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# COMMENT

## SYMPTOMS FOR SCALIA AND TEXAS:

### GAY RIGHTS AND AMERICAN NATIONALISM

DANIEL GORDON\*

#### INTRODUCTION: MATTI BUNZL'S FAITH IN AMERICAN CONSTITUTIONALISM AND *LAWRENCE*

Matti Bunzl in *Symptoms of Modernity: Jews and Queers in Late-Twentieth Century Vienna* expressed great faith in the multicultural fairness of American Society.<sup>1</sup> Bunzl recognized the threat of Christian Conservatives in the United States to gay and lesbian civil rights and civil liberties,<sup>2</sup> and he evidenced some skepticism of American multiculturalism.<sup>3</sup> However, overall Bunzl remained optimistic about the future of civil rights for gays and lesbians in the United States noting "it was in the United States that a postmodern sensibility of minority politics was pioneered."<sup>4</sup> Bunzl's basic optimism concerning the fuller integration of gay and lesbian rights in the United States

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\* Professor of Law, St. Thomas University School of Law; B.A., Harverford College; J.D. Boston College. I would like to dedicate this article to my wife Robin L. Gordon on our thirtieth wedding anniversary.

<sup>1</sup> MATTI BUNZL, *SYMPTOMS OF MODERNITY: JEWS AND QUEERS IN LATE-TWENTIETH CENTURY VIENNA* (2004).

<sup>2</sup> *Id.* at 223.

<sup>3</sup> *Id.* at 219.

<sup>4</sup> *Id.* at 218.

legal system derived from his view of the United States Constitution creating a cultural basis for equality and fairness for all in the United States including gays and lesbians.<sup>5</sup> Bunzl noted, "In the United States, a basic pluralism is enshrined in the country's constitutional principles."<sup>6</sup> For Bunzl, the United States Constitution served as the reason why most American lesbian and gay activists remained convinced that the gay and lesbian civil rights movement would succeed in the United States.<sup>7</sup>

Bunzl's optimism about the United States was partially realized in *Lawrence v. Texas*, (hereinafter, *Lawrence*) in which the United States Supreme Court struck down a Texas statute that criminalized gay sodomy.<sup>8</sup> Certainly, *Lawrence* evidenced the protective powers of the United States Constitution for gays and lesbians in the United States. However, *Lawrence* also reflected negative aspects of American culture and constitutionalism in the contexts of gays and lesbians. Not only did the majority and concurring opinions in *Lawrence* hint that federal constitutional protection will not be extended to the right of gays and lesbians to marry,<sup>9</sup> but Justice Scalia's dissent<sup>10</sup> mirrored the deep negativism directed toward gays and lesbians by the Texas Court of Appeals in *Lawrence*.<sup>11</sup> *Lawrence* equally supported Bunzl's nagging doubts about whether American multiculturalism will include gays and lesbians.<sup>12</sup> After all, *Lawrence* ended a criminal ban on gay and lesbian sexuality in a major American state more than thirty years after the end of such a ban in one of Europe's most socially regressive states, Austria.<sup>13</sup>

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<sup>5</sup> *Id.* at 218-19.

<sup>6</sup> *Id.* at 219.

<sup>7</sup> *Id.* at 223.

<sup>8</sup> 539 U.S. 558, 578 (2003).

<sup>9</sup> The majority noted, "It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* The concurrence noted, "Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. Unlike the moral disapproval of same sex relations . . . other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Id.* at 585 (O'Connor, J., concurring).

<sup>10</sup> *Id.* at 586-605 (Scalia, J., dissenting).

<sup>11</sup> *Lawrence v. State*, 41 S.W. 3d 349 (Tex App. 2001) *rev'd*, 539 U.S. 558 (2003).

<sup>12</sup> BUNZL, *supra* note 1, at 219.

<sup>13</sup> *Id.* at 64 (in 1971 Austria's parliament abolished the statute criminalizing same-sex sexuality); 539 U.S. at 578.

This article utilizes Bunzl's work along with the work of urban religion sociologists to examine the symbolic meaning of Justice Scalia's and the Texas Appellate Court's negativism toward gays and lesbians.<sup>14</sup> For Justice Scalia and the Texas legal system, gays and lesbians served as symptoms of modernity and modern urban growth.<sup>15</sup> First, this article reviews *Lawrence* in its state and federal contexts.<sup>16</sup> Then, the article develops Bunzl's basic theory about gays and lesbians serving as "abject symptoms of the modern nation-state."<sup>17</sup> Next, the article reviews the patrimonial aspects of urban growth.<sup>18</sup> Then, the article analyzes Justice Scalia's dissent and the Texas Court of Appeal's opinion in *Lawrence* in the light of Bunzl's anthropological construct and religious sociology's urban growth theory.<sup>19</sup> Finally, the article closes looking towards a brighter future where through globalization gays and lesbians may find themselves as members and not abject others in American society.<sup>20</sup>

#### I. *LAWRENCE*: STATE CASE, SUPREME COURT MAJORITY OPINION, CONCURRENCE, AND SCALIA'S DISSENT

Harris County Police Department officers entered a Houston, Texas area apartment in response to a reported weapons disturbance.<sup>21</sup> The officers observed John Lawrence engaging in a sexual act with another man,<sup>22</sup> which constituted in Texas a Class C misdemeanor involving deviate sexual intercourse.<sup>23</sup> The police arrested both men, charging them with engaging in deviate sexual intercourse with another individual of the same sex.<sup>24</sup> The Texas statute provided that deviate sexual intercourse with another individual of the same sex occurred where there exists "any contact between any part of the genitals of

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<sup>14</sup> See *infra* notes 99-163 and accompanying text.

<sup>15</sup> See *infra* notes 164-209 and accompanying text.

<sup>16</sup> See *infra* notes 22-98 and accompanying text.

<sup>17</sup> See *infra* notes 99-141 and accompanying text.

<sup>18</sup> See *infra* notes 142-163 and accompanying text.

<sup>19</sup> See *infra* notes 164-209 and accompanying text.

<sup>20</sup> See *infra* notes 210-224 and accompanying text.

<sup>21</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>22</sup> *Id.* at 562-63.

<sup>23</sup> *Lawrence v. State*, 41 S.W. 3d 349, 350 (Tex. App. 2001) *rev'd*, 539 U.S. 558 (2003).

<sup>24</sup> 539 U.S. at 563.

one person and the mouth or anus of another person, or . . . the penetration of the genitals or the anus of another person with an object."<sup>25</sup>

After being held in custody overnight, a Justice of the Peace convicted both men, who exercised their right to a trial *de novo* in Harris County, Texas Criminal Court.<sup>26</sup> The men entered pleas of *nolo contendere* to the charges of violating the anti-gay sodomy statute, but challenged this statute under the United States Constitution and the Texas Constitution Equal Protection clauses.<sup>27</sup> The Harris County Texas Criminal Court rejected challenges to the Texas anti-gay sodomy statute under the United States Constitution and the Texas Constitution Equal Protection clauses.<sup>28</sup> The Harris County Court fined the men \$200,<sup>29</sup> and the men appealed to the Texas Court of Appeals.<sup>30</sup>

#### A. THE TEXAS COURT OF APPEALS

The Texas Court of Appeals analyzed the Texas anti-gay sodomy statute utilizing equal protection and privacy analyses.<sup>31</sup> The Court of Appeals applied not only the United States Constitution but also equal protection and equal rights provisions of the Texas Constitution.<sup>32</sup> Under all analyses, the Court of Appeals affirmed the judgment of the Harris County trial court.<sup>33</sup> In analyzing the Texas constitutional provisions, the Court of Appeals conceded that the Texas and federal equal protection provisions shared common aims and goals resulting in the Texas cases often following federal precedent while interpreting the Texas Equal Protection provision.<sup>34</sup> However, the Court of Appeals also recognized that the Texas Equal

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<sup>25</sup> TEX PENAL CODE ANN. § 21.01 (Vernon 2004).

