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## Chaos, Law, and God: The Religious Meanings of Homosexuality

Jay Michaelson

*Boston University Law School*

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CHAOS, LAW, AND GOD:  
THE RELIGIOUS MEANINGS OF HOMOSEXUALITY

Jay Michaelson\*

- I. INTRODUCTION · 41
- II. THE IDEA OF ORDER VS. KEY WEST, OR,  
WHAT THE BIBLE REALLY SAYS ABOUT HOMOSEXUALITY · 44
  - A. *The Myths of Family Values* · 44
  - B. *The Truths of Biblical Homosexuality* · 56
    - 1. Hebrew Bible · 60
    - 2. New Testament · 68
  - C. *Chaos and the Engenderment of Law* · 79
- III. THE IMPERFECT IS OUR PARADISE, OR, THE  
RIGHT IS MORE RIGHT THAN IT KNOWS · 85
  - A. *Secular vs. Religious: Can There  
be Private Order and Public Chaos?* · 86
  - B. *Religious vs. Religious: The Progressive Revolution* · 90
  - C. *The Liminal as Holy Terror: A Queer Agreement* · 102
- IV. NOT IDEAS ABOUT THE THING, BUT  
THE THING ITSELF: CONCLUSIONS · 105
  - A. *An Integral Reassessment of "Homophobia" and  
"Religion"* · 106
  - B. *How Not to Move from Mythic to Post-Mythic* · 109
  - C. *Going to Hell for the Sake of Heaven* · 113

I. INTRODUCTION

Why is homosexuality so politically significant? According to our most reliable statistics, only 4% of Americans identify as gay or lesbian.<sup>1</sup>

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\* Visiting Assistant Professor of Law, Boston University Law School. Ph.D. Candidate in Jewish Thought, Hebrew University. J.D., Yale Law School, 1997. M.A. in Religious Studies, Hebrew University, 1998. B.A., Columbia University, 1993. The author wishes to thank Nathaniel Persily, Kenji Yoshino, David Seipe, Gary Lawson, Linda McClain, Kevin Outterson, Sadiq Reza, Gerry Leonard, Jo Ellen Green Kaiser, Gregg Drinkwater, Nathan Abrams, Arielle Kristan, and Andrew Novak for their comments and assistance on this and earlier versions of this Article.

1. The Center for Disease Control reports that 5.7% of men and 11% of women aged 15–44 have engaged in same-sex sexual activity. William D. Mosher, Anjani Chandra & Jo Jones, *Sexual Behavior and Selected Health Measures: Men and Women 15–44 Years of Age, United States, 2002*, in *Advance Data from Vital and Health Statistics, Number 362* (Center for Disease Control, Sept. 15, 2005). However, the percentage of Americans who self-identify as homosexual or bisexual is lower, at approximately

Why, then, does homosexuality, and same-sex marriage in particular, provoke as much heated debate as abortion, civil rights, and equal rights for women once inspired? How has such a small group—8.8 million Americans at most—come to be regarded as a threat to our nation's social fabric?

This Article argues that the religious meaning of homosexuality cannot be explained merely in terms of homophobia, "church and state," or traditional values versus progressive ones. Rather, the regulation of sexuality has a particular religious meaning: sexuality is a primary site in which religious law is engendered, where the lawfulness of religion meets the chaos beyond it. Whether in Biblical times or today, changing the way sexuality is regulated is a threat to the notion of order itself, as construed by Jewish and Christian religion. Arguments about gay rights, same-sex marriage, and related issues are not merely arguments informed by religious values; they are arguments about the nature of religion itself, which is still important to a vast majority of Americans.<sup>2</sup>

I begin in Part II by providing a typology of the New Christian Right's (NCR's) longtime claims about homosexuality,<sup>3</sup> and comparing those claims with Biblical text. While most contemporary anti-gay arguments cluster around notions of family, pathology, and the decline of civilization, the Biblical texts of the Old Testament are chiefly about purity and impurity, order and disorder, on the physical plane, while those

4%. GARY J. GATES & JASON OST, *THE GAY AND LESBIAN ATLAS* (2004). A wide range of estimates exists. See EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 294–96 (1994) (reporting that 9% of men and 4% of women have engaged in same-sex sexual activity); SAMUEL S. JANUS & CYNTHIA L. JANUS, *THE JANUS REPORT ON SEXUAL BEHAVIOR* 69 (1993) (reporting that 22% of men and 17% of women have had homosexual experiences); RICHARD POSNER, *SEX AND REASON* 294–95 (1992) (surveying data and concluding "most estimates of the number of male homosexuals are in fact between 2 and 5 percent").

2. According to the 2005 Harris Poll, 82% of Americans believe in God (though this is true of only 69% of Americans with postgraduate degrees), 73% believe in miracles, 70% believe in heaven, 70% believe that Jesus is the Son of God or is God, and 61% believe in the devil. Harris Poll No. 90, *The Religious and Other Beliefs of Americans 2005*, Dec. 14, 2005, available at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=618](http://www.harrisinteractive.com/harris_poll/index.asp?PID=618). According to the Barna Group, 69% of Americans believe in God as an "all-powerful, all-knowing perfect creator of the Universe who rules our world today." Sixty-one percent of Americans believe that "the Bible is totally accurate in all of its teachings." *THE BARNA UPDATE* (Barna Group, Ventura, Cal.), Sept. 3, 2002, available at [www.barna.org/FlexPage.aspx?Page=BarnaUpdate&BarnaUpdateID=120](http://www.barna.org/FlexPage.aspx?Page=BarnaUpdate&BarnaUpdateID=120).
3. Homosexuality has been a particular target of the NCR for decades. See CHRIS BULL & JOHN GALLAGHER, *PERFECT ENEMIES: THE BATTLE BETWEEN THE RELIGIOUS RIGHT AND THE GAY MOVEMENT* 1–38 (updated ed., Madison Books 2001) (1996).

of the New Testament are about creating “natural” order by subsuming the physical to the spiritual. In short, while the Bible does not regard homosexuality as the NCR does, they do share a basic underlying concern with order and chaos, and the siting of that concern in the domain of sexuality. The deeper meaning of homosexuality is chaos.

In fact, NCR leaders are perhaps more right than they know, because liberated sexuality (especially, and symbolically, homosexuality) is indeed a threat to the mythic *nomos* of religion as they understand it. Part III rejects the claim that debates about homosexuality are merely about homophobia or the simplistic dichotomy of “church and state.” Rather, when viewed with a more rigorous analytical framework (Part III utilizes the developmental models of theorist Ken Wilber, drawing on the work of Robert Kegan, Lawrence Kohlberg, Susann Cook-Greuter, and others), liberated homosexuality represents a change in the meaning of religion itself, a moving from what Wilber and others call a “mythic” understanding of religion to a “post-mythic” one. And from the perspective of mythic religion, the post-mythic is anarchy. Indeed, as Part III shows, two very different sets of GLBT thinkers—queer theorists and the gay spirituality movement—celebrate this very disordering potential of liberated (homo)sexuality. Like the NCR, both of these groups see homosexuality, read as a form of liminality, as a potential site for uprooting gender binarism, heteronormativity, and other structures of order. Two men standing under a marriage canopy may seem like a simple, even banal, image, but it is neither: Biblical concerns about law and chaos are still with us today. Sexuality remains the site at which legal-religious order is contested, and liberated sexuality continues to threaten the mythic *nomos* and its public and private notions of order and disorder.

In the concluding Part, I argue that there are ways out of this dilemma, but not easy ones. First, drawing on the work of Robert Cover, I caution against conflating the primary religious-*nomian* aspiration for order with simple homophobia, and against the reduction of complex religious developmental questions to the inadequate binary of “church and state.” A more subtle analytical lens reveals political debates about homosexuality to be a *Kulturkampf* between two different stages of religious development.<sup>4</sup> Second, I argue, based on empirical evidence, that

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4. For religious-political debate about gay rights as *Kulturkampf*, see William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 VAND. L. REV. 419, 437–40 (1997); Jay Michaelson, Essay, *On Listening to the Kulturkampf, Or How America Overruled Bowers v. Hardwick, Even Though Romer v. Evans Didn't*, 49 DUKE L.J. 1559 (2000); Steven H. Aden, *A Tale of Two Cities in the Gay Rights Kulturkampf: Are the Federal Courts Presiding Over the Cultural Balkanization*

those reforms which target mythic structures will be least likely to succeed, while those which evade them will be much more likely to succeed. Third and finally, drawing again on the work of Wilber and Cover, as well as that of Kenji Yoshino, I conclude on a note of cautious optimism, noting that experiential encounters, peak experiences, and world-shattering moments of growth—my primary example here is Huck Finn’s decision to “go to hell” rather than turn in the fugitive slave Jim—are the most effective means of moving from one stage of religious development to another.

Unfortunately, such encounters are religious, not legal, in nature. Fortunately, however, they may be as simple as simply knowing someone gay, and are strikingly congruent with our cultural moment’s emphasis on the personal and confessional as modes of political discourse.

Debates about the legal regulation of sexuality are not merely about the separation of church and state, or the role of traditional values in society, but about what religion itself is supposed to be and the kinds of legal order it is to maintain. While these questions have been with us for millennia, the answers to them are not immutable. The normative structures of religion appeal to the timeless, but, fortunately for many of us, they evolve over time.

## II. THE IDEA OF ORDER VS. KEY WEST, OR, WHAT THE BIBLE REALLY SAYS ABOUT HOMOSEXUALITY

### A. *The Myths of Family Values*

According to much of today’s political rhetoric, proponents of gay rights are flouting a central Biblical norm, while their opponents are mired in irrational homophobia. Both sides are incorrect. In this Part, I review the NCR’s anti-gay rhetoric and contrast it with Biblical passages discussing homosexuality, showing that while they are quite different on the surface, they do share fundamental concerns. That homosexuality is a “sin” for the NCR is, perhaps, obvious; my interest here is in *why* it is a sin, what exactly makes it wrong. In the next part, I address the pro-gay assertion that anti-gay political actors are motivated by fear and homophobia, showing that, in fact, the disordering power of

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*of America?*, 35 WAKE FOREST L. REV. 295, 307 (2000). The original usage of the term in this context is from Justice Scalia’s dissent in *Romer*. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (asserting that the majority had “mistaken a Kulturkampf for a fit of spite”).

homosexuality is still quite potent today, as it represents a shift in the meaning of religion.

As we survey these ideas, it is worth bearing in mind that questions of gay rights, such as same-sex marriage, are as much a litmus test as a policy debate, regardless of the protestations of anti-gay activists. Similar to abortion, gay rights has become a stand-in for a wide range of social issues, ranging from the death penalty to environmentalism, feminism to censorship. Much of its significance is obvious—since homosexuality is still something unknown, threatening, and forbidden to many people, the sight of two women marrying one another can be a galvanizing political image. Nor is homosexuality unique; the NCR has, over the years, been equally concerned with abortion, feminism, and prayer in schools. Yet what is striking about homosexuality is why it, rather than these quantitatively more important issues, has figured so prominently. Indeed, as Professor Didi Herman has shown, this was the case even before the last decade's legal changes; while the image of the homosexual has evolved from pathetic outsider to pernicious predator, the notion of homosexuality as fundamentally threatening the American political-religious order has been with us since at least the 1950s.<sup>5</sup> Thus, even as we may discount the actual import of homosexuality as a policy matter, we cannot ignore its prominence in NCR political rhetoric.

Finally, I do not mean to suggest that all anti-gay activists are religiously motivated, or that all religious people are anti-gay.<sup>6</sup> Indeed, my argument in Part III attacks this very oversimplification, and engages as much with pro-gay progressive religious arguments as with anti-gay ones, even as it remains the case that religiosity and conservative ideology are the best predictors of opposition to homosexuality.<sup>7</sup> Nevertheless, it is important to set forth the basic anti-gay political-legal

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5. DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 25–59 (1997) (tracing how homosexuality has been presented in the magazine *Christianity Today* from 1956–1997).
  6. For a survey of recent pro-gay Christian voices, see Susan J. Becker, *Many are Chilled, but Few are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 *AM. U. J. GENDER SOC. POL'Y & L.* 177, 224–231 (2006).
  7. Nathaniel Persily, Patrick Egan & Kevin Wallsten, *Gay Rights, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 234, 238, 248–50 (Nathaniel Persily, Jack Citrin & Patrick Egan, eds., 2008) [hereinafter *Gay Rights*] (identifying four main demographic variables that are predictors of attitudes toward gays and lesbians: education, religiosity, political ideology, and year of birth; later discussing religiosity); Becker, *supra* note 6, at 213–14 (citing Lee A. Kirkpatrick, *Fundamentalism, Christian Orthodoxy, and Intrinsic Religious Orientation as Predictors of Discriminatory Attitudes*, 32 *J. FOR SCI. STUDY RELIGION* 256, 256 (1993)).

argument, to find points of commonality and difference with Biblical text.

