

## TYRONE GARNER'S *LAWRENCE v. TEXAS*†

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FLAGRANT CONDUCT: THE STORY OF *LAWRENCE v. TEXAS*. By Dale Carpenter. New York and London: W.W. Norton & Co. 2012. Pp. xv, 284. \$29.95.

*Dale Carpenter's* *Flagrant Conduct: The Story of Lawrence v. Texas* has been roundly greeted with well-earned praise. After exploring the book's understanding of *Lawrence v. Texas* as a great civil rights victory for lesbian and gay rights, this Review offers an alternative perspective on the case. Built from facts about the background of the case that the book supplies, and organized in particular around the story that the book tells about Tyrone Garner and his life, this alternative perspective on *Lawrence* explores and assesses some of what the decision may mean not only for sexual orientation equality but also for equality along the often-intersecting lines of gender, class, and race. *Lawrence* emerges in this light not as a singular victory for lesbian and gay civil rights, or perhaps even for civil rights more generally, but as a complexly mixed opinion about and for equality in society and under law.

*I'm not a hero. But I feel like we've done something good for a lot of people. I feel kind of proud of that.*

—Tyrone Garner (p. 277)

*We still have a lot of work to do as far as getting equal treatment and jobs and housing and employment.*

—Tyrone Garner (p. 277)

*[F]ew remember Garner or invoke his name.*

—Dale Carpenter (p. 277)

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I. *LAWRENCE V. TEXAS* AND THE POLITICS OF CIVIL RIGHTS

The early returns on Dale Carpenter's *Flagrant Conduct: The Story of Lawrence v. Texas*<sup>1</sup> have persistently been in the mode of high praise.<sup>2</sup> It is easy to see why. This history of *Lawrence v. Texas*—culturally and legally, one of the most discussed U.S. Supreme Court decisions of the last decade, and for lesbian and gay equality the most significant constitutional breakthrough to date<sup>3</sup>—brings many of the people and events behind the decision, hence the decision itself, to life in a thoroughly engaging and informative way. The book's deeply human-centered approach, in which *Lawrence*, as a legal, political, and cultural event, is revealed as the product of a vast and complex set of human actions and interactions over extended time and space, humanizes *Lawrence* by naming many of the figures who made it possible along the way. In the process, the book also humanizes the legal process itself, showing that it is populated by individuals—not nameless, faceless bureaucrats—who can be recognized, identified with, and, in many cases, thanked. By returning the legal system to the public this way, the book reveals the democratic and egalitarian spirit animating it, a spirit that is felt in its narrative progression—*Lawrence v. Texas* as progress and justice achieved—as well as in its crystal-clear, at times beautiful, prose.

As it happens, the same democratic and egalitarian spirit that animates the book also animates its unabashedly pro-lesbian-and-gay-equality stance, a stance within which the book achieves what many readers will regard as a notable degree of fairness and balance. Carpenter has his views, of course, and his own pro-gay political blend. But despite his associations with libertarianism and Log Cabin Republicanism, and his conservative advocacy for marriage equality, the book does not read like it is pushing a conservative political brand. Yes, at moments—some subtle, some not—the book evinces sympathies for conservatism that might track Carpenter's views. But in one of the book's many surprises, it offers grist for a more radically progressive outlook and perspective on *Lawrence* than any true conservative, pro-gay manifesto ordinarily would choose. Through this telling, the book thus surpasses its title's claim. "The Story of *Lawrence v. Texas*" actually packs plurals—stories—with facets and dimensions that exceed a single plotline linked to a single-minded political game.

On its own terms, the book's account of *Lawrence* is filled with heroes of different sizes and shapes, more, certainly, than one would have guessed

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1. Dale Carpenter is the Earl R. Larson Professor of Civil Rights and Civil Liberties Law, University of Minnesota Law School.

2. See, e.g., David Cole, *The Gay Path Through the Courts*, N.Y. REV. BOOKS, Apr. 5, 2012, at 34; Sanford Levinson, *The Gay Case*, TEX. MONTHLY, Mar. 2012, at 62; Dahlia Lithwick, *Extreme Makeover*, NEW YORKER, Mar. 12, 2012, at 76; Michael O'Donnell, *From Brown to Lawrence*, NATION, Apr. 16, 2012, at 32; David Oshinsky, *Strange Justice*, N.Y. TIMES, Mar. 18, 2012 at BR 1, <http://www.nytimes.com/2012/03/18/books/review/the-story-of-lawrence-v-texas-by-dale-carpenter.html>.

3. The book's index contains one entry for "bisexuality" and none for "transgender." See pp. 329, 344.

based only on the judicial reports. Appropriately, the narrative repeatedly swirls around John Geddes Lawrence and Tyrone Garner,<sup>4</sup> “two humble men” but major “civil rights heroes” for delivering their sodomy arrests as the vehicle for challenging Texas’s and twelve other states’ sodomy bans.<sup>5</sup> But there are numerous other figures, many unknown publicly before now, whose actions, seemingly inconsequential when undertaken, turn out to be historically significant; they themselves, heroes in retrospect. Who knew before this telling, for instance, that *Lawrence v. Texas* might not have happened but for a “‘gossipy’ conversation” (p. 118) one night at a Houston gay bar where Nathan Broussard, a file clerk in the state court where Lawrence’s and Garner’s cases were initially filed, and his partner, Mark Walker, a Harris County Sheriff’s Office sergeant, mentioned the arrests to their bartender, Lane Lewis? Lewis, who “was active in the gay civil rights movement,” “knew that gay activists in Texas had been waiting for years to get a sodomy case based on an arrest of two adults in the privacy of the bedroom.”<sup>6</sup> He instantly recognized the potential for the arrests. “At that moment . . . *Lawrence v. Texas* was set on a legal trajectory no one there could have anticipated” (p. 118).

With all the heroes populating this book, the appearance of a fair share of villains is expected, for narrative symmetry at least. The book does not disappoint on this score. Some dark figures do appear. William Blackstone, J. Edgar Hoover, and Paul Cameron, along with other Christian moralists, including Anita Bryant-types, and Texas Republicans who, at times, do their bidding, all spring to mind, as do the authors of some frothily antigay amicus briefs filed in *Lawrence* with the Supreme Court. But by the time this work is out, history’s die is cast. *Lawrence*, decided in pro-lesbian-and-gay directions, keeps supporters of sodomy laws from being true villains any more, having lost the power they once possessed to hold homosexuality’s legal fate entirely in their hands. Even Justice Antonin Scalia, who some will see as one of the work’s major antiheroes, roaring in his rejection of the liberty and equality claims in *Lawrence*, roars in impotence—a diminished status that is gently but unmistakably announced by Paul Smith, Lawrence and Garner’s lawyer before the Court, when Scalia puts him on the spot during oral arguments (pp. 223–24).

Among the various characters in Carpenter’s book, one figure heroically stands out above them all: *Lawrence v. Texas* itself. Famously, *Lawrence* announces a right to sexual intimacy that lesbians and gay men, like their heterosexual counterparts, are free to enjoy, a right that leads the Supreme Court to declare that criminal prohibitions on sodomy between consenting adults constitutionally fall. An unequivocal triumph in these pages,

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4. Officially Tyron Garner, he “actually preferred the spelling Tyrone,” hence “Tyrone” here and throughout. Douglas Martin, *Tyron Garner, 39, Plaintiff in Sodomy Case*, N.Y. TIMES, Sept. 14, 2006, at D8.

5. P. 281; see also *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

6. P. 117–18. This story was sketched in earlier form in Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464 (2004).

*Lawrence*'s stature is felt throughout. In the work's bleakest moments, the gloomiest days of lesbian and gay rights—when they had not been conceived or did not exist as such, or when some initial successes, like a Houston city ordinance banning antigay discrimination (pp. 28–36), come under siege—*Lawrence* stands as a lighthouse in the distance, beaconing brightly. *Lawrence* itself is the book's very happy ending, whether pro-lesbian-and-gay sequels follow in the Supreme Court, as seems likely, or not.<sup>7</sup> Like other judicial decisions, *Lawrence* may flatten out the lived facts behind it, but when its details and dimensions are filled back in, it is a major and majorly felicitous event. It is just what Carpenter's book's subtitle touts: the opinion heralding freedom that “decriminalized gay Americans.”

The centrality of *Lawrence*'s heroism to the structure of Carpenter's book helps explain why commentary has regularly zeroed in on two revelations that the work serves up.<sup>8</sup> Individually and together, they suggest that *Lawrence*'s flattened-out facts may be flat out wrong in important respects. One piece of news—confirming suspicions that some commentators previously held—is that *Lawrence*'s representation of Lawrence and Garner as a couple in a marriage-like relationship is false. Not lovers, friends with benefits, or simply sexual regulars, “Lawrence and Garner never became much more than acquaintances. They were never in a romantic or sexual relationship with each other, either before or after the sodomy arrests.”<sup>9</sup> More spectacular is the “probabilistic” conclusion that not only were Lawrence and Garner not in an intimate or sexual relationship, but they were also probably not even having the sex that they were arrested and convicted for (pp. xii–xiii). A careful and important subplot develops the basis for this startling conclusion, which as an educated surmise, never achieves the status of hard fact. Close to it, the conclusion is well substantiated, including by Lawrence himself, who repeatedly insists that “[t]here was no sex,” and that the police who swore otherwise swore to “‘bald-face lies’” (p. 71). Corroborating, Garner at one point presents a version of events “obviously inconsistent with the claim that the men were having sex when the police arrived” (p. 72), elsewhere laughing aloud on hearing that the lead officer at the arrest said that he and Lawrence “continued to have sex after [officers] entered the bedroom” (p. 73).

The idea that there was no intimacy or even just sex behind the case that finally gave the United States a constitutional right to sexual intimacy has stirred up a brouhaha in some legal quarters.<sup>10</sup> Is something amiss about

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7. See *Petition for Writ of Certiorari, Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (No. 12-144); *Petition for Writ of Certiorari, United States v. Windsor*, 133 S. Ct. 786 (2012) (No. 12-307).

8. See, e.g., Cole, *supra* note 2, at 34; Levinson, *supra* note 2, at 63; Lithwick, *supra* note 2, at 77–78; Oshinsky, *supra* note 2, at 10. For an earlier rendition of these facts, see Carpenter, *supra* note 6.

9. P. 45; see also pp. 134, 280.

10. This, in part, is to paraphrase Dahlia Lithwick. See Lithwick, *supra* note 2, at 77–78 (“That’s the punch line: the case that affirmed the right of gay couples to have consensual sex in private spaces seems to have involved two men who were neither a couple nor having

burying facts like these in a high-profile case like this?<sup>11</sup> What effects, if any, might these revelations have? Will they reinforce stereotypes about homosexual mendacity? Will they harm the success of future lesbian-and-gay-rights litigation?

Answers aside, the real news of *Lawrence* in this work is what it has been all along: the decision's announcement of a right to sexual intimacy on constitutional grounds. This announcement is, in fact, so important to the book's account that its climax is structured around it, including immediate reactions in the decision's wake.

The scene, masterfully set, captures feelings that many lesbians, gay men, and their allies had in anticipation of, and on hearing, the *Lawrence* Court's ruling. As the High Court's term draws to an end, many lesbians, gay men, and their allies are anxiously awaiting the Court's *Lawrence* opinion. Lawyers from Smith's firm, including Smith himself, begin appearing on "opinion-reading days toward the end of the term, just in case *Lawrence* [is] announced" (p. 253). The term's final week arrives, and Monday comes and goes without a decision in the case. More waiting. No announcement will come until the last day of the term.

