

The Gay Path Through the Courts

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Flagrant Conduct:
The Story of Lawrence v. Texas
by Dale Carpenter.
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In 1986, in *Bowers v. Hardwick*, the Chief Justice of the United States, Warren Burger, drawing on the English jurist William Blackstone, described homosexual sodomy as “an offense of ‘deeper malignity’ than rape,” and “a crime not fit to be named.” He did so in a concurrence to a decision upholding a Georgia sodomy statute. Seventeen years later, in *Lawrence v. Texas*, the Supreme Court declared that same conduct to be a fundamental right, a constitutionally protected aspect of personal liberty when engaged in by consenting adults in private.

It is rare enough for conduct long considered criminal, indeed worse than rape, to be transformed into a constitutional right. But for it to happen in a mere seventeen years, the equivalent of a nanosecond in the “Jarndyce and Jarndyce” tempo of constitutional law, is nothing short of extraordinary. The story of how it happened is one of the great success stories of public interest law. It shows what a carefully orchestrated litigation campaign can do when supported by a passionate and growing social movement. At the same time, it offers a cautionary tale for the current controversy over the recognition of same-sex marriage, which may soon be headed, prematurely, to the Supreme Court.

The Supreme Court’s 2003 decision in *Lawrence v. Texas* devoted a scant paragraph to an anodyne description of the facts of the case, barely mentioned the defendants, and described their alleged conduct only as “a sexual act.” The Court was evidently more at ease with the nuances of constitutional jurisprudence than with the messy details of the case. Dale Carpenter’s *Flagrant Conduct* fills in the gaps, and provides a rich, meticulous, and fascinating account of the most important constitutional decision so far on the status of gays and lesbians in American society.

Unlike the Court, Carpenter revels in the factual details and the personalities involved in the struggle, as he takes us from the recesses of a private bedroom in a seedy condominium on the outskirts of Houston to the oral argument in the grand chamber of the United States Supreme Court. Along the way, he offers sharp insights into the politics, ironies, and strategies behind the *Brown v. Board of Education* of the gay rights movement.

It wasn’t only the Supreme Court justices, Carpenter reveals, who did not want to focus on the facts. It was no accident that in *Lawrence v. Texas* there had been no trial, no testimony, no witnesses. On advice of their lawyers, the defendants, John Lawrence and Tyron Garner, pleaded “no contest,” meaning that they accepted the facts as asserted in a single sixty-eight-word police report filed with the court, and chose instead to fight their convictions only by challenging the validity of the law they were alleged to have violated. The silence extended beyond the courtroom. Their attorneys counseled the two men

not to talk about what happened in the apartment, not only to the press while the case was ongoing, but even to Carpenter himself long after the case had ended in victory.

As Carpenter tells it, however, the story of what actually happened in John Lawrence’s apartment on the night of September 17, 1998, is far more complicated than the unchallenged police report suggests. Indeed, he maintains, there may have been no sex, much less sodomy, at the core of this case about



John Lawrence (left) and Tyron Garner (right), who were charged with sodomy under a Texas statute in 1998, celebrating their Supreme Court victory with Mitchell Katine, one of their attorneys, at a Gay Pride parade in Houston, June 28, 2003. Garner died in 2006, Lawrence in 2011.

the constitutional status of homosexual sexual activity.

What is undisputed is that four officers of the Harris County Sheriff’s Office responded to a call that there was a “black male going crazy with a gun” in a condominium apartment. The call had been made by Robert Eubanks, the sometime partner of Tyron Garner, in a drunken rage that may have been sparked by jealousy about Garner and Lawrence. The three men had been in Lawrence’s apartment on a hot September evening, and Lawrence and Eubanks were drunk. At some point, Eubanks left the apartment, angry, and called the police with the false report. The officers arrived, found Eubanks crying and shaking outside, and approached the apartment. When they found its door ajar, they announced themselves and entered.

What they found inside is entirely in dispute. The lead officer, Joseph Quinn, reported that after announcing the officers’ presence, entering the apartment, and moving to a back bedroom, he observed Lawrence and Garner there, engaged in anal sex. His partner William Lilly said he observed oral sex, but also said he wasn’t sure whether it was anal or oral. Lawrence claimed that he and Garner were not engaged in sex of any kind with each other, then or ever, and were actually seated fifteen feet apart when the officers entered. The other two officers said they saw no sex take place. Quinn’s account is undermined by his implausible claim that the men continued to engage in sex well after they knew police officers had entered their apartment, guns drawn, and

continued even after Quinn entered the bedroom and directly ordered them to stop.

