NATIONAL CONSTITUTION CENTER

The History of LGBTQ Rights in America

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[00:00:00] Jeffrey Rosen: Hello We the People friends, and happy Friday. Jeffrey Rosen here. We were in the middle of recording this week's podcast about the history of gay rights when the Supreme Court opinions in the Second Amendment and abortion cases came down. These are important cases, and we want you to hear from thoughtful scholars on all sides of the issue. But it's also Pride Month, and we have a fascinating conversation on the history of gay rights ready for you as well. So we're bringing you two episodes today, they'll both be in the feed. Download them both, enjoy your weekend, and we're also working on an episode about the Dobbs case, which we'll publish soon. There are three episodes on Dobbs in the catalog already, so check those out while you wait, and let's learn together. Thank you for listening, and enjoy the show.

[00:00:52] Hello friends, I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

[00:01:12] June is pride month, and an important new book called Secret City: The Hidden History of Gay Washington has inspired us to convene a conversation on the history of LGBTQ rights in America. James Kirchick is the author of Secret City as well as a columnist for the Tablet, and a writer at large for Air Mail. Jamie, it is an honor to welcome you to We the People.

[00:01:38] James Kirchick: Thank you for having me, Jeff.

[00:01:40] Jeffrey Rosen: And Dale Carpenter is the Judge William Holly Atwell Chair of Constitutional Law at the SMU Dedman School of Law. He's the author of Flagrant Conduct: the Story of Lawrence v. Texas, and he also blogs for the Voloch Conspiracy. Dale, it's an honor to welcome you also.

[00:01:56] Dale Carpenter: Delighted to be with you.

[00:01:58] Jeffrey Rosen: Jamie, your book is a revelation. It is a page-turner, it is deep, and it reveals a previously unexamined history of discrimination against gay people rooted in the federal government, embodied in an executive order passed in the Eisenhower administration, and inextricably linked to the fight against communism. Tell us about your thesis, that the effort to persecute gay people in the postwar period was tied to the fight against communism and fought at the federal level.

[00:02:33] James Kirchick: Yeah, I would actually begin a little bit earlier with World War II. And that is when homosexuality transforms from being a sin, uh, a medical diagnosis, and it becomes a national security threat. Because the fear is that gay people, who have this terrible, dark secret, uh, it is so bad that the word homosexuality is not even spoken, right? The love that dare not speak its name, that's how stigmatized, um, homosexuality was. The fear is that gay people, in order to protect this deep, dark, shameful secret, will go to any lengths to protect it, including, if that m- if they're in the government and they work for the government, including turning over sensitive secret information, uh, to our adversaries. So that gay people are more susceptible to blackmail.

[00:03:23] And, you know, prior to World War II, the United States didn't have a- an, an in- an intelligence service, it didn't have a national security bureaucracy. But World War II transforms America into a global superpower, and then during the Cold War, with the Red Scare, the fear of communism becomes even more pronounced. And that's right, in 1953 one of the first executive orders that President Eisenhower signs is Executive Order 10450, which prohibits anyone found guilty of sexual perversion, which was the term that was used to describe gay people at the time, from working anywhere in the federal government, and it explicitly prohibits them from holding security clearances.

[00:04:00] And this results in something called the Lavender Scare, uh, which is coterminous with the Red Scare. Um, and it's likely that even more people lost their jobs as a result of it than did people who had, you know, shady political associations.

[00:04:15] Jeffrey Rosen: Thank you so much for that. And as you argue in your book, the human costs of that so-called Lavender Scare were dramatic, all told an estimated seven to 10,000 federal employees lost their jobs owing to homosexuality in the 1950s alone, you know, a figure that extrapolated over time is comparable to the 14,000 people who were fired or resigned due to the Red Scare. Dale Carpenter, in the introduction to your book about Lawrence and Texas, you also note the connection between fear of the spread of communism and fear of so-called deviant sexuality, and you note between 1946 and 1961 alone, goverments imposed criminal punishments on many- as many as a million lesbians and gay men engaged in consensual adult, uh, activities. Uh, w- would you also start the story around the rise of the national security state? And, and tell us broadly how the Red Scare and the Lavender Scare were united in the law?

[00:05:12] Dale Carpenter: Yeah, I, I would say that the period immediately after World War II constitute what Bill Eskridge, a Yale Law professor has called an an- an anti-homosexual terror campaign in the United States. And that was at every level of government. I think Jamie has rightly focused, um, on the federal government in his book, but it was also true at the level of state goverments, it was also true at the level of local goverments. And so the, the, the figure of a million people arrested by various goverments for engaging in these activities were not just arrested for having sex. They were arrested for things like dancing together, for holding hands, for showing any kind of affection under a variety of state and local and other kinds of law. So this was a, this was an era of a terrible terror against gay and lesbian people in particular, um,

characterized by police raids against homes and gay bars, and surveillance of gay organizations, the, such as they were, sting operations.

[00:06:25] All kinds of, of things were going on, and there's so many examples of the sort of terror that was happening even at the local level that o- one of the most noteworthy in my mind, a s- a small one, is in 1956, when there was a serial killer of Santa Moni- in Santa Monica, a, a man who ha- who had killed, uh, several gay men, uh, was arrested by the police, and ultimately confessed to his crimes, that actually triggered an anti-homosexual cleanup of the city by the police department in Santa Monica. This is, this is as the result of the arrest of a man who was engaged in serial killing. So that's the kind of thing, uh, that was going on.

[00:07:10] And I think as Jamie noted, the State Department actually, at least in some years, actually fired more people for homosexuality than it did for some communist sympathies.

[00:07:21] Jeffrey Rosen: It is a remarkable story, and thank you for helping us understand the connection between the state and federal cases. Jamie, we're already in the mid-1950s and it was 1953 that Eisenhower signed Executive Order 10450. But you begin in the Roosevelt administration with vivid stories, including the tragic story of Sumner Wells. Wh- why don't you introduce us to th- the, the rise of the Lavender Scare by telling us how we move from a world where the president of the United States could fire his gay friend with the greatest reluctance, to one where discrimination became enshrined in federal law?