### Mutability

At its core, the anti-gay legal rhetoric of the New Christian Right depends upon the position that homosexuality is either a choice, a “lifestyle,” or a pathology.<sup>8</sup> This trope is best evidenced by the large number of “ex-gay” ministries connected to and supported by the NCR.<sup>9</sup> Exodus International, the largest ex-gay ministry, seeks to “[m]obiliz[e] the body of Christ to minister grace and truth to a world impacted by homosexuality.”<sup>10</sup> Similarly, James Dobson’s Focus on the Family has created a separate ministry called Love Won Out to help gays and lesbians “overcome” same-sex attractions.<sup>11</sup> Focus on the Family and Love Won Out

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8. See HERMAN, *supra* note 5, at 69–76; see also TIMOTHY DAILEY & PETER SPRIGG, GETTING IT STRAIGHT: WHAT THE RESEARCH SHOWS ABOUT HOMOSEXUALITY (1st ed. 2001); Nancy J. Knauer, *Homosexuality as Contagion: From The Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 458–63 (2000); Larry Mutz, *A Fairy Tale: The Myth of the Homosexual Lifestyle in Anti-Gay- and -Lesbian Rhetoric*, 27 WOMEN’S RTS. L. REP. 69, 69 (2006) (providing extensive discussion of the use of the term “lifestyle,” which began as a pro-gay term in the efforts to declassify homosexuality as a disorder, in anti-gay rhetoric). Cf. PAUL D. CAMERON, FAMILY RESEARCH INST., WHAT CAUSES HOMOSEXUAL DESIRE AND CAN IT BE CHANGED? (1999) [http://www.familyresearchinst.org/FRI\\_EduPamphlet1.html](http://www.familyresearchinst.org/FRI_EduPamphlet1.html) (“No one has found a single heredible [sic] genetic, hormonal or physical difference between heterosexuals and homosexuals—at least none that is replicable. While the absence of such a discovery doesn’t prove at inherited sexual tendencies aren’t possible, it suggests that none has been found because none exists.”); Love Won Out Frequently Asked Questions, <http://www.lovewonout.com/questions/> (last visited Dec. 19, 2008). Herman notes that the majority of NCR statements about the mutability of homosexuality depend on two studies that questioned the methodology of biological determinism. HERMAN, *supra* note 5, at 70.
  9. See David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1308 (1999); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507 (1994) (critiquing arguments of those opposed to immutability).
  10. See Exodus International Mission and Doctrine, <http://exodus.to/content/view/33/117> (last visited Dec. 19, 2008). For other examples of ex-gay ministries, see New Hope Ministries Home Page, <http://www.newhope123.org/index.htm> (last visited Dec. 19, 2008); Stephen Bennett Ministries Home Page, <http://www.igroops.com/igroops/sbm> (last visited Dec. 19, 2008) (“Founder and executive director Stephen Bennett, a former homosexual man now happily married to his wife Irene for over 15 years and the father of the couple’s two precious children, has traveled the world sharing the Lord’s story of love, hope, life and true change.”)
  11. See Love Won Out Home Page, <http://www.lovewonout.com/> (last visited Dec. 19, 2008). Focus on the Family itself employs over 1200 people, produces a dozen differ-

acknowledge that a variety of ‘environmental, cognitive and biological factors’ go into creating homosexual attraction.<sup>12</sup> Nonetheless, they maintain that “[G]ender confusion can be reversed. Biological predisposition can be treated. Patterns of attraction and addiction can be understood and reformed.”<sup>13</sup> Since being gay or lesbian is a choice, it is therefore appropriate to deter or prevent homosexual conduct, orientation and civil rights, and to deny recognition of lesbians and gays as a protected (and protectable) class.<sup>14</sup>

Polls also show a correlation between those who believe that same-sex relations are “always wrong” and those who believe it is “the way some people prefer to live.”<sup>15</sup> For example, during debates over Colorado’s anti-gay Amendment 2, Colorado for Family Values, which proposed the Amendment, asserted that “homosexuality isn’t something you are, it’s something you do.”<sup>16</sup> As we will see, in this regard, contemporary anti-gay voices are aligned with Biblical ones.

ent radio and television broadcasts and fourteen publications (including its flagship monthly magazine, *Focus on the Family*, with a circulation of 2.5 million), and has a budget of over \$100 million. Robert Dreyfuss, *The Holy War on Gays*, ROLLING STONE, Mar. 18, 1999, at 38, 40.

12. Love Won Out Frequently Asked Questions, *supra* note 8 (referring to the position of the American Psychological Association).
13. Don Schmierer, *An Ounce of Prevention*, TroubledWith.com, <http://www.troubledwith.com/ParentingTeens/A000000319.cfm?topic=parenting%20teens%3A%20homosexuality> (last visited Dec. 19, 2008) (quoting DON SCHMIERER, AN OUNCE OF PREVENTION: PREVENTING THE HOMOSEXUAL CONDITION IN TODAY’S YOUTH (1998)). TroubledWith.com is a website of Focus on the Family. *Cf.* Love Won Out Frequently Asked Questions, *supra* note 8 (describing the organization’s mission as helping those with same-sex attractions to “overcome” their desires).
14. Halley, *supra* note 9, at 517; Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 LAW & SEXUALITY 1, 74–78.
15. *Gay Rights*, *supra* note 7, at 235–38. Polls summarized by Persily et al. show that “in 2004, 57% of the public told the General Social Survey that same-sex relations are ‘always wrong.’ However, this figure has declined in a relatively steady fashion since the late 1980s, when it peaked at 78%.” Over the same period, the percentage of people who believed homosexuality is “something that people are born with” rose from 16% to 32%. *Id.* at 251–53. Further, “the decline in morally traditionalistic views regarding homosexuality has not been accompanied by increasing permissiveness on other matters of private behavior related to sexuality.” *Id.* at 235.
16. Knauer, *supra* note 14, at 77 (citing WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 143 (1997 & Supp. 2001)) (quoting letter). For one example of how the ascription of mutability to sexuality plays out in a legal context, see *Gaylord v. Tacoma School District No. 10*, 559 P.2d 1340, 1345–46 (Wash. 1977) (affirming a school board’s termination of a teacher because “[h]omosexuality is widely condemned as immoral and was so condemned during biblical times,” the teacher had indicated no intent to change, and he had “made a voluntary choice for which he must be held morally responsible”).



## Unnaturalness

The view that homosexuality is unnatural is a recurrent trope in NCR and wider conservative anti-gay literature.<sup>17</sup> It perhaps reached its zenith when President George W. Bush nominated for Surgeon General Dr. James Holsinger, Jr., who had prepared a study for the United Methodist Church called the “Pathophysiology of Male Homosexuality,” arguing that “the structure of the male and female reproductive system are fully complementary” and that the reproductive and alimentary systems are meant to be absolutely separate.<sup>18</sup> More prosaically, says the Family Research Council’s Robert Knight, “Just look at the human body . . . . You can’t fool nature. The rectum was not made for sexual activity . . . . It is an exit ramp, not an entry ramp.”<sup>19</sup> Or perhaps even more prosaically, God created Adam and Eve, not Adam and Steve.<sup>20</sup> As we shall see, such views have some precedent in Paul’s epistle to the Romans, though they misread Paul’s understanding of the “natural” as

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17. Sodomy (heterosexual and homosexual) was sometimes statutorily defined as “unnatural” or a “crime against nature.” For example, until 1968, Georgia defined sodomy as “the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman.” GA. CODE § 26-5901 (1933), *quoted in* Bowers v. Hardwick, 478 U.S. 186, 201 n.1 (1986). *See also* 1 WILLIAM HAWKINS, PLEAS OF THE CROWN 9 (6th ed. 1787) (“All unnatural carnal copulations, whether with man or beast, seem to come under the notion of sodomy, which was felony by the ancient common law, and punished, according to some authors, with burning; according to others, . . . with burying alive.”); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L. J. 459, 554–57 (1990) (summarizing and critiquing the position).
  18. JAMES W. HOLSINGER JR., PATHOPHYSIOLOGY OF MALE HOMOSEXUALITY 1 (1991), *available at* [http://abcnews.go.com/images/Politics/Holsinger\\_on\\_Homosexuality.pdf](http://abcnews.go.com/images/Politics/Holsinger_on_Homosexuality.pdf).
  19. *Quoted in* Dreyfuss, *supra* note 11, at 39. Such arguments do not, of course, address the high concentration of nerve endings in the anus, and the sexual pleasure generated by stimulation of the prostate gland, biological traits which would suggest a different biological “purpose,” if one were inclined to impute one.
  20. This cliché, attributed to anti-gay activist Anita Bryant and uttered on the Senate floor by anti-gay Senator Jesse Helms, is now widespread, available on bumper stickers, T-shirts, and more. *See, e.g.*, ROBERT M. BAIRD & STUART E. ROSENBAUM, SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 21 (1997); Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL’Y & L. 253 (2006); Cafepress.com, Adam & Eve Not Adam & Steve, <http://www.cafepress.com/constuff.11938883> (last visited Aug. 11, 2008) (bumper sticker) and <http://t-shirts.cafepress.com/item/adam-eve-not-adam-steve-black-tshirt/70482902> (last visited Aug. 11, 2008) (T-shirt).

being precisely that which transcends fundamental, natural, and base instincts and places the body in the service of the spirit.<sup>21</sup>

### Disease

Homosexuality is often described as being as unhealthy and pathological, a disgusting disease in and of itself that leads to further disease.<sup>22</sup> Pat Robertson has stated,

[O]ne of the great misnomers in our society is the term 'gay.' That somebody who is involved in something that is leading to suicide, where the V.D. rate is 11 times that of others, which are almost driven and ashamed and fearful and confused and psychotic and all the others that we read about plaguing this part of our society. The term gay is the most serious misuse of the English language. They're not gay, they're very, very depressed and miserable.<sup>23</sup>

A few years later, Robertson maintained that homosexuality "is anti-social, and it is a pathology. It is a sickness, and it needs to be treated."<sup>24</sup> Many NCR sources analogize the pathology of homosexuality to that of

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21. They also, of course, flatly contradict the evidence of homosexuality in over 300 animal species. See JOAN ROUGHGARDEN, *EVOLUTION'S RAINBOW: DIVERSITY, GENDER, AND SEXUALITY IN NATURE AND PEOPLE* (2004). But see ROGER LANCASTER, *THE TROUBLE WITH NATURE: SEX IN SCIENCE AND POPULAR CULTURE* (2003) (documenting religious and political uses of "nature" and arguing against simplifications such as a "gay gene").
  22. See, e.g., HERMAN, *supra* note 5, at 76–78; Mutz, *supra* note 8, at 75–76; Mark R. Kowaleski, Research Note, *Religious Constructions of the AIDS Crisis*, 51 *SOCIOLOGICAL ANALYSIS* 91, 93 (1990); Jerry Bergman, *Creationism and the Problem of Homosexual Behavior*, *ANSWERS*, Apr. 1995, at 121, available at <http://www.answersingenesis.org/tj/v9/i1/homosexual.asp>. On the construction of homosexuality as a disease in (secular) law, see Larry Catá Backer, *Constructing a "Homosexual" For Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 *TUL. L. REV.* 529, 554–57, 576–77 (1996). On the political and judicial use of disgust and contagion, see William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 *FLA. L. REV.* 1011, 1020–29 (2005).
  23. 700 Club (Christian Broadcasting Network (CBN) May 6, 1982), *quoted at* Posting of Kyle to Right Wing Watch, *The Perils of Wooing Pat Robertson*, <http://www.rightwingwatch.org/content/perils-woosing-pat-robertson> (Nov. 7, 2007, 16:21 EST) [hereinafter Right Wing Watch].
  24. *Quoted in* Craig W. Nowak, *Living Within the Ring of Fire (Diary of a Gay Man in America)*, 4:2 *CONVERSATIONS IN RELIGION & THEOLOGY* 245, 248 (2006).

pedophilia.<sup>25</sup> Some anti-gay sources conflate Biblical punishments for homosexuality with the disease and death that they assert inevitably accompanies it.<sup>26</sup> Of course, this rhetoric of disease and misery once drew primarily on the AIDS epidemic, widely seen in the NCR as God's punishment against homosexuals.<sup>27</sup> For example, Robertson said in 1988 that homosexuality is "an abomination. The practices of those people is [sic] appalling. It is a pathology. It is a sickness, and instead of thinking of giving these people a preferred status and privacy, we should treat AIDS exactly the same way as any other communicable disease."<sup>28</sup> As AIDS has declined in the gay community, however, and increased in Africa—where evangelicals have been active in combating the spread of AIDS—the association of homosexuality with disease has shifted from AIDS specifically to venereal disease and other health woes.