Lawrence was drunk, and refused to cooperate with the police. They had to drag him out of the apartment to the patrol car. He refused even to put his pants on, and went to the station in his underwear. Quinn, the lead officer on the scene, did not tolerate such defiance. He had a reputation for being overzealous, and had previously arrested two mothers for parking briefly in a no-parking zone while picking up their children from middle school, and

white man, had been arrested for drunk driving twice, and convicted of “murder-by-automobile” in 1967. He had a long-term relationship with another man, but not with Tyron Garner. Garner, a young black man raised in Houston’s poverty-stricken inner city, never owned a car or house, never held a steady job, and never even rented an apartment. He had been convicted twice for assaults and arrested three more times for other crimes. And Robert Eubanks, who made the call that precipitated the whole affair, was described by one person close to the case as a “gun-totin’, beer-swillin’, Gilley’s kickin’ bubba from Pasadena.” In short, these were not exactly the “poster children” that the gay rights movement wanted.

But of course the ideal defendants would be unlikely to be arrested or charged with such a crime. So the gay rights community took what it could get. The case made its way to a local gay attorney, Mitchell Katine, who contacted lawyers with Lambda Legal, a national gay rights public interest law organization in New York. Lambda lawyers saw their opportunity, and swiftly assumed a lead role. At their recommendation, Lawrence and Garner withdrew their initial pleas of “not guilty,” which would have necessitated a trial and factual defense, and instead pleaded “no contest,” which focused the case solely on whether the law was valid.

From that point on, Lawrence and Garner receded into the background, as the lawyers portrayed the case as a challenge to a statute that affected all gay and lesbian persons, treating them as criminals for engaging in the same consensual intimate sexual acts in which heterosexuals were free to engage. Since 1974, Texas’s law made anal and oral sex a crime only when committed by persons of the same sex. So the lawyers challenged the law as both a violation of the Constitution’s guarantee of equal protection by impermissibly singling out gays and lesbians, and a violation of the liberty of consenting adults to engage in sexual acts of their choice in the privacy of their own homes.

In a sense, it is entirely fitting that we do not know whether Lawrence and Garner were actually engaged in sex when arrested. The sodomy statutes, after all, were significant not because they actually deterred private intimate sexual activity among same-sex couples. Since they were so rarely enforced, few would avoid private sexual relations out of fear of being prosecuted. Rather, the statutes worked more insidiously, as a symbolic marker of second-class status for all gays and lesbians. Sodomy laws treated all but the celibate homosexual as presumptively criminal. And that status had ripple effects down the line, since it could be used to deny gay parents custody or adoption, to bar them from renting a home (on the ground that they would inevitably commit crimes there), or to disqualify them from jobs.

In November 1999, Lambda’s Ruth Harlow argued the case to an initial

appeals panel in Texas comprised of three Republican judges. Remarkably enough, she prevailed, 2–1. The Texas Republican Party, however, immediately rebuked the two judges in the majority, and vowed to oppose them in their reelection campaigns. The full Texas appeals court (also all elected judges) apparently heeded the warning and reversed the panel, 7–2, without even hearing oral argument. The Texas Criminal Court of Appeals, the state’s highest court for criminal matters, declined to hear a further appeal, and the case was ready to be presented to the US Supreme Court.

At this point, Harlow enlisted as co-counsel Bill Hohengarten, of Jenner & Block, a leading corporate law firm. And Harlow selflessly elected to have the case argued by Paul Smith, an experienced Supreme Court litigator, also at Jenner & Block. Harlow and others felt it essential that a gay or lesbian lawyer argue a case that so centrally implicated the status of gays and lesbians. Smith was openly gay, but was primarily known to the Court not as a gay rights advocate, but as a talented, trustworthy, and seasoned Supreme Court litigator who had a thriving appellate practice representing corporations. Lambda also coordinated the filing of “friend-of-court” briefs from some of the nation’s best lawyers, representing such establishment organizations as the American Psychological Association, the Episcopal Church, the American Bar Association, and even the Republican Unity Coalition.

