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## ARTICLES

# AN “OTHER” CHRISTIAN PERSPECTIVE ON *LAWRENCE V. TEXAS*

VICTOR C. ROMERO<sup>†</sup>

### I. GAYS, GOD, AND CAESAR

The introduction to the seminal compendium, *Christian Perspectives on Legal Thought*,<sup>1</sup> asks the following question: “What does it mean in America today to say that Jesus, rather than Caesar, is Lord?”<sup>2</sup> Put slightly differently, if Caesar represents the power, glory, and influence of man and the secular world, how should people who claim to follow Jesus rather than Caesar conduct themselves in the public sphere? As a Christian and a teacher of constitutional law, I would like to apply that question to an analysis of the American public’s reaction to recent events, beginning with the Supreme Court’s 2003 decision in *Lawrence v. Texas*,<sup>3</sup> the case outlawing prohibitions against same-sex activity, and ending with the 2005 referenda that resulted in limiting the definition of marriage to a union between a man and woman in eighteen states.

This essay will explore whether this public reaction, fueled in large part by Christians, reflects placing Jesus rather than the world at the center of worship and concern. Although I can claim no expertise in Christian theology, I wonder whether a more faithful application of Jesus’s teachings on social justice would have led to a different interpretation, one that embraces

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<sup>1</sup> CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT xvii–xxii (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001).

<sup>2</sup> *Id.* at xx.

<sup>3</sup> 539 U.S. 558 (2003).

*Lawrence* and rejects States' attempts to narrowly define families in ways that mirror Levitical teaching.<sup>4</sup> In the spirit of inquiry, reconciliation, and friendly debate, I humbly offer these thoughts to fellow Christians who may disagree, concerned that the prevailing narrative on these events reflects but one view of Christianity.<sup>5</sup>

## II. IN THE BEGINNING WERE *HARDWICK* AND *EVANS*<sup>6</sup>

Before the Supreme Court's pronouncement in *Lawrence*, American constitutional law on the rights of gays and lesbians was unsettled. On the one hand, *Bowers v. Hardwick*<sup>7</sup> stood for the proposition that there was no substantive due process right to engage in same-sex sodomy and that therefore, the state of Georgia was allowed to criminalize it.<sup>8</sup> On the other, *Romer v. Evans*<sup>9</sup> held that the state of Colorado could not amend its constitution to disallow gays and lesbians from petitioning authorities to enact antidiscrimination laws.<sup>10</sup> Because *Hardwick* was adjudicated on due process grounds while *Evans* was an equal protection case, the Court's view on future gay rights cases was decidedly murky, but perhaps what the justices anticipated.<sup>11</sup> As William Eskridge explains, "[t]his lack of

<sup>4</sup> See, e.g., *Leviticus* 18:22, 20:13 (New American) (discussing the sinfulness of same-sex activity under Old Testament law).

<sup>5</sup> I am reminded of the example of civil rights activist Bob Moses who, knowing he could not change hearts himself, understood nonetheless that he could be a catalyst for change: "Moses tried to be a catalyst—without being the determining force—of the other person's decision to act. He understood that as an outsider he could never badger the reluctant participant." CHARLES MARSH, *THE BELOVED COMMUNITY: HOW FAITH SHAPES SOCIAL JUSTICE, FROM THE CIVIL RIGHTS MOVEMENT TO TODAY* 104 (2005). It is in this spirit that I offer these thoughts, ever mindful that I may be wrong.

<sup>6</sup> Although these cases are more popularly called *Bowers* and *Romer*, respectively, I think it more appropriate to highlight the names of the gay petitioners whose rights were at issue.

<sup>7</sup> 478 U.S. 186 (1986).

<sup>8</sup> *Id.* at 189–91.

<sup>9</sup> 517 U.S. 620 (1996).

<sup>10</sup> *Id.* at 626–27.

<sup>11</sup> It is also worth noting that the reach of the proposed Amendment 2 in *Evans* extended beyond the sexual conduct discussed in *Hardwick* to encompass same-sex orientation. The amendment read:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation,

authoritative guidance is probably what the Supreme Court expected after *Evans*: . . . courts would struggle with issues of sexual orientation discrimination on a case-by-case basis, less constrained by Supreme Court precedent because of the *Hardwick* versus *Evans* choice now available."<sup>12</sup> Thus, in the interim between 1996, when *Evans* was decided, and 2003, when *Lawrence* was handed down, there was no clear answer to the issue of when government discrimination based on sexual orientation was constitutionally permissible. Although raising other thorny issues, the Court reconciled the apparent *Hardwick-Evans* conflict by overruling *Hardwick* in *Lawrence*, discussed more fully below.

