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How Can We Best Respond To *Lawrence v. Texas*?

By CHARLES E. RICE

In *Lawrence v. Texas*, the Supreme Court held unconstitutional a Texas law that made it a crime if a person "engages in deviate sexual intercourse," as defined in the statute, "with another individual of the same sex."

The two male defendants were convicted for performing the prohibited acts in the apartment of one of them. The police arrested them upon entering the apartment "in response to a reported weapons disturbance." Justice Anthony Kennedy, writing for five justices, held that the conviction violated the Due Process Clause of the 14th Amendment which provides that "No State shall. . . deprive any person of life, liberty, or property, without due process of law." Justice Sandra Day O'Connor concurred in the 6-3 decision on the ground that the convictions deprived the defendants of the "equal protection of the laws." The court overruled its 1986 decision in *Bowers v. Hardwick* in which a 5-4 majority had upheld Georgia's prohibition of consensual sodomy.

It may be helpful here to offer some conclusions about *Lawrence* and the appropriate response to it.

1) *Does opposition to the* Lawrence *ruling require defense of the Texas statute as such?* No. Justice Clarence Thomas, in his dissent, called it an "uncommonly silly" law. Not exactly so. The law served a symbolic purpose in the context of its enactment, despite the rarity with which such laws were enforced. As Justice Scalia noted, during the past half-century, 134 reported cases in the United States involved prosecutions for consensual, adult, homosexual sodomy. Those prosecutions indicate, as Scalia concluded, that the right to engage in consensual sodomy has not been recognized as a "fundamental right." Since it is not a "fundamental right," laws restricting it do not have to be justified by a "compelling state interest" under "strict scrutiny" by the courts. All that is required to justify such a law is the more relaxed standard of a "rational basis" for the law. The court in *Lawrence* held that there was no such "rational basis" for the Texas law.

As St. Thomas Aquinas concluded, the purpose of the human law is to promote the common good. Human law should "lead men to virtue, not suddenly but gradually." Otherwise, the law would be unenforceable, the law would be "despised," and "greater evils" would result. Therefore, "human laws do not forbid all vices." The human law "allows and leaves unpunished many things that are punished by divine Providence." (1)

A potentially intrusive prohibition such as that involved in *Lawrence* may not be useful, and may be harmful, to the promotion of the common good. The *Lawrence* ruling is a bad decision but that does not mean that the Texas statute was a prudent law.

2) *Does* Lawrence *indicate that the Supreme Court will rule unconstitutional a state or federal restriction of marriage to heterosexual unions?* Yes, almost certainly.

A suit challenging a state's restriction of marriage to a union between a man and a woman could arise in several ways. Article IV, sec. 1, of the Constitution requires a state to give "full Faith and Credit . . . to the public Acts, Records, and judicial Proceedings of every other State." If one state legalized same-sex marriage, the question would arise whether another state could refuse to recognize such a union as a marriage because it would conflict with the policy of that state. Or the marriage issue could arise in other ways.

Justice Scalia accurately summarized the impact of *Lawrence* on state regulation of sexual activity and of marriage: "Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation. . . . State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the court makes no effort to cabin the scope of its decision to exclude them from its holding."

"At the end of its opinion," Scalia asserts, "after having laid waste the foundations of our rational-basis jurisprudence — the court says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the court's opinion, which notes the constitutional protections afforded to 'personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education,' and then declares that '[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.' Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned" (emphasis in Scalia's opinion).

3) *But hasn't Congress sufficiently protected marriage in the Defense of Marriage Act (DOMA)?* No. DOMA provides: "In determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." This definition applies only to federal statutes and activities. It has no effect on the meaning of marriage in state law. DOMA also attempts to excuse the states from giving full faith and credit to a same-sex marriage recognized in another state. As a statute, DOMA is vulnerable to a Supreme Court holding that it is unconstitutional just as the court might hold a similar state law unconstitutional.

4) *Should Congress use its power under Article III, Sec. 2 of the Constitution to make exceptions to the appellate jurisdiction of the Supreme Court so as to prevent the court from hearing appeals involving the definition of marriage?* That would not suffice in this case. Congress has no power to restrict the original jurisdiction of the Supreme Court. "In all Cases . . . in which a State shall be a Party, the Supreme Court shall have original Jurisdiction." Art. III, Sec. 2. In original jurisdiction the Supreme Court acts, in effect, as a trial court. Cases involving a state's definition of marriage could readily arise under the original jurisdiction of the court, which Congress cannot restrict.

5) *So, should we amend the Constitution to protect the integrity of marriage?* Yes.

