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Adam Winkler

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# LAW ENFORCEMENT'S *FLAGRANT CONDUCT*

Adam Winkler\*

DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* (2012). Pp. 345. Hardcover \$15.50.

What if “Jane Roe,” also known as Norma McCorvey, had not really been pregnant when she challenged Texas’s ban on abortion?<sup>1</sup> What if Oliver Brown’s daughter, Linda, had never really attended a segregated school in Topeka, Kansas?<sup>2</sup> What if Dred Scott had never really been enslaved?<sup>3</sup> These questions come to mind when reading Dale Carpenter’s thoughtful and carefully researched book, *Flagrant Conduct: The Story of Lawrence v. Texas*.<sup>4</sup> As every law student learns, *Lawrence v. Texas* is the 2003 decision of the Supreme Court that held unconstitutional a state ban on sodomy (oral and anal sex) among consenting adults of the same sex.<sup>5</sup> The case was a major victory for gay rights and paved the way for the challenges to same-sex marriage bans now working their way up to the Justices.<sup>6</sup> *Lawrence*, in short, is a landmark.

The landmark, however, was built on a mirage.<sup>7</sup> At least that is what Carpenter’s research suggests.<sup>8</sup> Justice Anthony Kennedy’s opinion for the Court in *Lawrence* recounts the facts underlying the case:

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Gedes Lawrence, resided . . . . The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act.<sup>9</sup>

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\* Professor of Law, UCLA School of Law.

1. See *Roe v. Wade*, 410 U.S. 113 (1973).

2. See *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

3. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

4. DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* (2012).

5. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

6. See *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 5 (1st Cir. 2012), *Windsor v. United States*, 833 F. Supp. 2d 394, 396 (S.D.N.Y. 2012), *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 974 (N.D. Cal. 2012).

7. CARPENTER, *supra* note 4, at xii.

8. *Id.*

9. *Lawrence*, 539 U.S. at 562–63.

Kennedy's first two sentences are mostly true, although it was not Harris County Police who responded but Harris County sheriff's deputies.<sup>10</sup> Yet the last sentence — the one that provides the basis for the "case or controversy" over Texas's same-sex sodomy ban — is most likely completely false.<sup>11</sup>

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John Gedes Lawrence and Tyron Garner, it seems, were not caught having sex that night in Houston.<sup>12</sup> In fact, Lawrence and Garner apparently never had sex, ever.<sup>13</sup> They were friends, not lovers, and the case against them was evidence of the criminal conduct of the police rather than that of Lawrence and Garner.<sup>14</sup>

The story Harris County sheriff's deputies told about the night of Lawrence and Garner's arrest always strained credulity.<sup>15</sup> The lead officer on the scene that night, Joseph Quinn, filed a police report claiming that he and eventually three other deputies — William Lilly, Donald Tipps, and Ken Landry — arrived at Lawrence's apartment to find the door slightly ajar.<sup>16</sup> They were responding to a 9-1-1 call warning of a "black male going crazy with a gun."<sup>17</sup> That call was made by Robert Eubanks, a friend of Lawrence and Garner who was drunk and upset that Lawrence took away the bottle of vodka that Eubanks was drinking.<sup>18</sup> The deputies entered the apartment slowly.<sup>19</sup> "Sheriff's department! Sheriff's department!" Quinn shouted loudly.<sup>20</sup> Hearing no reply, the deputies entered Lawrence's tiny apartment.<sup>21</sup> Soon they discovered a Latino man, Ramon Pelayo-Velez, standing in the kitchen with his hands held high in the air and a telephone receiver in one.<sup>22</sup> "Do not move!" Quinn shouted, "[I]et me see your hands."<sup>23</sup> Pelayo-Velez dropped the receiver.<sup>24</sup> The commotion caused the other officers to come to the kitchen, where they frisked Pelayo-Velez and ordered him to sit on the couch where two deputies watched over him.<sup>25</sup>

Then Quinn and one of the deputies, William Lilly, went to check the last remaining room, Lawrence's bedroom.<sup>26</sup> The door to the room, which was only twenty-

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10. CARPENTER, *supra* note 4, at xi.

