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# Same-Sex Marriage and Jewish Law: Time for a New Paradigm?

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## Same-Sex Marriage and Jewish Law: Time for a New Paradigm?

by

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Working Paper

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## **Same-Sex Marriage and Jewish Law: Time for a New Paradigm?**

Doron M. Kalir\*

*In recent years the Supreme Court, as well as important segments of society, has come to accept and even celebrate same-sex relations that in the past, and for some still today, have generated contempt, hostility, and violence. This change in law and culture poses a unique challenge for those who are moved by the plight of gay people yet concomitantly feel bound by their religious convictions and therefore prevented from providing religious legitimacy to people who yearn to be part of their community. Professor Kalir meets this challenge by proposing that the Torah (and Jewish law), read in context, accepts homosexuality and treats gay people as equal members of the community. It does not plainly stigmatize and condemn them to the fringes of society, as people have previously thought on the basis of two verses in Leviticus. In a sophisticated, contextualized, and comprehensively-informed interpretation of the Levitical text, Kalir shows that a much more benign interpretation of the notorious verses in Leviticus is as plausible as (or more plausible than) the standard construction. In this new interpretation, the prohibition in Leviticus stigmatizes only one sort of homosexuality—that which occurs between members of the same extended family, i.e., incestuous homosexuality.*

\* Cleveland-Marshall College of Law. I would like to thank Sherry Colb, Avidan Cover, Lee Strang, Charles Ten Brinck, Steve Werber, and participants at the AALS semi-annual meeting, and workshops at Toledo and Michigan-State law schools for their notes on previous drafts of this article. I also like to thank my research assistant, Jeromy Simonovic, for his valuable advice and challenging questions.

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*"When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated."*<sup>1</sup>

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<sup>1</sup> THE FEDERALIST NO. 37, at 197 (James Madison) (Clinton Rossiter ed., 1961).

## Introduction

Demonstrating its evolving support of LGBT causes, the Supreme Court in *Obergefell v. Hodges*<sup>2</sup> recognized same-sex marriage as a constitutional right.<sup>3</sup> The Court was not far behind public sentiment – support for same-sex marriage is at all-time high, and continues to rise.<sup>4</sup> These newly-introduced notions of acceptance and respect, however, are not shared by all. In particular, they are rejected by those who feel sympathy towards the plight of gay and lesbian members of their community, yet at the same time feel compelled by their religious convictions to oppose any expansion their rights.<sup>5</sup> To those, the chasm created by *Obergefell* may seem unbridgeable.<sup>6</sup>

To the extent these religious objections rest on the text of the Jewish Bible (Old Testament) and Jewish Law, however, this article offers a possible relief. It argues that, properly read, the relevant Biblical text was never intended to restrict sexual relations between consenting adults of the same gender; rather, its sole purpose was to prevent intra-family same-sex relations between males of the same household, as part of a more comprehensive code of incest. Such interpretation, the article suggests, is supported by the three organizing interpretive principles of Jewish law, namely the notion that each person was created in the image of God; the duty to love your neighbor as yourself; and the understanding that the interpretation of the bible is not in the heavens, but rather in our hands. Further, the article demonstrates that such interpretation is easily compatible with a proper contextual reading of the relevant verses, both appearing in the Book of Leviticus.

To be sure, the article does not contend that the current-practiced interpretation, the one that has been in place for over two millennia – the one used as a justification for causing untold amount of suffering to those affected by it – is not plausible. Nor does it suggest that the new interpretation is the most intuitive reading of the text. Yet, the interpretation

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<sup>2</sup> 576 U.S. \_\_\_\_; 192 L. Ed. 2d 609 (2015).

<sup>3</sup> Memorably, the Court moved from de-criminalization of same-sex acts (*Lawrence v. Texas*, 539 U.S. 558 (2003)), to a federal recognition of same-sex marriage (*Windsor v. United States* 133 S.Ct. 2675), to imposition of duty on the States to do the same (*Obergefell, Id.*).

<sup>4</sup> See Janet Hook, *Support for Gay Marriage Hits All-Time High – WSJ/NBC News Poll*, WSJ March 9, 2015, available at <http://blogs.wsj.com/washwire/2015/03/09/support-for-gay-marriage-hits-all-time-high-wsjnbc-news-poll/> (finding that 59% of Americans support same-sex marriage, nearly double than the 30% reported in 2004).

<sup>5</sup> See Smauel G. Freedman, *Push Within Religions for Gay Marriage Gets Little Attention*, NY Times July 24, 2015, at A16 (contrasting recent intra-religion scholarly efforts to dispel traditional notions of biblical treatment with the categorical, all-opposing responses by most religion organizations to *Obergefell*.)

<sup>6</sup> See *Obergefell, Id.*, Slip Op. at 27 (per Kennedy, J.) (“Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriages should not be condoned.”); Slip Op. at 27 (Roberts, C.J., dissenting) (“Today’s decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is – unlike the right imagined by the majority – actually spelled out in the Constitution. Amdt. 1.”); Slip Op. at 7 (Alito, J., dissenting) (“I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such...”).

suggested here is easily “tolerated” by the biblical text.<sup>7</sup> It is plausible. It makes sense. Given the enormous social costs incurred by the current understanding, the new paradigm – permitting same-sex acts in all but the extended-family context – should be preferred.

Importantly, the adoption of a new interpretation would not set a Halachic (Jewish-law) precedent. In fact, on numerous occasions Jewish law has demonstrated its preference towards novel, more nuanced understandings of the biblical<sup>8</sup> text over (so-called) “clear” or “plain” meanings. In those instances, much like today, those interpretive preferences were made in response to evolving social norms seeking such changes. Examples abound. Take the *lex talionis*, the well-known biblical tenet demanding “*eye for an eye, tooth for a tooth, arm for an arm.*”<sup>9</sup> Read according with its plain meaning, the text clearly demands the severing of body parts as punishment for their loss. Yet Jewish law, considering the social costs incurred by such an interpretation too high, insisted on reading it differently. Jewish sages thus opted to interpret the text as merely ordering *monetary* relief for lost or damaged body parts, rather than a forced maim.<sup>10</sup> Similarly, biblical text specifically prohibits Jews from charging interest on loans granted to fellow Jews – “*do not charge him with any interest*”<sup>11</sup>. And yet, Jewish law specifically created the institute of “Heiter Iss’ka” (“Permissible Venture”) – a mix of loan and partnership – in order to allow, in essence, just that.<sup>12</sup> Notably, both these textual examples originated with the Book of Leviticus, the source of the biblical prohibition on same-sex acts. Yet this is not the only Book to be interpreted in that way. The Book of Exodus, for example, declares the month of Nissan as the first month of the Jewish calendar – “*it shall be the first month of the year.*”<sup>13</sup> Jewish law, however, determined that Tishrei would be that

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<sup>7</sup> On the tolerance of the text to “bear” several interpretations see AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 102 (2005).

<sup>8</sup> The terms “biblical” and “bible” as used here refer only the Jewish Bible (“Old Testament”).

<sup>9</sup> The “eye for an eye” formulation appears three times in the Jewish Bible; see Exodus 21:22-25; Leviticus 24:17-22; and Deuteronomy 19:16-21.

<sup>10</sup> See Talmud Bavli (TB) Baba Kama Ch. 4 p. 1 (“Eye for an Eye - damages.”). For a recent discussion, see Isaac Kalimi, *Targumic and Midrashic Exegesis in Contradiction to the Peshat of Biblical Text*, in *BIBLICAL INTERPRETATION IN JUDAISM AND CHRISTIANITY* 13-22 (Isaac Kalimi & Peter J. Haas, eds. 2006). See also Emanuel Levinas, *An Eye for An Eye*, in *DIFFICULT FREEDOM: ESSAYS ON JUDAISM* 147, 147-148 (Sean Hand, trns. 1990) (arguing that despite the strict language, a proper contextual reading must lead to the Talmudic fine-only approach: “the principle stated by the Bible here, which appears to be so cruel, seeks only justice.”).

<sup>11</sup> See Leviticus 25:35-36 (“Should your brother become poor ... support him such that he may live with you; *do not charge him interest or any profit* as you have feared your Lord and your brother has lived with you.”).

<sup>12</sup> See TB, *Baba Metzia* 104b; for a discussion see Steven H. Rosnicoff, *A Commercial Conundrum: Does Prudence Permit the Jewish “Permissible Venture”?* 20 *SETON HALL LAW REVIEW* 77, 78-84 (1989).

<sup>13</sup> See Exodus 12:1-2 (“And the Lord said...: This month to you – the head of all months, it shall be the first of all months of the year.”)

month, rendering Nissan only the seventh month of the Jewish calendar.<sup>14</sup> And these are merely three examples of many.<sup>15</sup>

The article proceeds in three parts. Part I explores Jewish law's traditional view on same-sex relations, consisting of a strict prohibition on all same-sex acts. For over two millennia this entire view was based, to a large extent, on two short verses appearing in The Book of Leviticus; one was understood as forbidding the act of homosexuality, the other as declaring it punishable by death.<sup>16</sup> Naturally, same-sex marriages – premised upon such prohibited acts and designed to perpetuate them – could not be condoned. This traditional view is not merely academic, it still prevails in all Orthodox circles.<sup>17</sup> Unfortunately, such understanding has also caused an untold amount of suffering to countless men and women who wanted nothing more than to become a part of their Jewish communities. Instead, they were shunned, shamed, and in many instances condemned to a life of secrecy, constant self-doubt, and in some cases suicide – all on account of being presumably in violation of the biblical prohibition.<sup>18</sup>

Recent years have seen an erosion of this firm view. Several Jewish denominations – Reconstructionist, Reform, and Conservative – began allowing same-sex marriages.<sup>19</sup> In one case, even an Orthodox rabbi dared to conduct a same-sex marriage ceremony,<sup>20</sup> only

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<sup>14</sup> See, e.g., Rabbi Alan M. Langer, *The History of the Tishrei Conundrum*, 40 JEWISH BIBLE QUARTERLY 131, 131 (2012) (“Is Tishrei the first or seventh month of the year? The Mishna (*Rosh Hashana* 1:1) states that the first day of Tishrei is the beginning of a new calendar year. However, in biblical times the month later called Tishrei... was considered the seventh month. Nominally, it has remained that way. But virtually all our calendars begin with Tishrei as the first month. Are they wrong?”). To be exact, *some* Levitical text is involved in this question as well. See Leviticus 23:24.

<sup>15</sup> For those and other examples see GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW* (1973) (arguing that “study of Judaism and of Jewish Law ... discloses a unique and extraordinary example of the paramountcy [sic] of the spirit over the letter of the law.” *Id.* at 1).

<sup>16</sup> Leviticus 18:22 and 20:13, respectively. For text and translation of these verses see *infra*, Part IA. Unless stated otherwise, all translations from the Hebrew original are mine.

<sup>17</sup> See, e.g., Rabbi STEVE GREENBERG, *WRESTLING WITH GOD AND MEN: HOMOSEXUALITY IN THE JEWISH TRADITION* 3 (2004) (“Two verses in the Torah (Lev. 18:22 and 20:13) have been understood for millennia to prohibit same-sex sexual relations between men. Since Orthodox Jews believe that the Torah is the word of God, the Levitical prohibition against sex between men [still] has the full weight of divine authority.”); cf. *Bowers v. Harwick*, 478 U.S. 186, 196-97 (1986) (Berger, C.J., concurring) (“Condemnation of those practices [homosexual conduct] is firmly rooted in Judeo-Christian moral and ethical standards... To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”).

<sup>18</sup> For the social cost incurred by the traditional view see *infra*, Part IC.

<sup>19</sup> See *infra*, Parts IIA-C. According to the Pew Research Center 2013 Survey of U.S. Jews, 35% of Jewish Americans today define themselves as Reform; 18% as Conservative; 10% as Orthodox; 6% as Other (including Reconstructionist); and 30% are unaffiliated. See *A Portrait of Jewish Americans – Findings from a Pew Research Center Survey of U.S. Jews*, p. 10, available at <http://www.pewforum.org/files/2013/10/jewish-american-full-report-for-web.pdf>. Accordingly, of the 70% affiliated Jews, 59% are members of denominations supporting, to one degree or another, same-sex marriage. Put differently, nearly 90% of all affiliated American Jews today (all except for Orthodox Jews) likely support, to some degree, same-sex marriage.

<sup>20</sup> See JTA – THE GLOBAL JEWISH NEWS SOURCE, *Orthodox Rabbi Officiates at Same Sex Wedding in D.C.*, (Nov. 14, 2011), available at <http://www.jta.org/2011/11/14/life-religion/orthodox-rabbi-officiates-at-same-sex-wedding-in-d-c>. (“An Orthodox rabbi, Steve Greenberg, officiated at a same-sex wedding.

to be swiftly and harshly condemned by his Orthodox peers.<sup>21</sup> More importantly, members of Jewish communities began trading their hatred and fear towards LGBT members with acceptance, compassion, and dignity. These more lenient views of same-sex relations are explored in part II of the article. Notably, although many of these new views were supported, to one degree or another, by a renewed discussion of the Levitical prohibition, none have offered an acceptable interpretive option sufficient to refute it.<sup>22</sup> As a result, many a Jewish denomination currently allow the conduct of same-sex weddings while at the same time denouncing the very act upon which those marriages are based. This is an unacceptable state of affairs. It calls for a new paradigm.

New legal thinking on same-sex relations has opened the analytical gates for such paradigm shift. If the Supreme Court is willing to recognize the equality and dignity with which same-sex members of our community – and the institution of same-sex marriage – should be treated, why can't Jewish law do the same? The third part of the article suggests it can. The proper starting point for understanding the two verses, the article argues, is not reading them in isolation, as most readers have done so far. Rather, the correct interpretive starting point would be their contextual reading within the framework of the entire Five Books of Moses. This framework calls for three organizing principles affecting the reading of all biblical text. In light of these organizing principles, the notion of targeting a group of Jewish men and women solely due to their love interest seems unreasonable at best.

From these general organizing principles we turn to examine the more immediate contextual environment of the two verses. We begin with the Book of Leviticus, where both appear. We consider the book's main themes, and review the part in which the verses are included. We then turn to inspect more closely Chapter 18, where the general prohibition resides. That chapter, we conclude, deals primarily with the laws of incest; verse 22 – where the general prohibition of same-sex acts appears – is no exception; indeed, the verse begins with the word “And,” a fact that eluded most translators. Accordingly, the verse should be read as part of the incest code. Before concluding this part, we consider likely criticism of the new interpretation.

The article concludes by considering the advantages brought by the new explanation of the verses. Indeed, following the permissibility of same-sex acts, the objection to same-sex marriage may be rendered obsolete. Further, an incestuous-only prohibition on same-sex relations make other parts of the bible come to life. Overall and most importantly, such new interpretation would save many members of the Jewish community from untold

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Greenberg, who is openly gay, married Yoni Bock and Ron Kaplan.... in a synagogue in Washington last week. The ceremony was held under a *Chuppah* [Jewish wedding cover] and included the breaking of a glass and the exchanging of rings [traditional Jewish customs]. The *Ketubah*, or [Jewish] marriage contract, was replaced with a *Shtar Shetufim*, or partnership contract.... It is believed to be the first time that an ordained Orthodox rabbi has officiated at a same-sex marriage in the United States.”).

<sup>21</sup> See *infra*, Part IID.

<sup>22</sup> See, e.g., Rabbi REBECCA ALPERT, LIKE BREAD ON A SEDER PLATE 38-40 (1997) (discussing the “interpretive method” of the two verses); for other new interpretations of the biblical text see *infra*, Part II.



amount of suffering, concomitantly enriching these communities' spiritual lives with new and profound contributions.

## I. THE TRADITIONAL VIEW: COMPLETE PROHIBITION ON SAME-SEX ACTS

Two verses in the Book Leviticus have been understood for millennia to entail a complete prohibition of same-sex acts between two men.<sup>23</sup> The first is Leviticus 18:22, which states in its entirety:

וְאִת־זָכָר--לֹא תִשְׁכַּב מִשְׁכַּבִּי אִשָּׁה תוֹעֵבָה הוּא:

*“And a male you shall not lie with the way one lies with a woman; it is an abomination.”*<sup>24</sup>

The second verse is Leviticus 20:13, which states:

וְאִישׁ אִשָּׁר יִשְׁכַּב אֶת־זָכָר מִשְׁכַּבִּי אִשָּׁה--תוֹעֵבָה עָשׂוּ שְׁנֵיהֶם; מוֹת יוּמָתוּ, דְּמֵיהֶם בָּם:

*“And a man who lies with a male the way one lies with a woman – both have committed an abomination; they shall be put to death, their blood is upon them.”*<sup>25</sup>

Based on these two short verses,<sup>26</sup> a truly remarkable – and extremely exclusionary – edifice of Halacha (Jewish Law) was built.<sup>27</sup> In essence, Halachic law concluded that

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<sup>23</sup> See DAVID GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 190 (1988) (“two passages in Leviticus seem to prohibit *male* homosexuality more generally.”)(citing same; emphasis in the original).

<sup>24</sup> The Hebrew term appearing at the end of the verse is “Toe’ae’vah.” I will deal with that specific, nearly-untranslatable term shortly (see Part 1B, *infra*). For now, it should be noted the term “abomination,” which I placed as translation here, represents merely one interpretive option, albeit one that is preferred by most biblical translators; see, e.g., the English Standard Version (ESV), the New American Standard Bible (NASB), King James Bible, the American King James Version, the American Standard Version, Douay-Rheims Bible, the Darby Bible Translation (DBT), the English Revised Version, and the Webster’s Bible Translation. Other translators prefer other terms, such as “detestable” (used by the New International Version (NIV), Holman Christian Standard Bible, and the World English Bible); “a detestable sin” (the New Living Translation (NLT)); “a detestable act” (NET Bible); “disgusting” (God’s Word Translation) and “abhorrent” (Etz Hayim). Importantly, however, none of these versions – other than one (DBT) – began their translation of the verse (Lev. 18:22) with the important term “And,” which does appear at the original Hebrew. One can only surmise to what extent this crucial omission – which precludes the verse from being read in its proper context – has contributed to its common understanding. (For comparison of all biblical versions see <http://biblehub.com/leviticus/18-22.htm>).

<sup>25</sup> Here I almost verbatim follow the English Standard Version translation (save the omission of the “And”), which states: “If a man lies with a male as with a woman, both of them have committed an abomination; they shall surely be put to death; the blood is upon them.” For several other translations of this verse, see <http://biblehub.com/leviticus/20-13.htm>.

<sup>26</sup> For some, other biblical texts – such as the story of Sodom and Gomorrah may provide further basis. I never found any textual or other basis in that story to justify such opinion, and I will not address it here. See also Jay Michaelson, *Chaos, Law, and God: The Religious Meaning of Homosexuality*, 15 MICH. J. GENDER & L. 41, 60-61 (2008)(rejecting same).

<sup>27</sup> See, e.g. Rabbi Goldie Milgram, *What Does Judaism Have to Say about Homosexuality, Jewish Same-Sex Marriages and Ordination?* Available at <http://www.reclaimingjudaism.org/teachings/what-does-judaism-have-say-about-homosexuality-jewish-same-sex-marriages-and-ordination> (citing with approval Rabbi Artson as stating that “[t]he proscription of homosexual acts in Leviticus forms the basis for all later halachic prohibitions of homosexual acts.”).

same-sex acts of any kind – primarily between men, but also between women – are completely prohibited.<sup>28</sup> And, for many years, no meaningful debate was ever conducted in Jewish Law regarding the scope of that prohibition. No interpretation was offered to relax it. And while the death penalty was apparently never imposed for its violation,<sup>29</sup> the Halachic approach was so categorical that it has instructed that “it would be better to be killed than to violate [the restriction on same-sex act].”<sup>30</sup>

While a comprehensive treatment of this remarkable Halachic edifice regarding same-sex acts is well beyond the scope of this article,<sup>31</sup> a short review of the main tenets of the Halachic approach is in order. After presenting the arguments leveled against same-sex acts, I would offer some counter-arguments. Those, however, do not stem from the Halacha itself and therefore are likely to have very little weight, if any, in modifying or relaxing the stern approach taken by Jewish Law on the issue.

#### A. **יהרג ואל יעבור: Better Be Killed...**

As a general principle, Jewish Law prefers life over death.<sup>32</sup> The pertinent biblical decree, which coincidentally precedes the same-sex restriction by merely a few verses, reads:

ושמרתם את חוקותי ואת משפטי אשר יעשה אותם האדם וחי בהם אני יהוה:

*“And you shall keep my laws and my rules that will be followed by mankind, and live by them, for I am the Lord.”<sup>33</sup>*

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<sup>28</sup> For an evocative discussion of this remarkable edifice, see RABBI CHAIM RAPPAPORT, JUDAISM AND HOMOSEXUALITY – AN AUTHENTIC ORTHODOX VIEW (2004) (hereinafter: RAPPAPORT, JUDAISM AND HOMOSEXUALITY). Much of the discussion in this subchapter owes to his impressive treatise.

<sup>29</sup> For a comprehensive discussion see RAPPAPORT, JUDAISM AND HOMOSEXUALITY, *Id.*, at 137-139 n.4. The failure to impose the death penalty can be explained, mostly, by the strict standards required to meet it: first, two witnesses were required to testify (both men, at the time); second, those two witnesses had to be eye-witnesses to a “live” violation of the rule; third, the two witnesses had to warn the couple engaged in the prohibited act of the capital nature of their offense; and the couple engaged – or the willing party, in the case of rape – had to acknowledge the warning but continue with the act nevertheless. See Generally Samuel J. Levine, *Capital Punishment in Jewish Law and its Application to the American Legal System: A Conceptual Overview*, 29 St. Mary’s L.J. 1037, 1045-56 (1997).

<sup>30</sup> See *infra*, Part IA. See also YESHAYAHU LEIBOWITZ, “I WANTED TO ASK YOU, PROFESSOR LEIBOVITZ” – LETTERS TO AND FROM YESHAYAHU LEIBOWITZ 177-179 (1999) (Hebrew, posthumous) (“You ask how the two [Jewish Law and same-sex acts] may be reconciled; the answer is clear, unequivocal, and leaves no room for debate: such reconciliation is impossible. The prohibition on same-sex acts by the Torah is absolute. It leaves no room for leniency. It is included in the list of three sins (and there only three!) that are ‘better to be killed than to violate’....”).

<sup>31</sup> For a comprehensive treatment of the issue see, RAPPAPORT, JUDAISM AND HOMOSEXUALITY, *supra* note 25, at 1-67 (text), and 137-184 (notes).

<sup>32</sup> See, e.g., DEUTERONOMY 30:19 (“I have put before you the blessing and the curse; and you shall choose life, for you and your offspring shall live.”)

<sup>33</sup> LEVITICUS 18:5. See also Ezekiel 20:11 (“And I have given them my laws and my rules, which I have informed them of, which mankind shall follow, and would live by them.”)

The practical implication of this general rule, as Maimonides explains, is the notion of *פיקוח נפש* Piku'ach Ne'fesh. This doctrine states, in essence, that one is allowed – even encouraged – to violate the most sacred Mitzvot (laws) of Jewish Law, including the observance of the holy Shabbat, should such violation assist in saving or preserving a life.<sup>34</sup> Life, in other words, is superior to the laws of Judaism. Yet this important principle has an exception. According to Halacha, some rules are so sacred, so central, and so important that their violation is deemed both egregious and abhorrent and therefore one should relinquish his or her own life rather than to violate them. This exception is known as *יהרג ובל יעבור* – “better be killed than to violate,”<sup>35</sup> and includes three cardinal sins. The first is *שפיכות דמים* “shfee'chut da'meem” (literally, the spilling of blood; in essence, the committing of murder); the second is *עבודה זרה* “Avo'dah Za'rah” (literally, the worship of others; in essence, idol worshiping); and finally, *גילוי עריות* “Giluy Ara'yut” (literally, the exposure of nakedness; in essence, committing incest<sup>36</sup>).

The restriction on same-sex acts has always been considered part of the *Giluy Ara'yut*,<sup>37</sup> and therefore a central tenet of the “better be killed” exception. According to Jewish Law, it is better to be killed than to commit the cardinal sin of engaging in same-sex acts.<sup>38</sup> And while lesbian relationship – or any restriction thereof – is never mentioned in the Biblical text itself,<sup>39</sup> the sages of Jewish Law have concluded that it, too, is forbidden and should be avoided at all cost.<sup>40</sup> Of special interest here, however, is the “reverse engineering” process by which Jewish sages arrived at their conclusion. First, they considered a verse that lies in great proximity to the prohibition on same-sex acts of men. The verse states: “The acts performed by the [residents of] the Land of Egypt, where you have dwelled, you shall not perform.”<sup>41</sup> They then assumed, without evidence, that the verse relates to a popular custom in Egypt, according to which same-sex *marriage* of

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<sup>34</sup> MAIMONIDES RABBI MOSHE (RAMBAM), MISHNEH TORAH – YAD HACHZAKAH, Hilchot Shabbat, Chap. 2. Halacha 3.

<sup>35</sup> See TOSEFTA Shabbat 16, 14; BT Sanhedrin, 74a.

<sup>36</sup> As for the translation of the third prohibition, Rabbi Rappaport is correct in observing that, according to the Orthodox view, “the common translations of *giluy arayot* as ‘adultery’ or ‘incest’ are inadequate as they do not include all the prohibitions that are enumerated in the above mentioned chapters in Leviticus [18 and 22] and which are subject to the Halachic strictures regarding *giluy arayot*.” RAPPAPORT, JUDAISM AND HOMOSEXUALITY, *supra* note 25, at 139 n.5. According to my suggestion, however, “incest” would perfectly fit the same-sex act restriction as well, as it may only apply within the confines of the extended family. See *infra*, Part III.

