

FORUM

## Complicating Conformity

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In the fall of 1989, the queer community became embroiled in a fierce debate over whether to press for marriage rights.<sup>1</sup> Two attorneys from Lambda Legal, a leading gay and lesbian rights organization, set out the competing considerations in the pages of *Out/Look*, a community magazine.<sup>2</sup> Tom Stoddard, the then-executive director, argued that the movement should prioritize marriage rights because that strategy provided the surest path to equality.<sup>3</sup> Paula Ettelbrick, Lambda's Legal Director, disagreed. She conceded that marriage provided "the ultimate form of acceptance" and "an insider status of the most powerful kind."<sup>4</sup> That fact, however, was the problem. Gays and lesbians, she argued, should not be focused on assimilating to the mainstream, but rather should pursue justice for those who were different.<sup>5</sup>

Ettelbrick lost. In the decades that followed, gay and lesbian rights groups litigated and lobbied for marriage equality, ultimately securing their victory at the Supreme Court in 2015.<sup>6</sup> Throughout that process, community members, advocates, and scholars continued to critique the legal project for its assimilationist imperative.<sup>7</sup> However, these debates over marriage equality turned on whether assimilationist arguments were the right strategic decision for the movement, not on whether they could convince the public. The expectation that Americans would see gays and lesbians as being like everyone else was all but a foregone conclusion.

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<sup>1</sup> George Chauncey, *Why Marriage? The History Shaping Today's Debate Over Gay Equality* (New York: Basic Books, 2004), 97–98.

<sup>2</sup> "Gay Marriage: A Must or a Bust?" *Out/Look*, Fall 1989, 8–17.

<sup>3</sup> Thomas B. Stoddard, "Why Gay People Should Seek the Right to Marry," *Out/Look*, Fall 1989, at 12.

<sup>4</sup> Paula Ettelbrick, "Since When Is Marriage a Path to Liberation?" *Out/Look*, Fall 1989, at 9.

<sup>5</sup> *Ibid.*, at 14.

<sup>6</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>7</sup> Cynthia Godsoe, "Perfect Plaintiffs," *Yale Law Journal Forum* 125 (2015): 153–54.

Yet Anna Lvovsky's engrossing new book reveals just how flawed that assumption was.<sup>8</sup> Lvovsky's rich study of how vice squads policed gays and lesbians in the 1950s and 1960s demonstrates how difficult it was for homosexuals to be understood as being the same in all but the gender of their sexual partners. For Lvovsky, the history of gay and lesbian rights was one of attempts at assimilating as well as of rebuffs from the majority, which insisted that homosexuals were categorically different. Conventional wisdom is that assimilationist arguments are often the most effective means of securing law reform. Lvovsky's work suggests the opposite, indicating that advocates need to look beyond assimilation to effectuate lasting change.

Lvovsky's monograph complicates arguments about what assimilation means, as well as whether and when conformity is possible. Her account is about more than policing, law, or gay and lesbian history. One of its significant contributions is to raise profound questions about whether and how beleaguered minorities can secure rights, given that assimilation often appears out of reach.

### **Becoming Indistinguishable**

In the mid-twentieth century, law enforcement officials zealously policed bars where gays and lesbians congregated. In addition to charging the patrons with vagrancy, lewdness, and disorderly conduct, agents brought license revocation proceedings against the establishments for knowingly serving a queer clientele.<sup>9</sup> Because investigators had to prove that bartenders, waitstaff, and managers knew that their patrons were gay, cases frequently turned on whether the customers conformed to stereotypes of how homosexuals looked and behaved. When gay individuals adopted more androgynous fashions that made them indistinguishable from the straight world, liquor licensing investigators had to change tactics to enforce the law.