6) *So therefore should we support the Federal Marriage Amendment (FMA) proposed by the Alliance for Marriage?* No. The FMA is a well-intended but inadequate response to the problem. It has been introduced in Congress by Cong. Marilyn Musgrave (R., Colo.) (H.J. Res. 56). It provides:

"Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."

The Constitution wisely left the definition and regulation of marriage to the decision of the states. Until now the Supreme Court has not disturbed the original arrangement in which the states decide what constitutes a marriage. *Lawrence* indicates, however, that the court is taking the matter out of the hands of the states so as to prevent them from limiting marriage to a man-woman union. The FMA seeks to prevent the courts from claiming that they are required by the Constitution or any law to recognize a same-sex union as a marriage. *Lawrence*, however, is not merely a technical misconstruction of federal-state relations or of the relation among the branches of government in a state. Rather, as Justice Scalia accurately said, *Lawrence* "is the product of a court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."

The cultural and legal war waged by the homosexual movement does not seek merely to transfer the power to define marriage from the states to the Supreme Court. It seeks to mandate the content of that definition for every unit of government, state and federal. Such a total assault requires a total response. It requires a constitutional amendment. But the FMA is insufficiently clear.

Judge Robert Bork clearly explained the purpose and effect of the FMA:

"The first sentence means that no legislature may confer the name of marriage on same-sex unions and no court may recognize a same-sex marriage contracted in another country. . . . So far as legislatures are concerned, the primary thrust of the sentence's prohibition is symbolic, reserving the name of marriage to its traditional meaning. But symbolism is crucial in cultural struggles. The second sentence expresses the main thrust of the amendment. It recognizes that liberal activist courts are the real problem. If courts are prevented from ordering same-sex marriage or its equivalent, the question of arrangements less than marriage is left where it should be, to the determination of the people through the democratic process. To try to prevent legislatures from enacting permission for civil unions by constitutional amendment would be to reach too far. It would give opponents the opening to say we do not trust the people when, in fact, we are trying to prevent courts from thwarting the will of the people." (2)

As Dr. Robert George explained the FMA, "If a benefit is not made to depend on marriage, it can be applied more generally. What the amendment prevents is the automatic, across-the-board qualification of same-sex partners for whatever marital benefits happen to exist." (3) Courts would be restricted so that they could not be required to confer "marital status or the legal incidents thereof" on any union other than marriage, defined in the first sentence of the amendment as the "union of a man and a woman."

The language of the amendment, however, is unclear. Presumably, under the first sentence of the amendment, the legislature, whether federal or state, could confer what could be interpreted as "legal incidents" of marriage upon "unmarried couples or groups," without defining such couples or groups as married. If the legislature did so, the courts would presumably be required to enforce that law and confer those "legal incidents" on such couples or groups despite the language of the second sentence.

The campaign to adopt the FMA would be confusing because it would implicitly identify the problem as judicial abuse rather than cultural collapse. It would imply that somehow same-sex marriage is acceptable if voted, in effect, by a legislature under a different label but not if voted by a court under any label.

7) *What sort of constitutional amendment would be appropriate?* Let's put the issue in context. From the acceptance by the American people of the contraceptive ethic, a direct causal connection runs to the legalization of same-sex marriage. The contraceptive ethic, based on the Enlightenment premises of secularism, relativism, and individualism, separates sex from procreation and makes man, of both sexes, the arbiter of whether and when life shall begin — and end. It has brought us abortion, euthanasia, rampant pornography and promiscuity, divorce, the glorification of sodomy and sodomites, and other manifestations of what can accurately be described as an anti-life culture. Of all these related issues, same-sex marriage is decisive. The campaign to legalize same-sex marriage, however, offers an opportunity for a successful counterattack against the entire anti-life culture.

A constitutional amendment defining marriage is a last resort. It is sufficiently clear, however, that the Supreme Court will mandate recognition of same-sex marriage and that resort to an amendment is imperative.

The effort to legalize same-sex marriage is part of a total, implacable assault on the family and the common good. That assault cannot be repulsed, and victory cannot be achieved, through an academically interesting but intrinsically secondary debate over judicial activism, federalism, and other partial issues. Instead, the Supreme Court is leaving the American people no alternative but to affirm in its basic law the true nature of marriage and the family. The issues at stake were recently spelled out by the teaching Church:

"By putting homosexual unions on a legal plane analogous to that of marriage and the family, the state acts arbitrarily and in contradiction with its duties. . . . The Church teaches that respect for homosexual persons cannot lead in any way to approval of homosexual behavior or to legal recognition of homosexual unions. The common good requires that laws recognize, promote, and protect marriage as the basis of the family, the primary unit of society. Legal recognition of homosexual unions or placing them on the same level as marriage would mean not only the approval of deviant behavior, with the consequence of making it a model in present-day society, but would also obscure basic values which belong to the common inheritance of humanity. The Church cannot fail to defend these values, for the good of men and women and for the good of society itself." (4)