### Threat to Society: The Institution of the Family

A common critique of legitimizing homosexuality is that doing so will destroy marriage, and by extension, the family. Many believe that biological, heterosexual, "nuclear" families are the ideal model for our society,<sup>29</sup> and that acceptance of homosexuality is an "active threat to the

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25. See, e.g., PAUL CAMERON, FAMILY RESEARCH INST., CHILD MOLESTATION AND HOMOSEXUALITY (1993), available at [http://www.familyresearchinst.org/FRI\\_EduPamphlet2.html](http://www.familyresearchinst.org/FRI_EduPamphlet2.html) ("Not only is the gay rights movement upfront in its desire to legitimize sex with children, but whether indexed by population reports of molestation, pedophile convictions, or teacher-pupil assaults, there is a strong, disproportionate association between child molestation and homosexuality."); Traditional Values Coalition, The Homosexual Movement and Pedophilia, [http://www.traditionalvalues.org/homosexual\\_movement\\_and\\_pedophilia/](http://www.traditionalvalues.org/homosexual_movement_and_pedophilia/) (last visited Feb. 18, 2008) ("There is an ever-increasing effort among homosexual organizations to target public school children, to abolish age of consent laws, and to publish 'studies' that purportedly show that adult/child sex is not harmful.").
26. See, e.g., Eskridge, *supra* note 22, at 1021–22 (describing the rhetoric of Anita Bryant).
27. See Kowaleski, *supra* note 22, at 93 (noting that religious groups who blamed the victim for AIDS "use[d] the AIDS crisis as support for a religious proscription of homosexuality, [and] for their campaigns against gay civil rights"). On homophobia and representations of AIDS and its relationship to wider fears regarding sexuality, see Leo Bersani, *Is the Rectum a Grave?*, in 43 AIDS: CULTURAL ANALYSIS/CULTURAL ACTIVISM 197, 197–222 (Douglas Crimp ed., 1987) (reviewing SIMON WATNEY, POLICING DESIRE: PORNOGRAPHY, AIDS, AND THE MEDIA (1987)).
28. 700 Club (CBN June 6, 1988), quoted at Right Wing Watch, *supra* note 23. Note the conflation of homosexuality as disease and AIDS as disease.
29. See, e.g., George W. Dent, Jr., *How Does Same-Sex Marriage Threaten You?*, 59 RUTGERS L. REV. 233, 256–57 (2007); Amy L. Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 RUTGERS L. REV. 377, 380 (2007); see also John M. Finnis,

stability of existing and future marriages.”<sup>30</sup> The reasoning for why homosexuality poses such a threat varies. Some point to research that children do best when their parents are married, are biologically related to the child, and of the opposite sex.<sup>31</sup> Some suggest that the allure of homosexuality might undermine the ideal of heterosexual marriage (a view which assumes straight people might be “tempted” into gay life).<sup>32</sup> Others say that the problem is that if gay couples get married and have fewer children than straight couples, childbearing might become less central to marriage generally.<sup>33</sup> Others argue that if married gay couples place less emphasis on fidelity than straight couples ordinarily would, straight couples may become more promiscuous, threatening family or

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*Law, Morality and “Sexual Orientation”*, 69 NOTRE DAME L. REV. 1049, 1069–70 (1994) (decrying homosexual sex as merely self-gratifying and its acceptance as such a threat to “the stability and protective and educative generosity of family life”). Obviously, this is not exclusively an argument of the NCR; many secular theorists believe the nuclear family to serve important social functions, and deviations from the heterosexual norm to be at least potentially destabilizing. See Linda McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2151–83 (2007) [hereinafter *Love, Marriage, and the Baby Carriage*] (discussing and critiquing such arguments in theory and case law). One of the primary justifications is that marriage serves to channel sexual drives and “domesticate” men who would otherwise not settle down to raise families. See, e.g., DAVID BLANKENHORN, *FATHERLESS AMERICA* 3, 16, 223–26 (1996) (arguing that “men are not ideally suited to responsible fatherhood. Although they certainly have the capacity for fathering, men are inclined to sexual promiscuity and paternal waywardness” and that marriage is necessary to conscript men into the role); LINDA MCCLAIN, *THE PLACE OF FAMILIES* 135–36 (2006) [hereinafter *MCCLAIN, THE PLACE OF FAMILIES*] (characterizing arguments as stating that “society requires marriage to domesticate men”); Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992).

30. Finnis, *supra* note 29, at 1070.

31. Wax, *supra* note 29, at 402–09 (citing Kristin Anderson Moore et al., *Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, CHILD TRENDS RES. BRIEF (Child Trends, Wash. D.C.), Jun. 2002, at 6, and Sandra E. Hofferth, *Residential Father Family Type and Child Well-Being: Investment Versus Selection*, 43 DEMOGRAPHY 53 (2006)).

32. Wax, *supra* note 29, at 400. (“[T]raditionalists . . . point to how conduct is mediated by social meanings and understandings. The fear is that, if the institution of marriage is reshaped to give priority to diversity, choice, and individual prerogatives—and if marital roles are redefined to fit different homosexual and heterosexual lifestyles—then behavior surrounding all marital relations may change in response.”) See also Dent, *supra* note 29, at 255 (“The harder it is to distinguish married couples from other kinds of relationships, the harder it is for communities to reinforce norms of marital behavior, the harder it is for couples to identify the meaning of their own relationship, and the more difficult it is for marriage to fulfill its function as a social institution.”) (quoting INST. FOR AM. VALUES, *CAN GOVERNMENT STRENGTHEN MARRIAGE?: EVIDENCE FROM THE SOCIAL SCIENCES* 9 (2004)).

33. See Wax, *supra* note 29, at 402.

societal stability.<sup>34</sup> Finally, some conflate the threat to the institution of the family with the threat that supposedly predatory homosexuals pose to families and children.<sup>35</sup>

### Threat to Society: Gender and Sexual “Boundary Maintenance”

In a similar vein, many critics claim that homosexuality forfeits or betrays the masculine gender role,<sup>36</sup> a critique sociologist Dana Briton calls a form of “boundary maintenance.”<sup>37</sup> For example, the Family Research Council’s Robert Knight has predicted that the acceptance of homosexuality will reduce the value of masculinity, which will then lead to further societal decay: “[A]s man is reduced in stature, all hell will break loose. We’ll see a breakdown in social organizations, with more drug use, more disease, more unwanted pregnancies. You’re mainstreaming dysfunction.”<sup>38</sup> On the other hand, Herman, citing anti-gay videos highlighting sadomasochism and naked bodies, has suggested that in NCR rhetoric, “gay sexuality is represented as masculinity out of control, as aggressive, powerful, and unrestrained,”<sup>39</sup> and as “an extraordinary combination of power, degradation, excitement, pleasure, savagery, and bacchanalian hedonism.”<sup>40</sup> As discussed in the next section, both of these contradictory themes are also present in the New Testament where, homosexual behavior is both “soft” and animalistic.

The contradiction is explained somewhat by the overriding concern with order generally: once men are loosed from the bonds of religious morality—and, as Herman shows, the NCR is almost entirely concerned with *male* homosexuality<sup>41</sup>—disorder reigns. More than the particulars of masculinity and femininity, this fear of disorder is the real

34. *Id.* See also Mutz, *supra* note 8, at 76 (“Gay sexuality, according to this common understanding, is all-encompassing, obsessive, and completely divorced from love, long-term relationships, and family structure—the civilizing influences that keep ‘normal’ sexuality under control.”). *But cf.* Jonathan Rauch, *Who Needs Marriage? in BEYOND QUEER: CHALLENGING GAY LEFT ORTHODOXY* 286–13, at 307–08 (Bruce Bawer ed., 1996) (arguing that marriage serves to constrain male promiscuity, and thus should be extended to gay men to restrict their promiscuity).

35. See Knauer, *supra* note 8, at 468–69 (stating that pro-family groups and individuals, including Anita Bryant, argued that homosexuals were actively “recruiting”).

36. See POSNER, *supra* note 1, at 300–04 (surveying a range of pejorative opinions about “effeminate” men).

37. Dana M. Briton, *Homophobia and Homosociality: An Analysis of Boundary Maintenance*, 31 Soc. Q. 423, 425 (1990).

38. Quoted in Dreyfuss, *supra* note 11, at 40.

39. HERMAN, *supra* note 5, at 80.

40. *Id.* at 81.

41. *Id.* at 92–110.

concern. It is echoed by the slippery slope arguments that acceptance of same-sex relationships will lead to the erosion of taboos against polygamy, bestiality, and incest. What one observer has called a “politics of disgust”<sup>42</sup> is of obvious political import, but my claim is that it is not purely politics; it is indeed how the NCR regards unregulated sexuality. Former Pennsylvania Senator Rick Santorum, for example, argued that “if the Supreme Court says that you have the right to consensual [gay] sex in your home, then you have the right to bigamy, you have the right to polygamy . . . you have the right to adultery.”<sup>43</sup> Similarly, Stanley Kurtz, a critic for *The National Review*, claims that the erosion of the taboo against homosexuality might lead to the erosion of the incest taboo.<sup>44</sup> Finally, some believe that legitimizing any sex outside of marriage creates “moral confusion,”<sup>45</sup> which in turn leads to societal views on sexuality going “awry,” as evidenced by the abuses at Abu Ghraib prison, the international sex tourism industry, and addiction to internet pornography.<sup>46</sup> These bizarre claims are sometimes seen as evidence of homophobia, ignorance, or simple insult. As we will see, however, they may be more usefully understood as legitimate expressions of the fear of chaos, inscribed on the sexual site of law’s engenderment.

### Threat to Society: Religion and Moral Order

Continuing this theme, homosexuality is frequently described as hyper-sexualized, depraved, a slippery slope to all forms of sexual degradation and violence, and a threat to religion and moral order.<sup>47</sup> Steven A. Schwalm of the Family Research Council says that “militant homosexuality is fundamentally opposed to religion, family, and anything that presupposes a natural moral order, a transcendent God, or something

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42. Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U.L. REV. 1543, 1543 (2005). See also POSNER, *supra* note 1, at 300–01.

43. Cahill, *supra* note 42, at 1544 (quoting interview by the Associated Press with Sen. Rick Santorum (Apr. 7, 2003)).

44. *Id.* at 1557.

45. See, e.g., Randy Beck, *The City of God and the Cities of Men: A Response to Jason Carter*, 41 GA. L. REV. 113, 135 (2006).

46. See *id.* at 137–38.

47. See Mutz, *supra* note 8, at 75–76. Mutz cites documents from the American Life League stating that common “homosexual practices” include “intercourse with pigs, goats, and dogs” and “dead persons or animals.” “Under the heading the ‘General Lifestyle of All Homosexuals,’ the group describes that aspects of the ‘lifestyle’ include child molestation, group sex, use of prostitutes, deliberately infecting others with sexually transmitted diseases, and making obscene phone calls.” *Id.* at 76.

else higher than ourselves. The activist homosexual agenda and worldview are fundamentally incompatible with Christianity or any form of true religion, because homosexuality is ultimately narcissism.”<sup>48</sup> As we will see, this critique, extreme as it sounds, resonates more with Paul’s argument for “natural” theocentricity above animalistic androcentricity than with the claims we have explored thus far. It also resonates with the NCR’s general sense that they are subject to increasing persecution as a group.<sup>49</sup>

In a modified form, it has lately been amplified by legal scholars’ claims that the societal protection of gays and lesbians is a threat to “religious freedom,”<sup>50</sup> because “legal and social equality . . . cannot be squared with respect for the traditional religions that disapprove of homosexuality . . . . In effect, government must declare traditional religion to be false and evil.”<sup>51</sup> Robert Knight, Lindsey Douthit and Concerned Women for America, for example, warn that “[h]ate crime’ laws are a key part of a long-term strategy by homosexual activists to use ‘sexual-orientation’-based policies and laws to suppress dissent, radically redefine marriage and, ultimately, to criminalize Biblical morality.”<sup>52</sup> Such arguments reached a fever pitch in the wake of the legalization of same-

48. Steven A. Schwalm, Family Research Council, *The Assault on Christians by the Militant Homosexual Movement* (1998), quoted in SHEILA S. KENNEDY, *GOD AND COUNTRY* 115 (2007).
49. See, e.g., Thomas Horn, *Persecution of Christians Growing in the United States*, WORTHY NEWS, Feb. 6, 2001, <http://www.worthynews.com/christian/persecution-of-christians-growing-in-the-united-states/>.
50. See, e.g., George W. Dent, Jr., *Civil Rights for Whom? Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553 (2007); Thomas J. Paprocki, *Marriage, Same-Sex Relationships, and the Catholic Church*, 38 LOY. U. CHI. L.J. 247 (2007); Roger Severino, *Or For Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL’Y 939 (2007).
51. Dent, *supra* note 50, at 556. The threat flows from several sources of law, including the decriminalization of sodomy after *Lawrence v. Texas*; employment anti-discrimination laws that protect sexual orientation; fair housing laws; hate-crime laws; and civil tort laws. For a pro-gay argument sensitive to these concerns, see Chai Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 77–79 (2006) [hereinafter Feldblum, *Moral Conflict*] (discussing gay rights laws’ impingement upon “belief interests”). I discuss Feldblum’s work in Part IV.
52. Robert Knight & Lindsey Douthit, *‘Hate Crime’ Laws Threaten Religious Freedom*, CULTURE & FAMILY ISSUES (Concerned Women For America, Wash., D.C.), Dec. 12, 2005, <http://www.cwfa.org/articledisplay.asp?id=9672&department=CFI&categoryid=papers>; see also Richard Land, Ethics & Religious Liberty Comm’n of the S. Baptist Convention, *Hate Crimes, The Thought Police, and Religious Freedom* (May 9, 2007), <http://erlc.com/article/hate-crimes-the-thought-police-and-religious-freedom>.

sex marriage in Massachusetts,<sup>53</sup> which was said to elevate the power of the state over the power of the church and individual families.<sup>54</sup> The ancient battle between libertine sexuality and the authority of the Church has been transposed into a modern legal context.

