbiter of social conduct and official censor."[1286] By 1966 the municipal police department's public image had hit its nadir. As one former police commissioner lamented in the *New York Times*, "Never before in the 150-year history of law enforcement has the police 'stock' been at a lower point."[1287]

While certainly less publicized than their distressing treatment of black protesters, the vice squads' anti-homosexual campaigns did not entirely escape notice. As early as the 1950s, local vice squads had drawn some criticism for their practice of encouraging solicitations. A practice that had gained some notoriety in the narcotics context—so much so, indeed, that Chicago's police superintendent publicly announced an end to the practice by 1962—the "ugly and evil business" of entrapment was a favorite target among liberal reporters, and the case of

[1284] Victor Riesel, "Civil Liberties Being Infringed," *Los Angeles Times*, Jul. 15, 1964, A5.

[1285] "A.C.L.U. Will Study Police 'Stop and Frisk,'" *Chicago Tribune*, Feb. 19, 1966, C16; "Frisking Assailed by Liberties Union," *New York Times*, Mar. 24, 1965, 50.

[1286] Eric Pace, "Times Sq. Cleanup Brings A Protest: Arrest of Deviates Scored by Civil Liberties Union," *New York Times*, Mar. 18, 1966, 42.

[1287] "Support for Police Seen at Low Point," *NYT*, 38; see also Herbert Packer, "The Courts, the Police, and the Rest of Us," *Journal of Criminal Law and Criminology*, Vol. 57 (1966), 241 ("It is widely recognized that community relations is a major problem facing the police today."); Samuel Walker, *Popular Justice: A History of American Criminal Justice* (New York: Oxford University Press, 1998), Chapter 6, especially 197-99.

homosexual solicitation was no exception.[1288] Throughout the 1950s, local newspapers eagerly reported on D.C. court cases rebuking overeager decoy officers like Louis Fochett and Dante Longo.[1289] When the D.C. Court of Appeals all but accused Robert Arscott of entrapping Calvin Rittenour in 1960, the *Washington Post* warmly welcomed the opinion. Conceding that homosexuality was, "of course, offensive to the morals and mores of Western civilization," the editorial board insisted that the "common—and contemptible—police practice . . . [of] provocation and entrapment" was "no better . . . than disgusting."[1290]

Beginning in 1963, however, the media interest in homosexuality sparked an unprecedented level of scrutiny for the police departments' anti-homosexual tactics. Based on their interviews with homosexuals and vice investigators, reporters in these years gave their readers a startlingly detailed window into the police's daily operations against the urban gay world: the bar raids, the plainclothes decoys, the "peepholes" carved in public lavatories.[1291] Not all journalists sympathized with the homosexual's legal troubles, yet many acknowledged that the police's pervasive techniques had their share of critics. The *Washington Post*'s Jean White noted that "[c]ivil libertarians have questioned the limits of proper police enforcement" when it

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[1288] For media criticism of entrapment in the vice context generally, see "Vice Squad Having Rough Time; Court Upholds Entrapment Charge," *Hartford Courant*, Jul. 17, 1958, 2; "Creating Crime," *Washington Post*, Sept. 18, 1960, E4. For Chicago's broad ban on entrapment practices in 1962, "Supt. Wilson Orders End of Entrapment," *Chicago Daily Tribune*, Sept. 5, 1962, 16.

[1289] See, for example, "Court Warns Police on Methods Of Getting Evidence in Morals Cases," *Washington Post*, Sept. 28, 1956, 32 (covering *Guarro* case); "Morals Detective Rebuked, Assault Conviction Reversed," *Washington Post*, Jul. 15, 1953, 21 (covering *McDermett* case).

[1290] "Morality and Crime," *Washington Post*, Aug. 28, 1960, E4. After a Park Ranger accidentally detained three decoys with the Morals Squad in Lafayette Park that same year, the *Post* again denounced the plainclothes officers who "clutter[ed] up" the city with their "ugly errand[s]." The Ranger, it concluded, should be commended on his "highly developed sense of decency." "Lafayette, Here We Come," *Washington Post*, Nov. 16, 1960, A16.

[1291] Doty, "Growth of Overt Homosexuality," 33; Welch, "The 'Gay' World Takes to the City Streets," 68, 71-73; White, "Those Others IV," A19; Whearley, "Militant Minority," 26; Hebert, "Detectives Watch Hangout," 1, 6; Wille, "Police Watch Homosexuals' Hangouts Here," 3-4.

came to the Morals Squad's decoy and surveillance tactics.[1292] In *Life*, an opinion piece published a year after Welch and Havemann's exposé took a more critical tone, dismissing the vice squad's anti-homosexual campaigns as either wholly ineffective or "unjust and repugnant because of its peephole and entrapment methods."[1293] Even Chicago's Lois Wille, warmer than most toward the vice squad's campaigns, noted the legal community's reservations about the police's undercover operations: "No, it isn't entrapment," civil rights attorney and homophile ally Pearl Hart acknowledged in an interview. "But I would say it's unethical."[1294]

Perhaps not coincidentally, the rising tide of media attention to the American homosexual came at a time when the police persecutions of gay men increasingly captured the attention of the nation's legal community. Long shunned by "respectable" attorneys mindful of their public reputations, by the mid-1960s the police's anti-homosexual abuses had transformed into something of a pet project for the American Civil Liberties Union.[1295] Joining forces with homophile groups like the Mattachine Society, the union's local branches active spoke out against the state's harassment of gay men.[1296] In New York, the union denounced Mayor

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[1292] White, "Those Others IV," A19.

[1293] "The Law and the Homosexual," *Life*, Jun. 11, 1965, 3.

[1294] Wille, "Police Watch Homosexuals' Hangout Here," 4.

[1295] For a history of the ACLU's initial resistance and gradual involvement with homosexual rights, see Craig A. Rimmerman, ed., *Gay Rights, Military Wrong: Political Perspectives on Lesbians and Gays in the Military* (New York: Routledge, 2013), 201-02; William A. Donohue, *Twilight of Liberty: The Legacy of the ACLU* (New Brunswick: Transaction Publishers, 2001), 46; Marc Robert Stein, *Sexual Injustice: Supreme Court Decisions from Griswold to Roe* (Chapel Hill: University of North Carolina Press, 2010), 159-162; D'Emilio, *Sexual Politics, Sexual Communities*, Chapter 11; Minton, *Departing from Deviance*, 243.

[1296] While the organization's official policy statement still declared it outside "the province of the union to evaluate the social validity" of laws criminalizing homosexuality, by the middle of the decade many of the organization's local branches joined forces with groups like the Mattachine Society to challenge the state's restrictions against gay men. Mark Lasius and Shane Phelan, eds., *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics* (New York: Psychology Press, 2007), 274. The ACLU would only revise its official policy in 1967. Stein, *Sexual Injustice*, 162.

Lindsay's drive to purge Times Square and Greenwich Village of social "undesirables."[1297] In Washington, D.C., it attacked the Morals Squad's use of "peep holes" and the Civil Service Commission's attempts to purge known homosexuals from federal employment.[1298] The "enticement" of homosexuals by plainclothes officers became an especially high-profile issue.[1299] When Francis Robillard, John Wrenn, and Leroy Snowden accused a patrolman of entrapping them in Greenwich Village in 1965, the NYCLU not only took the case but petitioned it all the way to the Supreme Court.[1300]

As the popular press detailed the vice squads' undercover campaigns against gay men for their readers, libertarian assaults against the plainclothes decoy struck a particular chord with the public. As early as 1961, when San Francisco's Alcoholic Beverage Control offered to "train" local patrolman to imitate gay men in bars, one alarmed citizen wrote to the *New-Call Bulletin* to decry the agency's "Gestapo-like tactics." Clarifying that he himself had "never been a patron of this type of bar," the writer nevertheless insisted that the ABC's zealous crusade was a threat to all citizens: "only one more step to the building of a police state."[1301] By the middle of the decade, as the broad specter of overzealous, autocratic policemen began to occupy the pages of the popular press, other heterosexuals came to share his concern that the police's ruthless anti-homosexual campaigns presented a threat to the liberties of homosexuals and ordinary men alike. In 1966, after one Ohio judge convicted a cruiser of disorderly conduct based on his alleged use

[1297] Pace, "Times Sq. Cleanup Brings A Protest," 42.

[1298] White, "Those Others IV," A19.

[1299] Eric Pace, "Policemen Forbidden to Entrap Homosexuals to Make Arrests," *New York Times*, May 11, 1966, 36; see also White, "Those Others IV," A19.

[1300] People of the State of New York v. Francis Robillard, et al., Respondent's Brief in Opposition to Petition for Writ of Certiorari before the Supreme Court, Docket No. 447 (1966). See generally Chapter 5.