[00:08:00] James Kirchick: Yeah, so Sumner Wells is the undersecretary of state in the Roosevelt administration, he's basically the de facto secretary of state, because the actual secretary of state, Cordell Hull, was an old, uh, tubercular man, he was sick half the time, falling asleep in meetings. And so FDR really relies heavily on his friend and fellow kinda blue blood, New England blue blood, um, Sumner Wells. And in 1940 on a, on, he's riding on the presidential train. He drunkenly importunes some porters, and the news of this winds up in Hull's hands. And along with another diplomat named William Bullitt, the two of them try to convince Roosevelt to fire Wells.

[00:08:38] And this is in the 1940, right, so it's before World War II. And FDR's initial reaction to this is, "Well, you know, Wells wasn't doing it on company time, was he?" So he kinda shrugs it off. Um, but there's another scandal brewing, um, that happens right after America enters World War II, it's in the spring of 1942. A Democratic senator, a conservative from Massachusetts, David Walsh, he's an adversary of President Roosevelt, and he is named by the New York Post, which at the time was a liberal newspaper, he's named as being a patron of an all-male brothel near the Brooklyn Navy Yard.

[00:09:13] This happens not to be true, um, but Roosevelt is sort of secretly, uh, supporting this campaign, because, uh, he's not a fan of, of Walsh. And so you can see here even, you know, Roosevelt is willing to protect his friend who's gay, but he's also willing to use the homosexual sphere against an adversary.

[00:09:34] Um, but by 1943, the pressure to get rid of Wells is building. There are threats among, uh, Roosevelt's, uh, enemies on Capitol Hill that they will launch investigations, and he's

able to secure Wells's resignation. And at the time, it was believed that this was, you know, this would be the end of it, tha- tha- that this, this accusation of homosexuality would not be used again, that it was such a, you know, terrible, dangerous weapon.

[00:10:02] Um, but that would be premature. And it really is, um, Joe McCarthy, I would say, who in 1950 is really able to tie these two fears together, of homosexuality and communism. I mean, the same month that McCarthy gives his speech where he famously is waving that list of 205 communists in his hand, it's just a couple of weeks later that Secretary of State Dean Atchison is called to testify. And one of his deputies, in passing, tells the senators that 91 homosexuals have been fired from the department over the previous three years. And McCarthy, who's an excellent reader of public sentiment, he's able to seize on this, and he, he conflates this in the public imagination.

[00:10:45] And, uh, there's this fear and this sense that sexual nonconformists will be political nonconformists, that both of these groups of people, homosexuals and communists, they live in the shadows. Um, you can't tell them, you can't tell who they are, you can't readily identify them. Um, so every potential homosexual is a potential communist and vice- and vice-versa.

[00:11:07] Um, and then the 1952 election campaign is partly run on a, on a, on a ... The Republican slogan is to clean up Washington, and, and part of that is referring not just to the Truman administration and the, the corruption in the Truman administration, but a sense that there's been this moral corruption, and particularly in the State Department. Um, 'cause you have to understand, you know, America had been experiencing many setbacks in the Cold War. You know, they lost China, quote-unquote, right, so to Mao Zedong. The Soviets are extending their influence over Central and Eastern Europe, and the State Department is blamed for this.

[00:11:40] And so it's these, it's these effete cookie pushers, is the term used to describe these, these men in the State Department, um, who are weak, they're feeble, they're the lavender lads, is, is the term that is used. And so homosexuality and weakness and effeminacy, um, becomes very much, uh, stro- very strong in the American public imagination. Um, and this is what leads to the, to the purge and, of, of gay people, not only the State Department but, but across the federal government.

[00:12:09] Jeffrey Rosen: Thank you so much for that, and you argue so powerfully that even at the height of the Cold War, as you put it, it was safer to be a communist than a homosexual. A communist could break with the party, a homosexual was forever tainted. Dale Carpenter, um, to what degree was, uh, m- McCarthyism and the Cold War responsible for the revival of previously u- underenforced or unenforced laws against crossdressing, against public indecency and sexual solicitation, including those against disorderly conduct, laws against child molestation and laws against obscenity, those are the four categories of early state and municipal law that Professor Bill Eskridge identifies as designed to constrain so-called deviance. And, and, and tell us how it was that this, uh, act of Joe McCarthy at the federal level led to the revival of these laws at the state level?

[00:13:02] Dale Carpenter: Well, it does seem to me that there is a direct connection between the two. The country's obviously very concerned about the postwar world and the perception, at

least, that communism was on the rise, and Russia was a great threat to the country, that there are enemies within that have to be dealt with. I think one notion was that a single, a single homosexual can pollute an entire office, that's the, that's the notion in the federal government at least.

[00:13:29] I think it's worth remembering that, um, this campaign was accompanied by a f- a wide variety of laws and a wide variety of consequences for ordinary gay and lesbian people. So for example, um, attempts to open bars in the 1950s for gay people where they congregated, uh, those were, those were, those attempts were met with stiff resistance by legal authorities. Um, you could lose your liquor license if you ran a gay bar. In fact, um, Miami passed an ordinance in 1954 that said that no bar with a liquor license could, um, could even serve a homosexual, a lesbian, or a pervert, in the words of the ordinance, and that they could not even allow two or more homosexuals to gather on the premises, and if they did they would be shut down and lose their license.

[00:14:25] You could lose your license as a doctor, as a lawyer, as a beautician, any kind of authority that the state had over you could be manipulated, uh, to suppress any kind of same-sex attraction or intimacy. Of course, your name would get published in the newspaper, that, that was a common thing, and that, that resulted in all kinds of serious social consequences for people, loss of their families, loss, ultimately of, of their jobs. Um, you could be court-martialed i- if you were in the military for same-sex intimacy, and of course you could be convicted of violating sodomy law. So all of this proceeded certainly down from the federal level, but it also proceeded up. I think there was a lot of, of concern just at the local level, uh, with homosexuality after the Second World War.