That day: "hazy and humid air," morning "temperature . . . already in the low eighties . . . as gay rights attorneys, academics, and law students beg[in] filling the courtroom to hear what the Justices [will] say" (p. 254). Luminaries, including Laurence Tribe, "on the losing side seventeen years earlier [in *Bowers v. Hardwick*], also [take] a seat" (p. 254).

Calling the case, Chief Justice Rehnquist announces that Justice Kennedy will read. "The room tense[s] up. The anticipation felt by people who ha[ve] worked on [*Lawrence*] for almost five years, and on the larger cause for longer, [is] palpable" (p. 255). What does it mean that Justice Kennedy has written the opinion? Have they lost or won? Cut to the New York City headquarters of Lambda Legal Defense and Education Fund, where Lambda lawyer Susan Sommer is "watching CNN and refreshing her web browser every few seconds to find out the result" (p. 256). One nearly hears and feels the nervous clicks of a computer mouse.

Pan back to Justice Kennedy, who begins reading the Court's opinion, his voice "uncharacteristic[ally] quaver[ing]" (p. 256). In Carpenter's book, the opinion's language is interspersed with Carpenter's own commentary. "[T]he question before the Court" and some of the case's facts—including that "officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act" (p. 256)—begin. Then, soon, a hint—the first—"that the Court might rule against Texas": the declaration that the Court "deem[s] it necessary to revisit this Court's holding in *Bowers v. Hardwick*" (p. 257). Kennedy continues, declaring that *Hardwick* "fail[ed] to appreciate the extent of the liberty at stake" (p. 257). This—at last!: The "moment that

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sex." For an important reply to Lithwick, see Kevin Cathcart, *Lawrence v. Texas: Extreme Truth*, HUFFINGTON POST (Mar. 7, 2012, 5:25 PM), [http://www.huffingtonpost.com/kevin-cathcart/lawrence-v-texas-extreme-truth\\_b\\_1327426.html](http://www.huffingtonpost.com/kevin-cathcart/lawrence-v-texas-extreme-truth_b_1327426.html).

11. Pp. 298–99 n.30; see also p. 135.

perceptive observers like Smith and [Lambda's Ruth] Harlow realize[] what [is] happening" (p. 257). Emotional gates open. "Tears [begin] to well up in the eyes of many in the courtroom" (p. 257). The reading proceeds, "overwhelm[ing] the best efforts of many gay-rights advocates to conceal their feelings" (p. 258).

By the time the formal reversal of *Bowers v. Hardwick* is announced, "[o]verwhelmed by what [is] happening, many of the gay and lesbian advocates sitting in the gallery [are] openly sobbing" (p. 259). "Justice Kennedy s[ees], and obviously fe[els], the reaction of the gallery. He seem[s] almost to choke up himself, catching his words as he sa[ys] that [*Hardwick*] was wrong 'when it was decided and it is not correct today.'" (p. 259).

Few readers with pro-lesbian-and-gay sympathies will read this passage and remain unmoved.

Outside of the Court, effusion spreads and quickly swells. In a series of where-were-you-when moments, news of the decision blazes across the country. From Washington, D.C., to Houston, Texas, the central figures in the case—Lawrence and Garner—learn of the decision in unspectacular ways: Lawrence from television news; Garner from a phone call from Mitchell Katine, a lawyer who helped represent him (and Lawrence) during the state-court phase of the case.<sup>12</sup> Joy spreading, the book's sights turn to reactions from cultural conservatives, including Reverend Fred Phelps, who, unimpressed, in perfect homophobic pitch, declares *Lawrence* "the death knell of American civilization" and "a covenant with death and an agreement with Hell" (p. 268).

Meanwhile, celebrations erupt in lesbian and gay communities nationwide. The book tallies events both in many of the major metropolitan areas that one might expect and in other locales that one might not. Missouri alone, a state that only hours before had been "one of the four states with a specifically antigay sodomy law," hosts "rallies celebrating the decision . . . in Columbia, St. Louis, Kansas City, and Springfield" (p. 270). Perhaps most memorable is the reaction in San Francisco, which centers on the huge, famous rainbow flag that flies "atop an eighty-foot pole at the corner of Castro and Market streets"—a flag whose design "first emerged for the 1978 San Francisco pride parade, the summer before Harvey Milk's assassination" (p. 271). Lowered for a single day, it is "replaced by an American flag" (p. 271). During the ceremony, a group of veterans, "several of whom had been expelled from military service for being gay, saluted as . . . a gigantic American flag [was raised] in its place. A rousing cheer went up. . . . The crowd sang the national anthem" (p. 272).

The revelers' reveling needs and receives no detailed, after-the-fact explanation. It is obvious what all the elation is for. Not to miss it, the San Franciscans' gesture carries the thought: No longer outlaws, lesbians and gay men were celebrating finally becoming full Americans—red-blooded, country-loving, flag-waving, "God Bless America"—singing patriots, all (pp. 270–77, 282).

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12. Reasons for the qualification are on p. 154.

A more nuanced understanding of *Lawrence* emerges from the book's larger account, in which the Court's opinion results directly from the pro-lesbian-and-gay litigation strategy in the Supreme Court–litigation stage of the case. Seen this way, *Lawrence* is not a breakthrough announcing radical constitutional values that were unknown the day before, but rather a decision affirming a preexisting social and legal order on morally conservative grounds.

According to the book, lesbian-and-gay-rights advocates, led by Smith's team, urged the Court to recognize that the Constitution promises protections for consensual intimate relations, including same-sex intimate relations, “for individualistic and communitarian reasons” (p. 193). “[T]he [main] brief [for *Lawrence* and Garner] carefully focused on sex as normatively desirable in connection with stability, commitment, and family—not in connection with a broader sexual liberation” (p. 193). The strategy's political torque is spotlighted:

The *Lawrence* team was making the most conservative argument possible for a constitutional right to sex. Overturning the Texas law would be a vindication of traditional American values—like respect for individual autonomy, privacy, relationships, the home, and families—in a changed world. The petitioners' brief was not the rejection of morality in favor of immorality or even amorality. It was an embrace of neotraditional morality. (p. 194)

Neotraditional moral arguments moved hand in hand with a strategic mantra, repeatedly echoed in the book, that, in granting *Lawrence* and Garner the relief they sought, the Supreme Court would be “following, not leading” the nation (pp. 192, 233). Based on what Carpenter writes, *Lawrence* embraces the moral premise that lesbian and gay advocates urged, making it “an embrace of neotraditional morality” and a preservation, if also a modest expansion, of the status quo to boot (p. 194).

The book seems untroubled by *Lawrence*'s moral conservatism, maybe pleased by it, though champagne-soaked ebullience is formally left to others to express (p. 270). At the same time, nobody who reads this story can forget the radically ambitious, and not-at-all conservative, lesbian and gay sexual politics that, over a span of space and time, made *Lawrence* conceivable, especially as a conservative, status-quo-oriented win.

The book pays these radical politics respects in different ways, but the most affirmative treatment they receive is as historical artifact (p. 199). The radicalism of lesbian and gay politics does not figure prominently in these pages as politics endowing political legacies that are alive and well in the present tense. Critiques, for instance, that take aim at the conservatism of the pro-lesbian-and-gay litigation strategy pursued at the Supreme Court or at *Lawrence* itself for rewarding it—critiques that find inspiration in these radical traditions—are dutifully acknowledged in passing, but no, or not much, more (p. 194). What these critiques believe *Lawrence* leaves undone and what

they hold should be made of that, the book, for its own part, more or less ignores.<sup>13</sup>

What appears instead in these pages as the work that *Lawrence* leaves undone is work that is recognizable less for its proximity to radical lesbian and gay politics than to the neotraditional morality in the case and to the political mainstream of the lesbian-and-gay-rights movements.<sup>14</sup> Speaking broadly and somewhat schematically, the work that the book sees as following in *Lawrence*'s wake is the project of taking lesbian and gay rights down a well-known and well-established path of civil rights.

What this civil rights path entails, or at least what some of its big-ticket action items are, is discussed when the book specifies what *Lawrence* does not do on its own. Understanding that *Lawrence*'s invalidation of sodomy laws punishing consensual, adult sexual intimacies relies on a decision principle that equates same-sex with cross-sex intimacies, the book notes that the opinion stops short of embracing the equation's implications for traditional marriage laws (p. 283). Likewise, the book recognizes that *Lawrence*'s constitutional respect for same-sex intimacies and lesbians and gay men could have been—but was not—taken to invalidate the “Don't Ask, Don't Tell”<sup>15</sup> policy that restricted military service by lesbians and gay men, keeping them from openly offering body, service, and life to defend a cherished nation (pp. 283–84). What's more, *Lawrence* formally leaves untouched the existing structure of antidiscrimination laws at the local, state, and federal levels. After *Lawrence*, “in most states [and for the most part under federal law,] . . . a person could still be fired from a job or denied housing simply because he was gay.”<sup>16</sup> These three items—marriage, military, and the existing rubric of antidiscrimination laws—are not mentioned by happenstance. They cohere a larger whole as signature elements within a mainstream lesbian and gay civil rights program.

As these details come into view, so does the debt that this lesbian and gay civil rights project owes the traditional civil rights program for race equality under law. Among its major victories are now regularly counted access to marriage on race-equal, or at least race-neutral, terms, as well as a

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13. See *infra* Part II for thoughts along these lines.

14. This is not to forget how the work that *Lawrence* leaves undone relates to the U.S. public's willing acceptance—beyond—toleration of lesbians and gay men.

15. 10 U.S.C. § 654 (2006), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

16. P. 277; see also p. 283. There are some protections under federal law against homophobic discrimination that should be noted. These protections treat antigay discrimination as unlawful when it operates as other forms of discrimination, including sex and disability discrimination. On sex discrimination, see, for example, *Rene v. MGM Grand Hotel Inc.*, 305 F.3d 1061, 1063–64 (9th Cir. 2002). On disability discrimination, see, for example, *Bragdon v. Abbott*, 524 U.S. 624, 641–42 (1998). In the housing context, there have been some notable recent developments. See, e.g., *Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity*, 77 Fed. Reg. 5662 (Feb. 3, 2012) (to be codified at 24 C.F.R. pts. 5, 200, 203, 236, 400, 570, 882, 891, 892).



right to military service and protections against discrimination through a range of positive law rules.

While both of these civil rights programs come in different forms, hence frame the precise content of civil rights goals in different ways, or anyway with different inflections on central themes, the lesbian and gay civil rights project in its principal form, borrowing from race-equality struggles,<sup>17</sup> is organized around formal equality norms. These norms seek the integration of lesbians and gay men into institutions long defined by their heterosexuality, including, as a cornerstone, what *Lawrence* gives: nonoutlawry for same-sex sex.<sup>18</sup>

Within this general framework, and driving *Lawrence* in different ways, the harm of antigay discrimination is in what the sodomy laws meant to do and did: deny lesbians and gay men an attribute of personhood or individual choice, or, in what amounts to much the same thing, impose group-based outlawry, exclusion, or marginalization on the basis of a morally irrelevant characteristic—the gender of one's sexual or love choice. The parallels to race discrimination are readily seen. A, if not the, central harm of race discrimination has often been thought to be making race the measure of an individual's talents, abilities, or willingness to satisfy the basic obligations of institutional membership or citizenship writ large, hence full membership in a community of equals, when it is not and should not be. As earlier civil rights struggles not only sought to eliminate state-based discrimination, but also to secure positive legal rights to freedom from discrimination in the public and private realms, the lesbian and gay rights civil rights project has pursued access to those institutions defined by their heterosexuality, like marriage and the military, as well as to the civil rights structure defined in both heterosexualized and racialized terms.<sup>19</sup> The point of opening the civil

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17. Or at least joining the liberalism sometimes underlying them. Not all race-equality struggles operate uncritically in this traditional liberal civil rights mode. *See, e.g.*, Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Robert S. Chang & Jerome McCristal Culp, Jr., *Nothing and Everything: Race, Romer, and (Gay/Lesbian/Bisexual) Rights*, 6 WM. & MARY BILL RTS. J. 229 (1997); Kimberlé W. Crenshaw, *Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality*, 46 TULSA L. REV. 151 (2010); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539 (2006); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995); *see also* Alan D. Freeman, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 96 (David Kairys ed., 1982); Alan Freeman, *Antidiscrimination Law: The View from 1989*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 121 (David Kairys ed., rev. ed. 1990).