### III. THE FLOOD: *LAWRENCE* AND THE BACKLASH

The facts of *Lawrence* are worth a brief mention here, if only because of the bizarre way in which the case came into being.<sup>13</sup> On one fall evening in 1998, John Lawrence and Tyron Garner were doing what millions of other couples do every day in America—they were having sex in their home. What happened next was less commonplace. Police broke into their apartment, interrupting their intimate activity. Unbeknownst to them, a neighbor had called the police to the Lawrence-Garner household, reporting a weapons violation. While the neighbor was later charged with filing a false report, Lawrence and Garner were arrested pursuant to a Texas statute that criminalized sex between members of the same gender as “deviate sexual intercourse.”<sup>14</sup> At the time of the arrest, Texas

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ordinance or policy whereby homosexual, lesbian or bisexual *orientation*, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

*Id.* at 624 (internal quotation marks omitted) (emphasis added).

<sup>12</sup> WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 172 (1999).

<sup>13</sup> For more on the murky facts of *Lawrence*, see generally Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464 (2004). The facts of *Hardwick* are similarly curious: Unbeknownst to *Hardwick*, a police officer was given permission to enter his home pursuant to what turned out to be a faulty arrest warrant. See JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 278–79 (2001).

<sup>14</sup> TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003), *invalidated by Lawrence v. Texas*, 539 U.S. 558 (2003).

was but one of a handful of states<sup>15</sup> that criminalized same-sex activity. After pleading guilty to the act, the couple challenged their convictions in the Texas state courts, claiming that the law violated their federal constitutional rights.<sup>16</sup> Perhaps not surprisingly, given the *Hardwick* precedent, the Texas courts upheld their convictions.<sup>17</sup>

In a 6-to-3 decision, the Supreme Court reversed. While Justice Kennedy penned the majority opinion and Justice O'Connor concurred in the judgment, the same six justices who struck down Colorado Amendment 2 in *Evans* voted in the plaintiffs' favor. The Kennedy majority explicitly chose to overrule *Hardwick*, noting that the Due Process Clause of the Fourteenth Amendment was broad enough to protect the consensual, private sexual activity of adults, whether the partners are of the same or opposite sex.<sup>18</sup> After painstakingly reviewing the history of anti-sodomy statutes generally (they did not discriminate against same-gender couples) and the Texas criminal law in particular (it was only recently enacted, apparently to target same-gender couples), Kennedy invoked the Court's decisions in *Planned Parenthood v. Casey*<sup>19</sup> and *Evans* as controlling precedents—*Planned Parenthood*, to emphasize the Due Process Clause's substantive protection of intimate, personal decisions, and *Evans* to highlight the Court's rejection of animus-based discrimination based on sexual orientation.<sup>20</sup> Notwithstanding Justice Scalia's invocation of *stare decisis*,<sup>21</sup> the Kennedy majority saw fit to overturn *Hardwick*.<sup>22</sup>

From a purely constitutional law perspective, *Lawrence* was a long time coming, and indeed, *Hardwick* was arguably

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<sup>15</sup> The other states which had similar laws at the time included Idaho, Louisiana, Mississippi, and South Carolina. *Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring).

<sup>16</sup> *Id.* at 563 (majority opinion).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 573–75.

<sup>19</sup> 505 U.S. 833 (1992).

<sup>20</sup> *Lawrence*, 539 U.S. at 573–75.

<sup>21</sup> *Id.* at 586–87 (Scalia, J., dissenting).

<sup>22</sup> Justice O'Connor's concurrence is worth noting, if only because she had joined the majority in *Hardwick* to uphold the Georgia statute, yet now voted to overturn the Texas one not on due process, but equal protection grounds. *Id.* at 579, 581–85 (O'Connor, J., concurring). Addressing Kennedy's concern that using the Equal Protection Clause might prompt the creation of neutral anti-sodomy laws, O'Connor believed that heterosexuals would not support such a movement. *Id.* at 584–85.

