

FORUM: NATION OF IMMIGRANTS

## Queer Border Crossings

Julio Capó, Jr.

Judge Leonard Moore surely made some enemies when he submitted his dissent in the Second Circuit's 2–1 ruling in the 1966 case *Boutilier v. INS*. The case involved a gay Canadian citizen who faced deportation because U.S. policy viewed homosexuality as constitutive of a “psychopathic personality” and thus an excludable trait at the border. This unsuccessful appeal, which failed again when the U.S. Supreme Court reviewed and affirmed the decision the following year, found Moore sympathetically citing Alfred Kinsey's *Sexual Behavior in the Human Male* (1948), which revealed Americans engaged in far more sexual practices—including homosexuality—and with greater frequency, than most believed. Moore maintained that the immigrant's due process rights had been violated, adding, “I cannot impute to Congress an intention that the term ‘psychopathic personality’ ... be construed to cover anyone who had ever had a homosexual experience.” He argued, “To label a group so large ‘excludable aliens’ would be tantamount to saying that Sappho, Leonardo da Vinci, Michelangelo, Andre Gide, and perhaps even Shakespeare, were they to come to life again, would be deemed unfit to visit our shores.” Moore must have really shaken the court's decorum when he levied the veiled indictment: “Indeed, so broad a definition might well comprise more than a few members of legislative bodies.” Moore's argument, which sought to genealogically link the likes of Sappho with people in the mid-twentieth century who crossed the border, intimated that such a draconian and short-sighted policy violated constitutional protections and had the potential to keep exceptional foreigners from entering, and contributing to, the United States.<sup>1</sup>

As this suggests, the experiences of queer foreigners—or those whose gender presentation or sexuality marked them as transgressive and outside the rubric of the “normative”—proves particularly insightful for understanding the checkered ways in which immigrants have been both welcomed and scorned in the modern United States. Framing some foreigners as sexually transgressive and perverse has been central to the mythologies that fueled U.S. immigration policy for well over a century. But at the same time, this history has been punctuated by moments of acceptance as well as queer resistance and defiance. The ways in which markers of transgressive gender and sexuality have been regulated at the U.S. borders, and the ways in which constructs of desirability and undesirability have fluctuated across place and time, reveal a jagged relationship between the state and queer border crossers.

The federalization of immigration law in the late nineteenth century was rooted in efforts to preserve and define normative and heteropatriarchal conceptions of marriage and the family. In 1875, U.S. Congress passed the Page Act targeting Chinese women suspected of seeking to enter for “lewd and immoral purposes,” largely understood as engaging in prostitution and polygamous relationships. As Kerry Abrams has argued, the 1875 Page Act proved an effective way for state and federal governments to control local Chinese communities through a discourse of safeguarding public morals, rather than codifying a restrictive federal immigration policy.<sup>2</sup> Seven years later, Congress followed up by passing both the Chinese Exclusion Act,

<sup>1</sup>Clive Michael *Boutilier v. The Immigration and Naturalization Service* 363 F.2d 488 (1966). For more on *Boutilier*, see Marc Stein, *Sexual Injustice: Supreme Court Decisions from Griswold to Roe* (Chapel Hill, NC, 2010).

<sup>2</sup>Kerry Abrams, “Polygamy, Prostitution, and the Federalization of Immigration Law,” *Columbia Law Review* 105, no. 3 (Apr. 2005): 641–716.

which halted the immigration of Chinese laborers, and the 1882 Immigration Act, the first broadly construed federal immigration law. Given this flurry of legislation, as Eithne Luibhéid contends, the period from 1875 to 1890 might be viewed as the gestation of the United States's imperative of promoting "family reunification." Significantly, such a foundation derived from policies that "produced an exclusionary sexual order that was integrally tied to gender, race, and class inequalities," as restrictive laws prohibited the wives of Chinese laborers to enter the United States, for example.<sup>3</sup>