<sup>37</sup> See, e.g., Rabbis Elliot N. Dorff, Daniel S. Nevins, Avram I. Reisner, *Homosexuality, Human Dignity, & Halacha: A Combined Responsum for the Committee on Jewish Law and Standards*, 5 (2006) (hereinafter “Dorff, *Human Dignity*”) (“the particular negative commandment associated with male homosexual sex is listed in the Torah among the *גילוי עריות* (literally, ‘exposures of nakedness’) and of these prohibitions it is said *יהרג ובל יעבור* ‘one should die rather than transgress.’”)

<sup>38</sup> For a comprehensive discussion, see RAPPAPORT, JUDAISM AND HOMOSEXUALITY, pp. 139-140 n.6. (collecting authorities, including Talmud Bavli (TB), Talmud Yerushalmi (TJ), Maimonides, and others discussing the inclusion of the restriction on same-sex acts within the “better be killed” exception).

<sup>39</sup> See *Id.* at 2 (“Lesbianism is not mentioned explicitly in the Bible.”).

<sup>40</sup> For a discussion, see *Id.*, 2-4 and authorities cited at 142-147;

<sup>41</sup> LEVITICUS 18:3.

both genders were allowed and practiced.<sup>42</sup> Accordingly, same-sex *marriages* between women (as well as between men) should not be allowed, as the verse warns us not to emulate the Egyptian practices. But if same-sex marriages (here, between women) are not allowed, nor are any same-sex acts between women.<sup>43</sup> In other words, the move the sages made – from (an assumption of) pervasive same-sex marriage that, in turn, should restrict same-sex acts – should work similarly the other way: if same-sex acts are condoned then same-sex marriages – premised on such acts and designed to perpetuate them – should be condoned as well.

In sum, despite the overarching Jewish Law principle of choosing life over death, same-sex acts were compared to – and linked with – the worst of cardinal sins, such as killing another person, committing incest, and worshiping of other gods. In that, these acts were forbidden in the strictest of manners, such that in choosing between death and committing them a person so inclined should have chosen death. One may only assume how LGBT members of the Jewish community have felt over the years while considering to engage – or even actively engaging – in such acts.

## B. "תועבה היא": "It is an Abomination..."

Beyond the restriction itself, and in support of it, Jewish Law's treatment of same-sex acts often seethes with moral indignation.<sup>44</sup> As Sefer Ha'Chinuch (Book of Education) puts it, "God forbids this act ... because it is perverted, vile and disgusting in His eyes, as it is in the eyes of anyone who has any sense. Each of us is created to serve Him and a person should not degrade himself with such a vile and ugly deed."<sup>45</sup> The textual fulcrum

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<sup>42</sup> See MAIMONIDES (RAMBAM), MISHNEH TORAH *Issurei Bi'ah* 21:8 ("Women who are wrapped around each other – it is forbidden, as we were warned by the acts of Egypt; as the Bible says: "The acts of the land of Egypt... you shall not perform. (Lev. 18:3). And sages comment, "what have they done?" and they answer: "A man would marry a man; and a woman marries a woman, and a woman marries two men.")

<sup>43</sup> For the interpretive move see *Id.* at 21:8-9.

<sup>44</sup> See, e.g., Dennis Prager, *Homosexuality, the Bible, and Us – A Jewish Perspective*, reprinted in SAME-SEX MARRIAGE: PRO & CON 60, 63 (Andrew Sullivan ed. 2004) ("[W]e do not derive our approach towards homosexuality only from the fact that the Torah made it a capital offense. We learn it from the fact that the Bible *makes a moral statement* about homosexuality.... The Torah uses its strongest term of disapprobation, "abomination," to describe homosexuality. It is the Bible's moral evaluation of homosexuality that distinguishes homosexuality from other offenses, capital or otherwise.") (emphasis added); GREENBERG, WRESTLING WITH GOD & MAN, *supra* note 3, at 74 (describing "abomination" in that context as reflecting notions of "abhorrent, ugly, and sinful."); DAVID GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 195 (1988) (describing *toevah* as "intrinsically evil"; concluding that "when the word *toevah* does appear in the Hebrew Bible, it ... always conveys great repugnance.") Of course, negative moral judgment of same-sex acts is not unique to Judaism. See, e.g., *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) ("Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly . . . it is fair to say that discrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality... Homosexuals have historically been the object of pernicious and sustained hostility.'" (internal citation omitted)); *Baskin v. Bogan*, No. 14-2386, at 30\* (7th Cir. 2014) (per Posner, J.) ("There is widespread moral osition to homosexuality.")

<sup>45</sup> Sefer Ha'Chinuch (Book of Education), Commandment 209 (note 4), at 138 (Berkowitz concise ed.; Rabbi Gershon Robinson trns. 2013).

upon which this attitude is premised is the Hebrew word “To’e’vah,” commonly translated as “abomination.”<sup>46</sup> As Rabbi Chaim Rapport explains: “the springboard for the discussion about the prohibition on male homosexual conduct is rooted in the designation of such conduct as a ‘to’e’vah.’ Whilst it is true that the Torah also employs this term regarding adultery, incest, and other form of sexual practices, the Talmud makes much of the fact that the Torah places special emphasis of homosexual intercourse as an abomination.”<sup>47</sup> The term ‘to’e’va’ itself, to be sure, may also be read merely as a step taken in the wrong direction – “to’eh bah,” or “to’eh ata bah” – which means, roughly, “you are wrong in choosing that way.”<sup>48</sup> But Jewish Law commentators have long ignored this lenient interpretation in favor of one reflecting disgust from, abhorrence of, and moral objection to any kind of same-sex acts.<sup>49</sup> The reasons for such interpretation vary. First and foremost stands the notion of procreation. Same-sex acts stand in direct rejection to the very first Mitzvah (command) in Jewish Law: “פרו ורבו” – “Be fruitful and multiply, and fill the earth” (Gen. 1:28).<sup>50</sup> This “is not only the first command in the Torah; it is [also] the fundamental imperative of [all] Jewish existence.”<sup>51</sup> In fact, in the Talmud, the failure to propagate is compared to a murder.<sup>52</sup> Accordingly, “the reason that the Torah forbade for a man to lie with a man or with an animal is all in order that men should marry women and fulfil the commandment to procreate.”<sup>53</sup>

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<sup>46</sup> See *supra*, note 23.

<sup>47</sup> RAPPAPORT, JUDAISM AND HOMOSEXUALITY, *supra*, note 25, at 8. See also *Id.*, at 152 n. 42 (citing *Rabbeinu Meyuchas*, as interpreting Leviticus 18:22: “It is an abomination’ – from this we learn that this [homosexual practice] is more than *all other forbidden sexual relationships*, for whilst they are all described as abominations, this practice is more abominable than all of them.”).

<sup>48</sup> This option was offered in BABYLONIAN TALMUD, *Nedarim* 51a, See also RAPPAPORT, JUDAISM AND HOMOSEXUALITY, *supra* note 25, at 13 and 152 n. 43; ALPERT, LIKE BREAD ON A SEDER PLATE, *supra* note 16, at 27-28.

<sup>49</sup> See, e.g. Rabbi Norman Lam, *Judaism and the Modern Jewish Attitude to Homosexuality*, in CONTEMPORARY JEWISH ETHICS 375 (Menachem Kelner ed. 1978) (“an act characterized as an abomination is *prima facie* disgusting and cannot be further defined or explained.”); Rabbi Solomon B. Freehof, *Judaism and Homosexuality*, in AMERICAN REFORM RESPONSA 50 (Walter Jacob ed. 1983) (“If scripture calls it abomination, it means that it is more than violation of a mere legal enactment; it reveals a deep-rooted ethical attitude.”).

<sup>50</sup> See e.g., SEFER HA’CHINUCH, *supra*, note XX, Commandment 209, at 138 (“God wants the world to be populated. For a man to lie carnally with another man runs counter to this goal, for such result in the destruction of the male seed and serves no positive purpose whatsoever.”) See also *Id.*, *Commandment 1*, at 3 (“God desires that the world be populated. The fulfilment of all the other mitzvos [laws] depends on this, because commandments are for human beings, not for angels. Those who deliberately neglect this mitzvah are severely punished because they indicate that they do not want to fulfill Hashem’s will that the world be populated.”).

<sup>51</sup> RAPPAPORT, JUDAISM AND HOMOSEXUALITY, *supra*, note 25, at 9.

<sup>52</sup> BT Yevamot 63b. For a discussion, see Peter S. Knobel, *Kiddushin: An Equal Opportunity Covenant, Not Only for Heterosexuals*, in 2 REDEFINING SAME-SEX MARRIAGE 85, 91-92 (2007).

<sup>53</sup> RABBI MOSHE FEINSTEIN, IGGROT MOSHE – ORACH CHAYIM, as cited *Id.*, at 155 n. 52; see also Rabbis Dorff, Nevins, and Reisner, *Homosexuality, Human Dignity, & Halacha: A Combined Responsum for the Committee on Jewish Law and Standards*, 9 (2006) (hereinafter “Dorff, *Human Dignity*”) (“Observant Jews who are gay or lesbian are caught in an impossible dilemma, unable to fulfil the traditional Jewish norm of heterosexual marriage, usually incapable of practicing life-long celibacy.”)

To be sure, the procreation argument is still very much alive today.<sup>54</sup> In fact, it figured prominently in oral argument of *Hollingsworth v. Perry*, the Supreme Court’s 2013 case about California “Proposition 8”<sup>55</sup> But the argument is not defensible, even assuming, *arguendo*, that it had a place in earlier times. First, the medical, ethical, and legal advancements made since this argument was first introduced have created a new reality, whereby many same-sex couples have their own children. In fact, in California alone 40,000 children were raised by same-sex couples in 2013, according to data submitted to the Supreme Court.<sup>56</sup> Indeed, the Court has explicitly recognized that fact in ruling in favor of same-sex couples.<sup>57</sup> There is no reason why Jewish Law should not do the same.<sup>58</sup> Second, the procreation argument was never considered a reason to deny opposite-sex couples the right to marry; indeed, it would probably be unconstitutional to prohibit a couple from marrying merely by virtue of their inability to procreate.<sup>59</sup> The

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<sup>54</sup> See, e.g., Lynn D. Wardle, “*Multiply and Replenish*”: *Considering Same-Sex Marriage in Light of State Interest in Marital Procreation*, 24 HARV. J. L. & PUB. POL’Y 771, 779 (2001) (“Culturally, the legalization of same-sex marriage would send a message that would undermine the social boundaries relating to marriage and family relations. The confusion of social roles linked with marriage and parenting would be tremendous, and the message of ‘anything goes’ in the way of sexual behavior, procreation, and parenthood would wreak its greatest havoc among groups of vulnerable individuals who most need the encouragement of bright line laws and clear social mores concerning procreative responsibility.”).

<sup>55</sup> See, e.g., Transcript of Oral Argument, *Hollingsworth v. Perry*, No. 12-144, \*24, available at [www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-144\\_5jf6.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144_5jf6.pdf). (counsel for Petitioners: “The concern is that redefining marriage as a genderless institution will sever its abiding connection to its historic traditional procreative purposes and it will refocus... the purpose of marriage and the definition of marriage away from the raising of children and to the emotional needs and desires of adults – of adult couples.”)

<sup>56</sup> Transcript of Oral Argument, *Hollingsworth v. Perry*, *Id.*, at \*24. (“Justice Kennedy: There is an immediate legal injury, or... what could be a legal injury, and that’s the voice of these children. There are some 40,000 children in California, according to the Red Brief, that live with same-sex parents, and they want their parent to have full recognition and full status. The voice of these children is important in this case. Don’t you think?”).

<sup>57</sup> See *Hollingsworth v. Perry*, 570 U.S. \_\_\_ at \*23 (“[DOMA] humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”).

<sup>58</sup> See, e.g., RABBI EUGENE B. BOROWITZ: RETHINKING GOD AND ETHICS 133 (Hava Tirosh-Samuels & Aaron W. Hughes eds. 2014) (“The key issue for me was the [in]ability of a gay man or a lesbian woman to procreate. With the availability of new technologies, (e.g. in-vitro fertilization), surrogate motherhood, [and] adoption, [we now have] ways to overcome the problem. Once gay persons could procreate, I was compelled to soften my opposition to homosexuality.”)

<sup>59</sup> See Transcript of Oral Argument, *Hollingsworth v. Perry*, *Id.*, at\*26. (“Justice Kagan: Well, suppose a State said, Mr. Cooper, suppose a State said that, because we think that the focus of marriage really should be on procreation, we are not going to give marriage licenses anymore to any couple where both people are over the age of 55. Would that be constitutional? Mr. Cooper: No, Your Honor, it would not be constitutional. Justice Kagan: Because that’s the same State interest, I would think, you know. If you are over the age of 55, you don’t help us serve the Government’s interest in regulating procreation through marriage. So why is that different? Mr. Cooper: Your Honor, even with respect to couples over the age of 55, it is very rare that both couples – both parties to the couple are infertile, and the traditional – (Laughter.) Justice Kagan: No, really, because ... I can assure you, if both the woman and the man are over the age of 55, there are not a lot of children coming out of that marriage. (Laughter.)” See also *Id.*, at 23 (“Justice Breyer: What precisely is the way in which allowing gay couples would interfere with the vision of marriage, as procreation of children, that allowing sterile ... couples of different sexes to marry would not? I mean, there are lots of people who get married who can’t have children. And so take a State that does allow

same is true, *mutatis mutandis*, in Jewish Law.<sup>60</sup> For each of those two reasons, and for both of them in the aggregate, the procreation argument should be denied as grounds to prohibit same-sex marriage and, consequently, same-sex acts.

In addition to the procreation rationale, same-sex acts were also viewed as morally reprehensible by Jewish Law scholars due to their deviation from the “law of nature.” Thus, the perversity of homosexual behavior, according to some rabbis, depends on the very notion of “deviating from the ‘natural’ act of heterosexual intercourse and pursuing homosexual relationships for which there cannot possibly be ... any natural desire.”<sup>61</sup> But the “natural” argument is even weaker than the “procreation” one.<sup>62</sup> To be sure, the argument kept appearing in many law treatises, among them Blackstone’s.<sup>63</sup> But as Israeli historian Yuval Harari has recently explained, the “natural” argument has very little – if anything – to do with nature itself: “Biology is willing to tolerate a very wide spectrum of possibilities.... Biology enables men to enjoy sex with one another – culture forbids them to realize this possibility. Culture tends to argue that it forbids only that which is unnatural. But from a biological perspective, nothing is unnatural. Whatever is possible is by definition also natural. A truly unnatural behavior, one that goes against the laws of nature, simply cannot exist, so it would need no prohibition. No culture has ever bothered to forbid men to photosynthesize.... In truth, our concepts [of] ‘natural’ and ‘unnatural’ are taken not from biology, but from ... theology.”<sup>64</sup>

Perhaps the most astonishing aspect of the attitude towards the term *To’e’va*, however, lies with its use by some Jewish Law commentators to preclude – shut down, in effect –

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adoption and say – there, what is the justification for saying no to gay marriage?”); *Baskin v. Bogan*, No. 14-2386, at 7\*-8\* (7th Cir. 2014) (Posner, J.) (“The challenged laws discriminate against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction – that same-sex couples and their children don’t *need* marriage because same-sex couples can’t *produce* children, intended or unintended – is so full of holes that it cannot be taken seriously. To the extent that children are better off in families in which the parents are married, they are better off whether they are raised by their biological parents or by adoptive parent. The discrimination against same-sex couples is irrational, and therefore unconstitutional...”) (emphasis in the original).

<sup>60</sup> According to Jewish Law, the governing principle here is "לא טוב היות האדם לבדו" – “It is not good for a man to be alone,” Gen. 2:18. According to the sages, that verse means that an unmarried man (here, to be sure, to another woman) is incomplete; therefore, marriage is always advised, regardless of age. See *Midrash Reshit Rabba* 17.

<sup>61</sup> RAPPAPORT, *JUDAISM AND HOMOSEXUALITY*, supra, note 25, at 10 (citing Rabbi Moshe Feinstein).

<sup>62</sup> See, e.g., CHRISTOPHER HITCHENS, *GOD IS NOT GREAT – HOW RELIGION POISONS EVERYTHING* 48 (2007) (referring to “the fatuous point that homosexuality is ‘unnatural’ because it does not occur in other species” as follows: “Leave aside the fundamental absurdity of this observation: are humans part of ‘nature’ or not? Or if they chance to be homosexual, are they created in god’s image or not? Leave aside the well-attested fact that numberless kinds of birds and mammals and primates do engage in homosexual play.... Homosexuality is present in all societies, and its incidence would appear to be part of human ‘design.’”). For a comprehensive naturalist perspective, see JOAN ROUGHGARDEN, *EVOLUTION’S RAINBOW: DIVERSITY, GENDER, AND SEXUALITY IN NATURE AND PEOPLE* (2008).

<sup>63</sup> See WILLIAM BLACKSTONE, *4 COMMENTARIES ON THE LAWS OF ENGLAND*, 215 (University of Chicago Press, 1979) (1769) (discussing “the infamous crime against nature, committed either with man or beast”).

<sup>64</sup> YUVAL N. HARARI, *FROM ANIMALS TO GODS – A BRIEF HISTORY OF MANKIND* 177 (2012).

any discussion or even contemplation of the issue.<sup>65</sup> According to this line of thought, same-sex acts were rejected in such a comprehensive and resentful manner (“To’e’va”), that a mere thought or contemplation on the legality of the issue constitutes, in and of itself, a Halachic sin. Thus, Rabbi Moshe Feinstein, known for originating the concept, wrote famously in one of his letters: “The wicked had intended to weaken the prohibition of male homosexual intercourse, first by the question of why the Torah has prohibited it. In itself this is great evil that weakens the prohibition for the wicked ones who have this ugly craving, which is so detestable that even the nations of the world know that there are no abominations like it. It needs no reason since it is an abomination, despised by all the world. All understand that transgressors of this sin are corrupt and not members of civilization at all.”<sup>66</sup>

Today, obviously, the notion of shutting down the opposition to prevent discussion seems anachronistic at best.<sup>67</sup> Indeed, castigating “those who dare ask ‘why’” is based, as Justice Ginsburg put it in another context, on “ideas that have long since been discredited.”<sup>68</sup> It bears little explanation that the more one discusses the topic of same-sex acts – and same sex marriage – the more one becomes informed, educated, and, perhaps wishfully, understanding of the underlying issues. Indeed, as we shall see in Part II, many a modern Jewish Law commentator have recently done just that. But this should come as no

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<sup>65</sup> See, e.g., RABBI REBECCA ALPERT, LIKE BREAD ON A SEDER PLATE 4-5 (recounting how, following her talk on the subject in the late 1970s before a NY congregation, “a venerable older member pronounced my talk irrelevant and absurd. ‘There are no Jewish lesbians,’ she proclaimed.” Alpert then continues: “Some who did not ignore us responded by asking us to keep our sexual identities hidden... Others, embarrassed by their ignorance and discomfort about our lives, responded by keeping silent and ignoring us.”) Perhaps not surprisingly, the silencing of the issue was not unique to Jewish Law. Thus, for example, Sir Blackstone refers in his famous Commentaries to same-sex acts as “peccatum illud horribile, inter christianos *non nominandum*” (“that horrible crime *not to be named* by Christians.”)(emphasis added). See BLACKSTONE *supra*, note 56, at 216.

<sup>66</sup> *Iggerot Moshe, Yoreh De’ah* 3:115; for a critical discussion see GREENBERG, GOD & MEN, *supra* note 5, at 136-139.

<sup>67</sup> Of the many “founding fathers” of free speech only two will be cited here. John Stuart Mill famously reminded us that “[i]f all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.” ON LIBERTY 18 (David Spitz ed. 1975) (1859). Justice Holmes, on his part, referred to the marketplace of ideas when he stated: “the ultimate good desired is better reached by free trade in ideas – [] the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [people’s] wishes safely can be carried out.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For a general discussion of the philosophy of freedom of speech see THE FIRST AMENDMENT 8-16 (Geoffrey Stone, Louis Seidman, Cass Sunstein, Mark Tushnet eds. 1999). In the Jewish Law context, consider Professor Leibowitz’s interesting take on the Tower of Babylon story, appearing in Genesis 11. The story begins with the legend-like opening: “And there was a time when the entire earth was of one language, and one sayings.” (Gen. 11:1). Leibowitz compares this unity in message and thought to “fascism and Nazism,” and explains that “the image of a single and unite humanity is nothing short of a nightmare, which can only spell the oppression of all opportunity for development and progress, and which leaves no room for competing views. And a world with no place for competing values is a world not worth of living in.” YESHAYAHU LEIBOWITZ, SEVEN YEARS OF DISCOURSES ON THE WEEKLY TORAH READING 31 (2003) (Hebrew).

<sup>68</sup> *Gonzales v. Carhart*, 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting) (“This way of thinking reflects ancient notions about women’s place in the family under the Constitution – ideas that have long since been discredited.”)



surprise, as open discussion has always been the hallmark of Jewish Law – a system that not only allowed, but sanctified vibrant debate through the publication of dissenting opinions alongside those of the majority in the Talmud itself.<sup>69</sup>

Before we leave the notion of ‘To’e’va’ – abomination, and the alleged moral turpitude it carries – it is worth mentioning some other iterations of the term in the Torah. Perhaps surprisingly, in the entire five books this precise term (as opposed to its derivations) is mentioned only four more times<sup>70</sup> - once in the Book of Genesis, and thrice in the book of Deuteronomy. A quick review of those iterations demonstrates that the case for negative moral connotation is, at best, mixed. Thus, for example, the first-ever appearance of the term in the Torah is in the context of racial discrimination. Thus, during the second meeting between Yoseph (Joseph) and his brothers, following his nomination as Vice King, he orders that everyone would break bread.<sup>71</sup> The text then explains the manner in which the command was carried: “And they served him by himself, and served them [the brothers] by themselves, and served the Egyptians dining with him by themselves, for the Egyptians could not eat bread with the Hebrews as this would be an abomination (To’e’va) to Egypt.”<sup>72</sup> It was, in other words, considered an abomination for Egyptians to break bread with their Hebrew neighbors, strictly due to their origin and even in the face of a royal command. One need not consider the specter of separate lunch counters to condemn such discrimination, even if it were –for some reason – more justified at the time of the Torah.<sup>73</sup> Clearly, such understating of “abomination” should not be endorsed today.

The second iteration refers to the worship of idols, which are prohibited by Jewish Law. The text first rejects the idea of idols, then continues: “You shall burn the statutes of their [the non-Jews’] gods in fire... And you shall not bring an abomination (To’e’va) into your

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<sup>69</sup> The pertinent governing principle of Jewish Law here is *אלו ואלו דברי אלוהים חיים* – “these ones and these ones – both are the living words of God,” Talmud Bavli (hereinafter: “TB”), *Eruvin* 13b. Indeed, the notion of speaking in one voice - and in one voice alone – is one of the earliest to be condemned in the Torah, in the famous story of the Tower of Babylon. That story begins with the wonderful rendition of “and everyone on earth spoke the same language, and the same words.” Gen. 11:1. For a discussion of why this unified form constituted a totalitarian thought-regime see YESHAYAHU LEIBOWITZ, *SEVEN YEARS OF DISCOURSES ON THE WEEKLY TORAH PORTION 30* (2003)(Hebrew). To be sure, whenever a conflict arise between competing opinions majority rule governs (“following the many is the rule,” Exodus 23:2; *see also*, most famously, the story of The Oven of Achnai, TB, Baba Metzia 59B.; *see infra*, Part IIIB). Still, the preservation – and the inclusion in the text – of other, dissenting opinions to a large extent a novelty of Jewish Law. *See* Mishna Eduyot Ch.1,4-6. And compare, more than a millennium later, CHARLES E. HUGHES, *THE SUPREME COURT OF THE UNITED STATES 68* (1936) (“A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”)

<sup>70</sup> In addition to the iterations appearing in each of the two Leviticus verses dealing with same-sex acts.

<sup>71</sup> *See* Genesis 43:24-31.

<sup>72</sup> Genesis 43:32.

<sup>73</sup> For a sobering comparison of slave marriages and same-sex marriages see Randolph W. Baxter, “*Aren’t We a Couple?*” *A Historical Comparison of Slave Marriages and Same-Sex Marriages*, in 3 *DEFENDING SAME-SEX MARRIAGES* 149 (Martin Dupuis and William A. Thompson eds. 2007) (arguing that “lesbian and gay couples in the century following the abolition of slavery in the United States faced a similar set of restrictions on their ability to have their commitments recognized by the hegemonic power structures of the day. *Id.*, at 150).

home, lest you shall be cursed like it.”<sup>74</sup> Again, the context clearly points to a demarcation between Jews and non-Jews. The same is true for the third iteration – after assuring the Jews that they are the chosen people, separate and apart from any other people, God instruct them not to eat any “abomination” (To’e’va), lest they will be like other people.<sup>75</sup> The only exception is the last iteration, which mirrors ours in that it deals with sexual conduct. Here, the text forbids a husband who previously divorced a woman – who has since been remarried and again divorced – to remarry her, calling such act “an abomination” (To’e’va).<sup>76</sup> Needless to say, such prohibition would not be well received today.

### C. The Rabbinical Silence

In a moral universe where one’s sexual orientation is considered not only a cardinal sin (punishable by death), but a malignant deviation, many a Jewish man and woman – in particular young ones – had to endure an untold amount of suffering.<sup>77</sup> In fact, these young Jews were doomed to suffer twice: first, as rank-and-file members of the LGBT community, they had to battle hate crimes, workplace and housing discrimination, and other forms of social rejection.<sup>78</sup> And second, as members of the Jewish community, they

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<sup>74</sup> Deut. 7:25-26.