[1301] "Special Cops for 'Gay' Bars," *Mattachine Review*, November 1961, 6.

of homosexual "signals" in a university bathroom, a university employee wrote *Playboy* in horror that he might soon fall victim to a false arrest. "I'll probably get a case of inflamed bladder now, because I'll be afraid to go into the restrooms," he bemoaned. "How can an ordinary heterosexual know what the 'signals' are and be sure he won't innocently use one of them?"[1302] In his own way, the employee was lamenting the same public ignorance of homosexual codes that journalists like Doty first tried to redress years earlier, but the stakes had changed. Where reporters like Doty had worried that a straight man's inadvertent use of gay codes might attract a homosexual's derision—or, at worse, his undesired amorous attentions—by 1966 some members of the public were far more concerned about attracting the attention of the police.[1303]

Regardless of who had the better legal argument in court, indeed, by the middle of the decade the ACLU and the gay men it represented had clearly won the battle over "entrapment" in the press. Quoted in the *Chicago Daily News*, Pearl Hart had explained that, due to the legal predisposition requirement, decoy policing technically "isn't entrapment," but most of the public declined to parse such fine distinctions, happy to apply the label to all vice squads' decoy arrests of gay men.[1304] In large part, of course, journalists' frequent references to police "entrapment" were a matter of rhetorical convenience: a widely accepted shorthand for police enticement practices among laymen lacking any constitutional training in the Supreme Court's case law.

[1302] "Playboy Forum," *Playboy*, August 1966, 145. His concerns were not unprecedented: as David Johnson has noted, the height of the Lavender Purge in the federal government similarly inspired fears about police entrapment or framing of innocent heterosexuals. David K. Johnson, *Lavender Scare: Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2009), 110-11 & fn. 18.

[1303] For concerns about the inadvertent use of homosexual signals leading to advances and possible violence, see Alfred A. Messer, "Letters to the Times: Focus on 'Curability,'" *New York Times*, Jan. 4, 1964, 22.

[1304] For common uses of "entrapment" to discuss the vice squad's decoy tactics in relatively conservative publications, see Stearn, *Sixth Man*, 167; "The Law and the Homosexual Problem," *Life*, 4. For more self-consciously liberal publications, see "Justice for Homosexuals," *Nation*, Vol. 201, Nov. 8, 1965, 319; Webster Schott, "Civil Rights and the Homosexual," *New York Times Magazine*, Nov. 12, 1967, 45.

Yet as the decade progressed, and as legal debates over the contours of permissible decoy arrests recurred with increasing frequency in both the courts and the popular press, some reporters became happy to avow that the vice squad's activities were not simply, to borrow Hart's phrase, "unethical"—they were simply illegal. In 1966, the *New York Post*'s James Wechsler published a two-part editorial lambasting the NYPD's decoy methods. Recounting the experience of one victim approached by an officer at a bar, he omitted the Supreme Court's predisposition requirement but concluded, in overtly legalistic language, that "the police officer, in effect, created the circumstances of the offense."[1305] Some months later, when the debate over the NYPD's "enticement of homosexuals" made its way to the *Hartford Courant*, the Connecticut paper declared with misplaced confidence that "such a practice . . . was, of course, illegal," a phenomenon denounced "[i]n court [as] entrapment."[1306] In fact, of course, courts in these years adamantly denied "entrapment" claims like that used in *Robillard*. Yet in a time of broad suspicion against excessive police tactics, many members of the lay public were happy to dismiss the vice squad's undercover tactics as another instance of institutionalized police misconduct.

As the media continued to detail the vice squads' nightly duties for the public, however, the potential infringements on civil liberties emerged as perhaps the least of the public's concerns about the plainclothes decoy. More often than denouncing the police's abuses of homosexual suspects, most readers simply questioned how the nation's police officers were spending their time. "It seems strange that the police do not have enough men to protect passengers and Muni drivers from juvenile hoodlums or to stop rioting at Hunter's Point,"

[1305] James Wechsler, "Entrapment, Inc.," *New York Post*, Mar. 7, 1966, 26.

[1306] "Police Policies And Sex Deviates," Hartford Courant, May 27, 1966, 20.

objected one San Franciscan of the ABC's tutorials in 1961, "but they do have enough men to train them on how to act, dress, and talk in gay bars to entrap homosexuals."[1307] When *Life* treated its readers to an evening with the LAPD, trailing one decoy officer as he loitered by Hollywood Avenue and bantered with passing cruisers, many readers found themselves asking the same question. "That police entrapment conversation in L.A. was absurdity at its height," insisted one letter to the editor; "[A]s a taxpayer, I revolt against the spending of such huge funds for harassment and entrapment of [consenting adults]."[1308] "At a moment when the city cries out for protection against crimes of violence," observed James Wechsler in the *New York Post*, "a squad of grown robust police officers dedicates itself" to pursuing "men suspected of preferring men to women."[1309] "Instead of protecting citizens from criminals," echoed a staff article in the *Nation*, "a substantial part of the police department devotes itself to harassing and persecuting homosexuals."[1310] To be sure, not everybody shared the outraged taxpayer's frugality. After running Bob Whearley's multipart exposé on Colorado's "militant" homosexuals, the *Denver Post*'s editorial board published a statement imploring police to add more officers to their vice squad, confident that this was "an expense the citizens of the community would gladly bear."[1311] But many critics remained far more skeptical. As the *San Francisco Chronicle* quipped in 1966,

[1307] "Special Cops for 'Gay' Bars," *MR*, 6.

[1308] "Letters to the Editor," *Life*, July 17, 1964, 28.

[1309] Wechsler, "Entrapment, Inc.," Mar. 7, 1966, 26.

[1310] "Justice for Homosexuals," *Nation*, 319.

[1311] Editorial Board, "Homosexuals in Denver," 18.

"far too many officers who might be out apprehending murderers and robbers, are spending their time . . . peeking through little holes in men's rooms."[1312]

In large part, of course, the media's reservations were purely pragmatic: an objection to what Pearl Hart decried in the *Chicago Daily News* as the vice squad's squandering of "time and the taxpayers' money."[1313] But even the most pragmatic concerns about officers who spent their hours "peeking" into men's rooms or flirting in homosexual bars also bespoke a more delicate concern about the vice squad's anti-homosexual operations. Journalists like Doty and Welch had portrayed the vice squad's proficiency in infiltrating the gay cruising scene as a professional skill, one from which their readers could stand to benefit. Yet as some readers' more acerbic criticisms implied, wasn't the vice officer's unique intimacy with the enigmatic gay world—not to mention his apparent zeal for enticing homosexual arrests—a fairly dubious professional accomplishment?

The explosion of media attention to the American homosexual in the 1960s came directly on the heels of a high-profile cautionary tale in the state's excessive entanglements with homosexuality. The government body involved in that case was not the police, but a legislative commission: Florida's Johns Committee, whose zealous investigations into homosexuality in public agencies culminated with its 1964 pamphlet "Homosexuality and Citizenship in Florida."[1314] Anticipating the pedagogical ambitions that would soon drive popular publications

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[1312] Thurber, "The City's Homosexuals," 4. See also Edwin M. Schur, *Crimes Without Victims: Deviant Behavior and Public Policy: Abortion, Homosexuality, Drug Addiction* (Englewood Cliffs: Prentice Hall, 1965), 82 (questioning "whether the use of policemen as decoys and for other surveillance of homosexuals is justified—particularly when there are more urgent social problems to which such efforts might be directed").

[1313] Wille, "Police Watch Homosexuals' Hangout Here," 4.

[1314] Florida Legislative Investigation Committee, "Homosexuality and Citizenship in Florida" Tallahassee, Florida, January 1964. For the history of the Johns Committee, see generally Stacy Lorraine Braukman, "Anticommunism and the Politics of Sex and Race in Florida, 1954-1965" (Ph.D. dissertation, University of North Carolina at Chapel Hill, 1999); R.O. Mitchell, Report of the Florida Legislative Investigation Committee (February 1965).

like the *New York Times*, the booklet proposed to share some "basic knowledge" on homosexual men with state administrators, although it noted that its insights were also invaluable to "every parent and every individual concerned with the moral climate of the state."[1315] To that end, it provided readers with a broad map of the homosexual's "special world," from his pornographic preferences and cruising habits to his unrealistic dreams of monogamy to—of course—a glossary of "Homosexual Terms and Deviate Acts."[1316] Making no secret of its deference to the "Biblical description of homosexuality as an 'abomination,'" the Johns Committee hoped that its intervention might cast some light on the homosexual's "insatiable" sexual appetite before he had a chance to wreak more damage on the nation's children.[1317] And some citizens certainly appreciated the efforts. As one Miami resident wrote to the Johns Committee after hearing the pamphlet described in the press, "I admire you very much for publishing this booklet and I do hope it will shock our State into making some new and stiff laws to control these SEX DEVIATES."[1318]

Unfortunately for the Johns Committee, however, most people who actually read "Homosexuality and Citizenship in Florida" were shocked less by the depravity of the homosexual than by the pamphlet's own sensationalistic excesses. Eager to impress readers with the gay world's sordid sexual practices, the booklet veered into fairly graphic detail. Its sampling of gay cruising techniques included a step-by-step guide to using glory holes: the cruiser first "places a finger through the hole," then waits while "the finger of the unknown

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[1315] Florida Legislative Investigation Committee, "Homosexuality and Citizenship in Florida" ("Preface").