11. *Id.* at xiii; *see Lawrence*, 539 U.S. at 563.

12. CARPENTER, *supra* note 4, at 71.

13. *Id.* at 45, 71.

14. *Id.* at xiii–xiv.

15. *Id.* at 70.

16. *Id.* at 65.

17. *Id.* at 62.

18. *Id.*

19. *See id.* at 65.

20. *Id.* at 66.

21. *Id.*

22. *Id.* at 66–67.

23. *Id.* at 67.

24. *Id.*

25. *Id.*

26. *Id.*

five feet or so from the front door to the apartment, was open.<sup>27</sup> The lights were off, but Quinn and Lilly claimed to have seen Lawrence and Garner engaging in sexual activity.<sup>28</sup> According to Quinn's account, Lawrence and Garner were having anal sex on the bed.<sup>29</sup> Lilly switched on the light and Quinn shouted, "Stop! . . . Step back!" with his gun aimed right at them.<sup>30</sup> Lawrence, Quinn said, looked at him, right in the eye, and continued to have sex for "well in excess of a minute" until Quinn put his gun away and physically separated the two.<sup>31</sup> Then the men were all corralled into the living room and eventually arrested, with Lawrence refusing to put on clothes.<sup>32</sup>

Lilly was not asked for his account at the time, but he later recalled the situation differently.<sup>33</sup> Lilly said that Lawrence and Garner were not having anal sex; he recalled them having oral sex.<sup>34</sup> They were not on the bed, as Quinn reported, but on the floor.<sup>35</sup> Garner was not naked, as Quinn reported, but clothed.<sup>36</sup> They did not continue to have sex for over a minute even though a gun was pointed at them, as Quinn reported, but stopped immediately.<sup>37</sup>

While Lilly's account is more credible than Quinn's, it remains a stretch. We would have to believe that Lawrence and Garner continued to have oral sex, despite knowing that law enforcement officers were in their apartment. By all accounts, the apartment was silent when the deputies arrived, and there was no way anyone in the apartment failed to hear the deputies' numerous shouts — first upon entering the apartment and then upon discovering Pelayo-Velez.<sup>38</sup> Yet, even according to Lilly's less sensationalistic account, Lawrence and Garner continued to engage in sexual activity, knowing that law enforcement officers were in the apartment.<sup>39</sup>

The conflicting stories deputies told about what they saw that night might have been sorted out at trial but there never was one.<sup>40</sup> Although Lawrence and Garner did plead "not guilty," presaging a trial, their case file was discovered by a closeted gay court clerk who informed a local gay rights activist.<sup>41</sup> Eventually, Lawrence and Garner accepted representation from movement lawyers, who persuaded the two men to change their pleas to "no contest."<sup>42</sup> With Lawrence and Garner facing only a relatively minor penalty — a small fine, so small in fact that lawyers had to ask the judge to raise the amount in order to preserve the chance to appeal — the goal was not to avoid

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27. *Id.* at 69.

28. *Id.* at 67–68.

29. *Id.* at 68–69.

30. *Id.* at 68.

31. *Id.* at 68–69 (citation omitted).

32. *Id.* at 76–77.

33. *Id.* at 67.

34. *Id.* at 68.

35. *Id.*

36. *Id.* at 67–68.

37. *Id.* at 68–69.

38. *See id.* at 66–69.

39. *Id.* at 67–68.

40. *Id.* at 73.

41. *Id.* at 115–16.

42. *Id.* at 114 (citation omitted).

punishment.<sup>43</sup> It was, rather, to preserve a constitutional challenge to Texas's sodomy law.<sup>44</sup> Activists were seeking a vehicle to challenge the law for years and Lawrence and Garner's case was the only one to come along.<sup>45</sup> If the case had gone to trial, the two men might well have been acquitted given the inconsistencies and incredibility of the deputies' stories, and the constitutional challenge lost.