18. Despite convergences, the mainstream lesbian and gay civil rights project does not mirror the trajectory of race-based civil rights in every last respect.

19. This holds at the national and state, including local, level. *See, e.g.*, Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2835 (2009); Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990); Violent Crime

rights structure to protections against sexuality-based discrimination is no different than the balance of the political program: to guarantee that lesbians and gay men receive all the same rights, benefits, and protections in society and under law that heterosexuals have or otherwise do not need.<sup>20</sup>

Against this backdrop, *Lawrence*, with its elimination of sodomy bans on morally conservative grounds equating, hence assimilating, lesbians' and gay men's intimacies to those of their heterosexual counterparts, does not only serve to point to work within the civil rights project that remains to be done. *Lawrence* is, in itself, a major victory within and for that project. Hence Carpenter's report that *Lawrence* is "the most important gay civil rights decision so far in American history" (p. 41).

On the following logic, it is: *Lawrence*'s elimination of homosexuality's outlawry is driven by a message of inclusion and integration into the larger community of constitutional persons entitled to, for now, at least, some basic constitutional rights. The conservatism of *Lawrence*'s underlying neotraditional, moralizing rationale does not change this. Indeed, it is a powerful argument sounding in shared constitutional values that collectively declare the exclusion of lesbians and gay men from all the existing structures of social, political, and civil life is unwarranted, at least when that exclusion is grounded in traditional moral opposition to homosexuality and when lesbians and gay men are only seeking treatment equal to their heterosexual counterparts. Synched with this thought is the impulse behind characterizations of *Lawrence* as the lesbian and gay equivalent of *Brown v. Board of Education*,<sup>21</sup> still widely seen as the greatest legal victory for race-based civil rights.<sup>22</sup>

A victory of this magnitude, *Lawrence* does not only clear a trail for civil rights victories to come. For a complex set of reasons having to do with the social, political, and legal uptake of the Supreme Court's constitutional decisions, and in a complex set of ways, *Lawrence* legitimates and normalizes homosexuality and same-sex relations beyond invalidating sodomy bans. Its principle of respect for same-sex intimacies and their equation with heterosexual intimacies—no matter how conservative—is a principle that, unleashed, may issue a constitutional call for the reconsideration in other public arenas of the justifications for a range of governmental policies keep-

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Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73; Employment Non-Discrimination Act, H.R. 1397, 112th Cong. (2011); Ohio Equal Housing and Employment Act, H.B. 176, 128th Gen. Assemb., Reg. Sess. (Ohio 2010); *see also* H.B. 335, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

20. *Cf. Romer v. Evans*, 517 U.S. 620, 631 (1996).

21. 347 U.S. 483 (1954); *see, e.g., Cole, supra* note 2, at 34; O'Donnell, *supra* note 2, at 32.

22. This despite reconsiderations of important aspects of this popular account in GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 39–172 (2d ed. 2008); Bell, *supra* note 17; and Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994). For some, of course, *Loving v. Virginia*, 388 U.S. 1 (1967), surpasses *Brown* in terms of doctrinal significance.

ing lesbians and gay men out of the mainstream or at the margins of social, political, and legal life.<sup>23</sup>

Carpenter's book details some ways in which *Lawrence* has had precisely these effects. Outside of the Supreme Court, a series of changes in laws relating to lesbians and gay men and sexual orientation discrimination have transpired since *Lawrence* came down. As the book points out, *Lawrence*'s gravitational force has been felt in struggles for marriage equality at the state level. The Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*,<sup>24</sup> the first decision to require full marriage equality at the state level, takes *Lawrence* and its logic as its model (p. 283). Notably, one of *Lawrence*'s greatest extrajudicial successes so far is the way that its ideals played out in the demise of "Don't Ask, Don't Tell."<sup>25</sup> Acknowledging that too many factors were in play to say that *Lawrence* singularly precipitated the law's repeal or other recent pro-lesbian-and-gay modifications to the legal fabric, the book remarks, "*Lawrence* did not cause all of this change, but it ratified and intensified the underlying cultural shift that made it possible. It also furnished a constitutional basis for further changes to come" (p. 284). Perhaps unsurprisingly, in this fast-changing area of law and in the short time since Carpenter's book has been published, other noteworthy legal changes have been made, including changes in marriage and antidiscrimination law.<sup>26</sup> Bringing to mind a libertarian's solicitude for the private sphere, the book also notes ways in which *Lawrence* has produced changes in private

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23. Not forgetting the constitutional limits that some pro-lesbian and pro-gay legislative measures may run into. *See, e.g.,* *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995).

24. 798 N.E.2d 941 (Mass. 2003).

25. 10 U.S.C. § 654 (2006), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

26. *See, e.g.,* *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012) (No. 12-307); *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (No. 12-144); *Koren v. Ohio Bell Tel. Co.*, No. 1:11-CV-2674, 2012 WL 3484825 (N.D. Ohio Aug. 14, 2012); *see also* *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 23, 2012) (finding by the Equal Employment Opportunity Commission that Title VII's sex discrimination prohibition includes discrimination against transgendered employees); *Castello v. Donahoe*, EEOC Request No. 0520110649, 2011 WL 6960810 (Dec. 20, 2011) (finding by the Equal Employment Opportunity Commission that an employee stated a "plausible sex stereotyping case" under Title VII when she claimed that she was discriminated against for "having relationships with women"); *Veretto v. Donahoe*, EEOC Appeal No. 0120110873, 2011 WL 2663401 (July 1, 2011) (finding by the Equal Employment Opportunity Commission that an employee stated a plausible sex stereotyping case under Title VII when he claimed that he was discriminated against for being a man marrying a man); Erik Eckholm, *In Maine and Maryland, Victories at the Ballot Box for Same-Sex Marriage*, N.Y. TIMES, Nov. 7, 2012, at P14, <http://www.nytimes.com/2012/11/07/us/politics/same-sex-marriage-voting-election.html> (discussing success of referendums in Maine and Maryland authorizing same-sex marriage); Stacey Solie, *Two Laws Are Welcomed After Midnight in Seattle*, N.Y. TIMES, Dec. 6, 2012, at A20, <http://www.nytimes.com/2012/12/07/us/two-laws-are-welcomed-after-midnight-in-seattle.html> (discussing success of Washington State referendum authorizing same-sex marriage).

conduct, where norms in relation to a broad range of private actions seem increasingly pro-lesbian and pro-gay (p. 283). More and more corporations and other actors in the private sector, and across the political spectrum, are embracing *Lawrence's* values of respect for same-sex intimacies and their equivalence to their cross-sex counterparts, including the decision's neotraditional moral approval for same-sex sex (p. 283).

With all that *Lawrence* has produced, it may seem fitting that *Lawrence's* conservatism did not seem to matter much to the lesbian, gay, and allied revelers who celebrated the decision after it came down. This essentially conservative opinion, though it leaves many lesbian and gay civil rights successes to be achieved, does seem to have set a course that, slowly, perhaps ineluctably, is leading toward what, for now, remains the capstone of the modern lesbian and gay rights civil rights program: marriage equality. *Lawrence's* conservatism appears not to have served as an obstacle to promising and delivering a present and a future for lesbian and gay civil rights. In a strange way, *Lawrence's* conservatism has only made the call for additional civil rights protections for lesbians and gay men seem more obvious, more urgent, more necessary, and harder not to give or to doubt, because they are no longer at or near the avant-garde of social, political, legal, or even constitutional life. As far as lesbian and gay equality is concerned, it is hard to hope for more.

## II. *LAWRENCE V. TEXAS* AND THE POLITICS OF THE DISPOSSESSED

Or is it?

The principal chord that Carpenter's book strikes is of *Lawrence v. Texas* as an unparalleled victory for lesbian and gay civil rights, if with further steps to go, steps it is already helping normalize. But the book also offers an important, if underdeveloped, melodic counterpoint: a perspective on the case that emerges through facts about its background that cast *Lawrence*, including its moral conservatism, and in some ways, by extension, the civil rights project of which it may be seen to be a part, in a distinctive, more complex, and finally, more realistic, light.

This counterpoint is detectable in different ways throughout the book. But its most dramatic moment arrives after the book's climax recounting *Lawrence's* announcement and the celebrations for it that followed nationwide. Although this climax practically brings the book to a close, the story of *Lawrence* told here is not quite at an end. It is reopened just long enough to add as a coda an Epilogue that offers some updates on events.

The Epilogue begins with news about John Lawrence. "For the most part," after the decision in "his namesake case," Lawrence "return[s] to a life of anonymous normalcy" that "journey[s] toward a domesticated liberty parallel[ing] the one taken by many gay men both before and after *Lawrence*" (p. 279). Lawrence moves out of the apartment where he was arrested and had lived for years and into a house that he has bought "so that he could live with his partner, Jose Garcia," which he does until he passes

away of a “heart-related illness . . . in his home . . . in the care of Jose” (p. 279).

In contrast, “[t]ime was less kind to [Tyrone] Garner” (p. 279). Following *Lawrence*, Mitchell Katine “trie[s] to get national gay-rights groups to use him as a spokesperson for the cause” (p. 279). But after Garner gets drunk “at a national black-tie dinner in the men’s honor in Washington, D.C. and accept[s] his gay-rights award with a rambling speech, there [are] no takers” (p. 279). Katine is quoted “speculat[ing]” that this missed opportunity “would’ve changed his life” (p. 279). But, Katine explains, apparently shrugging, “he didn’t have the training or education” (p. 279).

Returning to something of his pre-*Lawrence* life, Garner spends his remaining days in obscurity and penury, dying of causes uncertain, no unequivocal diagnosis cited, after being “sick for months,” and “[d]espite his youth” (p. 280). Garner apparently does not leave behind enough money for cremation or a headstone for a grave (p. 280). His family cannot pay either (p. 280). While “the media, including the gay media,” largely ignore his death, Kevin Cathcart, Lambda’s Executive Director, “[c]alling Garner’s contributions to the gay community ‘immense,’” steps in, “appeal[ing] to that community for funds to defray disposal and funeral costs” (p. 280). Next:

Two weeks after his death, \$200 had been raised. For weeks, the civil-rights hero’s body lay in cold storage in [a] morgue. Finally, [a month or so after his death], with only \$25 more having been donated, Garner’s brother released his body to the county for cremation (at no cost). The family wanted to place his remains in a modest metal urn, instead of a plastic bag, and run a proper obituary. . . . But they needed \$200 more for that and didn’t have the money. There was no memorial service for him in the gay community. There was no funeral, period. (p. 280; endnotes omitted)

No lecture, only facts, the disappointment is felt. Someone should have answered Cathcart’s call. Tyrone Garner’s body did not have to be delivered to the state to reduce it to ashes only to be returned to his family in a plastic bag. This is not the dignity and freedom from state interference in intimate matters that *Lawrence*—which was Garner’s case, too—is supposed to represent.