[1316] Ibid. ("Special World of Homosexuality," "Why Be Concerned?", "Glossary of Homosexual Terms and Deviate Acts").

[1317] Ibid. ("Who and How Many are the Homosexuals?").

[1318] Braukman, "Anticommunism and the Politics of Sex and Race in Florida," 289.

occupant . . . appears," and finally "inserts his sex organ."[1319] Its official Glossary promptly devolved from a list of generic gay slang ("trade," "fairy," "queen") to a voyeuristic catalogue of sexual fetishes ("anilingus" [sic], "urolagnia," "piquerism," and "flagellation").[1320] And in addition to its soon-infamous cover of two naked men kissing, the booklet's illustration included erotic prints of underage boys and a candid shot of two cruisers having oral sex through a partition in a public bathroom.[1321] Within a year, the Guild Press was distributing bootleg copies of the "Purple Pamphlet," as it came to be known, as novelty gay pornography.[1322]

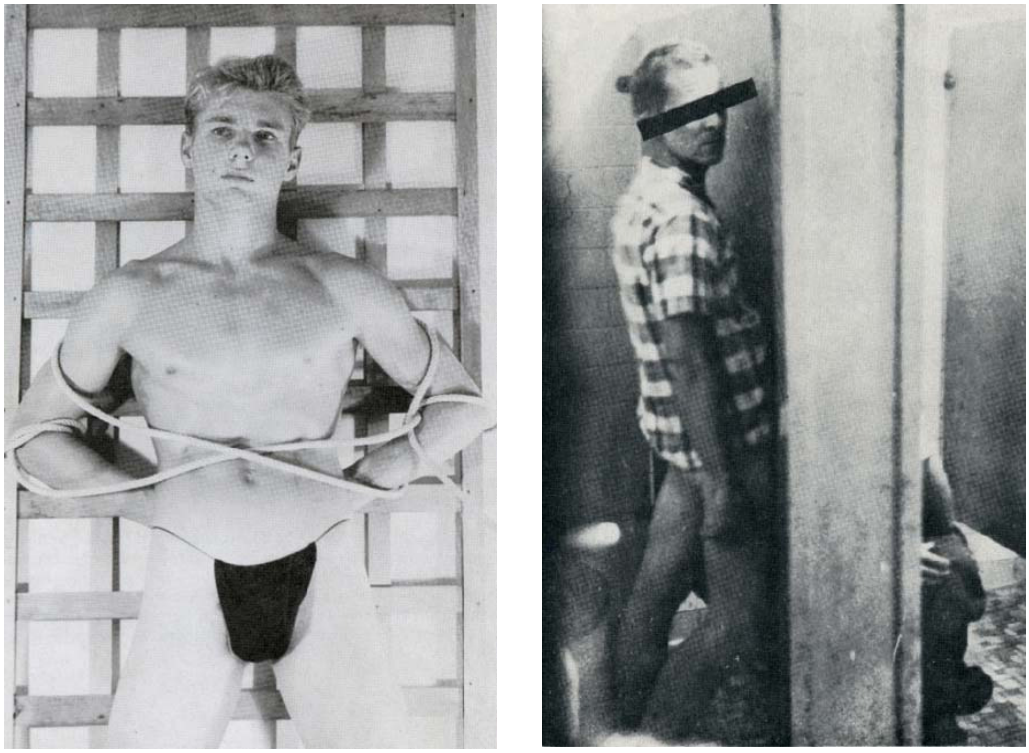


Figure V.3. Illustrations from "Homosexuality and Citizenship in Florida."

[1319] Florida Legislative Investigation Committee, "Homosexuality and Citizenship in Florida" ("Why Be Concerned?").

[1320] Ibid. ("Glossary of Homosexual Terms and Deviate Acts").

[1321] See generally ibid.

[1322] Advertisement for Trojan Book Services in *DRUM*, April 1966, "Law Enforcement—Sex Crimes Hysteria" Folder, Len Evans Papers, Gay and Lesbian Historical Society of Northern California, San Francisco Public Library. See also Thomas Waugh, *Hard to Imagine: Gay Male Eroticism in Photography and Film from their Beginnings to Stonewall* (New York: Columbia University Press, 1996), 375.

Unsurprisingly, the Purple Pamphlet turned into an instant scandal for the Florida legislature. The district attorney of Dade County dismissed it as "obscene and pornographic," a "means of engendering homosexuality" rather than restricting it.[1323] State Representative Fred Karl lambasted the Johns Committee's role in effectively disseminating gay erotica, decrying "anyone, and especially a committee of this legislature, [who] engaged in the publication of such vile material."[1324] The attacks soon spread to the popular press well beyond Florida's own borders.[1325] An editorial in the *Nation* marveled at the Johns Committee's "strange preoccupation with homosexuality."[1326] The committee's "war to protect the people of Florida from . . . dangerous homosexuals," derided the *New Republic*, "has taken a rather odd turn."[1327] As these insinuations suggested, "engendering homosexuality" among Florida's youth was not the sole concern raised by the Purple Pamphlet's graphic details. As during the Lavender Scare, when political cartoonists lampooned the Senate Republicans' dubious zeal for hounding suspected homosexuals in federal government, the sheer prurience of their final product called the Johns Committee's own motivations into question.[1328] Forced to defend its use of state funds

[1323] "Uproar Follows Report of Deviates in Florida," *Hartford Courant*, Mar. 19, 1964, 20l; see also Robert H. Williams, "Sex, Tallahassee," *New Republic*, May 23, 1964, 5.

[1324] "Uproar Follows Report of Deviates in Florida," *HC*, 20l.

[1325] See, for example, ibid.; Welch, "The 'Gay' World Takes to the City Streets," 74. The *Miami Herald* labeled the pamphlet an "official obscenity." Welch, "The 'Gay' World Takes to the City Streets," 74.

[1326] "Still Another List," *Nation*, June.22, 1964, 615.

[1327] Williams, "Sex, Tallahassee," 5.

[1328] For aspersions against the Senators leading the Lavender Scare in the popular media, see Johnson, *Lavender Scare*, 107; cf. David Alan Sklansky, "One Train May Hide Another": Katz, Stonewall, and the Secret Subtext of Criminal Procedure," *University of California-Davis Law Review*, Vol. 41 (2008), 916 ("What many people said or suggested, of course, was that the officers themselves might be sexually attracted to their work—essentially the same charge advanced in the 1950s against the congressional investigators fomenting and capitalizing on the Lavender Scare.").

on reprinting homosexual pornography, the Committee disbanded in the summer of 1965—a victim of having succeeded perhaps too well at its goal of publicly exposing the homosexual.[1329]

As mainstream outlets like *Life* inherited the Johns Committee's pedagogical aspirations in the mid-1960s, however, the suspicions generated by the Purple Pamphlet did not disappear alongside it. On the contrary, gay men and civil libertarians critical of the vice squad's anti-homosexual campaigns seized on such sly concerns to undermine the police's intimate surveillance and harassment tactics. With details of the police's intimate intrusions into the gay world flooding the pages of the popular press, journalists refocused the skepticism with which so much of the public had greeted the Johns Committee's "odd" fixation on sexual deviance onto the vice squad's techniques against the urban gay community—what the *New York Post*'s James Wechsler decried as the police's "preoccupation" with "hounding" homosexuals.[1330] And they soon harnessed their attacks to the vice squad's most sophisticated, impressive tool: the plainclothes decoy.

The first to recognize a new potential opening into the sympathies of the American public in the 1960s were gay men themselves, who commonly mocked the tenuous lines between the police and the alleged "degenerates" they patrolled. One man interviewed by Jess Stearn derided the NYPD vice officers who "postur[ed] for a half hour" in public bathrooms trying to make an arrest: "They should be the ones charged with loitering," he insisted.[1331] Another informed the *Atlanta Constitution*'s Dick Hebert that decoys routinely "expose[d] themselves" to cruisers, making "themselves more than available" for sexual overtures. (With either impressive

[1329] Mitchell, Report of the Florida Legislative Investigation Committee, vi; Waugh, *Hard to Imagine*, 375.

[1330] Wechsler, "Entrapment, Inc.," Mar. 7, 1966, 26.

[1331] Stearn, *Sixth Man*, 168.

artlessness or impressive dryness, he added, "I don't believe it's a policeman's job to do that. . . . Of course, I don't know what else they do.")[1332] When *Playboy* informed the nervous university employee in Ohio that the homosexual "signal" on which the police had relied to make their arrests was the cruiser's tapping his foot in a toilet stall, a gay reader wrote to express his astonishment at the tactic.[1333] It must set "some kind of record when a homosexual like me learns 'tricks of the trade' he knew nothing about from *Playboy*, which you learned from the police department," marveled A.J. Seagrams. "And *I'm* considered abnormal!"[1334] Seagrams's complaint captured the curious flow of knowledge created by the media's tutorials on homosexuality in the 1960s: popular magazines obtaining "insider" information about gay culture from the police force and then teaching it to the general public. Yet it also suggested the intrinsic dubiousness of a municipal police force apparently more sophisticated in the ways of gay sex than many gay men.