Legal categories of "the homosexual" were gradually made legible and given currency with the rise of the modern bureaucratic state, which, as seen with the passing of restrictive immigration laws, sought to define who was desirable and undesirable and therefore eligible for citizenship. Margot Canaday discovered that, prior to the 1950s, under a system with an inchoate understanding of an excludable "homosexual," the "likely to become a public charge" provision proved the most effective means of barring those who engaged in sexual acts or occupied bodies that were discretionarily deemed perverse. The clause, which excluded various people who were read as undesirable, operated under a broad and discriminatory assumption that particular immigrants would become a burden to the state; their suspect bodies were deemed incapable of earning a legal or respectable wage or otherwise viewed as likely to end up in a state institution or dependent on state funds.<sup>4</sup>

This clause was not enforced or interpreted uniformly; at times, immigration officials regarded immigrants' queer embodiments as evidence of their desirability, at least on certain legal grounds. For example, they admitted José Martínez, a Spanish citizen and so-called hermaphrodite who arrived in Boston in 1907 to be exhibited "as a curiosity before medical societies," because, considering the success of his enterprise in Spain, they found it difficult to build a case that Martínez, who made a living from his ambiguous anatomy, would likely become a public charge in the United States.<sup>5</sup> Frank Woodhull, a Canadian citizen who came to the United States by way of England the following year, received similar treatment. Immigration officials believed he had cross-dressed and falsified both his sex and name, as Woodhull was given the name Mary Johnson at birth. In a case that garnered much national attention, Woodhull insisted that this was an act of necessity to circumvent economic dependence on the state and men. Like Martínez, Woodhull weaved a narrative that particularly appealed to the Progressive-era tenets of personal responsibility and financial independence and was deemed a desirable immigrant. Despite their ethnic constructions as immigrants, as Emily Skidmore observes, we must not overlook the "power of whiteness in rendering queer individuals as potential citizens rather than 'foreign' outsiders or deviant threats to the nation."<sup>6</sup>

Indeed, empire-building and concepts of nation and race proved central to the employment and construction of the public charge provision's standard of desirability. For example, single or unaccompanied women—such as Bahamian women ferreted out at the Miami-Caribbean border in the early twentieth century—were viewed as inherently dependent on the state because, in the absence of a male authority, their status as women rendered them incapable of financial stability. Racialized mythologies about their hypersexuality further fueled inspectors' penchant to exclude them at the borders.<sup>7</sup> Or take the case of Isabel González, an unmarried and pregnant woman who sailed from Puerto Rico in 1902 hoping to enter New York. Officials turned her away under a racialized rubric that viewed her, and her sexual history, as evidence that she was likely to become a public charge. Her case reached the U.S. Supreme Court, representing the first time it weighed in on the citizenship status of those caught in the middle of

<sup>3</sup>Eithne Luibhéid, *Entry Denied: Controlling Sexuality at the Border* (Minneapolis, 2002), 3.

<sup>4</sup>Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, NJ, 2009), ch. 1.

<sup>5</sup>*Ibid.*, 38.

<sup>6</sup>Emily Skidmore, *True Sex: The Lives of Trans Men at the Turn of the Twentieth Century* (New York, 2017), 80.

<sup>7</sup>Julio Capó, Jr., *Welcome to Fairyland: Queer Miami before 1940* (Chapel Hill, NC, 2017), ch. 2.

the United States's more aggressive turn to building an empire beyond the contiguous continent. The Court ruled González could not be excluded because she was not an "alien," but remained silent on whether Puerto Ricans were U.S. citizens or subjects. González and her activism helped pave the way for U.S. Congress to extend Puerto Ricans citizenship in 1917.<sup>8</sup>

For decades, U.S. immigration law contained modes of excluding people the state deemed transgressive and undesirable by way of their gender and sexuality, but it was only in 1952 that the U.S. Congress passed a regulatory policy that more discretely attacked "the homosexual" *as person*.<sup>9</sup> After World War II, more cohesive queer subcultures had emerged, especially in large cities, helping to forge communities that increasingly came to share their sense of self around their same-sex sexual desires and, in some instances, even demands for social understanding and civil rights. While these developments helped spark the homophile movements that, for many, soon embraced identitarian politics, they also led to a state backlash. In this way, the 1952 McCarran-Walter Act's efforts to exclude those afflicted with a "psychopathic personality" was itself a manifestation of the "lavender scare" that viewed those who engaged in same-sex sexual behaviors as a threat to Cold War-era national security.<sup>10</sup> With a more discernible image of "the homosexual," the state then sought to exclude "sexual perverts or homosexual persons." That was the language initially proposed for the immigration legislation before the Public Health Service recommended that phrasing would prove too difficult to detect such a "diagnosis" and, it suggested, the "classification of psychopathic personality or mental defect" already encapsulated their exclusion.<sup>11</sup>