Lambda framed the dispute as a case about intimate relationships, not sex acts. The Supreme Court in *Bowers* had infamously (and offensively) identified the question presented as whether there was a fundamental right to engage in homosexual sodomy, and had answered no by pointing to the long history of condemnation of such conduct. The *Lawrence* litigators insisted that the liberty involved was the right of adults in relationships to engage in sexual intimacy of their choice, and emphasized the role that such intimacy plays in sustaining long-standing relationships. They emphasized that Texas’s only justification for intruding on the privacy of adult relations and treating homosexual sex differently from heterosexual sex was its moral disapproval of gays and lesbians as a class, which they asserted was an impermissible basis for a criminal law.

Equally important, Lawrence’s lawyers stressed that times had changed since 1986, when the Supreme Court decided *Bowers*, and that they were merely asking the Court to recognize that change. As Ruth Harlow put it, “We wanted the case to be positioned as if the Court were catching up to society, as opposed to pushing the Court to do something that would be leading society.” To that end, they framed their argument as narrowly as possible. They did not insist that discrimination on the basis of sexual orientation should be subjected to heightened scrutiny, for example, arguing instead that even under the most lenient scrutiny, the state’s bare interest in moral disapproval of gays and lesbians could not justify such a criminal law. And they were especially careful to avoid any argument that might implicate the nascent same-sex marriage debate, since

they were aware that that issue was far more controversial.

Dale Carpenter accurately calls the Supreme Court case a “mismatch.” The case was argued for Texas by the Harris County District Attorney’s Office, without any strong outside support. No major private law firm filed a brief in support of the law. The friend-of-court briefs on Texas’s side were dominated by antigay conservative religious groups, many of them on the fringe, and were largely written by lawyers unknown to the Supreme Court. As Carpenter puts it, “antigay argument was no longer acceptable in polite, elite society in Washington, DC, or among the top law firms in the country.”

In short, by the time the case reached the Supreme Court, those defending the status quo were largely outsiders,



Lawyers David Boies and Theodore Olson, who had filed a federal lawsuit challenging Proposition 8, California’s ban on some-sex marriage, celebrating a US district court ruling that it was unconstitutional, West Hollywood, August 4, 2010

while the mainstream appeared to be solidly behind the challengers. Carpenter concentrates on the lawyers who submitted briefs in the case and argued it before the Court; but an equally if not more significant perspective would point to changes in the world at large. Between *Bowers* and *Lawrence*, eleven states had abandoned or invalidated their own sodomy laws. State and local antidiscrimination laws increasingly included sexual orientation as a prohibited basis for employment and other decisions, and same-sex partner benefits were becoming the norm for private and public employers alike.

All but one state permitted gay adoptions. A federal law allowed surviving same-sex partners to receive death benefits. Gay men and lesbians were increasingly out of the closet, and many openly gay and lesbian politicians had been elected to public office. Nationwide, public opinion had shifted from 55 percent opposing the legalization of homosexual sex in 1986 to 60 percent supporting its legalization by 2003. Only four states still criminalized homosexual sex as a distinct category.

These changes were reflected even within the Supreme Court’s narrowly circumscribed world. Justice Lewis Powell, who cast the decisive fifth vote to uphold the Georgia sodomy law in *Bowers*, told his law clerk at the time, Cabell Chinnis, that he had never even met a homosexual. Chinnis himself was gay, but not out. Paul Smith had clerked for Powell in 1979–1980, but at the time was uncertain of his sexual orientation, and not out. By the time *Lawrence*

reached the Court, openly gay and lesbian clerks had worked for the justices, including Bill Hohengarten, who had clerked for Justice David Souter and was now representing Lawrence. The day of argument, someone told Smith that Justice Sandra Day O’Connor, who had joined the majority in *Bowers*, had recently sent a baby present to one of her former law clerks and her same-sex partner. By 2003, it was unlikely that anyone on the Court could say that they didn’t know a homosexual.

In this setting, the Court was receptive to arguments that striking down Texas’s law was simply following society, not leading it; that homosexual sex is, like heterosexual sex, an integral part of ongoing, committed personal relationships; and that simple moral disapproval is not a sufficient ground

to same-sex couples a violation of its state constitution. But prevailing in the Ninth Circuit, the most frequently reversed federal circuit, is no guarantee of further success. Boies and Olson are taking a big gamble.

