Lawrence v. Texas - The story behind the story
by Dahlia Lithwick March 12, 2012, The New Yorker

In 2003, the United States Supreme Court decided the case of Lawrence v. Texas, ruling, by a six-to-three margin, that anti-sodomy laws were unconstitutional. Even those of us who followed the case had a rather gauzy notion of what had triggered the litigation. On the night of September 17, 1998, someone made a phone call to the police, warning that a black man was “going crazy with a gun” in an apartment just outside Houston. A clutch of sheriff’s deputies stormed the apartment, and found no gun, but they arrested John Geddes Lawrence and Tyron Garner for having sex in Lawrence’s bedroom. And, in an unlikely series of legal twists, the arrests of Lawrence and Garner became a vehicle for challenging old anti-sodomy laws that were used solely to shame and stigmatize gay couples. Lawrence and Garner were arrested for simply doing what loving couples do.

The story told in Lawrence v. Texas was a story of sexual privacy, personal dignity, intimate relationships, and shifting notions of family in America. By the time the tale poured from Justice Anthony Kennedy’s pen, in his decisive majority opinion, it was even about the physical dimension of love: “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” The opinion used the word “relationship” eleven times.

That is the story that Dale Carpenter, a professor at the University of Minnesota Law School, seeks to untell in his important new book, “Flagrant Conduct” (Norton), a chronicle that peels the Lawrence case back through layers of carefully choreographed litigation and tactical appeals, back to the human protagonists we never really got to know, and back again through centuries of laws criminalizing “unnatural” sexual activity. What if, Carpenter asks, this weren’t a story about love, or even sex? What if, in the end, Lawrence v. Texas was less a whodunnit than a who didn’t? And, if there was no sex, let alone an intimate relationship, in John Lawrence’s apartment that night, how did the case come to be about both?

Start with the two men charged with sodomy. When Lawrence, who was born in 1943 to devout white Southern Baptists, was enlisting in the Navy, he quizzed a buddy about the forms he was filling out. “What’s a homosexual?” he wondered. Neither knew the word. Both were gay. After leaving the Navy, Lawrence moved to Houston, worked as a medical technician, and tatted up a slew of drunk-driving violations, including a conviction for murder by automobile, in 1967. In the late seventies, he moved into a run-down complex in East Houston populated by underemployed youngsters and strippers who liked to party. Lawrence largely kept his sexual orientation a secret at work, and was anything but a gay-rights activist. Right to the end of the litigation bearing his name, Lawrence’s principal beef was that overzealous policemen had invaded his home without a warrant.

Tyron Garner, the tenth child of black Baptist parents, was twenty-four years younger than Lawrence. He had no car and no fixed address, and supported himself by washing dishes and cleaning houses when he could. Described as “sweet” (despite three previous assault charges) and effeminate, Garner was involved in a stormy relationship with another white man from Houston, Robert Eubanks. And Eubanks, by all accounts, was a mess. Homeless and a heavy drinker, he was the person who called the police on September 17, 1998. Garner and Eubanks lived together wherever they could find an apartment, fighting viciously along the way.
Garner and Lawrence, according to Carpenter’s research, were never much more than acquaintances. They weren’t lovers before the case or after.

That night in 1998, Lawrence, Garner, Eubanks, and probably a fourth man were all in Lawrence’s apartment. Lawrence and Eubanks were very drunk. Eubanks seems to have thought that Garner was being flirtatious with Lawrence, and fell into a jealous rage. He left the apartment, supposedly to get some soda, and called the police with a false story about his lover, Garner, brandishing a gun. There was never any dispute that the four policemen who responded to that call were entitled to enter the apartment to investigate, or that Lawrence began screaming furiously at the intruding officers, demanding to see a warrant and threatening to call his lawyer. There was sexually explicit art on the walls, notably a pencil drawing of a naked James Dean with oversized genitals. Eventually, Lawrence and Garner were charged with the crime of “deviate sexual intercourse, namely anal sex, with a member of the same sex (man).”

Some gay-rights attorneys, having been burned a dozen years earlier when, in Bowers v. Hardwick, the Supreme Court upheld Georgia’s homosexual-sodomy law, wanted nothing to do with Lawrence or Garner or the prospect of another legal challenge. Since the days of Brown v. Board of Education, and right up to District of Columbia v. Heller, the 2008 handgun-ban case, major test cases, they knew, have turned as much on selecting the perfect plaintiffs as on the law being challenged. An interracial, lower-middle-to-lower-class pair hooking up in a seedy apartment in a marginal neighborhood: Lawrence and Garner were hardly a civil-rights litigator’s dream plaintiffs. They were not the type to tug at judicial heartstrings.