The details are intended in personal terms, a collective failure to honor the memory of this particular “civil-rights hero[]” who did so much for lesbian and gay rights (p. 280). It is no mistake to process the passage this way. If one does, no negative aspersions are cast on *Lawrence* itself. To the contrary, the failure to honor one of the decision’s principal heroes is a failure precisely because *Lawrence* is so great. Considering all that, giving Garner a decent burial was the least that he was owed, though he actually received less.

But there is another way to understand Garner’s death and the events surrounding it. In this view, they are not so much personal as political, raising some fundamental questions about *Lawrence* that are begged but never squarely asked, analyzed, and answered in the course of Carpenter’s work.

How could *Lawrence v. Texas*, this great victory for lesbian and gay civil rights, have done and meant so very little to the life of one of the two men most central to it? Without forgetting that it formally reversed his sodomy conviction, is it possible that *Lawrence* is (or was) more or less irrelevant not only to Garner particularly, but also to the lives and welfare of other lesbians and gay men? Does this suggest, more generally, that *Lawrence*'s benefits and limitations might be more capaciously rendered than they are in the main accounting in this book? Might there even be hard costs of the decision—not to the forces of traditional morality, seen as being dealt a major setback by the case, but, counterintuitively, to lesbians and gay men and maybe other minorities, as well?

#### A. A Portrait of Tyrone Garner

A handle on these questions emerges from the book's extended portrait of Tyrone Garner and his life. To begin,

[Garner,] a black gay man[,] . . . [t]he youngest of ten children[,] . . . grew up in Houston in poverty. After high school, he took a course in word processing but that did not yield stable employment. . . . [H]e worked in a variety of short-term jobs: a cook, a waiter, a dishwasher, a house cleaner. He did not own a car or a home, and never even rented his own apartment. Instead, he moved among the homes and apartments of family members or friends for a few days, weeks, or months at a time. He was unemployed at the time of his sodomy arrest in 1998. (p. 44; endnote omitted)

But Garner was not without occasional work. "About once a month . . . Garner [and his boyfriend, Robert Eubanks,] took a bus to Lawrence's apartment ["in working-class far east Houston" (p. 43)] twenty miles away to clean and run errands for Lawrence, for which they were paid a small wage" (p. 45).

Personally, Garner "had a quiet demeanor, at least around authority figures like police, judges, and attorneys. . . . He was shy, passive, and according to those who knew him, effeminate. . . . When he smiled, he tended to cover his teeth with his lips, as if embarrassed by their appearance" (p. 45). Garner's passivity is visible in public appearances where he stands by silently as Lawrence speaks for them.<sup>27</sup> Likewise, in obtaining counsel, "[a]s Lawrence went, so went Garner."<sup>28</sup> Garner's spoken English, quoted by Carpenter, reflects a lively intelligence, sounding at times naturally a little bit like Gertrude Stein. Of not speaking to his parents about his homosexuality, for instance: "'I never had to tell them,'" he said. "'I think they been knowing as long as I've been knowing'" (p. 44). Other locutions quoted verbatim are far from high King's English. Nobody is surprised that the gay-rights speaking circuit doesn't pan out.

In various snapshots, Garner, "living with relatives in a low-income area of Houston," comes across as trying, but not quite fitting in (p. 279). "Nei-

27. See, e.g., p. 273.

28. P. 120; see also p. 130.

ther Garner's white dress shirt nor his gray dress pants seemed to fit him. He smelled of cologne" (p. 280). A relationship with spirits is suggested but not pinned down. "[P]robably not intoxicated" the night of his sodomy arrest (p. 62), he was not "a heavy drinker,"<sup>29</sup> though from time to time he indulged to excess (pp. 166, 279). Not one of those moments, but memorable enough to tell, Carpenter takes "him back home at the end of [an] interview, at about two in the afternoon, [and Garner] ask[s] . . . to stop at a corner gas station and borrow[] some money to buy a large malt liquor beer" (p. 280).

At some point after meeting in 1990, Garner becomes boyfriends with Robert Eubanks, an older, poor, white gay man described as a "'gun-totin', beer-swillin', Gilley's kickin' bubba from Pasadena,' a working-class suburb of Houston" (pp. 44–45; endnote omitted). This is the same Eubanks who would later, in what is sometimes characterized as a fit of jealous spite,<sup>30</sup> place the false weapons-report call that led to Garner's sodomy arrest (pp. 62–63).

Soon after meeting, Garner and Eubanks "started living together, sharing a bedroom at the home of Garner's parents for a few months. After that, the two men shared apartments and transient hotel rooms" (p. 45). The relation between them was

tempestuous, to say the least. Eubanks was prone to calling Garner a "nigger" when he was drunk or angry. Garner was twice charged with assaulting Eubanks, in 1995 and again after the sodomy arrest, in 2000. In addition to these two assault cases, Garner was arrested for possession of marijuana, for aggravated assault on a peace officer in 1986, and for driving while intoxicated in 1990. (p. 45; endnotes omitted)

As *Lawrence* is pending, Eubanks sought

a court order to keep Garner away from him. In his affidavit, Eubanks accused Garner of several beatings and a sexual assault: Garner "punched me on my left eye two times" in January 2000; beat him with a hose in 1999 while "using crack and drinking"; beat him with a belt in 1998 . . . ; and, in May 1998, four months before the sodomy arrests, "stabbed me on my right finger with a box cutter, . . . grabbed a hot iron and burned me," and "then sexually assaulted me." The judge granted Eubanks's request for a temporary restraining order, but the matter was dropped after Eubanks's lawyer withdrew, saying she could not locate him for a scheduled hearing. Nevertheless—and bizarrely—Garner and Eubanks continued to live together. (p. 166; endnote omitted)

The pains taken to say that Garner "had a quiet demeanor, *at least around authority figures*" (p. 45; emphasis added) are taken because he didn't always. As Eubanks's affidavit attests, Garner was not always passive and shy (p. 166).

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29. P. 62. There is contradictory testimony about Garner's sobriety the night of his sodomy arrest. See pp. 69–70, 72, 298 n.26.

30. Eubanks's actual motives are a "mystery," though this explanation repeatedly resurfaces. See pp. 62, 63, 72. "According to the deputies, Eubanks volunteered that he was jealous because his lover, Garner, was cheating on him with Lawrence." P. 77; see also p. 90.

“[O]n-again, off-again,” Garner’s relationship with Eubanks is on again, things seemingly looking up for the couple, just before the sodomy arrests (p. 61). The men had “arranged to get an apartment together” and were at Lawrence’s that fateful day to get some furniture for it: two chairs, some tables, and an old bed (p. 61).

### B. *The Portrait of Garner—Mobilized*

The book’s portrait of Garner serves multiple purposes. Perhaps first and foremost, it ensures that his story, central to the story of *Lawrence v. Texas*, is told and preserved for posterity.<sup>31</sup> Equally significant, an early version of the portrait is deployed as part of the book’s analysis of the sodomy arrests in which an argument is offered that they were discriminatorily motivated. According to the book, drawing on Carpenter’s first-hand investigations, no fewer than four different social hierarchies—sexual orientation, gender, class, and race—all visible in Garner’s life, and differently in Lawrence’s, as well, were in important ways behind the decision by police to arrest and charge the two men with violating Texas’s sodomy law.<sup>32</sup> The point of this argument is not to sketch pleadings for a constitutional tort,<sup>33</sup> but to enrich our understanding of the real-world complexities *Lawrence* involved.

The argument begins with “[t]he simple fact” that Garner and Lawrence were two men engaged in sex (p. 99). “By itself, that is an acknowledgment that antigay animus led to the arrest[s]. The thought of sexual acts between two men elicited a special revulsion from the deputies that helps explain why there ever was a *Lawrence v. Texas*” (p. 99). In addition to the general, “antigay, hypermasculine world of good old boys” in which “[t]he deputies were [professionally] ensconced,” interviews with them revealed “their personal and deep discomfort with homosexuality” and “revulsion toward gay men . . . at work” “during the arrest[s]” (pp. 99–100). Garner and Lawrence said that “the deputies repeatedly used homophobic slurs like ‘fag’ and ‘queer’” (p. 100). There were also comments “about the pornographic contents of Lawrence’s home” (p. 100), including “a sketch on Lawrence’s wall”<sup>34</sup> of James Dean with “‘an extremely oversized penis on him’” (p. 76), a source of fascination, derision, and “disdain” for homosexuality (p. 100). There was also the seemingly homophobic assumption that, with gay pornography around, child pornography might also be found (p. 78). None was (p. 78). Additionally, the lead officer at the scene “expressed fears about coming into contact with ‘fluids’ from the men” (p. 100). After the physical

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31. See p. 277.

32. For Carpenter, these motives are among the “several reasons that [the lead officer on the scene of the arrests] might have made up a story about seeing Lawrence and Garner having sex, and why [the other officer who said he witnessed it] might have acquiesced in that story.” P. 98; see also p. 105. Not that these were the only motives involved in the arrests. Pp. 81, 87–104.

33. No such argument was ever made before the Supreme Court.

34. P. 100. Elsewhere, the reference is to “sketchings” or “etchings” in the plural. P. 76, 279.



contact of the arrests, he “advised [the other officers] to wash their hands. . . . In his patrol car, ‘. . . I doused myself with sanitizer’” (p. 81). Another officer, meanwhile, recounted that “he could detect homosexuality by the disgusting smell in the apartment” (p. 100). “‘That whole apartment smelled of gay’” (p. 78). Not cologne, but “[a]n anal odor. Very unpleasant’” (p. 78; endnote omitted). (Another officer missed the scent (p. 78).) Add to this the book’s surmise that police witnessed no sex between the men, and the suggestion by the lead officer at the scene that Lawrence and Garner refused to stop when caught in the act and told to desist (pp. 68–69), amounts to a “play[] [on] stereotypes of gay men as so sex obsessed they are literally unable to control themselves,” as “animals in their lust” (p. 100).<sup>35</sup> The idea that the officers were motivated by antigay discrimination seems, by argument’s end, to leave little room for doubt: Homophobia was a motivating feature of the arrests.

Proceeding, “[c]losely related to the homophobic motive, there might also have been an element of . . . ‘gender anxiety’ at work in the case” (p. 101). The two officers who said that they saw Garner and Lawrence having sex (p. 92) “harbored very traditional attitudes about the proper roles, attitudes, dress, and manner of men and women” (p. 101). One of the officers, himself African American, said that “[w]hat bothered him most about many gay men . . . was that they are effeminate. As a kid, he remembered another young boy who exhibited . . . ‘feminine twists’ that unsettled him” (p. 101). Pointing to Garner, the book explains that he “was one of those guys with ‘feminine twists’” (p. 102). The lead officer “described him as a ‘naggy bitch’” (p. 102). The book links Garner’s effeminacy with his passivity, as officers might have, to frame him in the officers’ eyes as “a feminized male” (p. 102). “Garner just stood by and took the abuse and orders [that the police] inflicted” (p. 102). If, in fact, the police did not see Garner and Lawrence having sex that night, it scarcely seems coincidental that Garner’s effeminacy may have caused officers to imagine him as the bottom to Lawrence’s top,<sup>36</sup> or, in a different version, to have been the one fellating Lawrence when the officers came in.<sup>37</sup>

The class dimensions driving the arrest follow:

Wherever gay people have been discriminated against, those at the lowest end of the economic scale have been among the hardest hit. . . . It is they who most often proved vulnerable to, and were undefended against, police harassment.