incorrectly decided in the first place because one of the justices in the original 5-to-4 majority later went public, acknowledging his error. In his memoir of Justice Lewis Powell, John Jeffries notes that the Justice struggled mightily with the issue of same-sex activity, afraid of going down the slippery slope of affording what he viewed to be extra-constitutional rights to gays and lesbians, yet uncomfortable with the idea of sending them to jail for private sexual activity.<sup>23</sup> Powell ended up siding with the majority, but a few months later, conceded that he had likely erred in *Hardwick*.<sup>24</sup> Given Powell's change of heart and the 6-to-3 vote in *Evans*, it is perhaps unsurprising that *Lawrence* overruled *Hardwick*, flatly ignoring the doctrine of stare decisis. Indeed, if, per the Court's 1965 ruling in *Griswold v. Connecticut*,<sup>25</sup> one is allowed to engage in consensual, private, non-procreative sex (including non-marital sex per *Eisenstadt v. Baird*<sup>26</sup>), is it much of a stretch to conclude that same-gender partners engaged in similar activity should not be subject to criminal prosecution? Put differently, if a broad reading of the Court's forty-odd-year-old decisions in *Griswold* and *Eisenstadt* could comfortably be extended to protect the privacy interests of same-gender partners, then arguably, the *Lawrence* decision is long past due. More importantly, our civic culture does not care about wasting scarce prosecutorial resources going after adult citizens having consensual sex in the privacy of their homes, our religious views regarding premarital and extramarital sex notwithstanding. In sum, one could easily view *Lawrence* as largely predictable, given both the development of our constitutional law and society's general indifference to policing private, consensual sexual activity between adults.

And yet, from the perspective of religious conservatives, the *Lawrence* decision was viewed as "an earthquake at the Supreme Court,"<sup>27</sup> as Esther Kaplan observes. Justice Scalia's dissent, wherein he warned that the majority's ruling would call into question "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication,

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<sup>23</sup> JOHN C. JEFFRIES JR., JUSTICE LEWIS F. POWELL, JR. 530 (2001).

<sup>24</sup> *Id.*

<sup>25</sup> 381 U.S. 479 (1965).

<sup>26</sup> 405 U.S. 438 (1972).

<sup>27</sup> ESTHER KAPLAN, WITH GOD ON THEIR SIDE: GEORGE W. BUSH AND THE CHRISTIAN RIGHT 155 (2004).

bestiality, and obscenity,”<sup>28</sup> was widely circulated among the religious right, who soon saw the case as less about the decriminalization of sexual conduct and more about the threat to the established social order. Kaplan reports that Christian groups that traditionally were very difficult to organize suddenly found an issue they could all embrace—protecting the institution of marriage from the assault of an activist court.<sup>29</sup> Some of the rhetoric was particularly strong. The group Concerned Women for America opined that, with *Lawrence*, the Court had dismantled “3,000 years of Judeo-Christian-based law,” and prominent radio evangelist James Dobson declared that the fight against gay marriage would be “our D-Day, or Gettysburg or Stalingrad.”<sup>30</sup> It was this framing of *Lawrence* as an attack by liberal, activist judges<sup>31</sup> on the Judeo-Christian tradition of marriage (rather than as the long-overdue decriminalization of same-sex sodomy) that helped convince voters in thirteen states in 2004 to amend their constitutions, limiting the definition of marriage to a union between a man and woman.<sup>32</sup>

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<sup>28</sup> *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

<sup>29</sup> KAPLAN, *supra* note 27, at 157.

<sup>30</sup> *Id.* at 156.

<sup>31</sup> At the state and local levels, Massachusetts began a mini-revolution of sorts around the same time as *Lawrence* by finding prohibitions against gay marriage unconstitutional under its own laws. See Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004) (holding that the proposed law creating separate civil unions for same-gender couples violated equal protection guarantees under the state constitution); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (finding state law limiting marriage to opposite-sex couples unconstitutional under Massachusetts equal protection guarantees). San Francisco, New Paltz, and a host of other cities soon followed suit. See *How Issue Evolved in State, Nation: Gay Marriage Ruling*, SEATTLE TIMES, Aug. 5, 2004, at A15. It may be that these events had more of an impact on the issue of gay marriage at the state level than *Lawrence*, especially vis-à-vis the thirteen states that decided to enact marriage amendments by the end of 2005, *infra* note 32, but because it was issued by the highest federal court in the land, *Lawrence* arguably was the catalyst that triggered a nationwide debate on the issue of gay marriage.

<sup>32</sup> See, e.g., *Group Drops Bid To Ban Same-Sex Marriage*, N.Y. TIMES, Dec. 29, 2005, at A24. Eleven of the thirteen passed these amendments in November 2004: Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Oregon, and Utah. See *Voters Pass All 11 Bans on Gay Marriage*, MSNBC.com, Nov. 3, 2004, <http://msnbc.msn.com/id/6383353/>. Missouri and Louisiana voters approved similar laws in August and September of 2004, respectively. See Monica Davey, *Missourians Back Amendment Barring Gay Marriage*, N.Y. TIMES, Aug. 4, 2004, at A13; *Gay-Marriage Ban Passes in Louisiana*, N.Y. TIMES, Sept. 19, 2004, § 1 at 24. For a detailed comparison of the racist backlash following *Brown v. Board of Education*, 347 U.S. 483 (1954), with the growing anti-gay rights backlash of recent years, see Carlos A. Ball, *The Backlash*