Liquor licensing boards and their agents insisted that gay men were easily recognizable through their dress, grooming, and physical affectations. Their certainty stemmed from a widely held assumption as to how queer men appeared and acted, which in turn originated in large part in the "pansy craze" of the 1930s. During the height of Prohibition, gay singers, dancers, and cabaret hosts became leading attractions at nightclubs and entertainment venues. These male performers sometimes appeared in full drag, with long gowns, wigs, and elaborate makeup, although many simply rouged their cheeks, bleached their hair, or penciled their eyebrows. Their mannerisms, including limp wrists, swishing hips, and high-pitched voices, also reinforced their gender-bending performance.<sup>10</sup>

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<sup>8</sup> Anna Lvovsky, *Vice Patrol: Cops, Courts, and the Struggle Over Urban Gay Life Before Stonewall* (Chicago: University of Chicago Press, 2021).

<sup>9</sup> Lvovsky uses "queer" to refer to individuals who engaged in nonnormative sex practices. This essay does the same. *Ibid.*, 23.

<sup>10</sup> *Ibid.*, 25, 40.

These elements of the pansy performance quickly became tell-tale signs of homosexuality for the public at large. Although most Americans never saw a drag ball in person, newspapers, magazines, and even one popular film taught their audiences to identify signs of sexual deviance.<sup>11</sup> As a result, one Chicagoan in the mid-1930s was able to boast that he could spot gay men “a block away” through “the walk, the eyes, the way they act.”<sup>12</sup> The pansy’s visual cues served as a code for the public to discern gay men.

Lvovsky deftly chronicles how liquor board agents used the pansy trope to shut down gay bars and nightclubs following Prohibition’s repeal. Investigators catalogued the number of male customers who sported face powder, blush, or lipstick, as well as the effeminate way in which they walked. Feminine nicknames and high voices dotted the agents’ reports and featured prominently in their testimony. Authorities used these hallmarks of homosexuality to prove that staff should have known they were serving gay men, and thus that the state should shutter the bars’ doors.<sup>13</sup>

The trouble for liquor licensing boards came in the 1950s, when gay men began eschewing these visual cues in favor of subtler cultural codes. These included tailored slacks, sport coats, fuzzy sweaters, and tennis shoes. As Lvovsky explains, tennis shoes were so ubiquitous among some gay circles that one leather bar in San Francisco marked its derision for less masculine men by hanging a cluster of sneakers from its ceiling.<sup>14</sup> Gay men’s new clothing style mirrored the popular fashions at Ivy League universities. By adopting a “self-consciously respectable and middle class” dress code, gay men became all but indistinguishable from the straight world.<sup>15</sup>

Bar owners hoped these shifting fashions would shield them from the liquor boards’ charges. Gay men, they reminded liquor boards, were those who fluttered their wrists, swished their hips, and reeked of perfume, not those in ordinary leisurewear.<sup>16</sup> In response, liquor investigators changed tactics, insisting that nondescript fashions could be signals of same-sex sexuality. To make their point, investigators drew increasingly fine lines around the boundaries of permissible attire. In their accounts, a sweater without an undershirt, or a loafer without socks, became damning evidence of homosexuality.<sup>17</sup>

Liquor licensing agents won their arguments, convincing liquor officials and judges that even gay men in suits, sport coats, and polo shirts were sufficiently “obviously” gay that bar owners should have recognized them. The end result was the closing of many spaces where queer individuals had laughed, caroused, and enjoyed one another’s company. In most narratives of law reform, conformity to the norm yields legal success. Lvovsky turns that conventional wisdom upside down. In addition to demonstrating that assimilation is neither

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<sup>11</sup> *Ibid.*, 36–41.

<sup>12</sup> *Ibid.*, 41.

<sup>13</sup> *Ibid.*, 41–52.

<sup>14</sup> *Ibid.*, 149.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, 57–59.

<sup>17</sup> *Ibid.*, 57.

uncontested nor abiding, her work highlights the great lengths that legal agents will go to in order to resist assimilationist claims.