In the same regard, there is evidence that economic class may have played a role in the *Lawrence* arrests. Lawrence and Garner were neither wealthy nor well educated. It is no accident the arrests occurred in a lower-middle-class area . . . . Police charging crimes against wealthy home

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35. For some discussion of what the lead officer said he saw happening in Lawrence’s bedroom and how that activity continued even after he told the men to stop, see pp. 67–70, 80, 92–93, 100–01.

36. See, e.g., p. 103.

37. See pp. 68, 304 n.53.

owners could expect the residents to fight back with ample resources. Lawrence and Garner, by contrast, could be expected to do nothing.<sup>38</sup>

“Beyond that, the lead officer in the case . . . approached his job differently” in the “lower-middle-class” neighborhood where Lawrence’s apartment was located (p. 102). “[R]esidents [of that area], [the officer] claimed, were less likely to speak to police in a respectful manner, were more prone to resist orders, and were generally less deferential” (p. 102). The officer “adapted to the difference by getting tougher on residents” of this area (p. 102). Lawrence, who used “foul language and defi[ed] . . . [police] authority” before and during his arrest, “would have been typical of the area, and [the officer] would have reacted in his customarily rough way” (p. 103).

The racial dynamics and motivations said to have been involved in the arrests, being specially freighted, receive special treatment in the book. Treading carefully, the book notes, to begin, that the call Eubanks made saying “that ‘a black male’ was ‘going crazy with a gun’” in Lawrence’s apartment was a report that might have “used a racial slur” instead (p. 103). Not only was the neighborhood where the arrest occurred “working-class,” but it was “also racially polarized. The Harris County Sheriff’s Office reflected those attitudes. Lawrence was white and Garner was 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” (p. 103; endnote omitted). As “one gay-rights activist familiar with the sheriff’s department suspected . . . : ‘Black guy, white guy, apartment, naked. That’s all you need,’” “suggest[ing] that a mix of homophobia and racism may have been at work” (p. 103; endnotes omitted) in the arrests.

The book clarifies that the racism charge being leveled—“[i]f racism was present” (p. 103)—is not simply one involving white officers driven by white supremacy. One of the officers

was black. This, too, added a potential racial element to the case. It is possible that [he], coming from a socially conservative and religious black community, was especially offended by the sight of a black man engaged in what he considered a morally objectionable sexual act with a white man. This offense may have been aggravated because [or so it was said] the black man was playing the receptive (passive, subordinate, female) role to the white man during sex. At the scene of the arrest, Lawrence was aggressive and belligerent (masculine); Garner was passive and cooperative (feminine). [The officer] was clearly bothered that Garner was very effeminate, which suggests that gender anxiety and racial pride may have produced a toxic mix. (p. 103; endnotes omitted)

For the black deputy, “Garner’s homosexuality may have been experienced as racial betrayal” (p. 104).

No sooner is this all said than it is added, “This is speculation” (p. 104). “The deputies have not admitted that race influenced the arrests, nor would they be expected to admit it if it had. Neither Lawrence nor Garner recalled

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38. P. 102; *see also, e.g.*, p. 98.

any racial slurs during the arrest or during their time in prison. . . . If race played any role, it was very complicated and is unlikely ever to be acknowledged explicitly by law-enforcement authorities or anyone else involved" (p. 104). But as a distinct possibility, the idea cannot be ruled out. And it is not.

All told, Carpenter's account—with its suggestion that homophobia, sexism, classism, and racism, either individually or in combination, played important, driving roles in producing the *Lawrence* arrests—seems more than plausible, if not proven beyond a shadow of a doubt. Measured by a certain common sense, the argument is perfectly understandable and entirely defensible, and seems, with all its caution, more or less basically right.

### C. *The Inequalities in Lawrence Reconsidered*

Consistent with the book's overarching humanism, which tends toward a liberalism focusing on individuals, the discrimination presented as motivation behind the arrests begins somewhere in the social world (it is out there and has been for a very long time) before being localized spatially (as in the neighborhood where Lawrence lived or his apartment itself), institutionally (as in the Harris County Sheriff's Office's norms), and temporally (this scene, this night), before then, finally, being personalized and interiorized in the officers themselves. This is discrimination as individual, psychological motivation.

One challenge of this kind of approach is that it ordinarily supposes at least some degree of knowable certainty of mental truths, figuring that speech, conduct, and certain other evidence—as with the sexual orientation, gender, and class discrimination claims—can supply a secure and clear line of insight into the deepest, darkest recesses of the human mind. But what the book says about the race discrimination claim seems more generally apt: "The possibilities are intriguing but are ultimately [in some sense] unknowable" (p. 104). Facts there may be, but certain access to them is something else. This is all well-heeled speculation. More problematically, it makes the discrimination in the case finally interesting and relevant to the book's narrative as the sum of individuals' psychological motivations.

Analytically prior to these psychologizing moves are the structures of social inequality that are at work and that, in different ways, have existed for a very long time. Whatever their origins and historical roots,<sup>39</sup> the social hierarchies of sexual orientation, gender, class, and race, at least in their current forms, are drawn upon by the book as fuel for its psychologized punch.

Taking these social hierarchies on their own terms, and viewing them as large-scale social institutions supported by ideologies that rationalize and justify group-based distinctions and inequalities, the book might have taken a cleaner, more powerful, if also a more far-reaching, argumentative shot. If it had, it might have offered that the scene of the arrests encapsulates and

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39. The book notes some, *see* pp. 3–8, 47–48, but does not and could not possibly trace them all.

crystallizes interpersonal and structural social dynamics that, once seen, reveal how sodomy laws can be captured and made to serve as conduits for various forms of social inequality, which they thus reflect and reinforce.<sup>40</sup> And, in this case, actually did.

On this view, the equality concerns with the arrests in *Lawrence* do not primarily focus on discriminatorily defective psychologies, hence the illicit motives operating in the officers' heads, personalized this way and perhaps curable by something that could set these particular heads straight. Driving much deeper, the challenge from this perspective is that the forces of inequality at work on the scene of the arrests, once understood, need to be confronted and rooted out to make sure they do not resurface again. Eliminating the vehicle for discriminatory expression—the sodomy ban—may be very important. Indeed, for some it is impossible to imagine nondiscriminatory enforcement of a sodomy law. But simply getting rid of sodomy bans will not on its own guarantee that the same social hierarchies will not repeatedly reemerge and converge, either on their own or together, to target and punish lesbians and gay men for their sexual orientation, gender, class, and race.<sup>41</sup>

The book does not string points together this way, but understanding *Lawrence* as a case about social inequalities and discriminatory social control along often-intersecting lines of sexual orientation, gender, class, and race presents a stark departure from the Supreme Court's doctrinal understanding of what it involves. Divorcing legal from social truths, *Lawrence* posits sexual orientation as the only form of inequality implicated in the case, and implicated by virtue of the social meaning of Texas's sodomy ban—its "homosexual conduct" law<sup>42</sup>—apparent on its face.<sup>43</sup> The various forms of discrimination that were actually working at the scene of these particular arrests, whether viewed as individual psychology shaping officers' motivations (as the book does) or as structural inequalities shaping the dynamics on the ground (as they might have been), nowhere figure in *Lawrence*'s doctrinal footwork. Although social theorists have documented the relation of sodomy bans and the homophobia they reflect to inequalities of gender, class, and race,<sup>44</sup> there are no signs of these ideas anywhere in *Lawrence*. The Court's opinion in the case even boldly ignores the fact

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40. Another way to run these moves is in Berta E. Hernández-Truyol, *Querying Lawrence*, 65 OHIO ST. L.J. 1151, 1238–39 (2004).

41. Saying this this way is not to forget, as will become clear, the ways in which others, including heterosexuals, bisexuals, and the transgendered, might be targeted or otherwise harmed by sex crimes law, depending on how they are written and enforced.

42. See *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

43. See *id.* at 563–64, 567, 575, 578; see also *id.* at 580, 581–82, 583–84 (O'Connor, J., concurring in the judgment). This even though the Court considers the social meaning of sodomy prohibitions across space and time, even before the "homosexual" as a social personage appeared for the first time.

44. The theoretical connections have been traced in ways too numerous to count, but a few illustrative examples for present purposes include GUY HOCQUENGHEM, *HOMOSEXUAL DESIRE* (Daniella Dangoor trans., Duke Univ. Press 1993) (1972); SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* (2d ed. 1997); and SIOBHAN B. SOMERVILLE, *QUEERING THE COLOR LINE* (2000). Cf. *HOMO ECONOMICS* (Amy Gluckman & Betsy Reed eds., 1997).

that Texas's sodomy law drew a facial sex-based classification, which, in turn, grounded an argument before the Court—that the sodomy law unconstitutionally perpetuated gender discrimination under well-established doctrinal tests.<sup>45</sup> Avoiding these ideas, *Lawrence* makes it all wonderfully simple: Texas's sodomy law, facially discriminatory as to sexual orientation, is otherwise neutral with respect to gender, class, and race. Neither Texas's sodomy ban nor, by extension, any other jurisdiction's—nor, as a result, *Lawrence* itself—says anything about or means anything for them. By categorical fiat, sodomy bans are unrelated to gender, class, and race, both facially and in operation.<sup>46</sup>

Through a powerful turn of rhetorical events, the idea that *Lawrence*, being about the constitutionality of sodomy bans, is only about lesbian and gay rights has fostered the development of a mythology that *Lawrence* benefits all lesbians and gay men. The book furthers this myth by describing the story of *Lawrence v. Texas* as the story of “how a bedroom arrest decriminalized gay Americans” (book title). Implicitly, “all” gay Americans, without qualification.

Partially right, *Lawrence* takes a bite out of homophobia's operation in the criminal setting, nullifying the enforcement of what was long considered the cornerstone and perfect embodiment of homophobia: sodomy bans. And the decision's reverberations, as the book shows, extend beyond that to the elimination of other forms of homophobic discrimination under law (pp. 281–84).

Notwithstanding the undoubtable and undoubted significance of these developments, it is emphatically not the case that *Lawrence* banishes discrimination against lesbians and gay men and their sexualities from even the limited waters of the criminal law. Stated affirmatively, *Lawrence* carves up the classes of lesbians and gay men and their sexualities into some that are no longer criminal (and no longer may be made criminal) and others that still are (and may be).

As others have noted, *Lawrence*'s declaration that sodomy bans violate constitutionally protected individual liberty respecting sexual intimacies—a declaration that is grounded in a “neotraditional [sexual] morality” that follows, but does not lead, the nation—comes at the expense of broad protections for consensual, same-sex sexual expressions against criminal regulation (p. 194). While, with Kenneth Karst, some one-night (or one-hour or five- or fifteen-minute) stands may be safeguarded under *Lawrence* because from them normative intimacies may bloom,<sup>47</sup> not all categorically are. The forms of consensual, same-sex sexual expression that *Lawrence* leaves

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45. For discussion, see Marc Spindelman, *Gay Men and Sex Equality*, 46 *TULSA L. REV.* 123, 140–41 (2010), and Marc Spindelman, *Surviving Lawrence v. Texas*, 102 *MICH. L. REV.* 1615, 1633–67 (2004) [hereinafter Spindelman, *Surviving Lawrence*].

