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The Strategy

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Flagrant Conduct: The Story of Lawrence v. Texas
by Dale Carpenter
W. W. Norton, 345 pp., $29.95

THE SUPREME COURT'S decision striking down state statutes that criminalized gay sex was a constitutional landmark, and will remain famous long after today's arguments over same-sex marriage come to seem just as antiquated as the early 1960s disputes over racially segregated public accommodations. *Lawrence* v. *Texas*, in 2003, arose from an unlikely confluence of unusual circumstances. Dale Carpenter's assiduous unearthing of the case's early history in Houston's overlapping gay and law enforcement communities highlights how every great constitutional decision owes its existence to obscure individuals whose crucial contributions proved more essential to the final outcome than anything in the legal briefs or oral arguments.

Those fortunate enough to have read *Simple Justice*, Richard Kluger's memorable history of *Brown* v. *Board of Education*, will remember Reverend Joseph A. DeLaine of Clarendon County, South Carolina, and anyone who appreciates *Griswold* v. *Connecticut*'s creation of a constitutional right to privacy must give thanks to James G. Morris, the emotionally disturbed Catholic layman whose insistent complaints about the opening of a Planned Parenthood contraception clinic led reluctant New Haven officials to authorize the arrest of Estelle T. Griswold, the clinic's director. Similarly, most people familiar with *Roe* v. *Wade* know the real name of the pseudonymous lead plaintiff, Norma McCorvey, but hardly anyone recalls the now-deceased Roy Lucas, the young lawyer whose constitutional vision underlay *Roe* and similar cases, or the other now-deceased attorney who introduced McCorvey to Texas's youthful abortion rights litigators.

In *Lawrence* v. *Texas*, the crucial roles were played by Harris County Sheriff's Deputy Joseph Quinn and one-time gay bartender Lane Lewis, who is now the chairman of the Harris County Democratic Party. Quinn was the lead law enforcement officer who responded to a false report of a man with a gun in a second-floor apartment, only to find a trio of gay men but no firearm. Quinn's subsequent police report asserted that two of the men, John Lawrence, white and age fifty-five, and Tyron Garner, black and age

thirty-one, continued on with frenetic anal intercourse even after officers with guns drawn ordered them to cease and desist.

Carpenter's painstakingly careful examination of the officers' contradictory accounts, plus Lawrence's and Garner's initial denials of any sexual activity, leads him to conclude that the two men were falsely arrested on a charge of sodomy, and that the most overt sign of gay sexuality the officers actually saw were "two pencil sketchings of James Dean, naked with an extremely oversized penis" in Lawrence's bedroom. Lawrence, furious at the deputies' late-night intrusion into his home, failed to censor his verbal comments or cooperate in being detained, so his resulting mug shot pictures a dishevelled man who had been unwillingly dragged down the concrete stairs outside his apartment.

Law enforcement colleagues viewed Quinn as a "tough cop" with a "bad attitude," and one local judged called him "just overzealous. He was 'zero tolerance.'" Based on those interview comments, Carpenter accurately concludes that "almost any other officer in the department would probably have released Lawrence and Garner" rather than arrest them. The two men spent the night in jail and pled not guilty, while word of the unique bedroom arrests spread quickly among local law enforcement personnel.

The court clerk Nathan Broussard and Sheriff's Sergeant Mark Walker were an understandably closeted gay couple, and when the charges first arrived on Broussard's desk the next morning, he called Walker to tell him what his notorious colleague Quinn had done. That evening the two men went to the gay tavern they visited weekly, where the bartender Lane Lewis had known them for years. Lewis, unlike Broussard, Walker, Lawrence, or Garner, was active in gay civil rights causes, and when he learned that night from his two friends about the unusual arrests, he immediately appreciated the case's legal potential and asked Walker to fax him a copy of the charges.

Soon after receiving the document, Lewis called John Lawrence to offer his help, and to explain how Lawrence and Garner's arrests could be used to challenge Texas's criminal prohibition of same-sex—and *only* same-sex—sodomy. The two men met that evening, and Lawrence, still furious over Quinn's treatment, agreed to follow Lewis's lead. Lewis then called a local gay attorney named Mitchell Katine, who later recalled that "I thought the call was a joke" until Lewis corroborated his story by faxing Katine a copy of the arrest report. Katine quickly informed Suzanne Goldberg, an attorney at the national gay rights group Lambda Legal, about the promising case. Within several days, Lewis, Lawrence, and Garner met Katine and a colleague at their law firm, and there Lawrence—as he told Carpenter in April 2011, just months before his death—"repeated what Lewis had already told the lawyers: he and Garner were not having sex."

