

TWENTIETH-CENTURY TRANSFORMATIONS: SEXUALITIES DEFINED AND SEXUAL EXPRESSION EXPANDED

Alison M. Parker

Margot Canaday. *The Straight State: Sexuality and Citizenship in Twentieth-Century America.* Princeton, N.J.: Princeton University Press, 2009. xiv + 277 pp. Illustrations, notes, and index. \$19.95 (paper).

Leigh Ann Wheeler. *How Sex Became a Civil Liberty.* New York: Oxford University Press, 2013. xiv + 327 pp. Notes, bibliography, and index. \$34.95.

Two excellent and important monographs, Margot Canaday's *The Straight State* and Leigh Ann Wheeler's *How Sex Became a Civil Liberty*, explore different aspects of how sexuality and sexual expression were defined and redefined over the course of the twentieth century in the United States. Canaday focuses on the role of the central state—especially the role of bureaucrats in branches of the federal government such as the military, immigration, and welfare—in defining and then policing the category of homosexuality. In contrast, Wheeler highlights the role of civil liberties lawyers, especially those in the American Civil Liberties Union (ACLU), in shifting public opinion and the perceptions of Supreme Court justices regarding the legal and social acceptability of an increasingly broad range of sexual expression.

Margot Canaday's *The Straight State* starts from the premise that, at the dawn of the twentieth century, the American state was still relatively small in comparison to European states and that the bureaucratic state grew at the same moment when homosexuality was being defined and homophobia was increasing. Canaday argues that the state helped produce the category of homosexuality and set the boundaries for citizenship, in part by setting up "a vast apparatus for policing homosexuality" (p. 2). By the 1940s and 1950s, federal policies explicitly banned homosexuals from welfare benefits, military service, and access to immigration and/or citizenship. Canaday cautions against historians' tendency to attribute too narrowly these more punitive policies and increased homophobia to McCarthyism's "lavender scare." Rather, she points to a much longer and steadier process of "state-building" based on government bureaucrats' attempts to create the category of homosexuality.

Canaday argues that, in the early decades of the twentieth century, federal bureaucrats played a significant role in defining homosexuality and in creating a "straight state." For example, immigration policies allowed inspectors to refuse entry to those who were physically disabled *and* those identified as "sexually perverse." Linking immorality and economic dependency together, officials argued that both groups should be excluded on the grounds that they were "likely to become a public charge" (p. 21). By associating citizenship with men's ability to care for their dependents, unmarried immigrant men without dependents could be characterized as less manly and thus as potentially "perverse." All immigration slowed during World War I, yet official attempts to bar homosexuals reappeared in military guidelines that tried to screen out "sex perverts" who might corrupt other soldiers. The government in this way sought to prevent the all-male military from being seen as an inherently corrupting, perverse space.

Fears of homosexuality also shaped New Deal programs, as the government confronted the problem of homeless transients who were labeled by federal officials as "non-family people" or the "unattached" (p. 91). The Federal Transient Program (FTP) was created in response to complaints by town and city leaders that invading hordes of hoboes were looking for food and shelter while increasing crime rates and disturbing the local populace. The FTP took already homeless young boys and older men and put them all together in isolated shelters without productive work where, critics feared, older men could sexually seduce or even rape the young boys. Not surprisingly, the program ended within two years under a cloud of charges regarding sexual degeneracy and "unnatural" male dependency. In contrast, the Civilian Conservation Corps (CCC) served a more popularly approved function of preventing transiency in young men. From 1933 until the United States entered World War II, the CCC gave young men productive work in a regimented, military-like environment while requiring them to behave as economic providers by sending a portion of their wages to a dependent or dependents each month.

In part two of her book, Canaday examines the intersection of federal military policy and the welfare state during and after World War II. During the war, the U.S. military aggressively policed not only sexual acts but also homosexual tendencies: "Soldiers suspected of homosexuality might be followed by vice patrols, observed in hospitals, diagnosed by psychiatrists, assessed by the Red Cross, and interrogated by military police, before finally having their fate determined before a military board" that could then issue them "undesirable discharges for homosexuality" (p. 148). After the war, fearing another "Bonus Army" of homeless veterans, Congress passed the 1944 GI Bill to encourage white male veterans to settle down by giving them access to home ownership and higher education. Yet those veterans who had been discharged on the grounds of homosexuality found themselves barred from first-class citizenship, including access to generous GI benefits.