### Threat to Society: The End of Civilization.

Perhaps the NCR's grandest claim is that homosexuality is destructive to the institutions of society, and to civilization itself. As early as 1978, Tim LaHaye (later the author of the bestselling *Left Behind* series) wrote that "the tidal wave of homosexuality . . . will drown our children in a polluted sea of sexual perversion—and will eventually destroy America as it did Rome, Greece, Pompeii, and Sodom."<sup>55</sup> In 1989, a member of the U.S. House of Representatives asked, "How are we, as supporters of the Judeo-Christian ethic, supposed to respond to this well-planned and well-financed attack on our civilization? . . . We must either defeat militant homosexuality or it will defeat us."<sup>56</sup> At a similar extreme of this critique, Pat Robertson suggested that the relaxation of the regulation of homosexuality will be a kind of moral anarchy that leads to fascism and Satanism: "When lawlessness is abroad in the land, the same thing will happen here that happened in Nazi Germany. Many of those people involved in Adolf Hitler were Satanists. Many of them were homosexuals. The two things seem to go together."<sup>57</sup> Elsewhere, Robertson stated, "[T]he acceptance of homosexuality is the last step in the decline of Gentile civilization."<sup>58</sup> More recently, 2008 Republican

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53. See Severino, *supra* note 50, at 941–942; Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, WKLY. STANDARD, May 15, 2006 (quoting Anthony Picarello, President and General Counsel of the Becket Fund for Religious Liberty); see also Peter Steinfeld, *Will Same-Sex Marriage Collide with Religious Liberty?*, N.Y. TIMES, June 10, 2006, available at <http://www.nytimes.com/2006/06/10/us/10beliefs.html> (pointing out that several mainstream legal and religious scholars also share the view that the legalization of same-sex marriage will likely create conflicts with religious institutions).

54. Paprocki, *supra* note 50, at 259.

55. TIM LAHAYE, *THE UNHAPPY GAYS: WHAT EVERYONE SHOULD KNOW ABOUT HOMOSEXUALITY* 10 (1978), quoted in HERMAN, *supra* note 5, at 62.

56. WILLIAM DANNEMEYER, *SHADOWS IN THE LAND: HOMOSEXUALITY IN AMERICA* (1989), quoted in HERMAN, *supra* note 5, at 63. See also Lynn Wardle, *The End of Marriage*, 44 FAM. CT. REV. 45, 52 (2006) ("liberal self-interest in society may bring the end of marriage as well as the end of history").

57. 700 Club (Jan. 21, 1993), quoted at Right Wing Watch, *supra* note 23.

58. Richard Lacayo et al., *The New Gay Struggle*, TIME, Oct. 26, 1998, available at <http://www.time.com/time/magazine/article/0,9171,989406,00.html>. This was the



Presidential candidate Gov. Mike Huckabee echoed this perspective, stating,

[S]in means missing the mark. . . . The mark is that we have marriage—men and women, they marry, they create children, and they train their replacements and you have a future generation then that creates their replacements and trains them. . . . If we didn't have that as the ideal, we wouldn't have a civilization that was able to perpetuate.<sup>59</sup>

In other words, the values in question are progeny and the survival of civilization; homosexuality means fewer children, which ultimately means the destruction of humanity.<sup>60</sup> As we will see below, such seemingly hyperbolic critiques are, while quite different in detail from Biblical criticisms, remarkably similar both to the underlying Biblical themes of order and chaos, and to the actual disruption of mythic religious order by the eruption of post-mythic religious thinking about liberated sexuality.<sup>61</sup>

### *B. The Truths of Biblical Homosexuality*

I now turn to the Biblical text, to show first that the NCR's specific critiques are not the same as those found in Biblical text, but, second, that they do share a fundamental concern: order and chaos.<sup>62</sup>

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same *Time* magazine article in which Robertson warned that hurricanes were likely to hit Orlando, Florida, due to gay-related events being held there.

59. Domenico Montanaro, *Huck FL Nod, More on Homosexuality*, MSNBC FIRST READ, Dec. 10, 2007, <http://firstread.msnbc.msn.com/archive/2007/12/10/509495.aspx>. For one legal scholar's argument for the importance of "natural parents", see Dent, *supra* note 29, at 241 ("It seems axiomatic . . . that human life is intrinsically valuable. If so, then the creation of human life is intrinsically valuable, and the unique capacity of a heterosexual relationship is intrinsically worth something.").
60. Ironically, of course, most environmentalists believe the destruction of humanity, if it happens, will result not from too few children but too many. As a result, some religious thinkers have suggested that higher prevalence of homosexuality is ecologically and thus religiously preferable. See Walter Wink, *Homosexuality and the Bible*, in *HOMOSEXUALITY AND CHRISTIAN FAITH* 33, 41 (Walter Wink ed., 1999). But see WILLIAM J. WEBB, *SLAVES, WOMEN & HOMOSEXUALS* 217–18 (2001) (disputing relevance of overpopulation in assessing importance of procreation).
61. Of course, more moderate approaches are also found in the literature. For example, Randy Beck suggests that we simply do not know the social consequences that will result from changing the definition of marriage. Beck, *supra* note 45, at 148 (arguing that it will have "profound social consequences").
62. I am aware of very few contemporary religious thinkers who both acknowledge the Bible's "order and chaos" concern and maintain it today as a reason to oppose homo-

By way of prologue, there are three arguments that I will not make. The first regards the actual nature and origin of homosexuality. As has been mentioned already, all of the foregoing religious arguments rest on the premise that homosexual behavior is chosen, despite the fact that sexual orientation is known, by those with first-hand experience of it as well as by scientists who study it, to be either genetically determined or so deeply developmentally ingrained as to be fundamentally unchangeable<sup>63</sup>—and apart from the shocking rates of suicide among gay and

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sexuality. One of these is DONALD WOLD, *OUT OF ORDER: HOMOSEXUALITY IN THE BIBLE AND THE ANCIENT NEAR EAST* (1998). Wold presents a reading of Leviticus similar to my own, *id.* at 91–136, including a cross-cultural analysis, *id.* at 30–61, but marshals this extensive historical and linguistic evidence (which Biblical critics usually use to undermine fundamentalist readings of text) to support an order-based ban on homosexuality today, notwithstanding changed circumstances and the apparent foreignness of the Levitical agenda, which we will shortly explore. Of course, as Wold is committed to Biblical inerrancy, the historical roots of Biblical text do not undermine its normative status but serve only to better explain its scope.

63. See KARI BALOG & CHANDLER BURR, *A SEPARATE CREATION: THE SEARCH FOR THE BIOLOGICAL ORIGINS OF SEXUAL ORIENTATION* (1996); POSNER, *supra* note 1, at 295–300 (assessing data and noting little effect of legal regime on those who “choose” homosexuality); JOHN D’EMILIO, *Born Gay*, in *THE WORLD TURNED: ESSAYS ON GAY HISTORY, POLITICS, AND CULTURE 154–64* (John D’Emilio ed., 2002); Shannon Gilreath, *Of Fruit Flies and Men: Rethinking Immutability in Equal Protection Analysis—With a View Toward a Constitutional Moral Imperative*, 9 J.L. & SOC. CHANGE 1, 8–10 (2006); Richard Pillard, *Homosexuality, Nature, and Biology: Is Homosexuality Natural? Does it Matter?*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* (Gonsiorek & Weinrich eds., 1991); Kari Balog, Note, *Equal Protection for Homosexuals: Why the Immutability Argument is Necessary and How it is Met*, 53 CLEV. ST. L. REV. 545 (2005–06) (examining scientific evidence supporting the legal argument of immutability); Chandler Burr, *Homosexuality and Biology*, ATLANTIC MONTHLY, Mar. 1993, at 47. Some of the voluminous scientific literature on the subject is discussed in L. Gooren, *The Biology of Human Psychosexual Differentiation*, 50 HORM. BEHAV. 589–601 (2006) (reviewing sex steroid studies and hormonal developments before birth); Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321–27 (July 16, 1993); William H. James, *Biological and Psychosocial Determinants of Male and Female Human Sexual Orientation*, 37 J. BIOSOC. SCI. 555–67 (2005) (suggesting a comprehensive theory of sexual orientation); Richard Pillard, *The Genetic Theory of Sexual Orientation*, HARV. GAY & LESBIAN REV. (Winter 1997); D.F. Swaab et al., *Brain Research, Gender, and Sexual Orientation*, 28 J. HOMOSEXUALITY 283 (1995). Cross-cultural sociological studies have long found that culturally contingent environmental factors are not responsible for sexual orientation. See, e.g., Frederick L. Whitman, *Culturally Invariable Properties of Male Homosexuality: Tentative Conclusions from Cross-Cultural Research*, 12 ARCHIVES SEXUAL BEHAV. 207 (1983) (finding that homosexual persons appear in constant numbers in all societies and that all homosexuals tend to express similar behavioral and social characteristics across cultures). In addition, a sizable literature finds homosexual behaviors to be present in non-human species as well. See, e.g., ROUGHGARDEN, *supra* note 21, at 55 (noting documented cases of homosexual behavior in approximately 300 species); Elizabeth A.

lesbian youth<sup>64</sup> and the total failure of “reparative therapy” to “repair” gay men and lesbians.<sup>65</sup> However, my focus here is the extent to which the NCR’s criticisms are borne out by Biblical text, not by scientific fact.

Second, I will not provide here a reading for how male homosexuality could be permitted according to Scripture. In both Jewish and Christian communities, this debate continues, with some denominations maintaining the traditional ban on most or all homosexual behavior,<sup>66</sup> others permitting it,<sup>67</sup> and still others divided

Fox, *Homosexual Behavior in Wild Sumatran Orangutans*, 55 AM. J. PRIMATOLOGY 177–81 (2001) (finding homosexual behavior among primate species). These studies controlling for culture and species lend support to the belief that homosexuality is neither volitional nor environmentally conditioned.

64. Gay and lesbian youth are estimated to comprise 30 percent of completed youth suicides annually, and are two to three times more likely to attempt suicide than other young people. U.S. DEP’T OF HEALTH & HUMAN SERVICES, REPORT OF THE SECRETARY’S TASK FORCE ON YOUTH SUICIDE (Marcia R. Feinleib ed., Jan. 1989). Incidentally, the study was suppressed by the Bush (I) administration on the grounds that it “undermined the institution of the family.” Chris Bull, *Suicidal Tendencies*, ADVOCATE, Apr. 5, 1994, at 37. Subsequent studies have confirmed that young homosexual men attempt suicide at an unusually high rate. See Gary Remafedi, James A. Farrow & Robert W. Deisher, *Risk Factors for Attempted Suicide in Gay and Bisexual Youth*, 87 PEDIATRICS 869–76 (1991). See generally Warren J. Blumenfeld & Laurie Lindop, *Gay, Lesbian, Bisexual, Transgender Youth Suicide*, available at [http://www.outproud.org/article\\_suicide.html](http://www.outproud.org/article_suicide.html) (last visited Nov. 21, 2008).
65. For a thorough compendium of studies debunking this form of brainwashing, and a refutation of every study supporting it, see WAYNE BESEN, ANYTHING BUT STRAIGHT: UNMASKING THE SCANDALS AND LIES BEHIND THE EX-GAY MYTH (2003). For a humorous account of reparative therapy in the Jewish context, see Phil S. Stein, *How I Ended Up at the Jerusalem Same-Sex Attraction Group*, ZEEK, Nov. 2005, [www.zEEK.net/spirit\\_0511.shtml](http://www.zEEK.net/spirit_0511.shtml). See also Ex-Gay Watch, <http://www.exgaywatch.com/wp/> (last visited Dec. 14, 2008) (collecting testimonials).
66. According to the Catholic Church, “[It] is only in the marital relationship that the use of the sexual faculty can be morally good. A person engaging in homosexual behavior therefore acts immorally.” Joseph Cardinal Ratzinger, Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons (Oct. 1, 1986), reprinted in HOMOSEXUALITY: DEBATING THE ISSUES 203, 212 (Robert M. Baird & M. Katherine Baird eds., 1995). The Southern Baptist Convention takes a similar approach, asserting that “the Bible is very clear about its condemnation of homosexual conduct. Both the Old and New Testaments speak with one voice on this subject.” Fellows of the Research Institute, Ethics & Religious Liberty Comm’n of the S. Baptist Convention, *Homosexuality: Your Questions Answered* (June 15, 2005), <http://erlc.com/article/homosexuality-your-questions-answered>. For a summary of Orthodox Jewish interpretations of homosexuality, and a proposed “liberal Orthodox” reading, see STEVEN GREENBERG, WRESTLING WITH GOD AND MEN: HOMOSEXUALITY IN THE JEWISH TRADITION 223–61 (2004).
67. Reform Judaism, the largest Jewish denomination in the United States, ordains gay rabbis and encourages rabbis to perform same-sex commitment ceremonies. Similarly, the United Church of Christ was an early supporter of gay rights, passing a resolution in 1977 that “deplored the use of scripture to generate hatred, and the

on the issue.<sup>68</sup> Naturally, all find Biblical and/or historical support for their positions. However, just as my purpose in this Part is to provide a historically and linguistically informed reading of the Biblical prohibitions rather than a survey of the scientific data, so too, I focus here on the Biblical text rather than on homiletical or religious-legal efforts to use that text to promote a particular policy within religious communities. Some of my arguments here do intersect with some of the points made on both sides of the issue in those communities, but my intention is not to provide a religious argument per se as much as a claim about religion and the Biblical sources.