[00:15:16] And also, you know, part of this was because, and I think John D'Amelio has described this. After World War II, a lot of soldiers and sailors came back to the country and discovered they could get away from their small towns, and they could congregate in these, have, have a sort of homosexual subculture in large urban centers for the very first time, and that development led in part to the backlash against that development. And so part of it can be explained by the fear of communism, part of it can be explained by larger cultural shifts that are going on in the country.

[00:15:50] Jeffrey Rosen: Jamie, you argued that to the extent that Americans have rejected the hostility against gays and lesbians, it's thanks in large part to a small but diverse group of intrepid individuals who lived in DC. And while most narratives, as you know, stress the Stonewall Uprising in New York, or the martyrdom of the San Francisco city councilor Harvey Milk, uh, and they played a significant role, you say that the flame was, uh, tended and significantly advanced by a group of people in DC, and in particular, Frank Kameny. Tell us about him and his crusade.

[00:16:22] James Kirchick: Yeah, Frank Kameny was a Harvard-trained, uh, PhD astronomer who was working for the US Army Maps Service, w- uh, in, in 1957, so just a couple months after the launch of Sputnik and the beginning of the space race. So someone whose talents and skills are very clearly in, in demand. And he's working at a observation post in Hawaii when he's

summoned back to Washington by the Civil Service Commission, which was the organi- which was the bureaucracy that was ch- charged with carrying out investigations and firings of gay people.

[00:16:56] And he's told that they have information that he's gay, he had been arrested on the solicitation charge before in San Francisco, and they fire him. And what he does is challenge it, and he's the first person to do so. I mean, thousands of people had been fired for being gay in the years leading up to this, but what's revolutionary about his decision is that he says, "You know what? I'm not gonna put up with this."

[00:17:17] Um, and I have to, you know, I've, I, I think it's appropriate, because Frank was an astronomer, to compare this to almost Galileo, you know, being told that the Earth was flat, and him saying, "No, it's round." And they put him in prison, and they force him, they try to force him to r- relent, and he refuses to do it. And that's what, that's, I really think, what this, this moment in American history was like. It required someone as stubborn as Frank. And I knew, I got to know Frank in his later years, and Dale knew him as well, he was an incredibly stubborn person. But you needed someone like that, because if you think about the status of the homosexual in America in the 1950s, his existence was illegal, he was medically diagnosed as a sexual psychopath, he was condemned from every pulpit of organized religion. Uh, in the media he was, you know, lampooned, if they even mentioned, uh, gay subjects.

[00:18:11] And he basically becomes the first public figure to kinda, to, to come out and, and challenge this. And he, even the ACLU would not take his case, which I think is important to note. That's how lonely the homosexual was in America in this era, that even the ACLU would not take his case. Um, and he appeals to the Army, it's rejected. He takes it to court, um, he tries to get his case heard by the Supreme Court. They, they deny it, they don't listen. And so he forms an organization called the Mattachine Society of Washington, which is really the first sustained gay rights organization in America.

[00:18:49] And they, they had their first meeting at the Hay-Adams Hotel in August 1961, and they carry out letter-writing campaigns, they organize the first picket outside the White House for gay civil rights in 1965, and then other pickets outside the State Department, the Civil Service Commission. And they're widely, you know, they're, they're, they're laughed at by many people, there's a, there's a clip you can see of Dean Rusk, the secretary of state, uh, at the time, um, joking about this group of deviants, you know, marching outsi- and all the journalists in the press conference laughing with him.

[00:19:23] But I think Frank got the last laugh, because, you know, he, he was successful. It took him a long time, but, you know, one of my inspirations for writing this book was I was present in 2009 at a ceremony at the Office of Personnel Management, which is the successor organization to the Civil Service Commission, and it was there that the head of OPM at the time, who happened to be a gay man, and Michelle Obama, the first lady, they apologized on behalf of the federal government to Frank.

[00:19:48] Um, and, and he accepted it. And so it's, it's hard to think of another cause, another, another issue where there has been a more dramatic, uh, transformation in public attitudes and in

legal status than for gay men and women in America from the 19- well, really from when my book begins, in the 1930s, to the present day. I can't think of another issue where there's been a more dramatic transformation in public attitudes or legal status than that of, of, of gay men and women. And we owe, and we really owe it to Frank, I think. Largely to, to, to Frank.

[00:20:21] Jeffrey Rosen: That's so moving, that you knew Frank Kameny, that you were present at that ceremony. And you tell his story so powerfully, including the fact that when the Mattachine Society was founded on November 15th, 1961, its statement of purpose committed itself, "To secure for homosexuals the right to life, liberty, and the pursuit of happiness as proclaimed for all men by the Declaration of Independence, and to secure for homosexuals the basic rights and liberties established by the word and spirit of the Constitution of the United States." Dale Carpenter, amazing that you knew Kameny as well, do you agree with Jamie about the centrality of his role in the fight for gay and lesbian equality, and how would you say that he advanced that fight?

[00:21:06] Dale Carpenter: Well, uh, Frank was an amazing person, he was a trailblazer. He would be next to anybody, maybe ahead of anybody in the pantheon of the founders of the gay rights movement in, in the United States, that's for sure. I do wanna go back specifically to something that Jamie mentioned, and that is the petition that Frank filed in the Supreme Court in 1961. No document like that had ever been filed in the United States Supreme Court, and it took somebody with the audacity and the cantankerousness of Frank Kameny to file it. Visionary, really. And wh- what I want to emphasize about that is he, he emphasized three basic points in that petition, I urge everybody to go back and read it, um, when you get a chance.

[00:21:58] One point he emphasized is a moral point. He actually made the audacious claim that there was nothing wrong with homosexuality. That it was not morally wrong, that it was not harmful, that it was in fact just a benign variation of human sexuality, not something to be afraid of, and it was actually good. He later coined the expression gay is good, uh, uh, later on accepted by gay rights groups.

[00:22:27] The second pillar of his, his argument for the Supreme Court was libertarian. The basic idea was that individuals should be able to decide for themselves what their own lives would look like, and act without the interference of the government, again, assuming that they were not hurting other people. That was a central pillar. So there's a moral pillar, a libertarian pillar, and then a third pillar. He drew explicitly on the lessons and example of the Black civil rights movement. So there's a civil rights and equal protection pillar in Frank Kameny's argument as well.