<sup>26</sup> 539 U.S. at 563.

<sup>27</sup> 41 S.W. 3d at 350. Under the Texas Constitution, Justice of the Peace Courts have original jurisdiction in misdemeanor cases. TEX. CONST. art V, § 19. In a trial *de novo*, a matter is tried as if it had never been tried before. BLACKS LAW DICTIONARY, 1544 (8<sup>th</sup> ed. 1999). The defendants' failed to challenge the propriety of the police conduct leading to their arrests or the facts surrounding those arrests. 41 S.W. at 350.

<sup>28</sup> 539 U.S. at 563.

<sup>29</sup> *Id.*

<sup>30</sup> 41 S.W. 3d at 350.

<sup>31</sup> *Id.* at 350-62.

<sup>32</sup> *Id.* at 350-59; U.S. CONST., amend. XIV, § 1; TEX. CONST., art. I, §§ 3, 3(a).

<sup>33</sup> *Id.* at 362.

<sup>34</sup> *Id.* at 359, 362.

Rights Amendment possessed no federal equivalent.<sup>35</sup> Nevertheless, even utilizing the Texas Equal Rights Amendment, intended to provide greater protection than the United States Constitution, the Court of Appeals failed to strike down the Texas anti-gay sodomy statute.<sup>36</sup>

The Court of Appeals found that the anti-gay sodomy statute failed to distinguish persons by sexual orientation because even a heterosexual individual would be prosecuted if that person performed a sex act with a person of the same sex.<sup>37</sup> As a result, the statute existed as a facially neutral statute.<sup>38</sup> The Court of Appeals recognized that facially neutral statutes could still support an equal protection challenge where the statute was motivated by discriminatory animus.<sup>39</sup> The Court of Appeals implied that such animus might exist in Texas because the Texas Legislature repealed a similar prohibition against heterosexual sodomy.<sup>40</sup> Even so, the Court of Appeals refused to acknowledge an equal protection violation because sexual orientation failed to rise to a suspect class, and, therefore, a focused prohibition against homosexual sodomy withstood challenge where such a prohibition was rationally related to a legitimate state interest such as the protection of public morals.<sup>41</sup>

The Court of Appeals also rejected an argument that the Anti-gay sodomy statute served as gender discrimination because the prohibition applied both to men having sex with men and women having sex with women.<sup>42</sup> In addition, the Court of Appeals utilized federal and state zone-of-privacy analyses.<sup>43</sup> Under both federal and state constitutional law, the Court of Appeals rejected such zone-of-privacy analyses because the Court of Appeals found that homosexual conduct failed to constitute a right “implicit in the concept of ordered liberty . . . deeply rooted in American history and tradition.”<sup>44</sup>

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<sup>35</sup> *Id.* at 352.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 353.

<sup>38</sup> *Id.*

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

<sup>40</sup> *See id.*

<sup>41</sup> *Id.* at 353-54.

<sup>42</sup> *Id.* at 357-58.

<sup>43</sup> *Id.* at 359-62 (citing U.S. CONST., amend. §§ 1, 3, 4, 5, 9.; TEX. CONST., art. I, § 19).

<sup>44</sup> *Id.* at 361.

## B. THE UNITED STATES SUPREME COURT: MAJORITY AND CONCURRENCE

The United States Supreme Court reversed the judgment of the Texas Court of Appeals.<sup>45</sup> In doing so, the United States Supreme Court overruled *Bowers v. Hardwick*, (hereinafter, *Bowers*) which held that no fundamental right existed to engage in homosexual sexual conduct and morality provided a rational basis for a criminal proscription against gay, or for that matter, any consensual act of sodomy.<sup>46</sup> In *Lawrence*, the United States Supreme Court, avoiding a fundamental-rights analysis, utilized a substantive-due-process privacy doctrine under the Fourteenth Amendment Due Process Clause to analyze whether the Texas anti-gay sodomy statute withstood constitutional challenge.<sup>47</sup> The Supreme Court in *Lawrence* utilized a rational-basis review finding, “[t]he Texas Statute furthers no legitimate state interest which can justify its invasion into the personal and private life of the individual.”<sup>48</sup> The *Lawrence* Court traced the evolution of the right of consensual sexual privacy from the narrowly protected space of the marital bedroom to the more broadly conceived right of unmarried teenagers to utilize contraceptive devices<sup>49</sup> to the right to obtain an abortion,<sup>50</sup> utilizing *Griswold v. Connecticut*, *Eisenstadt v. Baird*, *Roe v. Wade*, *Carey v. Population Services International*, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>51</sup>

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<sup>45</sup> *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

<sup>46</sup> *Id.* at 578; 478 U.S. 186 (1986).

<sup>47</sup> 539 U.S. at 565.

<sup>48</sup> *Id.* at 578.

<sup>49</sup> *Id.* at 564-66.

<sup>50</sup> See *Id.* at 573 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (modified the applicable test set out in *Roe* determining when a state can restrict a woman’s right to an abortion—moving from a trimester test to an undue burden test).

<sup>51</sup> *Id.* at 564-66, 573 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)(right of married persons to use contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)(right of single persons to obtain contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973)(right to obtain an abortion); *Carey v. Population Services Int’l*, 431 U.S. 678 (1977)(contraceptive devices to minors over 16); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)(modified the applicable test set out in *Roe* determining when a state can restrict a woman’s right to have an abortion—moving from a trimester test to an undue burden test)).

The *Lawrence* Court recognized the constitutionality of the anti-gay sodomy ban in *Bowers* as inconsistent with the substantive-due-process privacy doctrine.<sup>52</sup> The *Lawrence* Court noted that the anti-gay sodomy law in *Bowers* and in *Lawrence* prohibited more than a particular sex act.<sup>53</sup> The Georgia law upheld in *Bowers* and the Texas law challenged in *Lawrence* touched “upon the most private human conduct, sexual behavior, and in the most private of places . . . to seek to control a personal relationship that . . . is within the liberty of persons to choose . . . .”<sup>54</sup> In *Lawrence*, the United States Supreme Court held that adult gays and lesbians possess the right to engage in consensual, private noncommercial sex acts.<sup>55</sup> Though the *Lawrence* Court majority opted to utilize a broader and more protective substantive-due-process analysis instead of a narrower, less protective equal protection analysis,<sup>56</sup> Justice O’Connor concurred with the majority’s result<sup>57</sup> utilizing an equal protection analysis and finding, “[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”<sup>58</sup>

### C. JUSTICE SCALIA’S DISSENT

Justice Scalia dissented.<sup>59</sup> Justice Scalia, skeptical of the majority’s analysis, criticized the majority’s use of substantive-due-process fundamental-rights cases in analyzing the Texas Anti-Gay sodomy statute.<sup>60</sup> For Justice Scalia, *Bowers* remained good doctrine and good thinking.<sup>61</sup> In fact, Justice Scalia criticized the *Lawrence* majority for not properly utiliz-

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<sup>52</sup> *Id.* at 564-78.

<sup>53</sup> *Id.* at 567.

<sup>54</sup> *Id.* at 567.

<sup>55</sup> *Id.* at 578.

<sup>56</sup> *Id.* at 574-75.

<sup>57</sup> *Id.* at 579 (O’Connor, J., concurring).

<sup>58</sup> *Id.* at 582 (O’Connor, J., concurring).

<sup>59</sup> *Id.* at 605 (Scalia, J., dissenting). See generally, Daniel Gordon, *Moralism, and the Fear of Social Chaos: The Dissent in Lawrence and the Antidotes of Vermont and Brown*, 9 TEX. J. ON C. L. & C. R. 1 (2003).

<sup>60</sup> *Id.* at 594-96 (Scalia, J., dissenting).