The Congregation for the Doctrine of the Faith issued, with papal approval, this document opposing legal recognition of homosexual unions on June 3, 2003, the feast of "St. Charles Lwanga and companions, martyrs." St. Charles and his 21 Catholic companions were pages and other functionaries in the palace of the local king, Kabaka Mwanga of Buganda, who was a pedophile and pederast. They were killed by the king because they resisted his imposition of homosexual acts on the pages and other attendants. They were amputated, beaten, beheaded, and most were burned alive as a group on June 3, 1886. Thirteen Anglicans were similarly martyred at about the same time. (5)

The selection of the feast of St. Charles Lwanga for the release of this Vatican document was appropriate. The Church has consistently affirmed that the inclination toward homosexual acts is not itself sinful but is "objectively disordered" and that persons with homosexual inclinations are entitled to respect and should not be subjected to unjust discrimination. But the Church also teaches that homosexual acts are intrinsically wrong. (6) St. Charles Lwanga and his companions were martyred because they resisted homosexual acts. The Catechism notes that "Sacred Scripture . . . presents homosexual acts as acts of grave depravity." (7) The homosexual movement today demands the legitimization of such depravity in our law and culture. The example of St. Charles Lwanga and his companions affirms that there can be no compromise with such demands.

8) *What should a constitutional amendment provide?* The first thing to remember is that no amendment can be foolproof against evasion or distortion. The amendment should be an expression of basic principle. It should limit marriage and the legal incidents of marriage to unions between one man and one woman. It should bind all branches of the federal and state governments in all their activities. It could provide:

"Marriage in the United States shall consist only of the union of one man and one woman. Neither the United States nor any State shall recognize any relation other than between one man and one woman as a marriage or as entitled to any of the legal incidents of marriage. as such incidents are defined by law."

The term "legal incidents," as used in the FMA, was described by Dr. Robert George as "intended to convey the consequences 'either usually or naturally and inseparably' dependent upon marriage. The Supreme Court has called 'incidents of marriage' those 'government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimization of children born out of wedlock)' that follow upon marital status. Another example would be the marital privilege against being forced to testify against one's spouse." (8)

Realistically, of course, a legislature could avoid the strictures of this amendment by separating benefits and "incidents" from any requirement of marital status as a prerequisite for them in any case for anybody. Under this amendment, if a benefit, e.g., an inheritance right, is automatically triggered only by marriage, that benefit could not be extended to members of same-sex or other unions. Of course, if the state legislature were to cut a benefit loose from any attachment to marriage, neither this amendment nor the FMA would prevent the legislature from extending that benefit to other unions or individuals. Since the foundation of this nation the states have had unlimited power to define marriage and its incidents. Both this proposed amendment and the FMA would limit that power by preventing the juridical dilution of marriage by a law or a court decision formally equating other unions with marriage as to its definition or its legal incidents. But this amendment would clearly prevent the legislative enactment or imposition by courts of Vermont-style "civil unions" having legal incidents of marriage. The FMA would apparently not prevent the enactment of such Vermont-style laws by a legislature rather than by court decree. In this respect, adoption of the FMA would be useless and counterproductive.

A constitution is not a detailed code of law. An amendment here should merely establish the basic principle that not only marriage but also any legal incidents tied to marriage must be limited to a union between one man and one woman. Various formulations of such an amendment are possible. And no formulation will be perfect. But the amendment must be comprehensive and uncompromising. The campaign to adopt it would amount to a national referendum that could educate the American people on the nature and importance of marriage and the family as essential to the common good of any civilized society. The objective is the reconversion of the American people to respect for what the Declaration of Independence called the "Laws of Nature and of Nature's God."

A campaign for an uncompromising amendment to define marriage in accord with those laws will promote that reconversion.

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(Charles E. Rice is professor emeritus at Notre Dame Law School and visiting professor at Ave Maria School of Law.)

FOOTNOTES

1. *Summa Theologiae*, I. II, Q. 96, art. 1, 2.
2. Robert H. Bork, "Stop Courts From Imposing Gay Marriage," *The Wall Street Journal*, August 7, 2003, p. A14.
3. Robert P. George, "The 28th Amendment," *National Review*, July 23, 2001, 32, 34.
4. Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*, June 3, 2003, no. 8, 11.
5. Fr. Robert Muhiirwa, "Do You Know the Uganda Martyrs of Your Christian Faith?" *Today's Catholic*, June 6, 1993, p. 20.
6. Catechism, n. 2357.
7. Catechism, n. 2357.
8. Robert P. George, "The 28th Amendment," *National Review*, July 23, 2001, 32, 34.