As several immigrants got caught in a web created by the law's vagueness, challenges to the prohibitive policy ultimately served to strengthen elements of the lavender scare, further revealing the contradictions of postwar liberalism. Throughout the 1950s and 1960s, federal courts heard several suits against the policy and, in 1965, the same year the United States terminated its racially hierarchical national origins quota system, U.S. Congress amended the law to clarify the type of foreigner it intended to exclude: "sexual deviate." When the U.S. Supreme Court heard the case of Clive Michael Boutilier, the Canadian national mentioned in the introduction, two years later, the ruling interpreted "homosexuals" as a type or class of person; its interpretation saw engaging in homosexuality as a form of psychopathy. As Marc Stein has argued, in an era generally associated with progressive Supreme Court rulings on sexual matters, the ruling "developed a sexual rights doctrine that was not broadly libertarian or egalitarian; instead, the doctrine affirmed the supremacy of adult, heterosexual, marital, monogamous, private, and procreative forms of sexual expression."<sup>12</sup> Similarly, as Siobhan B. Somerville has observed, the nation's highest court ruled in *Boutilier* just three weeks before it invalidated state laws prohibiting interracial marriages in *Loving v. Virginia* (1967). In this way, she urges, we must understand *Loving* as "part of a crucial reconfiguration of sexual as well as racial citizenship." After all, it "consolidated heterosexuality as a privileged prerequisite for recognition by the state as a national subject and citizen."<sup>13</sup>

<sup>8</sup>Sam Erman, "Meanings of Citizenship in the U.S. Empire: Puerto Rico, Isabel Gonzalez, and the Supreme Court, 1898 to 1905," *Journal of American Ethnic History* 27, no. 4 (Summer 2008): 5–33.

<sup>9</sup>Surely, the 1917 Immigration Act included a provision excluding those deemed "constitutional psychopathic inferiors," but, despite the medicalization of homosexuality that persisted since the late nineteenth century, it did not function to weed out "sexual perverts." Canaday, *The Straight State*, 50n112.

<sup>10</sup>David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago, 2004).

<sup>11</sup>*Report of the Public Health Service on the Medical Aspects of H.R. 2379*, May 15, 1951, House Report No. 1365, 82 Cong. 2<sup>nd</sup> Sess., Feb. 14, 1952, 47.

<sup>12</sup>Stein, *Sexual Injustice*, 3.

<sup>13</sup>Siobhan B. Somerville, "Queer Loving," *GLQ: A Journal of Lesbian and Gay Studies* 11, no. 3 (2005): 335–70, here 357.

Narratives of “the homosexual” as a foreigner unworthy of American sympathy or admission could also be undermined by Cold War imperatives, however. Despite the policy barring “sexual deviates,” for example, hundreds of queer Cubans were permitted to enter the United States in 1980 during the Mariel boatlift. In the midst of staunch anti-communist priorities, the United States ultimately skirted its longstanding homophobic immigration policy to admit those who sought to leave—or, in some instances, had been purged from—Fidel Castro’s Cuba. From that moment until 1990, the year the United States statutorily removed the major ban on foreigners who engaged in homosexual activities—the state implemented a “proto-don’t ask, don’t tell” policy that could mitigate some of the more aggressive forms of harassment of queer folk at the U.S. borders. By the early 1990s, a handful of asylum cases involving queer foreign-nationals, including the influential *Matter of Toboso-Alfonso* (1990) of a queer Cuban man who entered during the controversial Mariel boatlift, Attorney General Janet Reno established a new precedent in 1994 that paved the way for foreign gender and sexual minorities to argue that their country of origin could persecute them as a product of belonging to a “particular social group” in refugee and asylee cases.<sup>14</sup>