But advocates for gay rights couldn’t afford to shop around for a perfect plaintiff. They knew how hard it would be to find a case to challenge the Texas sodomy statute. Since Bowers, no other test case had emerged in which someone was actually arrested for violating a state sodomy law. National gay-rights groups had been challenging state sodomy laws based on supposed harms to gay citizens, who were, litigators claimed, made to look like presumptive criminals. That strategy wasn’t working. After the Supreme Court, in Romer v. Evans (1996), struck down a Colorado initiative excluding gays from anti-discrimination protection, the time felt ripe for another challenge to sodomy statutes. But the gay-civil-rights groups needed to find plaintiffs who would not suffer custody losses or other collateral harms from admitting that they had violated criminal sodomy laws, which tended to rule out gay couples in a committed family relationship. As Carpenter puts it, civil-rights attorneys knew that they needed plaintiffs “with little to lose.” Garner and Lawrence fit that bill.

The two were accidental plaintiffs in more ways than one. Instructively, it was mere happenstance that their arrest even came to the attention of civil-rights advocates in the first place. A closeted gay file clerk saw the arrest report (the charge of sodomy was so rare that it didn’t even have an assigned code) and, gossiping at a local gay watering hole, told the bartender, a man named Lane Lewis. Since Lewis happened to be a gay activist, he recognized the potential importance of the case. It was Lewis who called Lawrence and persuaded him to speak to a gay-civil-rights veteran he had alerted. Each of the legal experts who were subsequently brought into the case knew instantly that it could end up at the high court. The challenge would be in finding a story about love and personal dignity to tell about Lawrence and Garner.

The cultural trends, the legal strategists knew, were in their favor, as they continue to be. Two decades ago, a majority of Americans thought that gay sex should be illegal, and that gays should be barred from serving openly in the military. Today, popular sentiment has switched
sides. The restriction on military service has been repealed, and almost half the states have laws offering gays some protection from discrimination. Whereas only a decade ago public-opinion polls showed Americans opposing gay marriage by a two-to-one margin, new polls show that slightly more than half of Americans are in favor of it. What explains the shift? The most commonly accepted account is what could be called the “Will & Grace” theory. A mainstream television comedy featuring openly gay characters demonstrated what social scientists have long known: the single most important indicator of one’s support for gay rights is whether one knows someone who is gay. In a pinch, it seems, a fellow on TV will do.

Of course, “Will & Grace” was never real. It replaced America’s unspoken nightmares about homosexual deviancy and dangers with a gorgeously lacquered world of lovable narcissists with enviable kitchenware. Yet the cultural logic was hard to resist. In order to counter centuries of vague horror, the real Lawrence and Garner had to be concealed behind a tasteful scrim. Lawrence and Garner may have been reluctant to talk to civil-rights lawyers from the outset, and reluctant to become the face of gay sodomy in Texas, and yet this imperfect test case could be made over into something more than serviceable. Lambda Legal, a national gay-rights advocacy group, agreed to represent them as a means both of directly challenging Bowers v. Hardwick and of highlighting the consequences of criminalizing consensual gay sex. Sodomy laws were almost never enforced, but their very existence legitimatized a culture of homophobia, and as long as Bowers was still on the books gay-rights arguments would be stymied in the courts.

The legal opportunity depended, however, upon persuading the defendants to go along with an unusual strategy. High-powered lawyers would represent Lawrence and Garner, as long as they agreed to stop saying they weren’t guilty and instead entered a “no contest” plea. By doing so, the two were promised relative personal privacy, and given a chance to become a part of gay-civil-rights history. The cause was greater than the facts themselves. Lawrence and Garner understood that they were being asked to keep the dirty secret that there was no dirty secret.

That’s the punch line: the case that affirmed the right of gay couples to have consensual sex in private spaces seems to have involved two men who were neither a couple nor having sex. In order to appeal to the conservative Justices on the high court, the story of a booze-soaked quarrel was repackaged as a love story. Nobody had to know that the gay-rights case of the century was actually about three or four men getting drunk in front of a television in a Harris County apartment decorated with bad James Dean erotica.

