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*HOW A BEDROOM ARREST  
DECRIMINALIZED GAY AMERICANS*

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**DALE CARPENTER**

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**FLAGRANT  
CONDUCT**

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THE STORY OF

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*LAWRENCE v. TEXAS*

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藏书章

# *Flagrant Conduct*

**THE STORY OF *LAWRENCE V. TEXAS***

*How a Bedroom Arrest  
Decriminalized Gay Americans*

**DALE CARPENTER**

FRONTISPIECE: June 26, 2003: Tyrone Garner (left) and John Lawrence get a hug from Houston resident Michelle Rinehart (center) after a rally at Houston City Hall celebrating the United States Supreme Court decision declaring the Texas sodomy law unconstitutional. At right is Lambda Legal attorney Brian Chase. (© Erich Schlegel / Dallas Morning News / Corbis)

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Additional praise for  
*Flagrant Conduct: The Story of Lawrence v. Texas*

*"Flagrant Conduct* is a real-life detective story that reveals the drama behind the scenes of a great Supreme Court victory for human rights. It upends much of what I thought I knew about the case that became *Lawrence v. Texas*. Dale Carpenter shows us that lawyers with guts, resolve, and a bit of good luck don't necessarily need a perfect case—or a perfect client."

—Linda Greenhouse, Yale Law School,  
author of *Becoming Justice Blackmun*

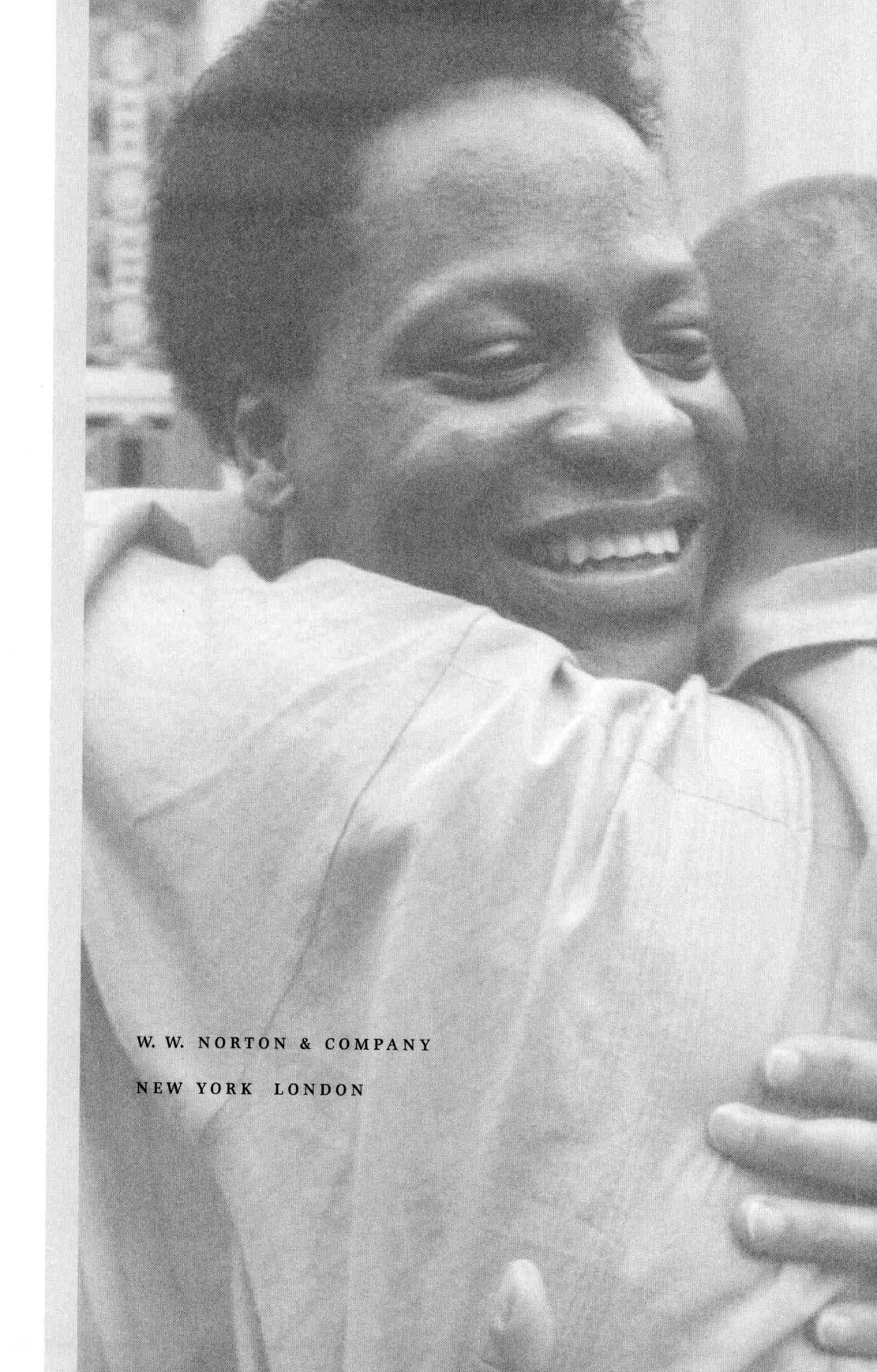
"A beautifully told classic Supreme Court drama that reminded me of *Gideon's Trumpet*. The decision changed for the better the rules under which human beings relate."