[00:23:04] And I have to say, I don't know that many people could improve upon the argument he made in 1961 today, because he really in some ways laid the groundwork for what we've been talking about for the last 60 years.

[00:23:20] Jeffrey Rosen: Thank you so much for identifying those three arguments in Frank Kameny's Supreme Court petition, and for encouraging We the People listeners to read it. Jamie, you acknowledge that Frank Kameny was the first person to challenge the federal government over its discrimination against homosexuals. Um, his petition to the

court failed, but you note that where Frank Kameny failed at convincing the justices to hear his arguments against the government's anti-homosexual discrimination, a man called, uh, Mr. Womack succeeded in February 1962, and the court agreed to hear its first case concerning the legal status of the homosexual, Manual Enterprises v. Day. Tell us about, uh, Womack and the Day case.

[00:24:03] James Kirchick: Yeah, H. Lynn Womack was a, uh, a very colorful character. Uh, he was an obese, uh, Caucasian albino former college professor, uh, who became a sort of amateur pornographer. Um, the magazines he was producing were not that explicit by today's standards, they were what, what were called beefcake magazines. They're basically pinup magazines, but for gay men. Um, and he starts printing these in Washington in the late 1950s. And, you know, almost immediately he is, uh, tried for obscenity, and he's waging legal battles back and forth with the, with the post office.

[00:24:42] Um, and in 1962, he appeals his case all the way to the Supreme Court, and it is the first oral argument, um, that is heard regarding gay rights, is this obscenity case. And the court decides, um, in the decision, uh, the justice who wrote the decision, he freely admits that he finds these images repulsive, uh, he doesn't like them, but they're no worse than those that would be used to titillate heterosexuals. Um, and so on those grounds, uh, he is, he wins. Uh, Womack wins. And I think that's an important legal precedent, and Dale can talk more about this, but I think to acknowledge that the homosexual has the same right, you know, to his, um, erotic literature, you might say, as a heterosexual has. I think that's an important precedent, um, and it is one that is rooted very much in, in the First Amendment.

[00:25:38] Jeffrey Rosen: Dale Carpenter, what was the significance of the Manual Enterprises v. Day case, the, the, the Womack, uh, obscenity trial? And then help us understand what else is going on in the lower courts and the Supreme Court in the 1960s.

[00:25:55] Dale Carpenter: Yes, so a main objective, I think, of anti-homosexual public policy has been the suppression of homosexual expression. Any support for gay rights, any ability of gay people to organize politically, just to get together, uh, socially to associate with one another, all of those things have been, uh, an- objectives of anti-gay campaigns. So we had early on surveillance, uh, and infiltration and harassment of nascent gay organizations like the Mattachine Society and the Daughters of Bilitis in the 1950s by the FBI. We have the censorship of all kinds of, of gay media, uh, including local, federal, and state obscenity law. I would say obscenity law was one of the main ways in which gay expression of any kind was suppressed.

[00:26:49] And we're not talking here about hardcore pornography of the kind you could see anywhere on the internet today. We're talking about the most mild expressions of intimacy or depictions of any kind of intimacy or advocacy of that kind of thing. So these obscenity laws were main tools for suppressing any kind of First Amendment expression, and therefore, one of the most important tools of liberation, I think, for gay people, has been, in fact, the First Amendment. It has been the way that gay people have organized politically, have done so even in an environment where they were condemned, where most Americans thought that they were immoral, that they were dangerous, that they were predatory, and a lot of Americans thought that

throughout this period of American history, and even up until the present day, and yet the First Amendment shields them. Um, and that has been an incredibly important, uh, tool, um, for the movement as a whole.

[00:27:51] Jeffrey Rosen: That's such an important, uh, point to emphasize the centrality of the First Amendment to this struggle. And Jamie Kirchick, you note that Frank Kameny actually wrote to Robert Kennedy, reminding Kennedy of the Supreme Court's unanimous 1958 decision NAACP v. Alabama, which held that African American civil rights groups couldn't be forced to turn over their membership rolls, but, uh, the missive was ignored. Nevertheless, you described the remarkable dynamic in the Kennedy administration where President Kennedy is tolerant of gay people, his best friend Lem Billings is gay, William Walton in the White House, uh, in, in private, and yet publicly he's forced to kick people out of government for being gay, and the, and the purge continues. Tell, tell us about that dynamic and wh- um, how blackmail remains a potent force in the 1960s in the Kennedy administration.

[00:28:44] James Kirchick: Well, I think it's a, it's a recurring theme, in my book, is that we see these presidents have close relationships with gay people, whether as advisors or friends, and yet it has no bearing whatsoever on their public policies. And I, I mentioned FDR and Sumner Wells. There's also friend l- of, of Dwight Eisenhower in Arthur Vandenberg, Jr., who is the son of the great Republican senator from Michigan, who leads the Citizens for Eisenhower movement, uh, and is prepared to assume a very senior job in the administration of Eisenhower when in December 1952, so just a couple weeks before that administration is set to begin, J. Edgar Hoover, who's a, obviously a very big presence in my book, he shows up at Ike's, uh, transition headquarters in New York with information indicating that Arthur Vandenberg, Jr. is a homosexual. And that's it, he's dropped, uh, immediately, withou- without any question.

[00:29:40] Um, and then JFK is different in this sense, that he is, as you know, uh, remarkably comfortable around, around gay people, his best friend Lem Billings is gay. Gore Vidal, Truman Capote, William Walton, the arts advisor in the White House. And yet it has no bearing on, uh, public policy. There are still people being expelled from the State Department. And, you know, LBJ has close gay, gay aides. Uh, one of the, one of the few men I out in the book, uh, Richard Nixon's chief speechwriter, a man named Ray Price, uh, was a gay man, and yet we know because of the White House tapes how, uh, obsessed Nixon was [laughs] with homosexuality. He goes on these long tirades with his aides where he's ranting about, you know, gays being responsible for the downfall of Greece and Rome, and the Soviets are trying to encourage homosexuality 'cause it brings down societies, it weakens the moral fabric of societies. And yet, you know, right, right there, just a couple steps down from the Oval Office, he has one of his closest aides and speechwriters, Ray Price, is a gay man.