Race and sexuality intersect at various points in Canaday's study. African American soldiers who protested against segregation and racist mistreatment in the military during World War II found themselves subjected to the same "undesirable discharge" as those accused of homosexuality. Back at home, black veterans faced additional shaming, prejudice, and rejection from employers who wrongly assumed that all undesirable discharges were issued for "moral turpitude." Given the racism they already encountered, the NAACP fought to change the status of black soldiers' discharges from undesirable and dishonorable to honorable. In 1945, Congress responded by holding hearings to see if and how African Americans were being unfairly stigmatized by the "undesirable discharge." Furthermore, even those African American soldiers who did qualify for the GI Bill found themselves denied access to colleges, loans, and employment opportunities because the Veterans Administration policy of allowing for the local disbursement of benefits was, Canaday explains, "devised to allow southern states to keep black veterans out of the program" (p. 150).

Just as black male veterans had trouble accessing GI benefits, women veterans faced difficulties as well. Although women of all races had made gains in employment in the military during World War II, the GI Bill gave them access to government resources only as wives and mothers. Ironically, the need to substantially grow the peacetime military bureaucracy during the Cold War precipitated women's integration into the military (starting in 1948, the same year the armed services were racially integrated) to serve in clerical and administrative positions. Yet, the inclusion of women also increased the government's anxiety that only "unnatural" women would choose a military career over a family of their own. To avoid this perceived "queering" of the military, Canaday asserts that authorities launched aggressive and misogynistic anti-lesbian investigations which, in turn, forced the government to identify and define lesbianism more clearly than ever before.

Congress further helped constitute the category of homosexual during the Cold War era when it passed the McCarran-Walter Act of 1952. This act explicitly barred from the country and allowed for the deportation of those aliens afflicted with a "psychopathic personality," a condition that included those who were "suffering from sexual deviation" (p. 220). Although the psychiatric profession moved away from saying that all homosexuals were psychopaths (in 1973, it finally removed homosexuality as a listed cause of mental illness from its Diagnostic and Statistical Manual), Canaday points out that Congress, immigration authorities, and the courts willfully disregarded these changes in medical opinion.

Canaday argues that homosexuality is "an ideal case to explore how state institutions shape identity." She also mentions in an aside that the process "was not totally dissimilar from the way that race was constituted by legal-political structures (over a much longer period of time)" (p. 257). In her discussion of

Boutilier v. Immigration and Naturalization Service (1967), Canaday misses an opportunity to explicitly discuss the interesting parallels between *Boutilier* and *Plessy v. Ferguson* (1896). Canadian Clive Boutilier applied for naturalization in the U.S. but was denied on the grounds that he had a “psychopathic personality”—he had admitted under INS questioning to having engaged in a few homosexual as well as heterosexual acts. In challenging the decision in court, Boutilier’s brief resisted attempts to narrowly categorize him on the basis of his sexual behavior. Instead, it problematized the issue by asking: “Who is a homosexual?” Similarly, *Plessy*’s brief had questioned attempts to categorize him by race. Of course, in *Plessy*, the Supreme Court rejected all destabilizing notions of racial indeterminacy. Similarly, in *Boutilier*, as Canaday rightly notes, the Court “moved to close that gap, stabilizing homosexuality as an identity that could be deduced from sexual acts, and asserting the distance between that identity and one’s capacity for citizenship” (p. 245).

Leigh Ann Wheeler’s *How Sex Became a Civil Liberty* argues that the ACLU helped expand the country’s understanding of First Amendment rights to include sexual behavior as a form of private, protected speech. Founded in 1920 to support the free speech and assembly rights of labor union organizers, anarchists, and radicals who were targeted in the first Red Scare after World War I, the ACLU soon came to the defense of birth control advocates such as Margaret Sanger who were frequently threatened with arrest under federal, state, and local anti-obscenity censorship laws. Wheeler convincingly establishes that the unconventional sex lives and relationships of early ACLU leaders made them predisposed to see sexual expression as a civil liberty worth fighting for. In the 1920s and 1930s they defended, as constitutionally protected free speech, burlesque shows, censored literature, nudism, and pamphlets about birth control and sex education. By the mid-1960s, ACLU leaders committed themselves to defending a wider range of behavior, from sodomy to prostitution, as “sexual expression,” thereby blurring the line between speech and action.