Justice Scalia is right that the rationale of *Lawrence* calls into question such laws as Proposition 8. Especially where, as in California, the state otherwise affords same-sex couples all the same legal benefits (and obligations) that opposite-sex couples obtain from marriage, and denies only the formal recognition of “marriage,” it is difficult to see what state interest denying full recognition would serve, except moral disapproval, the interest found constitutionally insufficient in *Lawrence*. And if, on Justice Kennedy’s reasoning, private sexual activity is constitutionally protected because it is central to human beings’ ability to develop and sustain committed relationships, should not the relationships themselves be similarly protected?

But it’s not so simple. Both Kennedy and O’Connor went out of their way in *Lawrence* to stress that their reasoning did not question the validity of state laws restricting marriage to unions between a man and a woman. To some of the justices, the fact that moral disapproval is an insufficient basis to impose a criminal sanction on private behavior may not necessarily mean that moral disapproval is insufficient to withhold the imprimatur of approval that is communicated by the state of “marriage.” But more important than that doctrinal question is whether the time is right for asking the Supreme Court to resolve the debate over same-sex marriage. The victory in *Lawrence* is most plausibly attributable to the social setting, in which Texas stood as an outlier. Against that background, Lawrence’s lawyers could assure the Court that it was following society, not leading it.

The situation with respect to same-sex marriage is very different. Twenty-eight states prohibit recognition of gay marriage by constitutional amendment. Another ten do so by statute. Only eight states and the District of Columbia affirmatively recognize gay marriage. The governors of Washington and Maryland recently signed bills legalizing same-sex marriage in their states—though opponents in those states and elsewhere are attempting to restrict marriage to unions between a man and a woman by referendum.

In short, recognition of same-sex marriage, while gaining momentum in recent years, is still the exception. Were the Supreme Court to rule that the Constitution demands recognition of same-sex marriage, it would be leading, not following. Moreover, in the unlikely event that it did so rule, its decision might well spark a backlash along the lines seen in California, only at the national level, with renewed calls for a federal constitutional amendment prohibiting same-sex marriage. The results could be disastrous.

A better vehicle for challenging restrictions on same-sex marriage exists. Three district courts have now declared unconstitutional a provision of the federal Defense of Marriage Act (DOMA), which was enacted by the Republican-controlled Congress in 1996 and signed into law by President Bill Clinton in a politically calculated

Adam Lau/AP Images

act that pandered to antigay prejudices. That provision denies a wide range of federal benefits (including Social Security and federal employee health benefits) to same-sex couples who have been legally married in states that recognize same-sex marriage.

Congress generally exerts no power over domestic relations law, and defers to the states with respect to who is married. But here, Congress selectively intruded on a traditional state domain for the sole purpose of denying federal benefits to same-sex couples. The act's legislative history makes clear that its

purpose was to express moral disapproval of homosexuality (same-sex marriage was not yet legal in any state when the act became law). And the Obama administration has recently declined to defend the law. Because the law is so patently discriminatory, intrudes on state authority, and the solicitor general will not even defend it, the cases against DOMA stand a far better chance of succeeding in the Supreme Court. But for now, since they are still pending in the courts of appeals, they are not yet ripe for Supreme Court review. Many gay rights advocates worry

that Boies and Olson's lawsuit, which is much less likely to be viewed favorably, will get there first.

The proponents of Proposition 8 have asked the Ninth Circuit court to rehear the case "en banc," which would mean erasing the recent victory declaring Proposition 8 invalid and holding a new hearing before a panel of eleven judges. Even though this would mean reconsideration of the recent panel decision in favor of same-sex marriage, that result may well be the best option for gay rights advocates. The longer this issue is kept from the Supreme

Court, the better. In time, the denial of same-sex marriage will be seen, like sodomy statutes, as a relic of the past, a reflection of bias against human beings equally deserving of society's respect for their relationships. But we are unlikely to be led there by the Supreme Court. It will recognize the proposition that gay marriage deserves equal status only after most of society has already recognized that truth. That day will come, but going to the Supreme Court prematurely risks delaying its arrival. □

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