<sup>75</sup> See Deut. 14:2-3 (“For you [the Jews] are a holly people for the Lord your God, and you have been chosen of all the people on earth to be His treasured people. You shall not eat any abomination (To’e’va).”)

<sup>76</sup> See Deut. 24:4 (“And the first husband – who sent her the first time – would not be able to marry her again after she has been defiled [by the second husband] – for this is an abomination (To’e’va) before God, and you shall not sin the land that God has given you as property.”)

<sup>77</sup> See, e.g., Dorff, *Human Dignity*, *supra* note 35, at 16 (“It is difficult to imagine a group of Jews whose dignity is more undermined than that of homosexuals, who have to date been told to hide and suppress their sexual orientation, and whose desire to establish a long-term relationship with a beloved friend have been lightly dismissed by Jewish and general society. They have, in effect, been told to walk alone, while the great majority of Jews are expected to walk in pairs and as families. In such a context, where is the dignity of homosexual Jews? How can we hide from their humiliation? What Halakhic recourse is available to integrate gay and lesbian Jews into the observant community with full dignity?”); Orthodox Rabbis and Educators, *Statement of Principles on the Place of Jews with Homosexual Orientation in Our Community*, Section 6 (2010), available at <http://statementofprinciplesnya.blogspot.com/> (“Jews with a homosexual orientation who live in the Orthodox community confront serious emotional, communal and psychological challenges that cause them and their families great pain and suffering. For example, homosexual orientation may greatly increase the risk of suicide among teenagers in our community.”).

<sup>78</sup> See, e.g., RABBI ALPERT, LIKE BREAD, *supra* note 10, at 9 (noting that both lesbian and gay Jewish groups have long had to deal with “civil rights such as protection from hate crimes and freedoms from workplace and housing discrimination.”); Rabbi Bradley Shavit Artson, *Enfranchising the Monogamous Homosexual: A Legal Possibility, A Moral Imperative*, 3 S’VARA: A JOURNAL OF PHILOSOPHY, LAW, AND JUDAISM 24, 31 (1993) (“Living in commitment and love, monogamous gay and lesbian Jews are, regrettably, the butt of endless hostility, beatings, and discrimination in employment, housing, insurance, and tax benefit.”); Dorff, *Human Dignity*, *Id.* at 2 (noting the current “amount of discrimination against gays and lesbians and their need to remain in the closet, with all the suffering, indignity, and the increased risk of suicide that this entails.”). Cf., in the general context, *Baskin v. Bogan*, No. 14-2386, at 9\*-10\*, 24\*-25\* (7th Cir. 2014) (per Posner, J.) (“homosexuals are among the most stigmatized, misunderstood, and

often had to endure self-imposed, intra-community sanctions such as excommunications, bans from appearing in public events, refusals to be ordained, refusals to teach in Hebrew schools, and many others.<sup>79</sup> In short, they were denied the dignity of being considered equal-rights members of both the general citizenry and their respective communities. And although direct evidence of such torment are rare – few Jewish LGBT members dared to out themselves in such oppressing environment of fear – anecdotal testimony began to appear in recent years, shedding some light on both the mental and physical dimensions of such sufferings.<sup>80</sup>

Thus for example, in a letter sent in 2003 by a young Jewish man to his Rabbi in Israel, the young man writes, in part<sup>81</sup>: “Whenever a religious young man finds out he is a homosexual, he first needs to confront the feelings of fear and despair he feels. It is hard to put into words the level of the embarrassment, confusion, and self-loathing he suddenly experiences. For until now, all he ever heard about regarding the issue were biblical terms like ‘better be killed’ and ‘death by stoning’; suddenly, all these verses point, allegedly, directly at him! Suddenly, he realizes that he is attracted to an abomination. The hysteria and despair are only augmented by the fact that the Jewish community treats the entire subject as the most repulsive issue imaginable. ‘It never happens to us’ is the most common statement. Moreover, Rabbis and other educators fear that merely discussing the issue may violate modesty standards [and is therefore forbidden]; or, worst, may provide legitimacy for this type of behavior. As a result, ignorance and misunderstandings prevail within the orthodox religious community; and those, in turn, create an

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discriminated-against minorities in the history of the world...Homosexuals had, as homosexuals, no rights; homosexual sex was criminal (though rarely prosecuted); homosexuals were formally banned from the armed forces and many other types of government work (though again enforcement was sporadic); and there were no laws prohibiting employment discrimination against homosexuals.”); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 162-163 (1980) (“Homosexuals for years have been the victims of both ‘first-degree prejudice’ and subtler forms of exaggerated we-they stereotyping.... It is therefore a combination of the factors of prejudice [against homosexuals] and hideability [by them] that renders classifications that disadvantage homosexuals suspicious.”). Suffering for being an LGBT member, moreover, may take much subtler forms. See, e.g., Roberta Israeloff, *Jewish Reconstructionist Communities: Becoming a “Kehilla Mekabelet,”* available at <http://www.jewishrecon.org/resource/becoming-kehillah-mekabelet> (“when everyone in the office reported on their weekend activities, [a lesbian Jewish congregant could not share with them hers]. Though she had a long-standing relationship and as active a weekend as anyone, she could never join in to talk about what she and her lover had done.”)

<sup>79</sup> See ALPERT, *LIKE BREAD*, *supra* note 73, at 7 (“Traditional Jews excommunicated some of us, merely for being lesbian. They banned us from marching in Israel Independence Day parades, from publicly honoring gay victims of the Holocaust, from planting trees in Israel in memory of our dead... Liberal Jewish institutions, while more sympathetic ... [also] refused to ordain us, to allow us to teach in Hebrew schools, to serve on college campuses, or to have the opportunity to honor our relationships.”); Dorff, *Human Dignity*, *supra* note XXX, at 16 (reporting on a rabbi who prevented a gay congregant, who was mourning the death of his own father, from leading services because he was gay, and then showed him an entire list of leadership activities from which he was banned.)

<sup>80</sup> The leading example is the award-winning, 2001 documentary “Trembling Before God,” which chronicles the lives of several gay and lesbian Orthodox Jewish couples. See [www.imdb.com/title/tt0278102/](http://www.imdb.com/title/tt0278102/).

<sup>81</sup> The Letter, written in Hebrew and sent to the Israeli Rabbi Yuval Sharlo, was published in full (save the author’s name) at <http://shut.moreshet.co.il/shut2.asp?id=74022>.

atmosphere of hatred and prejudice.”<sup>82</sup> He ends his letter, a full page and a half later, with an emotional plea: “We need a Rabbi! We need some attention to our issues other than ordering us to ‘change!’ Because the truth is, we can’t... Even the lepers had their own Rabbi [], while we are like a herd of black sheep without a shepherd. My only wish is for someone to take ownership over this issue.”<sup>83</sup> But the Rabbi never wrote back.<sup>84</sup> That Rabbi, like many others, remained silent.

And that is the response – at best – that many young Jewish LGBT members had to confront. Thus, on the one hand, they felt fearful and lost following the discovery of their sexual identity, often too scared to deal with the situation on their own. On the other hand, when they turned, like their parents before them, for the Rabbis for help – assuming those respected spiritual leaders who were often able to reconcile the sometimes rigid biblical text with the flexible needs of their society<sup>85</sup> – they were often answered with a roaring silence, or, worse, condemnation and rejection. As Rabbi Greenberg notes, “[y]oung gay people seeking help from rabbis have been given an array of advice and reproof. Some have been told to fast and roll in the snow... [others] to recite certain psalms, or to eat figs.... Many, until recently, were encourage to marry, with the promise that it would all work out. The more understanding rabbis ... advised gay people to enter therapy designed to change their sexual orientation. When therapy, fasts, or figs failed, absolute celibacy was demanded.”<sup>86</sup>

But not only Rabbis failed to offer a meaningful advice. Professor Yeshayahu Leibovitz, one of Israel’s most revered intellectuals and Jewish thinkers,<sup>87</sup> was asked at least on two occasions to provide advice on the issue. The two young men who wrote to him felt lost due to what they perceived as unresolvable tension between their sexual orientation and Jewish faith.<sup>88</sup> The first wrote: “I belong to a Chasidic family of Holocaust survivors. From my very earliest days – and before I could even define it – I was attracted to men. This fact caused me tremendous amount of torment, both physical and mental, during my studies at the Yeshiva and my residence in the dorms. My dilemma is: how can one

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<sup>82</sup> Id., p. 2.

<sup>83</sup> Id., p. 3.

<sup>84</sup> Id. To be sure, Rabbi Sharlo did publish the letter, as the young man asked him to do. But he never provided an answer to any of the [many] issues raised by the anonymous write. In fact, the Rabbi’s entire reply consisted of the following: “Greetings. I am publishing the letter, verse and chapter. Sincerely, Rabbi Sharlo.” Id.

<sup>85</sup> For three such reconciling examples, see Introduction, *supra* (explaining how “an eye for an eye” and other seemingly clear biblical texts were altered in light of social needs).

<sup>86</sup> GREENBERG, *WRESTLING WITH GOD AND MEN*, *supra*, note 3, at 3-4; cf. Rabbis Dorff, Nevins, Reisner, *supra* note XXX, at 17 (mentioning complete ban on all intimate acts, celibacy, and conversion therapy as some of the Halachic authorities’ responses).

<sup>87</sup> See generally, Eliezer Goldman, *Introduction*, in YESHAYAHU LEIBOWITZ, *JUDAISM, HUMAN VALUES, AND THE JEWISH STATE* xiii-xxviii (Eliezer Goldman, ed., Harvard, 1995).

<sup>88</sup> The letters appeared in a book published posthumously by Prof. Leibowitz’s family; see LEIBOWITZ, *supra*, note 24, at 177-179. Due to the rarity of such testimony, and their relevance to the issue here, I translated them in full.

reconcile the Jewish faith with homosexuality?”<sup>89</sup> Leibowitz could provide no real answer.<sup>90</sup>

Another 29-year-old student wrote to Professor Leibowitz, seeking similar advice.<sup>91</sup> He wrote, *inter alia*: “I am an observant 29-year-old student. I am trying my best to lead a religious life, and would like to serve God in any way I can. And yet, I have a problem that creates a real conflict with my desire towards God. The problem is that I am attracted to persons of my own gender, which is of course completely prohibited according to Jewish law. All my attempts to get rid of such attraction were futile. Believe me, every single day since I could articulate the issue I keep asking myself what I should do about it; I am caught between a rock – my own desires – and a hard place – my creator... I’ve already considered the option of ‘bluffing,’ that is, to disregard my own desires completely and go ahead and get married with a woman according to Jewish Law. But even then, I am still conflicted as to whether I should tell the woman who would want me; in other words, would she still want me if she knows that this is how I am? This issue causes me great tension, in particular when I am trying to connect with women, as I feel dishonest and untrustworthy. More than ever, I fear that what I hide today will be revealed tomorrow...”<sup>92</sup> Here, too, Professor Leibowitz could not offer a meaningful advice. He did, however, allow a rare glimpse into his own struggles with this Halachic doctrine when he wrote: “You are among the few people chosen [by God] to be strictly challenged, by being required to stand a test [every day of your life] ... Both Job and Avraham our Forefather were required to stand [similar] tests of overcoming their most basic human needs and urges – it is extremely courageous to do so. I, who was never put through a similar test and was never asked to prove my ability to withstand one,<sup>93</sup> am not entitled to ask other people for such degree of courage, which I have never demonstrated.”<sup>94</sup> At the end of his reply, Professor Leibowitz reminds the young person of the Talmudic advice, according to which “if a man sees that his urges overcome him, he should go to a place where nobody knows him; he should dress in black and don black and do as his mind wishes, as long as he would not violate the name of Lord in public.”<sup>95</sup>

In short, until recently, LGBT members of the Jewish community, especially young ones, have suffered an “intolerable humiliation.”<sup>96</sup> They could find no remedy in Jewish Law.

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<sup>89</sup> See LEIBOWITZ, *supra* note 23, at 178.

<sup>90</sup> In essence, Professor Leibowitz’s answer, cited in part *supra*, note 24, was that such reconciliation is impossible. This Article suggests it is.

<sup>91</sup> This exchange is also quoted – with a slightly different translation – at Rabbi Gordon Tucker, דרוש וקבל ששכר: *Halachic And Metahalachic Arguments Concerning Judaism and Homosexuality* 14 (2006) (Conservative dissenting view).

<sup>92</sup> *Id.*, at 178.

<sup>93</sup> Notably, Leibowitz lost his son, a brilliant neurobiologist, to cancer at age 38. This “test,” however, never shook his unyielding belief in the Jewish God.

<sup>94</sup> *Id.*, at 179.

<sup>95</sup> *Id.*, citing Talmud Bavli, Kiddushin 40a, available at <http://halakhah.com/pdf/nashim/Kiddushin.pdf>. (p. 130/277). See also GREENBERG, *WRESTLING WITH GOD AND MEN*, *supra* note 3, at 267 n. 1 (citing same as a frequent Rabbinical response to young Jews who complained “they were unable to totally repress their sexuality”).

<sup>96</sup> Rabbi Dorff et al., *Homosexuality, Human Dignity, & Halacha*, *supra* Note XXX, at 17.

Their Rabbis – their spiritual leaders, the persons they were supposed to turn to in time of crises - were silent. Their communities rejected them. Their own families refused to accept them. And this entire attitude was – and still is – based on the same two verses from Leviticus.

## **Part II: Recent Views – Partial Recognition of Same-Sex Marriage**

Recent years have seen an erosion of the traditional view against same-sex acts – and same-sex marriage – in Jewish Law. To be sure, Orthodox Jews still faithfully adhere to the view forbidding all forms of such behavior.<sup>97</sup> Then again, Orthodox Jews constitute only ten percent of all American Jews today.<sup>98</sup> Indeed, as the following pages demonstrate, the vast majority of affiliated American Jews are likely to condone, at least in part, same-sex marriage. To justify such recognition and in support of it, a new body of Jewish-Law literature began to emerge. In a significant way, this new literary wave ushered in a new era in Jewish Law: for the first time in its history, an open, robust, and diverse debate began to take place within Jewish Law about the proper place, and role, of same-sex members within the community. No longer was the issue in denial. No longer could the conspiracy of silence be kept. The issue is now out of the closet, and many religious leaders have responded to the call. But not all were welcoming, at least initially. As Rabbi Alpert has noted, the initial reaction by many a Jewish community was fraught with “ignorance, silence, homogenization, and exoticization.”<sup>99</sup> But that was twenty years ago. Since then, as the next pages will reveal, a major shift has taken place in the way that both leaders and congregants view same-sex issues.

We turn now to briefly review some of the recent literature on same-sex marriage in Jewish Law, in particular as it pertains to the Levitical prohibition. We divide our discussion along the four leading strands of Judaism today – Reconstructionist, Reform, Conservative, and Orthodox. We move in order from the most to the least progressive.

### **A. Reconstructionist Views**

The Reconstructionist movement is quintessentially American. Created in 1935 by Rabbi Mordechai Kaplan, it was in large part based on his *Judaism as a Civilization*.<sup>100</sup> There, Kaplan argued for “reconstruction” of Judaism, turning it into an ever-changing entity

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<sup>97</sup> See, e.g., Dorff, *Human Dignity*, *supra* note 49, at 17 (“Until this point, Halachic authorities have maintained a complete ban on all intimate acts by homosexuals.”) See also *infra*, Part IID.

<sup>98</sup> See Pew Research cited *supra*, note 7.

<sup>99</sup> ALPERT, LIKE BREAD ON A SEDER PLATE, *supra* note 10, at 3.

<sup>100</sup> See The Reconstructionist Movement, Rabbi Mordecai M. Kaplan, available at <http://www.rrc.edu/resources/mordecai-m-kaplan>.

able to meet Jews' evolving needs.<sup>101</sup> He also called for democracy in synagogues and advocated for respect of religious opinions of the individual.<sup>102</sup> Although his ideas gained some traction and following, the movement never became truly popular.<sup>103</sup> Today, while still considered one of the largest four denominations,<sup>104</sup> fewer than six percent of American Jewry identify themselves as Reconstructionists.<sup>105</sup>

Reconstructionism rejects the notion that the Torah and the Talmud were revealed by God at Sinai, or that *Halakhah* (Jewish law) serves as an absolute binding set of commandments.<sup>106</sup> Instead, in adopting Rabbi Kaplan's notion of evolving religious civilization, the movement "embodies both past and present by infusing our 'path' with the ethics and values that are our legacy as well as the realities of our present cultural lives."<sup>107</sup> It is no wonder, therefore, that the movement claims to be the first to publicly address the issue of homosexuality and Jewish Law.<sup>108</sup> Thus, in 1984 the movement approved of "the first Jewish seminary to endorse the ordination of gay and lesbian rabbis."<sup>109</sup> In 1992, the movement issued a seminal report on "Homosexuality and Judaism," which stated, among others: "We regard the Jewish values that affirm the inherent dignity, integrity, and equality of human beings as having primacy over historically conditioned attitudes based on ... texts that condemn homosexuality as an abomination. It is our duty to correct the misunderstandings and resulting injustice of the past and fulfill the Jewish obligation to seek justice."<sup>110</sup> Today, the movement asserts "an unwavering commitment to forming inclusive communities, welcoming to gay, lesbian, bisexual and transgendered Jews... and other groups traditionally excluded from full participation in Jewish communal life."<sup>111</sup>

In 1993 the movement adopted the recommendations of the 1992 Report, including the supporting of rabbis "who worked with and officiated at rituals and rites of passage for

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See generally Reconstructionist Judaism: The Fourth Denomination, available at [http://www.mu jewishlearning.com/history/Modern\\_History/1914-1948/American\\_Jewry\\_Between\\_the\\_Wars/Reconstructionist\\_Judaism\\_Prn.shtml](http://www.mu jewishlearning.com/history/Modern_History/1914-1948/American_Jewry_Between_the_Wars/Reconstructionist_Judaism_Prn.shtml)

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

<sup>105</sup> See Pew Research on American Jewry, cited *supra*, note 7.

<sup>106</sup> See *supra*, note 100.

<sup>107</sup> See Jewish Reconstructionist Communities, *FAQs on Reconstructionist Approach to Jewish Ideas and Practices* ("Reconstruction FAQs"), Q. 2 ("How Does Reconstructionism Regard Halakah/Jewish Law and Jewish Tradition?"), available at <http://www.jewishrecon.org/resource/faqs-reconstructionist-approaches-jewish-ideas-and-practices>.

<sup>108</sup> See "Reconstruction FAQs", *Id.*, Q. 10, ("Where Does Reconstructionism Stand Regarding Homosexuality and Same-Sex Marriage?"), available at <http://www.jewishrecon.org/resource/faqs-reconstructionist-approaches-jewish-ideas-and-practices>.

<sup>109</sup> Reconstructionist Rabbinical College, *Reconstructionist Movement Endorses Civil Marriage for Same-Sex Couple*, April 2004, at 1 ("Reconstruction Endorsement") available at <http://www.rrc.edu/news-media/news/reconstructionist-movement-endorses-civil-marriage-same-sex-couples>.

<sup>110</sup> Cited in Roberta Israeloff, Jewish Reconstructionist Communities, *Becoming a "Kehilla Mekabelet,"* 5 RECONSTRUCTIONISM TODAY, NO. 4 (Summer 1998), available at [www.jewishrecon.org/resource/becoming-kehillah-mekabelet](http://www.jewishrecon.org/resource/becoming-kehillah-mekabelet).

<sup>111</sup> *Reconstruction FAQs*, *supra* note XX, at Q. 10.

gay and lesbian Jews and same-sex couples, including marriage ceremonies.”<sup>112</sup> In 1997, the movement published a rabbi’s manual that included a “sanctification ceremony (Berit Ahava) for same-sex couples.”<sup>113</sup> In 2004, the movement announced that it “wants to go on record as being in support of full and equal civil marriage for gay men and lesbians in the United States and Canada.”<sup>114</sup> The movement reasoned that “Jewish teachings of tzedek (righteousness), mishpat (justice), and ke’vod habriot (the dignity of all human beings) are the sacred inheritance of all Jews, and inspire us to strive for a fully inclusive understanding of the teaching that humanity is created b’tzelem Elohim, as an embodiment of Godliness.”<sup>115</sup> In 2008, following the passage of California’s Proposition 8 and similar discriminatory initiatives passed in other states, the movement issued a statement condemning bans on same-sex marriages.<sup>116</sup> Today, from a policy perspective, the movement’s rabbis “are free to perform same-sex commitment or marriage ceremonies if it is their practice to do so.”<sup>117</sup> In practice, however, “most Reconstructionist rabbis today perform same-sex Jewish weddings, which are included in the Reconstructionist *Rabbi’s Manual*. Many use the traditional terminology of *Kiddushin* used for heterosexual marriages.”<sup>118</sup>

To be sure, not all has always been well in Reconstructionist kingdom. Though long considered the most liberal of the four Jewish denominations, community members had their fair share of struggles when the policy required actual implementation. For example, in 1998, one New York Reconstructionist congregation was considered becoming “*Kehila Mekabelet*” – a welcoming community – adopting several pro-gay measures,<sup>119</sup> including, potentially, same-sex marriage.<sup>120</sup> The experience has been anything but pleasant.<sup>121</sup> Reflecting on these event, one congregant wrote: “Maybe that faith [that each hardened heart is waiting only for an explanation eloquent enough to unlock it] is naïve. Maybe the process of shucking off thousands of years of prejudice simply takes this long... The work,

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<sup>112</sup> *Reconstruction Endorsement*, *supra* note XX, at 1.

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

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

<sup>115</sup> *Id.*

<sup>116</sup> Press Release, *Judaism Reconstructionist Movement Condemns Bans on Same-Sex Marriage*, available at <http://archives.religionnews.com/press-releases/judaisms-reconstructionist-movement-condemns-bans-on-same-sex-marriage>.

<sup>117</sup> *Reconstruction FAQs*, *supra* note XX, at Q. 10.

<sup>118</sup> Rabbi Amber Powers, *Same-Sex Marriage*, available at [http://www.mujewishlearning.com/life/Life\\_Events/Weddings/Contemporary\\_Issues/Same-Sex\\_Marriage.shtml?p=0](http://www.mujewishlearning.com/life/Life_Events/Weddings/Contemporary_Issues/Same-Sex_Marriage.shtml?p=0)

<sup>119</sup> Israeloff, *supra* note XXX at 1;

<sup>120</sup> See Lesser, *supra* note XXX at 1-2 (“A part of this process [“welcoming synagogues”] was the expectation that congregations would offer opportunities for gay and lesbian people to ritualize their unions in the synagogue... A congregation that went through the education process and adopted a statement of inclusion could take on the label *kehilah mekabelet* (welcoming community).”)

<sup>121</sup> Israeloff, *supra* note XXX. at 1 (“Our first mistake was assuming that we had our finger on the membership’s pulse and could accurately gauge their collective position on this sensitive issue. Sheer chutzpah!”). See also Lesser, *supra* note XXX at 2 (“In 1998, a group of students became aware of the disparity between the progressive education embodied in the curriculum of the [movement’s rabbinical] College, its advocacy positions on gay and lesbian civil inclusion, the embracing of LGBT issues within the movement, and the discomfort of many of the congregations.”)



after all, is about changing hearts, not simply passing resolutions.”<sup>122</sup> This type of experience, however, may be a thing of the past. “In the 21st century, the overwhelming majority of Reconstructionist congregations have embraced both the ritual and political rights of LGBT people with regard to marriage,” writes Rabbi Lesser.<sup>123</sup> The growing acceptance of same-sex marriage within the Reconstructionist community has been encouraging; and yet the need to examine the Halachic justification for such move remains. How did the Reconstructionist movement overcome the Levitical textual obstacle to recognition of same-sex marriage?

One attempt was made by Rabbi Goldie Milgram. In a short article<sup>124</sup> she reminds us that the verses are not conclusive: “a verse doeth not a moral code make, verses must be seen in the context of their larger rubric and through the lens of the times in which we live.”<sup>125</sup> She then explains that the Leviticus verses – as well as the Halachic edifice that followed – “speak about homosexual acts outside of the context of homosexual relationship.”<sup>126</sup> Thus, the “designation of a homosexual act as to’evah may be understood as referring to a homosexual act outside of the context of the entire person.... To’evah still applies to sexual relations with minors, bath house sex, rape, sado-masochistic sex. Indeed, all sexual acts that are coercive, morally degrading, or violent were prohibited by the Torah. That Torah prohibition has not changed at all.”<sup>127</sup> While Milgram’s argument is certainly interesting, it is hard to find it persuasive. The assumption that the simple biblical text prohibiting male same-sex acts relates specifically to “violent” or “coercive” acts is simply not supported by either the text or context of the prohibition. And while is certainly an attractive proposition, it can hardly be accepted as a tenet of Torah law.

Another, more systematic attempt to attack the Levitical prohibition was conducted by Rabbi Rebecca Alpert. One of the most important voices of the Reconstructionist LGBT community – and one of the first women to ever be ordained as a rabbi - Professor Alpert of Temple University<sup>128</sup> authored “Like Bread on the Seder Plate” in 1997.<sup>129</sup> There, she attempted to reconcile her Reconstructionist identity<sup>130</sup> with what she refers to as “troubling texts from Torah.”<sup>131</sup> Alpert begins with the premise that “even if we are not religious Jews, these ancient texts can affect us. Torah is used by others to support their belief that homosexuality is wrong. (This is true not only for Jews. Torah is

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<sup>122</sup> *Id.*, at 3.

<sup>123</sup> Lesser, *supra* note XXX, at 2.