<sup>61</sup> *Id.* at 594 (Scalia, J., dissenting).



ing *Bowers* in the *Lawrence* analysis.<sup>62</sup> Justice Scalia noted, “[n]ot once does it describe homosexual sodomy as a ‘fundamental right’ or ‘fundamental liberty interest.’”<sup>63</sup> Justice Scalia noted that substantive due process implicated heightened scrutiny for fundamental interests and rights only, which included rights deeply rooted in American history and tradition.<sup>64</sup> Neither homosexual nor heterosexual sodomy qualified as deeply held social liberty norms in American social and legal history.<sup>65</sup> In addition, Justice Scalia criticized the *Lawrence* majority, finding that no rational basis existed to support the Texas anti-gay sodomy statute.<sup>66</sup> For Justice Scalia, sexual morality served as a rational basis for the statute.<sup>67</sup> Justice Scalia accused the *Lawrence* majority of effectively decreeing the end of all morals legislation.<sup>68</sup> Justice Scalia predicted that the majority opinion’s attack on sexuality created a slippery slope that would result logically in a subsequent Supreme Court majority recognizing a liberty interest in gay marriage.<sup>69</sup>

*Lawrence* provided to gays and lesbians in the United States the freedom and security to be sexual without fear of criminal retribution. The Texas Court of Appeals opinion and Justice Scalia’s dissent, however, reflected a residual and lingering animus toward gay and lesbian Americans.<sup>70</sup> This animus reflects a broader abject role played by gays and lesbians in the United States. The next section exposes the animus embedded in the Texas Court of Appeal’s opinion and Justice Scalia’s dissent.

## II. THE ANIMUS EMBEDDED IN THE TEXAS COURT OF APPEAL’S OPINION AND JUSTICE SCALIA’S DISSENT

In defending the right and constitutional authority of the citizens of Texas and their legislature to punish gays and lesbi-

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<sup>62</sup> See *id.* at 594-98 (Scalia, J., dissenting) (“*Bowers* held, first that criminal prohibitions of homosexual sodomy are not subject to heightened scrutiny[.] The Court today does not overrule this holding.”).

<sup>63</sup> *Id.* at 594 (Scalia, J., dissenting).

<sup>64</sup> *Id.* at 593 (Scalia, J., dissenting).

<sup>65</sup> *Id.* at 596 (Scalia, J., dissenting).

<sup>66</sup> *Id.* at 599 (Scalia, J., dissenting).

<sup>67</sup> See *id.* at 599, 605 (Scalia, J., dissenting).

<sup>68</sup> *Id.* at 599 (Scalia, J., dissenting).

<sup>69</sup> *Id.* at 604-5. (Scalia, J., dissenting).

<sup>70</sup> See *infra* notes 71-101 and accompanying text.

ans for sexual intimacy, Justice Scalia attempted to communicate a neutral attitude toward gays and lesbians. Justice Scalia began a sentence by writing that he had nothing against homosexuals.<sup>71</sup> He failed, however, to end his sentence with those words. The complete sentence read, “Let me be clear that I have nothing against homosexuals . . . promoting their agenda through normal democratic means.”<sup>72</sup> Shortly before making this statement, Justice Scalia had already expressed concern about a homosexual agenda promoted by homosexual activists “directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”<sup>73</sup> Justice Scalia also referred to gay and lesbian civil rights not as a legal movement but as part of a culture war in which the *Lawrence* majority had taken sides.<sup>74</sup> Justice Scalia criticized the *Lawrence* majority for the American mainstream’s legal right to discriminate against gays and lesbians.<sup>75</sup> In addition, Justice Scalia derided the anti-anti-homosexual culture of the American legal profession.<sup>76</sup>

For Justice Scalia, animus towards gay and lesbian Americans exhibited itself in the popular consciousness of the American mainstream. Many Americans in mainstream America “do not want persons who openly engage in homosexual conduct as partners in their business[sic], as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home.”<sup>77</sup> He relied on the democratic majority to protect America’s families from a so-called homosexual lifestyle that the mainstream believed to be immoral and destructive.<sup>78</sup> Justice Scalia utilized the will of the majority in the democratic process to justify segregating gays and lesbians from so-called normal, mainstream American life.<sup>79</sup> The Texas Court of Ap-

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<sup>71</sup> 539 U.S. at 603 (Scalia, J., dissenting).

<sup>72</sup> *Id.* at 603 (Scalia, J., dissenting).

<sup>73</sup> *See id.* at 602 (Scalia, J., dissenting) (describing the majority’s decision as the product of a legal profession that has “signed on to the homosexual agenda.”).

<sup>74</sup> *Id.* (Scalia, J., dissenting).

<sup>75</sup> *Id.* (Scalia, J., dissenting) (“What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new ‘constitutional right’ by a Court that is impatient with democratic change.”).

<sup>76</sup> *Id.* at 602-3 (Scalia, J., dissenting).

<sup>77</sup> *Id.* 602 (Scalia, J., dissenting).

<sup>78</sup> *Id.* (Scalia, J., dissenting).

<sup>79</sup> *Id.* at 602-3 (Scalia, J., dissenting).

peals in *Lawrence* also utilized popular democracy reflected in legislative determination and action as a shield against legalizing gay and lesbian sexuality.<sup>80</sup> The Texas Court of Appeals noted that the Texas Legislature lacked infallibility but remained the sole constitutionally empowered entity to decide what constituted evil in the context of law.<sup>81</sup> According to the Texas Court of Appeals, the Texas Legislature possessed the power to conclude that gay sodomy constituted deviant sexuality while heterosexual sodomy failed to do so.<sup>82</sup> The Texas Court of Appeals wrote, "the court is not expected to make or change the law, but to construe it, and determine the power the legislature had to pass such a law; whether that power was wisely or unwisely exercised, can be of no consequence."<sup>83</sup>

Justice Scalia and the Texas Court of Appeals respected in an unquestioning way the public animus of the popular majority toward gays and lesbians. From the viewpoints of Justice Scalia and the Texas Court of Appeals, the Texas public found sound support for a segregationist dislike of gays and lesbians in tradition.<sup>84</sup> Contemporary lifestyles reflected long historical trends, and the Texas Court of Appeals described how Judaism, Christianity, and Islam condemned gay sexual acts<sup>85</sup> as did Roman Law, Blackstone, the Goths, and Montesquieu.<sup>86</sup> Justice Scalia more generally noted that historically four executions occurred during the American colonial period as a result of sodomy convictions and that a couple of hundred people faced prosecution for consensual homosexual sodomy between 1880

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<sup>80</sup> See *Lawrence v. State*, 41 S.W. 3d 349, 362 & n.39 (Tex. App. 2001) *rev'd*, 539 U.S. 558 (2003).

<sup>81</sup> *Id.* at 362.

<sup>82</sup> *Id.* at 356.

<sup>83</sup> *Id.* at 362 (citing *People v. Griffin*, 1 Idaho 476, 479 (1873)).

<sup>84</sup> *Id.* at 362; *Lawrence v. Texas*, 539 U.S. 558, 603 (Scalia, J., dissenting).

<sup>85</sup> *Id.* at 361, n.34.