The ACLU’s approach to defending sexual expression developed slowly, as Wheeler’s discussion of its views on homosexuality makes clear. The organization declined to help World War II veterans who were discharged for having committed homosexual acts. Even when ACLU director Herbert Levy received detailed and compelling letters from women in the air force who described military personnel so intent on discharging them for “homosexual tendencies” that they engaged in spying, harassing, intimidating, and forcing confessions from them and other women, he was unable to see this as a violation of civil liberties and instead recommended with all sincerity that the women get “medical treatment” to cure themselves (p. 109). As late as the 1950s, Wheeler explains, the organization focused somewhat narrowly on due-

process violations that arose in the hearings held by the House Un-American Activities Committee (HUAC) during the Second Red Scare. It cried foul when those accused of homosexuality and/or communism were not allowed to publicly respond to these charges. Yet during this time, the ACLU still did not see homophobia as a civil liberties concern. Assistant director Alan Reitman, for instance, suggested to homophile activists that they focus instead on convincing doctors to take homosexuality off the list of mental illnesses.

In fact, until the mid-1960s, the ACLU declined to take on any cases regarding homosexuality that were not explicitly about ensuring due process or free speech. When Rowland Watts became the new ACLU legal director in 1958, he responded sympathetically to letters detailing the suicide rates of women dismissed from the military, but he simply sent these letters on to other organizations. Watts did encourage the American Law Institute to question why it still treated sex associated with homosexuality, such as sodomy, as criminal acts in its drafts of the Model Penal Code even when it characterized other consensual sex as a purely private matter. The final Model Penal Code of 1962 reflected this more accepting stance and made no distinctions between heterosexual and homosexual sex. Watts’ attitudes evolved as he worked with Harriet Pilpel, an attorney who became a member of the ACLU’s Board of Directors in 1961 and who represented clients such as the Planned Parenthood Federation, the Association for Voluntary Sterilization, and sex researcher Alfred Kinsey. As a board member, Pilpel wanted homosexuality and abortion to be protected as vigorously as other sexual civil liberties and played a key role in moving the ACLU “from defending speech to defending sexual practice” (p. 93). Ultimately, Watts, Pilpel, and board member Dorothy Kenyon worked successfully to get the ACLU in 1964 to adopt a policy formally supporting the decriminalization of all adult consensual sexual conduct. This policy shift enabled the ACLU in 1966, for example, to lobby Congress to end the surveillance of homosexuals by postal authorities. It successfully demanded that postal inspectors stop opening private mail and, especially, stop reporting to employers those employees who received “homosexual mail.”

Wheeler makes an original contribution to our understanding of the expansion of sexual civil liberties in the United States; she identifies the ACLU as having created a new constitutionally protected category—that of consumers who have the “right to read.” The “right to read” expanded constitutional free speech rights from those who produce speech to those who consume it. Wheeler points to two Supreme Court decisions, *Redrup v. New York* (1967) and *Stanley v. Georgia* (1969), to demonstrate the ACLU’s success in promoting this right. In these decisions, the Court ruled that the First Amendment protected adults from prosecution when they sold or privately possessed pornographic materials. In *Stanley*, Justice Thurgood Marshall endorsed a person’s “right to read or observe what he pleases—the right to satisfy his

intellectual and emotional needs in the privacy of his own home" (p. 167). The ACLU's stance on privacy and the right to read, Wheeler concludes, had come to seem natural and inevitable.

Given that the ACLU had successfully committed itself to fighting for greater protections for all types of sexual expression, its leaders disagreed in the 1970s about whether they should take on cases arguing for the rights of individuals to be *protected from* unwanted sexual expression. Feminist lawyers within the ACLU who wanted to expand legal protections for women against rape and sexual harassment often found themselves up against stiff opposition from their colleagues. Of course, this is due in part to the organization's commitment to an absolutist position on free speech but also to the tortured and painful history of racism and rape charges in the United States. For decades, the ACLU had defended innocent black men accused of rape. It often tried to win these cases, Wheeler explains, by "seeking to discredit complainants as sexually promiscuous women" (p. 180). Thus, when feminists characterized rape as a pervasive form of violence against all women, promoted rape shield laws to protect the identity of the alleged victim, and called for marital rape laws and sexual consent laws, the ACLU was reluctant to embrace these protections. In 1976, it responded equivocally by calling "attention to the conflict between the defendant's right to a fair trial and the complainant's right to privacy" (p. 189).