<sup>124</sup> See Rabbi Goldie Milgram, *What Does Judaism Have to Say about Homosexuality, Jewish Same-Sex Marriages, and Orientation?*, available at <http://www.reclaimingjudaism.org/teachings/what-does-judaism-have-say-about-homosexuality-jewish-same-sex-marriages-and-ordination>.

<sup>125</sup> *Id.*, at 2.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 3.

<sup>128</sup> For a short biography see <http://www.cla.temple.edu/religion/faculty/rebecca-t-alcort/>.

<sup>129</sup> Alpert, *supra* note 60.

<sup>130</sup> See *Id.*, at 14 (“As a reconstructionist, I believe that the single unifying factor for Jews is our connection to the Jewish people and to Jewish civilization. From this perspective, Judaism includes all who claim identification with the narrative history of this particular people, its values and practices, however they define them.”)

<sup>131</sup> *Id.* at 17.

quoted by right-wing Christian religious groups to the same end).<sup>132</sup> She then considers the principle of “strict interpretation of Jewish law,” according to which “no pronouncement in the Torah can ever be nullified or abrogated.”<sup>133</sup> Indeed, Alpert explains, “we cannot simply excise what we do not like; it is our heritage and the primary text of our people.”<sup>134</sup> Which brings her the “piercing question [that] arises and reverberates through our lives: “How do we live as Jews when the same text that tells us to love our neighbors also tells us that the male homosexual acts are punishable by death by decree of that same God?... These are contradictory notions; if God created all human beings in the divine image, then men who love men and women who love women must also be part of the divine plan.”<sup>135</sup> She then arrives at the Leviticus verses where “male homosexuality is declared not only an abomination but also a capital crime,”<sup>136</sup> and admits: “Coming to terms with this passage in Leviticus may be the greatest single struggle facing lesbians seeking to find a home within the Jewish community, despite the fact that lesbians are not specifically mentioned in the this passage.”<sup>137</sup>

Examining the language of the verses more closely, Rabbi Alpert notes that “most of the interpretations of Leviticus 18:22 hinge on an unclear word – to’evah – which is generally translated as ‘abomination.’ In fact, the meaning of this word is obscure.”<sup>138</sup> She further correctly notes that “the text never tells us why lying with a man is to’evah, only that it is.”<sup>139</sup> After reviewing the two possible interpretations – “being led astray” and “prima facie disgusting”<sup>140</sup> – she concludes that since Jewish Law commentators have long preferred the latter, Jewish tradition “leaves little room for conversation” regarding another interpretation.<sup>141</sup>

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<sup>132</sup> *Id.* at 17. Of course, not only Christianity, but Islam rejects homosexuality entirely. *See, e.g.,* Mustafa Akyol, *What Does Islam Say About Being Gay?* N.Y. Times, July 28, 2015, at A12 (questioning the Koran’s traditional reading of same-sex acts; noting, however that “the traditional mainstream Islamic view on homosexuality produces intolerance in Turkey toward gays and creates starker problems in Muslim nations that apply Shariah. In Saudi Arabia, Iran, Sudan or Afghanistan, homosexuality is a serious offense that can bring imprisonment, corporal punishment or even the death penalty. Meanwhile, Islamic State militants implement the most extreme interpretation of Shariah by throwing gays from rooftops.”)

<sup>133</sup> *Alpert, supra* note 60, at 18

<sup>134</sup> *Id.* at 19.

<sup>135</sup> *Id.*, at 19-20.

<sup>136</sup> *Id.*, at 26.

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

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

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

<sup>140</sup> *Id.* at 28.

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

## B. Reform Views

Reform Judaism emerged in early 19<sup>th</sup> century, post-emancipation Europe.<sup>142</sup> Determined to bring Jewish life into the modern age, the new movement emphasized the universal aspect of the ethical teachings by biblical prophets. No longer was ritual observance viewed as ordained by God or inviolate, but rather as a means to reinforce the prophetic ideals of justice, freedom, and peace.<sup>143</sup> The movement began to gain supporters and extended to North America. Today, the Reform Movement is by far the largest of all U.S. Jewish denominations; with 35% of Jews identifying themselves as members, it is nearly twice as large as the next denomination, the Conservative.<sup>144</sup>

On the issue of same-sex relations, Reform Judaism has seen much evolution over time. Thus, for example, a major 1973 “Responsum” (an answer carrying a binding Halachic weight) on the issue opens with the following categorical statement: “There is no question that Scripture considers homosexuality to be a grave sin.”<sup>145</sup> The Responsum goes on to cite the two Levitical verses, suggesting that “if Scripture calls it an abomination, it means that it is more than violation of a mere legal enactment; it reveals a deep-rooted ethical attitude.”<sup>146</sup> Therefore, by this Responsum, “[t]here is no side-stepping the fact that from the point of view of Judaism men who practice homosexuality are to be deemed sinners.”<sup>147</sup> Dismissively, it concludes with the following warning: “It is hardly worth mentioning that to officiate at a so-called ‘marriage’ of two homosexuals and to describe their mode of life as “Kiddushin” (i.e., sacred in Judaism) is a contravention of all that is respected in Jewish life.”<sup>148</sup>

All that has changed today. But change came slowly, and gradually. In 1977, the Central Conference of American Rabbis (CCAR) – the governing body of the Reform Movement – issued a resolution recognizing the discrimination “long endured” by homosexuals in our society, calling for de-criminalization of same-sex acts, and for legislation that prohibits discrimination against them “as persons.”<sup>149</sup> Yet eight years later, when opining on the possibility of officiating at same-sex marriages, the same body demonstrated that the way to full recognition is still far: “Judaism places great emphasis on family, children and the future, which is assured by a family. However we may understand homosexuality, whether as an illness, as a genetically based dysfunction or as a sexual preference and lifestyle -we cannot accommodate the relationship of two homosexuals as a ‘marriage’ within the context of Judaism, for none of the elements of *Kiddushin* (sanctification)

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<sup>142</sup> See generally Rabbi Lawrence A. Englander, *History of Reform Judaism and a Look Ahead: In Search of Belonging*, available at <http://www.reformjudaism.org/history-reform-judaism-and-look-ahead-search-belonging>

<sup>143</sup> Id.

<sup>144</sup> See Pew Research Center, 2013 Survey of U.S. Jews, *supra* note 7.

<sup>145</sup> Rabbi Solomon B. Freehof, *Judaism and Homosexuality*, in AMERICAN REFORM RESPONSA 1889-1983, at 49 (Walter Jacob, ed. 1983).

<sup>146</sup> Id. at 50.

<sup>147</sup> Id.

<sup>148</sup> Id. at 51-52.

<sup>149</sup> CCAR Resolution: *Rights of Homosexuals* (1977), available at <https://ccarnet.org/rabbis-speak/resolutions/all/homosexuals-rights-of-1977/>.

normally associated with marriage can be invoked for this relationship. A rabbi cannot, therefore, participate in the "marriage" of two homosexuals."<sup>150</sup>

In 1990, the CCAR made its first positive step when it allowed, for the first time, the admission of openly-gay students to its rabbinical college.<sup>151</sup> The 1990 Resolution also began the long march towards recognition of same-sex marriage: "The committee strongly endorses the view that all Jews are religiously equal regardless of their sexual orientation. We are aware of loving and committed relationships between people of the same sex. Issues such as the religious status of these relationships as well as the creation of special ceremonies are matters of continuing discussion and differences of opinion."<sup>152</sup> In 1996 the CCAR expressed in a Resolution, for the first time, support for same-sex marriage, albeit only as a "matter of civil law, and ... separate from the question of rabbinic officiation at such marriages."<sup>153</sup> With that, the CCAR adopted broad language in supporting "the right of gay and lesbian couples to share fully and equally in the rights of civil marriage," and in opposing any "governmental efforts to ban gay and lesbian marriage."<sup>154</sup>

2000 was a watershed year in the attitude of Reform Movement towards Jewish same-sex marriage. In its Resolution of that year, the CCAR has endorsed for the first time the notion that "Kedushah [holiness] may be present in committed same gender relationships between two Jews and that these relationships can serve as the foundation of stable Jewish families, thus adding strength to the Jewish community."<sup>155</sup> Accordingly, the CCAR resolved that "the relationship of a Jewish, same gender couple is worthy of affirmation through appropriate Jewish ritual," and that it supports "the decision of those who choose to officiate at rituals of union for same-gender couples" as well as "the decision of those who do not."<sup>156</sup> Accordingly, the decision of whether to officiate over a same-sex marriage was left to each individual rabbi.

The 2000 Resolution left open one important question: What type of wedding ceremony may a Reform rabbi conduct? May it include a normal "*Kiddushin*" – the one applying to opposite-sex Jewish couples? According to some commentators, since Reform rabbis may usually choose the type of ceremony they will perform, "the 2000 resolution may include the possibility performing not only commitment ceremonies and abbreviated wedding ceremonies for homosexuals but also ... a regular wedding ceremony ... based on the

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<sup>150</sup> CCAR Responsa, *Homosexual Marriage* (1985), available at <http://ccarnet.org/responsa/carr-297-298/>.

<sup>151</sup> CCAR Resolution: *Report on the Ad Hoc Committee on Homosexuality and the Rabbinate* (1990), available at <https://ccarnet.org/rabbis-speak/resolutions/1990/homosexuality-and-the-rabbinate-1990//>

<sup>152</sup> *Id.* at 2-3.

<sup>153</sup> CCAR Resolution: *On Gay and Lesbian Marriage* (1996), available at <https://ccarnet.org/rabbis-speak/resolutions/1996/on-gay-and-lesbian-marriage-1996/>.

<sup>154</sup> *Id.* at 1.

<sup>155</sup> CCAR Resolution: *Resolution on Same Gender Officiation* (2000), available at <http://ccarnet.org/rabbis-speak/resolutions/2000/same-gender-officiation/>.

<sup>156</sup> *Id.* at 1-2.

concept of *Kiddushin*.<sup>157</sup> Others have called more explicitly to recognize the ceremony as *Kiddushin*.<sup>158</sup>

The CCAR rose to the challenge. In a 2014 Responsum,<sup>159</sup> the CCAR has held that “in light of the underlying purpose and values of Jewish marriage, as well as of our historic Reform Jewish understanding of the concept of *kiddushin*, Reform rabbis may consider these same-sex marriages to be *kiddushin*, utilizing in the marriage ceremony the Jewish forms and rites that are most appropriate to the Jewish partners involved.”<sup>160</sup> In arriving at this surprising conclusion – which is at odds with all its previous positions<sup>161</sup> – the CCAR relied on several Halachic principles. First, the notion that “it is not good for a person to be alone.” (Gen. 2:18).<sup>162</sup> Second, the notion that “our tradition strongly frowns on celibacy and encourages life partnership. Finding an *ezer ke’negdo* (Gen. 2:20), a mutually supportive and enriching life partner, is an enduring Jewish value.”<sup>163</sup> Obviously, both these principles are not limited to opposite-sex couples. Finally, the Halachic principle of human dignity “requires that same-sex couples be afforded the same opportunities as heterosexual couples to sanctify their marriages with *Kiddushin* and the presence of their rabbi.”<sup>164</sup>

Soon thereafter, CCAR elected, for the first time, an openly-gay female Rabbi – Denise L. Eger – to serve as its president.<sup>165</sup>

### C. Conservative Views

The Conservative Movement first emerged in nineteenth-century Germany, before immigrating to the United States a century later, much like the Reform Movement before it.<sup>166</sup> Generally speaking, Jewish Conservatism is Halachically situated between the most stringent Orthodox strand and the more liberal Reform Movement.<sup>167</sup> Today, 18% of

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<sup>157</sup> Jacob A. Moss and Rivka B Kern Ulmer, “Two Men Under One Cloak” – *The Sages Permit It: Homosexual Marriage in Judaism*, 55 J. OF HOMOSEXUALITY 71, 93 (2008) (collecting authorities).

<sup>158</sup> See, e.g., Peter S. Knobel, *Kiddushin: An Equal Opportunity Covenant*, *supra* note 51.

<sup>159</sup> CCAR Responsum: *Same-Sex Marriage as Kiddushin* (2014), available at <http://www.ccarnet.org/responsa/same-sex-marriage-kiddushin/>.

<sup>160</sup> *Id.* at 3.

<sup>161</sup> *Id.* at 3 (“The above, obviously, stands at odds with our traditional literature, which never applies the term *Kiddushin* to same-sex unions.”)

<sup>162</sup> *Id.* at 2.

<sup>163</sup> *Id.* at 2.

<sup>164</sup> *Id.* at 2-3.

<sup>165</sup> See AP, *Lesbian Rabbi Is to Become President of Reform Group*, NY Times, March 15, 2015, at A13.

<sup>166</sup> For a comprehensive historical overview, see DANIEL J. ELAZAR AND RELA MINTS GEFFEN, *THE CONSERVATIVE MOVEMENT IN JUDAISM – DILEMMAS AND OPPORTUNITIES* 13-28 (2000).

<sup>167</sup> See *Id.*, at 1 (noting that the Conservative Movement caters “to the needs of those American congregations that ... wanted to be remain traditional without being Orthodox and to adapt to the world around them without becoming Reform.”). See also Rabbi Reuven Hammer, *Judaism as a System of Mitzvot*, 61 CONSERVATIVE JUDAISM 12, 16 (2009) (“Many leaders of the Conservative movement have recognized that it is necessary to recreate a viable pattern of mitzvot for the modern age based upon a theology that is acceptable in light of modern knowledge.”); LEO TREPP, *A HISTORY OF THE JEWISH EXPERIENCE* 393 (1962) (“The [Conservative] immigrants... admired the decorum of the reform synagogue,

American Jews identify themselves as Conservatives, making the denomination one of the largest in American Jewry today, second only to the Reform Movement.<sup>168</sup>

In terms of Same-Sex Marriage, the Conservative Movement has dedicated a significant body of thought – perhaps more than any other Jewish denomination – to the issue. Indicative of the movement’s pluralistic nature, this impressive corpus is multi-dimensional, varied, and contains many a view on the place of same-sex practices in Jewish Law today. Here I will only touch upon few of the main themes.

In 1992, the Committee on Jewish Law and Standards (CJLS), the governing Halachic body of the Conservative Movement, published its first official "Responsum" (a binding Halachic position-paper) on the subject of same-sex marriage.<sup>169</sup> Although the Responsum, authored by Rabbi Elliot Dorff, began with the caution that “we do not know enough now to make a definitive decision on homosexuality,”<sup>170</sup> it continued to conclude that the movement, as a whole, still firmly rejects any lenient views on same-sex marriage. Accordingly, “[w]e will not perform commitment ceremonies for gays or lesbians,” and, “[w]e will not knowingly admit avowed homosexuals to our rabbinical or cantorial schools or to the Rabbinical Assembly or the Cantors' Assembly.”<sup>171</sup>

The next thirteen years have seen great evolution in Conservative thinking on the subject.<sup>172</sup> By 2005, when the CJLS had its second retreat on Halacha and Homosexuality, no less than nine comprehensive Responsa were offered for acceptance,<sup>173</sup> forming together the *annus mirabilis* of Conservative thought on the subject. In 2006, the CJLS has decided to adopt three Responsa, in part diametrically opposed: two affirming the 1992 status-quo, and one allowing for change – including the admission of openly-gay students to rabbinical schools and the conduct of commitment ceremonies (though not Jewish weddings) for same-sex couples.<sup>174</sup> Thus, each Conservative Rabbi could – and still can – adopt the Responsum most suitable for them.<sup>175</sup> Here I will touch briefly of

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but missed in it the warmth and intimacy which they desired. Neither could they accept the radical departure from tradition which, at that time, was the rule. They were not at home. The very term “Reform” was repugnant to them. Out of their need Conservatism emerged.”)

<sup>168</sup> See Pew Research Center, 2013 *Survey of U.S. Jews*, *supra* note 7.

<sup>169</sup> Rabbi Elliot Dorff, *Jewish Norms for Sexual Behavior: A Responsum Embodying a Proposal* (March 25, 1992), in *RESPONSA OF THE CJLS 1991-2000*, 691.

<sup>170</sup> *Id.* at 691.

<sup>171</sup> *Id.* at 692.

<sup>172</sup> See, e.g., Rabbi Bradley Shavit Artson, *Enfranchising the Monogamous Homosexual: A Legal Possibility, A Moral Imperative*, 3 *S'VARA: A JOURNAL OF PHILOSOPHY, LAW, AND JUDAISM* 24 (1993) (arguing that loving, committed, and exclusive homosexuality of today’s society is an innovation of modernity, and therefore could not have been the target of the biblical prohibition.).

<sup>173</sup> See Dorff, *Human Dignity*, *supra* note 35, at 22 n.2 (2006).

<sup>174</sup> See Rabbi Daniel S. Nevins, *Conservative Halacha and Homosexuality – An Insider View of the 2006 CJLS Gay Vote*, available at <http://www.myjewishlearning.com/article/conservative-halakhah-and-homosexuality/>;

<sup>175</sup> Laurie Goodstein, *Conservative Jews Allow Gay Rabbis and Unions*, NY Times, December 7, 2006 (“In [adopting conflicting legal opinions], the committee left it up to individual synagogues to decide whether to accept or reject gay rabbis and commitment ceremonies, saying that either course is justified according to Jewish Law.”). The choice is not static; Rabbis may change their mind. See, e.g., Ed Wittenberg, *Rabbi Weiss Agrees to Officiate Same-Sex Weddings*, Cleveland Jewish News, June 8, 2015 (Conservative Rabbi

three of the 2006 Responsa, all in favor of change, in particular as they relate to the Levitical prohibitive text.

First, the 2006 majority opinion. That Responsum, adopted by an extremely narrow margin (13:12), was authored by Rabbi Dorff – the author of the 1992 Responsum – together with Rabbis Nevins and Reisner. While still recognizing the “explicit biblical ban on anal sex between men,”<sup>176</sup> the Responsum nevertheless represents, by its own account, “a sea change in attitude within traditional Judaism.”<sup>177</sup> In particular, it allowed the admission of openly-gay students into the movement’s rabbinical schools<sup>178</sup>; and, perhaps more importantly, for a partial, gradual, and cautious acceptance of same-sex marriage: “we favor the establishment of committed and loving relationships for gay and lesbian Jews. The celebration of such a union is appropriate with blessings over wine and [a thankful prayer], with Psalms and other readings to be developed by local authorities. ... [But] our paper does not provide for rituals of *Kiddushin* [traditional Jewish marriage] for gay and lesbian couples.”<sup>179</sup> Turning to the Levitical text, the Responsum’s begins by noting the limited scope of the prohibition: “The Torah prohibits anal sex between men, while remaining silent regarding other forms of sexual intimacy between men and between women.”<sup>180</sup> While noting the later expansion advocated by Jewish Law to these verses, these broader restrictions, the Responsum argue, are merely “rabbinical” in nature rather than Torah-text based. Thus, they are “weaker” in weight, open to balancing by other Jewish Law principles.

One such principle is human dignity. The Responsum dedicates much of its elaborate discussion to analyzing the principle in current context.<sup>181</sup> Highlighting the Talmudic maxim that “so great is [the value of] human dignity that it supersedes a negative commandment of the Torah,”<sup>182</sup> the Responsum concludes that “concern for human dignity trumps both positive and negative commandments.”<sup>183</sup> Turning to same-sex members’ rights – and echoing the spirit of later decisions by the U.S. Supreme Court – it then goes on to note that “for gays and lesbian Jews, it is impossible to ensure an internal state of dignity as long as their social status is one of utter humiliation.”<sup>184</sup> The Responsum concludes by saying: “Until this point, Halachic authorities have maintained a complete ban on all intimate acts by homosexuals... However the rabbinic restriction upon gay men and lesbian women that result in a total ban on all sexual expression throughout life are in direct conflict with the ability of those Jews to live in dignity as

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“has announced he has changed his position on the subject of gay marriage and that he will officiate at same-sex weddings,” nearly a decade after the adoption of the conflicting Responsa).

<sup>176</sup> Dorff, *Human Dignity*, *supra* note 35, at 19.

<sup>177</sup> *Id.* at 19.

<sup>178</sup> *Id.* at 19 (“gay or lesbian Jews who demonstrate the depth of Jewish commitment, knowledge, faith, and desire to serve as rabbis, cantors, and educators shall be welcomed to apply to our professional schools and associations.”)

<sup>179</sup> *Id.* at 17.

<sup>180</sup> *Id.* at 5.

<sup>181</sup> *Id.* at 9-17.

<sup>182</sup> *Id.* at 10-11, citing TB Brachot, 19b.

<sup>183</sup> *Id.* at 12.

<sup>184</sup> *Id.* at 15.

members of the people of Israel. For this reason, the Halachic principle of [human dignity] must be invoked by CJLS to relieve their intolerable humiliation.”<sup>185</sup>

Another 2006 Responsum, submitted as a dissent, was authored by Rabbi Tucker.<sup>186</sup> In his extremely elaborate discussion, Rabbi Tucker offers not only a mere “answer” to the question at hand, but an entirely new method to evaluate and decide Halachic questions. Based in large part on Professor Robert Cover’s classic *Nomos and Narratives*,<sup>187</sup> Tucker advocates a much richer, narrative (“Aggadah”)-based approach, one that would allow the ever-shifting experiences of the community to be factored into Halachic answers. The Responsum advocates a more progressive rule than the one adopted by the majority opinion, though it also stops short of allowing Jewish weddings: “Male and female homosexuality can be reconciled with Judaism, conceived through Halachic lens... Congregations are encouraged to grant family membership to households created by same-sex couples, and to provide equal support to the celebration of life cycle events in those families, including the joining of partners of the same sex into exclusive spousal relationship.”<sup>188</sup> As for its discussion of the Levitical prohibition, the Responsum concludes with the following observation: ““And if we think we hear the verses in Leviticus 18:22 and 20:13 questioning us as to why we do not faithfully implement their clear version of what God desires of us? Let us remind them – and ourselves – that the journey of soul-searching, and the understanding of religious mandates, that those two little verses have produced for us will have more than justified their existence, and perhaps even some of the pain that they once caused. שכר וקבל דרוש – it is sometimes the demanding struggle, and not mere obedience, that generates the most enduring reward.”

The final 2006 dissenting Responsum, in favor of same-sex marriage recognition, was authored by Rabbis Geller, Fine, and Fine.<sup>189</sup> It represents one of the most daring, if not subversive, attempts to challenge Halachic conventions head-on. According to its authors, the Levitical prohibition on same-sex acts simply “does not apply” today. Why? First, “Jewish law has prohibited intimate relations between two men or two women because intimate relations are traditionally permitted only within the context of marriage, and a societally recognized same-sex union was never an option before our time. It is now.”<sup>190</sup> Second, “the term תועבה as used in the Torah to describe many proscribed actions, including gay sex, was not absolute but relative to society and time. The Halachic system recognizes that certain realities change through time. The new contemporary reality of a same-sex couple in a recognizable consecrated relationship should be excluded from the

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<sup>185</sup> *Id.* at 17.

<sup>186</sup> Rabbi Gordon Tucker, דרוש וקבל שכר: Halachic and MetaHalachic Arguments Concerning Judaism and Homosexuality, available at [www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/tucker\\_homosexuality.pdf](http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/tucker_homosexuality.pdf) (hereinafter: Tucker, 2006 Responsum).

<sup>187</sup> 97 HARV. L. Rev. 4 (1983).

<sup>188</sup> Tucker, Responsum 2006, *supra* note 186, at 31.

<sup>189</sup> Rabbis Myron S. Geller, Robert E. Fine, David J. Fine, *The Halachic of Same-Sex Relations in a New Context*, (2006) (“Geller, *New Context*”), available at [www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/geller\\_fine\\_fine\\_dissent.pdf](http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/geller_fine_fine_dissent.pdf).

<sup>190</sup> *Id.* at 22.



Torah's and subsequent Halachic prohibitions."<sup>191</sup> Accordingly, "homosexual relations are no longer considered an abomination."<sup>192</sup> Thus, "the new contemporary reality of a same-sex couple in a recognizable consecrated relationship should be excluded from the Torah's and subsequent Halachic prohibitions.... [L]ike heterosexual relations, same-sex relations are permitted in the context of a recognizable consecrated union."<sup>193</sup> To be sure, even this progressive Responsum stopped short of allowing traditional Jewish weddings, calling instead for rabbis to "officiate at same-sex *unions* to the extent permitted by civil law."<sup>194</sup>

In 2012, the Conservative Movement issued another Responsum relating to marriage and divorce for Same-Sex Couples.<sup>195</sup> The opinion, authored by the same three Rabbis who authored the majority 2006 Responsum, was adopted unanimously. In it, the authors offer two models of ceremonies for same-sex couples, "one that closely follows the traditional Jewish wedding liturgy, and one that starts fresh."<sup>196</sup> It then offers a series of marriage-related documents – from a pre-nuptial agreement to covenant of loving partners – and then concludes by offering several versions of dissolution forms.<sup>197</sup> In all, the 2012 Responsum represent yet another stage in the evolution of the Conservative Movement towards complete acceptance of Jewish same-sex members.

#### D. Orthodox Views

Orthodoxy is the oldest, most traditional movement in Judaism. Although it regards itself as the only true form of Judaism, today it represents merely 10% of all American Jewry.<sup>198</sup> Still, for an Orthodox Jew, "a Jew who is not orthodox is simply a sinful Jew."<sup>199</sup> The Torah represents the literal word of God; the words of the Torah, therefore, carry with them a divine and immutable authority.<sup>200</sup> Naturally, any major changes – or new interpretations thereof – are far from welcome.<sup>201</sup> This is true for same-sex relations as

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<sup>191</sup> *Id.* at 22.

<sup>192</sup> *Id.* at 22.

<sup>193</sup> *Id.* at 22. *But see Dorff, Human Dignity, supra* note 35, at 5 (rejecting this and similar arguments as not substantiated by the text).

