Dale Carpenter’s *Flagrant Conduct* analyzes *Lawrence v. Texas* and discusses how the Supreme Court made its decision to overturn *Bowers v. Hardwick* which held that sexual privacy was not protected by the Constitution. The epigraph of the novel states, “You don’t have any right to be here.” According to the footnote, they are the words spoken by Lawrence when the police walked into his bedroom on September 17, 1998. The epigraph sets the tone for the rest of the novel as the author dives right into the period of time which occurred before the arrests, outlining the history of anti-sodomy laws in the United States and then specifically in Texas. This novel uses the history of the law to set the scene for the *Lawrence v. Texas* case and draws on the constitutional challenge to the state’s sodomy laws in the Justice of the Peace court, Harris County Criminal Court, and the Fourteenth Court of Appeals. It finally illustrates the case as it enters the Supreme Court when Lawrence was granted his request for certiorari, including the reconsideration of the holding in *Bowers v. Hardwick*.

The background and history of the anti-sodomy laws and their enforcement in Texas and the United States set the tone for how the case is analyzed in this novel. The novel starts out by
noting that there was a 400 year history of anti-sodomy law precedent that existed prior to John Lawrence’s arrest in Texas. Sodomy was considered a crime as well as a mortal sin against God. The English had a history of punishing individuals who were caught performing sodomy, and this trend continued as they began to set up the first colonies. The first English settlement in Jamestown established martial law in 1610 that stated, “No man shall commit the horrible, detestable sins of Sodomie upon pain of death.” In the nineteenth and twentieth centuries, every state in the United States had anti-sodomy laws, describing them as “crimes against nature.” Homosexuals were also persecuted by their individual states, and law enforcement “used both direct and indirect methods to shut down gay bars.” These police raids and other forms of harassment continued into the 1990s.

Texas’s anti-sodomy laws were developed and enforced in essentially the same way as the rest of the states. The laws were written to prevent sodomy from taking place at any time, yet similar to the rest of the country, the anti-sodomy laws were rarely enforced in the home. Not much is known about the criminal code of the Republic of Texas that was in force from 1836 to 1845 as it pertains to the anti-sodomy laws. The author reflects that it was likely punishable as a crime against nature, however Texas was struggling to remain an independent nation and was probably not overly concerned with enforcing anti-sodomy laws at this time. Texas joined the United States in 1845, and in 1879, it created an anti-sodomy law which was enforced upon homosexual as well as heterosexual activity. In 1943, Texas legislature revised the state sodomy law which made oral sex a crime and applied it against homosexuals and heterosexuals alike. The case of Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970) made a revision to Texas’s sex laws, and declared that the state’s sodomy law as “unconstitutional as applied to married couples.” As the gay rights movement began to progress, Texas created a more rigid
standard for sexual conduct as applicable to homosexuals. Its new anti-sodomy law prohibited deviate sexual intercourse which it defined as “any contact between any part of the genitals of one person and the mouth or anus of another person” and under a separate provision titled “Homosexual Conduct” it made these acts criminal only if they were performed “with another individual of the same sex.” Ibid., § 21.01; see also Ibid., § 21.06(a). Gay rights advocates made both state and federal constitutional challenges to this law to no avail. No publically reported court decision involving the enforcement of the law against consensual sex in a private space existed in the history of Texas sodomy law. Most of the sodomy prosecutions that occurred prior to Lawrence involved sex in public or sex when a minor was involved. Nevertheless, little is known about the cases that were prosecuted, due to the fact that defendants were willing to plead guilty and pay any fine that was bestowed upon them in order to avoid the shame and humiliation that they would face from the public if they fought back against the courts.

In September 1998, the arrests that frame the entire case for Lawrence v. Texas occurred. Tyron Garner and Robert Eubanks were two gay men and were planning on renting an apparent together. John Lawrence was a friend of theirs who offered to give them furniture for their new apartment. The men spent the day moving furniture and Eubanks and Garner planned on renting a truck the next day to move any that was left over. At the end of the day the three men went out for dinner and drinks, and afterwards, they returned to Lawrence’s apartment. Eubanks began to drink heavily, Lawrence had one or two more drinks, and Garner abstained from drinking anymore. Lawrence finally took the bottle of vodka that Eubanks was drinking out of away from him. Eubanks then walked outside to a public telephone and called the Harris County Sheriff’s Office. According to the dispatcher, Eubanks declared that inside the apartment was “a black male going crazy with a gun.” The police came and patrolman Joe Quinn shouted “Sherriff’s
Neither Lawrence nor Garner reacted to Officer Quinn’s shout. The deputies began to investigate the apartment and Officer Quinn noticed that the back bedroom had not been cleared. Officer Lilly entered the room and reported that the men were having sex but could not differentiate whether it was anal or oral. Officer Quinn reported that the men were having anal sex. Lawrence became very angry and demanded that the officers leave. Officer Quinn decided to charge the men for violating the Homosexual Conduct law and took them to jail for it.