The malleability of anti-gay laws is in part a function of failed legal language. “Sodomy” was, for centuries, a crime defined by its unspeakable nature. The eighteenth-century British legal commentator William Blackstone called it a crime “not fit to be named,” which takes you only so far when it comes to drafting a ban. Sodomy was codified thereafter as a “crime against nature,” without much clarity about what unspoken horrors were not to be spoken of. Early American sodomy laws targeted heterosexual as well as homosexual conduct. The vagueness of the original crime tainted the subsequent laws, allowing for selective enforcement, and permitting those laws to turn into statutes that, like the one in Texas, criminalized just homosexual activity. By the time Texas criminalized gay sex, in 1973, it was also legalizing consensual heterosexual sodomy and bestiality.
That same unspoken horror of unnamed “unnatural” deviant conduct leads to Carpenter’s most fascinating revelation: the arresting officers in the Lawrence case never agreed on what they saw that night, and, in fact, reported seeing completely different conduct at the time. Two of the four officers who entered the apartment reported seeing two men having sex. Yet one officer reported seeing anal sex and the other remembered seeing oral sex. The other two saw no sex at all. At least three saw the homoerotic drawing.

Carpenter’s painstaking interviews establish that Garner and Lawrence not only weren’t having sex but were clothed (Lawrence was in his underwear, preparing for bed) and in separate rooms. This makes sense if you consider the timeline that night (Eubanks was ostensibly just slipping out to buy a soda) and the fact that there was yet another man still in the apartment. But the defendants’ accounts were never disclosed to the media. Nor was the existence of Lawrence’s longtime boyfriend, Jose Garcia. Requests by lawyers that the privacy of the two plaintiffs be respected meant that little attention was ever paid to their personal lives. Lawrence and Garner, for their part, were given strict instructions by the lawyers to shun the press. (Carpenter is careful throughout to show that none of the civil-rights lawyers lied or misrepresented the facts.) The litigation strategy, as the case made its way up through the trial courts and appeals courts, was deliberately framed to highlight the need to decriminalize homosexual conduct as a means of recognizing and legitimatizing same-sex “relationships” and “families.” In short, the legal issue was not that free societies must let drunken gay Texans have sex; it was that gay families around the country, in the words of one of the lawyers in the case, “are essentially just like everybody else.”

When it came to the plaintiffs, the legal team had to make the best of what Texas had given them. But there was one piece of casting that was done with painstaking care. Lambda had to pick the right litigator. The renowned constitutional scholar Laurence Tribe, who had argued Bowers before the Supreme Court, wanted to argue Lawrence v. Texas as well. But his Bowers performance got mixed reviews, and the legal team decided that the plaintiffs would do best before the Supreme Court if they were represented by a litigator who was gay—gay, without “being too gay,” as Carpenter writes. That is, the Lambda lawyers wanted someone whose legal reputation wasn’t tied up with the cause of gay rights. They settled on Paul Smith, a well-respected appellate litigator with very little experience in gay-rights litigation. Well known at the high court, Smith was a Washington insider, who would become the legal face of gay rights where Lawrence and Garner could not. Smith challenged the Texas sodomy statute as a violation both of the constitutional guarantee of equal protection of the laws, as enshrined in the Fourteenth Amendment, and of the liberty and privacy interests protected by the Constitution’s due-process clause. Indeed, as Carpenter tells us, briefs filed in Lawrence were extensively reviewed by former Supreme Court clerks who were themselves gay, with every argument framed to emphasize the “sameness” of same-sex couples. The names Lawrence and Garner were never once mentioned in arguments at the Supreme Court—a mark of the larger strategy’s success.

National gay-rights advocates certainly got a boost of confidence when, on the day of oral argument at the Supreme Court, someone in the audience whispered to Smith that Justice Sandra Day O’Connor—one of two potentially “gettable” swing voters on the Court—had recently sent a baby gift to a former clerk and her same-sex partner. That’s how much sentiment at the Court had shifted. Justice Lewis Powell, Jr., the swing vote in the 1986 Bowers decision, was seventy-eight when the case reached the high court. Baffled, he told his clerk, “I don’t
believe I’ve ever met a homosexual.” That clerk, as it turns out, was gay. But by the time that Lawrence arrived to challenge Bowers the Justices had openly gay clerks, and prominent lawyers who were gay were arguing major business cases at the Court. Insofar as this case could be packaged as a fight for the dignity and respect of a class of successful clerks, advocates, and lawyers now well known to the Justices, it was much easier for Kennedy to conclude, as he did, that “Bowers was not correct when it was decided, and it is not correct today.”

