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THE UNKNOWN PAST OF *LAWRENCE V. TEXAS*

*Dale Carpenter**

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"You don't have any right to be here."[1]

"Why are we all down on our knees thanking them for giving us something they should never have taken away?"[2]

I. INTRODUCTION

On the night of September 17, 1998, someone called the police to report that a man was going crazy with a gun inside a Houston apartment. When Harris County sheriff's deputies entered the apartment they found no person with a gun but did witness John Lawrence and Tyron Garner having anal sex. This violated the Texas Homosexual Conduct law,[3] and the deputies hauled them off to jail for the night. Lawyers took the men's case to the Supreme Court and won a huge victory for gay rights.

So goes the legend of *Lawrence v. Texas*.[4] Do not believe it. In every important respect it is terribly incomplete or very questionable. It flattens into two dimensions or simply erases a rich, complex, and tangled web of emotions, frustrations, motives, deceptions, jealousies, accidents, civil disobedience, serendipitous events, heroic acts, stirring pleas, and deep prejudices. It ignores the elements of race and class

1. September 17, 1998. Telephone Interviews with Joseph Quinn, Deputy, Harris County Sheriff's Department (Aug. 9, 31, 2003) [hereinafter Quinn interview] (quoting John Lawrence speaking to Deputy Joseph Quinn).

2. Telephone Interviews with Lane Lewis (Aug. 7, 8, 2003) [hereinafter Lewis interview].

3. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003).

4. 123 S. Ct. 2472 (2003). The factual account given in the first paragraph closely follows the Supreme Court's own description of the facts. *Id.* at 2475-76. The lower court decisions, including the state intermediate appellate court panel and the en banc intermediate appellate court, offered very similar accounts. *E.g.* Lawrence v. State, 41 S.W.3d 349 (Tex. App. 2001) (en banc).

present in the case. It naively accepts the word of law enforcement authorities who harshly (and perhaps corruptly) enforced a purposeless law that was lying on the criminal statute books like an unused whip. It omits the role the closet played in bringing the arrest out of the closet. It ignores the bravery of a single clerk for a lowly judge. It forgets the bartender *cum* activist who had come out of his own closet, saw a moment, seized it, and helped make it history. It is a lie.

This Article is the beginning of an attempt to correct the factual record. Based on my research, including interviews with most of the important participants[5] in the events of September 17, 1998, and its immediate aftermath, I come to a surprising, but still tentative and only probabilistic, conclusion: *It is unlikely that sheriff's deputies actually witnessed Lawrence and Garner having sex.* Assuming Lawrence and Garner were even having sex when sheriff's deputies entered Lawrence's apartment, it is likely they had stopped by the time the deputies saw the men. If this is what happened that night, the whole case is built on a foundational fabrication that makes it even more egregious as an abuse of liberty than the Supreme Court imagined. If I am right, and the "if" must still be emphasized, a sodomy law that was never really about sodomy was undone in a sodomy case that was not really about sodomy.

This Article is also an attempt to fill in some of the gaps in the public's knowledge of the case. Much of the rich post-arrest history of the case has been ignored. But for the courage, insight, and initiative of three men in particular, the arrest might have been another forgotten episode in what I call the underhistory of the Texas sodomy law, the history not told in appellate opinions or in most other accounts.[6] The names of these three men do not grace the pages of the *Lawrence* decision or appear anywhere in the lower court decisions, and the names of two of them still cannot be made public, but they each made *Lawrence* possible. They should be remembered.

Section II reviews what I call the "somewhat known" past, tracing the evolution of the Texas sodomy law from a statute so facially

5. Excluding, significantly, Lawrence and Garner themselves, who are being shielded from interviews by their attorneys. Telephone Interview with Mitchell Katine (Sept. 8, 2003) [hereinafter Katine interview 1].

6. I call the Texas Homosexual Conduct law a "sodomy law," here and elsewhere in this Article, fully aware that some will object to the term. Sodomy laws traditionally targeted both heterosexual and homosexual sex. The Texas law was a departure from this practice, singling out gay sex for the first time in 1973. *See infra* Part II. I use the term, despite its technical deficiency, because it is so closely tied to homosexual sex in the public mind. "Sodomy" has its own historical and popular anti-gay resonance that is lost in the clumsy modern phrase, "homosexual conduct."

indeterminate that it dared not speak its name[7] to an enactment of exquisite specificity focusing only on homosexuals. I conclude that it is likely the Texas law had sporadically been enforced against private, adult, consensual activity. However, the stories of the people involved in this enforcement have been hushed up, victims of the shame the law itself both reflected and reinforced. The Lawrence and Garner arrests nearly came to the same fate.

Section III begins to unearth the untold story of *Lawrence*, the story that cannot be found in the pages of the U.S. Reports or in newspaper and magazine accounts. This includes a description and analysis of what likely happened that partly cloudy September night in Houston more than six years ago. I want to emphasize that the conclusions I offer in this section are based on a necessarily incomplete examination of the principals involved. Most important of all, before any definitive conclusion could be reached, it is still necessary to hear the story of these events from Lawrence and Garner themselves. So far that has not been possible.

Section IV reveals how the matter started the journey from an arrest to a Justice of the Peace to more exalted places. It tells the story of a real hero, Lane Lewis, and the two men brave enough to assist him — all three of whom have been lost in the understandable focus on the defendants and their attorneys.

Section V places the story told in Sections III and IV in the larger framework of gay history and the treatment of gay people by the law. It explains 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 any expectation of full citizenship under the rule of law. If Lawrence and Garner were arrested based on a fabrication by sheriff's deputies, their arrests partake in a long and sad history of a bad law corruptly enforced. But even the uncontested facts of the case — including the discretionary decisions to cite the men and to send them to jail — show how police power can be used capriciously and invidiously against the class targeted by the law based on nothing more than the offense taken by the officers at seeing pornography or having their authority challenged by a gay person. Section V also discusses several ways in which the background facts of *Lawrence* echo several aspects of gay life and history, including the role of bars, of the closet, and of coming out.

II. THE SOMEWHAT KNOWN PAST OF *LAWRENCE*

Every law exists on two levels. One level concerns the words used by the legislature to express its will. The second level concerns the

7. *See* 1859-60 Tex. Gen. Laws 97 (criminalizing "the abomindable and detestable crime against nature").

actual application of those words. As we shall see, when it comes to Texas sodomy proscriptions, there was a considerable gap between the first and second levels.

A. The Three Statutory Versions

Below I offer a brief history of the Texas sodomy law, in its various statutory iterations.[8] I do so for two reasons. First, though the law never distinguished between acts committed in broad daylight and acts committed in the home, it was almost never enforced against the latter. That is, it was almost never enforced against the most prevalent instances of sodomy. Thus, the law's concern was not with preventing sodomy. The law was intended to send a symbolic message of disdain about the people thought to commonly engage in sodomy.[9]

Second, the history of the law's development establishes an important point: the Texas law, like other sodomy laws around the country, initially applied to certain *acts*, regardless of the sex of the people involved in the act. It was only through a process of specification[10] that it came to be aimed at certain *people* engaged in certain acts. The Texas law, like many such laws, instantiates a particular cultural view of homosexuals as hyper-sexualized and dangerous in some way. That view is perhaps best represented by the remarks allegedly made by one district attorney to a jury about a man charged with sodomy. The defendant, Shorty Darling, was said to be "a raving, vicious bull, running at large upon the highways, seeking whom he should devour; was dangerous, and should be penned up where he would have no more such opportunities to commit such abominable and detestable crimes."[11]

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8. The account here is drawn in part from a summary of Texas sodomy-law cases available on the SodomyLaws.org website. George Painter, *The Sensibilities of Our Forefathers: The History of Sodomy Laws in the United States*, *at* http://www.sodomylaws.org sensibilities/texas.htm (last edited Jan. 21, 2003). The SodomyLaws website is an excellent resource for finding history, state laws, newspaper accounts, and editorials on sodomy laws. The opinion of Judge Jerry Buchmeyer in *Baker v. Wade*, 553 F. Supp. 1121, 1148-53 (N.D. Tex. 1982), *rev'd en banc* by the 5th Cir., also contains a useful summary of the history of the Texas sodomy law.

9. In 1994, George W. Bush, as a candidate for Texas Governor, said that he opposed repeal of the Texas sodomy law because the law was a "symbolic gesture of traditional values." David Elliott, *Bush Promises to Veto Attempts to Repeal Sodomy Law*, AUSTIN AM.-STATESMEN, Jan. 22, 1994, at B3.

10. Nan Hunter gave us this description of the evolution of sodomy laws. Nan Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 538 (1992).

11. Darling v. State, 47 S.W. 1005, 1005 (Tex. Crim. App. 1898) (quoting the defendant's description of the prosecutor's argument, a description the court dismissed as "in no way verified as being true"). Also, the truncated factual description does not reveal whether the defendant's victims were male, female, or both.

As we shall see, the view of gays as dangerously hyper-sexualized may have crept into the arrest of Lawrence and Garner, leading sheriff's deputies to resolve their doubts and to use their discretion against the two men at every step of the way.

1. *The 1860 Statute*

The criminal code of the Republic of Texas, in force from 1836 to 1845 while Texas was an independent nation, contained no prohibition on sodomy, although common-law crimes were recognized. In its first fifteen years as a state, Texas had no statutory sodomy law.

The state adopted its first sodomy law in 1860, using the common-law definition for the crime. It provided: "If any person shall commit with mankind or beast the abominable and detestable crime against nature . . . he shall be punished by confinement in the penitentiary for not less than five nor more than fifteen years."[12] Commentators and courts of the era understood this language to prohibit anal sex between a man and a woman or between two men. It did not prohibit oral sex, and it did not prohibit any sex between women.[13] The category "homosexual conduct" would have been literally incomprehensible to Texas legislators of the era since there was no word for "homosexual" at the time.[14]

However, the Texas law was initially unenforceable. Texas courts repeatedly refused to affirm convictions under the statute because it was judged too vague under a state law requiring that criminal laws be "expressly defined."[15] The state's sodomy law became enforceable for the first time in 1879 when the state legislature eliminated the requirement that criminal offenses be clearly defined.[16] Thereafter, Texas courts repeatedly held that the law as it stood applied to anal sex but not to oral sex,[17] even as they expressed the policy view "that some legislation should be enacted covering these unnatural crimes [of

12. 1859-60 Tex. Gen. Laws 97.

13. 2 JOSEPH CHITTY, A PRACTICAL TREATISE ON CRIMINAL LAW 49 (1847); ROBERT DESTY, A COMPENDIUM OF AMERICAN CRIMINAL LAW 143 (1882); JOHN WILDER MAY, THE LAW OF CRIMES 223 (1881).

14. The word "homosexual" was invented in Germany in 1869 and was not used in the English language until the 1890s. COLIN SPENCER, HOMOSEXUALITY IN HISTORY 10 (1995).

15. Frazier v. State, 39 Tex. 390 (1873); Fennell v. State, 32 Tex. 378 (1869); State v. Campbell, 29 Tex. 44 (1867). The Texas statute was stricter about clarity in criminal statutes than the Constitution was understood to be. The statutory language had a well-understood meaning derived from the common law. Wainwright v. Stone, 414 U.S. 21 (1973).

16. TEX. PENAL CODE art. 3 (1879); *see also* Ex parte Bergen, 14 Tex. App. 52 (1883).

17. Munoz v. State, 281 S.W. 857 (Tex. Crim. App. 1926); Mitchell v. State, 95 S.W. 500 (Tex. Crim. App. 1906); Prindle v. State, 21 S.W. 360 (Tex. Crim. App. 1893).

oral sex]."[18] Moreover, Texas courts held that the sodomy law as enacted applied equally to heterosexual activity.[19]

In 1925, several parts of the Texas criminal code, including the state's 1860 sodomy law, were inadvertently omitted from the actual bill containing the revised penal code. In 1936, a Texas court held that, nevertheless, the omitted sexual acts remained crimes in the state. The court's reasoning was significant: "To impute to the Legislature the intent to repeal the statutes defining incest, bigamy, seduction, adultery, and fornication is to lay at its door the charge of ignoring the moral sense of the people of this state and striking down some of the strongest safeguards of the home."[20]

Thirty-seven years later, in 1974, the state legislature would "ignor[e] the moral sense of the people" by repealing the laws criminalizing seduction on promise of marriage, adultery, and fornication,[21] but leaving homosexual sex criminal. Sodomy in Texas, as this court's reasoning makes clear, had been criminalized only as part of a larger framework of sex laws that criminalized all non-marital, non-procreative sex. The traditional moral code mandated criminalization of all such sex, not homosexual sex alone.

2. *The 1943 Statute*

In 1943, the Texas legislature revised the state sodomy law a second time.[22] The new version, which passed by votes of 127-0 and 24-0 in the state house and senate,[23] respectively, made oral sex a crime for the first time in Texas:

> Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation, or who shall voluntarily permit the use of his own sexual parts in a lewd or lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be deemed guilty of a felony, and shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years.[24]

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18. Harvey v. State, 115 S.W. 1193 (Tex. Crim. App. 1909).

19. Lewis v. State, 35 S.W. 372 (Tex. Crim. App. 1896).

20. Ex parte Copeland, 91 S.W.2d 700, 702 (Tex. Crim. App. 1936).

21. Baker v. Wade, 553 F. Supp. 1121, 1150 (N.D. Tex. 1982).

22. 1943 Tex. Gen. Laws 194.

23. Painter, *supra* note 8, at n.42, http://www.sodomylaws.org/sensibilities/texas.htm.

24. 1943 Tex. Gen. Laws 194, *excerpted in* Painter, *supra* note 8, at n.42, http://www.sodomylaws.org/sensibilities/texas.htm.

The 1943 revision is bizarre in more ways than one. It suggests that while oral sex for the purpose of "carnal copulation"[25] is illegal, oral sex for some other purpose is just fine. It also suggests that while *sexual intercourse* with an animal is illegal, *oral sex* performed on an animal is not a problem since it is only oral sex performed on "another human being" that is criminal. Still, the law on its face applied equally to heterosexual and homosexual sex.

3. *The 1973 Statute*

In 1973, during a comprehensive criminal code revision, the Texas legislature changed the sodomy law a third time.[26] Now for the first time calling the law "Homosexual Conduct," the legislature banned oral and anal sex only between persons of the same sex. It first defined "deviate sexual intercourse" as "any contact between any part of the genitals of one person and the mouth or anus of another person."[27] Next, it made deviate sexual intercourse a crime only if performed "with another individual of the same sex."[28] The 1973 revision made homosexual conduct a Class C misdemeanor punishable only by a fine of up to $200.[29] It made lesbian sex criminal for the first time.

Also in 1973, the Texas legislature generally liberalized its sex laws, decriminalizing adultery, fornication, seduction, and even bestiality.[30] And while opposite-sex couples were now free to engage in "deviate sexual intercourse," same-sex couples were not.[31]

Thus, the 1973 Texas Homosexual Conduct law represented an *expansion* of the types of acts historically prohibited. Both anal and oral sex were now covered, though only anal sex was covered before 1943. At the same time, it also represented a *narrowing* of the class of

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25. "Carnal copulation" was interpreted to mean "sexual intercourse," presumably anal or vaginal sex. Furstonburg v. State, 190 S.W.2d 362 (Tex. Crim. App. 1945).

26. 1973 Tex. Gen. Laws 993.

27. *Id.* § 21.01.

28. *Id.* 21.06(a). The law was further amended in 1981 to prohibit "the penetration of the genitals or the anus of another person with an object." TEX. PENAL CODE ANN. § 21.06 (Vernon Supp. 1982). On its face, the 1981 amendment appeared to make criminal pelvic or prostate examinations if the doctor and patient were of the same sex. Two years earlier, the state had made criminal the sale or possession for sale of dildos and artificial vaginas. 1979 Tex. Gen. Laws ch.778, sec.1, § 43.21(a)(7), sec. 2, § 43.23(a).

29. 1973 Tex. Gen. Laws ch. 339, § 21.06(b).

30. Baker v. Wade, 553 F. Supp. 1121, 1150 (N.D. Tex. 1982).

31. In a challenge to section 21.06, plaintiffs served Requests for Admissions on attorneys for the state asking the state to admit the law prohibited same-sex, but not opposite-sex, conduct. The state's response contained what the court called "an unfortunate but Classic Typo," to wit: "Section 21.06 proscribes a *mole* engaging in 'deviate sexual intercourse' with another *mole* and likewise proscribes a female engaging in 'deviate sexual intercourse' with another female." *Id.* at 1150 n.6.

people historically covered. Same-sex, but not opposite-sex, couples were now covered.

Several attempts were made over the next twenty-eight years to overturn the law legislatively, during the Texas legislature's biennial sessions, but none succeeded. Most such attempts were half-hearted, consisting of little more than *pro forma* bills being filed by state legislators representing liberal urban districts. In 1975, a repeal effort lost by a vote of 117-14 in the state house.[32] Again in 1977 and 1979, repeal attempts were made, but the proposals failed to get out of committee.[33] Similar proposals met similar fates in the 1980s. In 1993, during a comprehensive overhaul of the state's criminal code, the Texas senate supported repeal, but the more politically conservative house defeated the effort.[34] Bills to repeal the sodomy law were filed in the 1997 and 1999 sessions. Both times the bills failed to make it out of the state house criminal jurisprudence committee.[35] Another attempt to repeal the sodomy law during the 2001 session fell one Republican vote short of the number the proposing Democratic legislator wanted to secure in order to vote the bill out of the house criminal jurisprudence committee.[36]

B. *Enforcement of the Texas Sodomy Law*

In the entire 143-year history of the Texas sodomy law, including its pre-21.06 versions, there are no publicly reported court decisions involving the enforcement of the law against consensual sex between adult persons in a private space.[37] In some reported decisions, the facts given by the court are too sketchy to determine whether the prosecution was for private, adult, consensual activity. Especially in early cases, the decisions are very short, often no more than a

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32. Rob Shivers, *Lone Star Solons Defeat Sodomy Reform*, ADVOCATE, Aug. 13, 1975, at 5.

33. *Baker*, 553 F. Supp. at 1151.

34. Two Texas Men Challenge State's Ban on Gay Sex, REUTERS, Nov. 18, 1998; *Lesbian/Gay Law Notes*, May 1993, at 41:1. Also in 1993, the Texas legislature passed, and Texas Governor Ann Richards signed, a bill broadening the state's sex-offender treatment law. Under the new version, anyone convicted of "a sex crime under the laws of a state or under federal law" was subject to treatment. 1993 Tex. Gen. Laws ch.590, sec.1, § 1(4)(A). The "sex crime" of "homosexual conduct" would seem to be included.