A primary (and well-known) argument raised by conservative Christians is that the Bible speaks against same-sex activity and reserves the sacrament of marriage to opposite-sex couples. In 1986, then-Cardinal Joseph Ratzinger (now Pope Benedict XVI) outlined the Catholic Church's opposition to same-sex relations, citing *Genesis* 3 (Adam and Eve, man and woman, created in the image of God) and 19:1-11 (denouncing the homosexuality of the Sodomites), *Leviticus* 18:22 and 20:13 (excluding from the Chosen People those who engage in homosexual acts), 1 *Corinthians* 6:9 (listing homosexuals as among those who shall not enter God's kingdom), *Romans* 1:18-32 (citing homosexual activity as an example of the blindness that has overcome humanity), and 1 *Timothy* 1, especially verse 10, which he notes, "explicitly names as sinners those who engage in homosexual acts."<sup>33</sup> Thus, to the extent that our laws reflect our Christian morality, criminalizing same-sex activity and prohibiting same-gender marriages are an attempt to conform our law to God's, so the argument goes. After all, the Decalogue's "Thou shalt not kill" finds its way into American state and federal law without controversy. Why then, through *Lawrence*, should unappointed federal judges be allowed to thwart the will of a God-fearing public (both within and without Texas) by, first, explicitly sanctioning same-sex relations prohibited by sacred texts and second, by implicitly condoning same-gender marriage?<sup>34</sup>

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*Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493 (2006).

<sup>33</sup> Cardinal Joseph Ratzinger, *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons*, in *HOMOSEXUALITY IN THE CHURCH: BOTH SIDES OF THE DEBATE* 39, 41 (Jeffrey S. Siker ed., 1994). At the time of his writing, Ratzinger was the Prefect of the Catholic Church's Congregation for the Doctrine of the Faith, which is responsible for stating the Church's official doctrine. See Biography of His Holiness Pope Benedict XVI, [http://www.vatican.va/holy\\_father/benedict\\_xvi/biography/documents/hf\\_ben-xvi\\_bio\\_20050419\\_short-biography\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/biography/documents/hf_ben-xvi_bio_20050419_short-biography_en.html) (last visited Jan. 11, 2006).

<sup>34</sup> Although the Kennedy and O'Connor opinions take pains to say that the issue before the *Lawrence* court was not same-gender marriage, there is strength to Scalia's claim that the majority's decision rests on a conception of morality different from that of the Texas legislature's and that, under the rational basis test, the Court may not substitute its judgment for that of the state's duly-elected legislators. Put differently, the law may be "uncommonly silly" as Justice Thomas noted in dissent, but, under his view, the proper legal recourse is to seek political, not judicial, redress. See *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)). As a matter of constitutional interpretation, I read the Court's "rational basis" cases

As I explain in the next section, I believe a strong argument can be made that the more persuasive reading of *Lawrence* from a Christian perspective is one that affirms both its explicit (same-sex relations may not be criminalized) and implicit (same-gender marriage promotes equality) messages.

#### IV. WHAT WOULD JESUS DO?: *LOVING LAWRENCE*

From a purely textual perspective, it is clear that at least some of the texts that Ratzinger cites cast a negative view on same-gender sexual relations. Noted theologian Walter Wink concedes that “[t]he Bible quite clearly takes a negative view of homosexual activity,” although he believes that, for most Christian churches, the Bible is not the final word.<sup>35</sup> He notes that, in reality, modern churches have selectively invoked the Bible’s edicts, choosing to follow some of its teachings (e.g., rejecting adultery), while ignoring others (e.g., permitting slavery).<sup>36</sup> In the realm of sexual activity, the Bible clearly forbids sexual intercourse during a woman’s period as well as many other non-procreative sex acts,<sup>37</sup> and yet, Wink argues, many modern Christians simply dismiss these passages as culturally-bound.<sup>38</sup> The challenge for each person, then, is to interpret the Bible in light of a principle that will resist the winds of change and culture.

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as allowing for greater judicial scrutiny—in Gerald Gunther’s analysis, rational basis with “bite”—where the evidence suggests irrational discrimination or animus. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–20 (1972). *Lawrence* and *Evans* reflect this understanding.

<sup>35</sup> See Walter Wink, *Homosexuality and the Bible*, <http://www.soulforce.org/article/homosexuality-bible-walter-wink> (last visited Jan. 11, 2006). This essay is particularly interesting because Wink challenges the interpretation that Ratzinger (and others) give to some of the Bible’s Old Testament passages. For instance, Wink views the attempted gang rape by the Sodomites in *Genesis* 19:1–29 as a case of “heterosexual males intent on humiliating strangers by treating them ‘like women,’ thus demasculinizing them.” *Id.* Ratzinger takes the story more literally, as condemning homosexual activity. See *supra* text accompanying note 33.