<sup>86</sup> *Id.* at 361. Roman Law is [t]he legal system of the ancient Romans, forming the basis of the modern civil law. BLACKS LAW DICTIONARY, 1355 (8<sup>th</sup> ed. 1999). Sir William Blackstone served as a legal commentator in the Eighteenth Century in England. DAVID A. LOCKMILLER, SIR WILLIAM BLACKSTONE, VII-VIII, 1 (Peter Smith 1970). Charles Louis de Secondat Montesquieu served as a French Enlightenment philosopher in the Eighteenth Century. VOL. 19 THE ENCYCLOPEDIA AMERICANA INT'L ED, MONTESQUIEU, 410 (2003). The Goths were peoples who attacked the Roman Empire in the 3<sup>rd</sup> Century. VOL. 1 MARK KISHLANSKY, PATRICK GREARY, PATRICIA O'BRIEN, CIVILIZATION IN THE WEST 177-78 (3d ed. 1998).

and 1995.<sup>87</sup> Justice Scalia noted a moral opprobrium that has traditionally attached to homosexual conduct.<sup>88</sup>

A long history of moral objection supported contemporary discrimination against gays and lesbians who threatened the American mainstream with their so-called lifestyle, according to Justice Scalia and the Texas Court of Appeals.<sup>89</sup> Justice Scalia and the Texas Court of Appeals equated gay and lesbian consensual sexual intimacy with repulsive and harmful immoral acts.<sup>90</sup> The Texas Court of Appeals implied that gay sexuality constituted an evil lumped together with child pornography, adultery, bigamy, and marijuana use in addition to seduction, fornication, and bestiality.<sup>91</sup> Justice Scalia made a similar implicit connection with repulsive and immoral acts including fornication, bigamy, adultery, adult incest, bestiality, and obscenity.<sup>92</sup>

Justice Scalia and the Texas Court of Appeals armed themselves with strong societal justifications for defending a system that traditionally, socially segregated gays and lesbians, who engaged in so-called open sexual activity. Subtly and implicitly, Justice Scalia and the Texas Court of Appeals viewed gays and lesbians as threatening the security, safety, and basic structure of American society. Justice Scalia asserted that American society had relied on the doctrine of *Bowers v. Hardwick* finding no fundamental right to engage in gay sexual activity.<sup>93</sup> *Bowers* allowed for the prohibition of a variety of immoral activities including gay and lesbian sexual intimacy.<sup>94</sup> Justice Scalia utilized, as examples of such societal reliance, restrictions on gays serving in the armed forces, discharge of bisexuals from the armed forces, subjecting gays and lesbians seeking secret and top secret security clearance to more extensive background checks by the United States Defense Department, and allowing a police department to ask job

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<sup>87</sup> 539 U.S. at 597 (Scalia, J., dissenting).

<sup>88</sup> *Id.* at 602 (Scalia, J., dissenting).

<sup>89</sup> See 41 S.W. 3d at 361; see also 539 U.S. at 602-3 (Scalia, J., dissenting).

<sup>90</sup> See 41 S.W. 3d at 362 & n.39.

<sup>91</sup> See *id.* at 362. & n.38.

<sup>92</sup> 539 U.S. at 590, 600 (Scalia, J., dissenting).

<sup>93</sup> 539 U.S. at 589 (Scalia, J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186, 190-191, 196 (1986).

<sup>94</sup> 539 U.S. at 589 (Scalia, J., dissenting).

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applicants about homosexual activity.<sup>95</sup> The Texas Court of Appeals wrote about the threat of gays and lesbians in a more subtle fashion. When demonstrating the limits of a zone of privacy under the Texas Constitution, the Texas Court of Appeals utilized a case involving the promotion of a police officer who engaged in an adulterous affair with another police officer's spouse.<sup>96</sup> While demonstrating the state's power to preserve and protect morality, the Court of Appeals pointed to, *inter alia*, requiring medical care for children, child endangerment, and the regulation of nude dancing in places where liquor is sold.<sup>97</sup> Justice Scalia essentially equated gay and lesbian sexuality with threats to national security and public safety, while the Texas Court of Appeals more subtly implicated public safety, the protection of children, and potentially harmful substances such as liquor in analyzing whether Texas could criminalize gay and lesbian sexuality.<sup>98</sup>

## III. MODELS FOR EXPLAINING ANIMUS

Justice Scalia in his dissent in *Lawrence* and the Texas Court of Appeals in its opinion in *Lawrence* posited a social-legal model that held American gays and lesbians in very low esteem among the so-called American mainstream majority. Justice Scalia's dissent and the Texas Court of Appeal's views of gays and lesbians evidenced a widespread, deep, and endur-

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<sup>95</sup> *Id.* at 590 n.2 (Scalia, J., dissenting) (citing 10 U.S.C. § 654(b)(1)(statute providing that member of the armed forces will be separated from services for engaging in homosexual relations); *Schowengerdt v. United States*, 944 F.2d 483, 490 (9<sup>th</sup> Cir. 2001)(upheld discharge of Navy civil engineer who was discharged for being bisexual); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 570-571 (9<sup>th</sup> Cir. 1990)(Department of Defense's practice of subjecting homosexual applicants to an expanded background check before issuing secret and top secret security clearances was not a violation of these applicants equal protection rights under the 5<sup>th</sup> amendment. The Department of Defense's practice was rationally related to its legitimate concern that homosexuals are a group targeted by counterintelligence agencies, and thus the expanded investigations were needed to ensure that these applicants would not be susceptible to coercion or blackmail); *Walls v. Petersburg*, 895 F.2d 188, 193 (4<sup>th</sup> Cir. 1990) (relying on *Bowers v. Hardwick* the court held that a police department did not violate an applicant's right to privacy by asking about applicant's homosexual relations).

<sup>96</sup> 41 S.W. 3d at 360.

<sup>97</sup> *Id.* at 354.

<sup>98</sup> See *id.*; 359 U.S. at 590 n.2 (Scalia, J., dissenting) (noting other instances of conduct that has been banned based on moral objections).

ing animus toward gays and lesbians.<sup>99</sup> What is remarkable is that almost sixty years after the beginning of the modern individual rights revolution beginning with the religious freedom cases<sup>100</sup> and fifty years after the fall of *de jure* racial segregation,<sup>101</sup> a Justice of the United States Supreme Court and a state court of appeals justify a legal model that segregates socially and stigmatizes criminally a segment of Americans because those Americans seek sexual and social intimacy. Two partial explanations exist for the enduring nature of the segregationist social model posited in the *Lawrence* dissent and majority opinion in the Texas Court of Appeal's decision in *Lawrence*—gays and lesbians as symptoms and the tensions of urbanization.

#### A. GAYS AND LESBIANS AS SYMPTOMS

Matti Bunzl in *Symptoms of Modernity: Jews and Queers in Late Twentieth Century Vienna*, Martin Riesebrodt in *Pious Passion, the Emergence of Modern Fundamentalism in the United States and Iran*, and Harvey Cox in *The Secular City, Secularization and Urbanization in Theological Perspective* provide some conceptual bases for understanding why gays and lesbians even in modern, individual rights sensitized America remain socially very unpopular among many Americans including Supreme Court justices and state appeals court judges.<sup>102</sup>

Matti Bunzl traced the roles of Jews, gays, and lesbians in Austrian society after the Second World War until the beginning of the new century.<sup>103</sup> Bunzl recognized that Jews, gays,

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<sup>99</sup> See *supra* notes 71-98 and accompanying text.

<sup>100</sup> See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 3, 18 (1947)(upheld a New Jersey statute that reimbursed parents for the cost of bus transportation to parochial schools) and *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 210 (1948)(held that a school program that released pupils from their legal duty to attend school for secular education on the condition that they attend religious classes violated the First Amendment of the U.S. Constitution).

<sup>101</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)(held that segregation of children in public schools solely on the basis of race denied minority children of equal educational opportunities).

<sup>102</sup> BUNZL, *supra* note 1; MARTIN RIESEBRODT, *PIOUS PASSION, THE EMERGENCE OF MODERN FUNDAMENTALISM IN THE UNITED STATES AND IRAN*, (1993); HARVEY COX, *THE SECULAR CITY, SECULARIZATION AND URBANIZATION IN THEOLOGICAL PERSPECTIVE*, (1966).