35. Eric Berger, *Danburg again files bill seeking sodomy law's removal*, HOUSTON CHRON., Jan. 20, 2001, at 31.

36. *Id.* Representative Debra Danburg (D-Houston), who had previously filed sodomy law repeal bills, insisted that *two* Republicans support her bill before it could be voted out of committee. *Id.* One Republican on the committee apparently supported the repeal, but that was it. *Id.*

37. The state of Texas claimed in *Baker v. Wade*, 553 F. Supp. 1121, 1150 (N.D. Tex. 1982), that section 21.06 had never been enforced against private activity between consenting adults. This, as we shall see, is simply not true. *See supra* text accompanying notes 44-50.

paragraph or two in length. Courts have often seemed too bashful even to present the facts. In a typical example, affirming a sodomy conviction after a guilty plea, one Kentucky court said simply, "It is not necessary to set out the revolting facts."[38]

All of the reported Texas cases detailing the circumstances of an arrest for sodomy involve some element that makes them distinct from *Lawrence*. Many involve charges of sodomy violations in a public or quasi-public place,[39] such as a jail.[40] Some cases involve some element of force or coercion.[41] Others involve sex with minors.[42] Indeed, in litigation challenging the state sodomy law, the state has contended that it has only enforced the law in cases where force was used, cases involving minors, and cases involving public sex.[43] This alone makes the arrest and prosecution of Lawrence and Garner, whose case involved none of these factors, anomalous.

However, the absence of reported decisions does not mean that the Texas sodomy law was never enforced against private activity. Instead, perhaps because of the shame long associated with homosexuality and homosexual acts, defendants arrested and charged with violating the law routinely pleaded guilty to the offense, paid whatever fine was imposed, and hushed up about their convictions.[44] As a result, almost all of the uses and misuses by police of the Texas sodomy law

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38. Medrano v. State, 205 S.W.2d 588, 588 (Ky. 1947).

39. Cases involving a public or quasi-public space include: *Young v. State*, 263 S.W.2d 164 (Tex. Crim. App. 1953), and *Jones v. State*, 308 S.W.2d 48 (Tex. Crim. App. 1957), both of which involved parked cars, *Sinclair v. State*, 311 S.W.2d 823 (Tex. Crim. App. 1958), which involved a theatre, and *Shipp v. State*, 342 S.W.2d 756 (Tex. Crim. App. 1961), and *Buchanan v. State*, 471 S.W.2d 401 (Tex. Crim. App. 1971), both of which involved public restrooms.

40. Cases involving acts in a jail include: *Blankenship v. State*, 263 S.W.2d 164 (Tex. Crim. App. 1956), *Bue v. State*, 368 S.W.2d 774 (Tex. Crim. App. 1963), and *Bishoff v. State*, 531 S.W.2d 346 (1976).

41. Cases involving alleged force or coercion include: *Gordzelik v. State*, 246 S.W.2d 638 (Tex. Crim. App. 1952), *Willard v. State*, 338 S.W.2d 472 (Tex. Crim. App. 1960), and *Pruett v. State*, 463 S.W.2d 191, 192 (Tex. Crim. App. 1970).

42. Cases involving a minor include: *Brown v. State*, 99 S.W. 1001 (Tex. Crim. App. 1907); *Holmes v. State*, 269 S.W. 95 (Tex. Crim. App. 1925); *Slusser v. State*, 232 S.W.2d 727 (Tex. Crim. App. 1949); *Pipkin v. State*, 230 S.W.2d 221 (Tex. Crim. App. 1950); *Sartin v. State*, 335 S.W.2d 762 (Tex. Crim. App. 1960); *Moats v. State*, 402 S.W.2d 921, 923 (Tex. Crim. App. 1966); *Johnston v. State*, 418 S.W.2d 522 (Tex. Crim. App. 1967).

43. Buchanan v. Batchelor, 308 F. Supp. 729, 733 (N.D. Tex. 1970). In *State v. Morales*, 826 S.W.2d 201 (Tex. Ct. App. 1992), the court found no reported sodomy prosecutions at all since 1973, *id.* at 203.

44. Telephone Interviews with Ray Hill, (Aug. 6, 7, 2003) [hereinafter Hill interview]. Hill is a longtime gay- and prisoners'-rights activist in Houston, having lived in the area almost his entire life. In Supreme Court history, Hill is best known for *Houston v. Hill*, 482 U.S. 451 (1987), in which his conviction for violating a disturbing-the-peace ordinance was reversed as abridging his First Amendment rights to criticize a police officer in the process of making an arrest.

(and of sodomy laws in other states) against private acts will never be known. They are lost to history because of shame and fear.

This closeted enforcement has been a common phenomenon in the history of sodomy laws and related laws used to harass homosexuals, including laws against public lewdness. William Eskridge has noted the relative ineffectiveness of procedural safeguards as tools to combat anti-gay harassment. Writing about the enforcement of sex laws against gays from the 1940s through the 1960s, Eskridge notes that "out of fear of further exposure, almost everybody pleaded guilty to charges of lewd vagrancy, degeneracy, and sodomy, and they pleaded guilty at higher rates than defendants did for similar crimes such as vagrancy, disorderly conduct, and rape."[45] Thus, constitutional procedural safeguards did not really raise the costs of enforcement.

One example of this phenomenon occurred in 1982 or 1983, when Texas Department of Public Safety deputies in Harris County arrested two men for having sex in a camper parked on state park grounds near the San Jacinto monument, an obelisk-like statue commemorating the Texan war for independence from Mexico.[46] Inside the camper, the men were shielded from public view. There, they probably had a reasonable expectation of privacy sufficient to warrant the usual constitutional protections guaranteed by the Fourth Amendment.[47]

The arresting officer reported that he was walking by the camper when a breeze blew aside the closed curtain, exposing the two men as they had sex. Ray Hill, a longtime gay civil rights and prisoners' rights activist in Houston, learned of the arrest from the presiding Justice of the Peace ("JP") and tried to persuade the defendants' lawyer to use the case as an opportunity to challenge the constitutionality of Section 21.06. The men's lawyer refused to do so, saying that his clients simply wanted to plead guilty and be done with the matter and that he (the lawyer) just wanted to collect his fee for handling it.[48] The matter was never appealed and died where it began in a JP court.

Another example of sodomy-law enforcement occurred in about 1980 in Houston, Texas. Officers were called to the scene of a loud party at a private home. When they arrived, officers saw men dancing together, hugging, and kissing. Some of the men were dressed as women. Ira Jones, an assistant D.A. for Harris County, was on duty when the police brought in "a paddy wagon full of 'em [homosexuals]" on charges of violating the Homosexual Conduct law. Jones declined

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45. WILLIAM N. ESKRIDGE JR., GAYLAW 87 (1999).

46. Hill interview, *supra* note 44. The facts about the 1982 or 1983 arrest come from this interview alone. To my knowledge, there is no official record of the arrest or the subsequent proceedings.

47. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33 (2001); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

48. Hill interview, *supra* note 44.

to authorize the charges, since police had not observed them violating the letter of the law. "It was fun for them," says Jones, speaking of the gay men arrested at the party and brought to jail. "They laughed and went away."[49] It is doubtful that the incident was "fun" for the men involved, but if Jones had been as unscrupulous as the police arresting them their fun might have extended into court appearances and fines.

Without doubt, there were numerous times in Texas history when sodomy arrests and prosecutions ended with a quiet guilty or no contest plea, a small fine, no publicity, and continued anonymity for the defendants. Hill, who personally knows many of the Harris County judges and their staffs handling criminal cases, recalls five such incidents (including the Lawrence and Garner arrest) in Harris County alone since Section 21.06 was adopted by the Texas legislature in 1973.[50] But for a fortuitous set of coincidences, and the initiative of three people, the arrest of John Lawrence and Tyron Garner could very easily have been just another forgotten episode in the underhistory of the Texas sodomy law.

III. THE UNKNOWN PAST OF *LAWRENCE*

A number of mysteries lie at the heart of the most important gay civil rights case yet decided by the United States Supreme Court.[51] What were the defendants actually doing when sheriff's deputies entered John Lawrence's apartment? Did the deputies really see them having sex? Was the case a set-up by gay-rights activists to challenge the constitutionality of the Texas sodomy law, as some conservative groups have charged? How did the arrest of these two previously unknown men wind up in the nation's highest court instead of dying a shame-faced and anonymous death, as so many prior sodomy prosecutions had? This section, drawing from original interviews of people close to the case from its inception, and including much documentary information not previously brought to the attention of the public, attempts to answer those questions. It attempts to rescue the facts from underhistory.

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49. Interview with Ira Jones, Assistant District Attorney, Harris County, Tex. (Aug. 27, 2003) [hereinafter Jones interview].

50. Hill interview, *supra* note 44.

51. The "official" version of the facts, the one recounted by the courts reviewing the case at all levels, was never contested at a trial. There was no trial.

A. *Posing as Somdomites*[52]*: John Lawrence and Tyron Garner*

Little is known publicly about the men whose arrest led to the most important gay civil rights decision in American history. According to the Houston attorney who handled their case at the trial court level, Mitchell Katine, "They're not out to be any more famous than they accidentally came to be. They're private people, and they are very happy this law has been changed, but they are just regular people."[53] "These are not professional civil rights people," says Katine.[54]

Indeed, the lawyers representing Lawrence and Garner have consistently shielded the men from public scrutiny, declining media requests (and my request) for interviews.[55] Lane Lewis, the first person known to have talked to Lawrence about the arrest shortly after he was released from his overnight stay in jail, served as the men's informal public relations manager for a time after they were

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52. I say Lawrence and Garner "posed" as sodomites because as this Section suggests they were probably not having sex when police entered Lawrence's bedroom, yet proceeded with their case on the premise that the police had indeed seen them. The phrase, "posing as somdomite," including the misspelling of the word "sodomite," comes from Lord Queensbury, the father of Lord Alfred Douglas, who used it to describe Oscar Wilde in a note to Wilde in February, 1895. *Oscar Wilde, in* IV NOTABLE HISTORICAL TRIALS 479, 485 (Justin Lovell ed., 1999). There is some dispute about the correct interpretation of Lord Queensbury's handwriting. *Id.* at n.1 (alternative interpretations include: "posing somdomite" and "ponce and somdomite"). Wilde sued Lord Queensbury for libel and lost. *Id.* at 516. He was quickly tried for violating England's then-existing sodomy law, but the jury hung. *Id.* at 527-28. He was then tried a second time, convicted, *id.* at 541, and sentenced to two years' hard labor, the maximum allowed under the law. *Id.* at 542. Sentencing Wilde, the trial judge announced that what Wilde had done was

> so bad that one has to put stern restraint upon oneself to prevent oneself from describing, in language which I would rather not use, the sentiments which must rise to the breast of every man of honour who has heard the details of these two terrible trials .... People who can do these things must be dead to all sense of shame, and one cannot hope to produce any effect upon them. It is the worst case I have ever tried .... I shall, under these circumstances, be expected to pass the severest sentence that the law allows. In my judgment it is totally inadequate for a case such as this.

Id. Wilde was released from prison on May 19, 1897, a broken and practically penniless man. He died on November 30, 1900. *Id.* at 544-46. On the back of his tomb is the following inscription, from Wilde's own *The Ballad of Reading Gaol*, written after his release from prison:

> And alien tears will fill for him
> Pity's long broken urn,
> For his mourners will be outcast men
> And outcasts always mourn.

Id. at 546.

53. Dana Calvo, *Private Lives Amid a Very Public Decision*, L.A. TIMES, July 1, 2003, at E1.

54. Katine interview 1, *supra* note 5.

55. Katine interview 1, *supra* note 5.

arrested.[56] "My job the first couple of years was keeping the media away from these boys," says Lewis, thirty-six, a gay civil rights activist and bartender in a Houston gay dance club.[57] Lewis instructed Lawrence and Garner not to discuss the case with any media and to refer all questions to their attorneys or to Lewis himself.[58] Some information about the men can be gleaned, however, from newspaper accounts, interviews, and the informational intake worksheets prepared by the Harris County Sheriff's Department the night Lawrence and Garner were arrested.

John Geddes Lawrence, whose apartment was entered by sheriff's deputies, was born in Beaumont, Texas, in 1943. He is white and was fifty-five-years-old at the time of the arrest.[59] One observer has described his demeanor as "more like a small-town banker than a social activist."[60] Katine describes both Lawrence and Garner as "on the quiet side, passive-type individuals."[61] At the time of the arrest, Lawrence lived on the second floor of a small Houston apartment complex. For more than a decade prior to the arrest, he worked as a medical technologist at a nearby medical center.[62] Lawrence had no prior involvement in either the gay civil rights movement or in any gay rights groups.[63]

Tyron Garner was born in Houston in 1967. He is black and was thirty-one-years-old at the time of the arrest.[64] Garner was unemployed and a Houston resident at the time.[65] He has had no steady employment since the arrest, either, working occasionally as a waiter in restaurants.[66] The sheriff's department intake worksheet for

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56. Lewis interview, *supra* note 2. Lewis has been active in gay civil-rights causes in Houston for more than a decade, serving among other things as president of the Houston Gay & Lesbian Political Caucus. He has a license in social work in Texas. *Id.*

57. *Id.*

58. *Id.*

59. Harris County Sheriff's Dep't; Inmate Processing — Warrant Pending — DIMS Worksheet (Sept. 9, 1998) [hereinafter Lawrence intake worksheet] (on file with author) ("DIMS" stands for Departmental Information Management System); R.A. Dyer, *Two Men Charged Under State's Sodomy Law*, HOUSTON CHRON., Nov. 6, 1998, at A1 (the first story about the arrests to appear in a newspaper).

60. Calvo, *supra* note 53; Hill interview, *supra* note 44; Lewis interview, *supra* note 2.

61. Katine interview 1, *supra* note 5.

62. Lawrence intake worksheet, *supra* note 59.

63. Hill interview, *supra* note 44; Lewis interview, *supra* note 2.

64. Harris County Sheriff's Department; Inmate Processing — Warrant Pending — DIMS Worksheet (Sept. 9, 1998) [hereinafter Garner intake worksheet] (on file with author); *see also* Dyer, *supra* note 59.

65. Garner intake worksheet, *supra* note 64.

66. Katine interview 1, *supra* note 5.

Garner lists his religious preference as "Baptist."[67] Like Lawrence, he had no prior involvement in the gay civil rights movement or in any gay rights groups.[68]

Both men had had run-ins with the criminal law before. Lawrence had twice been arrested for driving while intoxicated, once in 1978 and again in 1988.[69] Garner's prior criminal record was more extensive and more serious. It included arrests for possession of marijuana and aggravated assault on a peace officer in 1986, driving while intoxicated in 1990, and assault involving bodily injury in 1995.[70] Garner's prior arrests, in particular, may well have played a role in the events leading up to the encounter with the sheriff's deputies.

Nothing is known publicly about their relationship. They have consistently refused to discuss the nature of their relationship at the time of the arrest or since. For example, it is not known publicly whether they are/were committed partners, occasional sexual partners, or one-time sexual partners.[71] Katine says that the two men had known each other, at least as friends, for many years before the arrests.[72] They had been introduced to each other by a then forty-one-year-old man named Robert Royce Eubanks (now deceased), with whom Garner was romantically involved at the time of the arrest.[73] Based on his personal conversations with the men, Lewis believes that Lawrence and Garner may have been occasional sexual partners, but were not in a long-term, committed relationship when they were arrested.[74]

B. *The Arrest: The Deputies' Version*

Lawrence began with an uncommon — and unusual — police intrusion into the bedroom. The events of that night are to this day cloaked in mystery and some secrecy. They may never be completely known.

It is generally agreed the events began with a reported weapons disturbance shortly before 10:30 p.m. on September 17, 1998.[75] The

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67. Garner intake worksheet, *supra* note 64. The intake worksheet is blank regarding Lawrence's religious preference. Lawrence intake worksheet, *supra* note 59.

68. Hill interview, *supra* note 44; Lewis interview, *supra* note 2.

69. "JIMS Booking Inquiry — LBKI" (Nov. 6, 1998) (Lawrence) (on file with author) ("JIMS" stands for Justice Information Management System.)

70. "JIMS Booking Inquiry — LBKI " (Nov. 6, 1998) (Garner) (on file with author).

71. Dyer, *supra* note 59.

72. Katine interview 1, *supra* note 5.

73. Telephone Interview with Mitchell Katine (Mar. 14, 2004) [hereinafter Katine interview 2].

74. Lewis interview, *supra* note 2.

75. Deputy Joseph Quinn arrived at the apartment complex at 10:30 p.m. Paul Duggan, *Texas Sodomy Arrest Opens Legal Battle for Gay Activists*, WASH. POST, Nov. 29, 1998, at

report came from a man later determined to be Eubanks,[76] who likely called the Harris County Sheriff's Department from somewhere near the apartment complex.[77] Eubanks told the dispatcher, according to the Probable Cause Affidavit filed the night of the arrest, that "a black male was going crazy in the apartment and he was armed with a gun."[78] Based on his personal contacts with Eubanks, Lewis believes it is quite likely Eubanks used a racial slur — rather than "black male" — to describe the supposed armed man. Lewis describes Eubanks as a "gun-totin', beer-swillin', Gilley's kickin' bubba from Pasadena [Texas]."[79]

Deputy Joseph Rich Quinn was the first to arrive,[80] within minutes of getting the dispatch,[81] followed shortly thereafter by deputies William D. Lilly, Donald ("Donnie") Tipps, and Kenneth Landry.[82] According to standard procedure, Quinn took the lead because he was the first deputy on the scene. The deputies saw Eubanks at the foot of the stairs to the second-floor apartments. Eubanks motioned to Quinn and said, "Over here! Over here!" Quinn approached him and noticed he was "highly upset, shaking, and crying a little." Quinn asked,

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A3. According to the department's intake form, the arrests occurred at 11:10 p.m. Garner intake worksheet, *supra* note 64; Lawrence intake worksheet, *supra* note 59.

76. Lewis identifies him simply as Robert Royce. Lewis interview, *supra* note 2. Two accounts call him "Roger Nance." Duggan, *supra* note 75; NewsPlanet, *Texas Sex Bust Sparks Challenge*, PLANETOUT, Nov. 7, 1998, *at* http://www.planetout.com/news/article-print.html?1998/11/06/2 (on file with author). I will identify the man in this Article as "Eubanks."