46. *Accord* p. xii.

47. See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 633 & n.45 (1980). For additional reflections on the theme of sex and intimacy, see Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 *EMORY L.J.* 809 (2010).

unprotected include laws barring cruising and public sex,<sup>48</sup> as well as legal limits on serodiscordant sexual relations.<sup>49</sup> Also outside of *Lawrence*'s ambit are ostensibly nonnormative sexual practices like sadomasochism, as well as sex-for-pay,<sup>50</sup> whether sex workers or prostituted persons are lesbian women or gay men or their johns are, and whether they otherwise possess certain forms of white, upper-middle-class respectability (some do) or not. Those closer to the social margins who engage in survival sex to satisfy different sorts of survival needs—be they in prisons, sex-trafficking networks, or the remainder of the free world, and engaging in transactions on the street or other public places, or that start out there or on the internet or in clubs or bars—fare no better under *Lawrence*, and might in practice fare worse, because they are more vulnerable than others to, and possess fewer resources to defend themselves against, the crushing, hydraulic pressures of the criminal justice system.<sup>51</sup>

What all of these lesbians and gay men and their sexual practices have in common is *Lawrence*'s refusal to offer them safe harbor.<sup>52</sup> The nonprotection of these and other manifestations of lesbian and gay sexuality, as well as the sexual cultures that they have, at times, been a part of, is a reminder that *Lawrence*'s elimination of sodomy bans, without more, leaves many lesbians and gay men where they were before—as sexual outlaws—though newly cut off from their morally upstanding lesbian and gay sisters and brothers who are now entitled to constitutional protections for their chosen, and dignified, intimacies.<sup>53</sup> (Not that they cannot cover a private debauch.)

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48. Cf. p. 281.

49. The book raises the possibility that Eubanks may have been HIV-positive. See p. 85. Carpenter clarifies with emphasis that “[t]here is no independent confirmation that Eubanks was HIV-positive, had AIDS, or suffered from dementia.” P. 297 n.4. A review of the pages covered by the index entries for HIV and AIDS reveals no suggestion about Garner’s HIV status, and there is no relevant index entry for Garner that would supply additional information. Separately, for discussion and analysis of the often-complex relationship of HIV transmission to same-sex eroticism and sex, see Marc Spindelman, *Sexuality’s Law*, 24 COLUM. J. GENDER & L. 87 (forthcoming 2013), and Marc Spindelman, *Sexual Freedom’s Shadows*, 23 YALE J.L. & FEMINISM 179 (2011). No small aside, although consensual sexual practices like cruising, public sex, and serodiscordant sexual relations are not unique within same-sex sexual communities, their social meanings may still be—or still are—distinctive. The same either does or may hold true for sadomasochistic sex and sex-for-pay, though a full analysis of the point would need to be hammered out.

50. See p. 207.

51. Again, this is not to say that these acts are unique within same-sex sexual communities, only that their social meanings may be—or are—distinctive.

52. From a legal perspective, *Lawrence* may be seen to deliver on its promise of formal equality even in the context of what remains of sexual outlawry: leaving lesbians and gay men and their sexualities to be treated as outlawed on the same formal terms as their cross-sex counterparts.

53. These criminal regulations can ensnare them not for anything that they have done, but simply for their actual or perceived identities or simply for being. See, e.g., JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 45–92 (2011); cf. p. 109.

Given that *Lawrence* only decriminalizes some lesbians and gay men and some aspects of their sexual lives, and may do so differentially based partly on the other forms of social privilege that they have or lack, it should come as no surprise that the decision may deliver little concrete help to lesbians and gay men whose identities, like Tyrone Garner's, are significantly defined by their relatively unprivileged positions in, in addition to sexual orientation hierarchy, other social hierarchies like gender, class, and race.

An illustration of what this may practically mean begins with a feature of *Lawrence*'s architecture. By its formal terms, *Lawrence* leaves room for state regulation of sexually intimate relations that are nonconsensual, hence, on its logic, entail sex-based harm.<sup>54</sup> Along these lines, *Lawrence* has generally been supposed to approve the constitutional validity of existing non-consent-centered domestic violence regimes. Carpenter's book does not say so expressly, but its description of events surrounding the domestic-violence-protection-order case that Eubanks filed against Garner while *Lawrence* was pending—a case that was ultimately dropped, with Eubanks returning to Garner's side after a protection order against Garner was issued—flags questions about the veracity of the charging affidavit that Eubanks swore. Whether Eubanks's allegations, including a sexual assault charge, were true or not—no small matter—the question the book's telling raises is: What protection against the turning wheels of the legal system did Garner have on his own? Presumably, he would not have received the crack-erjack defense he received in *Lawrence* but for the happenstance of that “gossipy” conversation, combined with other coincidences and circumstances that led Lambda to take his case. His economic outlook alone, deeply marked by class disadvantage, makes it conceivable that his defense in the protection order proceedings might ordinarily have been only what the state might have provided him.<sup>55</sup>

But even with legal representation, Garner still faced multiple vulnerabilities—if not outright dangers—given his social identities and social location, when caught in the domestic violence system's grip. Officers at the scene of his sodomy arrest may have seen him as Carpenter suggests: as a “naggy bitch,” a limp-wristed, effeminate, passive, poor, black, gay man (p. 102). In contrast, the judge hearing the protection order case may have been primed by Eubanks's affidavit (and, if he saw it, by Garner's own rap sheet), along with the discriminatory social stereotypes involving sexual orientation, gender, class, and race that they triggered, to see Garner as a criminal perpetrator already: the male-dominant aggressor, his class and race marked by the crack he was said to have taken with drink, tormenting his poor, white, older gay lover with fists, hose, belt, box cutter, hot iron, as well as sexually assaulting him, presumably with his black penis. Social inequalities—specifically, of sexual orientation, gender, class, and race—may have

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54. The textual basis for this reading is set out in Spindelman, *Surviving Lawrence*, *supra* note 45, at 1648–50.

55. *Cf., e.g.,* STATE OF TEX. OFFICE OF COURT ADMIN., THE TEXAS FAMILY VIOLENCE BENCHBOOK 71 (2011).

coalesced in the domestic violence case in ways that, even if everything contained in Eubanks's affidavit was true, backed Garner against a wall of discriminatory cultural narratives that made it possible for him to be imagined guilty long before any legal allegations were proved. If so, the ordinary, legal presumption of innocence could have been inverted in his domestic violence case in ways that racism and other forms of discrimination can and otherwise do achieve.

Of course, Garner's actual vulnerabilities to the machinations of the legal system are all the more unjust—and dramatically spotlighted—if the suspicions that the book raises about Eubanks are right: that Eubanks made the false weapons report the night of the sodomy arrest as “retaliat[ion] against Lawrence and Garner,” “jealous because [he was convinced that] his lover . . . was cheating on him with Lawrence” (p. 77). If Carpenter has the probabilities right, there was no sex between Lawrence and Garner, hence no sexual cheating for Eubanks to be jealous about.

Either way, *Lawrence* is impervious to the various inequality-based vulnerabilities at stake in domestic violence proceedings like those brought against Garner. *Lawrence* is satisfied with the declaration that nonconsensual conduct can still be regulated, even prohibited, by the state. Whatever else this may do or mean, it does nothing to ensure that liberty like Garner's, at stake in domestic violence proceedings, is protected from state action that itself may be infected with, or shaped by, various kinds of social inequality, including sexual orientation, gender, class, and race.

This is not, to be very clear, an argument for eliminating domestic violence laws, only a frank recognition that they, and for that matter other criminal and civil law rules, remain porous to the operation of various forms of discrimination, including discrimination that simultaneously converges across multiple identity lines, including sexual orientation, gender, class, and race.<sup>56</sup> At the same time, it is to suggest that the system must be liberated from these forms of discrimination if, as *Lawrence* believes can happen, liberty is to be legally guaranteed. *Lawrence*, which does not address the law's porousness to existing social hierarchies even in the narrow context of criminal sodomy bans, scarcely takes the more ambitious step of addressing it in the context of other laws, like laws against domestic violence, that remain constitutionally legitimate in its wake. The good news may be that *Lawrence* leaves laws regulating intimate harms, like domestic violence rules, intact. The bad news is that it likewise leaves them open to discrimination in ways that can scale up and out to fit the remainder of the criminal law, and civil law, too, including in ways that will impact the lives of lesbian and gay victims of discrimination, many of whom live lives defined by multiple forms of inequality.

And it is not only state action that intersects with and is driven by the multiple forms of inequality that define many lesbians' and gay men's lives that is or ought to be of concern. No less problematic than discriminatory state action are those instances in which background social hierarchies work

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56. *Accord* p. 107.



to keep the state's machinery from protecting those disadvantaged by social inequality from the harms that it can, and does, produce. This idea may be easily understood, particularly if one thinks about it in the context of inequality of race. Social inequalities can be, and are, problematic and do their work without any action by the state. Indeed, social inequalities can affirmatively produce state inaction in different sorts of ways. But while the mechanics of these operations can sometimes be brutally obvious, other times, as in *Lawrence*, they can be quite subtle, a challenge to apprehend.

To see these dynamics at work in *Lawrence*, it is useful to recall the Court's embrace of a neotraditional moral argument that same-sex sexual intimacy, just like its heterosexual counterpart, is good for individual and communitarian reasons, hence entitled to constitutional protection. To ensure that these intimacies get the freedom they constitutionally deserve, *Lawrence* constructs around them certain legal protections—both substantive and procedural—requiring the state to presume that sexual intimacy is consensual, hence harmless, if it happens, hence should be left alone unless and until nonconsent, hence harm, is legally shown. This makes it sound like *Lawrence* securely protects victims of sexual abuse from the private harms they suffer. And that one can and should be confident that state action against private harms is firmly on the scene.

On closer inspection, however, the truth in many instances may be something else again. *Lawrence*'s legal rule may formally allow prosecutions for nonconsensual sexual activity as individual harm. But without more, it leaves entirely untouched the various ways in which, in the social world, multiple, intersecting forms of social inequality target individuals as possible objects of sexual violence and abuse precisely because of their disadvantaged, hence diminished, social status. This diminished social status can not only ground its own erotic appeal, but do so while making any sex-based injuries that result seem, when not affirmatively wanted, minimal or nonexistent, or anyway tendentious, if not flat out incredible. The permission that *Lawrence* gives the state to criminalize sexual harms when the state proves nonconsent neither addresses nor remedies these inequalities. Nor does *Lawrence* stop them from impacting the legal system's operation by undermining or practically negating the formal protections for victims of sex abuse that it actively imagines they will receive. The impact of all this is that *Lawrence* holds out what for many will prove to be an empty promise of effective legal recourse for the sexual injuries they suffer, a new "tolerated residuum" of sex abuse.<sup>57</sup>

A more granular sense of what is at stake here comes by considering some of the challenges someone in Garner's situation might encounter if sexually injured and attempting to advance a legal claim of harm. Gay men's claims of sexual injury are increasingly known to confront social and legal obstacles, being, as gay men regularly are, complexly situated in relation to norms of sexual orientation and gender. These norms can make gay

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57. See Duncan Kennedy, *Sexual Abuse, Sexy Dressing, and the Eroticization of Domination*, in *SEXY DRESSING, ETC.* 126, 137 (1993).

men, as men, seem sexually invulnerable, hence unharmable and unharmed, particularly at the hands of other gay men, who can themselves be imagined to be too effeminate to want to perpetrate sexual violence, rather than, as all gay men are stereotypically thought to be, desirous of sex abuse.