<sup>103</sup> BUNZL, *supra* note 1, at 23-24.

and lesbians differed markedly as social groups.<sup>104</sup> Jews possessed a traditional theology while gays and lesbians remained a group constructed on the basis of sexual orientation.<sup>105</sup> However, Bunzl also identified strong social structural similarities between the groups in the context of modern Austrian society and Central Europe generally.<sup>106</sup> Bunzl wrote, "Jews and queers not only occupy analogous positions as victims of Nazi persecution and oppressed minorities . . . [e]ven more importantly . . . they share a common genealogy of cultural abjection...."<sup>107</sup>

Bunzl described how after the Second World War, Austria developed for itself a victim myth in which Austria avoided envisioning itself as participating in the Nazi war atrocities; instead, Austria envisioned itself as the first invaded victim of Hitler's war machine in 1938.<sup>108</sup> This Austrian victim myth required that all Austrians, Jews, gays, and lesbians alike, become equalized in their suffering during the Second World War even if factually the equality failed to exist.<sup>109</sup> For Jews, this meant that they were socially and legally required to deny the suffering that they experienced in the Holocaust.<sup>110</sup> The legal requirement of self-denial emerged through the resistance of the Austrian state to reparatory compensation of Jewish victims of the Holocaust.<sup>111</sup> For decades after the Second World War, Jews became abject others in Austrian society facing continuing anti-semitism even after the experience of the Holocaust.<sup>112</sup>

Bunzl also characterized Austria's gays and lesbians as an abject excluded group from Austrian society during the decades after the Second World War.<sup>113</sup> Like Austrian Jews, Austrian gays also faced persecution by the Nazis during the Second World War, including imprisonment and death in concentration camps.<sup>114</sup> The Austrian victim myth that equalized all Aus-

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<sup>104</sup> *Id.* at 12.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 30-35.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 29-56.

<sup>111</sup> *Id.* at 36.

<sup>112</sup> *Id.* at 30, 44-49

<sup>113</sup> *Id.* at 60.

<sup>114</sup> *Id.* at 22.

trians as victims of Nazi persecution even those Austrians who actively supported the Nazis applied to gays and lesbians.<sup>115</sup> Like Jews, gays and lesbians faced resistance by the Austrian state to claims of reparatory compensation for suffering caused by the Nazis.<sup>116</sup> In fact, gays and lesbians in Austria faced continued persecution even after the end of Nazi rule.<sup>117</sup> Bunzl noted, “the structures of exclusion remained in place. Much as during the Third Reich, Austria’s postwar community was imagined in constitutive opposition to a homosexual Other.”<sup>118</sup> Gays and lesbians faced prosecution and imprisonment for sexual intimacy in the years following the Second World War,<sup>119</sup> and even when in 1971, the legal ban on gay and lesbian sexuality ceased to exist; gays and lesbians faced prosecution for organizing or advocating gay and lesbian social positions.<sup>120</sup> Overall, gays and lesbians hid privately in Austrian society in the decades following the Second World War.<sup>121</sup>

Bunzl shared very negative stories about Jews, gays, and lesbians in Austria in the decades following the Second World War.<sup>122</sup> In contrast, he painted a much brighter picture for Jews, gays, and lesbians in Austria at the turn of the Twenty-First Century.<sup>123</sup> A post-Second World War generation of Jews asserted itself politically and socially in the 1970s,<sup>124</sup> and the Austrian State, specifically the City of Vienna, recognized the Jewish community as a valuable component of Austrian society.<sup>125</sup> The Austrian government finally recognized the particularized suffering of the Jewish community during the Holocaust.<sup>126</sup> Post-Second World War generations of gays and lesbians also asserted themselves politically and socially beginning in the 1970s,<sup>127</sup> and the City of Vienna included gays and lesbi-

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<sup>115</sup> *Id.* at 30-32, 61.

<sup>116</sup> *Id.* at 61.

<sup>117</sup> *Id.* at 61-64.

<sup>118</sup> *Id.* at 60.

<sup>119</sup> *Id.* at 62.

<sup>120</sup> *Id.* at 68.

<sup>121</sup> *Id.* at 73-81.

<sup>122</sup> *Id.* at 29-85.

<sup>123</sup> *Id.* at 155-211.

<sup>124</sup> *Id.* at 23-24, 91-116.

<sup>125</sup> *Id.* at 155-86.

<sup>126</sup> *Id.* at 173-76.

<sup>127</sup> *Id.* at 117-51.



ans as valued members of the Viennese community.<sup>128</sup> The roles of both communities in Austrian society positively evolved, and Bunzl identified a specific social dynamic that controlled the perceptions of Austrian society of Jews and gays, negative and positive.<sup>129</sup>

Bunzl developed a theory for why Jews, gays, and lesbians served as abject others in not only Austrian but also in Central European society generally.<sup>130</sup> Bunzl posited that Jews, gays, and lesbians served as “symptoms” in the classic sense of that word, subjective evidence of disease or physical disturbance.<sup>131</sup> In a more general, non-medical sense, Bunzl also utilized the word “symptoms” to describe the condition of post-World War II Jews, gays, and lesbians as evidence of a phenomenon. For Bunzl, symptom included dysfunction and sign.<sup>132</sup> Bunzl envisioned Jews, gays, and lesbians as symptoms of nationalism.<sup>133</sup> Jews, gays, and lesbians served as social signifiers demarcating the symbolic space of the nation,<sup>134</sup> which by its very nature existed as “imagined modern collectivities as ethnically homogeneous and inherently masculinist . . . .”<sup>135</sup>

Jews, gays, and lesbians safeguarded a nation’s socially imagined boundaries by serving as symbols of what a nation is not.<sup>136</sup> A nation remained characterized as ethnically homogeneous and sexually pure.<sup>137</sup> A nation became constructed on an ideology of manliness, and Jews, gays, and lesbians challenged that imagined national image.<sup>138</sup> Bunzl wrote, “[i]n the late nineteenth century, Jews and homosexuals had emerged in their modern configurations as the constitutive Others of an imagined space of ethnic and sexual homogeneity.”<sup>139</sup> Jews, gays, and lesbians shared a set of stereotypes that included “effeminacy, sexual perversion, reproductive dysfunction,

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<sup>128</sup> *Id.* at 187-211.

<sup>129</sup> *Id.* at 12-18.

<sup>130</sup> *Id.* at 12-13.

<sup>131</sup> *Id.* at 16; WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2318 (Philip Babcock Gove, Ph.D ed., 1993).

<sup>132</sup> BUNZL, *supra* note 1, at 16.

<sup>133</sup> *Id.* at 13.

<sup>134</sup> *Id.* at 16.

<sup>135</sup> *Id.* at 13.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 15.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 217.

physical deformation – that located Jews and homosexuals in common opposition to the fiction of nationness.”<sup>140</sup> Under Bunzl’s construct of the modern nation, these stereotypes demarcated the space beyond the edge of the symbolic space of the modern state.<sup>141</sup>

## B. THE TENSIONS OF URBANIZATION

Bunzl anchored animus toward gays and lesbians in the homogenizing and masculinist natures of the modern nation. Other aspects of modernity also have an impact on Bunzl’s “symptoms of modernity.”<sup>142</sup> Another component of modernity is urbanization. Bunzl implied as much by centering his anthropological, ethnic, and intellectual enterprise in a city, Vienna.<sup>143</sup> A more direct view of the nature of urbanization helps one to understand the animus directed in modern America by many Americans, possibly even Justice Scalia’s so-called mainstream majority, toward gays and lesbians. Harvey Cox defined the nature of modern urbanization in his examination of the nature of contemporary secularization.<sup>144</sup> Cox envisioned urbanization as implicating the disintegration of tradition and diversity.<sup>145</sup> Specifically, the modern metropolis cast its inhabitants into an anonymous and mobile environment where people peeled away from their traditional social identities. Urban dwellers lived in a faceless and depersonalized space.<sup>146</sup> Cox noted that personal contact in the city tended to be “impersonal, superficial, transitory and segmental.”<sup>147</sup> Urbanization could be seen as cold and heartless.<sup>148</sup> The city existed as pragmatic space where the worldview is directed toward the practical aspects of the world, as they exist day-to-day.<sup>149</sup>

For Martin Riesebradt, the space of the impersonal, pragmatic, and mobile city created the fertile ground for a fundamentalist mobilization against the decay of the traditional pa-

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<sup>140</sup> *Id.* at 15.