77. Lewis interview, *supra* note 2. Katine believes the call came from a nearby pay phone. Katine interview 1, *supra* note 5. According to one report, citing Lawrence and Garner's attorney at the time (David Jones), Eubanks was with Lawrence and Garner earlier in the evening. Bruce Nichols, *Houston case could be test for Texas' anti-sodomy law*, DALLAS MORNING NEWS, Nov. 7, 1998, at 34A.

78. Joseph Rich Quinn, Probable Cause Affidavit, para. 1 (Sept. 17, 1998) [hereinafter Quinn Affadavit (Lawrence)] (on file with author); Joseph Rich Quinn, Probable Cause Affidavit, para. 1 (Sept. 17, 1998) [hereinafter Quinn Affadavit (Garner)] (on file with author).

79. Lewis interview, *supra* note 2. Pasadena, Texas is a lower-middle-class suburb of Houston.

80. Quinn interview, *supra* note 1. Quinn was thirty-nine at the time and had been a deputy with the sheriff's department for thirteen years. *Id.*

81. The Offense Report indicates Quinn was dispatched at 10:49 p.m. and arrived at 10:52 p.m. Detail Report for Harris County Law Enforcement 2 (Sept. 18, 1998) [hereinafter Offense Report] (on file with author).

82. Telephone Interview with William D. Lilly, Detective, Harris County Law Enforcement (Aug. 12, 2003) [hereinafter Lilly interview]; Telephone Interview with Donald Tipps, Deputy, Harris County Law Enforcement (Aug. 15, 2003) [hereinafter Tipps interview]. Now a detective for the sheriff's department, at the time of the arrest Lilly was a deputy. Lilly interview, *supra*. Tipps was thirty-two at the time and has been a deputy since 1991. Tipps interview, *supra*.

"Where is the man with the gun?" Eubanks pointed to Lawrence's second-floor apartment.[83]

Quinn, Lilly, Tipps and Landry headed up the stairwell, guns drawn, in what is known as a "tactical stack," one deputy right behind the other. Quinn was in the lead position. When they reached the apartment Quinn saw that the front door was mostly closed, but not pulled completely shut. It was resting against the door jam, slightly ajar, but offered no view into the apartment. Quinn checked the door knob and determined it was unlocked. He knocked on the door, which had the effect of pushing it open slightly. The light in the room was on. Quinn then pushed the door completely open. The deputies were quiet up to this point, not announcing their presence.[84]

From this point in the story, the accounts of the deputies diverge in ways small and large. Quinn's account, coming from the lead officer on the scene and the one responsible for filing the complaints against Lawrence and Garner, is the most richly detailed.

Lilly, the only deputy besides Quinn who claims to have seen Lawrence and Garner having sex, was reluctant to talk about the case at all, and offered me only a brief, bare-bones account. He declined to answer detailed questions and deferred any further interview until he received the approval of his superiors to do so. On August 25, 2003, I was informed that the department would not allow Lilly to discuss the case further. No explanation for this decision was given.[85]

Tipps played a smaller role at the scene, but I include his account based on my interview with him. I was unsuccessful in securing an interview of Landry who, in any event, appears to have played a similarly subordinate role.

What follows is a summary of what each deputy told me in interviews about what happened after they opened the door to Lawrence's apartment. I present these summaries of my interviews of the deputies to allow the reader to assess their credibility. Subsequent to my interviews with each man, I sent each of them a summary of their respective interviews by email asking for clarifications and corrections. I have noted these suggested clarifications and corrections, if any, in the summaries.

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83. Quinn interview, *supra* note 1.

84. *Id.*

85. Telephone Interview with Captain Van Peltz, Harris County Law Enforcement (Aug. 25, 2003).

1. *The Quinn Account*

a. The Interview.[86] At first Quinn saw only a normal living room area with a couch and chairs. Nobody was in the living room. No television or radio was playing and no other sound was heard. Quinn could see a kitchen area off to the right. To the left there was a bedroom. Quinn shouted, "Sheriff's Deputies!" twice, loud enough for anyone inside the apartment to hear. There was no response. As the deputies entered the living room, they began a "peel off" maneuver where deputies go in different directions to secure the area. One deputy peeled off toward the left to investigate the bedroom. The door to that bedroom was open and nobody was inside.

Quinn peeled off to the right, toward the kitchen area. There, Quinn saw a fully-clothed man ("Man #4") standing beside the refrigerator, talking on the phone. Quinn could not initially remember his name, but believes the man was Hispanic and in his thirties.[87] Quinn told the man, "Do not move! Let me see your hands." The deputies frisked and handcuffed the man to secure him while they continued to search the apartment for the reported armed intruder.

Still the deputies heard no noises in the apartment. They noticed there was another bedroom behind the kitchen area. The door to this bedroom was wide open but the light was off inside the room, so its contents were not completely visible. The deputies again formed a tactical stack, with Lilly taking the lead this time and Quinn right behind him, guns still drawn.

Slowly, Lilly and Quinn approached the bedroom. With the help of the lights that were on in the kitchen and living room Lilly could make out two naked men having anal sex, one on the bed (Garner) and the other standing behind him at the side of the bed (Lawrence). "It actually startled him [Lilly], what they were doing," says Quinn, "and he lurched back."

At this point, Quinn, who had not yet seen the men having sex, guessed that Lilly must have been surprised by seeing the reported

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86. The following is a narrative account based on my interviews with Joseph Quinn. Quinn Interview, *supra* note 1.

87. A narrative of the arrests filed that night by Quinn identifies Man #4 as Ramon Pelayo-Velez. Offense Report, *supra* note 81, at 5. Man #4 is not mentioned as a witness in the Probable Cause Affidavits Quinn filed that night. Quinn Affidavit (Lawrence), *supra* note 78; Quinn Affidavit (Garner), *supra* note 78. Nor does his name appear in any of the other court documents I have obtained. No media account mentions him. While Lilly confirms the presence of a fourth man, Tipps does not recall anyone but Lawrence and Garner being in the apartment. Lilly interview, *supra* note 82; Tipps interview, *supra* note 82. Through Lane Lewis, Lawrence denies that a fourth man was present. Lewis interview, *supra* note 2. Katine also denies that anyone besides Lawrence or Garner was in the apartment when the deputies entered. Katine interview 1, *supra* note 5. I have not been successful in tracking down Pelayo-Velez or in identifying anyone else who might have been Man #4.

gunman. Quinn came around low on Lilly's right side and entered the bedroom, in a crouched position, with his gun pointed straight ahead. Quinn's finger was on the trigger of his gun, ready to fire. A deputy turned the bedroom light on and the deputies clearly saw Lawrence and Garner having anal sex. With the deputies' guns pointed straight at the two men, Quinn yelled "Stop!" to them and "Step back!" to Lawrence, who was behind Garner. Despite these orders, the men continued to have sex. In fact, "Lawrence looked eye-to-eye at me," but kept having sex. Quinn repeated his instructions two or three more times. But the men continued to have sex for what Quinn says was "well in excess of a minute." Finally, Lilly and Tipps pulled Lawrence away from Garner.

Quinn believes there is no way the men did not hear him when he announced "Sheriff's Department!" twice when the deputies entered the apartment. The door to the bedroom was wide open, there was no other sound in the apartment, and the distance between where Quinn made the announcement and the bedroom door was only about twenty to twenty-one feet. Further, Lawrence and Garner should have heard Quinn tell Man #4 to put up his hands, since the distance from where Quinn stood at that point and the bedroom door was a mere three feet. Quinn estimates that the time between the announcement and the moment he entered Lawrence's bedroom was just under a minute, more than enough time for the men to stop having sex.

Quinn also cannot understand why Lawrence and Garner did not stop having sex when it was obvious the deputies were in the bedroom, had turned on the light, had their guns aimed directly at them, and were repeatedly shouting at them to stop having sex. "Most people who have any self-dignity would stop," says Quinn. "Have some courtesy for me and stop doing that," he adds. During my initial interview of him, Quinn did not recall that the men were intoxicated or high on drugs. However, the Offense Report for the sheriff's department filed that night by Quinn indicates that Lawrence, Garner, and Eubanks were "extremely intoxicated."[88] "I thought afterwards it was a set-up," says Quinn, meaning that Lawrence and Garner wanted to be caught in the act in order to be arrested and then to challenge the sodomy law.

After Lawrence was forcibly separated from Garner, the two men were handcuffed. Lawrence became angry and belligerent. "What the fuck are y'all doing?" he shouted at the deputies. "You don't have any right to be here," Lawrence protested. Lawrence refused to put on any underwear and was led into the living room handcuffed and naked.

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88. Offense Report, *supra* note 81, at 5. The intake worksheet for both Lawrence and Garner indicates that they had been using alcohol, but not drugs. It does not indicate whether they were intoxicated. Lawrence intake worksheet, *supra* note 59; Garner intake worksheet, *supra* note 64.

Once back in the living room, deputies sat Lawrence, Garner, and Man #4 on the couch. They were soon joined by Eubanks. Man #4 told the deputies he was a friend visiting Lawrence. Eubanks confessed to the deputies that he had invented the story about an armed intruder in order to retaliate against Lawrence and Garner. Eubanks was angry and jealous that his current lover, Garner, was cheating on him with his ex-lover, Lawrence. At one point Eubanks became so agitated that he stood up, shouted at Garner, and had to be forced to sit back down.

Quinn was angry that Lawrence and Garner had not stopped having sex when the deputies entered the apartment and announced their presence. "Do you realize that not once but twice we called out?" Quinn told them. "You were close to being shot." Lawrence remained angry, calling the deputies "gestapo" and "storm troopers" and "jack-booted thugs."[89] Lawrence said the deputies were "harassing" them because they were homosexuals. Quinn responded: "I don't know you. And I don't know your sexual orientation. So how can I be harassing you because you're homosexual other than that I caught you in the act?"

By now, several other sheriff's department officers had arrived, including Sgt. Kenneth O. Adams. (Adams retired in 2002.) Quinn discussed with Adams what to do about Lawrence and Garner. Because Homosexual Conduct was a Class C misdemeanor (like a traffic ticket), punishable by fine but not prison, Quinn knew that the deputies had the option simply to issue a citation without actually taking them to jail. Quinn recommended that the men be charged with violating the Homosexual Conduct law *and* be taken to jail.

Quinn explains his recommendation (1) to cite the men and (2) to jail them:

> I think the totality of the circumstances where I think there's a guy with a gun and I almost have to shoot, that it warranted me giving them a citation. It was a lovers' triangle that could have got somebody hurt. I could have killed these guys over having sex.[90] They were stupid enough to let it go that far.[91]

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89. Lawrence later publicly described the deputies' actions as "sort of Gestapo." Steve Brewer, *Texas Men Post Bonds, Challenge State's Sodomy Law*, N.Y. TIMES NEWS SERV., Nov. 20, 1998 (on file with author). The Associated Press quoted Garner as saying: "I feel like my civil rights were violated and I wasn't doing anything wrong." Terri Langford, *No Contest Plea in Texas Sodomy Case*, ASSOCIATED PRESS, Nov. 20, 1998 (on file with author).

90. Quinn's expressed concern for the men's lives reminds me of the concern expressed by the lead officer of the raiding party at the Stonewall Inn bar in 1969, the event that sparked a riot and the modern phase of the gay civil-rights movement. Describing how tense the situation became, he said, "You have no idea how close we came to killing somebody." CHARLES KAISER, THE GAY METROPOLIS 197 (1996).

91. Quinn Interview, *supra* note 1.

Adams agreed with Quinn and it was decided to call the assistant D.A. on duty[92] to get approval for the citation and arrest.[93] Quinn asked the assistant D.A. if it mattered, under the Homosexual Conduct law, whether the conduct was in a home or a public place. The D.A. looked at the statute and said it did not matter where the offense occurred.

While on the scene, the deputies noticed numerous pornographic gay magazines and videotapes inside the apartment. "The apartment was loaded with pornography," says Quinn. "Everywhere you looked there was some kind." In particular, deputies noted "two pencil sketchings of James Dean, naked with an extremely oversized penis on him." The sketches "were hung up like regular pictures," says Quinn. Quinn and Tipps laughed about the James Dean etchings, remarking sarcastically, "This is the kind of thing I would have in my house!"

As deputies prepared to leave the scene, Quinn advised them to wash their hands. "You have to wonder," says Quinn, " 'What have we touched? Have we come into contact with any fluids?' " Quinn recalls that, "I made sure I doused myself with sanitizer" that he kept handy in his patrol car.

Eubanks was charged with filing a false report, a Class B misdemeanor punishable by a short jail term, and was taken to jail. Man #4 was allowed to go free.

Lawrence refused to put on more than his underwear for his trip to jail. He also refused to be taken from his home and had to be physically carried to a patrol car by deputies, including Tipps. During the trip downstairs, Lawrence sustained minor scrapes on his legs that bled a little, but he was not abused. Quinn says that Lawrence could have been cited for resisting transport while under arrest. But Quinn did not cite him because Lawrence "was doing all this to entice me to do something that could show I hated homosexuals."

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92. There is a D.A. available twenty-four hours a day, offering legal counsel to the deputies in the field.

93. The DIMS Worksheet indicates Kay Lynn Williford was the "intake D.A." However, this is probably a mistake. Williford was not on duty until later in the evening and fielded only a subsequent administrative question about the arrests. It is her answer to this subsequent call that probably resulted in her name appearing as the intake D.A. on the DIMS Worksheet. Telephone Interview with Kay Lynn Williford, District Attorney, Harris County (Aug. 27, 2003) [hereinafter Williford interview]. Instead, Ira Jones, an assistant D.A. for 30 years in Harris County, took the initial call from Quinn. Jones interview, *supra* note 49. Although Jones cannot remember the details of this particular conversation, typically the assistant D.A.s serving intake duty listen to the officer's account of events and then make a determination whether there is probable cause for an arrest. Sometimes the assistant D.A.s will look up the text of a statute to determine whether the alleged facts fall within the letter of the law, but they do not conduct further legal research. The volume of calls is so heavy — every felony and misdemeanor arrest must be approved by the D.A.s — that there is little time available for each individual call. It is not the assistant D.A.'s role to determine the credibility of the officer's account. "In Texas," says Jones, "police officers are presumed to be credible." *Id.*

Lawrence, Garner, and Eubanks were led away to the station in separate patrol cars. Eubanks rode with Quinn. Lawrence continued to be angry and uncooperative throughout the standard intake procedures. Garner was quiet and cooperative.

In his arrest report filed that night, Quinn recounted the events as follows:

> Officers dispatched to [Lawrence's address][94] reference to a weapons disturbance. The reportee advised dispatch a black male was going crazy in the apartment and he was armed with a gun.
>
> Officers met the reportee who directed officers to the upstairs apartment. Upon entering the apartment and conducting a search for the armed suspect, officers observed the defendant engaged in deviate sexual conduct namely, anal sex, with another man.[95]

Quinn filed an identical affidavit regarding Garner.[96] Both documents listed Lilly, and only Lilly, as a witness to the crime. Both were notarized by Kenneth Adams. The formal complaint against the men, signed by Quinn and notarized the same night by Adams, indicates that Quinn "has reason to believe and does believe that" each man "engage[d] in deviate sexual intercourse, namely anal sex, with member of the same sex (man)."[97]

Quinn has no regrets about his actions, including his decision to issue the citations to Lawrence and Garner and to take them to jail. "When we review the entire record, the circumstances warranted what I did." And as for the notion he sometimes hears that "his case" ultimately lost? "I don't really look at it as my case," says Quinn. "I don't regret it. I did what I had to do. And I filed the charge."

b. The Offense Report. In addition to his affidavit and formal complaint, Quinn also wrote up an Offense Report, a more detailed narrative of the night's events for internal department use. It was filed with the Sheriff's Department a few hours after the arrest, at 3:22 a.m. on September 18, 1998. Part of the Offense Report simply lists the officers who were involved, the witnesses, and addresses for each person. Interestingly, the Offense Report lists Eubanks as living at Lawrence's address, indicating that they may have been roommates at the time. However, this may simply have been an error.

Part of the Offense Report includes an "Investigative Narrative" that describes the events. It is made public here for the first time. I

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94. Because he still lives in the apartment, I have omitted Lawrence's address.

95. Quinn Affidavit (Lawrence), *supra* note 78.

96. Quinn Affidavit (Garner), *supra* note 78.

97. Joseph Rich Quinn, Complaint Affidavit (Garner) (Sept. 17, 1998) (on file with author).

have preserved the original punctuation, and all-capital letters form, but have deleted personal identifying information for those involved:

INVESTIGATIVE NARRATIVE:

OFFICERS DISPATCHED TO [Lawrence's address] REFERNCE [sic] TO A WEAPONS DISTURBANCE. UPON ARRIVAL OFFICERS WERE SUMMONED AND DIRECTED TO THE UPSTAIRS APARTMENT BY THE REPORTEE WHO WAS LATER IDENTIFIED AS ROBERT ROYCE EUBANKS W/M 7-22-58.

OFFICERS VERIFIED THE REPORT VERBALLY AND MR EUBANKS REPLIED, "YES HE IS IN THAT APARTMENT UP THERE AND HE HAS A GUN."

OFFICERS KNOCKED ON THE DOOR AND ENTERED UPON FINDING IT UNLOCKED. OFFICERS BEGAN AN ARMED BUILDING SEARCH FOR THE SUSPECT WITH A WEAPON. OFFICERS FIRST OBSERVED A HISPANIC MALE LATER IDENTIFIED AS RAMON PELAYO-VELEZ 7-2-62 IN THE KITCHEN AREA TALKING ON THE TELEPHONE. OFFICERS SECURED THE FRONT BEDROOM AND PROCEEDED TO THE BACK BEDROOM OF THE FIVE ROOM APARTMENT.

OFFICERS UPON ENTERING THE BACK BEDROOM FOUND THE BLACK MALE AND A WHITE MALE ENGAGED IN DEVIATE SEXUAL INTERCOURSE NAMELY ANAL SEX. THE MALES WERE SEPARATED. THE BLACK MALE WAS IDENTIFIED BY TEXAS ID CARD [I.D. card number here] AS TYRON GARNER DOB 7-10-67. THE WHITE MALE WAS IDENTIFIED AS JOHN GEDDES LAWRENCE DOB 8-2-43. ALL PARTIES INVOLVED HAD BEEN DRINKING, AND WITH THE EXCEPTION OF MR. PELAYO-VELEZ, WERE EXTREMELY INTOXICATED.