[00:30:39] So this is a, a, a, a recurring theme, I think, is the cognitive dissonance between our, our presidents and their ability to benefit from the talents of gay people, and to rely on them as confidantes and advisors, yet this doesn't have an effect on the policies that they're implementing, um, as, as president.

[00:30:59] Jeffrey Rosen: It's, it's a remarkable dissonance. And as you note, uh, despite their personal tolerance for gay people, um, these presidents, uh, persecuted them under federal law, and it was the specter of homosexuality that provoked the first and only suicide by a member of Congress, in his Capitol Hill office, caused Lyndon Johnson to fret that he would lose the presidency, and seized the paranoid mind of Richard Nixon, second only to the plots of his ever-expanding list of enemies, as you note in your book. Dale Carpenter, to what degree was this dissonance reflected in law in the 1960s? Jamie notes that the presidents are personally tolerant, the public turns out to be more tolerant of homosexuality than Lyndon Johnson expects, when it's less upset by the Walter Jenkins scandal than Johns- than Johnson had feared, and yet the courts, of course, are slow to respond, and you note in your book a 1970 case called Buchanan v. Bachelor, where a three judge district court declared a Texas sodomy law unconstitutional, and granted the injunctive relief. So tell us about what's going on in society and in the law in the '60s and early '70s.

[00:32:06] Dale Carpenter: Yeah, so I, I think the '60s are th- the beginnings of the first cracks in anti-gay public policy, just the beginnings of the first cracks. And actually, you could go back a little bit earlier to 1955, when the American Law Institute promulgated the Model Penal Code, which is, as its name suggests, it's intended to be a model drafted by experts, in this case in criminal law, for adoption by the states, and they try to update laws in various ways and improve them.

[00:32:38] And what they proposed in 1955 was to remove from the criminal codes in the states various kinds of archaic offenses, including archaic sexual offenses. And one of the offenses that they propose to remove was the offense against, the offense of sodomy. So every state in the United States had severe penalties for violations of sodomy laws as of 1960, all 50 states had these. As a result of the promulgation of the Model Penal Code, in 1961, Illinois became the very first state to repeal its sodomy laws. Then after that, states followed in the 1970s and in the 1980s. But that's, I think, the beginning of, of a crack for, uh, law in this country, uh, in a way that's very significant. And I would also add that the challenges to the ban on service in federal employment by homosexuals also began to crack by the end of the 1960s, with decisions by federal appeals courts, there's a decision I'm thinking of specifically called Norton v. Macy, one in which Frank Kameny, by the way, had some indirect involvement. He was involved in everything in the 1960s, uh, in, in, in setting up gay organizations all up and down the East Coast and around the country, he was involved in this litigation ag- challenging the Civil Service Commission rules, he was just involved in it all.

[00:34:10] So I think we do begin to see the cracks in the 1960s, and of course that's the time when the Black civil rights movement is most prominent, uh, the women's rights movement is also gaining prominence, and I think the gay rights movement fed off a lot of those successes and tactics, and it began, just began to show some results in the '60s.

[00:34:31] Jeffrey Rosen: Jamie, you note Frank Kameny's fundamental insight, which is that the purported justification for the Lavender Scale, namely that gay people were susceptible to blackmail, disappeared as, as, as soon as gay people were no longer afraid of coming out. And, uh, by his courage, uh, y- set a standard, and you note that there were a few others who had that

courage in the '60s, in particular Bayard Rustin in the civil rights movement, who, um, openly acknowledged that he was gay, um, and Martin Luther King, uh, quietly supported him. T- tell us about Rustin as an example of, of just how simply having the courage to come out could obviate the justification for discrimination?

[00:35:13] James Kirchick: Yeah, Bayard Rustin is really one of the unsung heroes, not only of African American history but really American history, a great human rights activist. Um, and he's the chief organizer of the March on Washington. And he's a relatively openly gay man, I mean, the leaders of the civil rights movement, they know he's gay. In fact, this had been used against him by one of his adversaries, Adam Clayton Powell, uh, the Black congressman from Harlem, um, had a, had, was, was in a fight with Martin Luther King over, over some matter and was threatening to allege that King and Rustin were lovers.

[00:35:48] Um, so this was well known to the, to the leaders of the movement. And two weeks before the March on Washington, Strom Thurmond, the leading segregationist in the Senate from South Carolina, he delivers a speech on the floor of the, of the Senate. Um, and he, basically outing, uh, to the country, outing Rustin. He has in his possession a police record for a homosexual offense, uh, for Rustin in, that was years earlier, about a decade earlier in Pasadena, California. Presumably this was given to Thurmond by the FBI, and he's trying to discredit, trying to ruin the March on Washington.

[00:36:31] And what's remarkable is that the leaders of the march, uh, stand by Rustin. Um, they decide that to punish him, to remove him, to fire him from his leadership position would basically be giving a scalp to Strom Thurmond, and they're not going to do that. It's, it would be a form of, of appeasement, basically. Uh, and so Rustin survives this charge, he's really, he becomes the first public figure in America to survive an outing, you might say. Uh, he s- he speaks at the march, he appears on the cover of Life magazine, and he, he continues to have a very successful, influential career as a, as a, as a human rights activist, um, in the United States and around the world. And, um, that's a very important moment. I mean, we all know about the, the March on Washington, it's one of the mo- one, you know, one of the greatest moments in 20th century American history. We don't, this, this aspect of it, this sort of gay aspect of it I don't think is fully appreciated.

[00:37:28] Jeffrey Rosen: Thank you so much for that. At the Constitution Center, we show King delivering the dream speech in the Civil War and Reconstruction exhibit, and Bayard Rustin is behind him. Dale Carpenter, um, after the march, we're moving toward the 1970s. Uh, tell us about the major legal landmarks that happen then?

