

JANUARY 27, 1961: THE BIRTH OF GAYLEGAL EQUALITY ARGUMENTS

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In 1956, it was not exactly illegal to be a “homosexual” in the United States, but it was a felony to make love to anyone of the same sex, and mere suspicion of homosexuality could cost a citizen her livelihood. Dr. Franklin Kameny, a Harvard-educated (Ph.D.) astronomer, was arrested in August of that year for allegedly soliciting sex from an undercover police officer. Because the charges were expunged after a probationary period, Kameny’s application for a position with the Army Map Service identified the incident as one in which the plea was “not guilty” and the charge was “dismissed.”¹ This description of the incident was technically correct under state law, but when the Army learned of the underlying charge, it concluded that Kameny had not been sufficiently forthcoming. The Army dismissed him, and the Civil Service Commission (“CSC”) barred him from federal employment for several years. The employment bar also automatically prevented Kameny from obtaining security clearances needed for virtually any private sector job in his field.

That Kameny lost his job over a minor incident suggesting his homosexuality was nothing new in the period after World War II. Nor was the irony of his situation particularly unusual: dismissals from federal or state government service were just as likely to be based upon the failure of a government employee to be completely

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1. Kameny was arrested in San Francisco for allegedly soliciting sex from an undercover police officer in a public restroom. In return for a guilty plea to a charge of lewd conduct, the court sentenced him to probation. After he completed the probation, Kameny petitioned the court pursuant to § 1203.4 of the California Penal Code, to withdraw his guilty plea and substitute a plea of not guilty, upon which the court would dismiss the charges. The court granted the motion. See Petitioner’s Brief at 6–9, *Kameny v. Brucker*, 365 U.S. 843 (1961) (No. 60-676), *denying cert. to* 228 F.2d 823 (D.C. Cir. 1960) (per curiam); Brief for Respondents in Opposition at 3–4 & n.4, *Kameny* (No. 60-676).

truthful on a questionnaire as upon the crime itself.² What was unusual was Kameny's response: he sued the federal government to get his job back. His attorney, Byron Scott, argued that the government's action was arbitrary and therefore in violation of the Due Process Clause of the Fifth Amendment.³ The federal courts in the District of Columbia summarily dismissed this argument and the complaint. Without the assistance of counsel, Kameny filed a petition for writ of certiorari with the U.S. Supreme Court on January 27, 1961. Kameny's brief in support of that pro se petition is a landmark in the history of gay rights and sensibility.

Like his attorney in the courts below, Kameny made standard due process arguments: the government's decision to fire him and bar him from further employment was not sufficiently supported by the facts of his case, did not follow the proper procedures, and operated under a substantively arbitrary or overbroad rule barring federal employment of people who commit "immoral conduct."⁴ Not only was the "immoral conduct" bar vague, but it imposed an "odious conformity" upon federal employees, inconsistent with the First Amendment.⁵ Implicitly, Kameny was arguing a Millian limitation on government: the state cannot impose moral conformity upon its citizens, except where a person's conduct is harming other citizens.⁶ He linked this limitation to the First Amendment, on the ground that denying a certain class of dissident citizens state employment was one method by which the state could "attempt to tell the citizen what to think and how to believe."⁷ The philosophical basis for this argument is the positivist claim that law should be separate from morality. Philosophers and policymakers had deployed this kind of thinking in the 1950s to criticize laws making sodomy

2. Solicitation of sex with another man in a public restroom would also have barred Kameny from public employment. This was the Catch-22 for gay men and lesbians in the 1950s: if you had a social life, you lied about it; if you were caught lying (gay men were easy to catch), perjury replaced perversion as the basis for discipline. The rhetoric of officials in the Truman and Eisenhower Administrations and the behavior of government agents suggested that merely being a "homosexual" was sufficient ground for discharge. See Petitioner's Brief at 9, *Kameny* (No. 60-676) (CSC investigators asked Kameny what comments he cared to make about the allegation that "you are a homosexual").

3. See *Kameny v. Brucker*, 282 F.2d 823 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 843 (1961).

4. See *id.* at 21-25 (quoting CSC Disqualification of Applicants, 5 C.F.R. § 2.106(a)(3) (1958)).

5. *Id.* at 27; see *id.* at 28-29.

6. See JOHN STUART MILL, *ON LIBERTY* 85-86 (Prometheus Books 1986) (1859).

7. Petitioner's Brief at 29, *Kameny* (No. 60-676).

between consenting adults a crime,⁸ but Kameny's brief is the first public document I have seen that makes this libertarian argument in the context of the state's civil discriminations against gay people.