Finally, I do not claim that the handful of Biblical texts below constitute the only religiously or legally relevant material for Christians or Jews. Both traditions have extensive legal and narrative traditions outside the Biblical text, and ample capacity to allow social and historical

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violation of civil rights of gay and bisexual persons and called upon individual members, local churches . . . to continue to work for the enactment of civil rights legislation at the federal, state, and local levels of government.” United Church of Christ [UCC], *Resolution Deploring the Violation of Civil Rights of Gay and Bisexual Persons*, July 1–5, 1977, available at <http://www.ucc.org/assets/pdfs/1977-RESOLUTION-DEPLORING-THE-VIOLATION-OF-CIVIL-RIGHTS-OF-GAY-AND-BISEXUAL-PERSONS.pdf>. The UCC ordains gay and lesbian ministers and was the first Christian denomination in the United States to support same-sex marriage. See generally B.A. Robinson, Religious Tolerance.Org, The United Church of Christ & Homosexuality (last updated July 10, 2007), [http://www.religioustolerance.org/hom\\_ucca.htm](http://www.religioustolerance.org/hom_ucca.htm).

68. See generally *HOMOSEXUALITY IN THE CHURCH: BOTH SIDES OF THE DEBATE* (Jeffrey Siker ed., 1994). The United Methodist Church, the largest mainline Protestant denomination in the United States, maintains, “Homosexual persons no less than heterosexual persons are individuals of sacred worth. [However,] [t]he United Methodist Church does not condone the practice of homosexuality and considers this practice incompatible with Christian teaching.” See *THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH* (2004), available at <http://archives.umc.org/interior.asp?ptid=1&mid=1728>.

The Conservative movement, the second largest Jewish movement in America, recently approved both permissive and restrictive legal opinions on homosexuality. See Rabbi Joel Roth, Comm. on Law & Jewish Standards, *EH 24.2006a, Homosexuality Revisited* (Dec. 6, 2006), available at [http://www.rabbinicalassembly.org/teshuvot/docs/20052010/roth\\_revisited.pdf](http://www.rabbinicalassembly.org/teshuvot/docs/20052010/roth_revisited.pdf); Rabbis Elliot N. Dorff, Daniel S. Nevins & Avram I. Reisner, Comm. on Law & Jewish Standards, *EH 24.2006b, Homosexuality, Human Dignity, and Halakhah* (Dec. 6, 2006), available at [http://www.rabbinicalassembly.org/teshuvot/docs/20052010/dorff\\_nevins\\_reisner\\_dignity.pdf](http://www.rabbinicalassembly.org/teshuvot/docs/20052010/dorff_nevins_reisner_dignity.pdf). See generally Rachel Sara 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, 524–38 (2006) (summarizing traditional texts and the differing approaches to homosexuality within the modern Jewish community).

factors to both strengthen and weaken the force of religious injunction.<sup>69</sup> Indeed, these non-Biblical materials, particularly for Catholics and Orthodox Jews, may be more important than the Biblical ones, and various social and historical factors partly explain the disparity between the NCR's claims about homosexuality and Biblical ones. However, to the extent the Bible remains the site of debate, it remains the most important site for investigation.

### 1. Hebrew Bible

I confine my reading to the two verses that, in Jewish and Christian readings of the Hebrew Bible,<sup>70</sup> are understood to prohibit some forms of homosexual behavior: *Leviticus* 18:22 and *Leviticus* 20:13.

In passing, I note that two other relevant texts will not be discussed at length here. The first is *Genesis* 19, which tells the story of Sodom and Gomorrah. Notwithstanding its familiar association with homosexuality, the "sin of Sodom" is not on its face, and was almost never understood by other Biblical texts or Biblical commentators, to be such.<sup>71</sup> On the contrary, in *Ezekiel* 16, sexual immorality is at most one of many sins, and is arguably absent entirely:

As I live, saith the Lord God . . . Behold, this was the iniquity of thy sister Sodom: pride, fulness of bread, and abundance of idleness was in her and in her daughters, neither did she strengthen the hand of the poor and needy. And they were haughty, and did to evah before me: therefore I took them away as I saw fit.<sup>72</sup>

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69. On the development of Jewish law regarding homosexuality, see Rosenthal, *supra* note 68, at 524–28; GREENBERG, *supra* note 66, at 124–34 (noting that "in none of these responses do we find the kind of horror and contempt that appears in the contemporary period"). On the development of Christian prohibitions of same-sex activity, see generally DERRICK SHERWIN BAILEY, *HOMOSEXUALITY IN THE WESTERN CHRISTIAN TRADITION* (1955).

70. Citations to Hebrew Bible are to the Hebrew original, with my own translations provided. Citations to the New Testament are to the New International Version translation.

71. GREENBERG, *supra* note 66, at 64–69.

72. *Ezekiel* 16:48–50. It is unclear whether *to evah* here indicates a separate sin in addition to those listed, or whether it describes the listed sins. The latter reading is borne out by other Biblical texts. See *Deuteronomy* 32:32–38 ("For their vine is of the vine of Sodom, and of the fields of Gomorrah: their grapes are grapes of gall, their clusters are bitter. . . . And he shall say, Where are their gods, their rock in whom they trusted, Which did eat the fat of their sacrifices, and drank the wine of their drink of-

Scholars have generally understood the sin of Sodom as selfishness and inhospitality, a reflection of a naturally critical value in Ancient Near Eastern culture, as in many others.<sup>73</sup> This is of a piece with the general understanding of the Sodomites as being selfish, uncaring, and wicked, and with Lot's otherwise nonsensical offer of his own daughters as substitutes for the men lodging with him.

Second, and with a different legal message, the relationships of Saul and David, and of David and Jonathan, are likely modeled on homoerotic conventions of warrior love prevalent in the Biblical period,<sup>74</sup> with physical as well as emotional components. The jealous King Saul contemptuously characterizes David as his "son in law" due to David's relationship with Jonathan,<sup>75</sup> saying to Jonathan that it is "to the shame of your mother's nakedness."<sup>76</sup> David famously regards the love of Jonathan as "surpassing the love of women,"<sup>77</sup> and Jonathan "takes great delight" in David.<sup>78</sup> Biblical scholar Theodore Jennings has suggested

ferings? Let them rise up and help you, and be your protection."); *Jeremiah* 23:14 ("I have seen also in the prophets of Jerusalem a horrible thing: they commit adultery, and walk in lies: they strengthen also the hands of evildoers, that none doth return from his wickedness: they are all of them unto me as Sodom, and the inhabitants thereof as Gomorrah."); *Amos* 4:1–11 ("Hear this word, ye kine of Bashan, that are in the mountain of Samaria, which oppress the poor, which crush the needy, which say to their masters, Bring, and let us drink. . . . I have overthrown some of you, as God overthrew Sodom and Gomorrah.").

73. See MICHAEL CARDEN, *SODOMY: A HISTORY OF A CHRISTIAN BIBLICAL MYTH passim* (2005); J. HAROLD ELLENS, *SEX IN THE BIBLE* 106–17 (2006); DANIEL HELMINIAK, *WHAT THE BIBLE REALLY SAYS ABOUT HOMOSEXUALITY* 43–50 (Millennium ed., 2000); *SODOM'S SIN: GENESIS 18–19 AND ITS INTERPRETATIONS passim* (Ed Noort & Eibert Tigchelaar eds., 2004). For other Biblical passages on hospitality norms, see *Genesis* 18:1–8 (describing Abraham and Sarah greeting strangers who turn out to be angels); *Exodus* 22:21, 23:9 (proscribing the mistreatment and oppression of strangers); *Luke* 7:44–46 (quoting Jesus' rebuke of Simon: "I came into your house. You did not give me any water for my feet . . . You did not give me a kiss. . . . You did not put oil on my head. . . ."); *Hebrews* 13:2 ("Do not forget to entertain strangers, for by doing so some people have entertained angels without knowing it."); *Romans* 12:13 ("Share with God's people who are in need. Practice hospitality."). *But see* WOLD, *supra* note 62, at 77–89 (maintaining that the sin of Sodom is homosexual intercourse, not inhospitality to strangers).
74. See GREENBERG, *supra* note 66, at 99–105; TOM HORNER, *JONATHAN LOVED DAVID* 26–39 (1978); THEODORE W. JENNINGS, JR., *JACOB'S WOUND* 3–12 (2005). See generally MARTTI NISSINEN, *HOMOEROTICISM IN THE BIBLICAL WORLD* (2004) (discussing homoeroticism in Epic of Gilgamesh and other Mesopotamian texts and providing analogies to Biblical text). Cf. DAVID M. HALPERIN, *Heroes and Their Pals, in ONE HUNDRED YEARS OF HOMOSEXUALITY* 75, 81–83 (1990).
75. 1 *Samuel* 18:21.
76. 1 *Samuel* 20:30–31.
77. 2 *Samuel* 1:26. See JENNINGS, *supra* note 74, at 30–31.
78. 1 *Samuel* 19:2.

that David's role as Jonathan's beloved/armor-bearer prepares him for the role of God's beloved/armor-bearer which he is to assume as king.<sup>79</sup> Yet however intriguing these interpretations may be, the story of David and Jonathan is a narrative, not legal, passage in the Hebrew Bible, and has not been given legal weight in any traditional Jewish sources.<sup>80</sup>

Turning then to the legal material, I shall first address limitations on the "what" of the prohibition, and then turn to scholarly interpretations of the "why." On the substance of the text, the first thing one notices about *Leviticus* 18:22 and 20:13 is that it is far more limited than usually understood. The former verse reads, "*V'et zachar lo tishkav mishkevei islah, toevah hi*, or "and 'to' a man you shall not lie the lyings of woman; it is a *toevah*." And the latter reads, "*v'ish asher yishkav et zachar mishkevei islah, toeva asu shneihem, mot yumatu demehem bam*, or "and a man who lies 'to' a man the lyings of woman, the two of them have done a *toevah*, they shall be put to death and their blood upon them." I note here five important parameters of the prohibitions.

First, the verses do not prohibit "homosexuality," a concept invented in the nineteenth century,<sup>81</sup> or any sort of identity or sexual orientation; rather, they prohibit certain acts. Scholars and the NCR here are in agreement that, for both Hebrew Bible and New Testament sources, sexual behavior was conceived in terms of act, not identity—rather than "homosexuality," Helminiak's neologism "homogenitality" is a better description of what is actually prohibited.<sup>82</sup> Moreover, even those acts may be construed differently from how they are today. In some cultures, the penetrative role (*erastes*) is considered appropriate for all men, while the receptive role (*eromenos*) may be appropriate only for slaves, men of a lower social rank than the penetrator, or youth—though *Leviticus* 20:13 explicitly condemns the behavior of both participants. In general, however, there is no prohibition on "homosexuality" as an iden-

79. JENNINGS, *supra* note 74, at 37–66.

80. *But see* JENNINGS, *supra* note 74, at 199–202 (questioning distinction between legal and narrative passages).

81. *See* Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants on Bowers v. Hardwick*, 97 *YALE L.J.* 1073, 1088 (1988).

82. *See* GREENBERG, *supra* note 66, at 129–30; HERMAN, *supra* note 5, at 73; HELMINIAK, *supra* note 73, at 39–40 (characterizing Biblical prohibitions as being against "homogenitality"); NISSINEN, *supra* note 74, at 10–16 (drawing useful distinctions between sexual orientation, gender identification, sexual practice, and gender roles). On the development of the notion of homosexual identity, see MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 43 (Robert Hurley trans., Pantheon Books 1978). On recent legal confluences of act and identity, *see* Becker, *supra* note 6, at 194–99; Janet E. Halley, *Reasoning about Sodomy: Act and Identity after Bowers v. Hardwick*, 79 *VA. L. REV.* 1721, 1733–41 (1993); Mutz, *supra* note 8, at 79–85 (discussing "love the sinner, hate the sin" in NCR rhetoric and caselaw).

tity, orientation, or mode of desire; there is, instead, a prohibition on some homosexual acts. The notion of Biblical “homosexuality” is an anachronistic oxymoron.