OFFICER SEARCHED THE APARTMENT FOR THE ALLEGED GUN AND FOUND NO FIREARMS INSIDE. OFFICERS IN THE INVESTIGATION LEARNED THAT IT WAS AN APPARENT LOVE TRIANGLE AND MR EUBANKS CALLED BECAUSE HE WAS UPSET THAT MR GARNER AND MR LAWRENCE WERE HAVING SEX. MR EUBANKS IN HIS INTOXICATED STATE DENIED HAVING BEEN OUTSIDE THE APARTMENT AS OFFICERS ARRIVED.

OFFICER CONTACTED THE DISTRICT ATTORNEYS OFFICE AND SPOKE TO ADA[98] WILLIFORD. MS WILLIFORD WAS

98. "ADA" is a reference to "assistant district attorney."

ADVISED OF THE CIRCUMSTANCES AND ACCEPTED A CHARGE OF FALSE REPORT TO A POLICE OFFICER ON MR EUBANKS. OFFICER CONFIRMED WITH MS WILLIFORD THAT ELEMENTS OF HOMOSEXUAL CONDUCT DID NOT REQUIRE THE ACT TO OCCUR IN A PUBLIC PLACE. MS WILLIFORD AGREED THE ELEMENTS OF THE OFFENSE WERE MET.

OFFICER FILED CLASS C CHARGE OF HOMOSEXUAL CONDUCT ON MR GARNER AND MR LAWRENCE IN JUSTICE OF THE PEACE PRECINCT THREE POSITION ONE JUDGE MIKE PARROTT'S OFFICE.

ALL SUSPECTS WERE TAKEN INTO CUSTODY AND TRANSPORTED TO THE WALLISVILLE ANNEX FOR FILING OF CHARGES. MR LAWRENCE RESISTED BEING HANDCUFFED AND HAD TO BE FORCIBLY RESTRAINED. MR LAWRENCE REFUSED TO COOPERATE AND WALK UNDER HIS OWN POWER. MR LAWRENCE WAS CARRIED TO THE PATROL CAR. MR LAWRENCE DRAGGED HIS LEGS AND FEET AS OFFICERS CARRIED HIM DOWN THE STAIRS AND ALONG THE SIDEWALK.

MR EUBAMKS [sic] WAS EXTREMELY BELLIGERENT AND VERBALLY ABUSIVE. MR EUBANKS HAD TO BE FORCIBLY REMOVED FROM THE PATROL CAR AT THE STATION. MR EUBANKS FELL TO THE GROUND CLAIMING OFFICERS ASSAULTED HIM AND HAD TO BE PICKED UP AND CARRIED A PORTION OF THE WAY INTO THE STATION. HE THEN BEGAN WALKING UNDER HIS OWN POWER. MR EUBANKS CLAIMED TO HAVE HIV, HEART PROBLEMS, EPILEPSY, AND ASTHMA. DUE TO HIS COMPLAINTS AND MR LAWRENCE RECEIVING ABRASIONS TO HIS LEGS WHILE BEING CARRIED, OFFICER CALLED NORTH CHANNEL EMS. NORTH CHANNEL EMS ARRIVED AT THE STATION TO CHECK BOTH MR LAWRENCE AND MR EUBANKS. BOTH INDIVIDUALS REFUSED TREATMENT. ALL SUSPECTS WERE LATER TRANSPORTED TO IPC.

NO ADDITIONAL SUSPECT OR WITNESS INFORMATION AVAILABLE.[99]

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99. Offense Report, *supra* note 81, at 5-6.

2. *The Lilly Account*[100]

The deputies went into the apartment, with guns drawn, looking for the reported armed man. When the deputies entered the apartment, they announced their presence loud enough for anyone in the apartment to hear. There was a man ("Man #4") standing in the kitchen when the deputies entered.

After Man #4 was secured, the officers went into the bedroom where they saw Lawrence and Garner having sex. Lilly personally saw Lawrence and Garner having sex. Lilly says that Lawrence and Garner stopped having sex as soon as the deputies entered the bedroom.

3. *The Tipps Account*[101]

When the deputies arrived at the apartment door, it was slightly open. The deputies entered, guns drawn, and announced "Sheriff's Department!" loud enough for anyone inside to hear. The light was on in the living room but there was nobody in the room. Tipps could not hear any sounds, such as from a TV or stereo.

Straight ahead there was a bedroom door, which was slightly open and the lights appeared to be on inside. That bedroom was approximately thirty to forty feet from where the deputies stood when they announced their presence.

Tipps and Landry broke off to the left to investigate a bedroom. They found nobody inside that bedroom. Meanwhile, Quinn and Lilly went toward the bedroom straight ahead. Tipps heard Lilly and Quinn giving orders to persons inside the bedroom, such as "Let me see your hands." When Tipps and Landry heard this they went immediately to the other bedroom. They were there within seconds. Tipps estimates about thirty seconds passed between the time the deputies announced their presence and the time he first heard Lilly and Quinn giving orders to the men in the other bedroom. Inside the bedroom, Tipps and Landry saw two naked men, one white and the other black. Tipps and Landry did not see the men actually having sex. Only Quinn and Lilly would have been in a position to see that. Tipps did not pull the men away from each other to make them stop having sex. As far as Tipps knows, they had stopped voluntarily.

While Garner was compliant, Lawrence was uncooperative, refusing to put on his clothes and demanding to see his lawyer. Tipps asked Quinn, "Did you see anyone with a gun?" Quinn replied, "No but you ain't gonna believe this. Those guys were having sex."

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100. The following is a narrative based on my interview with William Lilly. *See* Lilly interview, *supra* note 82.

101. The following is a narrative based on my interview with Donald Tipps. *See* Tipps Interview, *supra* note 82.

"Really?" asked Tipps. "Yep," said Quinn. Lilly told Tipps he had seen the men having sex through the door and was so startled he backed up. "Better y'all than me" to see that, Tipps told Quinn and Lilly. Tipps says he cannot remember having seen another person in the apartment.

Tipps believes the men were cited and taken to jail for two reasons. First, they were cited and jailed because of the false weapons disturbance report. Second, they were cited and jailed because Lawrence was so uncooperative. These factors frustrated and angered Quinn and the other deputies.[102]

Tipps does not know why Lawrence and Garner would not have stopped having sex when the police entered the apartment and loudly announced their presence. "Maybe they didn't hear. Maybe they were too into what they were doing," he says. He does not believe either Lawrence or Garner were drunk or high on drugs. He says Lawrence and Garner did not protest their innocence to him. "They probably didn't think they were doing anything wrong," Tipps says. This was the first and only time Tipps has been involved in an arrest for homosexual conduct.

As for his place in history, Tipps observes: "I was hired to do a job and I'm going to do my job regardless. I was either at the right place at the right time or at the wrong place at the wrong time."

C. *The Arrest: Lewis' Version*[103]

The only other account of September 17, 1998, from a person close to the events comes from Lane Lewis, the first person to get into contact with Lawrence about the case after the arrests. Lewis currently works as a bartender at a Houston gay dance club. He has been involved in gay civil rights organizations and causes for more than a decade. He served as president of the Houston Gay & Lesbian Political Caucus, which vets and endorses candidates for public office. He has a license in social work from the state of Texas. In the years leading up to September 1998, Lewis made contacts with people who worked in the JP courts in Harris County because he knew that any sodomy case would go there first and he wanted to be contacted if

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102. In an email to me after I sent him a summary of our interview, Tipps annotated this portion of the interview summary as follows: "As far as both of the men going to jail they went to jail because they were breaking the law not because of them being uncooperative." Email from Donald Tipps to Dale Carpenter (Aug. 28, 2003) (on file with author). Despite this subsequent annotation, I stand by the version of what Tipps initially told me that I have included in the text.

103. *See* Lewis interview, *supra* note 2; Interview with Lane Lewis (Sept. 11, 2003) [hereinafter Lewis interview 2]. The account given here is supported by Lewis' handwritten notes that he says were taken during his initial telephone conversation with Lawrence [hereinafter Lewis, handwritten notes] (on file with author).

someone were arrested. The discussion that follows is based on my interviews with Lewis, recounting his knowledge of the facts as he learned them from Garner and especially Lawrence.[104] It is, of course, hearsay, but it is the closest thing we now have to Lawrence and Garner's own version of what happened.

When Lewis learned about the arrest, he called Lawrence.[105] In this first telephone conversation, and in subsequent conversations, Lawrence explained what happened the night of the arrest. Lawrence said that he, Garner, and Eubanks were all in Lawrence's apartment the night of the arrest. There was no other person in the apartment that night, according to Lawrence. Lawrence thinks the police may have gotten the idea of a fourth person from a man they saw walking up the stairs, but he does not know.

Eubanks is the person who called the police to Lawrence's apartment. Eubanks may have called from inside the apartment or from a pay phone, but Lewis is unsure about this. Lawrence told Lewis that Eubanks made the call because he was jealous of the time Lawrence and Garner spent together watching TV and movies and drinking. Also, Eubanks was "drunk" at the time, as he often was. Eubanks had never been involved in gay rights causes or gay organizations.

When the police arrived, Eubanks answered the door and let them in. Eubanks was fully clothed. There were pornographic gay movies and gay magazines visible to the police in the living room.

Lawrence told Lewis that he and Garner were not having sex when the deputies entered the apartment. In fact, Lawrence said that he and Garner were in separate rooms when the deputies arrived — Lawrence in the bedroom and Garner in the living room. Lawrence and Garner had never been sexually involved with each other. At the time of the arrests, Garner and Eubanks were boyfriends. Lawrence has since repeated this version of events to Lewis, as recently as September 2003.

Lawrence and Garner were arrested and taken out of the apartment, according to what Lawrence told Lewis, "in their underwear and no shoes." Lewis says there is no validity to claims that the arrest was a set-up to test the law.

D. *The Arrest: A Reasonable Doubt About the Deputies' Version*

These accounts raise questions about whether Lawrence and Garner were having sex when sheriff's deputies entered Lawrence's

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104. I should mention that I have personally known Lewis since about 1994. We are acquaintances, but not close friends.

105. *See infra* Part IV.

apartment. Even if they were having sex at the moment the deputies opened Lawrence's front door and announced their presence, I believe it is unlikely sheriff's deputies actually saw Lawrence and Garner having anal sex. This conclusion is based on several considerations, which I outline below. They are arranged from most persuasive and probative to least. Perhaps no single one of them is persuasive by itself, but collectively they raise a serious question about whether the deputies actually witnessed Lawrence and Garner having sex. If the case had gone to trial, Lawrence and Garner's lawyers could have used the considerations below to challenge the factual basis for the arrests, and in doing so, raised a reasonable doubt about whether the men were guilty.

1. *The Improbability of the Deputies' Accounts*

Only two deputies claim to have actually seen Lawrence and Garner having sex. One is Quinn and the other is Lilly. Neither of the deputies' accounts is credible; Quinn's is almost comically incredible in parts. This does not mean either man is consciously lying, but it does seriously undermine their claims to have seen Lawrence and Garner having sex.

To accept Quinn's account, we have to believe that Lawrence and Garner: (a) were having sex and continued to have sex after sheriff's deputies entered Lawrence's apartment and announced their presence twice so loudly that anyone in the apartment could easily hear, (b) with the door to the bedroom open about twenty feet away and lights on in the house, (c) with no interfering sounds such as a TV or stereo to cover the deputies' announcement, (d) then continued to have sex while Quinn and Lilly discovered a person standing in the kitchen near the bedroom, told him to put his hands up, and handcuffed him, all within three feet of the open bedroom door, (e) then continued to have sex as deputies approached the bedroom door, (f) then continued to have sex after deputies turned on the bedroom light, (g) then continued to have sex while the deputies' guns were pointed at them and the deputies repeatedly shouted at them to stop having sex and to step back, (h) then continued to have sex as Lawrence looked "eye-to-eye" directly at Quinn, (i) then continued to have sex for "well in excess of a minute" overall, until (j) deputies literally had to pull them apart from each other.[106]

This account is so fantastic it cannot be taken at face value. It defies common experience and common sense. Perhaps parts of it could be passed over as the consequence of a failing memory of an event that occurred five years before. Perhaps what seemed to a

106. None of these details about the incident appear in Quinn's investigative narrative. *See supra* Section III.

shocked Quinn like "well in excess of a minute" during which he viewed live homosexual anal sex was really no more than a few seconds.

But parts of Quinn's account are very difficult to explain by fading memory. It is not credible to claim that deputies literally pulled one man off of the other, for example. Lilly's account disputes this as does Tipps' account. Tipps and Lilly would surely remember if they had been obliged to pry apart two men having anal sex. This part of the story seems like a conscious embellishment, designed to put Lawrence and Garner in the worst possible light. If Quinn is capable of concocting such a lurid detail, what other parts of his story must be questioned?

Yet Lilly's truncated account is not much more believable, consisting as it does of elements (a) through (e) above. The only significant differences between Quinn's account and Lilly's are that Lilly claims the men immediately stopped having sex when the deputies entered the bedroom and that deputies did not have to pull them apart. Both of these differences make Lilly's account more credible than Quinn's. But that still leaves Lawrence and Garner having sex *after* the deputies loudly announce their presence from a distance of about twenty to thirty feet and continuing to do so while Quinn and Lilly secure Man #4, just three feet away from Lawrence's open bedroom door, all with the lights on in the adjacent rooms and no other sound in the apartment.

I am not the first to note the improbability of this story. One source familiar with the case inside the Harris County judicial system told me her reaction when she first heard of the deputies' account: "My first thought was, 'That's a lie.' I don't care whether you're homosexual or heterosexual or like doing it with little puppies, when those deputies enter the apartment it's over."[107] A prosecutor involved in the case has also expressed incredulity that Lawrence and Garner would continue to have sex when sheriff's deputies entered the apartment, although he reaches the conclusion that Lawrence and Garner may have been part of a set-up to test the constitutionality of the state sodomy law, a conclusion I challenge below.[108]

There are four possible ways to understand the deputies' account. The first three — attempting to defend the truthfulness of the deputies' account — are possible but not probable explanations. The fourth — which suggests Lilly and especially Quinn are not telling the

107. Telephone Interview with person in Harris County judicial system (Aug. 11, 2003) [hereinafter Anonymous Interview]. The person requested not to be identified in this Article.

108. Telephone Interview with Bill Delmore, Prosecutor, Harris County District Attorney's Office (Aug. 27, 2003) [hereinafter Delmore interview]; Calvo, *supra* note 53.

truth about actually seeing Lawrence and Garner having sex — is more probable.

(a) The Obliviousness Explanation

The first explanation for Quinn's and Lilly's strange account of events inside Lawrence's apartment is that perhaps Lawrence and Garner *did* continue to have sex after the deputies entered the apartment and announced their presence because Lawrence and Garner were oblivious to the announcement and the deputies' other activities.[109] This is unlikely since all the officers have said that they announced their presence loud enough for anyone in the apartment to hear, there was no other sound in the apartment to cover the deputies' announcement, the door to the bedroom was open, and there is no indication that Lawrence and Garner are deaf or hard-of-hearing.

On the other hand, Quinn wrote in his Offense Report filed the night of the arrest that the men were "extremely intoxicated."[110] If true, this makes the obliviousness explanation slightly more plausible, since alcohol may have so impaired the men's judgment that they did not care who else was present in the apartment. However, the claim that they were drunk is not supported by any other officer at the scene and is directly contradicted by Tipps. Even if the men were intoxicated, the Quinn account is still dubious. Not one but both men would have had to be so alcohol-impaired that they were unable to respond as a rational person would by ceasing any sexual activity upon the announcement that Sheriff's Deputies had entered the apartment. By all accounts, there was more than enough time to stop any sexual activity, even for two very drunk people. No recount of the events places Lawrence and Garner in the living room having sex, a location that would have exposed their activity to immediate discovery by the deputies.

There is, in short, no credible evidence of anything that might have impaired the ability of Lawrence and Garner to hear the deputies' announcement and subsequent activities within the apartment, and then to cease any sexual activity that might have been occurring.

(b) The Moment-of-Passion Explanation

The second explanation for Quinn's and Lilly's strange account is that perhaps Lawrence and Garner *did* continue to have sex after the deputies entered the apartment and announced their presence because they were caught up in a moment of passion and could not stop

109. Tipps and Adams offer this as a possibility. Tipps Interview, *supra* note 82; Telephone Interview with Kenneth O. Adams, Sergeant (retired), Harris County Sheriff's Department (Sept. 12, 2003).

110. Offense Report, *supra* note 81.

themselves.[111] This assumes a degree of animalistic passion that seems highly improbable. Whatever passion Lawrence and Garner were enjoying at the moment was surely drained by the sound of a loud male voice announcing the presence of the "Sheriff's Department" and by the activities and words accompanying the deputies' encounter with Man #4. Moreover, the time that must have elapsed between the announcement and the moment the deputies actually entered the bedroom (just under a minute, according to Quinn) would have allowed passions to cool considerably.

The Tipps account suggests a more plausible theory in support of the deputies' version of events than either the Quinn or Lilly account. Tipps indicates that about thirty seconds passed between the time the deputies announced their presence (presumably, the moment when Lawrence and Garner would have realized the police were present) and the time Lawrence and Garner were observed having sex. If, consistent with the Tipps version, Quinn and Lilly maintained that they went straight to Lawrence's bedroom upon announcing their presence, they would be more believable. But that is not the account they, the only two eyewitnesses, have offered. And even the Tipps estimate of thirty seconds seems like a stretch as a support for the deputies' story. Thirty seconds, while brief in absolute terms, can be an eternity in real life. It is more than enough time for two people, engaged in sexual activity, and suddenly conscious of loud voices twenty to thirty feet away, to stop what they are doing. Further, the Tipps estimate of thirty seconds is very difficult to square with Lilly's and Quinn's memory of confronting and securing a fourth man in the apartment *before* seeing Lawrence and Garner *in flagrante delicto*. Although there may be reasons why they would make up a story about seeing Lawrence and Garner having sex,[112] there is no obvious reason why Quinn or Lilly would fabricate the presence of a fourth man involved in no criminal activity. Tipps' estimate of thirty seconds from announcement to apprehension therefore seems likely to be low. The actual elapsed time was probably closer to the minute Quinn estimates.

(c) The Test-Case Explanation

The third explanation for Quinn's and Lilly's strange account is that perhaps Lawrence and Garner *did* continue to have sex after the deputies entered the apartment and announced their presence because Lawrence and Garner were part of an elaborate scheme to set up a test case to challenge the constitutionality of the Texas sodomy law.

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111. Tipps also offers this as a possibility. Tipps Interview, *supra* note 82.