Having made this libertarian case against the CSC's policy and its application to his discharge, Kameny shifted legal and philosophical gears. The federal government's broad exclusion from employment "makes of the homosexual a second-rate citizen, by discriminating against him without reasonable cause," he argued.⁹ In a remarkable section, his brief then laid out in some detail the reasons why exclusion of this group is irrational. As the Kinsey report had shown, a lot of Americans have been intimate with someone of the same sex.¹⁰ In fact, the exclusion reached as much as thirty percent of the American population—and a group that was as intellectually, morally, and physically heterogeneous as persons of color, Jews, and other groups that had once been wrongfully excluded from state employment.¹¹ Further, Kameny noted, there was no scientific basis for the belief that "homosexuals" were psychopathic (a term of the era).¹² "The average homosexual is as well-adjusted in personality as the average heterosexual."¹³ Because such persons are capable of excellent government service, the brief continued, excluding them is presumptively irrational, and sheer madness if the exclusion is accompanied by terrorizing state investigations.¹⁴

The irrationality stands in contrast to the purpose of the American government, as articulated in documents ranging from the Declaration of Independence to a 1960 presidential report, Kameny further maintained. "Our government exists to protect and assist *all* of its citizens, not, as in the case of homosexuals, to harm, to victimize, and to destroy them."¹⁵ This portion of the brief reasserted the theme that anti-homosexual discrimination was grounded upon "prejudices" rather than efficiency but pressed the

8. See, e.g., COMM. ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT ¶ ¶ 62–76 (1957) [hereinafter REPORT] (study commissioned by the British Parliament), reprinted in THE WOLFENDEN REPORT 48–55 (Stein and Day, Inc. 1963); H.L.A. HART, LAW, LIBERTY, AND MORALITY 13–17 (1963) (defending REPORT, *supra*).

9. Petitioner's Brief at 32, *Kameny* (No. 60-676).

10. *Id.* at 34–35 (citing ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 650 (1948)).

11. *Id.* at 34–37.

12. *Id.* at 37.

13. *Id.*

14. *Id.* at 38–39, 42.

15. *Id.* at 49.

theme further, and in a way inconsistent with the document's initial libertarian premises: "'One role of government is to stimulate changes of attitude.' In fields of anti-Negro, anti-Semitic, anti-Catholic, and other prejudice, the government has indeed recognized, and is playing fully and admirably its role as a leader of changes in attitude."¹⁶ The CSC's exclusion, Kameny argued, "constitute[s] a discrimination no less illegal and no less odious than discrimination based upon religious or racial grounds, a personal discrimination which is, to borrow a phrase from *Bolling v. Sharpe*, 'so unjustifiable as to be violative of due process.'"¹⁷ Having made an open appeal to the equal protection component of the Fifth Amendment, Kameny's positivism fell away entirely: the exclusionary policy was "a stench in the nostrils of decent people, an offense against morality."¹⁸

The Supreme Court denied the petition and, as is customary, gave no reasons for the denial. Kameny's brief had fallen upon deaf ears.¹⁹ Yet the ideas in it were revolutionary and important. The brief was an announcement that the objects of the postwar antihomosexual *Kulturkampf* were insisting on equal citizenship—not just an easing of persecution. Such demands were virtually unprecedented. The federal government was unwilling even to tolerate "sex perverts," whom CSC official Kimball Johnson announced in 1960 would be "fired on the spot."²⁰ Even the homophile groups of the 1950s (the Mattachine Society in Los Angeles and the Daughters of Bilitis) had pleaded only for tolerance but had not dared insist on full equality.²¹ Thus Kameny's petition went beyond both the government and the homophile positions, maintaining that tolerance was not enough; equal treatment was required.

After filing his petition, Kameny founded the Mattachine Society of Washington, D.C. ("MSW"), which expressed his philosophy in a letter to Attorney General Robert Kennedy:

16. *Id.* at 50 (quoting PRESIDENT'S COMM'N ON NAT'L GOALS, REPORT 4 (1960)).

17. *Id.* at 56 (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)) (citation omitted).

18. *Id.* at 59.

19. Kameny's pro se brief languished in legal obscurity until noted by historian David K. Johnson. David K. Johnson, "Homosexual Citizens" *Washington's Gay Community Confronts the Civil Service*, WASH. HIST., Fall-Winter 1994-1995, at 52-53.

