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Individual Losses to Movement Victories:
How Sex Became a Civil Liberty

Review by Dara E. Purvis*

HOW SEX BECAME A CIVIL LIBERTY. By Leigh Ann Wheeler. New York, New York: Oxford University Press. 2013.

For those of us who teach courses relating to sexuality and the law, it can be a Sisyphean task to help contemporary students grasp a world in which giving a lecture about birth control that involved the visual aid of a packet of spermicide could result in criminal prosecution. Yet, in order to understand today's headlines about legal challenges to required insurance coverage of contraceptives, one must be able to trace how and why political, social, and legal understandings of sexuality moved it from a deeply illicit taboo towards constitutionally protected rights.

In her book, *How Sex Became a Civil Liberty*, Leigh Ann Wheeler seems to claim this ambitious goal, announcing as the broadest characterization of her aims to trace "how the U.S. Constitution became central to discourse on sexual expression and behavior."¹ In her introduction, however, Wheeler identifies a much narrower scope using a single organization, the American Civil Liberties Union (ACLU), as the lens through which this massive constitutional shift will be viewed.² By focusing on "stor[ies] of personal experiences, contested understandings, collaborative undertakings, and turning points," rather than any kind of "exhaustive history,"³ Wheeler's aim is to show the personalities at the heart of what became a broad shift in political and social perceptions of sexuality.

Even with this significant limitation, Wheeler's book is still a racing overview through only a few of the highlights of the personalities and issues involved in the first several decades of the ACLU's work. While this is in some ways a limitation, to fully cover the ACLU's storied history would make a book unmanageably large. Wheeler's achievement, then, is not in a comprehensive history of a

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1. LEIGH ANN WHEELER, *HOW SEX BECAME A CIVIL LIBERTY* 8 (2013).

2. *Id.* at 3–4.

3. *Id.* at 7.

conceptual shift in American law, but in a fascinating narrative that provides multiple entrances for further areas of study. Her book poses more questions than it answers, but the questions raised are from fascinating, novel perspectives and they provide interesting additions to the typical legal scholar's knowledge. Scholars, not only of sexual identity and civil liberties, but also of legal activism and the political process more generally, will find material that piques their interest and generates further thought and research.

Within the book, the ACLU's work is broken down into chapters that focus on both time period and subject matter. The narrative begins with a bang: police breaking up the inaugural American Birth Control Conference led by Margaret Sanger,⁴ fights about monogamy between ACLU founders (and unhappily married partners) Roger Baldwin and Madeleine Zabriskie Doty,⁵ and vigorous ACLU defense of nudists in the 1920s and 1930s.⁶ Once the narrative hits the key mid-century decades spanning 1940 through 1980, however, the account cannot cover all the topics and personalities Wheeler hoped to include in a single pass, so chapters double back chronologically. Chapter three, to take one example, discusses the ACLU's attempts to recognize First Amendment speech rights of readers and listeners, affecting regulations as diverse as postal restrictions on obscene materials and the Motion Picture Association of America movie ratings.⁷ All the analysis of speech and audience does not allow for any coverage of birth control or other issues related to the privacy of the bedroom, so chapter four begins again in the 1940s to track those questions in turn.⁸

This repetition is as much a product of the range of the ACLU's work as any authorial decision by Wheeler, but even with repeated passes through several decades much of the analysis is brief, leaving tantalizing hints of further interest according to the reader's own specialties. In my case, the tortured path towards moving gay rights onto the ACLU's agenda proved interestingly reminiscent of more modern disputes in the gay rights movement implicating impact litigation and the political process.

In Wheeler's rough division of topics affected by the ACLU, issues related to gay rights are discussed in relation to sexual expression rather than reproductive freedom, although a spirited argument could be posed for inclusion in the other chapters. Furthermore, it is worth noting that Wheeler's book covers only the earliest stages of the gay rights movement. Even the 1990s, the latest time period covered in Wheeler's book, are considered relatively early in the continuing progress of the gay rights movement—William Eskridge recently labeled the 1990s as “stage one” of the gay rights movement, in which the first order of business is simply

4. *Id.* at 11.

5. *See id.* at 30.

6. *Id.* at 43.

7. *Id.* at 91.

8. *See generally id.* at 93–119.

halting overt prosecution of homosexuals and bisexuals.⁹ Understandably, Wheeler's chronicle does not discuss modern issues of LGBT equality such as marriage and parental rights, yet the debates portray eerie precursors of modern arguments.