<sup>141</sup> *Id.* at 16.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 2.

<sup>144</sup> COX, *supra* note 102.

<sup>145</sup> *Id.* at 4.

<sup>146</sup> *Id.* at 33.

<sup>147</sup> *Id.* at 36.

<sup>148</sup> *Id.* at 37.

<sup>149</sup> *Id.* at 52.

triarchal family.<sup>150</sup> Like Cox, Riesebrodt focused on the depersonalized character of the city.<sup>151</sup> Riesebrodt identified the depersonalizing social organization of the city as threatening the personalistic-patriarchal nature of traditional religion and community.<sup>152</sup> Traditional sex roles constituted an important aspect of the personalistic-patriarchal system.<sup>153</sup> While describing the breakdown of the patriarchal-paternalistic culture of the bazaar in Teheran, Riesebrodt noted, “a profound break with traditional ideas... all demonstrated to the bazaar milieu that it had lost its previous function as a cultural model.”<sup>154</sup> Sexual morality and the relationship between the sexes represented a major challenge to patriarchal order.<sup>155</sup>

As a result of the depersonalization processes of the city, the traditional patriarchy suffered a considerable loss of prestige.<sup>156</sup> Mobility and anonymity in the city cheapened the value of traditional social roles and prestige as newcomers to the city failed to recognize the social and political achievement of those traditionally in power, the patriarchy.<sup>157</sup> In the anonymous, impersonal, and atomized environment of urbanization, constant social change remained a logical result. Those who traditionally held power logically needed to share power and prestige with a lot of other types of people in the pluralistic city. Cox noted “that a degree of tolerance and anonymity replace traditional moral sanctions and long-term acquaintanceships.”<sup>158</sup> According to Riesebrodt, the forces of tradition rebelled against the natural social disintegration of traditional social structures in the city through the rise of fundamentalist movements.<sup>159</sup> This reaction against a loss of social prestige among the traditional patriarchy threatened gays. While describing the results of the fundamentalist revolution in Teheran in the early 1980’s, Riesebrodt noted, “[a]mong the first to suffer retaliation following the mullahs’ seizure of power, be-

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<sup>150</sup> RIESEBRODT, *supra* note 102, at 83, 86.

<sup>151</sup> *Id.* at 168-69.

<sup>152</sup> *Id.* at 168-70.

<sup>153</sup> *Id.* at 145-46.

<sup>154</sup> *Id.* at 167.

<sup>155</sup> *Id.* at 173-74.

<sup>156</sup> *Id.* at 167-69.

<sup>157</sup> *Id.* at 95-7.

<sup>158</sup> COX, *supra* note 102, at 4.

<sup>159</sup> RIESEBRODT, *supra* note 102, at 94.

sides political enemies and religious minorities, were ... homosexuals. Many of them were brought to trial, and not a few executed."<sup>160</sup>

Bunzl, Cox, and Riesebrodt provided pieces of a model in which gays and lesbians faced threats from the stresses of modern social development.<sup>161</sup> Animus towards gays and lesbians is a modern and modernizing phenomenon. Bunzl implied such when he wrote, "[i]n early modern times, Jews did not have a privileged position vis-à-vis the body politic, while homosexuals had not existed as distinct species."<sup>162</sup> The dissent in *Lawrence* and the majority opinion of the Texas Court of Appeals in *Lawrence* cast gays and lesbians in the role of symptoms of modernity, including nationalism and urbanization.<sup>163</sup>

#### IV. EXPLAINING THE ANIMUS TOWARD GAYS AND LESBIANS

Bunzl's social model in which gays and lesbians served as symptoms of modernity at least partially explains the animus toward gays and lesbians evidenced in Justice Scalia's dissent in *Lawrence* and in the Texas Court of Appeals majority opinion. Gays and lesbians remained the abject others in both Scalia's dissent and the Court of Appeals opinion. Justice Scalia implied that gays and lesbians not only resided in social space outside the American mainstream, but that the private entities and government possessed the legal authority to discriminate against gays and lesbians.<sup>164</sup> In fact, Justice Scalia utilized quotation marks around the word "discriminate" when he discussed the *Lawrence* majority's concern about discrimination against gays.<sup>165</sup> The Texas Court of Appeals conceived of gay sexuality and sexual intimacy as beyond the realm of what constitutes public morals. The prohibition against gay sodomy became classified with the immoral when the Appeals Court noted, "the legislature has outlawed behavior ranging from murder to prostitution precisely because it has deemed these

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<sup>160</sup> *Id.* at 128.

<sup>161</sup> See *supra* note 102.

<sup>162</sup> BUNZL, *supra* note 1, at 16.

<sup>163</sup> See *infra* notes 164-209 and accompanying text.

<sup>164</sup> *Lawrence v. Texas*, 539 U.S. 558, 603-4 (Scalia, J., dissenting).

<sup>165</sup> *Id.* at 603 (Scalia, J., dissenting).

activities to be immoral.”<sup>166</sup> While discussing how gay sexuality remained traditionally outlawed, the Court of Appeals even referenced Blackstone’s description of gay sexuality as an “infamous crime against nature.”<sup>167</sup>

Bunzl identified gays and lesbians as “constitutive Others” beyond the national norm,<sup>168</sup> just as Justice Scalia and the Texas Court of Appeals identified gays and lesbians beyond the American mainstream moral space. During the Second World War, the Nazis forced gays incarcerated in concentration camps to wear a pink triangle in the interest of sexual purification.<sup>169</sup> Justice Scalia and the Texas Court of Appeals directed scorn against America’s gays and lesbians by classifying gay sexuality as the traditional target of moral opprobrium.<sup>170</sup> Bunzl also posited that the modern nation “depended on the foundational construction of constitutive outsiders.”<sup>171</sup> Justice Scalia and the Texas Court of Appeals implied the nationalistic nature of the United States through an implicit contrast with gays and lesbians as constitutive outsiders of American society. Justice Scalia starkly contrasted gays and gay activists with the American mainstream, and insinuated that gay activism is a form of culture war against the American mainstream.<sup>172</sup>

Opposition to gay sexuality ran consistent with American majoritarianism. The Texas Court of Appeals emphasized that the Legislature “alone is constitutionally empowered to decide which evils it will restrain when enacting laws for the public good.”<sup>173</sup> This devotion to democratic principles in defending the Texas anti-gay sodomy statute indicated that the popular will of the citizenry opposed gay sexuality. Justice Scalia implicitly accused gay activists of imposing their views on the democratic majority.<sup>174</sup> The democratic majority represented the essence

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<sup>166</sup> *Lawrence v. State*, 41 S.W. 3d 349, 354 (Tex. App. 2001) *rev’d*, 539 U.S. 558 (2003).

<sup>167</sup> *Id.* at 361.

<sup>168</sup> BUNZL, *supra* note 1, at 213-14.

<sup>169</sup> *Id.* at 22.

<sup>170</sup> *Lawrence v. Texas*, 539 U.S. 558, 602 (Scalia, J., dissenting); 41 S.W. at 361.

<sup>171</sup> BUNZL, *supra* note 1, at 13.

<sup>172</sup> See 539 U.S. at 602-3 (Scalia, J., dissenting).

<sup>173</sup> 41 S.W. 3d at 362.