Second, the prohibition, like much of the NCR’s rhetoric, applies only to men. The later rabbinic prohibition on lesbian sexual activity actually derives from different sources: the injunction not to follow in the ways of the Egyptians (which exegesis interprets as, *inter alia*, same-sex marriage), and a general prohibition on lewd or lascivious behavior.<sup>83</sup> Indeed, the Talmudic text which contains the prohibition on “women who rub one another” places the offense in the same category of wearing immodest dress, such as today’s bathing suits.<sup>84</sup> And, as we will see in a moment, the New Testament’s possible reference to female homosexuality is more likely a condemnation of non-vaginal sex. In short, whatever the Biblical text says about male behavior, it is silent on the behavior of women, and later rabbinic law equates lesbianism with wearing a bikini.

Third, the prohibition may be limited to certain acts. Does the “lyings of woman” (*mishkevei israh*) mean all sexual activity, or only some sexual acts? The 11th century Jewish commentator Rashi suggests that there are two “lyings of woman,” i.e., vaginal and anal sex, and that the Levitical prohibition is thus a prohibition on anal sex only.<sup>85</sup> This view is borne out by rabbinic understandings of sex as essentially consisting of penetration;<sup>86</sup> with only limited exceptions, if there is no genital penetration, there is no sex. (Within the context of marriage, the Talmud expressly rejects the claim that oral sex is impermissible, and states that a

83. The Biblical prohibition is contained in *Leviticus* 18:3 (“After the doings of the land of Egypt, in which you dwelt, you shall not do. . . . neither shall you walk in their laws”). The extension of the prohibition to Lesbianism is contained in *Sifra Achearei Mot* 8:8 (listing “doings of the land of Egypt” as referring only to specific Egyptian laws, in particular, that “a man would marry a man, a woman would marry a woman”). The Talmudic classification of lesbianism as lewdness (*prizuta b'alma*) is in *BT Yevamot* 76a. See also *BT Shabbat* 65a–b (affirming that lesbianism is not sexual intercourse). The two sources, one regarding marriage and the other regarding lesbian sexual activity, are conflated in *Maimonides' Mishna Torah, Kidushah, Issuray Be'ah* 21:8. See also *id.* at 20:2. See generally GREENBERG, *supra* note 66, at 86–95.

84. *Prizuta* generally refers to lewdness or obscenity. See Angela J. Riccetti, *A Break in the Path: Lesbian Relationships and Jewish Law*, in *MARRIAGE, SEX, AND FAMILY IN JUDAISM* 262–94 (Michael Brody ed., 2005); Reena Zeidman, *Marginal Discourse: Lesbianism in Jewish Law*, in *1 WOMEN JUDAISM: MULTIDISCIPLINARY J.* (1997). But see REBECCA ALPERT, *LIKE BREAD ON THE SEDER PLATE: JEWISH LESBIANS AND THE TRANSFORMATION OF TRADITION* 7–16 (1997) (arguing that, in order to participate fully in Jewish life, lesbians must confront, challenge, and transform Jewish texts).

85. See *Rashi on Leviticus* 20:13 (stating “lyings of woman” includes vaginal and anal sex, but not oral sex); GREENBERG, *supra* note 66, at 80–81.

86. See *BT Yevamot* 54a–55a; *Sanhedrin* 55a; *Niddah* 13b (distinguishing between penetrative and non-penetrative sexual acts).



man “may do whatever he pleases” with his wife.<sup>87</sup>) Of course, the rabbinic exhortation to “build a fence around the Torah”<sup>88</sup> would extend the *halachic* prohibition to subsidiary sexual acts as well. But the wording of the Biblical prohibition itself, as understood by commentators, is narrower.

Fourth, the prohibition may be limited to certain kinds of homosexual anal sex. Curiously, *Leviticus* 18:22 states *v'et zachar*, or “at”/“to” a man, rather than *v'im zachar*, or “with” a man. *Et* is a Hebrew word which serves to signal a direct object; there is no translation for it in English. Here, it indicates that the *eromenos* is the “object” of the *erastes*, perhaps suggesting the hierarchy typical of the Greek *erastes/eromenos* relationship, or even sexual violence. Of course, these interpretations are speculative in nature. Yet the verse invites such speculation by deliberately using *et* instead of *im*.

Fifth and perhaps most importantly, the entire prohibition, whomever and whatever it covers, is of a particular type: *toevah*. In the King James Bible, as in popular understanding, this word is translated as “abomination,” but it might be better rendered as “taboo.”<sup>89</sup> A *toevah* is something forbidden to one group but permitted for another. For Israelites, the ultimate *toevah* is idolatry, and most other *toevot* flow from it.<sup>90</sup> Indeed, Israelites are not the only ones with *toevot*. For example, in *Exodus* 8:22, Moses describes Israelite sacrifices as being *toevat mitzrayim*—*toevah* of Egypt—although obviously Israelite ritual is not an objective “abomination.” Other things which are taboo for Israelites,

87. *BT Nedarim* 20a, *Pesachim* 112b. The medieval sage Maimonides had a more stringent view; while not forbidding oral sex, he said that “the pious way is not to act lightly in this matter . . . and not deviate from the common practice [of intercourse] for this thing is really only for procreation.” *Mishneh Torah, Issurei Biah*, 21:9.

88. *Mishnah Avot* 1:1. See also *BT Yevamot* 21a (citing *Leviticus* 18:30).

89. The words are suggestively similar in sound, but etymologists believe that “taboo” is of Pacific origin, and thus is unlikely to be related to *toevah*. See AMERICAN HERITAGE DICTIONARY (4th ed. 2000) (describing the history of the word “taboo”). Greenberg calls a *toevah* “something that offends the accepted order, ritual or moral.” GREENBERG, *supra* note 66, at 82. See also Jacob Milgrom, *Abomination in 2* ENCYCLOPEDIA JUDAICA 96–97 (Cecil Roth ed., 1st ed. 1971).

90. See *Isaiah* 44:19; *Ezekiel* 7:20, 16:36; *Jeremiah* 16:18; *Deuteronomy* 7:25–26; 1 *Kings* 16:3; 1 *Kings* 14:24. Interestingly, Biblical sources use the word *toevah* to refer to cultic prostitution and *zimah* to refer to prostitutes in general. See, e.g., *Leviticus* 19:29. This suggests that the essence of *toevah* is not the physical act but the cultic context, and thus supports the reading that what is prohibited in *Leviticus* is cultic homosexual behavior, not ordinary homosexual behavior, as well as the claim that the overall values in question are the boundaries between purity/impurity, Israelite/foreign order/chaos, and holy/profane.

but implicitly acceptable for others, include the eating of shellfish<sup>91</sup> and remarriage.<sup>92</sup> Thus, as one activist has playfully maintained, to the extent that “God Hates Fags” may be derived from the Levitical prohibition, it is only insofar as “God Hates Shrimp.”<sup>93</sup>

This reading of *Leviticus* 18 and 20 is borne out by the overall context of the verses, which relate not to ethics, family, morality, sexuality, or “nature,” but to the importance of drawing lines between pure and impure, Israelite and heathen, holy and unholy.<sup>94</sup> Indeed, the chapters preceding *Leviticus* 18 contain some of the most obscure, and seemingly alien, laws of the Torah, including the laws of leprosy (actually *tzaraat*, a skin disease similar to leprosy but different in various ways), seminal emissions, and menstruation. Here we are told the detailed method of the sacrificial sin-offerings and wave-offerings and the methods of purity and contamination. The extended topical section begins with the narrative of Aaron’s sons Nadav and Avihu bringing “strange fire” (*eish zarah*, which can also be translated as “foreign fire”) into the tabernacle and being destroyed. The language of *Leviticus* 10:2 is actually a bit ambiguous as to exactly what happens; it’s not clear whether God sends out a fire to destroy the young priests, or whether they are consumed by their own creation. But in *Leviticus* 10:3–4 the response is clear: in a “team meeting” between Moses, Aaron, and Aaron’s remaining sons, new rules are set forth for regulating priestly behavior and maintaining the purity of the Israelite nation.

The “minutes” of this meeting are quite lengthy. Their essence, both textually and in the context of what archeologists tell us regarding

91. *Deuteronomy* 14:3 states “thou shalt not eat any *toevah*.” *Deuteronomy* 14:21 specifies which animals are permitted and which forbidden. Forbidden animals are characterized as *tameh*, impure, again suggesting a connection between *toevah* and notions of purity/impurity. *Leviticus* 11:10–13, however, describes forbidden animals (including shellfish and birds of prey) as a *sheketz*, rather than as *toevah*. Unhelpfully, both terms are often rendered by translators as “abomination.”

92. *Deuteronomy* 24:4. Notably, the text states that this *toevah* would “cause the land to sin,” again connoting ritual purity and boundary-drawing; here the *toevah* has an almost magical property of polluting the land and causing it to sin.

93. See God Hates Shrimp, <http://www.godhatesshrimp.com> (last visited Sept. 18, 2008).

94. See WOLD, *supra* note 62, at 121–36 (discussing importance of purity to priestly Israel); Eskridge, *supra* note 22, at 1027. Other rationales that have been offered by Jewish sources for the meaning of *Leviticus* 18:22 include that of procreation, and prohibiting “social disruption,” gender category confusion, and the humiliation of other men. See GREENBERG, *supra* note 66, at 147–64; 166–74; 175–91; 192–214 (summarizing each); VICTOR PAUL FURNISH, *The Bible and Homosexuality: Reading the Texts in Context*, in *HOMOSEXUALITY IN THE CHURCH*, *supra* note 68, at 18.

the cultic practices of ancient Canaan, which were varied, syncretic, and often ecstatic in nature, is contained in *Leviticus* 10:9–11:

Do not drink wine or strong drink, you and your sons, when you come into the tabernacle, so you don't die. This will be an eternal law for your generations, so you can discern between holy and secular, and between impure and pure, and so you can teach the children of Israel the laws that God speaks to them through Moses.

The injunction—to discern and distinguish, separate and sanctify—is the essence of Biblical Judaism. Indeed, it is a double distinction, both internal (affirming a worship of discernment) and external (it separates Israelites from Canaanites); Israel is distinguished by its distinguishing. Nadav and Avihu invented their own ritual and imported “foreign” cultic practice—a double sin. Israelite worship is not to be an ecstatic bacchanal in which distinctions are erased and the god(s) known in wild abandon. It is to be precise, mindful of distinctions, and separated from anything “unclean” or foreign.

This general rule is explicated, in great and often gory detail, in the eight chapters that follow. Chapter 10 discusses clean and unclean, pure and impure, permitted and forbidden. Chapter 11 spends forty-seven verses on which animals may be eaten and which are “abominations,”<sup>95</sup> before repeating the injunction “to discern between impure and pure.” Chapter 12 describes the laws of separation of the “impure” mother following childbirth; Chapter 13, the specific diagnosis for *tzaraat* (fifty-nine verses), and Chapter 14, its spiritual-physical remedy, which involves quarantine (i.e., separation to contain the contaminating agent) and special offerings. Chapter 14's fifty-seven verses are closed again by the injunction “to teach when something is impure, and when it is pure.” Fifty-seven more verses, this time of Chapter 15, describe how seminal and menstrual emissions render a person *tameh* (“impure”), and how *tahara* (“purity”) is to be regained after them. Finally the section concludes, “[T]hus shall you separate the children of Israel from their impurity, and they shall not die from it by defiling my tabernacle which is among them.”<sup>96</sup>

All of this distinguishing and separating acts as a prelude to the Levitical material, beginning in Chapter 17, known as the “Holiness Code,” so named because of its repeated injunctions to the Israelites to

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95. Here the Hebrew word is *sheketz*, whose exact meaning, like that of *Leviticus* 18's *toevah*, is unknown.

96. *Leviticus* 15:31.

be *kadosh* (holy). While all of this material is assumed by Biblical scholars to be of the same priestly origin (Priestly with a capital “P” in the nomenclature of Biblical criticism), it is the Holiness Code and the material surrounding it that is perhaps at the heart of the Levitical purity agenda.

The general theme of this material is quite clear. This part of the Bible is not about what is “natural,” nor what is moral, nor what is ethical. It is about what is pure and what contaminates, what is proper for Israelites, and what is to be left to other nations.<sup>97</sup> Indeed, *Leviticus* 18 itself is quite clear on this point. After reciting the prohibitions on incest, male homosexual behavior, bestiality, and sex with a menstruating woman—all of which seem to be equivalent in gravity—an explicit rationale is provided: “Do not impurify yourself with all these things, because with all these things the *goyim*, who I am sending away before you, impurified themselves, and impurified the land.” (“Impurified” is a bit clumsy, but it literally translates the Hebrew *titamu*, from the same word as *tameh*; words like “defiled” fail to make the connection.)

It is also worth observing how much more weight is given today to one verse in *Leviticus* 18 than the forty-seven verses of Chapter 11, fifty-nine of Chapter 12, and fifty-seven of Chapter 15. Both religious bigots and anti-religious activists sometimes act as if the Bible is all about homosexuality, but a lot more of it is about leprosy—about 220 verses more, to be precise. And why? Because both contaminate the cultic purity of the Israelite nation and blur the distinctions between Israel and other.