112. *See supra* Section III.C.2 (discussing possible motivations for fabrication).

Under this scenario, Lawrence and Garner *wanted* to be seen having sex so that they would be arrested for violating the law.

There has been some speculation that *Lawrence* is a "cooked" case, meaning that the officers' intrusion into Lawrence's apartment was deliberately provoked by gay activists in order to test the validity of the Texas sodomy law. Bill Delmore, a Harris County prosecutor who handled the Lawrence case all the way to the Supreme Court, believes Lawrence and Garner may have helped set up a challenge to the Texas law. "I have suspected that from the beginning," he says. Delmore gives three reasons for believing the case might have been set up to challenge the law. First, "It is difficult to imagine circumstances in which people would continue engaging in the act with police in the apartment. Most people would discontinue any sexual activity."[113] He told one newspaper: "If the police knocked on the door — and one would assume that they did[114] — people would stop their sexual conduct. But they didn't."[115] Second, Delmore says that he has talked to numerous officers and asked them whether, under circumstances where they are looking for an armed suspect and happened upon two men having sex, they would charge the men with violating the state sodomy law. Not one of them, he reports, said that he would make an arrest under those circumstances. Instead, they would tell the men to stop what they were doing, instruct them to put their pants on, and then continue the search for the armed suspect.[116] "I can't imagine a police officer would care enough to file a charge," says Delmore, "unless something offended him or he was involved in the set-up." Since he does not believe Quinn would have been involved in a set-up to challenge the Texas sodomy law, he concludes Quinn must have been offended by something he saw and that the defendants provoked this offense by their behavior.[117] Third, Delmore heard someone say that there was open discussion of a test case on gay radio shows in the area. Delmore admits this is hearsay.[118]

Quinn also suspects this was a deliberate test case, based on the high-powered legal team brought in to defend the men. "I thought afterwards it was a set-up," says Quinn.[119]

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113. Delmore interview, *supra* note 108.

114. According to the officers, they did not knock on Lawrence's door, but verbally announced their presence once inside. Quinn interview, *supra* note 1; Tipps Interview, *supra* note 82.

115. Calvo, *supra* note 53.

116. Delmore interview, *supra* note 108.

117. *Id.*

118. *Id.*

119. Quinn interview, *supra* note 1.

The speculation about a set-up is intended to minimize Lawrence's and Garner's claims that the Texas sodomy law truly invaded their liberty or privacy as a practical matter. In this view, they had to "invite" the invasion to be able to complain of it. It also supports the Quinn and Lilly accounts that they actually observed Lawrence and Garner having sex. It provides a motive for the men to continue having sex while the deputies entered and searched the apartment.

There is support for the cooked-case speculation in the sheer rarity of enforcement of sodomy laws against consensual, noncommercial adult sex that occurs in the privacy of the home.[120] The state has claimed (probably incorrectly) that the Texas sodomy law, at least prior to 1994, had never been enforced in those circumstances.[121] There is also support for this cooked-case speculation in the frustration of gay legal advocates in Texas, whose earlier challenge to the law had been dismissed by the state courts for lack of standing precisely because there had been no enforcement.[122]

The more probable conclusion, however, is that *Lawrence* was not deliberately set up as a test case. It was simply one of those rare, chance examples of sodomy law enforcement, a bolt from the blue.[123] There are several reasons to doubt the cooked-case hypothesis.

First, Lawrence, Garner, and their attorneys deny that they set up the unusual circumstances that led to their arrests in order to test the law.[124] So do gay activists closely associated with the case.[125]

Second, neither Lawrence nor Garner had any known record of involvement with gay civil rights causes prior to their arrests.[126] In other undoubted examples of set-up test cases, the parties involved have tended to be active in the reform movements with which their test case is associated. In *Griswold v. Connecticut*,[127] for example, the persons arrested for setting up a birth-control clinic, including Estelle Griswold, had long been active in the birth-control movement generally and with Planned Parenthood specifically.[128] Finding two anonymous people, not previously involved in gay-rights activism who

120. *See supra* Part II.

121. Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982).

122. *See* State v. Morales, 869 S.W.2d 941, 947-48 (Tex. 1994).

123. Cases like this, says Ray Hill, "strike like lightning" in the lives of ordinary citizens. Hill interview, *supra* note 44.

124. Katine interview 1, *supra* note 5.

125. Hill interview, *supra* note 44; Lewis interview, *supra* note 2.

126. Lou Chibbaro Jr., *Taking credit for* Lawrence vs. Texas *decision*," WASH. BLADE, July 18, 2003, http://www.washblade.com/2003/7-18/news/national/credit.cfm; Hill interview, *supra* note 44; Lewis interview, *supra* note 2.

127. 381 U. S. 479 (1965).

128. DAVID GARROW, LIBERTY AND SEXUALITY (1994).

are willing to be initiated into activism by being intruded upon *in flagrante delicto* by the police, arrested and hauled off to jail, convicted of a sex offense, and then to pursue litigation for years, with all the media exposure and potential loss of privacy that entails, beggars belief. It is possible, of course, but does not seem likely.

Third, the person who reported seeing an armed intruder enter Lawrence's apartment, Robert Eubanks,[129] would almost certainly have had to be part of any conspiracy to test the law. It was his telephone call, after all, that started the chain of events. Eubanks admitted to the deputies *at the scene* that he was lying about an armed intruder,[130] was later convicted of filing a false report, and spent at least two weeks in jail.[131] Eubanks, like Lawrence and Garner, had no prior involvement in gay rights causes or organizations.[132] It is unlikely a non-activist would have agreed to participate in such a way and undergo the penalty.[133] Moreover, even the deputies' accounts of the events suggest an "innocent" (i.e., non-test-case) motivation for Eubanks' making a false report: he was jealous because he believed his boyfriend was fraternizing with another man.[134]

Fourth, even if Lawrence and Garner managed to orchestrate a scenario in which Eubanks would call the sheriff's department with a false report and Lawrence and Garner would be seen having sex when the police arrived, they could never have been certain that the deputies would actually cite them and arrest them. If Harris County D.A. Bill Delmore is correct, very few if any officers would actually cite people for having sex under such circumstances.[135] A test-case scenario would have been a very dubious enterprise at best, further reducing the likelihood it is true.

Finally, had gay activists wanted to set up a test case, it is unlikely they would have chosen Lawrence and Garner as the defendants.

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129. Eubanks has also been identified as "Roger David Nance" in one media account. NewsPlanet, *supra* note 76.

130. Quinn interview, *supra* note 1.

131. NewsPlanet, *supra* note 76. According to one account, Eubanks spent thirty days in jail. "Houston case may test sodomy law," Nichols, *supra* note 77.

132. Lewis interview, *supra* note 2.

133. Delmore agrees that this undercuts the test-case theory. Delmore interview, *supra* note 108.

134. Hill interview, *supra* note 44; Lewis interview, *supra* note 2; Lilly interview, *supra* note 82; Interview with Mike Parrott, Justice of the Peace (Aug. 6, 2003) [hereinafter Parrott interview]; Quinn interview, *supra* note 1; Tipps Interview, *supra* note 82; *see also* Chibbaro, *supra* note 126. The story credits unnamed sources for the claim. A lawyer for Lawrence and Garner claimed that the motive for the false report was a "personality conflict between the caller and the people in the apartment." NewsPlanet, *supra* note 76. The jealousy motive for the false report is mildly supported by the fact that Garner was later arrested for a Class C misdemeanor assault on Eubanks. Delmore interview, *supra* note 108.

135. Delmore interview, *supra* note 108.

Instead, they would likely have chosen two people in a committed relationship who could articulately plead their case to the media. Lawrence and Garner do not meet these criteria.

(d) The Fabrication Explanation

The fourth explanation for Quinn's and Lilly's strange account is that Quinn is not being truthful about what he saw and that Lilly passively acquiesced in the story. According to this explanation, whatever Lawrence and Garner were doing when the deputies entered the apartment and announced their presence, they were not still having sex by the time the deputies made their way to the bedroom. Under this scenario, the most likely of the four in my view, the deputies simply are not telling the truth when they say they actually saw Lawrence and Garner having sex.

The problem with this scenario is that it means believing a law-enforcement official fabricated evidence to issue a citation and make an arrest. This may be less of a "problem" for the fabrication explanation than one might suppose:

> Cops throughout the United States have been caught fabricating, planting and manipulating evidence to obtain convictions where cases would otherwise be very weak. Some authorities regard police perjury as so rampant that it can be considered a "subcultural norm rather than an individual aberration" of police officers. Large-scale investigations of police units in virtually every major American city have documented massive evidence of tampering, abuse of the arresting power, and discriminatory enforcement of laws according to race, ethnicity, gender, and socioeconomic status.[136]

One does not have to accept the full force of this conclusion, as I do not, to agree that police fabrication of evidence is common enough to make it a plausible answer when no other theory appears to explain improbable officer testimony.[137]

Police misconduct against gay people specifically, including fabrication of "evidence" and entrapment of gay men for sex crimes, is common in the annals of American law.[138] The Lawrence/Garner arrests may be just another episode in that sorry history.

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136. Roger Roots, *Are Cops Constitutional?*, 11 SETON HALL CONST. L.J. 685, 718 (2001) (footnotes omitted).

137. *See also* Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1311 (1994) ("Police perjury is the dirty little secret of our criminal justice system."); Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693 (1996); Myron W. Orfield Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992).

138. *See, e.g.*, ESKRIDGE, *supra* note 45, at 87. Especially in the context of law-enforcement operations to entrap homosexuals for violating public lewdness laws, "police officers often misrepresent the facts of their enticement rackets, in which they frequently invite propositions, then fabricate critical details, including offers of compensation." Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts*

But we should be reluctant to reach that conclusion unless there is no other plausible one. Neither the obliviousness explanation, nor the moment-of-passion explanation, nor the test-case explanation offers a plausible story about why Lawrence and Garner would continue to have sex until at least the moment the deputies entered Lawrence's bedroom.

Delmore doubts the fabrication theory. "I can't imagine the officer making up the fact that he'd seen them having sex," says Delmore. "I don't have any reason to think it happened in this case." However, Delmore acknowledges that he has never spoken to the officers involved in the arrest. "I wanted to know only what was in the record" in order to preserve the state's argument that the record did not disclose whether the activity was truly in private, was consensual, was non-commercial, and so forth.[139]

Quinn dismisses speculation that Lawrence and Garner were not actually having sex when the deputies entered the apartment, but that the deputies arrested them anyway. "Why would I risk my career and reputation for that?" he argues. One answer to this very good question is that, from the perspective of that night, it would have seemed unlikely that Quinn or Lilly were taking much of a chance on their reputations or careers by arresting these two men for homosexual conduct.

Lilly was taking almost no chance, since he was not the lead deputy, never signed an affidavit swearing to any facts, and knew he likely would not be called to testify. He would never have to make a false statement; only Quinn would.

Even for Quinn the risks would have seemed small. Homosexual conduct was a Class C misdemeanor in Texas, the equivalent of a traffic ticket. It would be a deputy's word against the defendants' word, and who were they? They were obviously not rich or famous men. Moreover, they were homosexuals, a despised class of persons, who would probably meekly plead out the way so many before them had.[140] It probably seemed unlikely the two men would even get a lawyer, or challenge their citations, much less take their case to the U.S. Supreme Court. They were easy marks.

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go in After Them?: An Update on the Fight Against "Sodomy" Laws, 21 FORDHAM URB. L.J. 997, 1006 (1994).

139. Delmore interview, *supra* note 108. There is, in fact, no evidence that whatever Lawrence and Garner were doing was non-consensual, commercial, or in public view. In its Supreme Court brief, the State pointed to this gap in the evidentiary record as a reason to dismiss the appeal. Respondent's Brief, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102).

140. ESKRIDGE, *supra* note 45, at 87 (noting disproportionate guilty pleas in sodomy cases).

2. *The Evidence of a Motive to Fabricate*

To strengthen the fabrication explanation we need a reason why Quinn would make up a story about seeing Lawrence and Garner having sex, and why Lilly might have acquiesced in the story. We need not choose a single motive, of course, for more than one may have been at work.

I believe motives to fabricate can be found in the deputies' own accounts of what happened that night and in their expressed feelings about the events. In order of probability, here are three possible motives for fabrication.

a. The Anger and Frustration Motive. It is clear the deputies, especially Quinn, were angry and frustrated the night they took Lawrence and Garner to jail. To begin with, they had to deal with a false report of a weapons disturbance, a potentially deadly situation for the officers and for anyone they encountered. Though Lawrence and Garner could not be blamed for the false report, they were part of the frivolous (to the deputies) "lover's triangle" that led to it. Quinn acknowledges that the false report played a role in his decision to cite Lawrence and Garner and to take them to jail instead of simply issuing them a citation.

Further, by all accounts Lawrence did not go gently into that good night. He refused to cooperate in putting his clothes on, derided the deputies as "gestapo" and "jack-booted thugs," accused them of anti-gay harassment, and cussed at them. These acts were tantamount to civil disobedience on his part. Of course, if he was falsely charged with a crime, Lawrence's righteous anger is understandable. Quinn acknowledges that Lawrence's uncooperative and belligerent actions and words also played a role in his decision to cite Lawrence and Garner and to take them to jail instead of simply issuing them a citation.[141]

From the deputies' point of view they had been lied to, had put their lives and the lives of others at risk, and had been verbally abused for silly reasons. The deputies' anger and frustration may have been taken out on Lawrence and Garner who, as homosexuals, could plausibly be charged with the crime of acting on their homosexuality. They had probably been engaged in some sexual activity anyway, Quinn could have reasoned, making them no less guilty than if he had actually seen the act. A citation and arrest, from the deputies' perspective, may have been just punishment for those shenanigans.

b. The Homophobic Motive. Interviews with the deputies reveal their overall discomfort with homosexuality. Both Quinn and Tipps

141. Quinn interview, *supra* note 1.

made it clear they regard homosexual acts as morally wrong.[142] Moreover, their objections to homosexuality appear to be visceral. Quinn's statements about the pornographic contents of Lawrence's home, including his derisive laughter at a sketch on Lawrence's wall, indicate great disdain for Lawrence's lifestyle. Quinn's fears about coming into contact with "fluids" from the men may reveal an irrational fear of their activity and perhaps of them as persons. Quinn's defensiveness about not wanting to give Lawrence room to claim anti-gay bias also reveals his distrust of gays as manipulative and perhaps conspiratorial.

Further, while it is difficult to accept that the deputies actually saw Lawrence and Garner engaged in sex, it is likely the men were still nude (perhaps hurriedly looking for their clothes inside the dark bedroom) when Quinn and Lilly saw them. Whatever Lilly saw, it shocked him so much that he lurched back. The very shock of seeing two adult men in a bedroom together in the nude, with the light off, may have awakened homophobic feelings.

In fact, Quinn's account of the men as continuing to have sex for over a minute with deputies watching and shouting, guns aimed at them, and the light turned on, plays into stereotypes of gay men as so sex-obsessed they are literally unable to control themselves. They are animals in their lust. Quinn's complaint that Lawrence and Garner lacked what he calls "self-dignity" is very telling in this regard. Quinn could have expected that his version of events would be believed, since these stereotypes of gay men as sex-obsessed are widely shared.[143]

The perception of gays as hypersexual is a defining characteristic of homophobia. As James Woods argued in his study of gay men in American corporations: "Prevailing stereotypes about gay men (that they are hypersexual, promiscuous, indiscriminate) further emphasize the sexual aspects of their lives. The result is a tendency to hypersexualize gay men, to allow their sexuality to eclipse all else about them, *even to see sexual motives or intentions where there are none.*"[144] From the deputies' perspective, then, it may have seemed obvious that Lawrence and Garner had been having sex, or were preparing to do so. Moreover, what they had been doing or were preparing to do was morally objectionable and repulsive to the deputies. The fact that the men had not actually been caught in the act was unimportant. They were as good as guilty.

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142. Quinn interview, *supra* note 1; Tipps Interview, *supra* note 82.

143. ESKRIDGE, *supra* note 45, at 209 (explaining the narcissistic and obsessional qualities of homophobia).

144. JAMES D. WOODS, THE CORPORATE CLOSET 65 (1993) (emphasis added).

Upon discovering the possibility of homosexual activity, the deputies may have suffered a moment of what Eve Kosofsky Sedgwick has called "homosexual panic," one's fear of one's own potential for homosexual desire.[145] That is one way to understand Lilly's "lurch back" upon seeing Lawrence and Garner.

To be fair, both Quinn and Tipps are somewhat equivocal about the rights of homosexuals. For his part, Quinn claims to be of two minds about the result in the Supreme Court. On the one hand, "if you just look at the way it's written [the Equal Protection Clause], there is no equal protection here. They don't ban that activity for heterosexuals. It isolates the homosexual." On the other hand, "the states themselves should have the right to make their own laws." "But then again," he adds, "we are one nation governed by a Supreme Court so I have to live by it." He does think "it's unfortunate it had to happen over something stupid that could've cost them their lives."[146]

As for the Supreme Court's opinion, Tipps says: "I don't agree with it. I don't agree with homosexual conduct either. Nothing against homosexual *people*."[147] Asked about whether the men should be entitled to privacy, he says, "There are some things that don't need to be done in your home and this is one of them."[148]

c. The Racist Motive. Finally, it is possible that complex racial feelings — unstated and perhaps subconscious — entered the decision to cite the men and take them to jail. Race-consciousness was present at the start of the events, when the sheriff's department received a report that "a black male" was "going crazy" with a gun. In fact, it is possible Eubanks used a racial slur when he made the report.[149] Lawrence's apartment was in a lower-class area on the outskirts of Houston, an area that is very traditionalist in its attitude toward gays and not very enlightened in its attitudes about race. The Harris County Sheriff's Department can often reflect those attitudes.[150]

Lawrence is white and Garner is black. Few have commented on the fact that they were an interracial pair or on what role that might have played in the relatively harsh treatment they received. "It was not a gentle arrest," says Katine.[151] I asked one gay-rights activist familiar with the Harris County Sheriff's Department what might

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145. EVE SEDGWICK KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET (1991).

146. Quinn interview, *supra* note 1.

147. Tipps Interview, *supra* note 82. This distinction between homosexual acts and gays as people — captured by the phrase, "love the sinner, hate the sin" — is a classic formulation of the opposition to gay equality.

148. *Id.*

149. Lewis interview, *supra* note 2.

150. Hill interview, *supra* note 44.

151. Katine interview 1, *supra* note 5.

cause the deputies to fabricate a story about having seen sexual activity. His response was simple: "Black guy, white guy, apartment, naked. That's all you need."[152] This answer suggests that a mix of homophobia and racism may have been at work.