<sup>194</sup> *Id.* at 23.

<sup>195</sup> Rabbis Elliot Dorff, Daniel Nevins, and Avram Reisner, *Rituals and Documents of Marriage and Divorce for Same-Sex Couples* (2012), available at [www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/2011-2020/same-sex-marriage-and-divorce-appendix.pdf](http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/2011-2020/same-sex-marriage-and-divorce-appendix.pdf).

<sup>196</sup> *Id.* at 3.

<sup>197</sup> *Id.* at 15-20.

<sup>198</sup> See Pew Research Center, 2013 *Survey of U.S. Jews, supra* note 7.

<sup>199</sup> TREPP, HISTORY OF JEWISH EXPERIENCE, *supra*, note 166, at 404. A less generous depiction is used by other, even very prominent, Orthodox Jews to describe non-Orthodox. See, e.g., AP, *Israeli Government Clashes with Liberal Jewish Streams*, NY Times, July 22, 2015 (Reporting that Israel's Religious Affairs Minister, Mr. David Azoulay, "has publicly blasted Reform Jews, recently telling Israel's Army Radio that he doesn't consider them to be Jewish. 'A Reform Jew ... I cannot allow myself to say that he is a Jew,' he said. He later dialed back his comments.").

<sup>200</sup> See 17 ENCYCLOPEDIA JUDAICA 1486 (1971); importantly, the entire body of Mishna and Talmud – previously known as "oral Torah" and now codified – is equally binding. *Id.*

<sup>201</sup> TREPP, HISTORY OF JEWISH EXPERIENCE, *supra*, note 166, at 404 ("The words of the Torah are literally His words, explaining why major changes in the law are impossible. Since He has ordained that there may be no fire on the Sabbath, any kind of fire is prohibited, be it the ignition of an automobile or the glow in a

well. The traditional Orthodox view – discussed extensively in earlier pages<sup>202</sup> – has not changed for millennia, and is not likely change anytime soon.<sup>203</sup>

Indeed, a single recorded attempt to deviate from this firm rule met with devastating consequences. In November 2001, Rabbi Stephen Greenberg, an openly-gay Orthodox rabbi, officiated over a same-sex wedding ceremony in Washington D.C.<sup>204</sup> The response was swift, and harsh: in less than a month, over 100 Orthodox rabbis signed a declaration stating, among others, that “By definition, a union that is not sanctioned by Torah law is not an Orthodox wedding, and by definition a person who conducts such a ceremony is not an Orthodox rabbi.”<sup>205</sup> The declaration continued:

The public should not be misled into thinking that Orthodox Jewish views on this issue can change, are changing, or might someday change. The Rabbinical Council of America recently declared that ‘the Torah, which forbids homosexual activity, sanctions only the union of a man and a woman in matrimony.’ This is the only statement on this matter that can reflect Orthodox Judaism. Any claims or statements to the contrary are inaccurate and false.<sup>206</sup>

Following the criticism, Rabbi Greenberg issued a clarification stating he never meant the ceremony to be considered a Jewish wedding.<sup>207</sup>

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radio tube. For He who sees the world from eternity to eternity knew of all the modern inventions at the time. He gave the law. Had he wished to except them He would have said so.”); GREENBERG, GOD AND MEN, *supra* note 5, at 16 (“In the Orthodox community people are taught that the law does not change.”).

<sup>202</sup> See *supra*, Part I.

<sup>203</sup> See, e.g., Marc D. Stern, *Gay Rights and Orthodox Response*, 38 TRADITION 123, 123 (2004) (“If the question presented was whether homosexuality is acceptable, the answer would be a simple, unequivocal and unembarrassed no. The Torah bans male homosexual intercourse. No apologies or creative reinterpretation can blink that fact.”)

<sup>204</sup> For a report, see *supra*, note 8.

<sup>205</sup> *100 Orthodox Rabbis Issue Same-Sex Marriage Declaration*, The Algemeiner, Dec. 5, 2011, available at [www.algemeiner.com/2011/12/05/100-orthodox-rabbis-issue-same-sex-marriage-declaration/](http://www.algemeiner.com/2011/12/05/100-orthodox-rabbis-issue-same-sex-marriage-declaration/).

<sup>206</sup> *Id.* See also Rabbi Yosef Kanefsky, *An Orthodox Gay Wedding?* MORETHODOXY: EXPLORING THE BREADTH, DEPTH, AND PASSION OF ORTHODOX JUDAISM (Nov. 18, 2011), available at <http://morethodoxy.org/2011/11/18/an-orthodox-gay-wedding/>. (“This wedding ceremony raises a serious question for the part of the Modern Orthodox community in which I live. The question is not about whether we should recognize the ceremony as being religiously significant. *We obviously do not and cannot.* The formal religious partnering of two men or two women is unalterably contrary to both the law and the spirit of the Torah and the Halacha, and *an Orthodox gay marriage ceremony is as hopeless a misnomer* as an Orthodox intermarriage is. How we assess the religious significance of the ceremony is clear-cut and simple.”) (emphasis added).

<sup>207</sup> Rabbi Steven Greenberg, *The Case for Companionship*, THE JEWISH WEEK (Dec. 6, 2011), available at [http://www.thejewishweek.com/editorial\\_opinion/opinion/case\\_companionship](http://www.thejewishweek.com/editorial_opinion/opinion/case_companionship) (“A month ago I officiated a Jewish commitment ceremony and civil marriage for two men in Washington, D.C. The event was sensationally reported as a ‘Gay Orthodox Wedding,’ and this news has stirred controversy within the Orthodox community. I am aware that my conducting this ceremony has made many uncomfortable, among them, some of my friends and supportive colleagues. In light of the strong feelings I felt that it was important that I clarify the facts.... I did not conduct a ‘gay Orthodox wedding.’ I officiated at a ceremony that celebrated the decision of two men to commit to each other in love and to do so in binding fashion before family and friends. Though it was a legal marriage according to the laws of the District of Columbia, as far

And yet even Orthodoxy could not entirely escape the winds of change. In recent years, several Orthodox thinkers began viewing the issue through a more compassionate lens.<sup>208</sup> Take, for example, two 2004 books authored by Orthodox rabbis from both sides of the pond. In England, Rabbi Chaim Rappaport – a member of the Cabinet of the Chief Rabbi of Great Britain – published a treatise on *Judaism and Homosexuality*,<sup>209</sup> a book described by Rabbi Jonathan Sacks, UK’s Chief Rabbi, as “sensitive, thoughtful work on a subject too often either ignored or treated superficially.”<sup>210</sup> In the United States, Rabbi Steven Greenberg published *Wrestling with God & Men: Homosexuality in the Jewish Tradition*,<sup>211</sup> where he openly confessed his own sexual orientation.<sup>212</sup> Seven years later, Rabbi Greenberg would go on to officiate over the first – and so far the only – Orthodox same-sex wedding ceremony.<sup>213</sup>

Both Orthodox Rabbis offer their interpretation to the Levitical prohibition. Rabbi Greenberg suggested to narrow the scope of the verse to include to the “active partner” alone.<sup>214</sup> This is not an entirely novel argument, however, as Rabbi Greenberg dully concedes. Unfortunately, the death penalty prescribed by Leviticus 20:13 to *both parties* seems to render the point rather academic.<sup>215</sup>

Rabbi Rappaport offers a different interpretation. In his mind, a Jewish person who engages in same-sex acts should be considered as having diminished capacity,<sup>216</sup> much like “*tinok she’nishbah*” (a toddler held in captivity). According to Rappaport, that concept “insists that we take into consideration the educational climate in which the individual was raised, before deeming him responsible and accountable for his or her religious failings.”<sup>217</sup> Thus, for example, when a child is raised among non-Jews, he has

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as Orthodox Jewish law (Halacha) is concerned, there was no *Kiddushin* (Jewish wedding ceremony) performed.”)

<sup>208</sup> See, e.g., Rabbi Ronen Luvich, *Revulsion, Tolerance, or Acceptance: Judaism’s Attitudes Towards Homosexuality*, (2004) (Hebrew), available at <http://toravoda.org.il/node/2004> (advocating neither extremes – revulsion or tolerance – as guiding attitudes towards the issue, but rather tolerance.)

<sup>209</sup> See *supra*, note 25.

<sup>210</sup> See *Foreword*, *Id.* at ix.

<sup>211</sup> See *supra*, note 5.

<sup>212</sup> *Id.* at 12 (“The world’s first openly gay Orthodox rabbi.”)

<sup>213</sup> See *supra*, note 8.

<sup>214</sup> Greenberg, *God & Men*, *supra* note 5, at 81-84 (“According to this analysis, the verse prohibits one, and only one sexual practice between men, namely anal intercourse, and speaks specifically to the active partner. There is no mention of any other behavior that this verse could prohibit... Whatever the reason or reasons that undergird the prohibition in Leviticus, the text appears to be concerned primarily with the man on top, the penetrating partner, and only in a derivative fashion with the receptive partner.”)

<sup>215</sup> See, e.g., Dorff, *Human Dignity*, *supra* note 35, at 4 (“[The Rabbis’] only debate regarded whether [Leviticus] 18:22 penalizes the receptive as well as the insertive partner. In [Leviticus] 20:13 the penalty for both partners is made explicit.”).

<sup>216</sup> The notion that same-sex intimacy represents a psychological imbalance has already been offered by an Orthodox rabbi in 1974. See Rabbi Norman Lamm, *Judaism and the Modern Attitude to Homosexuality*, in *CONTEMPORARY JEWISH ETHICS* 375 (Menachem M. Kellner ed., 1978); for a discussion, see Rachel S. Rosenthal, *Of Pearls and Fish: An Analysis of Jewish Legal Texts on Sexuality and Their Significance for Contemporary American Jewish Movements*, 15 *Colum. J. Gender & L.* 485, 531-32 (2006)

<sup>217</sup> RAPPAPORT, *JUDAISM AND HOMOSEXUALITY*, *supra* note 25, at 76.

not held responsible for failing to abide by the edicts of Jewish Law. As The Rambam (Maimonides) has noted, the status of such a child “is comparable to that of an individual who has been coerced. Even if he later learns that he is a Jew and becomes acquainted with Jews and their religion, he is nevertheless to be regarded as a victim of compulsion, for he was reared in their erroneous ways.”<sup>218</sup> Such a child, Rappaport explains, “is exonerated from the charge of deliberate heresy or rebelliousness and is included amongst those whom we are commanded to love and care for.”<sup>219</sup>

Rappaport then demonstrates how, building on the Rambam’s premise, Jewish Law has expanded the notion of *tinok she’nishbah* to other areas, such as to Jews who married out of faith, were less observant than Orthodox, or otherwise violated many of the Torah’s commandments.<sup>220</sup> In one memorable example, the Chief Rabbi of Germany applied the concept to *all* Jews who have lost their faith following the Holocaust, explaining that their current situation must be attributed to the confusion caused by the ‘total eclipse of the Divine Providence,’ which reigned supreme during the Holocaust.<sup>221</sup> In all these instances, the sinners were exonerated of all culpability by using the rationale of *tinok she’nishbah*. Rabbi Rappaport then suggests to apply that same concept to “sexually active homosexuals.”<sup>222</sup> In his mind, Jews “who have been raised in a secular ambience or have been seduced by Westernised culture and value systems, may not be culpable for their homosexual behavior.”<sup>223</sup> Thus, Rappaport explains that we currently live in a “permissive society, where the predominant secular view tolerates homosexuals conduct and – in the case of individuals with exclusive homosexual orientation – even advocates ‘self-realization’ in the sense of acting upon their sexual impulses.”<sup>224</sup> Raised in such a way, a person “may not be held accountable for adopting a liberal, permissive view... [and therefore he] ought to be granted the status of *tinok she’nishba*, with its attendant ramifications.”<sup>225</sup> Finally, Rappaport notes the winds of change that may affect even Orthodox thinking. In his view, “many institutions reject, or even cast scorn on, the Jewish attitude towards homosexual relationships... I think it is fair to say that the societal trend is most definitely one of acceptance of, if not encouragement to, emerging practicing homosexuals. All this makes it even more difficult for a person who has been predominantly influenced by secular society to accept the Jewish view on homosexuality.”<sup>226</sup>

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<sup>218</sup> *Id.*, at 77 (citing MAIMONIDES, HILCHOT MAMRIM 3:3); *see also Id.*, at 184 n.2 (citing authorities).

<sup>219</sup> *Id.* at 77.

<sup>220</sup> *Id.*, at 78-79

<sup>221</sup> *Id.*, at 79 (citing Rabbi Shimon Schwab, *Challenges Ahead: Setting the Sights for New Horizons*, in SELECTED SPEECHES 156 (1991)).

<sup>222</sup> *Id.*, at 80.

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

<sup>224</sup> *Id.* Rappaport cautions, however, that the concept may only apply on a case-by-case basis and should not be interpreted as a “blanket” authorization to engage in Homosexual acts. *Id.*, at 187 n.15.

<sup>225</sup> *Id.* At 81. In addition, Rappaport emphasizes that while the concept applies to the *person* who commits the act, it has nothing to do with the “inherent negativity” of the *act* itself. *Id.* at 81.

<sup>226</sup> Rappaport, 80-81.

Reacting to Rappaport's proposal, one of Britain's leading Orthodox Rabbis wrote that "[o]pinions may differ as to the Halachic viability of this approach ['diminished liability' due to the notion of *tinok she'nishbah*], as well as the extent to which it can provide a general formula for our dealings with Jewish homosexuals. But it does have the merit of providing specific Halachic parameters as a basis for consideration. Needless to say, as Rabbi Rappaport emphasizes, it is only meant to be a *bedi'avad* rationale [allowing the act in retrospect]... and should not be taken as *hecsher* [carte blanche] for people seeking to engage in homosexual conduct."<sup>227</sup>

Closer to home, in 2010 a group of Orthodox rabbis and educators released the most progressive, respectful, and thoughtful statement to date on "The Place of Jews with a Homosexual Orientation in our Community."<sup>228</sup> The Statement opens with the recognition that "all human beings are created in the image of God and deserved to be treated with dignity and respect (kevod ha'briot)."<sup>229</sup> Accordingly, any "[e]mbarrassing, harassing or demeaning someone with a homosexual orientation or same-sex attraction is a violation of Torah prohibitions that embody the deepest values of Judaism."<sup>230</sup> This section, without more, represents a sea-change in Orthodox thought.

The Statement then continues to emphasize the obligation to treat these gay members "with dignity and respect"<sup>231</sup>; to affirm their "religious right... to reject therapeutic approaches they reasonably see as useless or dangerous"<sup>232</sup>; to require rabbis "to be sensitive" to their emotional plight, including, in particular, the greatly increased "risk of suicide among teenagers in our community"<sup>233</sup>; to remind us that these members "need and deserve our support," and therefore neither "outing" should be tolerated, nor coercion to remain in the closet.<sup>234</sup>

More generally, and perhaps more importantly, the Statement advocates that Jewish gay and lesbian members of the community "should be welcomed as full members of the synagogue and school community.... They should participate and count ritually, be eligible for ritual synagogue honors, and generally be treated in the same fashion and under the same Halachic framework as any other members of the synagogue they join."<sup>235</sup> The Statement concludes with perhaps its most progressive and revolutionary statement to date, according to which same-sex members of the Orthodox community should "not

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<sup>227</sup> Rabbi Berel Berkowits, *Preface*, *Id.*, at xiii.

<sup>228</sup> The full text of the Statement is available at <http://statementofprinciplesnyc.blogspot.com/>. By Aug. 4, 2010, more than 150 Orthodox rabbis and educators have signed it. See Jonah Lowenfeld, *Orthodox Rabbis Release Statement on Respecting Homosexuals*, *The Jewish Journal*, Aug. 4, 2010, available at [http://www.jewishjournal.com/community/article/orthodox\\_rabbis\\_release\\_statement\\_on\\_respecting\\_homosexuals\\_20100804](http://www.jewishjournal.com/community/article/orthodox_rabbis_release_statement_on_respecting_homosexuals_20100804).

<sup>229</sup> Statement, *Id.*, Section 1.

<sup>230</sup> *Id.* Section 1.

<sup>231</sup> *Id.* Section 2.

<sup>232</sup> *Id.* Section 5.

<sup>233</sup> *Id.* Section 6.

<sup>234</sup> *Id.* Section 7.

<sup>235</sup> *Id.* Section 8.

be encouraged to marry someone of the other gender, as this can lead to great tragedy, unrequited love, shame, dishonesty and ruined lives.”<sup>236</sup>

To be sure, this is still an Orthodox document; thus, it repeats the basic understandings according to which “Halacha sees heterosexual marriage as the ideal model and sole legitimate outlet for human sexual expression,”<sup>237</sup> and that “Halachic Judaism views all male and female same-sex sexual interactions as prohibited.”<sup>238</sup> Accordingly, the Statement reiterates that Orthodox Judaism “cannot give its blessing and imprimatur to Jewish religious same-sex commitment ceremonies and weddings.”<sup>239</sup> Similarly, the Statement cautions from appointing gay members to religious offices before “the entire congregation [is] fully comfortable with having that person serve as its representative.”<sup>240</sup>

Still, despite these important exceptions, there is no doubt this Statement represents the dawn of a new era in Orthodox thought on the subject. The fact that only a minority of Orthodox rabbis has signed it<sup>241</sup> should not deter from this otherwise great achievement.

### III. A NEW PARADIGM? CONTEXTUAL READING OF THE BIBLICAL PROHIBITION

The progress made in recent years by all four major Jewish denomination is remarkable. Orthodox Jews now recognize, for the first time publicly, the need to treat same-sex members of their community with dignity and respect.<sup>242</sup> Conservatives allow same-sex members to marry, offering both guidance and support.<sup>243</sup> Reforms and Reconstructionist Judaism went a step further, willing to recognize same-sex weddings as *Kiddushin*, a term reserved so far in Jewish Law only to opposite-sex marriage.<sup>244</sup>

Yet the two Levitical verses, stubbornly, remain nearly untouched. The Conservative Movement, for example – which, in recent years, has dedicated more thought to the issue than perhaps any movement ever had – considered, and rejected, several novel interpretations. For example, some have offered to read the verses as applying “only to cultic, coercive, or exploitative sex.”<sup>245</sup> That interpretation was rejected as fitting neither the *p’shat* (plaint meaning)<sup>246</sup> nor the context<sup>247</sup> of these verses. Other have argued that

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<sup>236</sup> *Id.* Section 12.

<sup>237</sup> *Id.* Section 3.

<sup>238</sup> *Id.*, Section 4.

<sup>239</sup> *Id.* Section 11.

<sup>240</sup> *Id.* Section 9.

<sup>241</sup> Responding to the fact that 150 Orthodox rabbis has signed it, one of its objectors argued that “the fact that so few Rabbinical Council of America members have signed it – we are a rabbinical body of over 1,000 rabbis – is testimony enough.” See Lowenfeld, *supra* note 225, at 2.

<sup>242</sup> See *supra*, Part IID.

<sup>243</sup> See *supra*, Part IIC.

<sup>244</sup> See *supra*, Parts IIB and IIA, respectively.

<sup>245</sup> See Geller, *New Context*, *supra* note 188 at 9 (quoting Rabbi Artson).

<sup>246</sup> See Dorff, *Human Dignity*, *supra* note 35, at 5 (“Yet none of these interpretations is *p’shat*, the exclusive contextual reading of these verses.”)

<sup>247</sup> See Geller, *New Context*, *supra* note 188, at 9 (“We find these efforts unconvincing because they do not fit the context of פְּרִשְׁת עֲרִיּוֹת. We believe that context is the sanctity and purity of sexual relations.”)

the verses should only be understood in the context of marriage and procreation – two social options closed to same-sex partners in biblical time; since today both are plausible, the argument goes, the ban should be lifted inasmuch that it applies to committed relationship.<sup>248</sup> That option, too, was rejected for similar reasons.<sup>249</sup> The fate of other proposals – treating same-sex partners as having diminished capacity, limiting liability only to the “active” partner – was no different.

Despite the wide recognition of same-sex marriage, then, today’s Jewish Law status-quo accepts the two Levitical verses as necessary evil.<sup>250</sup> Yet in a Jewish, social, and legal universe where same-sex partners’ rights and acceptance are all but equal to those of opposite sex, the very existence of such verses is incongruent with everything Judaism holds dear. A new paradigm is therefore needed,<sup>251</sup> one that would align the two verses more properly with Jewish-Law traditional values – such as human dignity and love for the other – as well as current social norms. That paradigm, I would argue, should rely on careful reading of the two verses, as well the context in which they reside.

### A. On The Importance of Biblical Contextual Reading

The Levitical text prohibiting same-sex acts is a legal text.<sup>252</sup> It specifies an act; it designates it as prohibited; it then threatens the death-penalty to those who engage in it. More importantly, it carries with it – to this day – several real-life consequences: the discrimination against, demeaning attitude towards, and humiliation of many an LGBT Jewish member is still based, to a large extent, on this very text.<sup>253</sup> The Levitical text therefore reads, acts, and impacts like an actual legal text.<sup>254</sup> It is only natural, therefore, that it would be interpreted like one.<sup>255</sup>

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<sup>248</sup> For a presentation of this interpretation see Geller, *New Context*, *supra* note 188, at 10-11.

<sup>249</sup> See Dorff, *Human Dignity*, *supra* note 35, at 5 (“Although they present their reading as “the *p’shat*,” there is nothing simple or contextual about this interpretation. Nowhere does the passage mention marriage.”)

<sup>250</sup> Typical in this respect is the first conclusion cited by the Conservative Movement’s majority opinion in favor of same-sex marriage from 2006: “The explicit biblical ban on anal sex between men remains in effect. Gay men are instructed to refrain from anal sex.” Dorff, *Human Dignity*, *supra* note 35, at 19.

<sup>251</sup> Though the term “paradigm shift” does not appear in it, it rightfully belongs to THOMAS KOON, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

<sup>252</sup> Indeed, as Rabbi Greenberg notes, “the Book of Leviticus ... is primarily a law book – indeed, the sages call it *Torat Kohanim*, the priest’s handbook.” GREENBERG, *WRESTLING WITH GOD AND MEN*, *supra*, note 5 at 75-76.

<sup>253</sup> See *supra*, Part IC.

<sup>254</sup> I refer here, most generally, to analytical positivism such as the Austinian view of “command theory”; see JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832), *reprinted in* GEORGE C. CHRISTIE AND PATRICK M. MARTIN, *JURISPRUDENCE* 517-664 (2d ed. 1995) (excerpts). The same binding result, of course, would be reached through the use of natural law

<sup>255</sup> To be sure, the interpretive result I arrive in in this chapter may be obtained through much older, Talmudic-based hermeneutical techniques. In particular, the Thirteen Rules of Interpretation as developed by Rabbi Ishmael, which are not dissimilar to our own Canons of Interpretation, may be useful here. See *Generally*, AZZAN YADIN, *SCRIPTURES AS LOGOS: RABBI ISHMAEL AND THE ORIGINS OF MIDRASH* (2011, U. Penn. Press). Rabbi Ishmael, of course, only expanded on previous interpretive work, primarily by Rabbi Hillel.

What is the proper classification of the Levitical prohibition? In the hierarchy of biblical texts, if one were to consider the Ten Commandments to be of constitutional stature,<sup>256</sup> the Levitical text should be considered “statutory” in nature.<sup>257</sup> How should one approach a biblical statutory text? Generally speaking, like any statutory text, the biblical text requires search for a meaning, as the meaning is not rendered by the words alone<sup>258</sup>; as James Madison has reminded us, “[w]hen the almighty himself condescends to address mankind in their own language, His meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.”<sup>259</sup> There is a need, therefore, for statutory interpretation. What would be a proper first step in statutory interpretation? The search for the proper meaning should begin with the understanding that statutory interpretation is a “holistic endeavor.”<sup>260</sup> In other words, “he who interprets

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*See S. Zeitlin, Hillel and Hermeneutic Rules*, 54 *Jewish Q. Rev.* 161, 173 (1963) (“Rabbi Ishmael increased hermeneutic principles to thirteen, really a further development of the Hillelite principles.”)

<sup>256</sup> *See generally* U.S. Const. Art. VI cl. 2 (Supremacy Clause). The notion that the Ten Commandments are of a constitutional stature was adopted by at least one leading Jewish Law scholar in Israel, who was associate Justice of the Israeli Supreme Court who wrote it into one of his seminal opinions. *See Israeli Supreme Court C/A 6821/93 United Mizrahi Bank v. Migdal*, P”D 49(4), 221, 474 (1995) (Cheshin, J., dissenting (not on this point)) (Hebrew) (“That is the way in which the People of Israel have adopted their first Constitution. First, the People were ordered to purify themselves for receiving the Constitution... for three days... Then, while the People are prepared to receive the Constitution, on the third day, the ceremony begins: filled with awe and inspiration.... The voices are heard, and lightning is seen, and heavy fog descends from above, and the voice of the Shofar carries afar... and after all that comes, finally, the Constitution itself arrives... There is no doubt who has provided the People with the Constitution; there is no doubt in His authority to do so... There is no doubt that it is a Constitution that is provided here.”) Another current Israeli Supreme Court Justice, who is also a noted Jewish Law scholar, wrote as then-Israel’s A.G. the following: “There is a certain “constitutional” magic to the Ten Commandments. That magic is derived from the Commandments’ clearly-bounded text and scope; from the very unique and impressive surroundings in which they were adopted, as described in the Torah; from their clear and concise message; from their unique integration of the universal, national, and individual message; and from the fact that they always seem relevant – to every person, at any point in history.” Elyakim Rubinstein, *The Ten Commandments – Through the Ages and According to Israeli Law*, (2002) (Hebrew) available at <http://www.daat.ac.il/mishpat-ivri/skirot/108-2.htm>.