The case was heard in a Texas small claims court the Harris County Criminal Court, and the Fourteenth Court of Appeals, before it finally made its way to the Supreme Court. Lawrence petitioned the Supreme Court for certiorari, with his attorneys framing their briefs to the Supreme Court around the United States’ progression “beyond the crude and cruel antigay posturing represented by the Texas sodomy law.” In September 2002, the Supreme Court requested that Texas respond to Lawrence’s certiorari petition. The District Attorney’s office responded to each of Lawrence’s arguments. The D.A.’s brief opposing certiorari stated that homosexual anal sodomy had not achieved the status of fundamental right since the Bowers decision, the sodomy law did not discriminate on the basis of sexual orientation because it equally punished homosexual conduct by heterosexuals or bisexuals, and even if the law did discriminate against homosexuals, “it was not constitutionally problematic.” Finally in December 2002, the Supreme Court granted Lawrence’s request for certiorari. Briefs were submitted to the Court, and the Court also heard from each side’s oral advocates. On the day that the Supreme Court issued its decision, Justice Kennedy stated that the Bowers court stated that the federal Constitution did not confer a fundamental right to sexual activity between members of the same sex. Justice Kennedy concluded, “That statement, in our view, discloses Bowers’ failure to
appreciate the extent of the liberty at stake.” Regarding the Supreme Court’s opinion, the author concludes, “[Gay sex] was constitutionally protected because it was normatively right, just as it was for heterosexual couples who might decide to marry. It was part of the good life. This was the moral code adopted in Lawrence.” Justice Scalia gave his dissent, declaring that the Court had “taken sides in the culture war between traditional morality and the latest moral fads and fancies.” He also declared that the majority opinion “dismantled” the constitutional framework which made a distinction between heterosexual and homosexual unions.

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The first chapter depicts a very chronological and detached history of anti-sodomy laws in the United States and Texas. While it is historical and detailed, it is not boring and it draws the reader in as it moves towards modern times and makes the law more humanized as the author adds in anecdotes of men who were prosecuted for sodomy but never fought back. Further along in the chapter, Carpenter describes Houston’s history as a city and its homophobic attitudes that pervaded into the 1990s. He strays away from legal jargon and the constitutional framework that is essential to understanding the case in order for the reader to fully capture the lifestyle of secrecy that homosexual men and women had to uphold in order to escape harassment while living in Houston, Texas.

¹ See http://perma.cc/08CynEkJjCF. University of Minnesota Law, Dale Carpenter: Earl R. Larson Professor of Civil Rights and Civil Liberties Law, (last accessed Nov. 19, 2013),
Carpenter’s description of the arrest is extremely hard to follow and confusing, and it is clear that was his intention when he wrote the novel. Each person that was present at John Lawrence’s house on that September 1998 night had differing depictions of what exactly transpired in the moments before and after the police arrived. The arresting officers had different versions of what kind of “deviate conduct” was taking place, and Lawrence alleged that he and Garner were not having any sort of intercourse at all. Carpenter conducted interviews with all parties involved that night and incorporated portions of the interviews into this novel. He uses the interviews as a way to go back in time and piece together ambiguities. For example, if an individual were to quickly skim the facts of the case, they would most likely conclude that Officer Quinn overstepped his boundaries and acted like somewhat of a brute the night he decided to arrest Lawrence, Garner, and Eubanks. However, in his interview with Carpenter, Officer Quinn explained his decision to arrest them, stating, “I think the totality of the circumstances, where I think there’s a guy with a gun and I almost have to shoot, that it warranted me giving them a citation. It was a lover’s triangle that could have gotten somebody hurt.” Adding this piece of the interview into the chain of events humanizes not only Lawrence and Garner, but it also allows the reader to identify with the arresting officer.

The chapters following the arrest essentially bring Carpenter’s thesis to light. Most people in the United States, especially law students, have either read or studied about Lawrence v. Texas at some point in their lives. Carpenter’s incentive in this novel is to look beyond the constitutional implications of this case and to see the faces and emotions hiding behind the motions for cert and legal memorandums. He gives detailed background information about all parties involved in the case, even the defendants. Throughout the novel Carpenter seems to allow every party in the story to fully explain their position at the time without a biased opinion of
what that position is. It is obvious that Carpenter can’t help himself from portraying Justice Scalia as the villain in this case. Carpenter describes him as “dismissive, angry, and sarcastic,” and rather than simply accepting Scalia’s dissent for what it was – a dissent, Carpenter describes it as an intention to “point out how ridiculous the Court’s opinion was.” He made an insinuation that Scalia does not respect the opinions of his colleagues, which does not seem like a fair assessment to make based on Scalia’s disagreement with the majority’s overturning of Bowers.

This novel gives detailed insight and background into a case that has framed America’s history as well as its constitutional interpretation of the equal protection and due process clauses. It is perfect for anyone who wants more insight into the Lawrence v. Texas case in terms of who the major players were and how the case came into being in the first place. Anyone who studies constitutional law and is bound to read and study about Lawrence should be mandated to read this book because it shows that beyond the statutes, attorneys, oral arguments, and briefs, there are human lives that are made or broken because of these important cases.