If racism was present, however, it was not as simple as white deputies inflicting their racist views on an interracial couple. Although Quinn is white, Lilly is black. It is possible that Lilly, coming from a socially conservative and religious community,[153] was especially offended by the sight of a black man about to engage in a morally objectionable sexual act with a white man. This offense may have been heightened if for some reason he perceived the black man was playing the receptive (passive, subordinate, female) role to that white man during sex.[154] At the scene of the arrest, after all, Lawrence was aggressive and belligerent (masculine); Garner was passive and cooperative (feminine).

This is speculation. The deputies have not admitted that race played any role in the arrests, nor would they be expected to admit it if it had. We cannot know with any certainty what role race may have played. The possibilities are intriguing but are ultimately probably unknowable. If race played any role, that role was very complicated and is unlikely ever to be acknowledged explicitly by law-enforcement authorities.

3. *The Conflicting Account Offered by Lewis, Based on His Conversations with Lawrence*

Throughout the litigation, and continuing to the present, Lawrence, Garner, and their attorneys have refused to present their version of what happened that night. Neither Lawrence nor Garner has publicly admitted even having sex. Neither was ever called to testify in the case, since no testimony was ever taken. There was never a trial. In their briefs, their attorneys have generally been careful only to recite the facts as alleged in the arrest reports and formal complaints against the defendants.

In my initial interview with him about the case, Lane Lewis was very forthcoming and detailed about a number of things heretofore publicly unknown, such as the relationship of the defendants to one another and the sequence of events that led to gay-rights attorneys' involvement in the case. Lewis freely told me everything he knew and

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152. Hill interview, *supra* note 44.

153. *See, e.g.*, Ron Fournier, *Bush, Kerry Put Value in Beliefs of Voters*, HOUSTON CHRON., July 14, 2004, at 10 (noting that the religious right has pursued ballot measures to ban gay marriage in swing states, partly to drive a wedge between Democrats and blacks, who are "more socially conservative than most people realize").

154. I was unable to probe this possibility with Lilly, who refused an extended interview.

could remember about events leading right up to the moment when the deputies first encountered Lawrence and Garner, and everything he knew and could remember about what followed that initial encounter. But, initially following instructions from Mitchell Katine, Lewis was unwilling to discuss the encounter itself. Specifically, Lewis was initially unwilling to discuss on the record what Lawrence and Garner were doing when the police entered the apartment or whether police actually saw Lawrence and Garner having sex. I asked Lewis directly whether Lawrence and Garner were having sex when the police entered the apartment. His response during our first interview was, "That would be a legal question best directed toward Mitchell [Katine] or Lambda." Lewis also declined at first to provide me a copy of his handwritten notes of his initial telephone conversation with Lawrence, as they contain the sensitive information he had been instructed not to discuss.[155]

Lewis subsequently changed his mind, however, and provided the account I give in subsection C above, which he said was based on his first conversation with Lawrence by telephone after Lawrence left the jail. In brief, Lewis says that Lawrence denied the two men were having sex when police entered the apartment. Lewis' handwritten notes from that conversation, which he has now provided me, back up this claim.[156]

4. *The Unwillingness of the Defendants, Their Representatives, and Lawyers to Discuss What the Defendants Were Doing or What the Police Likely Saw*

Katine has likewise refused to discuss what Lawrence and Garner were actually doing or what the police actually witnessed or could have witnessed. "We don't discuss that because we feel it's irrelevant and an invasion of their privacy," says Katine. He also refused to grant an interview with Lawrence and Garner themselves.[157] This reticence is strange and, I think, very suggestive. If Lawrence and Garner *were* having sex and the deputies *actually saw* them doing so, there would be no reason for the defendants and their attorneys not to confirm it publicly. It could not hurt their case in the courts, since their entire argument is built on a right to make certain intimate choices, which right was infringed by the deputies enforcing an unconstitutional law on men having sex. It could not hurt their case with the public, which already assumes the men were having sex. For the same reason, revealing the truth about what happened would be no greater invasion

155. Lewis interview, *supra* note 2.

156. Lewis interview 2, *supra* note 103; Lewis, handwritten notes, *supra* note 103.

157. Katine interview 1, *supra* note 5; Katine interview 2, *supra* note 73.

of Lawrence's and Garner's privacy than has already occurred. All this makes the attorneys' silence on the issue bewildering, and suspect.

The negative inference from the attorneys' silence is that they are loath to reveal a fact they believe might be unhelpful: that Lawrence and Garner were not actually having sex when the deputies saw them. Why might this fact be thought unhelpful to their cause?

Perhaps the attorneys fear that if it were learned Lawrence and Garner were not having sex it would somehow undermine the factual basis for the Supreme Court's decision, and even the decision itself. If this is the fear, it is exaggerated. What difference would it make in the case to learn Quinn lied about what he saw? The Supreme Court is not going to withdraw its opinion at this point. It is certainly not going to do so based on the revelation of a possible fact — a false and abusive arrest — that makes the case for striking the law even more compelling than it already was. While concerns about standing might have caused the defendant's attorneys to resist any factual challenge before the Supreme Court's decision, that is not a strong reason to do so now.

Or perhaps defendants' attorneys fear that their own ethics as attorneys might somehow be called into question if it were revealed they allowed the case to proceed on a false assumption about what happened. If this is the fear, it too seems exaggerated. As long as the defendants' attorneys never asserted as true facts they knew to be untrue, they have probably not breached any ethical or professional obligations. Simply repeating the facts as asserted in the arrest reports and complaints against the defendants would not qualify. I have found nothing in the record of the case that would call into ethical question the attorneys' behavior or statements, even assuming the police never witnessed sexual conduct in Lawrence's apartment and even assuming the defendants' attorneys believed this to be true.

Even if the fabrication explanation is correct, that does not undermine the validity or good faith of the defendants' no-contest pleas. If the defendants expect police perjury and expect it to be believed by a trier of fact, they are better off pleading guilty. They avoid the expense of trial and the risk of future police retaliation. The Supreme Court has upheld the validity of a guilty plea when the defendant pleads guilty but simultaneously argues his factual innocence.[158] Lawrence and Garner — and by extension, their attorneys — were perfectly justified in defending the case based on their constitutional objections rather than defending it based on

158. North Carolina v. Alford, 400 U.S. 25, 37 (1970) ("An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.").

contested facts.[159] The first defense may have seemed a far more promising route than the latter and is well within the range of zealous, ethical advocacy.

Katine has offered the view that to discuss what Lawrence and Garner were actually doing with each other, if anything, that night would constitute an invasion of their privacy.[160] Yet the defendants' privacy has already been invaded by the public allegation, lodged by the deputies, that they were having anal sex with each other. To dispute that public allegation negates the invasion of their privacy; it does not expand it.

Whatever the reason for silence on this issue by defendants and their attorneys, the strong but not inescapable implication is that the defendants' attorneys believe the police did not actually witness a violation of the Texas sodomy law.

5. *The "Not Guilty" Pleas After the Arrests*

Lawrence and Garner were taken to jail the night they were arrested. They stayed in jail for about 24 hours.[161] The next evening, without counsel, they appeared before hearing officer Carol Carrier for the purpose of determining probable cause for the arrest and for the purpose of entering their pleas. At such arraignment hearings, a representative of the district attorney's office reads the arresting officer's sworn statement. The hearing officer then determines whether there is a technical fault in the charge. If probable cause exists based on the officer's statement the defendant is asked to plead "not guilty," "guilty," or "no contest." Most defendants in low-level misdemeanor cases plead guilty or no contest, pay their fines, and are done with the whole business. The process typically takes five minutes or fewer, since there are often dozens of defendants waiting to be arraigned on everything from simple theft to traffic violations.[162]

At their initial arraignment hearing, both Lawrence and Garner pleaded "not guilty." Lawrence asked for a trial by jury.[163] Garner requested a trial by judge.[164] Both were then released on personal recog-

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159. I thank Don Dripps for these insights.

160. Katine interview 1, *supra* note 5.

161. *Id.*

162. Telephone Interview with Richard Carper, Supervisor of JP Clerks, Harris County (Aug. 25, 2003) [hereinafter Carper interview]. He was present at Lawrence and Garner's arraignment.

163. Lawrence Hearing form, State v. Lawrence (Sept. 18, 1998) (Case No. CR31C1000002) (on file with author).

164. Garner Hearing form, State v. Garner (Sept. 19, 1998) (Case No. CR31C1000003) (on file with author). The different date on Garner's form may be a clerical error. Richard Carper, supervisor of the JP clerks for Harris County, recalls them appearing at the same time. Carper interview, *supra* note 162.

nizance, which allows defendants to be released without paying a bond if they agree to appear at a subsequent court date. That subsequent court date was set for October 5, 1998, just over two weeks away.[165]

There are many reasons why Lawrence and Garner might have pleaded "not guilty" the day after their arrests and before they had the benefit of counsel. Perhaps they believed this was the best way to preserve their case until they could contact a lawyer. Perhaps they believed that in having anal sex in Lawrence's home they had done nothing wrong, or at least nothing that should be a crime.

The most obvious inference from a "not guilty" plea, however, is that Lawrence and Garner were *professing their innocence of the crime charged.* The arraignment may well have been the first time they heard Quinn's claim that they had actually engaged in anal sex, rather than the more nebulous "homosexual conduct." Later, represented by attorneys eager to challenge not the factual basis for the arrests but the constitutionality of the law, their pleas changed to "no contest."[166] But the earlier "not guilty" pleas are the closest thing we have to a statement from Lawrence and Garner, immediately after the arrests, about what actually happened. The fact that they pleaded not guilty does not establish their innocence, of course. Perhaps they had actually been caught in the act and were avoiding the truth. But this is one more bit of information that tends to undercut Quinn's account of what happened.

6. *The Hearsay Denial from Garner*

Finally, although we have no direct testimony from either Lawrence or Garner about their experience the night of the arrests, we do have hearsay information from Garner. According to Ray Hill, Garner told him that when the police entered the apartment, he and Lawrence were not having sex and in fact were in different rooms of the apartment. As Garner allegedly described it to Hill, "We weren't doing anything. I was in the living room and he [Lawrence] was in the bedroom." Lawrence never told Hill what they were doing when the police arrived and Hill never asked Lawrence about it.[167]

As with the other bases for challenging the deputies' account of what happened, this one is also open to question. It is possible that Hill misunderstood what Garner told him. It is possible that Hill simply has a bad memory about what Garner said. It is possible that Hill is lying, though he has no apparent interest in doing so. It is also

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165. Lawrence Hearing form, *supra* note 163; Garner Hearing form, *supra* note 164.

166. Judgment, State v. Lawrence (Nov. 20, 1998) (Case No. CR31C1000002) [hereinafter *Lawrence* judgment] (on file with author); Judgment, State v. Garner (Nov. 20, 1998) (Case No. CR31C1000003) [hereinafter *Garner* judgment] (on file with author).

167. Hill interview, *supra* note 44.

possible that Hill accurately remembers what Garner said but that Garner himself was not telling Hill the truth. But again, the most obvious possibility is that Garner actually told Hill that he and Lawrence were not having sex when the deputies encountered them and that he was telling the truth. This hearsay is corroborated, of course, by Garner's own plea of "not guilty" immediately following his arrest.[168] The hearsay denial is hardly conclusive but it tends to undercut the story told by the deputies.

E. *The Arrest: The Most Likely Scenario*

In this subsection I offer a chronological account of what most likely happened the night of the arrests. This account is pieced together from the documentary evidence and the most plausible parts of each of the interviews I have conducted of people who were actually there that night or are close to those who were. Where no direct evidence is available I offer what I believe is a reasonable inference from the facts we do know. While this reconstruction of the arrest is far richer than anything that has yet appeared in public about the case, it is no doubt mistaken in parts and far from complete in other parts. I do not offer it as the final word on what happened. It is based on the best information available so far. It is only a first stab at what must be a continuing effort to get at the truth of what happened. But, I conclude, it is at least probably not far from that truth in most major respects.

John Lawrence, Tyron Garner, and Robert Eubanks spent part of the day on Thursday, September 17, 1998 together planning for the gift of some of Lawrence's furniture to Eubanks.[169] The three men had dinner together. Sometime in the evening, they were joined by Ramon Pelayo-Velez in Lawrence's home, a modest two-bedroom apartment on the second floor of a small complex in a lower-middle-class and crime-prone area of Houston. None of the men could be described as "A-list" gays, that is, wealthy, educated, well-groomed, and cultured. None were involved in gay-rights activism. Lawrence, a quiet fifty-five-year-old white man, worked as a medical technologist at a nearby clinic. It was a low-paying but steady job. He had only two minor brushes with the law on his record, arrests for drunk driving that had each occurred at least a decade before. Garner, a quiet thirty-one-year-old black man, was unemployed at the time and had more serious and recent incidents on his record, including an arrest for assault. Eubanks, a forty-one-year-old white man, was the most combustible of the lot, prone to bouts of drunkenness, swearing, and even violence. He has been described as a "gun-totin', beer-swillin', Gilley's kickin' bubba from Pasadena

168. *See supra* Section III.C.5.

169. *Cf. supra* Section III.C (Lewis's version); Katine Interview, *supra* note 5.

[Texas]."[170] He lived with Lawrence as an occasional roommate. Pelayo-Velez, a thirty-six-year-old Hispanic man, was a friend of Lawrence's. Eubanks was currently Garner's boyfriend.[171]

The men drank alcohol during the evening. They became somewhat tipsy, but, with the exception of Eubanks, not extremely intoxicated. They did not use drugs. At some point, Eubanks grew jealous of the interest Lawrence and Garner were showing in one another, as evidenced by the time they spent together. An argument among the men ensued. Shortly before 10:30 p.m., Eubanks stormed out of the apartment, closing the door not quite completely behind him.[172] Lawrence and Garner retired to Lawrence's bedroom, determined to ignore Eubanks' tantrum. Pelayo-Velez entertained himself in the living room and kitchen, drinking and calling friends.

Knowing that Garner had had prior problems with the law, Eubanks decided he would punish Garner by calling the police and getting him into trouble again with the law. Crying and shaking with anger, he went to a pay phone near the apartment complex and looked up the number for the Harris County Sheriff's Department. When the dispatcher answered, Eubanks reported that there was "a nigger going crazy with a gun" in Lawrence's apartment.[173] He gave the dispatcher the name of the apartment complex and Lawrence's apartment number and said he would wait for deputies to arrive.

Eubanks waited for the deputies at the bottom of the stairs leading to Lawrence's apartment. He didn't have to wait long. Deputy Joseph Quinn was on patrol nearby and arrived within minutes of the call. Quinn was the first deputy on the scene, followed shortly thereafter by deputies William D. Lilly, Donald Tipps, and Kenneth Landry. According to standard procedure, Quinn took the lead on the scene because he was the first deputy to arrive.[174] The deputies, weapons drawn, began looking for the man who had called in the report and for the apartment containing the armed suspect. Eubanks saw the deputies and motioned toward them, saying, "Over here! Over here!" The deputies could tell that Eubanks was upset because he was visibly shaking and crying. Quinn asked, "Where is the man with the gun?" Eubanks pointed up the stairs toward Lawrence's apartment, saying, "He is in that apartment up there and he has a gun."[175]

Quinn, Lilly, Tipps and Landry headed up the stairwell in what is known as a "tactical stack," one deputy right behind the other, with Quinn at the front of the stack. When they reached the apartment Quinn saw that the

170. Lewis Interview, *supra* note 2.

171. *Id.*

172. *Id.*

173. Quinn Affidavit (Lawrence), *supra* note 78; Lewis Interview, *supra* note 2.

174. Quinn Interview, *supra* note 1.

175. Offense Report, *supra* note 81.

door was mostly closed, but not pulled completely shut. It was resting against the door jam, slightly ajar, as Eubanks had left it. Quinn could not see into the apartment. He turned the door knob and determined it was unlocked. Quinn knocked on the door, which pushed it open slightly and allowed him to get a peek inside. The light was on but no sound could be heard. Seeing no armed suspect or other person, Quinn pushed the door wide open into a standard living room. Still no one could be seen inside. Announcing "Sheriff's Department! Sheriff's Department!" in a loud voice, Quinn and the deputies quickly entered the apartment.[176]

Inside Lawrence's bedroom about twenty to thirty feet from where the deputies announced their presence, with the light off but the bedroom door at least partly open, Lawrence and Garner were nude and engaged in sexual activity. They heard the announcement, "Sheriff's Department!," were startled, stopped what they were doing, and started fumbling around in the dark for their clothes.