A trial in which Lawrence and Garner would renew their initial pleas of not guilty might well have resulted in their acquittals rather than a fact-perfect constitutional challenge to Texas's criminal sodomy statute, and so Lawrence and Garner willingly committed to the sacrifice that Lane Lewis first had broached in his initial phone call: to withdraw their not-guilty pleas

and instead plead "no contest" to Quinn's charges. As Katine later phrased it, "John and Tyron allowed their lawyers to proceed with the case in the manner necessary to succeed"—succeed, that is, in taking forward a case everyone understood had national potential, rather than just quickly clearing the men's records.

At their next court appearance, their first with counsel, Lawrence and Garner each signed Texas's standard no-contest form—"I confess that I committed the offense as alleged in the State's information and that each element of the State's pleading is true"—and were assessed fines that allowed their lawyers to appeal the case upwards. "From the beginning," Katine told *Legal Affairs*, "we did not want to complicate the case by dealing with the facts. We said, 'Whatever the police said, we will not challenge it.'"

Carpenter, who himself practiced law in Houston during the 1990s and was active in the gay community, accurately observes that "*Lawrence* advanced as a case because nobody wanted to know what the underlying facts were." Eighteen months passed before an initial state appeals court panel considered the constitutional merits of Katine's and Lambda's challenge to Texas's statute penalizing only same-sex—and not heterosexual—sodomy, and when that panel ruled two-to-one in their favor, the gay rights lawyers faced the unexpected danger of triumphing too soon, thus being unable to use *Lawrence* as a vehicle for challenging the U. S. Supreme Court to reconsider, and overrule, its infamous decision in *Bowers* v. *Hardwick* in 1986, where a narrow five-to-four majority had enthusiastically endorsed the continued state criminalization of gay sex.

Fortunately for the cause of gay rights, a political backlash amongst Texas Republicans against the panel's ruling led the full appeals court—whose judges are elected, not appointed—to reverse the panel by an overwhelming margin of 7-to-2, thus reinstating Lawrence's and Garner's convictions. Texas's highest criminal court then sat on the resulting appeal for over a year before deciding that the case did not merit its review. Only then, in mid-2002, were the gay rights litigators able to take *Lawrence*v. *Texas* to the U. S. Supreme Court.

With Texas's Attorney General refusing to defend the statute, the task of arguing for the convictions fell to the seriously understaffed Harris County District Attorney's office. The new District Attorney couldn't spare the time to read the briefs that his office filed, but nonetheless insisted upon making the oral argument himself. Similar mismatches have long been the historical norm: in *Brown*, Kansas was represented by a young state lawyer who had never before visited Washington and was put on the train all by himself; in *Griswold*, Connecticut's prohibition of contraceptive use was defended by one, part-time assistant state's attorney; and in *Roe*, each of Texas's two oral arguments were presented by badly overworked lawyers from the state attorney general's office.

Dale Carpenter, who is now a law professor at the University of Minnesota, does a superb and memorable job of narrating the appellate ins and outs as

Lambda's first-rate and deeply committed legal staff oversaw all of the filings and preparations for the oral argument before the U. S. Supreme Court. Lambda selected an experienced gay Supreme Court advocate named Paul Smith, who twenty years earlier had clerked for Justice Lewis F. Powell, Jr., the most ambivalent member of the *Bowers* majority, to argue for Lawrence and Garner. Smith's performance so out-classed the prosecutor that gay rights proponents were rightfully optimistic long before the Court publicly announced its 6-to-3 overruling of *Bowers* on June 26, 2003.

Justice Anthony M. Kennedy's majority opinion exalted the importance of personal liberty, but one sentence from Justice Antonin Scalia's angry dissent best captured the future import of the *Lawrence* ruling: "Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned." Scalia's accurate prediction has not yet come true, but the day when it will is not many years away.

Carpenter rightly concludes that *Lawrence* "had been abstracted away from what had or hadn't happened" that September night five years earlier on the east side of Houston. But that was as it should be, for as Carpenter has written elsewhere, "sodomy laws ... were never really about sodomy" but about marking gay, lesbian, and transgendered individuals as people of inferior status rather than fully equal citizens. American history is of course all too familiar with this pattern—racial segregation was never really about *segregation*, either—but *Lawrence*'s end result and future impact are a powerfully fitting tribute to all of the Lane Lewis's and Joseph Quinns, whose historical contributions are not ignored or forgotten in this wonderful book.

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