<sup>36</sup> Wink, *supra* note 35.

<sup>37</sup> Conservative columnist Andrew Sullivan explores the cultural understandings regarding non-procreative sexual activity in a recent article, noting that the roots against sodomy appeared in the Middle Age writings of monk Peter Damien, who argued that the beginning of sexual rebellion against God is “‘when someone spills semen outside the place specified for this.’” See Andrew Sullivan, *We Are All Sodomites Now*, [http://www.andrewsullivan.com/main\\_article.php?artnum=20030327](http://www.andrewsullivan.com/main_article.php?artnum=20030327) (last visited Jan. 11, 2006).

<sup>38</sup> Wink, *supra* note 35.

For Christians, the key principle should be the love and example of Jesus Christ. Jesus's "love ethic," as Wink calls it, does not exploit and does not dominate; instead, it is "responsible, mutual, caring, and loving."<sup>39</sup> A Christian code of sexual ethics, therefore, should not place opposite-sex relations above same-sex ones, if the sex act involves an expression of genuine love between two persons; indeed, the four gospels contain not a word about Jesus's views of same-sex relationships,<sup>40</sup> but many statements about how we are required to care for each other. In what some consider to be the most challenging of Jesus's parables, Christ separates the "sheep" from the "goats," lifting up his faithful servants for their commitment to social justice—feeding the hungry, clothing the naked, welcoming the stranger, and visiting the prisoner—while condemning to eternal fire those who have ignored the plight of the oppressed.<sup>41</sup>

Like Jesus's love ethic, *Lawrence* echoes the majority's commitment to societal outsiders. Justice Kennedy's majority opinion defines the substantive bounds of due process to set a baseline freedom that all enjoy—a freedom not to be incarcerated for private, consensual, sexual activity. Employing Equal Protection analysis, Justice O'Connor's concurrence reaches the same result, using language that parallels Christ's charge that we care for the least among us when she writes, "The Texas sodomy statute subjects homosexuals to 'a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with' the Equal Protection Clause."<sup>42</sup> To the extent that our Constitution can be interpreted to reflect Christ's commitment to social justice, *Lawrence* is entirely consistent with Christianity.

Two objections from the Christian right become readily apparent. First, critics might contend that Jesus's love ethic,

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<sup>39</sup> *Id.*

<sup>40</sup> See John J. McNeill, *Homosexuality: Challenging the Church To Grow, in HOMOSEXUALITY IN THE CHURCH: BOTH SIDES OF THE DEBATE*, *supra* note 33, at 56.

<sup>41</sup> See *Matthew* 25:31–46 (New American).

<sup>42</sup> *Lawrence v. Texas*, 539 U.S. 558, 584 (2003) (O'Connor, J., concurring) (omission in original) (citing *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring)). It is fitting that O'Connor thought to analogize the plight of the *Lawrence* plaintiffs to the noncitizens in *Plyler*, a case in which the Court found that undocumented children could not be denied the basic right to a free public primary and secondary education. See *Plyler*, 457 U.S. at 230.

while demanding that we love every *person*, would simultaneously require that we condemn their *sinful behavior*. And second, some might wonder whether the true danger implicit in the *Lawrence* decision is the threat to the traditional husband-and-wife conception of marriage embraced by the majority of Christians.

The first objection is a version of the old adage, "We must love the sinner, but hate the sin." To wit, Jesus's love ethic would require that we condemn the practice of same-gender sex while loving the gay or lesbian person. Same-sex activity should be condemned because it constitutes self-destructive behavior, like drug abuse or consensual polygamy, the argument goes. Thus, Christians are required to show their love to their gay and lesbian kin by gently reminding them of the sinfulness of their behaviors. Some Christians believe that the self-destructive nature of this act may be proven not just because most people (and not just Christians) find homosexual practices *immoral* even though support for gay civil rights has grown,<sup>43</sup> but also because current *scientific evidence*, although unwilling to label homosexuality a psychological disorder, does not support the view that its practices are normatively desirable. As Christian psychologists Stanton Jones and Mark Yarhouse argue, "[t]he removal of a behavioral pattern from a list of designated psychopathologies . . . bears no necessary logical relation to endorsement of that pattern as healthy, whole, or a normal variant."<sup>44</sup> While acknowledging that societal homophobia may partially explain the data, Jones and Yarhouse point to the high incidence of personal distress and maladaptiveness of gays and lesbians as evidence of the undesirable nature of such conduct.<sup>45</sup>

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<sup>43</sup> "[S]urveys of public opinion have continued to show for over two decades that almost 80 percent of the general public has continued to view all instances of homosexual behavior as immoral, even while support for equal civil rights for homosexuals has grown." Stanton L. Jones and Mark A. Yarhouse, *The Use, Misuse, and Abuse of Science in the Ecclesiastical Homosexuality Debates, in HOMOSEXUALITY, SCIENCE, AND THE "PLAIN SENSE" OF SCRIPTURE* 107 (David L. Balch ed., 2000).