<sup>174</sup> See 539 U.S. at 602-3 (Scalia, J., dissenting). Justice Scalia first accused the majority of being influenced by the homosexual agenda. *Id.* at 602 (Scalia, J., dissenting). Subsequently, Justice Scalia stated that the majority had impatiently imposed its views on the people. *Id.* at 603 (Scalia, J., dissenting).

of the American social value system. As a result, Justice Scalia and the Texas Court of Appeals cast gays and lesbians beyond the outer boundaries of American social life; gays and lesbians functioned as negative social signifiers, giving coherence to American nationness, or at least the Texas majority's notion of American nationness.<sup>175</sup>

As the implicit, constitutive others to the American social norm in Justice Scalia's dissent and the Texas Court of Appeal's opinion, gays and lesbians indirectly signified the true nature of American society. First and most obvious, America is a heterosexual nation. The Texas Court of Appeals implied as much in how it analyzed the equal protection issue in *Lawrence*.<sup>176</sup> In 1973, the Texas Legislature repealed the general sodomy prohibition.<sup>177</sup> The Legislature failed, however, to repeal the prohibition against gay sodomy.<sup>178</sup> As a result, heterosexual sodomy became lawful, while gay sodomy remained unlawful.<sup>179</sup> The Texas Court of Appeals found no equal protection problem when the Court of Appeals noted, "the legislature could have concluded that deviant sexual intercourse, when performed by members of the same sex, is an act different from or more offensive than any such conduct performed by members of the opposite sex."<sup>180</sup> Justice Scalia in his dissent implied that the American mainstream remained heterosexual, and the gay activists trying to convince the democratic majority of the acceptability of gay sexuality had a long way to go to succeed in their efforts.<sup>181</sup>

In addition to being a heterosexual nation, the United States valued heterosexual family life and children born in heterosexual unions. Justice Scalia noted that such families and children felt threatened by active gay lifestyles.<sup>182</sup> Justice Scalia announced that Americans did not want gays to be scoutmasters and teachers.<sup>183</sup> Americans wanted to bar gays from board-

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<sup>175</sup> BUNZL, *supra* note 1, at 16; 539 U.S. 602; 41 S.W. 3d at 354.

<sup>176</sup> See 41 S.W. 3d at 350-59.

<sup>177</sup> *Id.* at 353.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 356-57.

<sup>181</sup> See *Lawrence v. Texas*, 539 U.S. 558, 602-3 (Scalia, J., dissenting).

<sup>182</sup> See *id.* at 602. (Scalia, J., dissenting).

<sup>183</sup> *Id.* (Scalia, J., dissenting).

ing in their homes.<sup>184</sup> Overall, Americans protect themselves and their families from the supposed destructiveness of gay lifestyles.<sup>185</sup> Furthermore, American business also desires protection from the gay lifestyle, as Americans want to avoid gay business partners who engage in gay lifestyles.<sup>186</sup>

Bunzl noted that nationalism by its very nature is a masculinist enterprise.<sup>187</sup> Justice Scalia's view of the need to protect the American family and the protection of their children supports such a view of the American social space. A guardian needed to stand at the door of the American home, Justice Scalia implied that mainstream America needs a protective family patriarch.<sup>188</sup> This guardian is even needed for American business to protect itself against what Bunzl noted as the traditional notion of gay effeminacy.<sup>189</sup> Justice Scalia's imagery reflected the masculine nature of the American nation. Justice Scalia asserted that the majority in *Lawrence* created a massive disruption in the social order by overruling *Bowers*.<sup>190</sup> With *Bowers* gone, the *Lawrence* majority threatened the legal precedent that protected the American military and the Defense Department in their exercise of discriminatory practices against gays and lesbians.<sup>191</sup> Justice Scalia assumed that gays and lesbians threatened institutions that guarded America's security and strength. Justice Scalia implied that gays and lesbians threatened a muscular, manly aspect of the American

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<sup>184</sup> *Id.* (Scalia, J., dissenting).

<sup>185</sup> *Id.* (Scalia, J., dissenting). See generally, Daniel Gordon, *Moralism, and the Fear of Social Chaos: The Dissent in Lawrence and the Antidotes of Vermont and Brown*, 9 TEX. J. ON C. L. & C. R. 1 (2003).

<sup>186</sup> *Id.* (Scalia, J., dissenting).

<sup>187</sup> BUNZL, *supra* note 1, at 15-16 (discussing Mosse, Nationalism and Sexuality).

<sup>188</sup> See 539 U.S. 602. (Scalia, J., dissenting).

<sup>189</sup> BUNZL, *supra* note 1, at 15 (discussing Mosse, Nationalism and Sexuality).

<sup>190</sup> 539 U.S. at 591 (Scalia, J., dissenting).

<sup>191</sup> *Id.* at 590 n.2 (Scalia, J., dissenting) (citing 10 U.S.C. § 654(b)(1)(statute providing that member of the armed forces will be separated from services for engaging in homosexual relations); *Schowengerdt v. United States*, 944 F.2d 483, 490 (9<sup>th</sup> Cir. 2001)(upheld discharge of Navy civil engineer who was discharged for being bisexual); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 570-571 (9<sup>th</sup> Cir. 1990)(Department of Defense's practice of subjecting homosexual applicants to an expanded background check before issuing secret and top secret security clearances was not a violation of these applicants equal protection rights under the 5<sup>th</sup> amendment. The Department of Defense's practice was rationally related to its legitimate concern that homosexuals are a group targeted by counterintelligence agencies, and thus the expanded investigations were needed to ensure that these applicants would not be susceptible to coercion or blackmail).

social order, which assured that America would continue to survive even in the face of a determined enemy.

Justice Scalia's nationalist project in *Lawrence* became clear in his approach to foreign law. The *Lawrence* majority relied on foreign law in deciding whether to overrule *Bowers*.<sup>192</sup> The *Lawrence* majority wrote, "it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision."<sup>193</sup> Justice Scalia responded negatively to the majority's reliance on foreign law.<sup>194</sup> Justice Scalia reminded the majority that sodomy failed to be a right deeply rooted in American law, and that such a right would never spring into existence in America as a result of foreign laws decriminalizing sodomy.<sup>195</sup> The norms of a wider civilization were irrelevant. For Scalia, foreign law remained meaningless and dangerous law.<sup>196</sup> The Texas Court of Appeals avoided discussing the value of foreign law. However, the Court of Appeals alluded to the narrowness of its legal, analytical enterprise by stating, "[o]ur concern . . . cannot be with cultural trends and political movements because these can have no place in our decision without usurping the role of the Legislature."<sup>197</sup> As a result, the Court of Appeals cast doubt on whether it would consider foreign law in analyzing whether the Texas Legislature could prohibit gay sexual intimacy.

Not only did dissent in *Lawrence* implicate American nationalism but the also the effects of urbanization. The geographic context of *Lawrence* was Houston, Harris County, Texas,<sup>198</sup> a major, cultured American city. John Lawrence and Tyron Garner, the arrestees in *Lawrence*, did not run afoul of a small town deputy sheriff who viewed gays as threatening to a small town's way of life; instead, they ran afoul of police in a sophisticated urban region of Houston.<sup>199</sup> The anti-gay animus

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<sup>192</sup> *Id.* at 572-73.

<sup>193</sup> *Id.* at 576.

<sup>194</sup> *Id.* at 598 (Scalia, J., dissenting).

<sup>195</sup> *Id.* (Scalia, J., dissenting).

<sup>196</sup> *Id.* (Scalia, J., dissenting). See generally Daniel Gordon, *Gay Rights, Dangerous Foreign Law, and American Civil Procedure*, 35 MCGEORGE L. REV. 685 (2005).

<sup>197</sup> *Lawrence v. State*, 41 S.W. 3d 349, 362 (Tex. App. 2001) *rev'd*, 539 U.S. 558 (2003).

<sup>198</sup> 539 U.S. at 562.