Prohibiting sexual harassment at work initially seemed less problematic for the ACLU because the issue was less racially charged than the subject of rape. Indeed, African American women generally supported the inclusion of sexual harassment as a violation of Title VII of the Civil Rights Act. However, Wheeler explains that the ACLU ultimately chose to protect the free speech rights of harassers. In *Harris v. Forklift Systems*, a sexual harassment case decided by the Supreme Court in 1993, for instance, the ACLU filed a brief arguing that an employee's desire for a work environment that was not "intimidating, hostile, or offensive" must not be achieved by suppressing another employee's First Amendment rights to view pornography or make aggressive sexual innuendoes to a female colleague, for example (p. 206). Similarly, when some feminist attorneys called for the ACLU to argue for federal funding of family planning programs, others in the organization balked due to their fears about the racist history of eugenics and forced sterilization programs. In a constructive response to these internal critiques, the ACLU's Women's Rights Project in the 1970s focused on ending the coerced sterilization of teenage girls whose mothers and families relied on public assistance and who were wrongly threatened with denial of their assistance unless they agreed to sterilizations. The ACLU also created a separate Reproductive Freedom Project that supported informed consent laws and waiting periods for sterilizations. When Congress passed the Hyde Amendment in 1976, which prohibited almost all Medicaid-funded

abortions, the ACLU attorneys who led the project viewed it as "only the latest method used by the government to coerce the reproductive lives of poor women, especially poor women of color" by not giving them the real freedom to choose whether and when to have children (p. 145).

Taking a very different approach, ACLU attorney Marilyn Haft obtained funding from Hugh Hefner's Playboy Foundation to begin the Sexual Privacy Project in 1973. Its goal was to decriminalize what were newly termed the "victimless crimes" of sexual expression, including sodomy, prostitution, and public solicitation (p. 163). Although the ACLU brought several of these cases to the Supreme Court between 1973 and 1977, it failed to convince the Court to broaden the right to privacy to include these more taboo forms of sexual expression. The ACLU and its Sexual Privacy Project initially failed, yet Wheeler convincingly argues that it ultimately changed society's attitudes toward sexual expression and "made sex a civil liberty." This shift in public ideas is symbolized by the Supreme Court's 2003 *Lawrence v. Texas* determination that sodomy laws are unconstitutional (p. 176). As Wheeler documents, by the end of the twentieth century the justices had decriminalized virtually all sexual expression and conduct between consenting adults.

As proof of just how fast change is occurring today, both Wheeler and Canaday point to new Supreme Court decisions decriminalizing all types of consensual sex between adults as well as to state laws affirming the right of homosexuals to get married. In her conclusion, Margot Canaday concedes the risk of trying to make predictions in the face of a rapidly changing cultural, legal, and political landscape. While noting that, until very recently, gay rights activists made more gains at the state level than through federal policies or legislation, Canaday acknowledges that, as an increasing number of states grant gays the right to marry, this is leading to significant changes at the federal level. At this point, the federal government may be less invested in using the category of homosexuality to define citizenship or to build up its own identity, as Canaday believes it did in the early decades of the twentieth century. Indeed, the federal Defense of Marriage Act was overturned by the Supreme Court in *United States v. Windsor* (2013). Leigh Ann Wheeler persuasively credits the ACLU with creating compelling constitutional arguments about individuals' rights to produce and consume all types of sexual expression. These two books help us understand how and why contemporary gay marriage activists and legal advocates approach federal laws and policies and how and why they invoke their First Amendment rights to sexual privacy.

Alison M. Parker is a professor of history at the College at Brockport, State University of New York. The author of *Articulating Rights: Nineteenth-Century American Women on Race, Reform, and the State* (2010), she is now working on a book on Mary Church Terrell.