### Differentiating Queerness

Queer people's ability to fly below the radar became even more difficult in the mid-1960s, when the media "discovered" gay life. Journalists increasingly forayed into the gay world, where they learned—much to their surprise—that many gay men did not fit any of their stereotypes of the effeminate pansy. They did not sway, paint their nails, or rouge their lips. Instead, reporters marveled that no one in the gay bars they visited "looked" homosexual. As one journalist explained, the contemporary gay man was "the most masculine-looking person in the world."<sup>18</sup>

Journalists' wonder quickly turned to alarm. At the time, Americans generally accepted that homosexuals were dangerous persons, whose very presence in a government office presented a security risk.<sup>19</sup> Gay men were also thought to be predators who violated children.<sup>20</sup> Moreover, many Americans considered homosexuality distasteful, if not immoral. To protect the public and maintain social boundaries, it was essential for the media to strip homosexuals of their camouflage.<sup>21</sup> Newspapers and magazines consequently published *exposés* that educated readers on how to recognize homosexuals.<sup>22</sup>

These tutorials did their best to restore the American public's ability to recognize a gay man on sight. They included information on the clothing that gay men were likely to wear, including tight tapered slacks and sneakers.<sup>23</sup> Magazines helped reinforce these sartorial lessons with photo arrays, so that readers could detect the subtle patterns that they might see on the streets.<sup>24</sup> To prevent readers from accidentally finding themselves in a gay-friendly location, the press identified the neighborhoods where queer communities most often gathered. These reporters also marked the spots where homosexuals vacationed, outing New York's Fire Island.<sup>25</sup> Should all of that be insufficient to keep readers from accidentally stumbling into the gay world, the press provided a primer on gay lexicon, explaining terms like "queen," "camp," and "flaming."<sup>26</sup>

The deep irony of this press coverage, Lvovsky notes, is that the media justified its insistence on covering the gay world's trademark fashions by explaining that gay men had begun flooding cities, where they "flaunted" their

<sup>18</sup> *Ibid.*, 220.

<sup>19</sup> David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004).

<sup>20</sup> Estelle B. Freedman, "Uncontrolled Desires: The Response to the Sexual Psychopath, 1920–1960," *Journal of American History* 74 (1987): 103.

<sup>21</sup> Lvovsky, *Vice Patrol*, 221.

<sup>22</sup> *Ibid.*, 225.

<sup>23</sup> *Ibid.*, 234.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, 230.

<sup>26</sup> *Ibid.*

deviation.<sup>27</sup> However, “the offensive flamboyance of gay men always depended in large part on the public’s deliberate attempts to gain some fluency in their culture.”<sup>28</sup> Gay men had adopted their dress codes and styles precisely because they were inconspicuous. They only became markers of difference because of journalists’ efforts to train readers on how to identify gay men.

Lvovsky’s argument is as much historiographical as it is historical. The media’s reporting helped reframe common narratives of gay men, who were no longer simply clinical patients or sexual predators. They instead became members of a subculture, with identifiable customs and structures. Historians have often lauded that shift as an important moment in the path toward equality.<sup>29</sup> But Lvovsky warns that these media depictions were not necessarily a liberalizing force. Rather, by instructing the public in queer life, the press provided “a key tool in the social regulation of sexual difference.”<sup>30</sup> These media accounts made it such that gay men could no longer disappear into the urban landscape.

Lvovsky’s work implies that assimilation was in many ways a futile goal for queer communities in the mid-twentieth century. Gay men and lesbians might have donned the fashions and styles of middle-class urbanites, but the straight world insisted that the communities were different, and recognizably so. Lvovsky’s attention to the press’s role in undermining assimilationist strategies is what allows her to make this important contribution. She shows us her skill as both a legal scholar and historian by highlighting how non-legal actors shape communities’ abilities to secure legal change. In the 1960s, media reporting echoed the arguments of liquor investigators, putting these claims on a public stage. Together, these legal and cultural authorities moved the goal posts of assimilation, thereby reinforcing the state’s ability to regulate queer life.