A trial might well have revealed, as Lawrence recounted, "[t]here was no sex."<sup>46</sup> The morning after the arrests, at the arraignment, Lawrence remembers being surprised to discover that he had been arrested for violating the sodomy law.<sup>47</sup> When the deputies came into the apartment, Lawrence recalled, he and Garner were not engaged in any sexual activity.<sup>48</sup> Garner, who died after the Supreme Court decision in the case, never went on the record about what happened that night, yet Carpenter views his actions and expressions as consistent with Lawrence's story.<sup>49</sup>

And what about Ramon Pelayo-Velez? Although police arrested everyone else in Lawrence's apartment that night, there is no reported arrest of Pelayo-Velez.<sup>50</sup> No one by that name who could have been in Lawrence's apartment that night has ever been found.<sup>51</sup> Perhaps strangers were hanging out in Lawrence's apartment making telephone calls from the kitchen. In any event, no one seems to know who Pelayo-Velez is or was.<sup>52</sup> Pelayo-Velez is thus another mystery surrounding what happened in Lawrence's apartment that night.

So did deputies catch Lawrence and Garner having sex? We will never know for sure. But the story told by the sheriff's deputies is hard to believe. One of the most important constitutional law cases in recent memory, it seems, was built on the shakiest factual foundation. And there is at least a very good possibility that it was built on fraud.

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For generations, the idea of the "police in your bedroom" has been a metaphor for a government that has grown too big and too insensitive to privacy. Justice William O. Douglas invoked this idea in his opinion for the Court in *Griswold v. Connecticut*, the groundbreaking privacy case holding unconstitutional a ban on contraceptives.<sup>53</sup> In his ruling, Justice Douglas asked, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."<sup>54</sup> *Flagrant*

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43. *Id.* at 140.

44. *Id.*

45. *Id.* at 118.

46. *Id.* at 71.

47. *Id.* at 114.

48. *Id.*

49. *Id.* at 72-73.

50. *See id.* at 66.

51. *Id.* at 66, 297 n.9.

52. *Id.* at 297 n.9.

53. *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965).

54. *Id.* at 485-86.

*Conduct* provides a window into one bedroom invaded by police.<sup>55</sup> The book suggests that the problem is not just big government and privacy.<sup>56</sup> Police in your bedroom also pose a considerable challenge to the rule of law.<sup>57</sup>

Deviancy can thrive in the privacy of one's bedroom. Away from the scrutiny of others, a person can engage in desired activity without fear of social opprobrium. Yet the privacy offered by the bedroom can also hide deviant behavior by the police, and the conduct that individuals engage in can invite abusive and unequal application of the law. Perhaps, the story of Lawrence and Garner suggests, the privacy of the bedroom can also hide police misconduct. Indeed, the "flagrant conduct" referred to in the title of Carpenter's book is not that of Lawrence and Garner.<sup>58</sup> It is, rather, a description of the actions of sheriff's deputies and others who pursued the prosecution of the two men.<sup>59</sup>

Ironically, part of the problem of police in your bedroom arises not from government being too big, but rather government being too small. There are too many bedrooms to police. Sexual activity occurs too often among too many people for the government to have any hope of overseeing and disciplining it to ensure compliance with social or legal norms. So when the police do enter a bedroom, it is infrequent and haphazard. The result is that any prosecution for doing something disfavored in one's bedroom is almost certain to raise issues of arbitrariness. Lawrence and Garner, for example, were arrested for doing what millions of other people do all the time without fear of being arrested. Texas had nearly a century and a half of anti-sodomy laws on the books and there was not a single reported case of the law being applied to consenting adults caught in the privacy of their own home.<sup>60</sup>