—William S. McFeely,  
author of *Proximity to Death*

*"Flagrant Conduct* is such an important statement on gay rights. But it is much more about human rights, and it reminds us we need to think, act, and live with open minds and caring souls."

—Billie Jean King,  
sports icon and social justice pioneer

## *Flagrant Conduct*

A black and white photograph of a woman with short, dark, curly hair, smiling broadly and showing her teeth. She is wearing a light-colored, short-sleeved button-down shirt. She is being embraced from behind by another person, whose arm and hand are visible on her right shoulder. The background is slightly out of focus, showing what appears to be a city street with buildings.

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NEW YORK LONDON

*For my family,  
all of it*

**"YOU DON'T HAVE ANY RIGHT TO BE HERE."<sup>1</sup>**



## Introduction



**N**O ONE COULD HAVE PREDICTED THAT THE NIGHT OF SEPTEMBER 17, 1998, would be anything but routine in Houston, the city of skyscrapers and strip malls and bayous sprawling across the southeastern corner of Texas. A languid, petroleum-sweet air, typical for late summer, hung over the city's east side. Certainly nobody expected that an arrest that night of two gay men for a minor criminal offense would reverberate in American constitutional law, challenging not only the traditional understanding of what makes a family but also the proper role of government in maintaining that understanding. Nobody foresaw the cultural storm that would gather from the events that transpired in a modest second-floor apartment. Nor could anyone have foreseen how a single arrest might expose the deep malignity in a law that was superficially directed at certain conduct, but that in practice was used to brand an entire group of people as strangers to moral tradition.

Even a call to the police that someone was “going crazy with a gun” in an apartment complex known for late-night shenanigans, while dramatic, was hardly out of the ordinary. When Harris County sheriff's deputies arrived minutes later, they did not find a crazed gunman, but they did report that they caught John Lawrence and Tyron Garner *in flagrante delicto* having anal sex inside Lawrence's bedroom. While that act would hardly have been shocking sexual conduct for gay men, it was extraordinary for police officers actually to witness it in the privacy of a home. And the act was still considered extraordinary—criminal, “devi-

ate" sexual activity—under Texas's Homosexual Conduct law.<sup>1</sup> The deputies hauled the offending men to jail for the night. Gay-rights lawyers took their case, *Lawrence v. Texas*,<sup>2</sup> to the Supreme Court, which struck down the Texas sodomy law<sup>3</sup> and similar laws in twelve other states. More than that, though, the Court delivered a potentially lethal blow to the constitutional legitimacy of homosexuals' second-class status, including their exclusion from marriage.

However, that is getting ahead of the story, which opens a door into not only a bedroom but what already may seem like a buried past. The bare-bones version of *Lawrence* told in arid (some would say airy) judicial opinions is in almost every important respect incomplete and questionable. It flattens a complex web of emotions, motivations, and deceptions. It omits the accidents and serendipity without which the case would have been lost to history. It neglects the civil disobedience, heroism, and deep prejudices that animated those involved at every level of the case. It ignores the presence of gender, race, age, and class pulsing in the background.<sup>4</sup> It naïvely accepts the word of law enforcement authorities who harshly, and perhaps deceitfully, enforced a law that remained on the criminal statute books like an unused whip. It neglects the role the closet played in bringing the arrest of Lawrence and Garner to light, given the fortuitous presence of a closeted sheriff's sergeant and his partner, who was himself a closeted clerk for the judge in whose jurisdiction the arrest happened to occur. It disregards the bartender *cum* activist who had already come out as gay, recognized the moment, seized it, and helped broaden the sweep of civil rights history.

The pancaked conventional tale remains—years after the landmark Supreme Court decision in *Lawrence v. Texas*—a stubborn myth. This book attempts to correct and enrich our understanding of the case, by ferreting out what happened that September night in Houston and by explaining the way gay civil rights lawyers rewrote a snarled human story as part of a pristine legal argument acceptable to a basically conservative Supreme Court.

Based on my research, including interviews with most of the important participants in the events and their immediate aftermath, I come to a surprising, but only probabilistic, conclusion: it is unlikely that sheriff's deputies actually witnessed Lawrence and Garner having sex. As we

shall see, John Lawrence himself now flatly denies that Garner and he were having sex. Even assuming they were having sex when sheriff's deputies entered Lawrence's apartment, they had probably disengaged by the time the deputies saw the men. If the police did not observe any sex, the whole case is built on law enforcement misconduct that makes it an even more egregious abuse of liberty than the Supreme Court knew.