[00:37:48] Dale Carpenter: Well, I think there are a number of major legal landmarks. I would say, uh, undergirding the development, the legal development was a significant development with the American Psychiatric Association, which had had as of 1952 a, um, homosexuality listed as a kind of mental disorder. And part of the visionary leadership actually of Frank Kameny in the early 1960s or mid 1960s was to say that we have to get the APA to repeal that. Because one of the pillars of anti-gay public policy, in addition to religion and law, is actually psychiatry. You see gay people as immoral through religion, you see them as criminals through

law, and you see them as sick through psychiatry, and that was a significant, uh, a significant fact of life for a lot of gay people, and subjected gay people to a whole lot of, of horrible treatment, including in institutionalizations and places like the Atascadero State Facility in California, where people were subjected to, um, electroshock therapy and castration and all kinds of horrible treatments. It w- in fact, it was called, I believe, Dachau for queers, as it was known in California.

[00:39:09] So, um, removing that, um, happened in the 19- in 1973, as a result of the activism of, of people like Frank Kameny, who appeared repeatedly th- at these conventions of the APA, and urged them to repeal the policy, because there was no basis for it. There was no, there was no basis for saying that homosexuality was some kind of mental disorder, or that homosexuals were in any way a threat to themselves or to others.

[00:39:38] That was a very significant development, and then I think a number of things happened in the '70s that followed that. One of them was in 1974, Bella Abzug actually introduced the very first gay rights bill in Congress, where she proposed actually amending Title VII of the Civil Rights Act of 1964 to protect gay people from discrimination in employment, uh, the earliest action, I think, taken by a member of Congress.

[00:40:08] We also saw, of course, after that, the fact that local communities passed their own civil rights protections for gay people in employment, certainly in, in, uh, public employment, and even in some other areas. So that also began to happen in the 1970s, although there was also, uh, a, a backlash in the 1970s, where we had the crusade of people like Anita Bryant to try to connect the growing homosexual rights movement with predation on children and recruitment of children, that sort of, um, theme was developed in the '70s, and, and continues, we have seen, even today.

[00:40:50] Jeffrey Rosen: Jamie, as you note, uh, the 1970s, in particular, '71 was the year that Frank Kameny became the first openly gay candidate for public office when he ran for the non-voting delegate to Congress, uh, in DC. He lost, but he, um, felt that he affirmed the importance of not being closeted. And the '70s were also the time when Oliver Sipple, a gay man who saved the life of President Ford, lost his own after he was outed. Uh, he sued on the grounds of invasion of privacy, the California Supreme Court dismissed his case on the grounds that his homosexuality was already known by hundreds of people at the time of the assassination attempt, and he was so upset that, uh, he eventually committed suicide. So tell us about Sipple, Kameny, and the highlights of Kameny's efforts in the 1970s?

[00:41:42] James Kirchick: Yeah, so this is in the era really of gay people coming out of the closet in great numbers, um, and it's really sparked in many ways by the Stonewall Uprising in 1969, this gains national attention. Um, it goes on for several days, and it's written about in newspapers across the country, and you see the first gay pride parades in cities, um, uh, all, all over the United States.

[00:42:07] Um, and Kameny's run for Congress in 1971 is a pretty big deal in this regard, because he is, uh, the first openly gay person to run for Congress. He doesn't get many votes, but he's there in the newspapers, he's there on local television making the case. Um, and he's also

talking about lots of other issues, he's not a single-issue candidate. He's running as a, as an across the board candidate.

[00:42:29] Um, the case of Oliver Sipple is, shows this tension between openness and disclosure. That is really a running theme, I think, through my book, but also just the history of gay people in America. Because what distinguishes gay people as, as a minority is that they have the ability to hide. Uh, they have this thing called the closet that they can stay in. And it's a double-edged sword, because on the one hand, th- it can protect you if you're in a job or you're in a sensitive position somewhere, but on the other hand it makes it very difficult to organize as, as a political community when you have all these gay people who are not wiling to acknowledge it, and it's a real challenge for political organizing.

[00:43:06] And this is reflected in the life of Oliver Sipple, who's an ex-Marine, he's a veteran of the Vietnam War. And in September 1975, he is the man who saves Gerald Ford from the second assassination attempt that month, um, when he sticks his hand out and, and presents the, the, prevents the assassin's bullet from striking the president.

[00:43:25] And who, the person who outs him, it's a, it's a ironic story, is actually Harvey Milk, who was not yet a city councilman, but he was on his political rise. And he wants the world to know that the man who saved the president of the United States was a gay man. He thinks that this is very important for the country to realize, that we're not, we're not all pedophiles and criminals and communists, that we're also heroes, as well. And he leaks this information to Herb Cain, who's the legendary columnist for the San Francisco Chronicle.

[00:43:54] And what happens is that, you know, Oliver Sipple, like many gay people who moved to San Francisco in the early 1970s, they were fleeing, you know, very oppressive, um, homes. And Oliver Sipple's family disowns him when this, this becomes news. Uh, his mother tells the media that, you know, "We were very proud of Oliver, and then we heard this, and now I can't leave the house, 'cause I'm too ashamed to see people outside." And when she dies, his father won't even let him come to the funeral. His family completely cuts him off.

[00:44:23] He does sue, uh, a consortium of newspapers, saying that they violated his privacy. But as you noted, um, his legal case is thrown out, because it was not exactly a secret. Um, but he's basically driven to alcoholism and, and, and dies of alcoholism in, in the late 1980s. And then it's a sad, it's a, it's a sad story, and you see this tension, um, between the, the, what many gay people believe was the imperative, uh, that gay people needed to come out of the closet, but there were also consequences of this, unforeseen consequences. Certainly Harvey Milk did not, you know, he was not malicious in doing what he was doing. You can understand where he was coming from. Um, but there was a real human cost to this, um, in this particular case.

[00:45:08] Jeffrey Rosen: There was indeed a human cost, and your book does such a invaluable service in telling the stories of these victims of discrimination so that we can understand exactly what the cost was. Uh, Dale Carpenter, I'm gonna ask a big question now, which is for you to basically take us from the Bowers and Hardwick case in 1986 when the Supreme Court upheld a Georgia sodomy law criminalizing, uh, sodomy in private between consenting adu- dults, and Lawrence v. Texas in 2003 when the court overruled Bowers and

reaffirmed that the right to privacy included the right to same-sex intimacy. A big story, your, your book tells it so well, but broadly, what are some of the factors that you would highlight for We the People listeners about why the court changed its mind?