Meanwhile, still unaware that Lawrence and Garner were in Lawerence's bedroom, Tipps and Landry peeled off to the left to investigate a bedroom. The door to that bedroom was open and nobody was inside.[177] At the same time, Quinn and Lilly went to the right, toward the kitchen area, where the light was on. There, Quinn saw Pelayo-Velez, fully clothed, standing by the refrigerator and talking on the phone.[178] Standing just three feet away from Lawrence's open bedroom door, Quinn ordered the man, "Do not move! Let me see your hands." The deputies quickly frisked and handcuffed Pelayo-Velez to secure him while they continued to search the apartment for the reported armed intruder.[179]

Guns still drawn, Quinn and Lilly moved toward Lawrence's bedroom. Lilly took the lead in approaching the bedroom, with Quinn right behind him. With the aid of the lights from other rooms Lilly made out the moving shapes of two nude men in the bedroom. Startled at the sight, he jumped back. Quinn, who had not yet seen the naked men, guessed that Lilly must have seen the reported gunman. In a crouched position, Quinn came around low on Lilly's right side with his gun pointed ahead. The deputies entered the room, with their fingers on the triggers of their guns, ready to fire. Lilly turned the bedroom light on and the two deputies saw Lawrence and Garner standing there in the nude, shocked looks on their faces. Quinn shouted at the men, "Let me see your hands!" Lawrence and Garner complied, raising their hands.[180]

Hearing this, Tipps and Landry immediately came to see what was

176. Quinn Interview, *supra* note 1.

177. Tipps Interview, *supra* note 82.

178. Offense Report, *supra* note 81.

179. Quinn Interview, *supra* note 1.

180. *Cf.* Quinn Interview, *supra* note 1; Lilly Interview, *supra* note 82.

happening.[181] The deputies ordered the men to put on their underwear, handcuffed them, and led them into the living room where they sat the three men down to figure out what was going on. Lawrence, genuinely upset and bewildered at the deputies' intrusion into his home, asked, "What the fuck are y'all doing here? You don't have any right to be here." Quinn replied that they had every right to enter the apartment under the circumstances.[182]

A deputy fetched Eubanks and brought him up to the apartment. The deputies quickly determined Eubanks had lied about an armed black man because he was jealous of the attention Lawrence and Garner were paying to each other. At one point Eubanks became so angry he stood up, shouted at Garner, and had to be forced to sit back down. When the deputies learned the report had been false, their frustration and anger grew. From their perspective, the prank could easily have resulted in a fatal shooting.[183]

"Do you realize that not once but twice we called out?" Quinn told the men. "You were close to being shot." Lawrence remained angry, calling the deputies "gestapo" and "storm troopers" and "jack-booted thugs."[184]

As the deputies looked around the apartment, they found stacks of gay pornography and explicit images hanging as art on the walls. "The apartment was loaded with pornography," says Quinn. "Everywhere you looked there was some kind." In particular, the deputies noticed "two pencil sketchings of James Dean, naked with an extremely oversized penis on him." The sketches "were hung up like regular pictures," says Quinn. Quinn and Tipps laughed about the Dean etchings, joking, "This is the kind of thing I would have in my house!"[185]

Tipps asked Quinn, "Did you see anyone with a gun?"[186] Quinn, angry about the false report, shocked at seeing two nude men in a bedroom together, offended by the gay pornographic images in the apartment, and frustrated with Lawrence for being uncooperative and name-calling the deputies, glanced at Lilly and made a split-second decision to charge them with homosexual conduct, which Quinn knew was a crime in Texas. "No," he replied. "But you ain't gonna believe this. Those guys were having sex." "Really?" asked Tipps, incredulous. "Yep," responded Quinn, "we caught 'em in the act."[187] Quinn figured he would teach Lawrence and Garner a lesson not to disrespect law enforcement authorities. He also had nothing to lose in citing them. They were obviously not rich or important men. They would probably just pay their

181. Tipps Interview, *supra* note 82.

182. Quinn Interview, *supra* note 1.

183. *Id.*

184. *Id.*

185. *Id.*

186. Tipps Interview, *supra* note 82.

187. *Id.*

fines and move on. Lilly remained quiet, figuring this was Quinn's show, that he (Lilly) would not be filing the charges, and that Lawrence and Garner had probably been having sex at some point anyway. With the men caught naked and now sitting there in their underwear, Tipps and Landry had no reason to doubt Quinn's word.

Lawrence accused the deputies of "harassing" them because they were gay. Quinn responded: "I don't know you. And I don't know your sexual orientation. So how can I be harassing you because you're homosexual other than that I caught you in the act?"[188] Lawrence and Garner understood that they were being charged with "homosexual conduct" which, for all they knew, included any gay sexual activity.

By now, several other deputies had arrived, including Sgt. Kenneth O. Adams. Quinn discussed with Adams what to do about Lawrence and Garner. Because Homosexual Conduct was a Class C misdemeanor (like a traffic ticket), punishable in Texas by fine but not prison, Quinn knew that the deputies had the option to issue no citation, or to issue a citation without actually taking the men to jail. But Quinn recommended that the men not only be charged with violating the Homosexual Conduct law but also be taken to prison. "I think the totality of the circumstances where I think there's a guy with a gun and I almost have to shoot, that it warranted me giving them a citation" and taking them to jail, Quinn says. "It was a lovers' triangle that could have got somebody hurt. I could have killed these guys over having sex. They were stupid enough to let it go that far."[189]

Adams agreed with Quinn and it was decided to call the assistant D.A. on duty (in Harris County, Texas, there is a D.A. available twenty-four-hours a day, offering legal counsel to the deputies in the field) to get approval for the citation and arrest. The D.A. on duty was Ira Jones. Quinn told Jones that he had seen Lawrence and Garner having anal sex and then asked Jones if it mattered, under the Homosexual Conduct law, whether the conduct occurred in a home or in a public place. Jones looked at the statute and confirmed it did not matter where the offense occurred.[190]

Eubanks was charged with filing a false report, a more serious Class B misdemeanor. He later served more than two weeks in prison for it. Pelayo-Velez was allowed to go free.[191]

Enraged by the deputies' intrusion into his home, their behavior, and the charge, Lawrence engaged in his own form of civil disobedience. He refused to put on more than his underwear for his trip to jail. He demanded to see a lawyer. He also refused to walk out of his home and was physically carried by the deputies down the stairs, in his underwear,

188. Quinn Interview, *supra* note 1.

189. *Id.*

190. *Id.*; Jones Interview, *supra* note 50.

191. Quinn Interview, *supra* note 1.

> to a patrol car. Lawrence's legs dragged on the ground as the deputies carried him down the stairs, resulting in minor cuts and bruises.[192] Quinn says that Lawrence could have been cited for resisting transport while under arrest. But Quinn did not cite him because Lawrence "was doing all this to entice me to do something that could show I hated homosexuals."[193]
>
> As the deputies prepared to leave the scene, Quinn advised them to wash their hands. "You have to wonder," says Quinn, " 'What have we touched? Have we come into contact with any fluids?' " Quinn recalls that, "I made sure I doused myself with sanitizer" that he kept handy in his patrol car.[194]
>
> Lawrence, Garner, and Eubanks were led away to the station in separate patrol cars. Eubanks rode with Quinn. Once they arrived at the station, Lawrence continued to be angry and uncooperative throughout the standard intake procedures. By contrast, Garner was quiet and cooperative. Garner had had enough prior experience with the police to know better than to provoke them. Lawrence and Garner were given orange prisoners' jump-suits and spent the night in jail.[195]
>
> The next evening, September 18, Lawrence and Garner appeared before a hearing officer and pleaded "Not guilty." Lawrence requested a trial by jury; Garner, a trial by judge. They were released on personal recognizance, with bond set at $200, the maximum fine allowed for violating the state sodomy law.[196]

I should explain one choice in particular that I made in picking and choosing from among the often conflicting elements of the various accounts of what happened the night Lawrence and Garner were arrested. As laid out in the reconstruction above, I believe it likely that Lawrence and Garner were in Lawrence's bedroom together when the police arrived. I further believe it likely that the two men were involved in some kind of sexual activity (possibly, though not necessarily, including prohibited anal sex) when the police arrived.

Thus, on the one hand, I do not believe a central contention of Quinn and Lilly's account. For reasons I gave earlier,[197] I think it unlikely the deputies actually witnessed Lawrence and Garner having anal sex.

On the other hand, I also do not believe that Lawrence and Garner were in separate rooms and thus were not engaged in some sexual activity with each other when the deputies arrived at Lawrence's door.

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192. Offense Report, *supra* note 81; Quinn Interview, *supra* note 1.

193. Quinn Interview, *supra* note 1.

194. *Id.*

195. *Id.*

196. Lawrence Hearing Form, *supra* note 163; Garner Hearing Form, *supra* note 164.

197. *See supra* Section III.D.

According to Lewis[198] and Hill,[199] the men both contend that when the police arrived Lawrence was in his bedroom and Garner was in the living room. But that account is difficult to accept. According to each of the three law enforcement personnel I interviewed who were the first to enter the apartment (Quinn, Lilly, and Tipps), there was nobody in the living room when they arrived. For Lawrence and Garner's version to be correct (separate rooms, no sex), all three deputies would have to be lying about whether Garner was in the living room. That is possible, but harder to accept than my version of events above (same room, some sexual activity but none seen by deputies), according to which we need to believe that one deputy is actively lying, one is going along with the story, and one is being truthful. Tipps, in particular, was very believable during our interview. His account of his role and what he saw was straightforward, logical, fits with common experience, and was unembellished with details seemingly calculated to put Lawrence and Garner in an unflattering light.

Further, the conclusion that Lawrence and Garner were engaged in some sexual activity is supported by the undisputed fact that they were naked or only partially dressed when the deputies arrived. Although Garner subsequently put his clothes on, it is undisputed that Lawrence was taken from the apartment in his underwear.

A remaining puzzle is why, even now, Lawrence and Garner would continue to deny (again, through the intermediaries I spoke to) the likelihood that they were engaged in some sexual activity when the deputies arrived. I can only speculate about the reason(s). Perhaps they denied from the start that they were having sex and do not want to be perceived as lying now. Perhaps they are embarrassed to admit what they were doing. Perhaps they think it's nobody's business what they were doing and that a denial is a way to protect their privacy.

Finally, if Lawrence and Garner were indeed in separate rooms when the deputies arrived, and if I am wrong to conclude that the men were probably engaged in some kind of sexual activity the deputies never actually saw, that fact would change none of the larger conclusions I draw from this episode about the abuse of police power and discretion.[200] The underlying factual conclusion would remain the same — the deputies did not witness the men having sex, yet charged and arrested them anyway. And the lessons from this episode would, if anything, be magnified.

198. *See supra* Section III.C.

199. *See supra* Section III.D.6.

200. *See infra* Section V.

IV. THE ROAD TO *LAWRENCE*

At Lawrence and Garner's initial arraignment on September 18, the hearing officer set an arraignment in the court of Justice of the Peace Mike Parrott for October 5, just over two weeks away.[201] If their case was to go anywhere, the arrest of these two men with no connections to the gay civil rights movement would somehow have to be brought to the attention of gay civil rights advocates and then given over to lawyers equipped to handle it. If the case had made it to the JP Court without the guidance of gay-rights lawyers, there was a very real chance it would have been dismissed and lost to history.[202] The story of how we got from an arrest on a Class C misdemeanor to the U.S. Supreme Court has been ignored until now. This section tells the beginning of that story.[203]

A. Lawrence *at the Bar*

In 1998 Lane Lewis was working as a bartender at Pacific Street, a Houston gay bar. On the night of Friday, September 18,[204] a regular customer of the bar (Lewis declines to name him, so I will call him "Tom") approached him and said, "You're not going to believe this." Tom, who worked within the Harris County judicial system, then explained that he had overheard "someone high up in the Harris County judicial system" talking about the arrest of two men for violation of the sodomy law. Tom told Lewis that he had mentioned the arrest to his (Tom's) partner, who also worked within the Harris County judicial system (Lewis declines to name the second person, so I will call him "Harry"). Tom told Lewis that Harry had access to the men's arrest report. Lewis asked Tom to have Harry fax Lewis the arrest report at Lewis's home.[205]

When Lewis went home that night, the arrest report was waiting on his fax machine. It had been faxed by Harry. Lewis looked at it,

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201. Lawrence Hearing form, *supra* note 163; Garner Hearing form, *supra* note 164.

202. Hill interview, *supra* note 44. A source inside the Harris County judicial system confirms this very easily could have been the outcome. Anonymous Interview, *supra* note 107.

203. Except where noted, the narrative in this section is based on my interview with Lane Lewis. Lewis interview, *supra* note 2.

204. I arrive at this date because Katine indicates the arrest became known to him within a day after the men were released from jail. Katine interview 1, *supra* note 5. This means he must have heard about the arrests on Saturday, September 19.

205. I have since learned the identity of both Tom and Harry through a third source within the Harris County judicial system who asked not to be identified. Anonymous Interview, *supra* note 107. When I asked him for an interview, Harry refused to discuss the case. Telephone Interview with "Harry." To protect their employment and privacy, I have decided not to reveal their names or their positions within the Harris County judicial system.

and saw the names of John Lawrence and Tyron Garner, whom he had not known before the incident. Lewis realized the significance of this arrest and called Tom and Harry at their home, saying: "I think this may be a Supreme Court case."

Lewis tried to call the phone number given for Garner on the arrest report. There was no answer at Garner's number. Lewis next called Lawrence's number. Lawrence answered the phone. (Lewis took notes of his conversation on the faxed arrest report, as they spoke.[206]) Lewis introduced himself and explained that he had obtained the arrest report. A surprised Lawrence asked, "How did you get our arrest report?" Lewis replied: "I can't tell you." Lewis explained to Lawrence that he wanted to help him, that he was not an attorney, and that he could hang up if he wanted to. He offered to get Lawrence an attorney that would represent him free of charge and suggested that his case could lead to a Supreme Court decision that would get rid of sodomy laws across the country. Lewis said that if Lawrence didn't like the first attorney Lewis could get another one.

Lewis describes Lawrence as being angry about the arrest.[207] Lawrence said to Lewis: "I am very mad that they came into my home and did this." Lawrence was also concerned that his job might be in jeopardy because of the arrest. Lewis warned Lawrence about the possibility of enormous media coverage. They then talked about what had happened the night of the arrests.[208]

After his initial telephone call with Lawrence, Lewis immediately thought that Mitchell Katine would be the best attorney to handle the case. To get advice, Lewis next called three leaders of the Houston gay community: Annise Parker,[209] Grant Martin,[210] and Ray Hill. Each seemed to disbelieve Lewis at first. Once convinced that the arrest was real, all three agreed Katine would be the best attorney to handle the case.

Lewis next called Katine and described what had happened. Katine was in disbelief. Lewis faxed the arrest report to him. When he had reviewed the report, Katine called Lewis back and said: "Lane, do you have any idea what you've got here?" Katine was, he recalls,

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206. *See supra* note 103.

207. Katine concurs that Lawrence and Garner were very angry about being cited and about the way they were treated. Katine interview 1, *supra* note 5. "Had they simply been given a ticket it wouldn't have generated the same feelings of anger," says Katine. *Id.* This anger may explain their ultimate decision to challenge the law, says Katine. *Id.*

208. *See supra* Section III.C.

209. At the time, Parker was an at-large member of the Houston city council, the first openly gay person elected to office in the city. She has been involved in gay civil-rights causes for more than two decades.

210. Among other things, Martin raises money for Democratic candidates and gay-rights causes.

"shocked and excited."[211] Katine immediately called Suzanne Goldberg, an attorney for Lambda Legal, a national gay legal advocacy group, to get Lambda's assistance.[212]

B. *The Speech*

In late September or early October,[213] Lewis, Lawrence, Garner, and Eubanks went to Katine's office to meet with several lawyers and to discuss whether and how to proceed with the case. The lawyers explained what they would do for Lawrence and Garner to pursue a constitutional challenge to the sodomy law. After the lawyers' presentation, the lawyers left the conference room to allow Lawrence and Garner to make a decision about whether to challenge the law. Only Lawrence, Garner, Eubanks, and Lewis were left in the conference room. Of Eubanks, Lewis says: "I could smell bourbon on him across the room. Man, he made us nervous." Lewis and the attorneys involved believed Eubanks was a loose cannon.

Lewis spoke to the men for about fifteen minutes. He told Lawrence and Garner that what he was about to say might sound corny. He then quoted the famous line from John F. Kennedy's inaugural address, "Ask not what your country can do for you but what you can do for your country." Invoking the history of the gay civil rights movement and its early pioneers, he told Lawrence and Garner to "think about all the gay and lesbian people who stuck their necks out so you could enjoy whatever freedom you have." He told them about the Mattachine Society, one of the earliest gay rights organizations, and about Harry Hay, one of the movement's pioneers. He told them how they had hidden in basements to have meetings. He told them about the Stonewall riot in New York in 1969, the spark for the modern phase of the gay civil rights movement. He told them the story of Harvey Milk, the first openly gay elected official in San Francisco, who was gunned down by a homophobic colleague. "They went above and beyond the call of their duty and I'm asking you to go above and beyond the call of your duty," Lewis said. "Think how far we've come from all that, but think how far that really is. You were drug out of your home." Then he added: "You tell me to stop and I'll pull the plug." Lewis finally asked, "Is this something you would be

211. Katine interview 1, *supra* note 5.

212. Goldberg is now an associate law professor at Rutgers-Newark.

213. The meeting must have occurred between the time Lawrence and Garner were initially arraigned (September 18) and the date of the first letter from the defendants' lawyers to the JP court indicating their representation and asking for a continuance in the arraignment date (October 13). Letter from David A. Jones to Judge Parrott (Oct. 13, 1998) (on file with author).

willing to move forward on?" Lawrence and Garner looked at each other and said yes.

The attorneys came back into the room, Lewis informed them of Lawrence and Garner's decision to challenge the sodomy law, the attorneys were elated, and the case proceeded.

Throughout the early stages of the case, Lewis served as Lawrence's and Garner's friend, confidant, informal public relations manager, and spokesperson. They both trusted him and generally followed his instructions. "My job the first couple of years was keeping the media away from these three boys," Lewis says, referring to Lawrence, Garner, and Eubanks. (Garner was subsequently arrested and charged with assaulting Eubanks.) The three men agreed to speak to no media except through Lewis. Lewis gave them instructions that if any media called, the media were to be directed to Lewis and/or the attorneys. "Once you start talking," Lewis warned them, "they will be at your house, at your job, and everywhere else." Despite the publicity, neither Lawrence nor Garner ever threatened to withdraw from the case.

C. *A Little Harder, Please*

At their arraignment before Justice of the Peace Mike Parrott on November 20, it was already obvious this would be a major case. The *Houston Chronicle* had broken the story in the mass media on November 6 and it had been picked up by newspapers around the state and country.[214] The day of the arraignment, a large number of attorneys showed up for the defendants. Also, the D.A.'s office got involved for the prosecution, an unusual event, according to Judge Parrott. Large numbers of media, including half a dozen TV cameras, were outside the courtroom waiting to see what would happen.[215]

The defendants signed the plea form, pleading "no contest" to the charge of violating the Homosexual Conduct law and waiving a jury trial.[216] No testimony was taken, nor would testimony be taken at any stage of the case. Only Quinn's affidavit and the formal complaint against the men were entered in the record. The sparse information in these documents is all the Supreme Court was ever told about the facts of the case.

Parrott, of his own accord, then imposed a fine of $100 on each of them. Within a few minutes or so, attorneys for the defendants

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214. R.A. Dyer, *Two Men Charged Under State's Sodomy Law*, HOUSTON CHRON., Nov. 6, 1998, at 1; *see, e.g.*, *Texas Case Could Kill Sodomy Law*, CHI. TRIB., Nov. 6, 1998; *Nation in Brief — Texans Vow Court Challenge of Sodomy Law*, ATLANTA J.-CONST., Nov. 7, 1998, at A4.