20. See Petitioner's Brief at 32, *Kameny* (No. 60-676).

21. See generally JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970* 150-56, 174-75 (1983) (explaining how Kameny's approach diverged from the homophile movement of the 1950s).

We feel that, for the 15,000,000 American homosexuals, we are in much the same position as the NAACP is in for the Negro, except for the minor difference that the Negro is fighting official prejudice and discrimination at the state and local level, whereas we are fighting official prejudice and discriminatory policy and practice, as ill-founded, as unreasonable, as unrealistic, and as harmful to society and to the nation, at the Federal level [as well]. Both are fighting personal prejudice at all levels. For these reasons, and because we are trying to improve the position of a large group of citizens presently relegated to second-class citizenship in many respects, we should have, if anything, the assistance of the Federal government, and not its opposition.²²

Other groups, such as San Francisco's Society for Individual Rights and New York's Mattachine Society, took similar positions. In February 1966, the First National Planning Conference of Homophile Organizations adopted this resolution:

Homosexual American citizens should have precise equality with all other citizens before the law and are entitled to social and economic equality of opportunity.

Each homosexual should be judged as an individual on his qualifications for Federal and all other employment.

. . . .

[I]t is time that the American public re-examine its attitudes and its laws concerning the homosexual.²³

By the late 1960s, Kameny's slogan "Gay is Good" had become the rallying cry for gay activists.

Although avant-garde, Kameny's full equality stance did not crystallize out of thin air. It was borne of the frustration felt by "homosexuals" in the late 1950s. The libertarian compromise supported by both homophiles and mainstream moderates was the mutually protective closet: the government would leave "homosexuals"

22. Letter from Dr. Franklin E. Kameny, President, The Mattachine Society of Washington, D.C., to Robert F. Kennedy, Attorney General (June 28, 1962) (on file with the FBI, FOIA File HQ 100-430320 (Mattachine Society) § 6, Serial No. 88); *see also* News Release, The Mattachine Society of Washington, D.C. (Aug. 1962) (on file with the FBI, FOIA File HQ 100-403320 (Mattachine Society) § 6, Serial No. 90X) (insisting on the same constitutional rights for "the homosexual minority—a minority in no way different, as such, from other of our national minority groups").

23. *U.S. Homophile Movement Gains National Strength*, THE LADDER (Daughters of Bilitis, Inc., San Francisco, Cal.), Apr. 1966, at 4–5 (quoting the conference's resolutions) (internal quotation marks omitted).

alone so long as they did not flaunt their sexual orientation and made no trouble. But the closet was unstable. For many straight people, apparently including some in the CSC, the closet was like a Trojan Horse, threatening their or the nation's security; for many gay people, the closet was an emotionally suffocating prison.²⁴

Another way of understanding the instability of the closet is through a normative lens. The compromise of the closet rested upon the assumption of *tolerable sexual variation*: people "deviating" from the heterosexual norm were unfortunate or miserable beings but posed no danger to the majority. Although sexologists supported this norm, most straight Americans did not. They considered "homosexuals" mentally sick and sexually dangerous; in American culture, homosexuality was synonymous with child molestation. By 1961, an increasing number of "homosexuals" rejected the toleration idea, but for the opposite reason. From their perspective of *benign sexual variation*, homosexuality was a misfortune only because of social intolerance; the condition itself was no more problematic than being left-handed.²⁵ The problem was homophobia, not homosexuality. Kameny's Supreme Court brief was the boldest articulation of this point of view before the 1970s.

A final significant feature of Kameny's brief, of course, was that it was a legal document petitioning a court for recognition of constitutional rights. The arguments made in the brief were almost unimaginable in 1961 and, for the most part, had not been made by Kameny's attorney to the lower courts. Before 1961, "homosexuals" almost never resisted their persecution in a court of law: they paid off corrupt police officers and judges; pleaded guilty to charges of attempted sodomy, lewd conduct (Kameny's crime), indecency; or quietly left their jobs. Reported cases raising issues of sexual variation in the 1950s almost uniformly involved appeals of felony convictions, state and federal censorship of homophile and men's physique magazines, and revocation of liquor licenses for alleged "homosexual hangouts."²⁶ Judges sometimes, grudgingly, applied

24. See William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703, 704-07 (1997); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1794-1802 (1996).

25. See Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267 (Carole S. Vance ed., 2d ed., Pandora Press 1992) (1984) (developing the norm of "benign sexual variation"); see also WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 9-12 (1999) (discussing the concept of "benign sexual variation").