Whether out of political sympathy or a comic appreciation of the absurd, some critics in popular press soon caught on to the critique. Examining homosexual men's legal troubles for the *New York Times*, civil libertarian Webster Schott depicted the police decoy in the field in terms indistinguishable from any other member of the homosexual marketplace: "Cruising gay bars," he charged, policemen affect gay mannerisms to "try to ensnare homosexuals."[1335] In the *Chicago Daily News*, attorney Pearl Hart noted that the vice squad's "good looking" decoys "go out almost on the make, you might say," enticing homosexual men by flirting with them in bars

[1332] Hebert, "Detectives Watch Hangout," 1.

[1333] "Playboy Forum," *Playboy*, August 1966, 145.

[1334] "Playboy Forum," *Playboy*, January 1967, 56.

[1335] Schott, "Civil Rights and the Homosexual," 47

and plying them with drinks.[1336] Prowling the urban homosexual's favorite nightspots in search of a suitable partner, fluent in the homosexual's unique mating patterns, tax-funded vice officers emerged as near-equally native citizens of the homosexual underground as the "undesirable" homosexuals they policed.

Some critics adopted even more aggressive rhetoric. Whether out of derision for the vice squad's anti-homosexual crusades or out of genuine suspicions of the officers who so convincingly flirted with homosexual targets, many gay men had long suggested that decoy officers who entrapped homosexuals for a living were gay themselves. One man in San Francisco had recalled questioning the sexual preferences of the men who staffed the city's decoy force in the 1950s: "Often the most handsome, hung, desirable-looking cops were used for these plainclothes operations," he remarked. "I often wondered who did the selecting."[1337] Another man living in Los Angeles in these years insisted that the plainclothes officers who walked the streets "teasing" gay men were part of the problem they policed: "[M]ost of these guys were living with other cops themselves, you know?"[1338] By 1961, the gay men interviewed by Jess Stearn expressed a common belief that the police officers who emulated homosexuals in order to entice solicitations were more than just professionally invested in their work. As Stearn summarized, they consistently believed that "it takes one to know one"—or, as one subject more colorfully put it, "It takes lavender to smell lavender."[1339]

[1336] Wille, "Police Watch Homosexuals' Hangout Here," 4.

[1337] Michael Rumaker, *Robert Duncan in San Francisco* (San Francisco: City Lights Books, 2013), 16.

[1338] Transcript of interview of "Tex or JR" by Len Evans, undated, 24, Oral History Project, GLBT Historical Society (San Francisco, CA).

[1339] Stearn, *Sixth Man*, 167.

In large part, of course, such winking insinuations were a defensive polemic: an attempt to embarrass the police who tormented gay men in the mid-century, even outside their earshot, by launching presumably offensive aspersions against their own sexual practices.[1340] Yet the gay community's persistent charges that the vice squad's decoys "must" have been gay in order to perform their duties so effectively also reflected another, more aggressive strategy of resistance: a persisting insistence, despite the gay community's many painful experiences to the contrary, that gay men boasted unique talent at identifying others of their kind. By the early 1960s, some gay men caught up in the vice squad's plainclothes campaigns had learned to question Donald Webster Cory's claims in *The Homosexual in America* that "[t]he rapidity with which homosexuals recognized one another [can] only be contrasted with their success in remaining unrecognized by those outside the group."[1341] At least in public, however, many others continued to insist that the police's decoy arrests only confirmed, rather than undermined, that unique talent. In the *New York Times*, Doty contrasted the "normal" man's inability to spot gay men against gay men's own claimed "infallibility in identifying of their kind."[1342] "Confident they can tell a homosexual anywhere," Stearn reported in the *Sixth Man*, "some homosexuals claim they can name at least ten for every one spotted by a sharp-eyed heterosexual."[1343] As one interviewee informed Stearn, "Homosexuals have a sixth sense nonhomosexuals can never

[1340] In this sense, the strategy was not far different from gay customers' tactics for evicting heterosexual tourists from their exclusive bars: claiming to recognize past lovers, or unwelcome arrivals about their "butch" fashions or effeminate mannerisms, in order to simply humiliate them into leaving. Cavan, "Interaction in Home Territories," 27-28.

[1341] Cory, *Homosexual in America*, 80. See also Chapter 5.

[1342] Doty, "Growth of Overt Homosexuality," 33.

[1343] Stearn, *Sixth Man*, 55.

develop."[1344] At heart, gay men's claims that they could pass unnoticed by the mainstream public was part of the same power play that underlay the public's own confidence that it could easily identify a homosexual on sight. While some members of the urban public affirmed their cosmopolitanism and sophistication through their mastery over the sexual deviant, gay men proclaimed their superiority over a hostile public by emphasizing its naiveté and ignorance of gay communities. Particularly as gay men in American cities came together into increasingly camouflaged, diverse communities, their insistence on their allegedly exclusive powers of self-recognition provided a key weapon against the arrogance and contempt with which popular culture treated the flamboyant fairy.

Had Doty's or Stearn's readers hesitated to take gay men at their word, by the 1960s those boasts had also received some surprising support from the nation's leading medical experts on sexual deviance. Psychiatrists had first advanced the notion that identifying homosexuals involved a set of skills and instincts unique to the sexual deviant as early as the 1930s, when the National Association for Mental Health reported that "homosexuals recognize each other intuitively, as well as through experience."[1345] Over the next decades, gay men's exclusive powers of self-recognition emerged as a core part of the psychiatric discipline's turn against the stereotype of the effeminate fairy. Far from advertising their difference to the casual passerby, insisted New York psychoanalyst Abram Kardiner in 1954, "homosexuals recognize one another by mysterious signs to which the heterosexual male is blind."[1346] Writing for the *New York Times Magazine* in 1965, Irving Bieber confirmed that while "sexually normal people

[1344] Ibid.

[1345] National Association for Mental Health, *Mental Hygiene*, Vol. 22 (1938), 608.

[1346] Abram Kardiner, *Sex and Morality* (Indianapolis: Bobbs-Merrill Company, 1954), 161.

(heterosexuals) by and large have no way of identifying most homosexuals," gay men "recognize each other through characteristic language and subtle behavior cues," often adopted "without even being consciously aware of it."[1347] As Columbia University's David Abrahamson concluded, the homosexual's talents at picking out kindred spirits through his nearly imperceptible behavioral codes meant that he rarely approached sexual partners who did not share his predilections. "It is as though there is a mutual sexual attraction between them," he speculated.[1348] As in the interwar years, emphasizing the difficulty of classifying gay men helped inflate the status of the psychiatric profession, turning both the identification and treatment of true sexual deviance into matter of medical expertise. But it also suggested, not counterintuively, that the "expertise" involved in recognizing homosexual was not always a medical talent. In most cases, it was a skill developed and practiced primarily by homosexuals themselves.

Unsurprisingly, by the start of the decade the rumors of the homosexual's exclusive powers of self-recognition had also permeated the nation's police departments. As Los Angeles attorney Herb Selwyn recalled from his conversations with plainclothes decoys, "the other officers teased them that it takes one to catch one, things of that type."[1349] No doubt some decoys shrugged off such insults as good-spirited banter. Selwyn himself remembered accidentally approaching one arresting officer while trying to identify a new client in court. "I know I look like a fag," the officer assured him, apparently without a hint of embarrassment.

[1347] Bieber, "Speaking Frankly," 75.

[1348] David Abrahamsen, *Crime and the Human Mind* (New York: Columbia University Press, 1944), 119; reprinted in David Abrahamsen, *Psychology of Crime* (New York: Columbia University Press, 1960), 169.

[1349] Interview of Herb Selwyn by John D'Emilio, NYPL.

"That's why they chose me for this assignment."[1350] But by the 1960s, some decoys were approaching the inevitable cases of mistaken identity with a little less magnanimity. Jess Stearn recalled interviewing one plainclothes detective who, undercover but not out to make solicitation arrests specifically, was approached by an "obvious homosexual" while standing in Herald Square. Half-amused by the flagrant proposition, the officer nevertheless "half-resent[ed] the fact that he had been singled out by a 'fairy.'"[1351] In another anecdote that soon made the rounds among New York's gay community, an officer waiting to testify in court found himself accidentally called to the stand in the defendant's place. After an aide alerted the presiding judge to his mistake, a wave of suppressed laughter in the courtroom left the young officer "blush[ing]."[1352] Even the vice inspector who had shown such careless fluency in gay slang turned out to be somewhat self-conscious about sounding too much like a homosexual. "Just because some pretty boy makes eyes at you," he observed at one point to Stearn at one point, "gives you no reason for picking him up." Noting Stearn's immediate smile at the inadvertent innuendo, the officer "hurriedly amended" that he "mean[t], picking him up if you were a cop."[1353] Well aware that their jobs forced them to cross social boundaries that no "normal" man could typically be expected to transgress, some vice officers had grown self-conscious about what their consummate homosexual camouflage implied to the public about their own sexual lives.