<sup>199</sup> See DAVID G. MCCOMB, HOUSTON: A HISTORY at 182-186 (1981).



evidenced in Justice Scalia's dissent and the Texas Court of Appeals decision originated with a legal system in a sophisticated urban environment. *Lawrence* implicated Harvey Cox's observations concerning the anonymous, impersonal, and mobile nature of urbanization,<sup>200</sup> and Martin Riesebrodt's observations concerning the socially reactionary revolt against the anonymous and depersonalized nature of the city.<sup>201</sup> Houston possesses a tradition of rapid urbanization.<sup>202</sup>

Riesebrodt observed that rapid urbanization and change resulted in an enormous loss of prestige for traditionalists, even on a nationwide basis.<sup>203</sup> Riesebrodt noted, "[t]he entirety of experiences of deprivation and of fears of social decline and disappointed hopes in upward social mobility in the context of rapid rise of other social groups is explained as the fruit of . . . immorality."<sup>204</sup> The Texas Court of Appeals in *Lawrence* evinced a social clash between homosexuals and heterosexuals.<sup>205</sup> The Court of Appeals considered the Texas Legislature a protective shield against the onslaught of gays and the gay lifestyle. The Legislature possessed the power to prefer heterosexual sexuality to homosexual sexuality, and the Legislature utilized its power.<sup>206</sup> Justice Scalia was more direct in identifying a clash between a traditional group, heterosexuals, and a newcomer in a mobile urbanizing, even national context, gays.<sup>207</sup> According to Justice Scalia, gay activists hijacked the American legal profession creating a pro-gay culture in the legal profession,<sup>208</sup> which, in turn, attempted to impose a gay agenda on the democratic majority.<sup>209</sup> Justice Scalia and the Texas Court of Appeals protected the traditional heterosexual milieu in the *Lawrence* context, a rapidly urbanizing milieu in

<sup>200</sup> See *supra* notes 144-149 and accompanying text.

<sup>201</sup> See *supra* notes 150-160 and accompanying text.

<sup>202</sup> MCCOMB, *supra* note 199, at 6-7. As one Houstonian described the situation, "I think I'll like Houston if they ever get it finished". *Id.* at 132. See also 1990 United States Census, Population and Housing Units, 1970 to 1990: Area Measurements and Density: 1990, Table 45, 477.

<sup>203</sup> RIESEBRODT, *supra* note 102, at 96-97, 167.

<sup>204</sup> *Id.* at 198.

<sup>205</sup> *Lawrence v. State*, 41 S.W. 3d 349, 356, 362 (Tex. App. 2001) *rev'd*, 539 U.S. 558 (2003).

<sup>206</sup> *Id.* at 355-56.

<sup>207</sup> 539 U.S. at 602 (Scalia, J., dissenting).

<sup>208</sup> See *id.* at 602-3 (Scalia, J., dissenting).

<sup>209</sup> *Id.* (Scalia, J., dissenting).

Houston, from the onslaught of the rising gay and lesbian communities led by their activists.

Justice Scalia in *Lawrence* and Texas Court of Appeals opinion in *Lawrence* represented the utilization of gays and lesbians as symptoms of traditional American nationalism based on heterosexual homogeneity. American society possessed an outer limit. The heterosexual family and its children lived within the limits of that society. Gays and lesbians lived beyond these limits and helped to define America by representing what America was not, an effeminate nation unable to secure itself against whatever enemies America might face. Justice Scalia and the Texas Court of Appeals sought to protect the status of heterosexuals as totally dominant in not only Houston but throughout Texas and America.

## V. CONCLUSION: A BRIGHTER FUTURE-THE END OF ANIMUS

Justice Scalia's dissent and the Texas Court of Appeal's opinion in *Lawrence* reflected a deep animus toward gay and lesbian Americans.<sup>210</sup> Justice Scalia and the Texas Court of Appeals implied that this deep animus directed toward gays and lesbians represented a mainstream, traditional, and majority view.<sup>211</sup> This animus also served two social-space purposes in the American social system. First, this animus served as a symptom of American nationalism in which America became symbolized as a homogeneous, heterosexual, family-protective, masculine nation.<sup>212</sup> Second, this animus served as a shield directed against gay activism that threatened to downgrade the lofty status of heterosexual traditionalists.<sup>213</sup> Though American gays may have won the right to experience sexual intimacy without the threat of criminal sanction in *Lawrence*,<sup>214</sup> the animus directed toward gays in Justice Scalia's dissent and in the Texas Court of Appeal's opinion signaled the existence of a social undercurrent that continues to threaten the liberty interests and equality of gays and lesbians. The taint of social negativity reflected in the context of the *Lawrence* case may not be

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<sup>210</sup> See *supra* notes 71-98 and accompanying text.

<sup>211</sup> See *supra* notes 164-175 and accompanying text.

<sup>212</sup> See *supra* notes 176-197 and accompanying text.

<sup>213</sup> See *supra* notes 198-209 and accompanying text.

<sup>214</sup> 539 U.S. at 578.

long-lived. The social status of gays and lesbians in America may improve a great deal in the decades ahead as a response to weakening nationalism in the face of globalization.

Matti Bunzl not only chronicled the oppressive social circumstances of Jews, gays, and lesbians in Vienna during the second half of the Twentieth Century,<sup>215</sup> but he also described how conditions improved markedly for Jews, gays, and lesbians.<sup>216</sup> The dynamic of social improvement occurred according to Bunzl "as communities were no longer imagined according to nationalism's formative principles, groups like Jews and queers . . . ceased to function as constitutive Others."<sup>217</sup> With the weakening of nationalist tendencies came a parallel weakening of symptomatic tendencies that resulted in animus.<sup>218</sup> As nationalism weakened, the symptoms of nationalism faded.<sup>219</sup> Bunzl posited Austria's entry into the European Community as the internationalizing and pluralizing political force that significantly weakened Austrian nationalism, resulting in the social integration of Jews, gays, and lesbians into Austrian society.<sup>220</sup> In the American context, globalization should perform some of the same defusing of American nationalism. Globalization is a process that positively challenges nations, including the United States, to be socially open because globalization encourages a worldview beyond the nation, one open to pluralism. In the case of globalization, internationalizing and pluralizing economic forces are weakening nationalism, including American nationalism.<sup>221</sup> In addition, Houston and other American cities will not continue to grow forever. Urbanization, one hopes, will level off and the stresses of urbanization, including anonymity, mobility, and the impersonal nature of the city, will be better tolerated in a more demographically stable environment.

American gay rights cases certainly evidenced the legal-cultural impact of globalization. The *Lawrence* majority relied on European Community and comparative law to analyze

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<sup>215</sup> See BUNZL, *supra* note 1, at 29-85.

<sup>216</sup> *Id.* at 89-186.

<sup>217</sup> *Id.* at 216.

<sup>218</sup> *Id.* at 182-84.

<sup>219</sup> *Id.* at 216-17.

<sup>220</sup> *Id.* at 182-84.

<sup>221</sup> See THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE, UNDERSTANDING GLOBALIZATION* 7-24, 59-72 (1999).

whether to overrule *Bowers* and accord constitutional rights to gays and lesbians.<sup>222</sup> In *Goodridge v. Department of Public Health*, the Massachusetts case recognizing gay marriage as a right under the Massachusetts Constitution, the Massachusetts Supreme Court relied more than once on Canadian law in its analyses.<sup>223</sup> In *Baker v. State of Vermont*, the Vermont case recognizing gay civil unions as a right under the Vermont Constitution, the Vermont Supreme Court referred to discussions about registered partnership acts in Denmark and Norway.<sup>224</sup> It is hoped that these cases signal the weakening of American nationalism and the end of American gays and lesbians being exploited as abject others in order to define the homogeneous, heterosexual, and masculine nature of the American nation.

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<sup>222</sup> 539 U.S. at 572-73, 576-77.

<sup>223</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 966 n.31, 969 (Mass. 2003).

<sup>224</sup> *Baker v. State*, 744 A. 2d 864, 867, 886-87 (Vt. 1999).