For someone in shoes like Garner's, socially, hence legally, salient inequalities of class and race could easily complicate the picture, though it is not clear in advance whether they might improve the baseline situation or make it worse. How would authorities, including police, prosecutors, judges, jurors, not to mention social workers, parole officers, or other system players, or other private actors, including friends or acquaintances inside the multiple communities within which someone like Garner might move, perceive him if he came forward claiming sexual abuse? Given currently widespread assumptions about the sexually oriented and gendered dimensions and pathways of sexual violence—it is something that straight men do to women—someone like Garner might be aided if seen as Carpenter suggests he was seen at the scene of his sodomy arrest: feminine, passive, meek, bottom-ish. But that is only a “might.” It assumes the law would help a gay gender nonconformist, a feminine homosexual, or more precisely, a black, feminine homosexual, who is already so far from the norms of straight, white masculinity that it might be hard to perceive any harm—like the loss of manhood, autonomy, or dignity through sexual violation—for the legal system to repair. It is also worth asking: What would it mean—what would the legal system be understood to be producing—if it repaired a loss like that?

In different directions, someone in Garner's position might be further disadvantaged if viewed as he appeared in Eubanks's protection order affidavit: masculine, aggressive, violent, weapon wielding, drug crazed, top-ish, not just any out-of-control gay man, but engaging racist and class-based stereotypes with their deeper and broader resonances, making him into “a raving, vicious bull, running at large upon the highways, seeking whom he should devour; . . . [who himself] should be penned up where he would have no more such opportunities to commit such abominable and detestable crimes” (pp. 16–17). Of course, the granting of a protection order, even if the case involving it was dropped, given a rap sheet like Garner's, which included prior charges of partner assault, marijuana possession, aggravated assault of a peace officer, and drunk driving, might—as in the domestic violence case—set someone like Garner up to be seen as guilty unless somehow clearly shown otherwise. Guilt that is socially constructed like this, related in deep and intersecting ways to sexual orientation, gender, class, and race inequalities, could well make a complaint for sexual injury by someone like Garner seem outlandish, at least as an injury that the law should redress. If so, the legal system might leave him—notwithstanding any law on the books prohibiting same-sex sexual harms—with no other option but self-help, imagined sufficient in a situation like his, given what might be imagined as a capacity and talent for inflicting violence on others. All of which might eventuate an otherwise imagined conclusion: that if sex involving him happened, he, by definition, did not stop it, which, had he

wanted to, he could have. Therefore, he must have wanted it. Therefore, no injury ever took place.<sup>58</sup> *Lawrence* leaves this mode of thinking undisplaced.

This does not mean *Lawrence* is of no help at all to victims of same-sex sex abuse. It may in fact offer some victims some assistance, however indirectly, by normalizing homosexuality the way it does, thus easing the burden for some lesbians and gay men, among others, to complain about sex-based harms. That said, this normalization benefit might not extend equally across the social board. The more intimate the context of the abuse, the harder it may be to overcome *Lawrence*'s paean to intimacy, an effect that may practically normalize intimacies unequally along lines of gender, class, and race with those possessing more gender, class, and race privilege enjoying it more. At the same time, *Lawrence*'s constitutional modification of legal standards of proof involving same-sex sexual harm (alterations driven by the decision's embrace of a neotraditional moral norm of intimacy) seems to move in the direction of making it easier, even obligatory, for the state, in the name of securing constitutional liberty for intimacy, to treat some actual sexual harms—which the state cannot prove after *Lawrence*, and might not have needed to prove before it—as legal nonharms. This brackets, for now, how *Lawrence*'s identification of sexuality- and relationship-based harms as individual harms misses the ways in which victims of private sex abuse can be and often are injured not simply as individuals, but as members of socially subordinated groups, forms of subordination that the abuse being suffered reflects and reinforces.<sup>59</sup>

Taken together, these various observations show some of the complex ways that *Lawrence*, notwithstanding its liberation of some forms of same-sex sexual intimacy, leaves the lives of lesbians and gay men to be complexly regulated by various hierarchies of inequality, sometimes through processes of the state being commandeered by forces of social inequality, and sometimes by those same forces operating effectively to negate the orderly function of the state's rules.

For some, this might be enough to establish that *Lawrence*, both on its own and as a victory for the lesbian-and-gay-civil-rights program, has more of a mixed record than would ordinarily be gleaned from the main chord struck by Carpenter's book. But the record, it turns out, is still more variegated than that.

One way that social hierarchies, like the hierarchies of sexual orientation, gender, class, and race, manifest themselves is through deprivations of a range of basic goods that are thought useful, if not also necessary, to the development and exercise of the attributes of liberty and autonomy, and that also function as signs of acknowledgment of an entitlement of

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58. Thoughts along these general lines emerged during oral arguments in *Lawrence*. See p. 228. For further discussion, see Spindelman, *Surviving Lawrence*, *supra* note 45, at 1643–48.

59. An argument along these lines is in Spindelman, *Surviving Lawrence*, *supra* note 45, at 1633–67.

persons to equal concern and respect.<sup>60</sup> The portrait of Garner in Carpenter's book, which helps ground the argument that his sodomy arrest and Lawrence's were driven by illicit motivations, also reveals a range of basic goods that he apparently lacked: education or skilled-jobs training that landed him a steady, decent job; quality (and regular) healthcare (including dental care), mainly still a benefit of employment; a stable home, sometimes a benefit of employment, too; as well as mobility in the form of private transportation in a city like Houston where driving is freedom, public transportation being "skeletal" (p. 44). The book shows how a number of these realities of Garner's life exerted a powerful influence on the opportunities afforded to him in it, including those, like the financial opportunities *Lawrence* might have provided, that he could—and could not—readily seize.<sup>61</sup> Sadly, these same realities seem to have affected him in sickness and death.<sup>62</sup>

All this can be, and within certain models of individual responsibility might be, figured as Garner's own failure, one he continually repeated by not lifting himself out of his circumstances of disadvantage, showing—at least while he was alive—a lack of desire or aptitude to achieve, hence making his deprivation his chosen lot in life, desert.

A different perspective on this situation understands it to bear an important relationship to the social hierarchies that otherwise also held Garner and his life opportunities as strings in their hands. Seen this way, his circumstances and the circumstances of others like him are not simply remediable through more, better, or smarter exertions of individual self-help or a better hand up offered on a purely individual basis. Rather, if they are to be systematically addressed, it should be through a deeply redistributive and broad-based political program that comprehends how existing social hierarchies of inequality shape lives of and in disadvantage, while limiting access to that range of important, basic goods that can, in turn, shrink life's options and its available meanings. The remedy for these problems, it is supposed, is individual and collective action—self- and other help—channeled into action challenging existing social hierarchies and the disadvantages they produce, and working toward their elimination to ensure that the goods they cause to be maldistributed become more equally available.

Needless to say by now, a comprehensive redistributive political project like this is utterly foreign to *Lawrence*, with its conservative moralism and willingness to follow, but not lead, the nation that propels it. But as with Garner's own life circumstances, it is important not to miss the bigger picture and larger forces at work. While *Lawrence's* conservatism is in some sense uniquely its own, it also importantly reflects a much deeper strain of conservatism that pervasively defines the Supreme Court's constitutional politics, including (maybe particularly) those instances in which notions of liberty, autonomy, and equality under the Fourteenth Amendment are con-

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60. See Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 697–98 (1990).

61. See p. 44.

62. See pp. 279–80.

cerned. This constitutional conservatism regularly takes the form of a negative constitutionalism that regards the Court's constitutional decisions as properly serving as a check or veto on governmental action resulting from ordinary politics. Except in the most unusual and highly truncated circumstances, it does not entail decisions announcing affirmative demands or obligations on the state. Thus, if one sees the needs, both the individual- and group-based needs, involved in a case like *Lawrence* from a perspective like Garner's, Supreme Court action is (virtually) always guaranteed to come up short. No matter what the advocates of lesbian and gay rights argued, the Court would not have delivered a decision in *Lawrence* that offers or even gestures toward a constitutional right to a range of basic social goods that hierarchies of social inequality keep individuals from getting or getting fair access to. Likewise, no matter what the advocates of lesbian and gay rights argued, the *Lawrence* Court would not have delivered a decision affirming a right to liberty or autonomy that includes freedom from social hierarchies of sexual orientation, gender, class, and race.

The treatment *Lawrence* receives in Carpenter's book may make it seem as though the Court's opinion in the case, even if it itself does not offer any radically redistributive outcome, might not block it in the political realm. After all, with respect to the lesbian and gay politics of civil rights, *Lawrence* does not deliver everything on its agenda, whether a right to marry or to military service, or the expansion of existing civil rights laws to include nondiscrimination on the basis of sexual orientation. Without delivering these items, *Lawrence*, as seen in Carpenter's book, does not block them, but leaves open the possibility for them to be politically achieved. More, *Lawrence* is seen sympathetically to line up with the logic of nondiscrimination on sexual identity grounds. That being the case, it might likewise be believed that, with respect to a more ambitious politics of redistribution, the bottom line is no different. *Lawrence* may not give, but it doesn't take anything away either.

That is certainly one possibility. But another that is becoming increasingly clear over time is that *Lawrence*, far from remaining neutral as to an aggressive politics of redistributive reform, actually may be opposed to it in some basic, but widely unnoticed, ways.

To see why, it may be helpful to notice that *Lawrence's* convergence with a politics of lesbian and gay civil rights may be more wish fulfillment than solid fact. *Lawrence's* logic may clearly seem applicable to governmental discrimination against lesbians and gay men, as in a right to marry or to military service, but it need not apply more (or much more) broadly, if it applies to that.

Stated more directly, *Lawrence's* civil rights logic may in some respects be more conservative than the mainstream lesbian-and-gay-civil-rights program that, in Carpenter's book, is seen to have produced it. Properly understood, *Lawrence's* moral and institutional conservatism may be a reflection of deeper forces of negative constitutionalism that carry with them a deep skepticism about the project of governance, including lawmaking itself, broadly assuming liberty, autonomy, and equality are what individuals

have—and have as individuals, regardless of their membership in groups—before the government acts and takes them away. If so, *Lawrence*'s declaration of an equation between same-sex and cross-sex intimacies may be less aimed at the elimination of heterosexual supremacy than an announcement of the end of laws and legal rules that draw distinctions along sexual orientation lines. Consistent with this view, it is possible that legal rules against sexual orientation discrimination could be allowed to make their way into positive law, like antidiscrimination law, more than they already have. But the novelty of the new floor of sexual orientation neutrality in law that *Lawrence* announces may come along with a harder-to-see equality ceiling, the effects of which for lesbians and gay men and other minorities have not yet been fully appreciated.

In isolation, a ceiling of sexual orientation neutrality—or what might be thought of, following Robert Chang and the late Jerome Culp, as a rule of “sexuality-blindness”<sup>63</sup>—might well be worth the price of establishing as a new baseline a floor of sexual orientation nondiscrimination. But before any final calculation is made, the effects of that ceiling—on lesbians, gay men, and other minorities—should be recognized and assessed. For while *Lawrence* is busy producing one set of reactions in relation to sexual orientation—delight about a new constitutional baseline that seems very pro-lesbian and pro-gay—it may actually, at the same time, be feeding into and strengthening legal norms that in other contexts—like race, gender, and class—appear to have less felicitous effects.