Against this backdrop, liberal critics' acerbic remarks about the vice squad's irrational "preoccupation" with homosexuality—as well as less aggressive criticisms of how vice officers

[1350] Ibid.; Author's interview with Herb Selwyn, July 12, 2014.

[1351] Stearn, *Sixth Man*, 149.

[1352] Ibid., 167.

[1353] Ibid., 158.

were spending their time—clearly hit a nerve. Even before the media turned its attention to the vice squads' tactics, some of the nation's larger police departments had become sensitive to the dubious optics of their undercover operations against gay men. By 1964, police agencies around the Los Angeles area had instituted internal regulations to protect their public reputation from being damaged by vice officers' overly zealous pursuit of homosexual arrests.[1354] Several units formally forbade their plainclothes decoys from emulating homosexual cruisers in the field; "prohibited operating techniques" included jingling loose change, wearing overly tight trousers, and generally "lending themselves to the character of the homosexual."[1355] The LAPD warned its men against using urinals in public bathrooms or infiltrating cruising sites where blending in among the clientele might require officers to get undressed, such as gay bathhouses.[1356] Concerned by charges of vice officers engaging in overtly flirtatious conduct on the job, the department cautioned that officers sent out to infiltrate gay cruising sites "should "avoid any conversation or action which could be construed as willing participation and results in public criticism or embarrassment of the officer."[1357] In part, of course, such precautions aimed to appease the courts. As vice squads were well aware, trial judges in these years commonly found ways to dismiss charges brought by overly aggressive officers.[1358] Yet as the LAPD's emphasis on avoiding "public . . . embarrassment" implied, these policies also reflected police

[1354] The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration Techniques in Los Angeles County," *UCLA Law Review*, Vol. 13 (1966), 694 [herein after "*UCLA Law Review* Study"]. Policies cited by this article date include internal reports from March 1964, with some dating back to 1962. Ibid., 694 fn. 47 & n.53.

[1355] Ibid., 705 fn. 119

[1356] Ibid., 694.

[1357] Ibid., 691 fn. 34.

[1358] See Chapter 4.

departments' concerns about their popular image: their recognition that, in the words of one 1966 study of police techniques, perhaps "society does not approve of officers who dress and act like homosexuals."[1359]

When journalists like Doty and Welch turned to urban vice officers for their professional insights into their local gay communities, some investigators openly emphasized their unique intimacy with the social world of the American homosexual. As late as the winter of 1965, Whearley's article in the *Denver Post* seemed to suggest that the city's gay world was rife with vice officers keeping an eye on popular gay bars as much from duty as from curiosity. Soon after the flurry of media attention began, however, police chiefs more sensitive to the dubious optics of the vice squad's sordid anti-homosexual tactics rushed to downplay their involvement with the homosexual subculture. Hardly grateful for the attention, the LAPD responded to Welch's coverage of its educational pamphlet on homosexuality by flatly denying the story. When a curious reader wrote the agency to request a copy of "Some Characteristics of Homosexuals"—having learned of it not through *Life* itself, but through Hugh Hefner's admiring follow-up in *Playboy*—the LAPD insisted that Welch's report was based on "a misunderstanding" and no such publication ever existed.[1360] (*Playboy*'s editorial board assured the reader that, while the LAPD "may now deny [its] existence," they had a copy of the "seven-page typewritten report" in their own possession.[1361])

Meanwhile, other departments took a more proactive approach. When Jean White interviewed the Morals Squad for her account in the *Washington Post*, one official eager to

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[1359] *UCLA Law Review* Study, 706 fn. 127.

[1360] "Playboy Forum," *Playboy*, February 1965, 37-38.

[1361] Ibid., 38.

appease critics like *Life*'s outraged taxpayer denounced rumors that the Morals Squad spent its days peeking through the windows of men's lavatories. "Our officers may go in for five or ten minutes and then leave to come back again," he insisted, but "they don't sit by hours at peepholes. They don't have the time."[1362] After the New York Civil Liberties Union decried the spate of undercover officers in Greenwich Village and Times Square, Chief Inspector Sanford Garelik emphasized the small role played by anti-homosexual assignments in his officers' daily schedules to reporters. "Offenses by homosexuals [are] of only minor concern to them," he assured, "compared with the total problem of narcotics, ground control and other matters."[1363] Even Lieutenant O'Grady, happy to detail gay men's curious flirtations in bars for the *Chicago Daily News*'s Lois Wille, qualified that the bulk of his squad's anti-homosexual campaigns focused on prostitution and "the crime syndicate"; his officers were not simply "interested in going after queers."[1364]

Police chiefs made a particular point of downplaying the consummate gay camouflage that reporters like Welch presented as the vice officer's most impressive professional accomplishment. In January of 1965, the D.C. Morals Squad dismissed any allegations that its plainclothes decoys "camped it up"—"dressed and acted like stereotyped homosexuals to tempt suspects"—as a thing of the past. When White visited the police headquarters, she reported the vice officers who greeted her all had the "appearance of clean-cut men with normal clothes and haircuts."[1365] In Long Island, the Suffolk County Police Department repudiated accusations that officers on Fire Island "pos[ed] as homosexuals" to entice illicit solicitations. The

[1362] White, "Those Others IV," A19.

[1363] Pace, "Garelik Urges Public to Report Police," 60.

[1364] Wille, "Police Watch Homosexuals' Hangout Here," 4.

[1365] White, "Those Others IV," A19.

plainclothesmen who arrested gay men across Fire Island, insisted one detective, were simply "patrolling public areas and observing the obvious."[1366] Meanwhile, although the NYPD never specifically denied that its undercover operations against gay men sometimes required officers to dress like homosexuals, it insisted that these assignments required no particular professional training. As Chief Inspector Garelik assured reporters after the ACLU accused the New York vice squad of patrolling gay bars in tennis shoes and polo shirts, "plainclothes men in general dress[] to fit their surroundings."[1367]

By 1966, the liberal media's constant criticism of vice squads that relied on undercover officers to imitate and to entice gay men had become a significant concern for the police. That year, around the same time that police departments across the nation started launching civilian review boards and training programs to redress charges of racial abuses, several prominent agencies also publicly revised their policies on plainclothes solicitations of gay men.[1368] In Washington, D.C., after Roy Blick retired from the Morals Squad in 1964, his replacement tried to repair the unit's sordid reputation by not merely prohibiting its officers from affecting "camp" mannerisms, but also scaling back its use of decoys altogether. By the end of 1965, the city had

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[1366] Francis X. Clines, "L.I. Homosexual to Get Legal Aid," *New York Times*, Jul. 24, 1967, 19.

[1367] Pace, "Garelik Urges Public to Report Police," 60 (reporting police Chief Inspector's insistence, in response to criticism of vice officers' clothing, that "that plainclothes men in general dressed to fit their surroundings").

By 1967, a vice officer from San Jose felt the need to intervene in *Playboy*'s monthly discussions of overzealous anti-homosexual policing. In the course of his six months on the homosexual detail, James Wittenburg insisted, "my partner and I dressed conservatively, in Levis, sport shirt, and loafers," and "never employed verbal advances or other enticements to aid in making our arrests." "Playboy Forum," *Playboy*, December 1967, 84. Wittenberg's estimation of "conservative" dress relied on some very fine distinctions from the same fashions the ACLU had accused of constituting outright entrapment.

[1368] For the rise of civilian review board, see "Leary Announces His Review Board," *New York Times*, Nov. 23, 1966, 1; "ACLU Counsel Will Discuss Review Boards," *Los Angeles Times*, May 10, 1965, SF8; Darien, "Patrolling the Borders," 180. For police training programs, see Bernard Weinraub, "Police Academy Widens Outlook," *New York Times*, Jun. 22, 1966, 49; Arthur Jackson, "Advisers Help Police Avoid Violations of Civil Liberties," *Chicago Tribune*, Jan. 16, 1966, 22.

entrusted the policing of cruising spots like Lafayette and Franklin Parks entirely to a twenty-four-hour uniformed patrol by the Park Police, resulting in a 50% decrease in homosexual arrests.[1369] Long a critic of Blick's "disgusting practice" of undercover enticement, the *Washington Post* welcomed his new policy as "an enlightened and eminently healthy reform."[1370]

Meanwhile, in New York City, by the spring of 1966 the Mattachine Society's and NYCLU's complaints about policemen emulating gay men to entice solicitations had reached the ears of Mayor Lindsay's administration.[1371] Their campaign had received a critical boost in early March, after Randolfe Wicker and Mattachine president Dick Leitsch invited the *New York Post*'s James Wechsler to spend an evening taking phone calls from gay men arrested by the NYPD's decoys.[1372] Outraged by what he heard, Wechsler soon ran the first of his scathing editorials on "Entrapment, Inc.," denouncing the vice squad's "medieval" tactics as a blatant "squandering of police manpower."[1373] On April 1, Inspector Garelik addressed Wechsler's charges in a public interview, citing the NYPD's internal guidelines against "entrapment" and urging the public to "report cases in which policemen lure homosexuals into breaking the law."[1374] His statement was not well received. The civil liberties union derided Garelik's "naiveté" about his own department's undercover practices, while Wechsler shot back that it was

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[1369] "Roy Blick to Retire, Recommends Moyer," *Washington Post*, June 10, 1964, B5; "Morals in the Parks," *Washington Post*, Jan. 1, 1966, A6.