This barely scratches the surface of the long and textured histories of queer immigrants who have challenged the state and its conceptualization of belonging and the “citizen-subject.”<sup>15</sup> Although the U.S. Supreme Court ruled bans on same-sex marriage unconstitutional in 2015, the issue of marriage equality continues to attract much attention from critics on both the right and left. While some on the right have argued same-sex marriage violates Biblical and traditional gender roles and the institution of marriage, some leftists have maintained that legal marriage emboldens the state’s powers and that queers should find alternatives to unions that mimic assimilationist and heteropatriarchal models. How different, however, would the same-sex marriage debate have looked if it was reframed as an immigrants’ rights issue? After all, since 1922, when the Cable Act stopped female U.S. citizens from losing their citizenship when they married foreign nationals (that is, if they married men eligible for U.S. citizenship), marriage has been one of the most efficient paths for naturalization in the United States for heterosexual immigrants, an important benefit that same-sex couples had no access to until at least 2013. That was when the U.S. Supreme Court struck down the major prohibition of the federal Defense of Marriage Act (DOMA) that had limited marriage as a union solely between a woman and a man. While discriminatory policies and hurdles still exist for these binational couples, lesbian, gay, bisexual, transgender, and queer (LGBTQ) foreign nationals may now qualify for green cards in the United States.<sup>16</sup>

For well over a hundred years, immigration policy in the United States has been manifested through a complex matrix of normative and transgressive concepts of gender, sexuality, race, class, age, and ability. It is also shrouded in incongruities that affect queers of color in distinct ways. On December 18, 2010, for example, the U.S. Senate voted to repeal the military’s “don’t ask, don’t tell” (DADT) policy that barred lesbians, gays, and bisexuals from serving openly in

<sup>14</sup>Julio Capó, Jr., “Queering Mariel: Mediating Cold War Foreign Policy and U.S. Citizenship among Cuba’s Homosexual Exile Community, 1978–94,” *Journal of American Ethnic History* 29, no. 4 (Summer 2010): 78–106. It is impossible to ignore the numerous exceptional policies that benefited Cubans—and certain other immigrant groups—fleeing communism in the midst of the Cold War just as the U.S. federal government unrolled new racialized policies of interdiction and restriction targeting Haitians, for example, fleeing a right-wing dictatorship. See A. Naomi Paik, “Carceral Quarantine at Guantánamo: Legacies of US Imprisonment of Haitian Refugees, 1991–1994,” *Radical History Review* 2013, no. 115 (Winter 2013): 142; Alan M. Kraut, *Silent Travelers: Germs, Genes, and the Immigrant Menace* (Baltimore, 1995). See, in this forum, Jana Lipman, “Immigrant and Black in Edwidge Danticat’s *Brother, I’m Dying*,” *Modern American History* 2, no. 1 (March 2019). <https://doi.org/10.1017/mah.2018.32>

<sup>15</sup>See Nayan Shah, *Contagious Divides: Epidemics and Race in San Francisco’s Chinatown* (Berkeley, CA, 2001).

<sup>16</sup>See Yesenia Acosta, “Green Cards Still Elusive for Many Same-Sex Couples,” *Advocate*, Feb. 26, 2016, <https://www.advocate.com/commentary/2016/2/26/green-cards-still-elusive-many-same-sex-couples> (accessed June 12, 2018).

uniform. While some celebrated that moment as a step forward for LGBTQ rights, in that same session the Senate blocked the Development, Relief and Education for Alien Minors Act, better known as the DREAM Act. This represented a major defeat for undocumented people—queer and otherwise—and their families and communities. To view the repeal of DADT, which some have understood as a strengthening of queer participation in state power and violence, as a victory, but fail to see the DREAM Act's failure as a significant queer issue, betrays the textured and intersectional experiences of queer communities. In response to that moment, thousands of undocumented queers redoubled their mobilization efforts. The “UndocuQueer” movement, largely spearheaded by “activist” Julio Salgado, found would-be DREAMers bravely “coming out” as both undocumented and queer. Today, that movement has chiefly been consolidated into a broader DREAMer movement that is at once radical and queer. These DREAMers, along with generations of border crossers before them, make clear that immigration issues have always been queer issues.<sup>17</sup>

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<sup>17</sup>For more on the UndocuQueers, see “Equality Archive,” n.d., <https://equalityarchive.com/issues/undocuqueer-movement/> (accessed Jan. 31, 2018).