<sup>44</sup> *Id.* at 84.

<sup>45</sup> *Id.* at 107–12. They conclude, "[t]he evidence cited above falls far short of a convincing case that homosexuality in itself constitutes a psychopathological condition. The evidence also suggests that one would be on shaky grounds in proclaiming that there is no evidence that homosexuality is anything other than a healthy, normal lifestyle variant." *Id.* at 112.

I agree with Stanton and Jones, but only to the extent that they describe a self-inflicted harm that grows out of sexual idolatry. Hence, I believe that Jesus would condemn self-indulgent sexual behavior that commodifies persons, but that he would also lift up sexual activity that expresses genuine love between two committed individuals. Put differently, a Christian love ethic embraces sexual love and not lust, regardless of the gender of the actors. From the *Song of Songs*, a celebration of sexual love between a husband and a wife,<sup>46</sup> to Paul's Letter to the *Romans*, in which he condemns lustful behavior,<sup>47</sup> the Bible embraces sexual expression within the bounds of an exclusive, loving relationship while rejecting promiscuous, addictive, idolatrous sex. Jesus warned, "You have heard that it was said, 'You shall not commit adultery.' But I say to you, everyone who looks at a woman with lust has already committed adultery with her in his heart."<sup>48</sup> But why presume that those engaged in same-sex activity are any more lustful than those engaged in opposite-sex activity? Society's indifference to legally condemning premarital and extramarital sex among heterosexuals belies this assumption. The ready availability of divorce in modern America also undercuts this moral claim. In short, a Christian sexual ethic should embrace sexual love<sup>49</sup> and reject lust,

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<sup>46</sup> *Song of Songs* 4:1–7, 5:10–16 (describing a man and a woman's unabashed excitement upon seeing the other's naked bodies).

<sup>47</sup> *Romans* 1:18–32. In his careful examination of the original Greek text of *Romans* 1:24–27, Lutheran professor David E. Fredrickson explains, "[I]t is not Paul's interest to condemn homosexuality but to highlight sexual passion . . . , which is uniform with respect to the gender of the desired object. Paul tells the story of humans who have been overwhelmed by passion. The capacity . . . for acquiring what they believe to be good has been inflamed, and so they are in a constant state of frustration, unable to be sated. Their error . . . was to exchange normal use for erotic love." David E. Fredrickson, *Natural and Unnatural Use in Romans 1:24-27: Paul and the Philosophic Critique of Eros, in* HOMOSEXUALITY, SCIENCE, AND THE "PLAIN SENSE" OF SCRIPTURE, *supra* note 43, at 215.

<sup>48</sup> *Matthew* 5:27–28.

<sup>49</sup> For a detailed and persuasive moral argument for gay marriage and adoption from a philosophical perspective, see generally CARLOS A. BALL, *THE MORALITY OF GAY RIGHTS* (2003). Although not grounded in Christian thought, the book embraces a moral liberalism that balances traditional liberalism's concern for individual autonomy against the feminist recognition that human beings live in community. Ball writes, "[r]ather than viewing others primarily as a threat to autonomy, moral liberalism sees autonomy as emanating largely from our relationships with and our dependencies on others." *Id.* at 76. This conception of moral liberalism shares much with the ideal of community and interdependence lived out by the early Christians in the New Testament book of Acts. See, e.g., *Acts* 2:44–45 ("All who believed were

whether between a man and a man, a woman and a woman, or between a man and a woman.

The second objection worries about the threat that *Lawrence* and the so-called “gay rights agenda” pose to the traditional conception of marriage. As a purely legal matter, both Kennedy and O’Connor are quick to limit their opinions to the narrow issue of whether same-sex activity may be criminalized; *Lawrence* says nothing about the legality of same-gender marriages. Put differently, the *Lawrence* majority made no statement either endorsing or opposing gay marriage; it simply stated that individuals may not be put into prison for engaging in sex with others of the same gender. To those quick either to dismiss this defense as legal sophistry or to be concerned about the broader implications of the majority’s logic as was Scalia, we must ask the question why the traditional definition is to be preferred beyond the fact that it is tradition.