[00:45:55] Dale Carpenter: Well, there are a number of things I think that led the court to change its mind. Um, should, should back up probably by noting that as I said earlier, as of 1960, all 50 states had sodomy laws of one sort or another. In 1973, the state of Texas actually repealed its sodomy law legislatively, but then enacted what it called a homosexual conduct law that was targeted specifically only at same-sex couples, um, and so that's the, the run-up to Lawrence v. Texas, because the legislature refused to repeal that law in every year in its sessions afterwards.

[00:46:36] And then as you mention in 1986, there was a challenge to a Georgia sodomy law, um, and that challenge was unsuccessful. The, the challenge was basically on grounds that there was a right to privacy which homosexuals had, and the court responded but to that challenge in a 5-4 decision basically by saying the claim was facetious, that there was no right to what it called homosexual sodomy, ne- let alone this right to privacy that gay people might have, there was no right to homosexual sodomy, said the court. And that was a terrible defeat for the gay rights movement. Because it had effects all across the board. It had effects on service in the military. It had effects on the ability of parents to obtain custody of their children. It had effects on the right to hold a job as a police officer or be a public employee.

[00:47:33] It affected the rights of teachers to teach in the schools, because after all, why would you want a teacher in the school who was an admitted violator of the law? What sort of example was that to be setting for one's children that had an effect on service in the military, of course there was no talk of marriage by homosexuals. If they can't have sex, clearly they, they have no standing to say that they have any right of marriage.

[00:47:58] So that was a significant, uh, s- defeat. And gay rights activists looked for the case that would ultimately in Lawrence v. Texas reverse that decision in Bowers v. Hardwick. And the case that arose in Texas was a case where John Lawrence had been arrested for allegedly having sex in his own bedroom with another man, Tyrone Garner. Now, my book details the notion that they probably actually weren't having sex, or that the police actually didn't see them having sex, um, and that like- it's likely that the police were acting on a, a mixture of motives, including anti-gay motives, in arresting them, but at least that provided the basis for a challenge to the Supreme Court.

[00:48:47] They were not successful in the Texas s- court, so it goes back up to the United States Supreme Court. And I think what changed between 1986, when Bowers was decided, and 2003, when Lawrence v. Texas was decided, is not that the Constitution's text changed, not that we had some new discovery of the original meaning of the Constitution, or some new insight into the structure of the Constitution, not some, uh, new groundba- breaking precedent, uh, that changed the outcome. I think what changed is that the court and the country got much more familiar with gay people. They were coming out of the closet. So in 1986, a justice on the Supreme Court, who was the swing vote on the Supreme Court, could say with a straight face that he did not know any gay people, he did not understand them whatsoever. By 2003, all the justices on the court, I

believe, had had openly gay law clerks or cl- clerks that they knew by that time were gay, and they knew they weren't a threat.

[00:49:54] And the kinds of arguments that the advocates in 2003 made were this. In saying that the sodomy laws are now unconstitutional, you are not going to be leading the nation down some groundbreaking path, you're gonna be following the country. You're going to be following it, not leading it, and so it's safe for the court to, to make that move. After all, by 2003, only 13 states had sodomy laws anymore, and only four of them were targeted solely at homosexual conduct, as the Texas law was. So I don't think it's so much a doctrinal shift as I think it was a social and cultural shift in the country.

[00:50:34] Jeffrey Rosen: Jamie, do you agree with Dale that the most important shift between '86 and 2003 was the country becoming comfortable with gay people, a cultural, not a doctrinal shift? And tell us about the highlights from your book during that period. You, you date a central shift, uh, far earlier than Lawrence, uh, as early as 1975, that was the date that the federal government turned over what Frank Kameny called the surrender document, a set of guidelines nullifying a prohibition on gay people from holding civil service jobs, and you argue that it took only 18 years, but Kameny's pressure, uh, l- were finally beginning to show results.

[00:51:15] So in the, in that wide-angle scope, from, uh, where I guess we're talking about from 70 to t- 2003, lawyers are so Supreme Court-centric, but you really don't mention the Supreme Court all that much in your book. What do you think was going on during that period to shift public attitudes?

[00:51:30] James Kirchick: Well, I think that, that, uh, decision in 1975 with the Civil Service Commission to lift its ban on gay people working in the civil service is huge, and it also makes Washington, DC, you know, really one of the first cities to have, effectively, an antidiscrimination statute, because the federal government is the largest employer, of course. And so DC becomes a kind of gay mecca in a way, because you can come and now fork for the federal government and be protected in your job, and there are very few cities in the United States that have passed anything like that.

[00:51:59] Um, but yes, I absolutely agree with Dale, and it goes back to this issue before, of, of disclosure. And, you know, gay people are evenly distributed across the population. There are gay conservatives, there are gay liberals, th- you know, even the most conservative right-wing family or senator is gonna have a gay person within, with- within the family somewhere, right? Or, or will have an acquaintance.

[00:52:22] And AIDS is a huge part in this, and one of the characters I write about in the book is a man named Terry Dolan, who's one of the leading right-wing activists in Reagan's Washington, he basically, uh, creates the first PAC, the first political action committee. Um, he dies of AIDS in 1986, and it comes as a real shock to the people in the conservative movement, 'cause, uh, they didn't think that, you know, or they pretended not to know, perhaps, that there were gay conservatives, right? That, that gays were all these, you know, long-haired beatnik lefty types, but that's not the case.