<sup>257</sup> For the hierarchical structure of legal norms, *see generally* HANS Kelsen, *THE PURE THEORY OF LAW* 221–230 (2d ed., Max Knight transl. 1967).

<sup>258</sup> *See Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”); AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 14 (2005) (“Even a plain text requires interpretation, and only interpretation allows us to conclude that its meaning is plain.”).

<sup>259</sup> THE FEDERALIST NO. 37, at 197 (James Madison) (Clinton Rossiter ed., 1961). *See also* Max Radin, *Statutory Interpretation*, 43 *HARV. L. REV.* 863,866 (1929) (“The interpretation of words is a familiar technique of philology and theology, or, perhaps we might say, of theological philology. Words are found which in the case of the Bible are deemed to be the utterances of God. They are therefore unchangeable, eternal, and precise in content. Inadvertence or mere approximation is excluded.”).

<sup>260</sup> *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (per Scalia, J.); *see also* WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 7 (“statutory interpretation is a holistic enterprise.”). Aharon Barak, Israel’s most celebrated Chief Justice, expanded on this idea in his book on statutory interpretation. *See* AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 353 (2005) (“The interpreter should assume harmony within the legislative project and should avoid severing a statutory from the totality of legislation. Whoever applies a single statute, applies the entirety of legislation... The



one line of legislation, [should] interpret the entire legislative edifice.”<sup>261</sup> Thus, the biblical legal text, like all text, should be read in context,<sup>262</sup> and context is important.<sup>263</sup> Biblical scholars have long agreed with that proposition – both in general and in relation to the Levitical prohibition on same-sex acts.<sup>264</sup>

What is the proper “context” in which the biblical prohibition on same-sex acts should be read? The proper context for the two verses at issue here is the same proper context that apply for every biblical text: it is the entire Torah. Indeed, much like Chief Justice Marshall, we, too, are looking for a “fair construction of the whole instrument.”<sup>265</sup> Thus, all Five Books should serve as context to the two verses regarding same-sex acts. That proposition, of course, is nothing new. The entire Torah has been long considered one legislative edifice, consisting of 613 laws.<sup>266</sup> That has been the understanding of Jewish

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various statutes in a system exist as integrated tools, like different limbs of a single body. The way the body as a whole functions indicates the tasks designated to each statute.”).

<sup>261</sup> Israeli Supreme Court, HCJ 693/91 *Efrat v. Comm’r of Population Registry*, P.D. 47(1) 749 (1993) (per Barak, C.J.); see also *King v. Burwell*, 576 U.S. \_\_\_\_ (2015) (Slip Op. 9) (“But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme.”)(quotation marks and citations omitted).

<sup>262</sup> See, e.g., Rabbi Bradley Shavit Artson, *Enfranchising the Monogamous Homosexual: A Legal Possibility, A Moral Imperative*, 3 S’VARA: A JOURNAL OF PHILOSOPHY, LAW, AND JUDAISM 24, 29 (1993) (“Context does have legal consequence. Whether or not homosexual acts take place in the context practiced in antiquity ... or in a modern context... similarly ought to have legal consequence. It ought to make a difference.”). For the importance of contextual reading of statutory law in general, see ANTONIN SCALIA AND BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXT* 167 (2012) (“Context is a primary determinant of meaning. A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts”); John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006) (“modern textualists understand that the meaning of statutory language (like all language) depends wholly on context.”); *Cont’l Can Co. v. Chi Truck Drivers*, 916 F.2d 1154, 1157 (7th Cir. 1990) (per Easterbrook, J.) (“You don’t have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meaning shared by interpretive communities.”).

<sup>263</sup> See SCALIA AND GARNER, *Id.* (“Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.”); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting) (“[T]he meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view.”).

<sup>264</sup> See, e.g., JAY MICHAELSON, *GOD VS. GAY? THE RELIGIOUS CASE FOR EQUALITY* 57 (2011) (“Yes, context is important”); Rabbi Goldie Milgram, *What Does Judaism Have to Say about Homosexuality, Jewish Same-Sex Marriages, and Orientation?*, *supra* note XXX (“However, a verse doeth not a moral code make, verses must be seen in the context of their larger rubric and through the lens of the times in which we live.”); See also REV. JEFF MINER AND JOHN T. CONNOLEY, *CHILDREN ARE FREE: REEXAMINING THE BIBLICAL EVIDENCE ON SAME-SEX RELATIONSHIP* 9-10 (2002) (“If we want to interpret spoken or written statements accurately, we must carefully study the context in which the statements were made. Otherwise we can completely misunderstand what was intended. Theologians of all stripes (including the most fundamentalist) have long followed this rule when interpreting statements found in the Bible... A text taken out of context is pretext....[Citing the two Levitical verses at issue, they add:] As we have seen above, if we wish to understand the true meaning of these verses, we must look at their context, both textual and historical.”).

<sup>265</sup> *McCulloch v. Maryland* 17 U.S. (4 Wheat.) 315, 406 (1819).

<sup>266</sup> See *Generally* Det. 33:4 (“Torah was ordered on us by Moshe”); TB, *Makot*, 23:2 (“Teachings of Rabbi Shamlai: Six hundred and thirteen Mitzvot (laws) were ordered on Moshe; three hundred and sixty five “do

Law for generations. There is no reason to deviate from that holistic approach when examining the two verses at issue here.

What, then, is the meaning of reading a verse in the context of the entire Torah? Surely we cannot read the entire five books into the two verses in question. We need, rather, some guiding principles; some interpretive “lighthouses” to guide our way through the fog of interpretive options.<sup>267</sup> To be sure, the notion of using certain guiding principles when reading a legal text is not a novel idea; as Justice Frankfurter has long reminded us, the correct contextual approach for every statute “demands awareness of certain suppositions.”<sup>268</sup> What, then, are those “certain suppositions” when it comes to reading the Torah as a legal text?

In my view, of the many possible interpretive principles appearing in the Five Books, three are pertinent for reading *any* biblical text, especially the restriction on same-sex acts as appearing in Leviticus: first, the principle that all persons are created equal “in the image of God” (Gen. 1:27); second, the notion that the Golden Rule - “Love thy Neighbor as Yourself” (Lev. 19:18<sup>269</sup>) – is not only a foundational rule of the Torah, but in fact its entire summary in one sentence, as Rabbi Hillel himself thought; and third, the principle that the interpretation of the Torah is “not in the Heavens” (Det. 30:12), that is, was given to ordinary persons and is not limited to those who profess to speak on God’s behalf. Once these three organizing principles are introduced, I argue that the Levitical text cannot possibly be understood as saying what most understand it to say today – that a group of Jewish men and women should be marginalized, diminished, and discriminated against solely on the basis of the persons they love. Once such understanding is established, I return to the Levitical text in search for a more coherent, holistic, and sensible interpretation. I find such meaning in the laws of incest, and argue that both the restriction of same-sex acts and the related death penalty should be understood in that context alone. If that assumption is correct, I argue, then no Jews should be prevented from engaging in same-sex relationships, as long as those are not within the extended

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not,” as the number of days of the sun [year], and two hundred forty eight “do,” against the number of body parts in each person.”)

<sup>267</sup> See Drucilla Cornell, *From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation*, in *LEGAL HERMENEUTICS – HISTORY, THEORY, AND PRACTICE* 147, 161-62 (Gregory Leyh ed. 1992). (“We need legal principles that guide us through the maze of competing legal interpretations precisely because all claims cannot be vindicated... A principle, as I use it here is ... only as a guiding light. It involves the appeal to and enrichment of the “universal” within a particular *nomos*. We can think of a principle as the light that comes from the lighthouse, a light that guides us and prevents us from going in the wrong direction. A principle, however, cannot determine the exact route we must take in any particular case; a principle, in other words, does not pretend that there is only one right answer. It can, however, serve to guide us by indicating when we are in the wrong direction. If a principle cannot give us one right answer, it can help us define what answers are wrong in the sense of being incompatible with its realization.”)

<sup>268</sup> Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUM. L. REV.* 527, 537 (1947). See, more recently, *Bond v. United States* 572 U.S. \_\_\_ (2014) \*11 (“Part of a fair reading of statutory text is recognizing that Congress legislates against the backdrop of certain unexpressed presumptions.”)

<sup>269</sup> Of special note is the fact that this guiding principles appears *between* the two verses in Leviticus – the one prohibiting same-sex acts (Lev. 18:22) and the other imposing a death penalty (Lev. 20:13).

family. I turn now to examine the three organizing principles according to which every biblical text should be read.

## **B. Proper Context of All Biblical Texts: Organizing Principles**

### **1. "בצלם אלוהים ברא אותו": "In the Image of God He Created Him"**

In the very first Chapter of the very first book of the Bible we find a wonderful description of the creation of mankind:

[26] ויאמר אלהים נעשה אדם בצלמנו כדמותנו ... [27] ויברא אלהים את האדם בצלמו בצלם אלהים ברא אותו זכר ונקבה ברא אותם."

*"[26] And God said: Let us make a person (Adam) in our own image and our own likeness ... [27] And God created that person (Adam) in His own image; in the image of God He created him; a male and a female he created them."*

The notion that every person was created in the image of God is one of the founding principles of Jewish Law. As Israeli Supreme Court Deputy Chief-Justice Menachem Elon – Israel’s preeminent Jewish-Law scholar of the modern era<sup>270</sup> – has noted in one of his opinions: “In the image of God He created him,’ serves as both the theoretical and the philosophical foundation for the unique stand adopted by Jewish Law towards the sacredness of human life – the sacredness of the image of God with which every person is created – which is considered a supreme value. It is from that foundation that Halacha derives many of its views on a wide variety of issues.”<sup>271</sup>

But it is not merely the sacredness of human life – every human life – that the opening verses of Genesis require us to honor; the notion that every person was created in the image of God leads us to recognize the value of equality and love with which every person should to be treated. As Israeli Deputy Chief-Justice Elon noted on another matter:

One of the founding principles in the world of Jewish Law is the notion of human creation in the image of God. (Gen. 1:27). The Torah opens by reciting this principle, and it is from there that the Halacha derives its most basic notions of human value, which is found in each person – every person, without exception – as well as the requirement to treat every person with equality and love. “He (=Rabbi Akiva) used to say: how pleasing is a man for being created in [His] image; an extreme pleasantness is attached to him by virtue of being created in the image [of God], as the Torah said (Gen.

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<sup>270</sup> The late Justice Rabbi Menachem Elon, who also served as a law professor at the Hebrew University Law School and at NYU Law School, is best known as the author of the monumental MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES, Vol. I-IV (2003).

<sup>271</sup> Israeli Supreme Court, C/A 506/88 *Shefer v. State of Israel* P”D 48(1), 87, (1993).

9:6): ‘In the image of God he created man.’ (Mishna, Avot, 3, 14).... Of great interest here is the debate between two of the most well-known Ta’naa’im regarding the human value that should govern in the relationship between one person and another: “And love your neighbor as yourself” (Lev. 19:18), R. Akiva says: This is an essential rule of the Torah; while Ben Azai says: This is the story of the dawn of mankind (=”in the day God created man, in the image of God he created him.” Gen. 5:1) – this is even a more essential rule of the Torah.” (Safrá, Kedoshim, Parsha 4, 10) According to R. Akiva, in examining the relationship between one person and another, the primary value is the requirement to treat one another with love, and to love mankind. Conversely, according to Ben Azai, the primary value is that of human equality, as each and every person was created in the image of God. *But these two values – equality, and the love of mankind – have morphed to establish the very foundation of Jewish Law throughout the ages.*<sup>272</sup>

Other Jewish-Law scholars have demonstrated the sacred bond between “in the image of God” and the notion of equality.<sup>273</sup> But “In God’s image” goes much further than mere equality; it portends that every person enjoys the sacred – and legal – right to human dignity.<sup>274</sup> Indeed, the relation between human dignity and creation in God’s image is well established in Jewish Law. As Israeli Supreme Court Chief Justice Aharon Barak noted:

Human Dignity has deep roots in Jewish Law. It occupies a special place in Jewish thought. According to the world of Jewish Law, all the dignity in the world was delegated from the creator, who is the King of Dignity (“Melech Ha’Kavod”). Human dignity is derived from the dignity of God, because all humans were created in the image of God: “And God created man in his own image; in the image of God He created him.” (Gen. 1:27).... Human dignity means that the image of God, which exists in every person, should not be violated. Indeed, human dignity – or, as it is sometimes known as “the dignity of persons” – is a central tenet of Jewish Law.... According to Jewish Law, the starting point for other people’s dignity is your own dignity, as

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<sup>272</sup> Israeli Supreme Court, EA 2/88 *Neiman v. Chairman of the Election Committee*, P”D 39(2) 225, 298 (1985)(emphasis added). And compare, in the current context, *Bowers v. Hardwick*, 478 U.S. 186, 218-19 (1986) (Stevens, J., dissenting)(“Although the meaning of the principle that “all men are created equal” is not always clear, it surely must mean that every free citizen has the same interest in “liberty” that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.”)

<sup>273</sup> See, e.g., George P. Fletcher, *In God’s Image: The Religious Imperative of Equality Under Law*, 99 Colum. L. Rev. 1608, 1616 (1999) (“Both of these ideas of Genesis 1 – the act of creation *ex nihilo* and the principle of creation in the image of God – are central to understanding the moral force of the proposition that all men are created equal.”).

<sup>274</sup> To properly understand the notion of dignity, consider Immanuel Kant, *Groundwork of the Metaphysics of Morals* 102 (H.J. Paton trns., 1964)(1785)(“In the kingdom of end everything has either a *price* or a *dignity*. If it has a price, something else can be put in its place as an *equivalent*; if it is exalted above all price and so admits of no equivalent, then it has a dignity.”)

viewed by yourself; the dignity of your neighbor should be equal – in your own eyes – to yours.<sup>275</sup>

Another noted Israeli Jewish-Law scholar, Haim H. Cohen, who also served as Deputy Chief-Justice, further elaborated on the link between the two:

In the spectrum of Jewish-Law values, human dignity is second only to God's dignity; but just below that divine dignity, and right beside it, the notion of human dignity – sometimes known as “the dignity of persons” – has occupied a central place all on its own. Not only has human dignity received divine authority, its very existence is a necessary conclusion of the creation story by which a person was created “in the image of” or “the likeness of” God. Rabbi Akiva's statement, “how pleasing is a man for being created in [His] image; an extreme pleasantness is attached to him by virtue of being created in the image [of God],” was later described as “a founding principle in our sages' understanding of the value of every human being. The dignity of persons is a necessary conclusion from the fondness that God feels towards each person.”<sup>276</sup>

As we have noted before, the notion of human dignity occupies such a central role in Jewish Law that the Talmud has went so far as declaring that “so great is [the value of] human dignity that it supersedes a negative commandment of the Torah.”<sup>277</sup> Based on that lesson, human dignity has been used in a variety of Halachic contexts - from allowing a wedding ceremony on Shabbat,<sup>278</sup> to a call to allow all women to read Torah in public.<sup>279</sup> And, we have seen, the principle of human dignity was invoked by all four major Jewish denominations to justify their new thinking on same-sex relationship.<sup>280</sup>

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<sup>275</sup> AHARON BARAK, INTERPRETATION IN LAW, VOL. III – CONSTITUTIONAL INTERPRETATION 404-405 (1994). The link between those two concepts – God's image and human dignity – is not unique to Judaism, of course. See, e.g., Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT. L. 655 (2008) (“The catechism of the Catholic Church incorporates this idea of Man as made in the image of God as central to its conception of human dignity.”)

<sup>276</sup> HAIM H. COHN, BEING JEWISH 419 (2005)(Hebrew). Before serving in the Israeli Supreme Court, Dr. Cohn served as Israel's first Attorney-General. In this capacity, he was charged with enforcing the laws – mostly those left behind by the British – including the law against same-sex acts. Haim Cohn instructed the Israeli Police not to enforce that law. Much later in life Cohn, who was born and raised in Germany, reflected on this episode by saying: “I was of the opinion that it was my duty not to enforce a law I considered to be amoral. We have demanded the German Judges to not enforce the Nazi laws, which they considered amoral. And I think this duty applies to every Judge and every Attorney-General who should never assist in executing laws which, by their conscience, are considered amoral.” MICHAEL SHESHAR, HAIM COHN – SUPREME COURT JUSTICE: CONVERSATIONS (1989) (Hebrew).

<sup>277</sup> TB, Berachot 19b; for an elaborate discussion, see Dorff, Human Dignity, *supra* note 35, at 10-11.

<sup>278</sup> Shabbat – the rest day – is reserved, by Jewish Law, for rest and therefore wedding ceremonies are not allowed. For that and other examples see Rabbi Nahum Rakover, *Human Dignity* (1982) (Hebrew), available at <http://www.daat.ac.il/daat/kitveyet/shana/kvod-4.htm>.

<sup>279</sup> See Rabbi Daniel Sperber, *Congregational Dignity and Human Dignity: Women and Public Torah Reading*, 3 EDAH 2 (2002).

<sup>280</sup> See *supra* Part II.

The principle of human dignity has also been invoked by the Israeli Supreme Court when ruling on same-sex issues.<sup>281</sup> Thus, in 1994, the Court held that same-sex partner of an airline employee cannot be discriminated against in terms of workplace benefits.<sup>282</sup> Later, the Israeli Court was willing to recognize an adoption by a same-sex couple conducted in California,<sup>283</sup> and then in Israel.<sup>284</sup> Finally, although in Israel, statutorily, marriages of Jewish couples may only be conducted in accordance with Orthodox Jewish Law<sup>285</sup> - which prohibits, of course, any recognition of same-sex marriage – the Israeli Supreme Court was willing to recognize, and order the registration of, such marriage so long as they were recognized in the jurisdiction in which they were conducted (in that case, Canada).<sup>286</sup> Ironically, the dissenting opinion - which opposed such recognition – invoked the notion of human dignity extensively, while the majority took a more formalistic approach.

Finally, the United States Supreme Court has invoked the notion of human dignity when ruling on same-sex issues. It was Justice Kennedy – a practicing catholic<sup>287</sup> and a long-time friend of LGBT causes<sup>288</sup> – who introduced the notion of human dignity into the jurisprudence of same-sex relations. Holding that same-sex acts cannot be considered a criminal offense, Justice Kennedy wrote:

It suffices for us to acknowledge that adults may choose to enter upon this [same-sex] relationship in the confines of their homes and their own private lives *and still retain their dignity as free persons*. When sexuality finds

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<sup>281</sup> It is important to note that the right to human dignity was written into Israeli Basic Law in 1992; Basic Law: Human Dignity and Liberty, *available at* [www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm). On the law in general see BARAK, CONSTITUTIONAL INTERPRETATION, *supra* note XXX, at 403-569.

<sup>282</sup> Israeli Supreme Court, HCJ 721/94 *El-Al Israeli Airlines v. Danilovich*, PD 48(5) 749 (1994).

<sup>283</sup> Israeli Supreme Court, HCJ 1799/99 *Brener-Kadish v. Ministry of the Interior*, PD 54(2) 368 (2000).

<sup>284</sup> Israeli Supreme Court, HCJ CA 10280/01 *Yerus-Hakak v. Attorney General*, PD 59(5) 64 (2005).

<sup>285</sup> See The Rabbinical Court Jurisdiction (Marriage and Divorce) Law, 1953, § 2 (“Marriage and divorce of Jewish people in the State of Israel will only be conducted in accordance with the Laws of the Torah.”); AP, *Israeli Government Clashes with Liberal Jewish Streams*, NY Times, July 22, 2015 (“Israel’s Orthodox rabbinical establishment wields a monopoly over key aspects of daily life, such as marriage, divorce and burials. Reform and Conservative rabbis are not recognized, and their movements are largely marginalized. Most Jews in Israel, while secular, follow Orthodox traditions.”)

<sup>286</sup> Israeli Supreme Court, HCJ 3045/05 *Ben Ari v. Population Registrar, Ministry of the Interior*, PD 61(3) 537 (2006). For a review, see Yuval Merin, *Anglo-American Choice of Law and the Recognition of Foreign Same-Sex Marriages in Israel – On Religious Norms and Secular Reforms*, 36 BROOK J. INT’L. L. 509 (2011).

<sup>287</sup> See, e.g., JEFFREY TUBIN, *THE NINE – INSIDE THE SECRET WORLD OF THE SUPREME COURT* 189 (2007) (“[Justice Kennedy was] a conservative man by most definitions of that term. A devout and observant Catholic, he needed no instruction in the religious and moral prohibitions on homosexual conduct. He was, simply, a man who had been transformed by the changing world around him.”); *but see* BRUCE ALLAN MURPHY, *SCALIA – A COURT OF ONE* 152 (2014) (“Unlike Scalia’s devoutly conservative Catholic immigrant father, Kennedy was raised by Catholic parents based in the more openly inclusive religious mores of Sacramento, California.”).

<sup>288</sup> See MARK TUSHNET, *A COURT DIVIDED*, 156-179 (“Anthony Kennedy and Gay Rights”); Adam Liptak, *Surprising Friend of Gay Rights in a High Place*, N.Y. TIMES September 1, 2013 (quoting Professor Michael Dorf as saying “what Earl Warren was to civil rights and what Ruth Bader Ginsburg was to women’s rights, Kennedy is to gay rights.”)

overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.<sup>289</sup>

Ten years later, in *Windsor v. U.S.*,<sup>290</sup> Justice Kennedy relied heavily on the notion of human dignity in striking down Article 3 of the Defense of Marriage Act (DOMA), which defined the term “marriage” as applying only to heterosexual couples. Time and time again, Justice Kennedy emphasized the notion of human dignity as standing at the core of this decision.<sup>291</sup> Memorably, he noted that “DOMA’s history of enactment and its own text demonstrate that interference with the *equal dignity of same-sex marriages*, conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.”<sup>292</sup>

Two years after that, in *Obergefell v. Hodges*<sup>293</sup> the Court held – again, per Justice Kennedy – that the right to marry should extend to same-sex couples. And again, the notion of human dignity played a key role in the decision.<sup>294</sup> In fact, the Opinion of the Court ends with the following statement: “[Petitioners] ask for equal dignity in the eyes of the law. The Constitution grants them that right.”<sup>295</sup>

Indeed, the legal notion of human dignity – and its Jewish-Law corollary, the notion that every person was created in the image of God – is simply incongruent with the view that same-sex relationship should be seen as a target of ridicule, persecution, and legal

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<sup>289</sup> *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (emphasis added).

<sup>290</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>291</sup> The term “human dignity,” including its several derivations, is mentioned no less than 24 times in Justice Kennedy’s Opinion of the Court.

<sup>292</sup> *Id.*, at, 2681. (emphasis added); see also *Id.* at 2692-93 (“By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give *further protection and dignity* to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State *worthy of dignity in the community equal with all other marriages*. It reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.”). Cf. MICHAEL J. SANDEL, JUSTICE – WHAT’S THE RIGHT THING TO DO? 254 (2009) (“The debate over same-sex marriage is fundamentally a debate about whether gay and lesbian unions are worthy of the honor and recognition that, in our society, state-sanctioned marriage confers.”).

<sup>293</sup> *Supra*, note 2.

<sup>294</sup> See, e.g., *Id.* at 621-622 (“Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have *dignity in their own distinct identity*. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a *just claim to dignity was in conflict* with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.”)(emphasis added).

<sup>295</sup> *Id.* at 635.

discrimination. As we have seen, both the Israeli and U.S. legal systems have already arrived at that conclusion. Now it is time for Jewish Law to do the same. Indeed, many commentators have already found the tension irreconcilable.<sup>296</sup>

## 2. "ואהבת לרעך כמוך": "Love Your Neighbor as Yourself"

Nestled between the two same-sex related verses – the prohibition against same-sex acts (Lev. 18:22), and the death penalty for their performance (Lev. 20:13) – is the important principle of “*And you shall love your neighbor as yourself.*” (Lev. 19:18). As we have already seen, no less than Rabbi Akiva – on whom the Talmud teaches that Moshe himself could learn Torah from<sup>297</sup> – has declared this principle “an essential rule of the Torah.”<sup>298</sup> Even more, this principle – also known by other religions and cultures as the Golden Rule<sup>299</sup> – serves not only as one of the Torah’s leading interpretive principles, but also said to encompass the entire Torah in one sentence. And so goes the famous story – perhaps the most famous of all Jewish Law - about Rabbi Hillel the Elder, as told by the Talmud:

One day, a non-Jew came before Shamai [Hillel’s counter-part, a strict constructionist] and told him: Please convert me [to Judaism] so that you can teach me the entire Torah while I’m standing on one leg. He [Shamai, in response] pushed the man away, using the building rod he was holding. Afterwards, [that same person] came before Hillel with the same exact request. He [Hillel] told him [in Aramaic]: Whatever is hateful to you, do not do to your neighbor. *This is the entire Torah, and all the rest is commentary. Now get out and study!*<sup>300</sup>

Beyond the genius – and ingenuity – of condensing the five Books of the Torah to one sentence, Hillel’s formula is important to consider as an interpretive principle for understanding all biblical text. As Rabbi Telushkin has noted: “The fact that Hillel is willing to offer so brief an explanation – fifteen words in the popularly spoken Aramaic – indicates that there is a central focus to his understanding of Judaism, *one that provides*

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<sup>296</sup> See, e.g., ALPERT, LIKE BREAD ON THE SEDER PLATE, *supra* note 10, at 19-20 (“We must address the question of how lesbians can live as Jews when the sacred text that tells us we were created in God’s image also tells us that male homosexual acts are punishable by death and that the lesbian acts are associated with ‘the practice of Egypt.’ These are contradictory notions: if God created all human beings in the divine image, then men who love men and women who love women must also be part of the divine plan.”) See also *Id.*, at 39 (citing Rabbi Arthur Waskow of the Jewish Renewal Movement) (“Contemporary commentators see a contradiction between Leviticus 18:22 and the idea as stated in Genesis that we were all created in God’s image. This contradiction must be resolved. We must assume that those of us who were created lesbian and gay are also in God’s image, and that acts central to our identity cannot therefore be an abomination.”). See also authorities cited in Part IIC, above.