26. See ESKRIDGE, *supra* note 25, at 83-97 (surveying the cases).

ordinary principles of procedural due process and statutory interpretation to give homosexual defendants the minimal benefit of a rule of law.²⁷ The U.S. Supreme Court had even ruled that homophile publications and physique magazines were protected by the First Amendment.²⁸

Kameny's pro se brief, filed on January 27, 1961, marked the first time the U.S. Supreme Court was presented with an appeal by an openly homosexual man who had allegedly lost his job because of his sexual orientation or because of an arrest for homosexual activity. It was the first time a litigant before the Court had challenged the compulsory heterosexuality requirement for federal employment or other benefits. As Kameny argued, such a requirement of sexual conformity or closetry was a violation of the First Amendment.²⁹ It was the first brief before the Supreme Court to argue that homosexuality was a benign variation, that "homosexuals" were a minority group like Jews and African Americans, that antihomosexual discrimination was fundamentally based on prejudice rather than a neutral policy, and that the equal protection component of the Fifth Amendment barred discrimination on the basis of sexual variation. And all this was written by a person with no legal training. The table below encapsulates the revolutionary character of Kameny's brief by contrasting its ideas with those held by the government and by the established homophile groups in 1961.

It took almost a decade for the lawyers to catch up with Kameny. Challenges to the CSC's exclusion of "homosexuals" from federal service continued through the 1960s and were usually more successful than Kameny's had been.³⁰ The constitutional arguments made by attorneys were invariably due process and not equal protection ones—a realistic concession to the homophile position that tolerance and protection of law was all that "homosexuals" could expect from a homophobic society. This neglect of the equal protection argument changed immediately after the Stonewall riots

27. See, e.g., *Clackum v. United States*, 296 F.2d 226, 229 (Ct. Cl. 1960).

28. *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (per curiam), *rev'g* 241 F.2d 772 (9th Cir. 1957).

29. For an updated version of Kameny's argument, see David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994).

30. For an account of the cases and of the decline and fall of CSC's exclusion, see William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 911-18 (1997).

TABLE

Different Normative Stances Toward Homosexuality, 1961

Status Quo (Mainstream Consensus)	Homophile Position (Mattachine Soc’y of Los Angeles)	Kameny Position (Mattachine Soc’y of Washington)
<i>Malignant Sexual Variation:</i> Homosexuality (sexual perversion) is sick and predatory.	<i>Tolerable Sexual Variation:</i> Homosexuality is unfortunate but not harmful to third parties.	<i>Benign Sexual Variation:</i> “Gay is Good.”
<i>Homosexuals as Menace:</i> “Homosexuals” and sex perverts are a dangerous and predatory group.	<i>Homosexuals Pose No Dangers:</i> “Homosexuals” are no threat to anyone else and are not predatory.	<i>Homophobia as Menace:</i> Gay people are productive members of society. Homophobes are a dangerous and predatory group.
<i>The Straight-Threatening Closet:</i> Closeted “homosexuals” in government positions are a threat to national security and should be exposed.	<i>The Mutually Protective Closet:</i> “Homosexuals” in government should not be excluded so long as they are discreet.	<i>The Gay-Threatening Closet:</i> Gay people suffocate in the closet and ought not to be penalized by the state in any way.
<i>Communitarian:</i> The community needs to be protected against “homosexuals;” the law has an essential role. Parallel: Communism.	<i>Libertarian:</i> “Homosexuals” should be left alone and not persecuted. Parallel: Religious minorities.	<i>Egalitarian:</i> Gay people should be accorded the same treatment and dignity as straight people. Parallel: The civil rights movement.
<i>Procedural Due Process:</i> “Homosexuals” should be accorded the same rights to due process of law accorded rapists and child molesters.	<i>Substantive Due Process and First Amendment:</i> “Homosexuals” have a right to privacy and to publish their dissenting views.	<i>Equal Protection:</i> Gay people are entitled to the full equal protection of the laws; exclusionary rules founded on antigay prejudice are presumptively unconstitutional.

of June 1969.³¹ After Stonewall, lesbians, gay men, and bisexuals came out of their closets in substantial numbers and organized themselves into hundreds of organizations that agitated for changes in the law’s discriminatory treatment.³²

31. The Stonewall riots, on-the-street protests against police harassment and state persecution of gay people, occurred over several nights in late June 1969. See MARTIN DUBERMAN, *STONEWALL 193–203* (1993) for an account.