Lawrence and Garner were not arrested because the police were neutrally enforcing the law. Deputies brought them in, it appears, largely because of personal disgust.<sup>61</sup> Each of the deputies Carpenter interviewed expressed varying degrees of hostility toward gays.<sup>62</sup> The night of the arrest, they were clearly unnerved by what they found in Lawrence's bedroom, whether it was the two men having sex or the other evidence of their "deviant" sexuality.<sup>63</sup> The deputies were obsessed with the homoerotic art on Lawrence's walls — most notably, an image of James Dean, naked and with an erection.<sup>64</sup> They leafed through Lawrence's collection of gay pornography and called Lawrence and Garner "queers" and "faggots."<sup>65</sup> "That whole apartment smelled of gay . . . [There was a]n anal odor. Very unpleasant."<sup>66</sup> The deputies held the gay men in contempt — and ultimately arrested them — simply because they were gay.

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55. See CARPENTER, *supra* note 4, at 10–11, 16.

56. *Id.* at 16.

57. *Id.*

58. *Id.* at xiv.

59. *Id.*

60. *Id.* at 13.

61. *Id.* at 80–81.

62. *Id.* at 53–57.

63. *Id.* at 80–82.

64. *Id.* at 76.

65. *Id.* at 76, 78.

66. *Id.* at 78 (citation omitted).

Deputy Quinn, the lead officer who made the decision to arrest Lawrence and Garner, was particularly offended by the men's sexuality.<sup>67</sup> He was an overzealous macho type and had a record of responding harshly to anyone who questioned his masculinity.<sup>68</sup> It has long been speculated that one reason heterosexual men react so negatively to homosexuality is that it calls into question their own sexuality.<sup>69</sup> Nothing in the story of Quinn's arrest of Lawrence and Garner would convince you otherwise. Even though it was Quinn who went into Lawrence's apartment without invitation, when he found partially clad gay men inside — or worse, from his perspective, having sex — his sexuality was challenged. One way to reassert his heterosexuality was to punish the gay men by harassing and arresting them.

Of course, the police do not act arbitrarily based on their personal predilections only when inside someone's bedroom. People often find themselves arrested because they talk back to an officer — even though that is not, in and of itself, illegal. Yet, as Deputy Lilly told Carpenter, “ninety percent of the time people talk themselves into jail.”<sup>70</sup> The situation in Lawrence's bedroom that night was certainly exacerbated by Lawrence's anger towards the officers for invading his home.<sup>71</sup> He was, by all accounts, belligerent and hostile to the deputies.<sup>72</sup> Although Lawrence was not physically threatening, he spared the officers few choice words and warned he would have them fired.<sup>73</sup> That is another one of the predictable outcomes of police in your bedroom: you are likely to react negatively to their presence. This inevitably makes the confrontation worse and increases the likelihood that police will act arbitrarily to reassert their authority.

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Carpenter's book is also an excellent study of how litigation has been used to secure a broader range of constitutional protections for lesbian, gay, bisexual, and transgender (“LGBT”) people, and in particular of the role of movement lawyers in that process. Since the 1980s, the fight for equal rights for LGBT people has taken place largely in the courts.<sup>74</sup> While successes have been few in Congress — where the politics of backlash have usually prevailed<sup>75</sup> — the gay rights movement has taken advantage of footholds in constitutional doctrine to gain momentum. In this larger process, it is clear that the coordinated efforts of movement lawyers from Lambda Legal, ACLU, GLADD,

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67. *Id.* at 53–54.

68. *Id.* at 49, 53.

69. *See, e.g.,* KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* 34–36 (1993).

70. CARPENTER, *supra* note 4, at 81 (citation omitted).

71. *Id.* at 75.

72. *Id.*

73. *Id.*

74. *See, e.g.,* *Romer v. Evans*, 517 U.S. 620 (1996); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012).

75. *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 28 U.S.C. § 1738C (2012)).

and others have led the charge and deserve much of the credit.<sup>76</sup> Yet the *Lawrence* case reminds us of how contingent a litigation strategy can be upon the unpredictable actions of others.