[1370] "Morals in the Parks," *WP*, A6.

[1371] For the role of the NYCLU, see Pace, "Policemen Forbidden to Entrap Homosexuals," 36; Sklarewitz, "Caught in the Act," 1.

[1372] Alwood, *Straight News*, 58-59.

[1373] Wechsler, "Entrapment, Inc.," Mar. 7, 1966, 26.

[1374] Pace, "Garelik Urges Public to Report," 1.

Garelik's "responsibility, not the public's," to pull officers in line with official policy.[1375] A month later, Police Commissioner Howard R. Leary issued a formal policy change forbidding police officers from entrapping homosexuals.[1376] The move was heralded by legal groups from the ACLU to the New York Bar Association, and by newspapers throughout New England.[1377] With particular enthusiasm, the President of the New York Mattachine Society embraced the new policy as "the best thing that ever happened."[1378]

To be sure, the rash of public policy changes in the mid-1960s did not signal the end of vice squads' reliance on plainclothes decoys to boost their arrest rates. Undeterred by public criticism, some police chiefs defended their undercover practices well into the end of the decade. As the head of one morals division insisted: "I don't care how my men catch them, so long as they catch the right ones. Rats must be stopped."[1379] Even in cities like New York and Los Angeles, neither vice squads' widespread denials of their decoys' more embarrassing tactics nor their public policy revisions ended the practice of vice officers impersonating homosexual cruisers. In Manhattan, Commissioner Leary's renunciation of police entrapment did not halt the city's prosecutions of men arrested by undercover officers.[1380] In Long Island, gay men accused the Suffolk County Police Department of "dressing" like "homosexuals," "caress[ing] their pubic

[1375] Ibid., 60; James Wechsler, "Entrapment, Inc.," *New York Post*, Apr. 5, 1966.

[1376] Pace, "Policemen Forbidden to Entrap Homosexuals," 36.

[1377] "Police Policies And Sex Deviates," *HC*, 20; Gregory Battock, "Police as Decoys," *New York Times*, Jan. 8, 1968, 38.

[1378] Pace, "Policemen Forbidden to Entrap Homosexuals," 36.

[1379] Albert Deutsch, *The Trouble with Cops* (New York: Crown Publishers, Inc., 1968), 86.

[1380] Harold Bramson, letter to Mimi Bowling, December 7, 1994, 1, MssCol 18787, International Gay Information Center, New York Public Library.; see also Schott, "Civil Rights and the Homosexual," 47.

regions," and "simper[ing]" at passing men.[1381] Even in the Bay Area, famous for its alleged liberalism toward its gay community, local police relied on plainclothes decoys well through the end of the decade.[1382] Police departments' rush to distance themselves from the plainclothes decoys' controversial undercover tactics in the press, in short, did not necessarily bespeak a genuine commitment against the "evil business" of entrapment.

It did, however, reveal the public stigma attaching in the 1960s to vice officers who seemed to have too much intimacy with the contours of the urban gay world. Reporters like Welch and Doty leaned on the vice officer's professional expertise in the nuances of contemporary gay culture—its telltale fashions, its unique slang, its specialized cruising patterns—as an impressive skill and helpful source for their own ethnographic tutorials. Yet as the press began to reveal the blurring lines between the vice squad's undercover agents and homosexual cruisers in the field, the decoy's fluency in gay cruising culture did not simply cast him as a unique authority on the subject of sexual deviance. It also implicated him in that deviance itself. Initially happy to tout their unique knowledge to curious reporters, vice officers soon discovered that the popular press was not so different from the courts. Before the press, as before the bench, displaying too much expertise with the gay world could undermine the police's legitimacy—not only by raising doubts about the fairness of their enticement tactics, but also by impugning the perverse motives behind their own "preoccupation" with homosexuality.

[1381] Dick Leitsch, letter to Editor, *Fire Island News*, August 23, 1966, 1, Folder 7, Box 6, Reel 15, Mattachine Society Collection, International Gay Information Center, New York Public Library.; see also Clines, "L.I. Homosexuals to Get Legal Aid," 19.

[1382] "S.I.R. Sues to Halt Police East Boy 'Decoy' Squads," *Vector*, Vol. 5, No. 5 (August 1969), 8. See also "Coming to Terms," *Time*, Oct. 24, 1969, 88 (castigating vice squads for their "resort to such quasi-legal and demeaning tactics as entrapment"); Deutsch, *Trouble with Cops*, 86 ("Associated with the problem of entrapment, in many cities, is the existence of an unofficial, but strictly imposed quota system, requiring each vice-squad man to make a certain number of arrests each week or month.").

Interviewed by the Johns Committee around 1964, a veteran investigator with the Florida police defended the vice squad's anti-homosexual operations based on their superior knowledge of American homosexuals: "The problem is so little understood by lay people that the homosexuals will win every battle unless we band together to educate ourselves," he explained. "[The homosexual] is afraid of the police officer, because he feels the police offer can see through him a lot easier than anyone else can."[1383] Yet the press's and the public's ambivalent reactions to the vice officer's professional expertise in the 1960s reveal that the policeman's status as a social authority on sexual deviance was not coterminous with his claims of professional "expertise" about that phenomenon. Even as the public accepted a certain level of erudition about homosexuality as a mark of worldly cosmopolitanism, and even as some journalists deferred to the vice officer's professional intimacy with the gay world as a much needed guide to the modern homosexual, there remained a point where an officer's "unique" insights into sexual degeneracy nevertheless transformed into a stamp of degeneracy itself.

In part, of course, the backlash against the vice officer's intimacy with gay cruising culture in the 1960s tracked a reasonable distinction between more and less palatable modes of "expertise" on sexual deviance: the inherent intellectualism of studying the homosexual's psychological origins versus the voyeurism of studying his erotic practices—learning to recognize the deviant body versus learning to pass as one. After all, no one seriously impugned the sexual "preoccupations" of psychiatrists like Irving Bieber and Edmund Bergler, no matter how much unique expertise they claimed over the homosexual male—even as Kinsey's investigations into sexual practice back in these same years faced immediate censure from

[1383] Florida Legislative Investigation Committee, "Homosexuality and Citizenship in Florida" ("What To Do About Homosexuality").

conservative critics and politicians.[1384] The public's skepticism over overly "expert" police decoys in the field—authentic enough to trigger gay men's "sixth sense" in recognizing others of their kind—reflected the unique suspicion that attached to men who could, for whatever reason, so convincingly wear the codes and customs of the sexual deviant.

Yet at the same time, that backlash also revealed an intrinsic tension underlying the vice squad's bid for authority on the grounds of its unique intimacy with urban homosexuality: the curious optics of learning too much about a social phenomenon largely defined by its cultural insularity and prurient interest. At a time when the American homosexual inspired much of the public to competing reactions of profound curiosity and condemnation, vice officers discovered that the line between invoking their expertise on the gay world to establish their authority on a timely topic and revealing sufficient intimacy to trigger suspicions of perversion itself could be incredibly thin.

That treacherous cultural boundary may help explain the ironic denunciations of the "overt" homosexual that emerged in the 1960s: the media's subtle transformation of the rarefied gay codes in which it systematically trained its naïve readership into the self-revelatory, flamboyant flags of the shameless homosexual. Perhaps especially pronounced in light of the press's still-recent consternation over the homosexual's "surprising" invisibility, that transformation echoed a familiar pattern, beginning with the pansy craze of the 1930s, of emphasizing the very *effortlessness* of the sophisticated heterosexual's ability to recognize the sexual deviant. As early as the 1930s, after all, state liquor authorities' proceedings against homosexual-friendly bars had relied on the assumption that *any* self-respecting bartender should recognize a sexual deviant when he saw one—even as bar owners themselves denied such astute

[1384] See K.A. Cuordileone, *Manhood and American Political Culture in the Cold War* (New York: Routledge, 2005), 83; James Howard Jones, *Alfred C. Kinsey: A Life* (New York: W.W. Norton & Co., 2004), 576.

powers of perception. In 1931's *Strange Brother*, cousin Phil had shrugged off the simplicity of recognizing "degenerates" inside a crowded nightclub—even as June, marveling at the novel spectacle, revealed there was not necessarily anything so simple about it.[1385] The persisting cultural impulse toward characterizing the homosexual body as something obvious, something self-revelatory, did not simply insist on the intrinsic deficiency of the deviant body. It also shielded the public's reassuring insight into that deviant spectacle from the aspersions that attended any excessive expertise on sexual degeneracy.