From a Christian standpoint, perhaps the strongest argument to be made in favor of the traditional view is that the Bible and human experience appear to favor and encourage committed and loving opposite-gender relationships over equally committed and loving same-gender ones.<sup>50</sup> While it is true that Jesus never explicitly commented on same-gender relationships, he spoke favorably about opposite-gender marriages.<sup>51</sup> As theological ethicist Lisa Sowle Cahill contends, “[both biblical and nonbiblical] sources together point toward the privileging of a heterosexual model or ideal for human sexuality.”<sup>52</sup> Indeed, even theologians who believe that same-sex intercourse is not inherently sinful find no positive affirmations of such activity in

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together and had all things in common; they would sell their property and possessions and divide them among all according to each one’s need.”)

<sup>50</sup> One popular, although easily refutable, argument raised is that extending the right of marriage to gays will weaken family life. Aside from the fact that gay marriage would legitimize gay and lesbian families, and hence, strengthen families overall, one should consider instead the disease of “affluenza” or the ready availability of heterosexual divorce as equally important, although not equally condemned, causes of family and marital strife. See, e.g., JOHN DE GRAAF ET AL., AFFLUENZA: THE ALL-CONSUMING EPIDEMIC 66–67 (2001) (noting that Gross Domestic Product (GDP) has an inverse relationship with the social health index).

<sup>51</sup> See, e.g., *Matthew* 19:4–5 (quoting Jesus as saying, “Have you not read that from the beginning the Creator ‘made them male and female,’ and said, ‘For this reason a man will leave his father and mother and be joined to his wife, and the two shall become one flesh?’”).

<sup>52</sup> Lisa Sowle Cahill, *Homosexuality: A Case Study in Moral Argument*, in *HOMOSEXUALITY IN THE CHURCH: BOTH SIDES OF THE DEBATE*, *supra* note 33, at 72.

the Bible.<sup>53</sup> This evidence certainly would justify churches limiting the sacrament of marriage to opposite-gender couples. But because marriage has a legal meaning in addition to its ecclesiastical definition, it may be important to reconsider the implications of tying church marriages to civil ones. Specifically, our state and federal governments bestow upon married couples a myriad of pecuniary benefits (think of tax and inheritance implications, for instance)<sup>54</sup> that seek to encourage heterosexual couples to commit to loving, monogamous relationships consistent with biblical tradition.<sup>55</sup> While few, if any, likely marry to take advantage of these benefits, the effect of denying them to loving, committed, monogamous gay and lesbian couples constitutes official government discrimination. Evangelical leader Tony Campolo, himself opposed to altering the traditional definition of marriage, proposes that perhaps the solution should be to sever the union between church and state on the issue of marriage.<sup>56</sup> As Jim Wallis explains the argument, "Clergy should no longer pronounce marriage blessings 'by the authority vested in me by the State of Pennsylvania.'" <sup>57</sup> Campolo's compromise would not only further the constitutional norm of equal protection under the law, but it would also promote the

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<sup>53</sup> See, e.g., Mark McClain-Taylor, *But Isn't "It" a Sin?*, in *HOMOSEXUALITY AND CHRISTIAN COMMUNITY* 76 (Choon-Leong Seow ed., 1996) ("The ambiguity here is not simply that the Bible says both a yes and a no to homosexual practice. There is no clear yes, that I know of, and any such claims that scripture affirms what we know today as homosexual orientation would be anachronistic and strained at best.").

<sup>54</sup> In the first major case involving gay rights during the 1990s, the Hawaiian Supreme Court in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), outlined fourteen benefits that married couples were afforded under state law that were limited to opposite-gender couples only. *Id.* at 59. Federal benefits from marriage are even more numerous; one advocacy group estimates the total of federal and state marriage benefits to number over a thousand. See Lambda Legal, *Why Marriage Equality Matters*, available at <http://www.lambdalegal.org/cgi-bin/iowa/news/fact.html?record=873> (last visited on June 21, 2006) ("Not only does [marriage] bring the stability of a committed relationship, but also more than 1,138 automatic federal and additional state protections, benefits and responsibilities designed to support and protect family life.").

<sup>55</sup> As of this writing, only Massachusetts permits both same- and opposite-gender marriages. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961, 969 (Mass. 2003) (holding that the State's equal protection requirement mandates that marriage be afforded to same-sex couples).

<sup>56</sup> See JIM WALLIS, *GOD'S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN'T GET IT* 334 (2005).

<sup>57</sup> *Id.*

autonomy of churches and churchgoers to exercise their religious rights as they see fit.<sup>58</sup> Most important, from a Christian perspective, the proposal creates a public space for celebrating committed relationships between individuals, regardless of their sexual orientation.