### Rethinking Assimilation

Lvovsky’s work thus raises important questions about how rights become real. For many, assimilationist arguments are the sine qua non of civil rights work. As a legal matter, they are essential given that the Constitution’s Equal Protection Clause requires that governments treat similarly situated people alike. Moreover, they appeal to common conceptions of justice, thereby providing a convincing philosophical underpinning to rights claims. By demonstrating legal and public actors’ staunch historical resistance to that strategy, Lvovsky’s work offers a challenge to those studying and working in this field. Her book seems to leave readers with a puzzling question: how did gay rights progress given that conformity was out of reach?

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<sup>27</sup> *Ibid.*, 236.

<sup>28</sup> *Ibid.*

<sup>29</sup> John D’Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970*, 2d ed. (Chicago: University of Chicago Press, 1998), 138–80.

<sup>30</sup> Lvovsky, *Vice Patrol* 237.

Lvovsky provides a partial answer to that challenge. As her meticulous research indicates, assimilation was never an either-or approach, but always a matter of degree. The same men who traded blouses for polos also engaged in conduct that law enforcement identified as deviant: they stuck out their tongues, rolled their eyes theatrically, and ordered cocktails with cherries.<sup>31</sup> Liquor agents readily conceded that straight men also engaged in these antics, but maintained that gay crowds did so differently. Conformity was thus a spectrum, with legal battles turning on whether gay patrons' activities fell closer to one end than to the other.

The history of gay and lesbian rights post-Stonewall provides a second answer to Lvovsky's question. Those events are beyond the scope of Lvovsky's book, which ends in the late 1960s, when the pervasive surveillance of queer life began winding down. However, what that history reveals is that the assimilationist approach itself changed. Rather than merely conforming to majority codes of conduct and styles, gay and lesbian life increasingly appeared to focus on family. Moreover, the broader social context in which these shifts took place was also different, such that Americans were more open to the notion of non-traditional families. What this highlights is the deep contingency of assimilation as a successful legal strategy.

In the 1950s and 1960s, media images of the gay world centered on bars and cruising grounds, implying that meaningful and long-lasting relationships were rare.<sup>32</sup> In these accounts, gay men slinked through the city's dark streets, searching for late-night sexual contacts to satiate their desperate loneliness. What set homosexuals apart was not just their appearance, behavior, or sexuality, but rather how they structured their lives. The straight world, as Tom Stoddard and Paula Ettelbrick recognized decades later, was oriented around marriage and family. As a result, gays and lesbians might have come to look like their straight counterparts on the surface, but their lives seemed categorically different.

Those distinctions between gay and straight lives began to change in the early 1970s, when lesbian mothers and gay fathers began fighting in earnest for custody of the children from their heterosexual marriages.<sup>33</sup> Those disputes garnered national publicity, drawing attention to the fact that gay men and women were devoted parents. In 1979, for example, newspapers and magazines around the country reported on Sandra Schuster and Madeleine Isaacson, two women who had met at their Pentecostal church and built a home together with their six children. The couple took their custody battle with their ex-husbands to the Washington Supreme Court, which ruled the women's relationship did not harm their children.<sup>34</sup> *People* magazine ran a three-page story on the case that featured a photograph of the women snuggled tight, holding hands.<sup>35</sup>

<sup>31</sup> *Ibid.*, 56–57.

<sup>32</sup> *Ibid.*, 232.

<sup>33</sup> Marie-Amélie George, "The Custody Crucible: The Development of Scientific Authority About Gay and Lesbian Parents," *Law and History Review* 34 (2016): 488.

<sup>34</sup> *Ibid.*, 503

<sup>35</sup> Nancy Faber, "Lesbians Madeleine Isaacson and Sandy Shuster Find 'Marriage' Happy but Hardly Untroubled," *People*, July 9, 1979, 53–55.