Kennedy took the due-process argument to heart, rooting his analysis in the right to a zone of personal liberty into which the government may not intrude. In a lone concurring opinion, O’Connor argued instead that the equal-protection clause was what made the Texas ban invalid. Justice Antonin Scalia’s barnstorming dissent—joined by Justice Clarence Thomas and Chief Justice William H. Rehnquist—accused the majority of taking “sides in the culture war” and decrying the “end of all morals legislation”; Scalia warned ominously that the majority had opened the door to “judicial imposition of homosexual marriage.”

Yet something had changed in the years since Bowers. In the face of the constitutional challenge, lawyers for the State of Texas were obliged to show some state interest that the sodomy statute upheld. They did not exactly rise to the occasion. Before oral arguments, the D.A.’s office told the Houston Chronicle that it was defending the law “reluctantly,” and that because “the Legislature decided it” the office was “stuck with it.” Arguing before the Court, the state seemed content with the observation that homosexual conduct had been criminalized throughout history. That was a problem, because for a majority of the Justices a simple dislike of gay sex was no longer a plausible rationale. As Carpenter recounts, the attempts of the Harris County district attorney, Chuck Rosenthal, to articulate a single rationale for the law became painful to watch. Called on by the Justices to explain why Texas could criminalize gay sex but allow same-sex adoptions, Rosenthal had no response. Called on to explain why Texas permitted nonprocreative heterosexual sex and adultery but barred gay sex, he could not answer. Again and again, he argued that the state could criminalize behavior simply because it was inherently immoral. With the exception of Justice Scalia—who described anal sex as “that conduct” in ways that would have been familiar to Sir William Blackstone—nobody on the Court was willing to support that position at argument.

Several weeks ago, a federal appeals court in California struck down Proposition 8, the state’s referendum banning gay marriage. The decision, or a challenge to the Defense of Marriage Act, will likely bring the issue of same-sex marriage before the Supreme Court. Already there is enormous anxiety among gay-rights activists over which vehicle is better, whether the Court is ready to make this profound change in the definition of marriage, and whether, even if the Court allows gay marriage, it will launch a national backlash that will end up curbing gay progress in America in the long run. Given that a majority of states have recently adopted measures that explicitly prohibit gay nuptials, the plaintiffs face daunting legal, cultural, and political opposition. Still, it’s noteworthy that the federal appeals court’s carefully crafted opinion was stippled with references to Justice Kennedy’s opinions, and echoed his talk of “dignity,” as if to love-bomb the swing-voting Justice into acquiescence. The timing may be inopportune. But Scalia, in his warning, may ultimately prove to have been onto something.

As Carpenter’s nuanced exploration of what worked in Lawrence v. Texas makes clear, the Supreme Court is both supremely open to and supremely closed off from the world around it. That’s why we come to the Court, play by its rules, and tell the Justices stories they like to hear about people who remind them of themselves. The Justices don’t get out much. All of the current
nine attended two law schools; their clerks mainly come from seven law schools; cases are argued by a shrinking number of highly skilled oral advocates; a shrinking pool of journalists cover the arguments. Nobody currently sitting on the Court has ever run for elected office, nobody has tried a death-penalty case, and nobody, it’s fair to assume, has been interrupted by the police while he or she was half-dressed in a run-down apartment outside Houston. One Justice bragged recently about not bothering to read the supplemental briefs in the cases; another talks about his distaste for the news media. We may well wonder, then, where they get their information about the world outside their chambers, and how they learn—as Justice Powell learned only very late in his life—how much they don’t know about that world.

Does it matter that, in Justice Kennedy’s stirring meditation on privacy and dignity and the “manifold possibilities” of liberty, the truth of the non-relationship between the non-lovers John Lawrence and Tyron Garner was lost? Does it matter that our collective memory locks the two men together in a mythic embrace? The plaintiffs who seek redress at the Supreme Court are rarely as polished as the movie versions that the Court can bring itself to love. But it’s rare that they disappear altogether, the way Lawrence and Garner did.

At a press conference after the decision was announced, Lawrence read a brief prepared statement and Garner said nothing. Some advocates hoped that Garner might have a career as a gay-rights spokesman. After he gave a drunken speech at a black-tie dinner in the plaintiffs’ honor, that idea was scratched. The case is called Lawrence v. Texas. John Lawrence died last November. Almost no one took note. Garner died five years earlier, at the age of thirty-nine. When Lambda Legal proved unable to raise funds for a proper memorial or burial, Harris County cremated him and sent his ashes home to his family in a plastic bag. There was no funeral. ♦