There is no doubt that movement lawyers controlled the litigation from the earliest days of the *Lawrence* case. Within days of the arrest, Suzanne Goldberg of Lambda Legal was notified of the controversy and took the lead in devising the litigation strategy with an eye towards the Supreme Court.<sup>77</sup> Her involvement and that of other movement lawyers helped ensure that the case was properly managed as it worked its way up through the system. Perhaps because of the early participation by movement lawyers — and certainly due to the unusual circumstances surrounding the call that prompted police to come to Lawrence's apartment that night — some people have wondered if *Lawrence* was a "test case" set up by activists in order to challenge Texas's sodomy ban.<sup>78</sup>

Carpenter persuasively argues that *Lawrence* did not originate as a test case.<sup>79</sup> Lawrence and Garner themselves had no previous involvement with the gay rights movement.<sup>80</sup> Lawrence, in fact, was still apparently living a somewhat closeted life.<sup>81</sup> Unlike the type of sympathetic defendant movement lawyers might have chosen to represent their cause, Garner had a criminal record, no permanent home, and worked odd jobs to make ends meet.<sup>82</sup> The night of their arrest, they had been drinking, with Lawrence admittedly intoxicated, which is not what you would want from men supposedly chosen to act out a carefully choreographed play designed to lure in the police and precipitate an arrest.<sup>83</sup>

Strategic civil rights litigation usually involves recruiting the pitch-perfect individuals that can earn the empathy of judges, play well before the cameras, and win over donors with fund-raising appeals. Contrast Lawrence and Garner with the impeccable, clean-cut, all-American plaintiffs chosen to take the lead in *Hollingsworth v. Perry*, the challenge to California's Proposition 8, which banned gay marriage.<sup>84</sup> The lead lawyers for that case interviewed numerous couples extensively to find just the right ones, investigating their backgrounds and seeking out anything in their finances or sexual histories that might distract from the case.<sup>85</sup> Lawrence, who liked to drink, and Garner, with his history of petty crime, were not even in a long-term relationship with one another.<sup>86</sup> If they were having sex — and that seems doubtful — then it was exactly the

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76. For more information on these organizations and their current projects, see ACLU, <http://www.aclu.org/> (last visited Nov. 4, 2012); GLADD, <http://www.glaad.org/> (last visited Nov. 4, 2012); LAMBDA LEGAL, <http://www.lambdalegal.org/> (last visited Nov. 4, 2012).

77. CARPENTER, *supra* note 4, at 124, 129.

78. *Id.* at 88.

79. *Id.* at 89.

80. *Id.* at 90.

81. *Id.* at 43.

82. *Id.*

83. *Id.* at 90.

84. See *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

85. See *Plaintiffs*, AM. FOUND. FOR EQUAL RIGHTS, <http://www.afer.org/about/plaintiffs/> (last visited Nov. 4, 2012) (providing short biographies and photographs of the plaintiffs in *Perry*).

86. CARPENTER, *supra* note 4, at 90.



kind of sexual activity movement lawyers would never have chosen: a one-night stand, undertaken while inebriated, while the boyfriend of one of the men (Eubanks was in a relationship with Garner) was sitting outside the apartment drunk and disorderly.<sup>87</sup> These were not the poster boys for the kind of intimacy gay rights lawyers would have wanted to highlight. As Carpenter writes, this would have been “the clumsiest and most careless judicial test case ever planned in the history of the republic.”<sup>88</sup>

That is not to say that activists were not key to making the *Lawrence* case a landmark decision. Were it not for activists, the case would almost certainly have disappeared from history, with Lawrence and Garner either acquitted at trial or convicted and forced to pay a small fine. But the case file came across the desk of that clerk who recognized its potential significance and brought it to the attention of Lane Lewis, a bartender active in Houston’s gay community.<sup>89</sup> Given the significance of the Stonewall riots to the gay rights movement,<sup>90</sup> it is appropriate that a bar would play an important role in the *Lawrence* case. Lewis connected with Lawrence and brought him into contact with movement lawyers.<sup>91</sup>