In the decades that followed, the popular image of gay and lesbian life increasingly centered on family. In the 1980s, the media's reports on the AIDS crisis initially highlighted gay men's promiscuity. That focus shifted over time to people caring for their dying partners, pieces that emphasized the love and devotion the couples shared.<sup>36</sup> During that same period, gay and lesbian couples increasingly fostered and adopted children, thereby expanding the number of queer-headed families around the country. By the early 1990s, school districts around the country were revising their educational materials to feature gay and lesbian parents, which had become a fact of life for their communities.<sup>37</sup>

When the marriage equality movement began in earnest, the quintessential symbols of the queer world were no longer bathhouses or bars, but picket fences and PTA meetings. Thus, gays and lesbians did not just look like middle-class straight people, they acted like them too. What this indicates is that assimilation is not just a matter of *degree*, as Lvovsky's work shows, but also of *type*, with some kinds of assimilationist efforts more consequential than others.

As importantly, the gay and lesbian movement's ability to conform was a matter of timing. That fact helps explain why it was that gays and lesbians were able to succeed in their assimilationist efforts in the post-Stonewall period, even though they had failed to accomplish this same goal at mid-century. This is especially true given that, as Lvovsky's work suggests would happen, opponents of gay and lesbian rights attempted to move the goal posts of assimilation again. They insisted that gay and lesbian-headed households were inferior, if not dangerous, because the adults would model their sexual orientation to their children.<sup>38</sup>

Broader cultural changes that were sweeping through America made the gay and lesbian rights movement possible. Religious conservatives may have called themselves the "moral majority," but over the course of the twentieth century, they increasingly became the minority.<sup>39</sup> Divorce reforms that swept the country in the late 1960s and early 1970s reshaped the American family, while second wave feminism challenged conventions around sex and gender norms.<sup>40</sup> American culture had pluralized, thereby changing the standard to which gays and lesbians were assimilating. As a result, Americans were more willing to accept gay- and lesbian-headed families.

The world in which gay and lesbian advocates undertook their legal reforms was thus very different than the one that they had inhabited at mid-century. In other words, what made assimilationist arguments possible was thus not just

<sup>36</sup> Chauncey, *Why Marriage?* 102–4; and Edward Alwood, *Straight News: Gays, Lesbians, and the News Media* (New York: Columbia University Press, 1996), ch. 11.

<sup>37</sup> Marie-Amélie George, "Bureaucratic Agency: Administering the Transformation of LGBT Rights," *Yale Law & Policy Review* 36 (2017): 132.

<sup>38</sup> *Ibid.*, 124.

<sup>39</sup> Robert O. Self, *All in the Family: The Realignment of American Democracy Since the 1960s* (New York: Hill and Wang, 2012), 395.

<sup>40</sup> *Ibid.*, 110–12, 328; and Alison Lefkowitz, *Strange Bedfellows: Marriage in the Age of Women's Liberation* (Philadelphia: University of Pennsylvania Press, 2018), 2–3.

that popular understandings of gay and lesbian life had changed dramatically, but that family norms had shifted. That large cultural changes were so consequential for assimilationist arguments demonstrates how contingent the gay and lesbian rights movement's victories have been. That fact reinforces the complicated and contested nature of assimilationist strategies, which are not available to all minority groups.

## Conclusion

To say that the gay and lesbian rights movement secured marriage equality through assimilationist strategies is both true and clichéd. Historians, law professors, and advocates alike have probed the origins and implications of the strategy, tracing its evolution and debating its future contours.<sup>41</sup> That Lvovsky's work on policing provides new insight into this well-trod ground is a testament to her remarkable research.

Lvovsky's monograph demonstrates that assimilation is more dynamic and non-linear than scholars have previously assumed. While arguments about conformity can be a very useful legal tool, assimilation can also be extremely difficult to realize and maintain. Thus, in addition to providing a thorough and beautifully written history of anti-gay and lesbian policing, *Vice Patrol* offers profound insights for scholars interested in the mechanics of legal change. Moreover, by highlighting the limits of assimilation, Lvovsky's work pushes readers to consider how else discriminated-against individuals might secure rights.

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<sup>41</sup> Marie-Amélie George, "Framing Trans Rights," *Northwestern Law Review* 114 (2019): 555–632; Katherine M. Franke, "The Domesticated Liberty of *Lawrence v. Texas*," *Columbia Law Review* 104 (2004): 2688–90; and Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (New York: Free Press, 1999), 96–98.

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