<sup>297</sup> See TB Minchat 29:2.

<sup>298</sup> See *supra*, TAN XXX.

<sup>299</sup> See, e.g., *Golden Rule in THE OXFORD COMPANION TO PHILOSOPHY* 321 (Ted Honderich, ed. 1995).

<sup>300</sup> TB Shabbat, 31a.



him with a standard that later enables him to modify certain Torah laws in a manner that will shock other rabbis.”<sup>301</sup>

Using the standard of the Golden Rule, it is easy to conclude that no person – let alone a group of persons – should be discriminated against solely on the basis of their love’s subject. If we take the standard of treating each other with the same amount of love and respect we accord to ourselves, surely we would not like to see that “other” (or others) being constantly diminish. Indeed, in general philosophical discourse, the Golden Rule has been linked frequently to the notion of social equality. As Thomas Nagel explained recently:

You are to ask not just “What shall I do?” but “What should anyone in my position do?” and the answer comes from subjecting your conduct to standards of acceptable from everyone’s point of view at once, or the points of view of all affected – suitably idealized and combined... [T]his interpretation identifies the core of Kantian morality with some form of *equal consideration for all persons*, as a limit on the pursuit of one’s own interests – not by maximizing aggregate welfare as utilitarianism requires, but by mandating certain forms of *decent treatment of each person individually*.<sup>302</sup>

The need to provide “decent treatment of each person individually,” as Nigel puts it, includes the need for non-discrimination of each person on basis of their sexual orientation. A biblical text that puts the interpretive principle of Love Your Neighbor front and center would be hard to reconcile with the notion of such blunt discrimination. We should, accordingly, make any interpretive effort to avoid such a result.<sup>303</sup>

### 3. "לא בשמים היא": “It is Not in the Heavens...”

In the last of the Five Books, the Book of Deuteronomy, the author takes a moment to remind the reader of what otherwise should be considered obvious – that the laws included in Jewish Bible are meant to be followed by ordinary people, and therefore are written in a way that ordinary people may understand. But then the Book makes an interesting turn as it explains how one would be able to understand it – what are, in other words, the interpretive authority one should recognize:

[11] *For the law [Mitzvah] which I command upon you today should not be too baffling for you, nor is it beyond reach. [12] It is not in the Heavens, as*

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<sup>301</sup> RABBI JOSEPH TELUSHKIN, HILLEL – IF NOT NOW, WHEN? 19-20 (2010)(for examples of novel interpretations, see *id.*, at . 47-58).

<sup>302</sup> Thomas Nagel, *The Taste for Being Moral*, THE NEW YORK REVIEW OF BOOKS Dec. 6, 2012, p. 8/10. (emphasis added).

<sup>303</sup> See, e.g., JAY MICHAELSON, GOD VS. GAY? THE RELIGIOUS CASE FOR EQUALITY 56 (2011) (“There need be no contradiction between the commandment to love our neighbors as ourselves and the handful of biblical verses that have troubled us for so long.”)

*one would say: “who [among us] would ascend to the heavens and bring it to us, and would allow us to hear its voice so we may observe it?” [13] Neither is it placed across the sea, as one would ask “who would be able to cross the entire sea and would bring it to us and would allow us to hear its voice so we may observe it?” [14] For this thing [Torah] is extremely close to you, and it is in your own mouth and in your own heart to observe. (Deut. 30:11-14).*

The Torah itself, in other words, tells us that each of us is responsible for reading, understanding, and following the Torah in their own way. In fact, it warns us – explicitly – from those self-proclaimed “authorities” who would claim to converse with the Heavens, where the interpretation presumably lies; no and no, says the Torah – it is Not in the Heavens.

The notion that Torah interpretation is not a heavenly task - but rather should be practice down here on earth<sup>304</sup> – lends itself to another insight. If Torah words are open to interpretation by every generation of readers, surely that generation may see Torah in a new light. The Torah, in other words, renders itself to a “dynamic” form of legal interpretation, much in the form William Eskridge has advocated for all statutory law.<sup>305</sup> There is no reason, in other words, not to change biblical interpretation in accordance to current morals and social needs: “God gave the Torah... on Mount Sinai. Subsequently God relinquished the right to interpret and change the law. This responsibility was given by God to the sages of each generation who were charged with interpreting the law according to the needs and problems their own time.”<sup>306</sup>

The awesome responsibility that comes with assuming a novel interpretation – an interpretation that may, in some instances, contravene the original meaning of the text – did not escape Jewish Law sages; and yet they insisted that the authority of interpretation – and the responsibility that accompanies it – should remain at the hands of the sages, even at the sight of Divine Intervention. This is best demonstrated by the great story of Achnai’s Oven, which begins with a Halachic dispute over the *Kashrut* (Jewish appropriateness) of an oven that was found unclean. On the one hand of the dispute stood the known Rabbi Elazar; on the other, a group of unidentified sages who –due to their number – constituted a majority opinion. But Rabbi Elazar was not willing to quit so easily:

On that day R. Eliezer brought forward every imaginable argument, but they did not accept them. Said he to them: 'If the Halacha agrees with me, let this

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<sup>304</sup> Jason P. Rosenblatt and Joseph C. Sitterson, *Introduction*, in “NOT IN THE HEAVENS”: COHERENCE AND COMPLEXITY IN BIBLICAL NARRATIVE 1 (1991) (noting the option that “these three bare words themselves authorizing the independent, earthbound, arguments of literary critic.”)

<sup>305</sup> ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION *supra*, note XXX. For an application of his theory on gay rights, see Heidi A. Sorensen, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEORG. L. REV. 2105 (1993).

<sup>306</sup> Jacob A. Moss and Rivka B Kern Ulmer, “Two Men Under One Cloak” – *The Sages Permit It: Homosexual Marriage in Judaism*, 55 J. OF HOMOSEXUALITY 71, 78 (2008).

carob-tree prove it!' Thereupon the carob-tree was torn a hundred cubits out of its place — others affirm, four hundred cubits. 'No proof can be brought from a carob-tree,' they retorted. Again he said to them: 'If the Halacha agrees with me, let the stream of water prove it!' Whereupon the stream of water flowed backwards — 'No proof can be brought from a stream of water,' they rejoined. Again he urged: 'If the Halacha agrees with me, let the walls of the schoolhouse prove it,' whereupon the walls inclined to fall. But R. Joshua rebuked them, saying: 'When scholars are engaged in a Halachic dispute, what have You to interfere?' Hence they did not fall, in honour of R. Joshua, nor did they resume the upright, in honour of R. Eliezer; and they are still standing thus inclined. Again he said to them: 'If the Halacha agrees with me, let it be proved from Heaven!' Whereupon a Heavenly Voice cried out: 'Why do ye dispute with R. Eliezer, seeing that in all matters the Halacha agrees with him!' But R. Joshua arose and exclaimed: 'It is not in heaven.' What did he mean by this? — Said R. Jeremiah: That the Torah had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written in the Torah at Mount Sinai, After the majority must one incline. R. Nathan met Elijah<sup>6</sup> and asked him: What did the Holy One, Blessed be He, do in that hour? — He laughed [with joy], he replied, saying, 'My sons have defeated Me, My sons have defeated Me.' (TB Baba Metzi'a 59b).

This Divine recognition — which is extremely unique by standards of Jewish Law — that “My sons have defeated me,” sends a very clear message to those who claim that they, and only they “speak the words of God.” For if only a number of sages — who would ultimately constitute a majority opinion — would be available to support an intellectually-defensible Halachic view, even the Lord Himself would not be able to it “a false interpretation,” and the same is true for his purported representatives. As the story of Achnai’s Oven teaches us, the opposite is true.<sup>307</sup>

The interpretive principle of Not in the Heavens has already been used extensively by Jewish Law.<sup>308</sup> As we have seen, it was even invoked in the in the context of same-sex marriage within Jewish.<sup>309</sup>

In considering a new interpretation according to the rule, one that deviates from (and in fact opposes to) previous understandings of the text, one should consider the social costs of the current understanding. We have demonstrated, if only in a nutshell, the great pain and suffering that Jewish gay and lesbians have to endure due to the current interpretation.<sup>310</sup> But as Rabbi Dorff and others have noted, even without such immense

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<sup>307</sup> Cf. Maimonides (Rambam) *Introduction to the Interpretation of the Mishna*, (Hebrew) available at <http://www.daat.ac.il/daat/mahshevt/hakdama/2-2.htm> (“For it already has been said, (Deut. 30) “Not in the Heavens.” And the Lord, Blessed is He, has not allowed us to learn from the prophets, but rather from the sages, people of knowledge and opinion.”)

<sup>308</sup> For a review, see Shimon Kalman, *‘It Is Not in the Heavens’ – And the Rule of Law*, 203 HA’MA’A’YAN (The Spring) 49 (2013) (Hebrew).

<sup>309</sup> Moss and Kern Ulmer, “*Two Men Under One Cloak*,” *supra* note XXX at 78.

<sup>310</sup> See *supra*, Part IC.

social costs the current understanding lends itself to seek the impossible: “the premise of [the demand to become holy to God] is that it is essentially possible... The Torah is possible – it is the gift of life, not a path for suffering and destruction of the physical self... In demanding that observant homosexuals avoid all sexual contact for life, [however,] the Halacha is not asking for heroism but inviting failure.”<sup>311</sup>

And in urging his fellow rabbis to better conform today’s same-sex norms to the majority-accepted biblical interpretation, Rabbi Gordon Tucker included the following warning:

The law is given cogency and support by the ongoing story of the community that seeks to live by the law. This is true no less for religious than for secular communities, and it is precisely what Robert Cover had in mind when he wrote that “for every constitution there is an epic.” The ongoing, developing religious life of a community includes not only the work of its legalists, but also its experiences, its intuitions, and the ways in which its stories move it. *This ongoing religious life must therefore have a role in the development of its norms*, else the legal obligations of the community will become dangerously detached from its theological commitments.<sup>312</sup>

Indeed, if the interpretation of the Levitical prohibitions on same-sex is Not in the Heavens, we must make every possible effort to find one that is congruent with current social understandings, as well as with the organizing principles mentioned below – of human dignity and treating the other as yourself. To that interpretation we turn now.

### **C. Proper Context of the Levitical Prohibitions**

All three organizing principles – the first layer in the contextual reading of the two verses in question – stand in stark contrast to their current understanding as decreeing a complete ban on same-sex acts, punishable by death. We now move to examine the next two layers in the contextual hierarchy: the book in which the restrictions are included, and their respective chapters. Only then would we return to a close examination of the verses themselves, this time read in their proper contexts.

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<sup>311</sup> Dorff, *Human Dignity*, *supra* note XXX, at 9.

<sup>312</sup> Tucker, *Responsum* 2006, *surpa* note 186, at 19-20 (citing Robert Cover, *Nomos and Narratives*, 97 HARV. L. REV. 4, 4 (1983))(emphasis added). For a nuanced articulation on the connection between professor Cover’s seminal article and same-sex marriage, see Michaelson, *Chaos, Law, and God*, *supra* note 25, at 113 (“In a Coverian sense, law is itself a religious force, even laws which, from a conventional perspective ... are entirely secular in nature. This is especially true because, for Cover, law is ‘a system of tension or a bridge linking a concept of a reality to an imagined alternative.’ In other words, law does not merely regulate; it aspires, connects the ‘is’ to the ‘ought.’ Thus to simply maintain that same-sex marriage is a species of pluralistic value of ‘live and let live’ is to ignore the fact that that value is, itself, a religious value ... that, when applied to religious questions such as marriage, is a theological argument. ‘Live and let live’ denies the aspirational intent of religious law, or at least, replaces one nomian aspiration with another.”)(footnotes omitted).

## 1. Proper Context of the Book of Leviticus: Family & Holiness

Both verses in question – the first understood as forbidding all same-sex acts (Lev. 18:22), the other as prescribing the death penalty (Lev.20:13) – appear in the Book of Leviticus. This book – its structure, purpose, and content – constitutes, therefore, an important layer in the contextual understanding of the two verses.

The Book of Leviticus – *Va'Yikra* ויקרא (“And He called...”) in the original Hebrew – is the third of the Five Books of Moses (“Torah”). As Rabbi Greenberg notes, this Book “lacks the narrative sweep of the other books of the Bible. It is primarily a law book – indeed, the sages call it *Torah Kohanim*, the priests’ handbook.”<sup>313</sup> The Book is divided into three main parts: first, the laws of sacrifice as practiced by the priests (Chs. 1-10); second, the laws of purity and holiness, as related to both priests and families in general (Chs. 11-25); and finally, some blessings and curses relating to God’s covenant with the Israelites.<sup>314</sup> Of the three, the entire first part of the Book – the laws of sacrifice – is no longer practiced by today, and in fact hasn’t been in use for nearly 2,000 years.<sup>315</sup> Thus, at the outset one has to acknowledge the fact that a large part of the Book of Leviticus, in essence, is considered anachronistic today – and has been for the past two millennia.

It is the second part of the Book – sometimes known as the “Holiness Code”<sup>316</sup> – in which both verses reside. What is the subject-matter of that part? Professor Baruch A. Levine, a noted expert on Leviticus, has identified the Jewish *family* – rather than the Jewish individual – as the main subject of the holiness code. In his words: “This section begins by ordaining the place and form of proper worship of the God of Israel. It then defines the *Israelite family* and details improper sexual behavior, including *incest* (Lev. 18)... Chapters 20 to 22 contain *more on the Israelite family* and ordain specifically priestly duties...”<sup>317</sup> The Book of Leviticus, then, deals – in pertinent part – with the Jewish family unit, not with the Jewish individual. This important insight should factor heavily when contextualizing the verses in question. The term “Jewish family” itself, moreover, should be interpreted as extended family rather than a nuclear one; members of those extended families used to reside together in biblical times and strict sexual regulation of such families was much needed as we shall soon realize.

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<sup>313</sup> GREENBERG, *GOD & MEN*, *supra* note 5, at 76. These priests, known in English as the Levites, are the source for the translated title of the Book.

<sup>314</sup> See A.S. Hartom, *Introduction to The Book of Leviticus*, in *THE BIBLE (KASSUTO INTERPRETATION) – SH’MOT & VA’YIKRA*, 5 (1961) (Hebrew).

<sup>315</sup> See YESHAYAHU LEIBOWITZ, *SEVEN YEARS OF DISCOURSE ON THE WEEKLY TORAH READING 437,442 (2003)* (Hebrew) (hereinafter: LEIBOWITZ, *SEVEN YEARS*) (“This type of worship [through sacrifice] has stopped despite our best intentions and against our will with the destruction [of the Second Temple, 70 E.C] and has never resumed. This type of worship is entirely foreign to us today, and not only that but all the rules relating to impurity of the Temple do not make much sense, and even seem foreign to the world of Jewish knowledge and experience [as we know it today]... Still, even if these issues carry little practical implications for us today, they do comprise a part and parcel of the Torah universe.”)

<sup>316</sup> See Baruch A Levine, *Introduction to Leviticus*, in *ETZ HAYIM – TORAH AND COMMENTARY* 584 (2001) (“Leviticus 17-26 cohere as a literary unit, referred to as “the Holiness Code,” because of the frequent use of the term *Kadosh*, “holy.”).

<sup>317</sup> *Id.* at 584 (emphasis added).

The notion of “holiness” provides another key element for understanding the Levitical prohibition. As we have seen, the second part of Leviticus is known as the Holiness Code. Thus, Chapter 11, which opens that part, contains the following celebratory decree:

*“For I am the Lord your God; you shall sanctify yourselves and be holy, for holy am I.”* (Lev. 11:44).

Similar decrees appear near the verse prohibiting same-sex acts (Lev. 19:2), and the one ordering the death-penalty (Lev. 20:26). What does “holy” mean in that context, and how may it help us understand the same-sex prohibitions? The term “holiness” in Judaism is complex, multi-faceted, and often misunderstood.<sup>318</sup> For our purposes, it would be useful to review the last iteration of the notion in the current context, four verses following the death-penalty verse:

*“And you shall be holy to Me for I, the Lord, am Holy; and I shall set you apart from other peoples so you shall be mine.”* (Lev. 20:26).

A crucial element of the notion of Jewish holiness, then, is the uniqueness – exceptionalism, in today’s parlance – of the Jewish people as compared with other peoples.<sup>319</sup> It is Jewish Law’s distinct nature that makes it holy in comparison with other nations. As Professor Levine, who named this phenomenon “Holiness & Otherness,” explains:

The Sifra, a rabbinic midrash, conveys the concept of “otherness” in its comment to Leviticus 19:2: “You shall be holy’–You shall be *distinct* (*p’rushim tiheyu*), meaning that the people of Israel, in becoming a holy nation, *must preserve its distinctiveness from other peoples*. It must pursue a way of life different from that practiced by other peoples. This objective is epitomized in the statement of Exodus 19:6: “you shall be to Me a kingdom of priests and a holy nation (*goy ka’dosh*).” (A better rendering might be: “You shall be My Kingdom of priests and My holy nation.”) This statement also conveys the idea, basic to biblical religion, that holiness cannot be achieved by individuals alone, no matter how elevated, pure, or righteous. *It can be realized only through the life of the community, acting together.*”<sup>320</sup>

The Book of Leviticus deals, then, with the notions family and holiness (exceptionalism); both refer to a community, rather than the individual Jewish person; and both require joint effort by their members in order to achieve compliance. These two contextual

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<sup>318</sup> See LEIBOWITZ, SEVEN YEARS, *supra* note XXX, at 523-526 (*inter alia*, describing anyone who uses the term outside the realm of *Emunah* (Jewish Faith) as blasphemous.)

<sup>319</sup> See *Introduction to Book of Leviticus*, in THE WORLD OF BIBLE – VA`YIKRA 9 (Baruch A. Levine, ed., 2000)(Hebrew)(“Leviticus’ Code of Holiness (Chs. 17-27) does not stem from the *Mishkan* [temporary temple] ... but from God himself, who is the only holy being... Since the People of Israel were separated from other people and became holy to their God, they should distance themselves from any impurity.”)

<sup>320</sup> Baruch A. Levine, *Biblical Concepts of Holiness*, (emphasis added), available at [www.myjewishlearning.com/author/baruch-a-levine/](http://www.myjewishlearning.com/author/baruch-a-levine/).

notions should guide as we arrive to examine the final layer in the contextual reading of the two verses – the chapters in which they appear.

## 2. Proper Context of the Leviticus Chapters 18 & 20: Laws of Incest

As Rabbi Tucker has already noted, “if we are attempting to use ... the contextual meaning of Leviticus 18 to infer (not impose) qualifications on the prohibition, then those qualifications must fit the context.”<sup>321</sup> What is the proper context of Leviticus 18?

Chapter 18 contain 30 verses. Following a traditional preamble,<sup>322</sup> it opens with an important warning:

*“The acts performed in the Land of Egypt, where you have resided, you shall not perform; and the acts performed in the Land of Canaan, to which I shall lead you, you shall not perform; and in their laws you shall not follow.”*(Lev. 18:3).

This warning, we have seen, did not remain inconsequential; the entire body of Jewish law restricting lesbian relationship is built entirely upon this single verses.<sup>323</sup> More generally, this verse reflects the notion of “holiness,” or exceptionalism, which is at the heart of the Book of Leviticus – and still defines much of Jewish practice today.<sup>324</sup> But Leviticus 18:3 is only one of the chapter’s “book-ends”; the other is verse 24, which states *“do not defile yourselves in all these for these are the acts that defiled the nations that I am casting out before you.”* The structure of Leviticus 18, then, is of a set of decrees “book-ended” by the general warning for the Jewish people not to go in the ways – emulate the acts performed by – the nations around them.<sup>325</sup>

What are, then, the acts that Leviticus 18 warns from, the acts that were “performed in the land of Egypt” and should not be performed by the newly-formed Jewish people? The answer, which is key to our understanding of the same-sex restricting text, arrives immediately, and creates the contextual framework of entire chapter. It reads:

"אִישׁ אִישׁ אֵל-כָּל-שָׂאֵר בְּשָׂרוֹ לֹא תִקְרְבוּ לְגִלּוֹת עֲרוּוָה אֲנִי אֲדוֹנִי."

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<sup>321</sup> Rabbi Gordon Tucker, *Responsum* 2006, *supra* note 186, at 27.

<sup>322</sup> “And God spoke to Moshe and said: Speak to the Children of Israel and tell them I am the Lord your God.” (Lev. 18:1).

<sup>323</sup> See *supra*, TAN 38-41.

<sup>324</sup> Indeed, comprehensive Jewish law instructions still call today for unique behavior in almost all walks of life, from specific dietary laws (*Kashrut*), to a strict dress code (*T’snee’ut, sha’at’nez, etc.*), to limited activity on rest day (*Shabbat*), and many others. Here we examine one of the many unique rules relating to Jewish sexuality.

<sup>325</sup> See THE WORLD OF BIBLE – VA’YIKRA, *supra*, note XXX at 121 (“This series of Mitzvot [decrees] (Lev. 18:6-23) is designed to specify, at the same time, what are the “acts of the lands of Egypt” and “acts of the land of Canaan” [which you should avoid], and “My rules and My laws” [which you should keep]. This double emphasis is obtained through presenting all the vile acts by which Egypt and Canaan were known, phrased as negative commandments, of which the Israelites are warned. The double function of this series of Mitzvot is expressly noted by the verses at the end of the chapter (Lev. 18:24): “Do not defile yourselves in *all these*” – the acts mentioned previously in verses 6-23 – “for *these are the acts* that defiled the nations.”)(Hebrew)(emphasis in the original).

“None of you shall approach anyone of his own flesh to uncover nakedness; I am the Lord.” (Lev. 18:6)<sup>326</sup>

In other words, the main subject matter of Leviticus 18 is the restriction on sexual relations with blood relatives, or, as they are commonly known, the laws of incest.<sup>327</sup> This should be clear, in its face, from the text of 18:6. It should also be clear from the structure of chapter 18, in particular its “book ends.” But in order to truly make the point, one also must establish that such practices were commonly used “in the Land of Egypt.” (Lev. 17:3).<sup>328</sup> Was incest a common practice in ancient Egypt? According to most current scholarship, the answer is yes.<sup>329</sup>

Leviticus 18, then, deals with intra-family sexual restrictions. To make that point abundantly clear, the text does not stop at the general restriction. Rather, it goes on to specify, in great detail, each and every relative with whom such relations are prohibited. Thus, the next verse notifies us of the (almost self-evident) rule that one may not have sexual relations with either their father or mother (Lev. 18:7). From there, it specifies fourteen types of relatives with whom sexual relations are forbidden.<sup>330</sup> Importantly, and

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<sup>326</sup> Unfortunately, this crucial verse presents some almost-insurmountable translation challenges. For example, the original Hebrew begins, with an uncommon repetition: “Ish, Ish,” which literally means – “man, man” (or person, person) as in “person, person ... you shall not come near (or approach)...” In choosing “None of you shall approach...” I have followed most Jewish translations (JPS, Etz Chayim), as well Christian ones (for a comprehensive list, see <http://biblehub.com/leviticus/18-6.htm>); still, it is important to note that this is far from transliteration. Second, the term “she’ar be’ssaro” – the type of person none should approach – was nearly transliterated to “anyone of his own flesh” by both Jewish translations above, which I also chose to adopt here. Many Christian translations, however, opted for the much clearer “close relative” (NIV and many others), “blood relative” (New Am. Standard, others), or “near of kin” (King James Bible and many others). Finally, and most importantly, the subject of the restriction – the action for which you may not approach your relative – is perhaps the hardest of them all. Literally, “le’galot erva” means to uncover someone’s genitalia. Again, the Jewish translators moved near transliteration, which I accepted above. Although many Christian translators agreed, some, again, preferred a much clearer note: “to have sexual relations” (NIV and others), “for sexual intercourse” (Holmes Christian Standard Bible). Thus, while translated very literally (above), the same verse can – and perhaps should – be understood as forbidding anyone from having sexual relations with their blood relatives.

<sup>327</sup> See, e.g., *Introduction to Leviticus 18*, in ETZ HAYIM – TORAH AND COMMENTARY 688 (2001) (“Incest laws, prohibiting people from sexual contact with their closest relatives and underscoring those prohibitions in the strongest terms, are virtually universal in all ancient and modern societies.”);

<sup>328</sup> See Rabbi Bradley Shavit Artson, *Enfranchising the Monogamous Homosexual: A Legal Possibility, A Moral Imperative*, 3 S’VARA: A JOURNAL OF PHILOSOPHY, LAW, AND JUDAISM 24, 27 (1993) (“Thus the Torah explicitly identifies these prohibited practices, these abominations, with the accepted practices of the non-Israelites of the period.”).

<sup>329</sup> PAUL JOHN FRANSDEN, *INCESTUOUS AND CLOSE-KIN MARRIAGE IN ANCIENT EGYPT AND PERSIA* 33,38 (Univ. of Copenhagen Press, 2009) (“In the literature on the incest problem, Ancient Egypt is frequently mentioned as the exception, [where the alleged universal prohibition on incest seems to have been suspended], that confirms the rule.”); SIMON SCHAMA, *THE STORY OF THE JEWS*, 98 (2013) (citing 2 BOOK OF MACCABEES, 9:10) (“while other nations were capable of violating even their mothers and daughters, such abhorrent practices – along with homosexual copulation – was forbidden to Jews.”)