From the moment that Lawrence and Garner agreed to let movement lawyers manage the case, those lawyers exercised nearly complete control over the litigation. They were the ones behind the decision of Lawrence and Garner to change their pleas from “not guilty” to “no contest,” essentially admitting guilt, because they realized a trial on the merits would be a mistake.<sup>92</sup> For their challenge to succeed, it was essential that Lawrence and Garner be convicted; acquittal would deny them the ability to take the challenge to Texas’s sodomy law all the way to the Supreme Court. And it was movement lawyers who realized that Lawrence and Garner, once convicted and ordered to pay \$100 each in fines, were going to lose their right to appeal if the amount was not higher.<sup>93</sup> The judge in the case was surprised by their request to raise the amount of the fines, something the judge said he had never witnessed before.<sup>94</sup>

Movement lawyers were helped by others, of course, like the judge who agreed to raise the fine. Yet from its earliest days in the local courthouse to the final ruling in the Supreme Court, the *Lawrence* case was a movement lawyers’ case and, notably, an overwhelming success.

Today, movement lawyers are struggling to maintain their influence over gay rights litigation. No case has posed a bigger challenge to them than the Proposition 8 case in California.<sup>95</sup> That case was not the product of movement lawyers. Rather, it was the brainchild of a couple of liberal activists<sup>96</sup> who bucked the advice of movement

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87. *Id.* at 89–90.

88. *Id.* at 90.

89. *Id.* at 117–18.

90. *Id.* at 22–23.

91. *Id.* at 119–20, 130.

92. *Id.* at 131.

93. *Id.* at 140.

94. *Id.*

95. See *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), cert. granted sub nom. *Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144).

96. See *Legal Team*, AM. FOUND. FOR EQUAL RIGHTS, <http://www.afer.org/about/legal-team/> (last visited

lawyers who believed it was too soon to bring a direct challenge to same-sex marriage bans under the federal Constitution. Reasonably fearful of what a conservative Supreme Court might do, the movement lawyers tried to persuade the Proposition 8 challengers not to bring their case. They were unsuccessful, but smart enough to realize that, once the case was brought, they had to do everything they could to help the Proposition 8 challengers win.<sup>97</sup> Once involved, they had to fight the Proposition 8 challengers' lawyers, who wished to avoid a trial on the merits. Movement lawyers ultimately won that battle, leading to a remarkable decision by Judge Vaughn Walker of the U.S. District Court that rested largely on the factual deficiencies of the case against same-sex marriage.<sup>98</sup> The tension between lawyers long committed to the struggle for gay rights and the entrepreneurial lawyers behind the Proposition 8 case shows that strategic civil rights litigation cannot be controlled by anyone. Such litigation has been, in a sense, democratized — open equally to all, with the chaos and unpredictability that it necessarily invites.

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There is an obvious linkage between Proposition 8's ban on same-sex marriage and Texas's same-sex sodomy ban. Proposition 8 was largely symbolic. Gay couples in California still had essentially all the same rights and privileges of married couples under state law; they just could not call it marriage.<sup>99</sup> Like California's law, Texas's sodomy ban was also mostly about symbolism, not sodomy. Lawmakers could never have reasonably expected the ban to stop gay people from having sex. Instead, the law was, like so many anti-gay laws, about branding gays as deviant law-breakers in order to justify further hostility towards them. "Since sodomy laws, like the one in Texas, were never really about stopping sodomy," Carpenter writes in what could be the coda for this engaging and important book, "it is fitting that they got their comeuppance in a case in which there was probably no sodomy."<sup>100</sup>

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Nov. 4, 2012) (discussing the background of the attorneys who argued the case — Theodore B. Olson and David Boies).

97. See *Case Timeline: District Court*, AM. FOUND. FOR EQUAL RIGHTS, <http://www.afer.org/our-work/case-timeline/case-timeline-district-court/> (last visited Nov. 4, 2012) (detailing the efforts and trial strategy of the Proposition 8 challengers).

98. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 931 (N.D. Cal. 2010).

99. *Id.* at 994.

100. CARPENTER, *supra* note 4, at xiv.

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