32. See Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1581 (1993) (stating that “Stonewall was quickly followed by the formation of new gay liberation organizations”); D’EMILIO, *supra* note 21, at 233 (noting that the Stonewall riots were able to “spark a national grassroots . . . effort among gay men and women”).

Yet the first lawyers to develop Kameny's equal protection arguments were associated with the American Civil Liberties Union (the "Union"), which had officially endorsed the old consensus. In 1957, the Union's Board of Directors had adopted a resolution stating that "[i]t is not within the province of the Union to evaluate the social validity of laws aimed at the suppression or elimination of homosexuals. . . . [H]omosexuality is a valid consideration in evaluating the security risk factor in sensitive positions."³³ Yet the Union never denied that "homosexuals" should be afforded the full protections of legal procedures and rules, however, and Union-affiliated attorneys such as Mitchell and Juliet Lowenthal litigated pathbreaking precedents in some of the early gay rights cases. Further, in Washington, D.C., the National Capital Area Civil Liberties Union provided attorneys and clout to assist gay people discharged from federal employment or denied security clearances because of their sexual orientation and activities.

Ten years later, the national ACLU revoked its prior policy and in 1967 took the position that sodomy laws criminalizing private conduct between consenting adults of the same sex were an unconstitutional infringement of the right to privacy.³⁴ In 1969, the Union took an even more momentous step. Under the auspices of the ACLU, Professor Norman Dorsen of the New York University School of Law agreed to file petitions for certiorari on behalf of two gay men who had been dismissed from federal employment and denied security clearances. Dorsen and Charles Lister, a lawyer in Washington, D.C., drafted and submitted briefs in support of certiorari for the petitioners in *Schlegel v. United States*³⁵ and *Adams v. Laird*.³⁶ Although the authors were apparently unaware of Kameny's petition filed almost ten years earlier, Dorsen's and Lister's petitions in those cases made similar arguments: gay people are good citizens, homosexuality is an acceptable variation from the norm, and antigay discrimination is "odious," unjust, and contrary to the equal protection component of the Fifth Amendment.³⁷ While "irrational fears and prejudices abound . . . the government

33. *ACLU Position on Homosexuality*, MATTACHINE REV., Mar. 1957, at 7 (reprinting resolution); *The ACLU Takes a Stand on Homosexuality*, THE LADDER (Daughters of Bilitis, Inc., San Francisco, Cal.), Mar. 1957, at 8–9.

34. See D'EMILIO, *supra* note 21, at 212–13.

35. 397 U.S. 1039 (1970), *denying cert. to* 416 F.2d 1372 (Ct. Cl. 1969).

36. 397 U.S. 1039 (1970), *denying cert. to* 420 F.2d 230 (D.C. Cir. 1969).

37. Petitioner's Brief at 6–9, *Schlegel* (No. 69-1257); Petitioner's Brief at 5, *Adams* (No. 69-1258) (incorporating the reasons given in *Schlegel*). The *Schlegel* brief also invoked the anti-discrimination principle of the Civil Rights Act of 1964 and subsequent laws. Petitioner's Brief at 17–18, *Schlegel* (No. 69-1257).

may not add its approval or sanction to these prejudices. Otherwise, Negroes, communists, and bastards would not have been entitled to the constitutional protections that the Court has consistently provided" under the Equal Protection Clause of the Fourteenth Amendment.³⁸

Like Kameny's arguments, these fell on deaf judicial ears. But also like Kameny's, they were the arguments of the future. Since 1970, attorneys representing gay men, lesbians, and bisexuals have made open appeals to equal protection for sexual and gender minorities in the context of state and federal employment, adoption and child custody, military service, security clearances, and marriage licenses, to mention only the most frequently litigated areas.³⁹ That the nation remains disinclined to recognize gay people as completely equal citizens does not undermine the importance of the aspiration, first articulated in the highest court by an astronomer and constantly pressed since 1970 by the law professor we honor in this issue.⁴⁰

38. Petitioner's Brief at 15, *Schlegel* (No. 69-1257).

39. ESKRIDGE, *supra* note 25, at 125-37, 205-41 (surveying the cases).

40. During Professor Dorsen's presidency and with his active support, the ACLU established its famous Gay and Lesbian Rights Project. The national Union or its local affiliates played a key role in dozens of gay rights litigation efforts, including the same-sex marriage cases of the 1990s, in which I was involved. *See, e.g., Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (per curiam) (denying same-sex couple a marriage license; the National Capital Civil Liberties Union had submitted an amicus brief on behalf of the claimants).