<sup>330</sup> The fourteen categories are (I adopt here the “you” and “yours” biblical form): 1. Your father’s wife (apparently, not your mother) (Lev. 18:8); 2. Your sister (18:9); 3-4. Your granddaughter – either from your son or daughter (18:10); 5. The daughter of your father’s wife (see 1)(18:11); 6. The sister of your father (18:12); 7. The sister of your mother (18:12); 8. The wife of your father’s brother – your aunt (18:8)(this verse also contains, *arguendo*, a restriction of approaching the father’s brother (uncle) himself, and by that



crucially for our purposes, all these types of relatives are *female*. Not a single male relative is mentioned. Even more, since Hebrew is not a gender-neutral language, all of these restrictions are directed, literally speaking, only at *men*, although the biblical author is well aware of at least one incident where a sexual encounter initiated by a woman was aimed at a man of her household (although, admittedly, that man was not a family member).<sup>331</sup>

But before arriving at the single, stand-alone prohibition on male sexual relations, let us pause for a moment to consider the rationale for incest laws. Why was there a need, during biblical times, to prohibit these kinds of intra-family sexual relations? And why was there a need to do so in such great detail? For some, there is no point in looking for a reason; this is the will of God, and therefore it should be followed.<sup>332</sup> Others, however, have offered a more practical explanation:

One suspects that incest laws were meant to make clear that members of the opposite sex in one's household are not to be considered as possible sexual partners. A household would become impossibly "overheated" if sexually mature brothers and sisters, parents and children could regard each other as sexually available.<sup>333</sup>

That makes great sense. If the household includes many family members of different ages, sexual regulation is pertinent. The only question that emerges, then, is *whether* the typical biblical household indeed included that many members. Modern research suggests it has:

The nuclear family was the cornerstone of Israelite society in general and in village society in particular, but since the economy demanded large human resources the nuclear family joined with others in a larger unit, the extended family, which sometimes included up to three generations. The extended family included the (grand)father, (grand)mother, their unmarried daughters, their sons (married and unmarried), and their sons' wives and children. *All of these lived in one four-room house or in a complex made of several attached houses.* In addition, the compound housed unrelated

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to contain a male – and not only a female – restriction; I doubt that possibility, mainly because I can see no reason to single out this specific male relative as a likely sexual target; in addition verse 18:16 suggests that this verse refers only to the female mentioned therein.); 9. Your daughter-in-law, your son's wife (18:15); 10. Your brother's wife (18:16); 11. Any woman and her daughter (presumably, of the same household) (18:17); 12. Any granddaughter (from the son's side)(Id.); 13. Any granddaughter (from the daughter's side) (Id.); 14. Any woman and her sister (presumably, again, from the same household).

<sup>331</sup> See the wonderful story of Yoseph (Joseph) and his master's wife, Gen. 39:7-12 ("After a time, and his master's wife cast her eyes upon Yoseph and said: 'lie with me.' But he refused... And so she spoke to him day in and day out, yet he never relented to her wishes to lie by her and be with her. One such day, he arrived at home... and none of the household members were at the home. And she caught him by his garment and said: 'lie with me.' And he left his garment in her hands and escaped outside.")

<sup>332</sup> See LEIBOWITZ, SEVEN YEARS, *supra* note XXX, at 508 (citing the Ramban for the proposition that "the Torah does not forbid incest because it is morally wrong, but the opposite is true: because the Torah prevents us from doing so, it is morally wrong.")

<sup>333</sup> ETZ HAYIM – TORAH AND COMMENTARY, *supra* note XXX, at 688.

people who were considered part of the *extended family*, including slaves, hired hands, and others.<sup>334</sup>

Indeed, the typical biblical family – the one for which the text was originally written – resided in one household, and comprised of several generations of men and women, several of whom in sexually-active ages. Clearly the biblical author saw a great need in regulating and restricting sexual encounters within such a household, within such an extended family. Equally clear is the fact that most of the regulatory energy was aimed at heterosexual relations: then<sup>335</sup>, as now<sup>336</sup>, that seems to have been the norm. But every norm has an exception, and – in addition to heterosexual relations – there were several other type of sexual relations that required regulation *within the family*. Thus, for example, regarding children, it was important to clarify that child sacrifice is unacceptable.<sup>337</sup> Similarly, regarding wives (who were allowed, of course, to be generally “approached” for sexual encounters), it was important to clarify that they are not always available sexually.<sup>338</sup>

Finally, we arrive at Lev. 18:22, the only restriction aimed towards *men* with its subject matter being *other males*, as opposed to females. That restriction reads:

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<sup>334</sup> ODED BOROWSKI, DAILY LIFE IN BIBLICAL TIMES 22 (2003).

<sup>335</sup> The biblical “norm” of heterosexual relations can be deduced from Genesis 2:22 (“*Therefore, a man would leave his father and his mother, and would cling to his wife, and they would become one flesh*”). This verse was interpreted by many Orthodox Jewish Law thinkers to suggest that homosexuality is universally prohibited, rather than prohibited to Jews. See, e.g., RAPPAPORT, JUDAISM AND HOMOSEXUALITY, *supra* note 25, at 147 n.25 (“The Gemara derives the ban on *miskav zachar* (homosexual acts) for gentiles from Genesis 2:24). But the text of Genesis suggests no such restriction, of course; it merely describes the (statistically prevailing) practice of heterosexual marriage; it says absolutely nothing about other forms of marriage.

<sup>336</sup> Though the issue defy conventional polling, even today, by several current estimates still 96% of American population is heterosexual. See *Baskin v. Bogan*, No. 14-2386, at \*32 (7th Cir. 2014) (per Posner, J.) (“No one knows exactly how many Americans are homo-sexual. Estimates vary from about 1.5 percent to about 4 per-cent.” (citing statistics)); Michaelson, *Chaos, Law, and God*, *supra* note 25, at 141 (“According to our most reliable statistics, only 4% of Americans identify as gay or lesbian.”)

<sup>337</sup> See Lev. 18:21 (“And from your semen you shall not allow to offer to the Molech”).

<sup>338</sup> See Lev. 18:19 (“And to ISHA during her period you shall not approach to uncover her nakedness”); the term ISHA, in Hebrew, means both “woman” and “wife.” While most understand (and translate) this verse as referring to women in general, I would strongly suggest that common sense, context, and other Biblical laws require the understanding that this verse merely refers to wives. First, the verse assumes the woman in question, during non-period times, is allowed to be “approached” sexually. But according to the Ten Commandments – which have the weight of a constitutional norm, as we have seen earlier – one should refrain from either committing adultery, (Ex. 20:13), or even coveting his neighbor’s wife (Ex. 20:14) (a restriction later expanded to include engaged women (Deut. 23-27)). Accordingly, the “woman” in question cannot be someone else’s. Since the verse is located well within the two “book ends” of Leviticus 18, it would also make sense to assume that it is targeted at the women of the household; since the unmarried women were already “ruled out” for sexual approach previously – as elaborated by the 14 categories mentioned earlier – it make much more sense to assume that the ISHA which may be approached usually, but is restricted during her period, is one of the lawful wives, or concubines. (It should be noted that, during biblical times, both before and after Leviticus, having multiple wives and concubines was the norm: from Jacob the Forefather (two wives (sisters) and two concubines (Gen. 30:1-10)) to King Solomon (700 wives and 300 concubines (I KINGS 11:3)).

*“And a male you shall not lie with the way one lies with a woman; it is an abomination.”*<sup>339</sup>

Note that the verse begins with an “*And*,” a clear indication of being a part and parcel of the entire section preceding it. Note also its location, squarely between the chapter’s two “book ends” – verses 6 and 24 – which clearly suggests that it is, and should be understood as, part of the laws of incest. Finally, consider the fact that the vast almost *all* the intra-family sexual prohibitions are aimed at heterosexual relations; the notion that a residual, male same-sex restriction would appear as well seems nearly self-evident. Indeed, if the intra-household regime was aimed at preventing “overheating” of the extended family environment, as Professor Levine puts it, surely such rationale would apply if two family members of the same gender (here, only male) would have sexual relations. Indeed, even the phrasing of the prohibition – a phrasing parsed by many a Jewish law scholar, as we have seen – seems to have the heterosexual relation as a model; instead of restricting “homosexuality” – as Halachic sources did with lesbian relations<sup>340</sup> – the Torah text models the same-sex male restriction after the manner in which a man “lies with a woman.”

The almost inevitable conclusion, therefore, of reading Leviticus 18:22 in context is that the biblical prohibition against same-sex acts pertains only to intra-family, intra-household relations. That conclusion stems from organizing interpretive principles of the entire Bible – such as the notion that every person was created in the image of God; that every person should love another “as themselves”; and that the interpretive solutions to Torah texts “are not in the heavens.” It also stems from the context of The Book of Leviticus, which aims at sanctifying the family and the community, providing them with ways to separate them from their non-Jewish neighbors and other nations. Finally, it stems directly from Leviticus 18 itself, which clearly sets two “book ends” to define the list of acts – or deeds – that are forbidden *within the laws of incest*.

The same is true for Leviticus Chapter 20 – home of the dreadful death penalty for same-sex acts (between men), applied to both participants.<sup>341</sup> At the outset it is important to

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<sup>339</sup> The Hebrew term appearing at the end of the verse is “*Toe’ae’vah*.” I will deal with that specific, nearly-untranslatable term shortly (see Part 1B, *infra*). For now, it should be noted the term “abomination,” which I placed as translation here, represents merely one interpretive option, albeit one that is preferred by most biblical translators; see, e.g., the English Standard Version (ESV), the New American Standard Bible (NASB), King James Bible, the American King James Version, the American Standard Version, Douay-Rheims Bible, the Darby Bible Translation (DBT), the English Revised Version, and the Webster’s Bible Translation. Other translators prefer other terms, such as “detestable” (used by the New International Version (NIV), Holman Christian Standard Bible, and the World English Bible); “a detestable sin” (the New Living Translation (NLT)); “a detestable act” (NET Bible); “disgusting” (God’s Word Translation) and “abhorrent” (Etz Hayim). Importantly, however, none of these versions – other than one (DBT) – began their translation of the verse (Lev. 18:22) with the important term “*And*,” which does appear at the original Hebrew. One can only surmise to what extent this crucial omission – which precludes the verse from being read in its proper context – has contributed to its common understanding. (For comparison of all biblical versions see <http://biblehub.com/leviticus/18-22.htm>).

<sup>340</sup> See *supra*, TAN 38-41.

<sup>341</sup> Leviticus 20:13 (“*And a man who lies with a male the way one lies with a woman – both have committed an abomination; they shall be put to death, their blood is upon them.*”)

remind ourselves that in more than two millennia since it was inscribed, no death penalty was ever imposed for this violation<sup>342</sup>; thus, the death penalty should be considered a moral warning at best, and dead-letter law at worst. More importantly, the death penalty verse resides well within the perimeters of the “Holiness Code” portion of Leviticus, thus rendering it well within the “family” context. And, indeed, a quick glance at all the other “death penalties” surrounding the same-sex one reveals they all relate to intra-family, incestuously prohibited sexual relations: from a death penalty to a man who lies with the wife of his father (presumably, not his mother) (Lev. 20:11) – the first type of female relative that cannot be approached, according to Leviticus 18 (Lev. 18:8); and lying with one’s daughter-in-law (18:20), the ninth category of female relatives mentioned (Lev. 18:15) – both appearing before the same-sex death penalty – to lying with a woman and her mother (20:14; cf. 18:17), appearing immediately afterwards. All these penalties are prescribed for intra-family activity, and there is no reason to understand them differently.

And while the Torah text provides us with important clues as to its proper interpretation, sometimes it is the text that was not written – “the dog that didn’t bark”<sup>343</sup> – that provides even greater clues. Take the Torah’s fifth and final book, Deuteronomy – “D’varim” (“words” or “commandments”) in the Hebrew original. This book is also known as “Mishne Torah” – Secondary Torah, or Repetition of the Torah, which is the source of its English name.<sup>344</sup> Accordingly, the book consists, at least in part, of a selective repetition of “highlights” of the laws and rules mentioned in previous books.<sup>345</sup> Importantly, when it comes the sexual restrictions prescribed by Leviticus 18 and 20, the Book of Deuteronomy dedicates a special section to such repetition, adding to each restriction the notion of being “cursed” for its violation.<sup>346</sup> Thus, we learn that “*Cursed is he who curses his father and mother*” (Det. 27:16)<sup>347</sup>; that “*Cursed is he who lies with his father’s wife*” (27:20)<sup>348</sup>; and “*Cursed is he who lies with his sister*” (27:22); and some other “cursed” categories. Yet the restriction on same-sex acts is glaringly missing from that list. Not a word. Not there, and not in the entire Book of Deuteronomy. Such an omission, as well, may teach us that the scope of Levitical prohibition was extremely narrow – within the family – and, in any event, did not merit a mention in the summary of these rules in Deuteronomy.

### 3. Reading the Levitical Prohibitions in Context

A proper contextual reading of both Levitical verses – the one forbidding same-sex acts (18:6), and the one prescribing a death penalty for the violation (20:13) – lends itself, almost naturally, to the conclusion that they were meant to apply only within the confines of the biblical household – i.e., within the extended family unit. All other same-sex relations, therefore, should not be regarded as prohibited by the Torah.

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<sup>342</sup> See *supra*, note 27.

<sup>343</sup> The term, of course, belongs to Sherlock Holmes. See ARTHUR CONAN DOYLE, *SILVER BLAZE* (1892).

<sup>344</sup> See, e.g., Jeffrey H. Tigay, *Introduction to Book of Deuteronomy*, in ETZ HAYIM – TORAH AND COMMENTARY, *supra* note XXX, at 980.

<sup>345</sup> See *Id.*, at 981 (“Some of Deuteronomy’s passages ... duplicate contents found elsewhere in the Torah.”)

<sup>346</sup> See *Deut. 27:15-26*.

<sup>347</sup> Cf. Lev. 20:9 (death penalty to same).

<sup>348</sup> Cf. Lev. 18:6 (restriction on same); 20:11 (death penalty for same).

Obviously, this approach is not free of criticism. Two arguments spring to mind. The first is textual. Recall our assumption that Leviticus 18's two "book-end" verses limit the content therein; that assumption, one suspects, can be agreed to by all. But the text of these "book-end" verses, one might argue, is not limited to the restriction of "not to approach" a blood relative; rather, it applies to – and should be understood to restrict – *all* acts performed in Egypt. What if, the argument goes, homosexuality was prevalent in Egypt, and therefore was also restricted by Leviticus 18 as a *general rule*, rather than only within the intra-family confines? Indeed, several scholars have claimed that homosexual relationships – not only incest – were prevalent in Egypt during those days.<sup>349</sup> Can the Levitical prohibition apply more generally? The answer to this argument is twofold: first, the evidence as to the prevalence of these practices in Egypt at the time are questionable, at best<sup>350</sup>; in fact, one of the greatest authorities on the issue, Professor David Greenberg, has concluded that "[a]s far as we can tell, homosexuality per se was not a category in Egyptian thought."<sup>351</sup> Second, all three contextual levels of the Levitical prohibition – the verse's chapter, the book in which it appears, and the Bible as a whole – firmly places it within the parameters of the family confines. To argue otherwise merely due to a textual conjecture seems weak, at best.

More generally, the *need* for a general prohibition against homosexual relations in the bible may be called into question by Jewish Law commentators themselves, who argued, consistently, that two Jewish men should not be "suspected" as desiring each other and therefore be allowed to spend time on their own.<sup>352</sup> Accordingly, sages have permitted two Jewish men to sleep under one blanket.<sup>353</sup> As noted by two astute observers:

Based on a passage in the *Talmud Bavli, Kiddushin 82a*, one may assume that there was no need for a safeguard against homosexuality, because it did not occur among Jews; the absence of homosexual behavior by Jews was presumed by the editors of the Talmud and its commentators (Rashi on

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<sup>349</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 18-19 (1996)(suggesting that "Egyptian society at some points in its history was accepting of same-sex relationship"; Professor Eskridge then proceeds to cite the traditional Orthodox interpretation of Leviticus 18:22 as suggesting that male same-sex acts were prevalent in Egypt at the time; as I have explained in length, I believe that interpretation was based, in large part, on a wrong (that is, a-contextual) reading of the verse.)

<sup>350</sup> See Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?* (reviewing ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, Id.), 95 MICH. L. REV. 1578, 1580 (1997) ("Eskridge's single most questionable historical claim is that we can infer that 'same-sex intimacy was common in (ancient) Egypt' from the denunciation of the Egyptians practice of same-sex marriage in Leviticus. Nothing is more common than to ascribe sexual abominations to your enemies. Whether there is *any* accurate history in the early books of the Bible is open to serious doubt, and if there is any-, it is unlikely to concern the sexual practices of Egyptians.")

<sup>351</sup> GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY, *supra* note XXX, at 135.

<sup>352</sup> Rambam, Mishne Torah, Hilchot Issurey Bee'ah 22:2 ("Israel [Jewish men] were never suspected on homosexual relations, or on bestiality; accordingly, there is no restriction on being alone with them.") The "being alone" restriction – Issur Yichud – in Jewish law refers to the general prohibition against being alone in one room with a member of the opposite sex, applied to any one man and one woman (except close relatives). See *Id.*, 22:3.

<sup>353</sup> Mishna, *Kiddushin* 4:14 ("Rabbi Yehuda says: ... nor may two unmarried men sleep under the same cloak. But the sages permit it.")

*Kiddushin* 82a mentions that there is a safeguard against homosexuality. The premise of this passage, and of many others in Jewish legal text, is that Jews are not even suspected of homosexuality.<sup>354</sup>

The second point of criticism is contextual. It relates, unfortunately, to bestiality. Textually, the restriction on having carnal relations with a beast seems closely related to that of same-sex acts. Thus, the verse following 18:22 – the same-sex acts restriction verse – is “*And every beast you shall not provide; lying with it will defile yourself.*” (Lev. 18:23). Similarly, in the death-penalty section, the capital punishment for having carnal relations with a beast is prescribed two verses following the one provided for same-sex act by men (Lev. 20:13, 15).<sup>355</sup> It is no wonder, therefore, that the two have been tied together in many a mind, and are still mentioned together today – both by Jewish Law commentators<sup>356</sup>, as well as the general public.<sup>357</sup> Surly, the argument goes, the prohibition on bestiality is universal; in any event, it may not be considered a part of the intra-family restrictions. If that is the case, the argument continues, then the same-sex act restriction, appearing just prior to bestiality, should also be interpreted as universal – rather than as limited in scope to intra-family relations.

I will not delve here into the complex issue of the exact nature of the restriction on bestiality.<sup>358</sup> Nor will I discuss the possible relation between it and homosexuality as a sexual orientation.<sup>359</sup> I will argue, however, the obvious. First, even without a specific biblical recognition about the importance of human dignity – of the notion that each and every human was created in the image of God - the very comparison between a sexual orientation resulting in two loving men (or women) and a sexual attraction to a beast is demeaning, disrespectful, and humiliating to most gays and lesbians. And, when it comes to Judaism, such a comparison is simple incongruent with every organizing principle Jewish Law holds dear. Second, and more importantly, the restriction on sexual relations with animals concludes the section that deals with sexual regulations of the *household*. It is reasonable to assume that animals were considered a part of the household; the bible

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<sup>354</sup> Moss and Kern Ulmer, *The Sages Permit It*, *supra* note XXX, at 77.

<sup>355</sup> Even the Book of Deuteronomy, which prevents from “cursing” same-sex acts, is careful to note that “*Cursed is he who lies with any beast.*” (Deut. 27:21).

<sup>356</sup> See, e.g., Dennis Prager, *Judaism's Sexual Revolution: Why Judaism (and then Christianity) Rejected Homosexuality*, (1993), available at [www.orthodoxtoday.org/articles2/PragerHomosexuality.php](http://www.orthodoxtoday.org/articles2/PragerHomosexuality.php). (“There is, one could say, a continuum of wrong which goes from premarital sex, to celibacy, to adultery, and on to *homosexuality, incest, and bestiality*. We can better understand why Judaism rejects homosexuality if we first understand its attitudes toward these other unacceptable practices.... In all my research on this subject, nothing moved me more than the Talmudic law that Jews were forbidden to sell slaves or sheep to non-Jews, lest the non-Jews engage in homosexuality and bestiality.”)

<sup>357</sup> See, e.g., Cavan Sieczkowski, ‘*Duck Dynasty*’ Star Phil Robertson Makes Anti-Gay Remarks, Says Being Gay Is A Sin, Huffington Post, Dec. 18, 2103 (“Everything is blurred on what’s right and what’s wrong. Sin becomes fine,” he later added. “Start with homosexual behavior and just morph out from there. Bestiality, sleeping around with this woman and that woman and that woman and those men

<sup>358</sup> For a nuanced consideration of several options, see Sherry F. Colb, *The Meaning of “Harmless” in Describing Sexual Offenses*, Dorf on Law, Sept. 17, 2014, available at [www.dorfonlaw.org/2014/09/the-meaning-of-harmless-in-describing.html](http://www.dorfonlaw.org/2014/09/the-meaning-of-harmless-in-describing.html).

<sup>359</sup> For a critical view, see Antonio M. Haynes, *The Bestiality Proscription: In Search of a Rationale*, 21 Animal L. Rev. 21, 26-27 (2014).

itself provides an example.<sup>360</sup> Indeed, current research affirms that assumption as well.<sup>361</sup> All the “bestiality” text instructs us, therefore, is that –much like all members of the extended family residing in the house, female or male – household animals were excluded from being “fair game” for sexual purposes. The rationale here is identical to all previous restrictions – preventing unnecessary sexual friction with the home. Indeed, the bestiality restriction is also located, every single time, well within the “household section” of each chapter. Here, too, common sense should prevail over prejudice: there is no universal restriction, but merely a warning for not violating animals who are part and parcel of the household<sup>362</sup>.

## CONCLUSION

For millennia, the Levitical prohibition on same-sex acts was interpreted as universal. Those who attempted to challenge such understanding were silenced, or called intellectually dishonest; the biblical text, it was argued, simply does not lend itself to any other interpretation.<sup>363</sup> In this article I attempted to present an intellectually-defensible alternative to its accepted understanding. According to this reading, same-sex acts were prohibited by the Torah only within the confines of the extended-family, and for the same reasons that heterosexual acts were forbidden by the same laws of incest. Such interpretation, I have demonstrated, is more compatible with the organizing principles of Jewish law – the notion that every person was created in the image of God; the duty to love your neighbor as yourself; and the understanding that the interpretation of the Torah is not in the Heavens – than its current understanding. I have also demonstrated that this limited interpretation derives naturally from the context in which the verses appear – the Book of Leviticus, the Holiness Code, and the laws of incest.

Understanding the biblical prohibition against same-sex acts as merely applying within the confines of the extended family – as part of the laws of incest – is important for several reasons. First and foremost, it allows Jewish gay and lesbian – who are not members of

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<sup>360</sup> See the famous story of “the poor man’s sheep,” 2 SAMUEL 12:2-3 (“And the rich man had many goats and sheep; but the poor had nothing, but for one little sheep that he bought and raised, and she grew up with him and his sons together; from his plate she would eat, and from his cup drink, and *she lay down in his arms*, and became like a daughter to him.”)

<sup>361</sup> See ODED BOROWSKI, EVERY LIVING THING DAILY USE OF ANIMALS IN ANCIENT ISRAEL 45 (1998) (“Remains of stone-walled animals pens were excavated at several sites in the hill country and the Negev. Scholars suggest that sheltering the animals inside the house was common among the Israelites who lived in “four room houses.”)

<sup>362</sup> I am not contending here that Jewish law does – or should - condone bestiality. That issue is well beyond the scope of that article. What I do suggest is that Leviticus 18 is limited in scope to the extended family – and all members of the household; therefore, any restriction prescribed therein should be limited by those parameters.

<sup>363</sup> See, e.g., Prager, *Homosexuality, The Bible*, *supra* note 42, at 62 (“The onus is on those who view homosexuality as compatible with Judaism or Christianity to reconcile this view with their Bible. Given the unambiguous nature of the biblical attitude towards homosexuality, however, such a reconciliation is not possible. All that is possible is to declare: ‘I am aware that the Bible condemns homosexuality, and I consider the Bible wrong.’ That would be an intellectually honest approach.”)

the same extended family – to freely engage in loving relationships. Second, and perhaps more importantly, if the act itself is allowed by the Torah, then same-sex marriage should also be understood as allowed (or, in any event, not forbidden by) the Torah. This is the path carved by the U.S. Supreme Court<sup>364</sup>, and there is no reason for Jewish Law not to follow it. This is true in particular in light of the significant milestones achieved in recent years by the different Jewish denominations, save Orthodoxy, regarding same-sex marriages.

Third, from a biblical-interpretation perspective, this interpretation allows us to “free” many of the wonderful texts included in the bible that has so far been marginalized or improperly read. Take for example King David’s eulogy over the loss of his dearest friend, Yonatan (Jonathan): “So sorry am I for your loss, my brother Yonatan, as you have been so pleasant to me. Your love has been more wonderful to me than any woman’s love.” (II Sam. 1:26). The same is true when the Wise King advises us, in a language that is gender-specific to two males, that “Two are better than one... So when both of them shall lie together, it will be warm to both of them; and the one, how will he become warm?” (Esc. 4:9-11). These and other passages would now be able to be read in the same spirit they they were written – a spirit of love, respect, and equality.

Two verses in Leviticus have caused an untold amount of suffering to too many Jews, of both genders. The time has come to end that suffering, turning its victims to full-fledged members of their communities. It would make them better; it would make their communities whole. As the great Jewish-law sages have taught us – “If not now, then when?”<sup>365</sup>

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<sup>364</sup> See *supra*, note 2.

<sup>365</sup> MISHNA, *Nezikin, Pirkei Avot* 1:13.