Still, with all respect to Campolo, I would go a step further and argue that a more practical solution would be to simply allow for gay marriage, just as our law and culture has now allowed for interracial marriage. In *Loving v. Virginia*,<sup>59</sup> the Supreme Court ruled unconstitutional the state of Virginia's anti-miscegenation law.<sup>60</sup> To me, *Loving* is precedent for both a constitutional and Christian expansion of the definition of marriage. Writing for a unanimous Court, Chief Justice Warren saw Virginia's desire to prevent the Lovings from marrying for what it was—an attempt to “maintain White Supremacy.”<sup>61</sup> One has to wonder whether the eighteen states that amended their constitutions to limit the definition of marriage are consciously preserving “traditional sexual mores”<sup>62</sup> or unconsciously perpetuating “heterosexual supremacy,” or perhaps both.<sup>63</sup> Were it possible to divorce, at

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<sup>58</sup> *Id.* I leave open for now the thorny issue of allowing discrimination in churches that wield de facto societal power and serve as an “old boy network” of sorts. Should this arise, a strong argument could be made that state intervention would be necessary to dismantle that network, not unlike requiring private social clubs to allow women into membership. See, e.g., *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). In any event, in a pluralistic society such as ours, we should generally encourage the separation of churches from the existing power structure, both formal and informal, not only because such a practice would be consistent with the First Amendment's Establishment Clause, but also because, from a Christian perspective, we should be wary of “the [yeast] of the Pharisees”—self-righteous teachings and practices that perpetuate power differentials rather than serve the downtrodden. See *Matthew* 16:6 (New American) (“Jesus said to them, ‘Look out, and beware of the [yeast] of the Pharisees and Sadducees.’”).

<sup>59</sup> 388 U.S. 1 (1967).

<sup>60</sup> *Id.* at 12.

<sup>61</sup> *Id.* at 11.

<sup>62</sup> *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

<sup>63</sup> By drawing the analogy to the “white supremacy” argument in *Loving*, I do not assume ill will on the part of Christians whose faith leads them to conclude that civil marriages should be limited to opposite-sex unions. But neither do I assume that all white folks who were in favor of segregation during the 1950s and 1960s acted in bad faith. Instead, I subscribe to the view that, this side of the Fall, we are all too often blind to how even our best intentions lead to the oppression of others. Hence, just as we (and our government) can be guilty of unconsciously contributing to racism, we can also be guilty of unconsciously perpetuating homophobia. See generally Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning*

this late date, the ecclesiastic and governmental conceptions of marriage from each other, then Campolo's proposal might make sense. In this day and age, however, not many will be willing to give up marriage as an institution of the state, and, therefore, the only pragmatic recourse for Christians sympathetic to Jesus's call for social justice would be to press for broader definitions of marriage at both the state and federal levels and perhaps a well-defined strategy to mount a constitutional attack against more limited definitions, using *Evans* and *Lawrence* as grist for the mill and the NAACP's strategy in the school desegregation cases as a model.

I am cautiously optimistic that this alternate view of *Lawrence* and its place in the greater movement for social justice will resonate among more and more Christians. The Christian-inspired civil rights movement for racial and socioeconomic justice<sup>64</sup> continues to stand as a shining example of the power of the gospel to transform lives for the better. While we all know that race and poverty discrimination continue to plague our world, we must not despair, but instead patiently and lovingly stay the course for social justice. The spirit blows where it will, and hearts and minds will be won one person at a time. Indeed, if the same Earl Warren, who, as Governor of California, strongly supported the racially-motivated internment of Japanese-American citizens during World War II,<sup>65</sup> could later become the author of such cornerstones of our civil rights jurisprudence as *Loving* and *Brown v. Board of Education*,<sup>66</sup> then there is hope for us all.

To return to the beginning, what does it mean to follow Jesus and not Caesar in modern America? It means not to express fear or anger at the *Lawrence* decision, but instead to embrace it as a call to social justice for sexual minorities that simultaneously

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with *Unconscious Racism*, 39 STAN. L. REV. 317, 355 (1987) (arguing that "unconscious racism . . . underlies much of the racially disproportionate impact of governmental policy").

<sup>64</sup> Two recent books have highlighted the religious groundings of the movement. See generally DAVID L. CHAPPELL, *A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW* (2004); MARSH, *supra* note 5.

<sup>65</sup> See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 664-65 (Vintage Books 2004) (1976) (describing Warren's initial advocacy in favor of the internment and his eventual regret).

<sup>66</sup> 347 U.S. 483 (1954) (holding unconstitutional the doctrine of "separate but equal" as applied to public education).

creates space for a renewed conversation about a Christian sexual ethic that lifts up committed, loving relationships between people.