[00:52:54] Um, and so I think it's, it's, uh, it's a combination of this and, again, going back to the, to the First Amendment, and to freedom of expression and freedom of association. Um, this is what, uh, forces the issue onto the public scene. The Clinton administration, uh, Bill Clinton is the first presidential candidate to openly appeal to gay people, in 1992. He's the first president to openly recruit gay people to work in his administration. There are, obviously, you know, um, uh, downsides to the Clinton administration, there are steps backward. There's the Defense of Marriage Act, there's gays in the military. Um, but for the purposes of my book, I end, I end in 1995 with the lifting of the ban on security clearances, because that is when what I call the specter of homosexuality comes to an end. At that point there is no more official prohibition on gay people working in the government.

[00:53:48] There's still homophobia, of course, there's still legal battles to be won. But in terms of this era of, um, enforced secrecy, in this era when homosexuality was the most dangerous political weapon, um, i- it ends around the, the turn of the century.

[00:54:06] Jeffrey Rosen: Dale, do you agree that 1995 and the end of official federal discrimination is the right place to at least draw a strong marker, or would you say that it wasn't until the Obergefell, uh, marriage equality decision that full equality for gays and lesbians is obtained, and ba- basically taking us up from Lawrence to Obergefell, what caused that shift?

[00:54:33] James Kirchick: Well, I- so obviously I think that the end on the, the ban on service by gay people, um, i- in federal employment is extraordinarily important. I also think that the end of the ban on service by gay people in the military is extremely important, and that doesn't happen actually until 2010, 2011, uh, under the Obama administration with some support from Republicans. Uh, that's very significant, because that's a significant marker of citizenship in this country. You are a full citizen if you can serve the country, as gay people had been doing since going back to World War II and before. So those are all significant moments. I would say, um, more significant in some ways is actually Lawrence v. Texas, which happens to be the subject of my book, because I think it's absolutely critical that before you can have marriage rights, you h- have an acknowledged right to intimacy in the privacy of your own home. That is a building block of a relationship with, which Justice Kennedy recognized in his opinion in Lawrence v. Texas.

[00:55:40] And I have to say that in some ways, Justice Scalia, who warned in his dissent that gay marriage would be the next step was accurate, that this was actually an essential building block, it was essential to end the, these sodomy laws around the country to get more progress toward marriage. Because I think what happens after that is we get the decision from the Massachusetts Supreme Court saying that marriages have to be allowed in that state. That's just 2004. No gay marriages in this country until 2004, even, even that victory was not secure for a couple of years, there were significant challenges legislatively to that, and there was a lot of backlash in the states to, uh, the prospect of gay marriage, as there had been in, uh, 1996 under the Defense of Marriage Act.

[00:56:31] So this was a, a process, but back to Jamie's point, it's the most remarkably quick process that I think we've ever seen. We go from no gay marriages anywhere in the world in the

year 2000, and certainly none in the United States in 2004, to in 2015 we have a decision from the Supreme Court that finally recognizes that going from outlaw to outcast is not, uh, the full range of liberty that gay people should enjoy, that's in Justice Kennedy's opinion. So, um, ultimately, I think Obergefell is the culmination of decades of progress, uh, I think you see that much of that in Jamie's book, and I think you see it in my book as well, and in the history of the gay rights movement over the la- last half or two-thirds of the 20th century.

[00:57:23] Jeffrey Rosen: Well, I'm loathe to close, as Lincoln said, but we need to have, uh, closing thoughts. Uh, Jamie, your book makes such a contribution in telling a story that many lawyers and citizens don't know, which is the central role of federal discrimination against gay people and its tie to anticommunism in creating the persecution in the postwar period, and the end of that discrimination which resulted from the activism and Frank Kameny and others. After writing this remarkable book, what are some broad lessons that you'd like to share with We the People listeners?

[00:58:01] James Kirchick: Well, I'm just incredibly grateful to be a gay person living today, because it was terrible and extremely difficult to be a gay person living just a few generations before my time, uh, and I'm very proud of our, uh, of our Constitution. This is a cons- this is a podcast about the Constitution, and it is absolutely the principles of the First Amendment, freedom of expression and association that transforms the status of gay people from the most despised group in this country in the 1930s, '40s, when I begin my book, um, to where we are today, and it's a, it's just a, it's an incredible story of perseverance and persuading people of what was right, and using, using our constitutional freedoms, there was no violence required, there was no revolution required. It was using our Constitution and our, and our liberty to persuade our fellow citizens. Um, and it's, that is what was responsible for this dramatic, incredibly positive transformation in public attitudes.

[00:59:01] Jeffrey Rosen: Beautifully said, and thank you so much for that. Dale, last word in this meaningful discussion is to you, what final thoughts would you like to leave We the People listeners with about the remarkable transformation in the courts about the status of gay rights in the postwar period?

[00:59:20] Dale Carpenter: Yeah, I think, uh, Jamie has it exactly right. I think two things about the structure of the United States Constitution made the progress of the gay rights movement possible in the latter half of the 20th century and the first couple of decades of this one, and that is the decentralized nature of American government, the fact that you could have experimentations with equality and nondiscrimination in locales and in states around the country that then bubble up to the federal level, and the libertarian structure of this country, which both limits the power of the government in some very important ways and actually affirms some very important rights guarantees, including first and foremost, as Jamie says, the First Amendment, which actually made the creation of modern gay America possible.

[01:00:12] Jeffrey Rosen: Thank you so much, Jamie Kirchick and Dale Carpenter for an inspiring discussion about the history of gay rights and the central role of the First Amendment and the Constitution. Jamie, Dale, thank you so much for joining.

[01:00:27] James Kirchick: Thank you for having us.

[01:00:28] Dale Carpenter: Thank you.

[01:00:31] Jeffrey Rosen: Today's show was produced by Melody Rowe and engineered by Greg Scheckler. Research was provided by Colin Dubeau, Vishan Chowdury, Sam Desai, and Lana Ulrich. Homework of the week, please read the great books we're discussing today, Secret City by Jamie Kirchick and Flagrant Conduct by Dale Carpenter, and rad the Supreme Court decisions that are coming out as they come down so you're ready for next week's podcast. Always remember that the National Constitution Center is a private nonprofit, and please keep the emails and donations coming. Your notes and letters mean so much, um, as does your support. And you can provide that by becoming a member at constitutioncenter.org/membership, or give a donation of any amount to support our work, including this podcast, at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.