Instead, the reader learns of the difficult task ahead of progressive ACLU leaders who hoped to make the organization view gay rights as a civil liberties issue at all. The ACLU's first representation of any gay victims of government persecution took place during the Red Scare of the 1950s.¹⁰ Senator Joseph McCarthy's witch hunt to identify and eliminate communists in the federal government was motivated by anti-communist fervor, but incorporated and exploited homophobia to create a "Lavender Scare."¹¹ The logic was that any homosexual government employee was vulnerable to blackmail by communist agents and as a result there was a "wholesale persecution" of homosexuals in government service.¹² Although the ACLU was directly involved in anti-McCarthy efforts, including representation of victims of the Lavender Scare, ACLU leadership did not consider the Lavender Scare itself nor persecution of homosexuals more generally to be a civil liberties issue.¹³

Similarly, the ACLU received repeated requests for representation or other involvement in the discharge of homosexual members of the military. The national ACLU legal director informed a group of lesbian soldiers that there were no civil liberties implicated in their discharge and proposed that if they truly wanted to stay in the military and to abandon homosexuality, then they should "seek medical treatment."¹⁴ To the modern reader who views the ACLU as intensely progressive, such anecdotes are jarring and a necessary reminder of how recent the achievements of the gay rights movement truly are.

Wheeler's coverage of the ACLU and LGBT issues is particularly fascinating when parallels emerge to other aspects of the modern gay rights movement. The national ACLU leadership was particularly reticent to take on gay rights issues, even as prominent board members and individual ACLU supporters were leaders in the nascent movement. Rather than leadership from the top, Wheeler explains that local branch affiliates of the ACLU effectively pushed gay rights onto the national agenda by taking on cases at the local level, thus forcing some kind of action—if only a reaction once cases reached the headlines—from the national organization. The very same process was repeated among gay rights organizations debating

9. William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 281 (2013) (identifying stage one as 1970 through 1996).

10. WHEELER, *supra* note 1, at 108.

11. *Id.*

12. *Id.*

13. *See id.*

14. *Id.* at 109 (quoting ELIZABETH FRATERRIGO, *PLAYBOY AND THE MAKING OF THE GOOD LIFE IN MODERN AMERICA* 174–75 (2009)) (internal quotation marks omitted).

whether to make marriage equality a central goal in the 1990s. The Hawaii same-sex marriage case *Baehr v. Lewin*¹⁵ is thought of today as the spark of the modern marriage equality movement. Despite its ultimate failure to secure same-sex marriage in Hawaii at the time,¹⁶ *Baehr* vaulted same-sex marriage onto the national scene, sparking a huge backlash embodied most infamously in the Defense of Marriage Act.¹⁷ The case, however, was not the product of an activist organization. The case was proposed to Lambda Legal as well as the ACLU and Dan Foley, a former ACLU attorney.¹⁸ Although Foley likely was unaware of this at the time, the country's leading gay rights organizations were already engaged in discussion as to whether marriage equality should be added to their central goals.¹⁹ Disagreement among activists was heated, but the groups had eventually resolved against taking any actions towards securing marriage equality.²⁰ The proposal caused a revisiting of the topic, and Lambda Legal decided against taking the case, in part for long-term strategic reasons and in part because they thought the case simply had no chances of success.²¹

Similarly, the case that was eventually heard before the United States Supreme Court as *Hollingsworth v. Perry*²² was brought without the cooperation of the leading gay rights legal organizations.²³ Douglas NeJaime, who has written extensively about the strategic dimensions of impact litigation using marriage equality as a case study, described the initial filing as having “defied the strategic vision” of attorneys at the ACLU, among other organizations.²⁴ In his seminal article, *Winning Through Losing*, NeJaime discusses the possible “[p]roductive [p]otential[s]” of losing a court case.²⁵ NeJaime argues that among other things, a prominent loss in

15. 852 P.2d 44 (Haw. 1993).

16. While the case was still pending before state courts, Hawaiian voters passed a state constitutional amendment limiting marriage to opposite-sex couples. See Dara E. Purvis, *Evaluating Legal Activism: A Response to Rosenberg*, 17 BUFF. J. GENDER L. & SOC. POL'Y 1, 41 (2009).

17. *Id.* at 48.

18. See Purvis, *supra* note 16, at 20 (discussing the proposal to Lambda Legal); Michael D. Sant’Ambrogio & Sylvia A. Law, *Baehr v. Lewin and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705, 708 (2011) (discussing the proposal to the ACLU and the role of Dan Foley).

19. See Purvis, *supra* note 16, at 19.

20. *Id.*

21. See Purvis, *supra* note 16, at 20.

22. 133 S. Ct. 2652 (2013).

23. ADAM LIPTAK, *TO HAVE AND UPHOLD: THE SUPREME COURT AND THE BATTLE FOR SAME-SEX MARRIAGE* 416 (2013) (ebook available on amazon.com).

24. Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 664 (2012) (citing *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded*, *Hollingsworth*, 133 S. Ct. 2652).

25. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 969 (2011).

court can help to strengthen an organization's identity and mobilize its constituents towards further activism and fundraising.²⁶ I have written previously to argue that the examples of Hawaii and other same-sex marriage losses in court show another function of lawsuits outside of the courtroom: that individual activists can use litigation to change the agenda of organizations from within.²⁷

It appears that this process helped to turn the ACLU's eye to gay rights issues. The process was not exclusively from below — Wheeler also outlines the frustrating tasks ahead of individual ACLU leaders attempting to convince other board members to view gay rights issues as civil liberties concerns. In the 1950s, the ACLU's new legal director, Rowland Watts, came to the job hoping to address homophobia.²⁸ Although his hopes of bringing lawsuits on behalf of LGBT individuals were stymied, he was successful in pushing the ACLU to adopt a policy statement that stated the ACLU could (not would) support the defense of individuals subjected to homophobia.²⁹ The statement did not lead to any cases, but the mere existence of the policy statement meant that the ACLU became a sort of networking hub, referring potential litigants to other burgeoning gay rights organizations.³⁰

Although Wheeler conceptually divides sexual expression and reproductive freedoms in the organization of her book, activists recognized that the two concepts were linked and that advocating birth control could lead the organization further towards issues of gay rights.³¹ At the 1964 ACLU Biennial Conference, an extraordinary reproductive justice activist named Harriet Pilpel gave a plenary presentation arguing that the ACLU was refusing take the lead on “the most difficult issues of all, ‘namely abortion and homosexuality.’”³² Pilpel worked with the ACLU and was a mentee of one of the organization's founders, but was not within the inner circle of the ACLU leadership. At that conference, however, Pilpel met Dorothy Kenyon, who was the only woman on the ACLU's board for years and had more of a platform to lobby ACLU leadership.³³ Wheeler describes their meeting as momentous in the ACLU's history, as Pilpel and Kenyon's friendship and cooperation “portended a sea change within the ACLU as women individually and collectively gained ground in staff and policy-making positions that would take the ACLU's budding new privacy agenda in unexpected directions.”³⁴

In the meantime, however, the ACLU's first forays into gay rights were not seen as equality claims brought on behalf of LGBT Americans. Instead, the first

26. *See id.* at 983.

27. *See Purvis, supra* note 16, at 31–32.

28. WHEELER, *supra* note 1, at 110.

29. *See id.* at 111.

30. *Id.*

31. *Id.* at 114.

32. *Id.* at 115.

33. *See id.* at 33.

34. *Id.* at 116.

examples of representing gay or lesbian defendants were justified by additional civil liberties infringements that were freestanding claims themselves—violations of the free speech rights of gay magazines, for example.³⁵ Initially, the speech claims were the sole justifications for the lawsuits—ACLU leadership saw civil liberties violations where media outlets rejected ads from “homophile” organizations,³⁶ or where postal authorities reported recipients of gay magazines to the recipients’ employers.³⁷

By the 1960s, however, Wheeler states that branch ACLU affiliates “began, as they had with other issues, to get out ahead of the national organization on the matter of homosexual rights.”³⁸ Due in large part to the work of the branch organizations, by 1966 Newsweek identified the ACLU as the only organization not entirely devoted to LGBT rights that “actively opposed laws against homosexual acts.”³⁹ This was a startling victory by more progressive branch activists in the public sphere, deserving of further exploration and explanation. The ACLU was certainly not actively working for LGBT equality writ large, but local activists had succeeded in changing the perception of the ACLU on the national stage. By the 1970s, Marilyn Haft was leading the ACLU Sexual Privacy Project, which was funded by the Playboy Foundation, to challenge “laws that criminalized private, consensual, sexual conduct between adults.”⁴⁰ Although the project lost every one of its cases and ended in 1977,⁴¹ there were several cases brought in 1976 challenging sodomy prosecutions.⁴² Wheeler cites the project as the ancestor of modern ACLU efforts such as today’s Lesbian, Gay, Bisexual, Transgender and AIDS Project.⁴³

If the narrative of legal activism was a straight line, this assertion would be deeply puzzling—how could a series of losses possibly lead to the ACLU’s modern leadership in LGBT issues? As Wheeler puts it, “When asked, in 2010, what the short-lived Sexual Privacy Project accomplished, Marilyn Haft laughed. ‘You know we lost every case,’ she admitted. But court victories are not the only measure of success.”⁴⁴ Such early losses may have been deeply important wins, in other words,

35. *Id.* at 155.

36. *Id.* at 154.

37. *Id.*

38. *Id.* at 155.

39. *Id.*

40. *Id.* at 161.

41. *See id.* at 175.

42. *Id.* at 174. One was an entrapment case in which the owner of a massage parlor and bookstore was propositioned by a “seventeen-year-old marine and decoy for the local police.” *Id.* As was typical until public scandal forced the practice to close, the decoy actually committed fellatio and sodomy with the entrapment subject as part of his service for law enforcement. *Id.*

43. *Id.* at 177.

44. *Id.* at 176.

because they helped mobilize the institutional weight of the ACLU behind such claims. The significance of Haft's work, as well as the work of progressive branch ACLU employees, individual ACLU lawyers, and board members who all hoped to throw the ACLU's force against homophobia, was in the internal ACLU chronicle of how the national organization eventually adopted gay rights onto its agenda. Wheeler's achievement in *How Sex Became a Civil Liberty* is thus not in actually explaining exactly how sex in all its permutations came to be understood as a constitutional issue, but in giving a historical perspective as to how individuals banded together under the auspices of the ACLU with many different ideas of how sex might or should be viewed as constitutionally protected.