In this sense, the public's curious confidence in its visual mastery over the flamboyant homosexual may not have been simply a matter of self-aggrandizement, nor simply a rhetoric of social or moral superiority. Simultaneously flattering the public's power to identify gay men and denying that this power was an accomplishment of any sort, the persisting, persistent myth of the self-revelatory homosexual suggests the intrinsic paradox of the public's attempt to buttress its own distance from the sexually perverted though its intimacy with sexual perversion itself.

Conclusion

For a brief time in the early 1960s, when the popular press first discovered the "problem" of the American homosexual, the nation's vice squads seemed poised for some long overdue recognition for their unflagging campaigns against the sexual deviant. Appalled to discover that the public's outdated stereotypes of homosexuality had allowed a covert gay community to blossom beneath its nose, the media embarked on a remedial campaign to educate its readers about the modern gay world, from its favorite neighborhoods to its insular slang to its curious, codified mating patterns to its reassuringly consistent fashions. Eager to compensate for the

[1385] Niles, *Strange Brother*, 55.

public's disappearing visual mastery over the homosexual body with a new ethnographic mastery over gay culture itself, journalists reduced the gay world to an object of study and curiosity for the mainstream public. And fortunately for its purposes, the press discovered that the vice officer—that professional student and master of gay cruising culture—provided a perfect teaching assistant. Presenting the plainclothes officer's fluency in the dress, mannerisms, and customs of the homosexual as a rarefied skill forged through his unique professional exposure to the gay world, journalists portrayed the vice investigator as a uniquely credentialed authority on the problem of the American homosexual. Yet, as some police departments had always anticipated and others more bitterly discovered, the social capital of the vice officer's professional "expertise" in the contours of the homosexual subculture had its limits. Denouncing the police for using taxpayer dollars to train their officers to dress, talk, and flirt like the very degenerates they sought to patrol, progressive journalists, civil libertarians, and gay men themselves assailed the nation's vice squads by asking what plainclothes decoys' unusual intimacy with cruising culture revealed about their own moral and even sexual adjustment.

The media interest in the American homosexual in the 1960s suggests the ambivalent status of the public's intellectual mastery over the sexual deviant in the twentieth century. The sophisticated urbanite's intimacy with the phenomenon of sexual deviance—his ability to recognize, diagnose, and understand the homosexuals around him—emerged as a core component of the public's sense of security and superiority against an unwelcome sexual minority. Yet, as the vice officers acutely discovered, claiming too much "expertise" over the phenomenon of homosexuality risked casting the specter of prurience and abnormality on the expert himself. The tension underlying the public's attempts to "master" the sexual deviant in the twentieth century helps explain the myth of the self-revelatory, flamboyant homosexual, from

the effeminate fairy of the 1930s to the "overt" cruisers of the 1960s. A thin line walked particularly well by journalists in the 1960s, the so-called "overtness" of the gay body helped reassure the average American of his mastery over the sexual deviant while allowing him to keep his distance from aspersions of sexual deviance itself.

Epilogue

The early 1960s were, in many ways, the apex of the vice squads' campaigns against gay men in the United States. After the burst of media attention in the middle of the decade, the police's most innovative anti-homosexual techniques faded from their repertoire. In bars and popular cruising sites, vice squads began to distance themselves from plainclothes decoys' controversial enticement tactics. In public bathrooms, the Supreme Court's decision in *Katz* in 1967 largely ended the police's practice of clandestine surveillance in enclosed stalls.

That same year, courts in New York and New Jersey even put a stop to liquor boards' proceedings against bars that served openly gay customers. In November of 1967, the New Jersey Supreme Court finally reconsidered the suggestion that the very "presence of apparent homosexuals in so-called 'gay' bars" sufficed to violate the Alcoholic Beverage Control Law.[1386] Relying in no small part on the wisdom of "expert" sociologists like Donald Webster Cory and Edwin M. Schur, who emphasized both the insularity of gay bars and the public's growing tolerance of homosexuality, the court insisted that the public welfare demanded no absolute ban on gay customers. So long as "their public behavior conforms with currently acceptable

[1386] The ABC initially insisted that the congregation of "apparent homosexuals"—that is, patrons "who behave as homosexuals and act as homosexuals"—qualified as an actionable "nuisance" under the law. During the appeal, however, the ABC's own lawyers apparently conceded that the mere peaceful presence of effeminate homosexuals "would not constitute overt conduct offensive to current standards of morality and decency." "Three Taverns Challenge ABC Homosexual Rulings," *Asbury Park Press*, August 27, 1967, "Bars" Folder, Ephemera Collection, International Gay Information Center, New York Public Library; One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 50 N.J. 329, 340 (1967).

standards of decency and morality," the court concluded, gay and straight men alike had an "equal right" to frequent places of public accommodation.[1387]

A few weeks later, New York's highest court agreed. "It is reasonable to think that even though he dresses strangely, a homosexual may be orderly in the sense in which the Alcoholic Beverage Control Law defines order," the New York Court of Appeals declared in December of 1967.[1388] More than just the presence of an overtly gay clientele, "disorderly conduct" under the New York liquor laws required some measure of disruptive *behavior* by a bar's customers—a standard that, in the court's view, could not "distinguish between the activities of homosexuals and that of heterosexuals."[1389]

Certainly, the policing of gay men in the United States did not come to an end in the 1960s. Plainclothes officers continued to arrest gay men in parks and bathhouses well through the end of the decade.[1390] Vice squads experimented with patrols in public bathrooms into at least the 1980s.[1391] Some bar owners complained that the petty harassment of gay customers only increased over the coming years.[1392] Yet the vice squads' most controversial techniques soon went out of style, replaced by a more regularized schedule of uniformed patrols and bar raids. It was perhaps no coincidence that, when the policing of gay men reclaimed the national spotlight during the Stonewall Riots of 1969, the catalyzing event was not some clever

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[1387] One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 50 N.J. 329, 334-36 (1967).

[1388] Kerma Rest. Corp. v. State Liquor Auth., 21 N.Y.2d 111, 115 (1967).

[1389] Becker v. New York State Liquor Auth., 21 N.Y.2d 289, 292 (1967).

[1390] Albert Deutsch, *The Trouble with Cops* (New York: Crown Publishers, Inc., 1968), 86; "S.I.R. Sues to Halt Police East Boy 'Decoy' Squads," *Vector*, Vol. 5, No. 5 (August 1969), 8; "Coming to Terms," *Time*, Oct. 24, 1969, 88.

[1391] See, for example, People v. Dezek, 107 Mich. App. 78, 85 (1981).

[1392] See, for example, "Playboy Forum," *Playboy*, January 1967, 56.

plainclothes operation or clandestine surveillance post, but a public raid carried out primarily by uniformed policemen.[1393]

The 1960s thus emerged as a delicate time for vice squads: a moment when the police's specialized exposure to the gay world both turned it into a type of professional authority on homosexuality and ultimately undermined support for its most effective tactics. On the one hand, the growing sophistication of urban vice operations over the mid-twentieth century transformed police officers into expert voices on homosexuality in the United States. From their intimate surveillance of public bathrooms to their nightly observations in gay bars to their fluency in gay cruising culture, police officers amassed a body of unique, self-consciously specialized insights into the queer underworld. If, in the 1930s, policemen largely echoed the mainstream public's common stereotypes of the fairy, by the 1960s they had emerged at the forefront of public debates about urban deviance as rarefied experts on the contemporary gay world. As one veteran vice officer assured the *Washington Post* in 1965: "The public can't understand what it doesn't see. *We see them*."[1394]

In practice, of course, the vice squads' proliferating anti-homosexual campaigns allowed them to play a strong role in how the public itself saw gay men. Professionals who both operated in unique proximity to the gay world and carried behind them the force of the state, vice officers emerged as core epistemological agents in the construction of public knowledge about gay communities. Choosing among competing bodies of wisdom about gay men so as to expand

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[1393] For an overview of the Stonewall Riots and their prominent statute in the mainstream media, see Martin Duberman, *Stonewall* (New York: Dutton, 1993); Charles Kaiser, *The Gay Metropolis, 1940-1996* (New York: Houghton Mifflin, 1997), 198-201; Edward Alwood, *Straight News: Gays, Lesbians, and the News Media* (New York: Columbia University Press, 1996), Chapters 3 and 4; Larry Gross, *Up From Invisibility: Lesbians, Gay Men, and the Media in America* (New York: Columbia University Press, 2001), Chapter 3.

[1394] Jean M. White, "Those Others IV: 49 States and the District Punish Overt Homosexual Acts as Crimes," *Washington Post*, Feb. 3, 1965, A19 (emphasis added).

their enforcement practices, endorsing their preferred paradigms in court, and imposing direct legal penalties against defendants who dared to disagree, the police helped determine how—and when—shifting scientific and social insights into homosexuality reached the American public.