215. Parrott interview, *supra* note 134.

216. *Lawrence* Judgment, *supra* note 166; *Garner* Judgment, *supra* note 166.

approached Parrott to say that the fine was too low because it did not meet the minimum necessary for an appeal to the Criminal Court. They asked Parrott to set aside the fine and enter a higher fine in order to meet the minimum. The D.A.'s office did not object to the change. Parrott set a higher fine of $125 necessary to meet the minimum for an appeal.[217] Court costs of $41.25 were added to each fine, for a total penalty against each man of $166.25.[218]

After the arraignment, Parrott discussed the case with Deputy Quinn, who had appeared at the arraignment in case his testimony was needed. Speaking to Parrott, Quinn denied press reports that the police had "busted down" Lawrence's door to enter the apartment. As Parrott puts it: "Lawrence was the only one with forcible entry, if you know what I mean."[219]

V. *LAWRENCE* IN A NEW LIGHT

The factual material and suppositions contained in Sections II, III, and IV shine a light on the background of *Lawrence* that is only dimly lit in the opinion itself. This new material suggests that the state of affairs for gay men and women was both better and worse than the Court supposed; that the Court's opinion offers a portrait of gay life dipped in a single color, obscuring the mélange beneath; that *Lawrence* is in every respect a product of a rich gay past that keeps intruding upon the gay present and future.

Many aspects of gay life and history — especially of the life and history of gay men — are present in *Lawrence*. We have in *Lawrence* the closet as metaphor and the closet as reality, with its uses both as shield and sword against oppression. We have the related metaphor of coming out, with its important personal and political dimensions, its danger and its power. We have the bar as a site for political organizing and resistance, as it was even in the early days of gay organizing. We have the relational democracy of gay life, the crossing of racial and generational lines. We have the corruption of the law, deformed by the very hatred and ignorance that birthed it. We have resistance,

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217. Parrott interview, *supra* note 134; Katine interview 1, *supra* note 5.

218. *Lawrence* Judgment, *supra* note 166; *Garner* Judgment, *supra* note 166.

219. Parrott interview, *supra* note 134. Based on his discussion with Quinn, Parrott describes the relationship among Lawrence, Garner, and the third man who called the police as a "love triangle." *Id.* As for his opinion of gays, Parrott, a Democrat, says: "That's the life they choose. As long as they do it in their homes, and not in front of me or my family or on TV, I don't care. I feel the same way about Republicans." *Id.* On the morality of homosexual acts, Parrott says: "They'll deal with that at another time, when they die." *Id.* In recognition of his role in the *Lawrence* case, Parrott was asked to be a grand marshal in the Houston Gay Pride Parade in 2003. He declined. "That's not a plus for me," he explained, noting that he is elected from a blue-collar, heavily union, socially conservative area, not from the heavily gay Houston district of Montrose. *Id.*

generated not by abstractions but by experience. Here, in one case, we have a microcosm of the gay fight for equality under a regime of inequality.

A. *Undermining the Foundation of Liberty: The Perversion of Laws and Law Enforcement*

If the probabilistic scenario described in Section III.E is correct, sheriff's deputies did not actually see Lawrence and Garner having sex. This does not mean that Lawrence and Garner did not break the law. If they were having anal or oral sex when the police entered Lawrence's apartment, they broke the Texas sodomy law whether deputies saw them or not. However, American law is not designed to catch and punish every instance of illegal conduct. Nothing short of a totalitarian state could do that. It is designed to prosecute persons when there is a reasonable basis for believing they have committed a crime, and then to convict them when there is no reasonable doubt that they are guilty. An arrest cannot even be made unless there is probable cause to believe a crime was committed.[220] If the deputies saw Lawrence and Garner having sex the standard is obviously met. But if deputies only saw Lawrence and Garner naked in a bedroom, the standard is probably not met, at least not without more information indicating they had engaged in impermissible anal or oral sex.[221] Too many other possible explanations intrude, including that they were engaged in sexual play, such as mutual masturbation or kissing, that did not violate the Texas law. If the deputies did not see the act of anal sex, as they claimed, they did not have probable cause to make an arrest and there could be no subsequent prosecution. *Lawrence* would never have happened.

Even if Quinn and Lilly actually saw Lawrence and Garner having sex, moreover, that does not explain the decision to issue citations to the men and it certainly does not explain the decision to take them to jail for the night. The fact that someone is caught breaking the law does not mean they will be cited for it, as anyone who has gotten a "warning" for speeding can attest. Moreover, under these same circumstances, many deputies would not have even cited Lawrence and Garner, much less arrested them.[222]

What explains the deputies' decision to cite the men (whether they actually saw the sex or not) and to take them to jail, I have suggested,

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220. Tennessee v. Garner, 471 U.S. 1, 7 (1985).

221. Jones interview, *supra* note 49 (discussing earlier case where deputies had busted up a party in a private home).

222. Delmore interview, *supra* note 108.

may have been partly their evident disdain for gays.[223] Thus, the discretion built into law enforcement may be abused by authorities harboring prejudice against the class of persons targeted by the law. One of the sources of that prejudice is surely the very law to be enforced, a law that singled out gays both on its face and in its practical effects. A law of the type under examination in *Lawrence* — that is, one that is rarely enforced but packs a strong cultural message about the group it affects[224] — may or may not evince constitutionally impermissible animus in its adoption.[225] But it will be peculiarly susceptible to animus in its enforcement, as appears to have happened here. The law itself may be a perversion of the Constitution, but it invites and creates more perversion in the authorities who enforce it.

This background shows how gays were both better and worse off in states with sodomy laws than the Court imagined. If the fabrication explanation is correct,[226] *Lawrence* shows once again how rare it must be for law enforcement authorities to be legally present in a home when two people are having sex much less to *witness* the act so that they have the clear constitutional authority to arrest them. The facts of the case under a fabrication explanation are a confirmation of, rather than an exception to, the history of the Texas sodomy law discussed in Section II. The chances of being caught by police in the act of sodomy in a private home were like the chances of a lightning strike. Gay persons could rely on this improbability in making decisions about "the most private human conduct, sexual behavior, and in the most private of places, the home."[227] What gay persons could not factor into decisionmaking about private life was the opportunity the law afforded and the incentive it gave for abusive enforcement. Any law may be abused; evidence can be fabricated against anyone. But the danger is especially acute where the law has taught prejudice against a class, where enforcement is rare, where the activity itself is considered not just illegal but deeply shameful and literally indefensible, and where the effect of this shame is to inhibit all challenge. It is for these very reasons, among others, that the American Law Institute recommended the decriminalization of sodomy in the Model Penal Code more than four decades ago, writing:

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223. *See supra* Section III.D.2.(b).

224. *See* Cass Sunstein, *What Did* Lawrence *Hold? Autonomy, Desuetude, Sexuality, and Marriage*, SUP. CT. REV. (forthcoming 2004), *at* http://ssrn.com/abstract_id=450160.

225. Romer v. Evans, 517 U.S. 620 (1996) (holding animus impermissible as a basis for legislation under the Equal Protection Clause).

226. *See supra* Section III.D.2(d).

227. Lawrence v. Texas, 123 S. Ct. 2472, 2478 (2003).

> To the extent . . . that laws against deviate sexual behavior are enforced against private conduct between consenting adults, the result is episodic and capricious selection of an infinitesimal fraction of offenders for severe punishment. This invitation to arbitrary enforcement not only offends notions of fairness and horizontal equity, but it also creates unwarranted opportunity for private blackmail and official extortion.[228]

At a minimum, *Lawrence* involved these very problems of 'episodic and capricious selection,' accompanied by 'arbitrary enforcement.' But the enforcement of the Texas law in this case also involved much more, a deeper malignity within the state's criminal code, that inoculated it from meaningful challenge. Because of the deep shame it instilled in its targets, the law insulated itself against the checking function that our criminal procedural guarantees are supposed to serve.[229] The Court glimpsed this truth when it observed that the state sodomy law was "an invitation to subject homosexual persons to discrimination both in the public and private spheres."[230] But what the Court could not have known is that this perversion of the public and private spheres likely touched the very enforcement of the law under review.

If citizens cannot trust that laws will be enforced in an evenhanded and honest fashion, they cannot be said to live under the rule of law. Instead, they live under the rule of men corrupted by the law. Gay citizens, as demonstrated by the underlying facts of *Lawrence*, have lived in a parallel world where principles of honesty and impartiality in law enforcement thought to apply to everyone have in fact not applied to them. That is, prior to this final act of perversion by law enforcement authorities and its repudiation by a Court not aware of the extent of the law's depravity, gays cannot be thought to have been full citizens at all.

Lawrence, in this light, was not simply a case of enforcing a bad law. It was a case of *corruptly and capriciously* enforcing a bad law. It was not just an invasion of "liberty," as the Court thought. It was the deformation of the basis for all liberty: order under law. *Lawrence*, therefore, involved a double perversion of law. It was worse than we knew.

B. *The Complexities of (Gay) Life*

The background facts of *Lawrence* are a mix of lies, alcohol, pornography, sexual free-wheeling, and jealousy. Lawrence and

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228. MODEL PENAL CODE § 213.2 Cmt. 2 (1980)

229. ESKRIDGE, *supra* note 45.

230. *Lawrence*, 123 S. Ct. at 2482. The Court's argument here is reminiscent of Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992).

Garner were not in a long-term, committed relationship. Lawrence, Garner, and Eubanks were apparently caught up in a jumbled, complicated mix of sexuality, friendship, and enmity, in which the lines between friendship and sexuality were blurred. No single category seems adequate to define their relationships to each other. Even the deputies' description of the troika as being in a "lovers' triangle" does not seem adequate.

While Lawrence was gainfully employed, neither Garner nor Eubanks seem to have made much of their lives career-wise. Lawrence and Garner had had problems with the law. Neither man was highly educated or articulate. They were not active politically.

The background facts do not, in other words, make for a neatly packaged story with idealized characters. This may help explain the decision of the men's lawyers to shield them so completely from media scrutiny, shielding that continues even now. As Katine acknowledges, Lawrence and Garner "are not who you would select as your poster people for doing something of this magnitude."[231] The background does not make for very good public relations.

How could this jumble become the occasion for a sermon from Justice Kennedy on the "transcendent dimensions" of life,[232] "the most intimate and personal choices a person may make,"[233] "personal dignity,"[234] and the way the law "demean[ed] their existence"?[235] The immediate answer is that none of the background facts make any difference to the constitutional claim made by Lawrence and Garner. Even if the Court had known everything we now know, the men nevertheless would have been entitled to liberty to make their own choices about their private sexual conduct.[236] Liberty includes the freedom to make choices the majority finds suboptimal or even distasteful, and it extends that freedom to people who did not attend Harvard.

The more fundamental answer, however, is that *Lawrence*, in all its complexity and background unpleasantness, is nothing more than a mirror held up to all life. People lead complex lives. They fall in love. They cheat. They lie. They drink. They are weak. They are vindictive. None of this makes them any less entitled to "respect for their private

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231. Katine interview 1, *supra* note 5.

232. *Lawrence*, 123 S. Ct. at 2475.

233. *Id.* at 2481 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

234. *Id.*

235. *Id.* at 2484.

236. Laurence Tribe, *The Fundamental Right that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1904-05 (2004) (Liberty includes the right to make choices about personal relationships, even if they involve only one-night stands).

lives."[237] If it were otherwise, there would be very few people — gay or straight — entitled to liberty.

C. Lawrence *in the Light of Gay History*

Many features of *Lawrence* will be familiar to any student of gay life and history in the United States.

1. *The Role of the Closet*

The closet — a powerful metaphor for gays' need to hide their sexual orientation and identity in the face of stigma, physical danger, and legal discrimination — is present in *Lawrence.* The man I have called Tom, who first informed Lane Lewis of the arrests, was closeted at his job within the Harris County law enforcement system. This hiding was necessary because of the strong homophobia of his work place. As do many other gay people, Tom no doubt felt that coming out would jeopardize his employment. The closet, for him, was a necessary prison.

Yet, at the same time, Tom's being in the closet probably helped make *Lawrence* possible. The authorities he overheard discussing — perhaps even joking about — the recent arrests of two men for sodomy no doubt felt comfortable discussing it around others they presumed to be heterosexual. Had they known a gay person was present, they might have been reluctant to discuss it at all. If Tom had not heard about the case, he might not have alerted his partner, Harry, to it. If none of this had happened, Tom would not have approached Lewis to inform him about the arrests. And if Lewis had not been informed soon after the arrests, it is doubtful gay activists would have become aware of the case before it was dismissed. Thus, if not for the closet, it is likely *Lawrence* would never have been decided.

The irony of this should not be forgotten. Many gay people have had the experience of being told, or overhearing, anti-gay jokes related by friends or colleagues who did not know of their sexual orientation. It is a painful experience. Yet in this case, the pain of the closet became a sword to use against anti-gay bias itself.

2. *The Role of Coming Out*

If the closet played a pivotal role in the genesis of *Lawrence*, so did coming out of the closet. Lewis, in particular, illustrates the unexpected and manifold dividends of coming out. As a gay activist, Lewis not only came out in his personal life to family and friends but politicized his sexual orientation by alerting personnel in the Harris

237. *Lawrence*, 123 S. Ct. at 2475.

County court system to his sexuality and his eagerness to challenge the state sodomy law. Lewis has some reflections on his previously unheralded role in helping bring along the case from its very beginning. "How odd it feels to be such a significant insignificant in such a significant happening." He adds: "The significance of this is the importance of putting your name out there. If I didn't have the anger and courage to be out in the community, then I would not have had the information and leads to put myself out to the Justice of the Peace Courts."[238]

The closet helped bring the case to gay activists. But coming out made it possible for gay activists to bring the case to the courts. And the generations of gay people who had come out before the litigation began made it possible for courts to think of gays as people deserving constitutional rights.[239]

3. *The Role of the Gay Bar*

When Tom approached Lewis to tell him about the arrests of Lawrence and Garner, he did so in a gay bar. "Had I not been a bartender I would never have met the boyfriend (Tom) of the guy (Harry) who sent me the fax," notes Lewis.[240]

To any student of gay life and history, the site of this pivotal moment in the life of *Lawrence* should not be surprising. The very act of creating gay bars in an era of repression was political, and had a political impact on gays. "[B]ars were the first institution in the United States that contradicted . . . stigmas and gave gay Americans a sense of pride in themselves and their sexuality," writes gay historian Alan Berube. "In a nation which has for generations mobilized its institutions toward making gay people invisible, illegal, isolated, ignorant and silent, the creation of gay . . . bars were daring political acts, the first stages in creating the roots of America's national movement for civil rights for gay people."[241]

In an age where gay political organizations were few and small, bars were also an important gathering place for the exchange of information and for organizing. Gay historian John D'Emilio has described one example of this, San Francisco's Black Cat bar in the early 1960s. Jose Sarria, a performer at the bar, would end his performances by leading the patrons in a round of "God Save Us Nelly Queens." With

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238. Lewis interview, *supra* note 2.

239. William N. Eskridge Jr., *Channeling Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001).

240. Lewis interview, *supra* note 2.

241. Declaration of Alan Berube in Support of Memorandum of Points and Authorities in Support of Ex Parte Application for Leave to Intervene, at 4, State ex rel. Agnost v. Owen, (Cal. App. Dep't Super. Ct. 1984) (No. 830-321).

undercover vice squad officers present taking names, the song was a way of saying, "We have our rights too."[242] When Sarria ran for city supervisor in 1961, he collected signatures for his petition to run by approaching the patrons of the city's gay bars. D'Emilio concludes: "[Sarria's] candidacy, although it garnered only 6,000 votes, was the hot topic in the bars that fall, forcing patrons to think about their identity, their sexual orientation, in political terms."[243]

Finally, it is worth remembering that the modern phase of the gay civil rights movement got its start in a gay bar, New York's Stonewall Inn in 1969, when gay patrons rioted in response to a police raid.[244] There is now a burgeoning literature on how gay bars helped to create gay communities in major cities across the nation.[245] In gay bars, the social has always been political. In those bars and elsewhere, the most unpolitical gay people have never really been able to escape the politicization of their lives by those who detest them. So it was in *Lawrence.*

4. *The Role of Class*

Wherever gay people have been discriminated against, those at the lowest end of the economic scale have been among the hardest hit. According to historian Martin Duberman, the patrons at the Stonewall Inn were from the economic and social margins of life.[246] It is they who most often proved vulnerable to, and undefended against, police harassment.

In *Lawrence*, too, the men arrested were not wealthy or well-educated. It is no accident the arrests occurred in a lower middle class area, rather than in a tony Houston neighborhood like River Oaks. Police charging crimes in a wealthy home could expect the residents to fight back with ample resources. Lawrence and Garner, by contrast, could be expected to do nothing. Yet Lawrence and Garner, like the patrons at the Stonewall Inn and like so many generations of gay people before them, resented their shabby treatment. They had had enough and were ready to do something about it.

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242. JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970, at 186-92 (1983).

243. *Id.*

244. MARTIN DUBERMAN, STONEWALL (1993).

245. ESKRIDGE, *supra* note 45, at 405 n. 98 (collecting sources on the role of gay bars in Buffalo, Detroit, Chicago, Denver, Philadelphia, San Francisco, New Orleans, Richmond, and Washington).

246. DUBERMAN, *supra* note 244.

VI. CONCLUSION

Lane Lewis recalls that when the Houston celebratory rally of gay activists following the Supreme Court's decision was about to begin, someone asked whether they should start with the Pledge of Allegiance. "I turned around and said, 'No!' " Lewis recalls. He explains his visceral reaction: "The Supreme Court never had the right or authority to take away my right to express love or sex through sodomy,[247] so we shouldn't validate the system that leads to that. Why are we all down on our knees thanking them for giving us something they should never have taken away?" Lewis says the politicians and dignitaries present ignored him and it was decided to begin the rally with the Pledge anyway.[248]

There is much to learn from the previously untold story behind the arrests that led to *Lawrence*. The case is connected umbilically to a rich gay past, including its complexity, its bars, its closetedness, its political liberation, its encounters with police repression and corruption, and its resistance to discrimination.

If anyone "set up" the events that led to *Lawrence*, it was not gay activists. It was very possibly the cops who arrested them. Since sodomy laws, like the one in Texas, were never really about sodomy, it is fitting that they got their comeuppance in a case in which there was quite possibly no sodomy. A law rarely enforced was upended in a case of phantom enforcement. The laws that encouraged gays to lie about their identity ended in a web of untruths and half-truths probably created by the very authorities charged with enforcing them. The laws that declared homosexuals had no privacy right heterosexuals were bound to respect died at the hands of homosexuals who had learned to master the sleight of hand, not bothering to deny what they had not in fact done. Sodomy laws were ultimately the victim of overzealous authorities who had been taught their zealotry by sodomy laws themselves.

247. Bowers v. Hardwick, 478 U.S. 186 (1986).

248. Lewis interview, *supra* note 2.