Comparisons between *Lawrence* and *Brown v. Board of Education*,<sup>64</sup> as well as between *Lawrence* and *Loving v. Virginia*,<sup>65</sup> are now well known, widely accepted, and no longer rejected out of hand.<sup>66</sup> In a similar vein, though not so commonly considered, are the connections between *Lawrence* and other race-equality rulings like the Supreme Court's affirmative action decisions in *Grutter v. Bollinger*<sup>67</sup> and *Gratz v. Bollinger*,<sup>68</sup> which may be replicated and extended when revisited in *Fisher v. University of Texas at Austin*.<sup>69</sup>

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63. See Chang & Culp, *supra* note 17, at 235–36. Chang and Culp see this rule of sexuality blindness operating in *Romer v. Evans*, which opens with the first Justice Harlan's admonition in *Plessy v. Ferguson* “that the Constitution ‘neither knows nor tolerates classes among its citizens.’” *Romer v. Evans*, 517 U.S. 620 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

64. 347 U.S. 483 (1954).

65. 388 U.S. 1 (1967).

66. For comparisons to *Brown*, see pp. 211, 259, 264; Spindelman, *Surviving Lawrence*, *supra* note 45, at 1615–16 n.4. For comparisons to *Loving*, see Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 MICH. L. REV. 1447 (2004). For discussion of the “*Loving* analogy,” see Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359 (2001).

67. 539 U.S. 306 (2003).

68. 539 U.S. 244 (2003).

69. *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012) (granting certiorari).

Interestingly, Carpenter's book issues a reminder that only a few days before *Lawrence* was decided, *Grutter*<sup>70</sup> and *Gratz*,<sup>71</sup> cases involving admissions policies at the University of Michigan, were handed down (pp. 253–54). The book points to these decisions largely as temporal coincidences, suggesting that they, or at least Justice Kennedy's opinions in them, "augured little for *Lawrence* because Kennedy had long sided with conservatives in cases regarding racial issues" (p. 254). Dutifully, the book notes that the cases substantively split, one upholding Michigan Law School's affirmative action plan, the other striking down an undergraduate admissions policy on constitutional grounds. Despite these results, however, uniting both decisions is an underlying logic that state-based affirmative action conflicts with constitutional equality norms because it expressly considers race, hence violates a principle of strict racial neutrality, or colorblindness, as it is often called.<sup>72</sup> This principle, poised to be deepened and expanded if Justice Kennedy's opinions embracing it rule the day in *Fisher*, is a race-based analogue of the largely overlooked ceiling that may come with *Lawrence*'s floor. Registered succinctly, the thought is: Constitutional colorblindness is a principle that may be supported and lent credibility, even authority, by *Lawrence* and its sexuality blindness norm.

Connected this way, *Lawrence* may deliver lesbians and gay men like Garner some sexual-intimacy rights while making it harder for them and others to overcome social conditions of race inequality through educational advancement, remembering what affirmative action means for people of color, women and men, poor and not, regardless of their gender identity, and no matter whether they are lesbian, gay, bisexual, or straight. Affirmative action programs, after all, are no more singularly about race than *Lawrence* is singularly about sexual identity. This being so, it should be asked: Could the end of race-based affirmative action be the end of gender-based admissions considerations? Single-sex, women-only education? Are sexual-orientation-conscious admissions decisions far behind?

These questions, with their possible answers, point to deeper questions of principle: How far might constitutional colorblindness go? As in *Lawrence* itself, so long as laws are racially neutral on their face, the constitutional command of colorblindness is satisfied, no matter how laws impact race-defined constituencies or how they are discriminatorily enforced, if they are.<sup>73</sup> If colorblindness is truly the new norm—if, in Chief Justice Roberts's words, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"<sup>74</sup>—aren't existing civil

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70. *Grutter*, 539 U.S. 306.

71. *Gratz*, 539 U.S. 244.

72. This holds true even in the case upholding Michigan Law School's affirmative action plan. See *Grutter*, 539 U.S. at 341–43.

73. *But see* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Compare *id.*, with *Washington v. Davis*, 426 U.S. 229 (1976).

74. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

rights protections that are written expressly in racial terms in order to get society beyond them in the colorblind Constitution's crosshairs? In their applications in individual cases, don't they require the state to take account of race in order to get beyond it? Political realities may make the use of a constitutional colorblindness principle to strike at the heart of existing civil rights protections seem legally implausible.<sup>75</sup> But consistent with a strict logic of colorblindness, particularly when that logic combines with constitutional skepticism about governmental action—logic with which *Lawrence* may itself be consistent, and which *Lawrence* may weave that much more deeply into the fabric of constitutional law—can the possibility be entirely dismissed?<sup>76</sup> It has scarcely been that long since, in *United States v. Morrison*,<sup>77</sup> gender-based civil rights took a hit that, in the process, weakened the doctrinal foundations of existing civil rights legislation enacted under either the Commerce Clause or the enforcement provision of the Fourteenth Amendment.<sup>78</sup>

In not unrelated directions, to understand *Lawrence* as enacting a deep status-quo bias that maintains an active skepticism about governmental action because of the possibility it will infringe on individual rights paves the way for an appreciation of how *Lawrence* resonates with the recent decision on the constitutionality of the Patient Protection and Affordable Care Act,<sup>79</sup> a federal program that, on a fundamental level, notwithstanding its corporatist twist, aims for broad-based, class-welfare redistribution of health care as a public good. In that decision, especially the joint dissent, which Justice Kennedy joined, there are unmistakable echoes of *Lawrence*, including its view that the Constitution presumes that liberty and freedom exist as of right before the government acts to take them away.<sup>80</sup> To be sure, *Lawrence* is not the cause of these sounds—sole or otherwise. But once noticed, they nevertheless expose *Lawrence*'s underlying constitutional conservatism in a way that clarifies that the constitutional version of civil rights that lesbian-and-gay-rights advocates were bargaining for in the case may be, as the Court embraced it, less open to programs of redistribution that are more ambitious than the lesbian-and-gay-civil-rights politics themselves are. To the extent that lesbian-and-gay-civil-rights politics stand with affirmative action or the Affordable Care Act, or both, maybe not even that.

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75. *But see* *Shelby Cnty. v. Holder*, 133 S. Ct. 594 (2012); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 201–06 (2009) (noting that racial protections requiring federal preclearance of any change to state election procedures in § 5 of the Voting Rights Act may no longer be constitutional as “[t]hings have changed in the South”).

76. Not that it is not a longshot. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 526 (2003).

77. 529 U.S. 598 (2000).

78. Compare *id.* at 612–13, 615–19, with *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252–53, 255–57 (1964), and *Katzenbach v. McClung*, 379 U.S. 294, 299–301 (1964). *But see* *United States v. Lopez*, 514 U.S. 549, 558, 573 (1995).

79. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

80. *Id.* at 2643 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting); *see also id.* at 2587, 2588, 2591 (majority opinion).



Consistent with this last observation, if somewhat impressionistically, *Lawrence*'s aggressive form of rational-basis review—which formally refuses to declare homosexuality a suspect classification—seems to have contributed to an expanding, general warrant for close judicial inspection of ordinary social and economic legislation in a range of cases. The Affordable Care Act decision—and not only the joint dissent Justice Kennedy signed—may be an illustration. To repeat, *Lawrence* is in no way the sole or a primary cause of the aggrandizement of judicial power, not even close to it. Much more modestly, the point is that *Lawrence* is not wholly innocent of this dynamic either. More, it is to recognize that, as a decision that has been widely trumpeted (including in Carpenter's book) as a case involving a great civil rights victory, it has played a part in helping to normalize and validate a longer line of cases before and after it gathering and deploying judicial power. In these cases, the extraordinary deference to representative government and its law products in the area of ordinary social and economic reform, negotiated around the Great Depression significantly in the interest of creating room for progressive class-welfare legislation, is and has been increasingly coming under pressure, if it is not slowly being undone.<sup>81</sup> An opinion like the one Justice Kennedy signed in the Affordable Care Act case and, to the extent that it squares with it, the majority opinion in that case, as well, is not only significant for what it does, but also as a sign of what else may come under the gun of judicial-supremacist judicial review.

Stepping back from these details to draw various strands together, it should now be clearer how and why *Lawrence*, which has been seen as doing and meaning so much for lesbians and gay men, and also to have been an unequivocal victory for the lesbian and gay politics of civil rights, could practically have meant so little to and in Tyrone Garner's life beyond the formal invalidation of his sodomy conviction. *Lawrence* is a decision that, by its terms, only addresses sexual orientation discrimination, and its means of addressing even that are limited. It does not see or respond to the multiple forms of inequality that many lesbians and gay men live and face. It does not see, much less address, the broad and deep forms of structural inequality, whether on individual or intersecting grounds of sexual orientation, gender, class, or race. It does not see or apprehend, much less address, that with these forms of structural inequality often comes the maldistribution of important social goods needed to possess and exercise liberty and autonomy, and which are also signs of equal concern and respect delivered. And, rather

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81. A decision by the Supreme Court recognizing that sexual orientation discrimination triggers heightened scrutiny, see *Windsor v. United States*, 699 F.3d 169, 181–85 (2d Cir. 2012), cert. granted sub nom. *United States v. Windsor*, 133 S. Ct. 786 (2012) (No. 12-307), and the Obama Administration has maintained that it does, see Letter from Eric H. Holder, Jr., Attorney Gen., Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>, might help in some respects to alleviate these pressures, though what *Lawrence* has already done, it has already done. A closer analysis of the move may reveal problems with heightened scrutiny for sexual orientation discrimination, notwithstanding the view that it would be a singular victory for lesbian and gay civil rights.

than remaining neutral with respect to efforts through politics and law to respond to various existing social hierarchies and to promote a more egalitarian distribution of social goods, *Lawrence* may stand in the way in ways that disadvantage lesbians and gay men, particularly but not only those who also live other social inequalities at the same time, as well as members of other socially subordinated groups.

To offer these assessments, putting these additional costs of the Supreme Court's decision in *Lawrence v. Texas* on the table, will undoubtedly seem to some, perhaps many, like *Lawrence* is being damned. A far cry, certainly, from the principal chord Carpenter's book strikes about the case, so upbeat, so positive, which makes for such a wonderful read because, within it, *Lawrence* is basically such a happy tale. The value of this story—like the value of *Lawrence*, as reflected in this book—is not just as a reassurance for those who already see or who are easily persuaded to see *Lawrence* as a great triumph in the march for civil rights. It is also that, in showing how much more complex *Lawrence* is than the “pancaked” version of it found in the *United States Reports* (p. xii), the book renders a bigger, better, and more granular and accurate picture of the decision. From this picture emerges a counterpoint, including a portrait of one of the men central to the case, Tyrone Garner, that points to a larger perspective on the decision, including features and implications of it—what it means, in particular, for lesbians and gay men whose lives are, like Garner's was, marked by a range of social inequalities, and what it means for others whose lives are also lived in deeply unequal terms—that have been largely invisible and unexplored until now. To recognize and explore that perspective, to bear witness to what *Lawrence* may mean in its fuller light—its benefits, particularly seen from the perspective of a lesbian and gay politics of civil rights, and its costs, particularly seen from the perspective of those for whom multiple, intersecting social inequalities and disadvantages are the realities of life—is not to make a case for a single, simple perspective on *Lawrence*, but the reverse: to recognize, as this book does, the many stories of *Lawrence* that can and should be told. Recognizing what Carpenter's book achieves, along with the efforts of others that it seeks to record, the call is for greater insight into a decision that has widely been glorified as a singular victory for civil rights. About that, remembering Tyrone Garner, as the book urges, it asks: What does this symbol really stand for and do? And for whom?