Yet on the other hand, the police's influence over public understanding about gay men in the twentieth century often had little to do with any claims to professional "expertise." Even as they gained an ever-more impressive mastery over urban cruising culture, vice officers routinely found themselves legitimating their operations by *denying* any specialized insights into the gay world. From liquor boards' proceedings against gay-friendly bars to plainclothes decoys' arrests of flirtatious customers to the vice squads' observations in public bathrooms, police officers insisted that their campaigns to ferret out homosexual delinquency in public drew simply on the public's common-sense intuitions about gay men. When, in the 1960s, some officers finally ventured to take credit for their more specialized wisdom in the popular press, they discovered that their overt claims to professional expertise only undermined their legitimacy among the mainstream public.

The police's modesty about their professional insights into the gay world likely accommodated a number of factors. In many cases, the police's staunchly democratic rhetoric reflected the strict requirements of the law: the constraints of state liquor statutes that prohibited bar owners from "knowingly" serving gay customers, or the Fourth Amendment's limited exceptions for evidence left in "plain view." In others, that rhetoric accommodated the humors of particular trial judges, many of whom disdained the police's more aggressive tactics even when those tactics technically stayed within the limits of the law. And in some instances, vice squads' rush to deny their unique intimacy with the gay world accommodated the humors of the public itself. In an age when popular discussions of homosexuality commonly strove to give the

public both a sense of mastery over and a sense of distance from the specter of sexual deviance, the police's denial of any expertise over the gay world reflected the paradox of the very concept of "expertise" with regard to a subject like homosexuality: the persisting skepticism attaching to anyone who claimed too great an authority over a marginal sexual underworld.

The history of anti-homosexual policing in the United States illuminates the complex evolution of public knowledge about gay men in the twentieth century—both how such knowledge was created, and how it was put to use. Most obviously, that history demonstrates the dense and deeply political social network through which the most seemingly objective, unassailably "scientific" insights about homosexuality were disseminated among the American public. Often invoked by homophile activists and their adversaries as the highest stamp of public legitimacy, social scientific insights themselves won public legitimacy only through the strategic support of institutional allies like the police—social actors motivated less by the search for truth than by their own internal biases and political concerns. At the same time, the history of anti-homosexual policing reveals the extent to which the stamp of public authority over homosexuality in the twentieth century was not coextensive with the mantle of "expertise" itself. Whether due to the legal constraints governing the police's campaigns or to the social constraints governing the public's discussions of deviance, the lay public's commonsense presumptions about gay men often had far more persuasive force than the imprimatur of trained professionals.

Finally, the history of anti-homosexual policing demonstrates the unpredictable political valences of even the most seemingly objective discussions of gay men in American popular culture. Culminating with the media coverage of the 1960s, the public's intermittent bursts of curiosity about gay men in the twentieth century have often been seen as the seeds of a more tolerant approach toward homosexuality: a step, however small, toward accepting the gay world

as just another variant in a diverse cosmopolitan landscape. Yet the centrality of the police in that public debate suggests a more complicated view. From the theatrical pansies of the 1930s to the thriving queer communities of the 1960s, the public's self-conscious curiosity about homosexuality—that pedagogical drive toward a more objective, more nuanced, even more *accurate* understanding of the gay world—itself advanced the project of anti-homosexual regulation, assuring mainstream Americans of their sophistication with regard to urban deviance and, in some cases, directly expanding the reach of the police's anti-homosexual campaigns. As gay communities in the twentieth century developed a set of increasingly subtle codes precisely to evade the scrutiny of the public, the public's persistent curiosity about the gay world coopted those same signals as a tool to re-expose gay men to public denigration and arrest.

Perhaps most conspicuously, this dynamic emerged in the media's shifting visual stereotypes of the homosexual body. "Visibility" has long been something of a buzzword in academic circles: a double-edged phenomenon that both represents the promise of public recognition for minority communities and, in all too many cases, threatens to redound against them, subjecting their members to unwanted levels of scrutiny by often unsympathetic voices.[1395] In most historical narratives of homosexuality in the United States, however, "visibility" has occupied a privileged place. Identifying the emergence of America's earliest gay communities

[1395] For critical examinations of "visibility," see Leo Bersani, *Homos* (Cambridge: Harvard University Press, 1995), 11-15; Suzanna Danuta Walters, *All the Rage: The Story of Gay Visibility in America* (Chicago: University of Chicago Press, 2001), 10, 13, 20; Kevin G. Barnhurst, "Introduction," in *Media/Queered: Visibility and Its Discontents*, ed. Kevin G. Barnhurst (New York: Peter Lang, 2007); Narisz Fejes and Andrea P. Balogh, *Queer Visibility in Post-Socialist Cultures* (Bristol: Intellect, 2013); Lee Edelman, *Homographesis: Essays in Gay Literary and Cultural History* (New York: Routledge, 1994); Terry, *An American Obsession*; Jennifer Terry and Jaqueline Urla, "Introduction: Mapping Embodied Deviance," in *Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture*, eds. Jennifer Terry and Jacqueline Urla (Bloomington: Indiana University Press, 1995). For examples of more optimistic invocations of "visibility" in discussions of gay liberation, see Molly McGarry and Fred Wasserman, *Becoming Visible: An Illustrated History of Lesbian and Gay Life in Twentieth-Century America* (New York: Penguin Studio, 1998). Kevin Jenning, *Becoming Visible: A Reader in Gay and Lesbian History for High School* (New York: Alyson Publications, 1994).

around flamboyant spectacles like the drag show, historians have figured the unabashed queer presence that emerged in those settings—as, indeed, most conspicuous displays of queer visibility—as an axis of empowerment for a minority subculture: a moment when gay men grew sufficiently comfortable to claim an overt presence in the public sphere. Conversely, the regulation and suppression of gay men in the twentieth century, by the police as well as by private citizens, has emerged as a project against the affirmative possibilities of visibility: a reactionary attempt to render gay men "invisible" in the urban landscape.[1396]

As much it may have aimed to eradicate the phenomenon of homosexuality from the nation's cities, however, anti-homosexual policing in the United States hardly aimed to obscure its practitioners from sight. Certainly, the goal was not to force gay men into hiding, shamed into camouflaging their proclivities beneath the outward façade of normative masculinity. On the contrary, both the public's debates and the police's drives against gay men in the twentieth century played a core role in preserving the social role of the homosexual as an inherently visual object. Beginning in the interwar years, when the popular spectacles of the pansy craze assured many urban Americans of their ability to recognize gay men on sight, police relied on the stereotypical flamboyance of the fairy to expand the reach of state liquor boards' charges against gay-friendly bars. In the Cold War, as vice squads adopted increasingly innovative, sophisticated tactics to patrol gay bars and cruising sites, they defended their arrests by classifying gay men as flagrant criminal offenders, insisting that even defendants who took utmost care to escape public notice had deliberately courted their attentions. When, in the 1960s,

[1396] See, for example, George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (New York: Basic Books, 1994), 331-33, 352-61; Lillian Faderman and Stuart Timmons, *Gay L.A.: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (New York: Basic Books, 2006), 47-52, 136-37; Chad Heap, *Slumming: Sexual and Racial Encounters in American nightlife, 1885-1940* (University of Chicago Press, 2009), 11, 138, 247-50; Nan Alamilla Boyd, *Wide-open Town: A History of Queer San Francisco to 1965* (Berkeley: University of California Press, 2003), 58-61, 174, 201.

the media finally renounced the stereotype of the effeminate fairy, plainclothes decoys provided the public with a new arsenal of ethnographic codes and semiotics that reinscribed the gay world as an intrinsically "overt" phenomenon.

Throughout the mid-twentieth century, in short, regulatory campaigns against gay men in the United States deliberately relied on, renegotiated, and reinforced the status of the homosexual body as a uniquely visible object. In a time when the American public tried to redress its anxieties over the spread of homosexuality in its cities by attempting to gain some mastery over that phenomenon, visibility emerged as a particularly privileged form of social control, both helping the public quarantine an unwanted social minority and underwriting many of the police's most effective techniques against gay men. In the long narrative of gay communities in the United States, the promise of gay "visibility"—the state's and public's acceptance of an overtly *visible* role for gay men in the public sphere—has not simply served the unilateral goal of gay liberation. It has been a tool deeply imbedded within the gay community's negotiations with institutionalized power, alternately defined and deployed by both sides of the struggle.

The unpredictable politics of public knowledge about gay men in the twentieth century suggest the significance of studying the cultural history of policed groups alongside the history of police work itself. In the case of homosexuality itself, the public's assumptions and beliefs about gay men were shaped by numerous scientific and political sources, and those beliefs in turn helped shape gay men's interactions with state and social authorities in numerous spheres—from the popular press to the public streets to the police station. The project of anti-gay policing in the United States has, for the most part, remained a twentieth-century story, with mercifully little place among police departments today. Yet that story might best be seen as just one case study of what is undoubtedly a far broader social phenomenon: the complex origins, and

unpredictable consequences, of the quest for public knowledge about the deviant other in the United States.

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