Yet, as anthropologist Mary Douglas describes, and as we will explore in detail below, these concerns are not limited to this portion of the priestly code; they undergird the way the Bible describes the creation of the world (order from disorder), how it orders the social realm, and how, in general, the ordered cultic worship of YHVH defined itself in opposition to contemporaneous spiritual practices. This text is about ancient cultic purity, and the prohibition of foreign actions and mixtures which contaminated it.<sup>98</sup> It is not about “homosexuality,” a concept

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97. See HELMINIAK, *supra* note 73, at 51–67.

98. Arguably, “gender confusion” between men and women is yet another form of improper mixing of categories. I find the reading that the verse is essentially commanding “Don’t make a woman out of a man,” GREENBERG, *supra* note 66, at 192–209, both appealing and compatible with my own. See also Daniel Boyarin, *Are there any Jews in “The History of Sexuality”?*, 5 J. HIST. SEXUALITY 333, 333–35 (1995) (analogizing prohibition on same-sex activity to prohibition on cross-dressing and other forms of boundary-crossing). For present purposes, however, my intention is to stay closer to the literal language and context of the Biblical text with only a minimum of interpretation.

invented in the nineteenth century, nor is it about the family, nature, or morality. After all, what do menstruation, vultures, leprosy, and male-male anal sex have in common? Ethics? Hardly.

At first, these Biblical obsessions with cleanliness and separation seem quite distant from our own moment. However, as Part III will show, their fundamental concern—order and chaos—is very much with us today. That is, while the NCR is wrong that the Bible is worried about family and ethics, the NCR is actually motivated by the same concerns as is the Bible: order and disorder. These will be the themes of the next Part.

## 2. New Testament

As religious advocates for gay rights have noted, homosexuality is hardly mentioned in the New Testament, and never by Jesus. Nor does the New Testament make any use of *Leviticus*; as we will see, Levitical law is emblematic of the legalism which the New Testament sought to supplant. Characteristic of its emphasis on the spiritual rather than the corporeal, and the spiritual rather than the literal, the New Testament has no interest in the varieties of bodily impurity we have just explored. Yet in its three passages apparently addressing the question of homosexuality—as in the previous section, I focus on moral/legal pronouncements rather than on narrative<sup>99</sup>—its underlying anxieties are quite similar.

The first and most sweeping of the New Testament's passages on homosexual conduct is in *Romans* 1:26–27:

Because of this, God gave them over to shameful lusts. Even their women exchanged natural (*physin*) relations for unnatural (*paraphysin*) ones. Likewise the men also abandoned natural relations with woman, and were inflamed with lust for one another, Men committed indecent acts with men (*arsen*), and received in themselves the due penalty for their perversion.

As with *Leviticus*, the scope of condemnation in *Romans* is not entirely clear. First, if *Romans* 1:26 can indeed be read as a condemnation of fe-

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99. Theodore W. Jennings, Jr., has provocatively suggested that the narrative in *John* 13:19 may be read as describing a homoerotic relationship between Jesus and “the man Jesus loved.” THEODORE W. JENNINGS, JR., *THE MAN JESUS LOVED: HOMOEROTIC NARRATIVES FROM THE NEW TESTAMENT* 13–54 (2003). This and other narrative texts are beyond the scope of the present study.

male homosexuality, it would be the only one in an otherwise silent Bible. Mark Smith believes this to be the correct reading of the text. Because the two passages are connected by the word "homoios" (translated here as "likewise," and in the New International Version as "in the same way"), Smith says the parallelism between verses 26 and 27 implies that "unnatural" means "with each other" rather than with members of the opposite sex.<sup>100</sup> In such a reading, *Romans* 1:26–27 is a blanket condemnation of homosexual behavior, whether among women or men, on the grounds that such behavior is "unnatural."

Robin Scroggs has a somewhat more limited view. Scroggs agrees that, if taken independently, verse 26 should probably not be read as an attack on female homosexuality, but argues that "since the two verses are so closely linked in the Greek, it is virtually certain that Paul and the tradition on which he is dependent had lesbianism in mind."<sup>101</sup> Yet Scroggs believes that Paul was condemning not homosexual activity in general, but pederasty in particular. Given that pederasty was the only form of homosexual behavior that Paul would likely have known,<sup>102</sup> Paul's condemnation of homosexual activity was really a condemnation of the widespread and socially acceptable practice of pederasty.<sup>103</sup> "While the phrase 'males with males' relates to the laws of Leviticus," Scroggs writes, "the likelihood is that Paul is thinking only about pederasty."<sup>104</sup> (Notwithstanding the phrase "for one another," which seems to suggest an exchangeability of *erastes* and *eronemos* in stark contrast with the pederastic ideal, this reading is supported by the fact that Paul uses the term *arsen*, a general term for male that is used in Philo and elsewhere to refer to a young male, rather than *aner*, meaning an adult male.) In sum, Scroggs maintains that "no other form of male homosexuality in the Greco-Roman world . . . could come to mind."<sup>105</sup> So, while lesbianism is condemned in *Romans* 1:26, all that is really condemned in *Romans* 1:27 is pederasty.<sup>106</sup>

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100. Mark D. Smith, *Paul and Ancient Bisexuality: A Rejoinder*, 65 J. AMER. ACAD. RELIGION 867, 869–70 (1997).

101. ROBIN SCROGGS, *THE NEW TESTAMENT AND HOMOSEXUALITY* 114 (1983).

102. *See id.* at 115, app. A.

103. *Id.* at 115; Mark D. Smith *Ancient Bisexuality and the Interpretation of Romans 1:26–27*, 64 J. AM. ACAD. RELIGION 225, 226–27 (1996). *See generally* SCROGGS, *supra* note 101, at 29–43.

104. SCROGGS, *supra* note 101, at 116.

105. *Id.*

106. Smith takes issue Scroggs' reading, focusing on the fact that Paul does not specifically refer to pederasty, but to "unnatural" relations in general. "His general language must have a general meaning—referring to homosexual activity in general—unless it can be shown that Paul and his audience could only be thinking about one particular type of homosexual activity." Smith, *supra* note 100, at 870. Smith also adduces a wealth of

According to James Miller, *Romans* 1:26–27 is not actually about homosexuality at all. First, *Romans* 1:26 cannot be read this way, as it does not specify that the unnatural sexual partner of the woman is to be another woman.<sup>107</sup> Since parity between male and female homosexuality is a modern social construction, and given the historic Jewish tradition of silence on the topic of female homosexuality, it is unlikely, Miller argues, that Paul would have equally condemned the unusual practice of female homosexuality and the more widespread practice of male homosexuality.<sup>108</sup> Rather, Miller states, Paul probably referred to certain forms of non-procreative intercourse, i.e., oral or anal sex, whether performed by women (with men) or by men (with other men).<sup>109</sup> Miller argues that Scroggs and other writers are “working from the assumption that Paul and his audience had a single category of ‘homosexual’ which was subdivided into male and female forms,” and that this assumption is anachronistic.<sup>110</sup> So, for Miller, homosexual behavior is condemned, not because it is homosexual, but rather because it is “unnatural,” i.e., non-procreative. Homosexual and heterosexual sodomy are, in this view, equally proscribed.

Whatever the appropriate category of the prohibition is, however, the purpose of it centers on the word *physin/physikos*, usually translated as “natural.” To our eyes, the word may suggest an affirmation of the “natural” desires of the body, in contrast to other “unnatural” ones, or perhaps “natural” in the sense of procreative, fulfilling the “order of nature,” or perhaps even “natural” in the sense that the NCR uses it, in terms of the alignment of male and female anatomy and the presence of

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evidence that other forms of homosexuality besides pederasty existed in the ancient Greco-Roman world, particularly consensual relationships between adult males. Smith, *supra* note 103, at 246. *But see* James E. Miller, *Response: Pederasty and Romans 1:27: A Response to Mark Smith*, 65 J. AMER. ACAD. RELIGION 861, 863 (1997) (arguing that homosexual behavior among adult males was universally condemned and would not have been Paul’s object).

107. James E. Miller, *The Practices of Romans 1:26: Homosexual or Heterosexual?*, 37 NOVUM TESTAMENTUM 1, 1 (1995).

108. *Id.* at 1–2.

109. *Id.* at 3.

110. *Id.* at 2. John Boswell has offered a suggestive, if controversial, reading of *Romans* 1:26–27 that would deny its applicability to gay people at all. According to Boswell, Paul was condemning not homosexuals per se, but primarily heterosexuals engaged in homosexual acts—i.e., something that would indeed be “unnatural” for them. JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* 109 (1st ed. 1980). Few scholars, however, accept this view. *See* Smith, *supra* note 103, at 225–26.

two genders in the first place.<sup>111</sup> Yet these readings are incorrect. *Physis* is not “nature” in the sense of biology, but “nature” in the sense of natural law. For Aristotle as well as for Paul, *physis* refers to those principles which are natural, known, and universal, in contrast to the *nomos*, which is conventional and culturally dependent; this is the source of the doctrine of Natural Law itself. As we will see, and as I have discussed at length elsewhere, Paul seeks to displace the externally mandated *nomos* with an internally-known “spiritual” *physis*. This is part of Paul’s wider project, which generally regards the body as but a vessel of the non-corporeal spirit.<sup>112</sup> Paul repeatedly makes claims such as: “If you live according to the flesh, you will die; but if by the Spirit you put to death the misdeeds of the body, you will live;”<sup>113</sup> and “Flesh and blood cannot inherit the kingdom of God, nor does the perishable inherit the imperishable.”<sup>114</sup> Indeed, for the author of the *Epistle to the Colossians* (the text is not believed by scholars to be written by Paul, but is traditionally ascribed to him), the “earthly” is exactly that which is sinful: “Put to death, therefore, whatever belongs to your earthly nature: sexual immorality, impurity, lust, evil desires, and greed.”<sup>115</sup>

*Physikos*, then, does not mean “natural” bodily desires. On the contrary, it means the opposite: the proper subjugation of body to spirit, letter to spirit,<sup>116</sup> in which the former is subsumed to the latter. Recall, for Paul, as for contemporary conservative family theorists, the natural-biological inclination of men is to be carnal and sexually omnivorous.<sup>117</sup> *Physikos* is thus precisely the state of affairs in which such “natural” desires are subjugated to God’s will, and channeled into appropriate containers. *Physis* does not refer to the body’s desires; it refers to the

111. See discussion *supra* Part II.A. But see ROUGHGARDEN, *supra* note 22, at 155 (concluding that “the more complex and sophisticated a social system is, the more likely it is to have homosexuality intermixed with heterosexuality”).

112. See, e.g., Paul’s discussion of circumcision in *Romans* 2:29 (“real circumcision is a matter of the heart—it is spiritual and not literal”). For academic discussions of Pauline anti-corporealism, see DANIEL BOYARIN, *CARNAL ISRAEL: READING SEX IN TALMUDIC CULTURE* 233 (1993) [hereinafter BOYARIN, *CARNAL ISRAEL*]; DANIEL BOYARIN, *A RADICAL JEW: PAUL AND THE POLITICS OF IDENTITY* (1994) [hereinafter BOYARIN, *RADICAL JEW*]; Jay Michaelson, *Religious Mistrust of Law: Anti-Legalism, Anti-Judaism and the Problem of the Soul* (forthcoming 2009).

113. *Romans* 8:13.

114. 1 *Corinthians* 15:50.

115. *Colossians* 3:5.

116. See, e.g., 2 *Corinthians* 3:6 (“[t]he letter kills, but the Spirit gives life”).

117. See McCLAIN, *THE PLACE OF FAMILIES*, *supra* note 29, at 135–39; HELMINIAK, *supra* note 73, at 77–86 (interpreting *paraphysin* as socially unacceptable, not morally wrong).



body properly regulated. It is a “naturalness” of law and order principally. *Physis* is really “orderliness.”

Consequently, those in the NCR who claim that homosexuality is “unnatural” in the sense of contrary to biology or science or some other notion of “nature” in the contemporary meaning (and those pro-gay voices which point out that homosexuality is present throughout the animal kingdom) have the valence of *physis* exactly backwards. Indeed, were Paul to learn of the prevalence of homosexuality among animals, he would likely regard it as proof of his position that it is “animalistic” rather than spiritual. As one religious writer has said, “The context of Romans 1 indicates that Paul’s view of the word *nature* cannot be classified with modern scientific descriptions of it. Of key importance to Paul’s indictment of humanity in this chapter is his view that the word *nature* is defined by revelation.”<sup>118</sup> When desires are *physikos*, they reflect the priority of spirit over flesh. They are governed, ordered, tamed, contained. In contrast, “passion” and “vile affections,” whatever forms of sexual relations they occasion, inverts the proper hierarchy of body and spirit. They are *anomian*, wild, untamed, unyoked. Paul is not anti-gay; he is anti-sex.