*Flagrant Conduct* proceeds chronologically through three main parts. Part I ("Before the Arrests") examines the historical context for the arrests, including a discussion of the background of each of the major participants. Part II ("The Arrests") revisits the night of the arrests, presenting the versions offered by the police and by the defendants and addressing claims of a conspiracy or setup to challenge the state sodomy law. Part III ("After the Arrests") looks at what happened after the arrests, as the case went from a simple charge of petty crime to the highest court in the land. It also affirms that the case had broad national implications that have continued to ricochet well beyond the state lines of Texas.

The book then concludes with a description of the historic scene as Justice Anthony Kennedy announced the Court's decision to a courtroom packed with people who had devoted much of their lives to ending discrimination against gay men and lesbians. It tells of the spontaneous joy that then erupted from one coast to the other on the eve of what happened to be gay-pride weekend in June 2003.

In the course of telling the story of *Lawrence v. Texas*, the book exposes both the peculiar corrupting quality of laws that target a class of persons for moral opprobrium and the distance such laws place between the targeted class and the rule of law. If John Lawrence and Tyron Garner were indeed arrested based on a fabrication by sheriff's deputies, their arrests are redolent with the long and noxious history of a bad law maliciously enforced. But even the uncontested facts of the case—including the discretionary decisions to cite the men and to send them to jail for the legal equivalent of a speeding ticket—expose how police power can be used capriciously and invidiously against the class targeted by such a law. Under such conditions, police could, and often did, misuse their authority to make arrests based on nothing more than the personal revulsion they felt at seeing things that disgusted them. Or

they could, and did, misuse their authority whenever it was challenged by a person whose very existence disgusted them.<sup>5</sup>

If anyone set up the events that led to *Lawrence*, as some have claimed, it was surely not gay activists. It was inadvertently the authorities who arrested the men. Since sodomy laws, like the one in Texas, were never really about stopping sodomy, it is fitting that they got their comeuppance in a case in which there was probably no sodomy. A law rarely enforced was upended in a case of phantom enforcement. The laws that encouraged gays to lie about their identity were buried in an avalanche of untruths and half-truths triggered by the authorities enforcing them. Sodomy laws were ultimately the victim of overzealous police who had been taught their antigay zealotry in part by sodomy laws themselves.

There was plenty of flagrant conduct in *Lawrence v. Texas*. But this epithet, so often directed at gays and lesbians, does not describe the behavior of Garner and Lawrence on the night they were arrested, even if the police really did intrude upon them *in flagrante*. The flagrant conduct in the case was, in the first instance, the behavior of the police themselves, from the moment they handcuffed the two men to the moment they dragged John Lawrence out of his own apartment. The flagrant conduct was the use of precious prosecutorial time and money to pursue two men for sex in a private home rather than to pursue truly public and genuinely harmful acts. The flagrant conduct was the cowardice of elected state court judges who refused even to listen to the men's legal claims, shifted responsibility to other courts, and likely capitulated to political pressure. The flagrant conduct was the blatant effort by a political party to make judges enforce their policy preferences. The flagrant conduct was the passage of a law selectively burdening one small group of people on the pretext of preserving a moral heritage applicable to all. And the flagrant conduct was the refusal of those stalwart legislators, year after year, session after legislative session, decade after decade, to repeal that law, even when it became obvious that it served no public purpose other than to justify discrimination and to dignify animus in every realm against a tiny minority.

Sodomy laws taught lessons—well learned in Houston—to both homosexuals and heterosexuals. Generations of homosexuals learned

silence and shame. Heterosexuals learned privilege and power. The laws conditioned gay men and lesbians to pay their fines and meekly move on. The same laws taught officers of the Harris County Sheriff's Office to write whatever they wanted on an arrest report about flagrant homosexuals without fear of contradiction or repercussion.

By 1998, gay men and lesbians, even those living in the bayous of life, had begun to bridle that silence and shame. Twenty-nine years after the eruption by gays against police abuse at the Stonewall Inn in Greenwich Village, they were no longer following the old script. Silence had yielded to organization; shame, to resistance.

*Lawrence v. Texas* is connected umbilically to a storied gay past, in all of its legal, sexual, socioeconomic, racial, and gendered complexity. The case was conceived in bars, cloaked in closetedness, nourished by political liberation, and fired by encounters with police repression and corruption. It was born into a rebellion against discrimination and stigma. In *Lawrence*, we have the closet as metaphor and the closet as reality, with its uses both as shield and sword against oppression. We have as well the related metaphor of coming out, including its essential personal and political dimensions, its fear, and its power. We have the bar as a site for political organizing, just as it was in the early days of the gay civil rights movement. We have the law, deformed by ignorance, pressing itself into the lives of marginalized people. We have resistance, generated not by abstractions but by experience. Here, in one case, we have a microcosm of the fight for equality under a regime of inequality. *Lawrence* challenged not only the American legal order but ultimately the cultural assumptions that undergirded it.

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*Part One*

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# BEFORE THE ARRESTS