While *Romans* is sometimes read as being concerned about the social structure of the family being disrupted by homosexuality, the passage itself seems to suggest that the harms are more individual than societal. Paul does not describe deleterious effects on society of men “leaving the natural relations with woman.” Rather, he describes unregulated lust as “vile affections,” being “consumed in passion” and “unseemly act,” all of which are individually, not collectively, harmful. Most importantly, he describes the sinners as “receiving in themselves the due penalty for their acts.” If in *Romans* 6:23, “the wages of sin is death,” then here lustfulness itself is the “due penalty” for such acts; sexual immorality, insofar as it necessitates an alienation from the Holy Spirit, is its own punishment. This punishment is meted out individually, though, not collectively. Whereas Levitical impurity had societal consequences, Pauline lustfulness as described in this passage—contrary to the rhetoric explored in this Article’s previous Part—does not.

The role of homosexuality as signifying carnality rather than spirituality is further explored in the New Testament’s other two possible condemnations of it, contained in 1 *Corinthians* 6:9 and 1 *Timothy* 1:10. Unlike in *Romans*, homosexuality is mentioned only in passing in these verses. The passages, as rendered in the New International Version, are:

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118. WOLD, *supra* note 62, at 178. See also NISSINEN, *supra* note 74, at 13–15 (discussing how “naturalness” is defined by social role).

Do you not know that the wicked will not inherit the kingdom of God? Do not be deceived: Neither the sexually immoral nor idolaters nor adulterers ( pornos ) nor male prostitutes ( malakoi ) nor homosexual offenders ( arsenokoitai ) nor thieves nor the greedy nor drunkards nor slanderers nor swindlers will inherit the kingdom of God. And that is what some of you were. But you were washed, you were sanctified, you were justified in the name of the Lord Jesus Christ and by the Spirit of our God.<sup>119</sup>

We know that the law is good if one uses it properly. We also know that the law is made not for the righteous but for law-breakers and rebels, the ungodly and sinful, the unholy and irreligious; for those who kill their fathers or mothers, for murderers, for adulterers and perverts ( arsenokoitai ), for slave traders and liars and perjurers—and for whatever else is contrary to the sound doctrine that conforms to the glorious gospel of the blessed God, which he entrusted to me.<sup>120</sup>

As before, the meaning and scope of these prohibitions is unclear. Both verses include the term *arsenokoitai* ( ἄρσενοχοῖται ) translated variously as “homosexuals,” “sodomites,” and “sexual perverts.” In addition, 1 *Corinthians* 6:9 includes *malakoi* ( μαλακοί ) translated variously as “boy prostitutes,” “effeminate,” “perverts,” and “self-indulgent.”<sup>121</sup> As

119. 1 *Corinthians* 6:9–11.

120. 1 *Timothy* 1:8–10.

121. The passage varies by translation, and, as Boswell writes, “disparity invites skepticism.” BOSWELL, *supra* note 110, at 339. For 1 *Corinthians* 6:9, the following are representative of the multifold translations: “Do not be deceived: Neither the sexually immoral nor idolaters nor male prostitutes nor homosexual offenders . . . will inherit the kingdom of God” (New International Version). Here, “male prostitutes” is the translation of *malakoi*, and “homosexual offenders” is the translation of *arsenokoitai*. “Be not deceived: neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor abusers of themselves with mankind . . . shall inherit the kingdom of God” (King James Version). “Be not deceived. For neither fornicators, neither worshippers of images, neither whoremongers, neither weaklings, neither abusers of themselves with mankind . . . shall inherit the kingdom of God” (Tyndale Bible). “Do not err: neither fornicators, nor idolaters, nor adulterers, nor the effeminate, nor liars with mankind . . . shall possess the kingdom of God” (Douay-Rheims Bible). “Do not be deceived; neither fornicators nor idolaters nor adulterers nor boy prostitutes nor sodomites . . . will inherit the kingdom of God” (New American Bible). For 1 *Timothy* 1:10, the following list is representative: “[Law] is not meant for a righteous person but for the lawless and unruly, the godless and sinful, the unholy and profane . . . the unchaste, practicing homosexuals, kidnapers, liars, perjurers, and whatever else is opposed to sound teaching . . .” (New American Bible). “Knowing this, that the law is not made

is clear from the variety of translations, however, neither term is entirely clear. *Arsenokoitai*, though rare,<sup>122</sup> is more precise, and is made up of the two words “male” and “bed.” *Malakoi* is much more common, but its meaning is less clear. Some suggest that *malakoi* are sacred prostitutes who take the receptive role in a pederastic relationship, and that *arsenokoitai* are those men who take the insertive role in the same form of relationship. This supports Scroggs’ contention that “the words point to a very specific form of pederasty,”<sup>123</sup> and his somewhat creative translation of the passage as “male prostitutes, males who lie with them, and slave-drivers who procure them.”<sup>124</sup>

Over the centuries, however, both terms have been given different meanings. *Malakos* literally means “soft,” and metaphorically has been taken to mean “effeminate.”<sup>125</sup> According to Boswell, who cited a number of Catholic sources, “the unanimous tradition of the church through the Reformation, and of Catholicism until well into the twentieth century, has been that this word applied to masturbation.”<sup>126</sup> For Boswell, *malakoi* and *arsenokoitai* have no more in common than do thieves and drunkards; they are merely in a list of people exhibiting lustful, disfavored behaviors. *Malakoi*, Boswell says, refers to masturbation, and *arsenokoitai*, to “male sexual agents, i.e., active male prostitutes, common throughout the Hellenistic world in the time of Paul.”<sup>127</sup> To Boswell, prostitution was manifestly of greater concern to the author of

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for a righteous man, but for the lawless and disobedient, for the ungodly and for sinners . . . for whoremongers and for those who defile themselves with mankind, for menstealers, for liars, for perjured persons, and if there be any other thing that is contrary to sound doctrine” (King James Version). “[For] a righteous man law is not set, but for lawless and insubordinate persons, ungodly and sinners, impious and profane . . . whoremongers, sodomites, men-stealers, liars, perjured persons, and if there be any other thing that to sound doctrine is adverse” (Young’s Literal Translation). “[The] law is not given to unto a righteous man, but unto the unrighteous and disobedient, to the ungodly and to sinners, to unholy and unclean . . . and whoremongers: to them that defile themselves with mankind: to menstealers: to liars and perjured, and so forth if there be any other thing that is contrary to wholesome doctrine . . .” (Tyndale Bible).

122. SCROGGS, *supra* note 101, at 106–07. See also HELMINIAK, *supra* note 73, at 105–10 (discussing “wide variation in translations” of the terms).

123. *Id.* at 109.

124. *Id.* But see WOLD, *supra* note 62, at 188–98 (disputing such readings).

125. SCROGGS, *supra* note 101, at 106.

126. BOSWELL, *supra* note 110, at 107.

127. *Id.* at 344. Boswell calls Scroggs’ theory “fanciful and unsubstantiated by lexicographical evidence.” *Id.* at 341. But see David Wright, *Homosexuals or Prostitutes? The Meaning of ἀρσενοχοῖται (1 Cor. 6:9, 1 Tim. 1:10)*, 38 VIGILAE CHRISTIANAE, 125, 144 (1984) (challenging Boswell).

the epistles<sup>128</sup> than any sort of homosexual behavior, including pederasty.<sup>129</sup>

Clearly, whatever their exact meaning, the words refer to acts, like thievery or murder, not an identity such as “homosexual” or “heterosexual,” concepts as unknown to the New Testament as to the Hebrew Bible.<sup>130</sup> Yes, *malakoi* and *arsenokoitai* are nouns. They may even be professions. But they are not identities in the rich sense of the word.

Thus far, the three epistles are not so distant from *Leviticus*, inasmuch as both seek to contain the wild, disruptive power of sexuality in the name of the proper ordering of the community and cosmos. But there is a crucial difference between the Pauline view of chaos and the Levitical one, and that is the nature of law. In both cases, what is feared is that which inverts hierarchies, transgresses boundaries, and undermines social/magical order.

Yet if the Levitical solution is a system of law, for Paul, that system has been supplanted by faith. Indeed, what is striking is that the passages in *Corinthians* and *Timothy* share an explicitly legal context. Paul’s list of those who will not inherit the kingdom of God in *Corinthians* is stated within the context of a harangue against litigiousness—and more specifically, recourse to the “lawyers” (Pharisees) to arbitrate disputes. Consider how the meaning of the passage changes when situated into its context:

If any of you has a dispute with another, dare he take it before the ungodly for judgment instead of before the saints? Do you not know that the saints will judge the world? And if you are to judge the world, are you not competent to judge trivial cases? Do you not know that we will judge angels? How much more the things of this life! Therefore, if you have disputes about such matters, appoint as judges even men of little account in the church! I say this to shame you. Is it possible that there is nobody among you wise enough to judge a dispute between believers? But instead, one brother goes to law against another—and this in front of unbelievers! The very fact that

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128. There is some uncertainty among scholars as to which of the Pauline epistles were actually written by Paul. There is virtual consensus that *Romans* and *Galatians* are authentically Pauline in origin. *Corinthians* is widely, though not unanimously, believed by critics to be of Paul’s hand as well. *Timothy* is not.

129. BOSWELL, *supra* note 110, at 341.

130. See William L. Petersen, *Can ΑΡΣΕΝΟΚΟΙΤΑΙ be Translated by “Homosexuals?”* (*1 Cor. 6:9; 1 Tim. 1:10*), 40 *VIGILIAE CHRISTIANAE* 187, 189 (1986) (“[‘Homosexual’ must] fail as a translation for it violates historical and linguistic fact by attempting to read a modern concept back into antiquity, where no equivalent concepts existed.”).

you have lawsuits among you means you have been completely defeated already. Why not rather be wronged? Why not rather be cheated? Instead, you yourselves cheat and do wrong, and you do this to your brothers. Do you not know that the wicked will not inherit the kingdom of God? Do not be deceived: Neither the sexually immoral nor idolaters nor adulterers nor male prostitutes nor homosexual offenders nor thieves nor the greedy nor drunkards nor slanderers nor swindlers will inherit the kingdom of God. And that is what some of you were. But you were washed, you were sanctified, you were justified in the name of the Lord Jesus Christ and by the Spirit of our God.<sup>131</sup>

Likewise in *Timothy*, in which the context is a rebuke to those who study points of law:

As I urged you when I went into Macedonia, stay there in Ephesus so that you may command certain men not to teach false doctrines any longer nor to devote themselves to myths and endless genealogies. These promote controversies rather than God's work—which is by faith. The goal of this command is love, which comes from a pure heart and a good conscience and a sincere faith. Some have wandered away from these and turned to meaningless talk. They want to be teachers of the law, but they do not know what they are talking about or what they so confidently affirm. We know that the law is good if one uses it properly. We also know that the law is made not for the righteous but for lawbreakers and rebels, the ungodly and sinful, the unholy and irreligious; for those who kill their fathers or mothers, for murderers, for adulterers and perverts, for slave traders and liars and perjurers—and for whatever else is contrary to the sound doctrine that conforms to the glorious gospel of the blessed God, which he entrusted to me.<sup>132</sup>

In both cases, law is that which governs sinful people who are not able to govern themselves. The epistles' purpose here is an obviously sectarian one: to separate Christian Jews from non-Christian Jews, and to separate the new faith of Christianity from the religion of Judaism. This mission recurs time and again. In *Galatians*, for example, Paul excoriates the

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131. 1 *Corinthians* 6:1–11.

132. 1 *Timothy* 1:3–11.

gentile Galatians who, having accepted Christ, now wish to undergo circumcision and become Jews. In *Corinthians*, Paul is at pains to minimize the value of the literal “law” in favor of the liberating “spirit.” The law, because it governs the body, involves itself in the body, which is mortal and liable to sin. For Paul, it is nonsensical to draw Levitical boundary lines between pure and impure bodies. The only true solution is to leave the body behind altogether, to take refuge in the spirit.

As I have suggested elsewhere, this Pauline move is a form of anti-nomianism, which rejects any notion that law can save us.<sup>133</sup> Yet Paul’s antinomianism is not anarchy; quite the contrary. Because the external law is replaced by the internal one, it is an internalization of law and an ordering of the interior according to such law’s demands.

This view is explained in the same chapter of 1 *Corinthians*. After “shaming” those who seek justice at the law, and after suggesting that no sinful people will inherit the kingdom of God unless they are “justified in the name of the Lord Jesus Christ and by the Spirit of our God,” Paul continues, using sexual immorality as his case in point:

“Everything is permissible for me”—but not everything is beneficial. “Everything is permissible for me”—but I will not be mastered by anything. “Food for the stomach and the stomach for food”—but God will destroy them both. The body is not meant for sexual immorality, but for the Lord, and the Lord for the body. By his power God raised the Lord from the dead, and he will raise us also. Do you not know that your bodies are members of Christ himself? Shall I then take the members of Christ and unite them with a prostitute? Never! Do you not know that he who unites himself with a prostitute is one with her in body? For it is said, “The two will become one flesh.” But he who unites himself with the Lord is one with him in spirit. Flee from sexual immorality. All other sins

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133. Michaelson, *supra* note 112; see also Jeremy Waldron, *Dead to the Law: Paul’s Antinomianism*, 28 CARDOZO L. REV. 301 (2006). The term “antinomianism” originally referred to the Christian heresy, which appeared numerous times in history that Christians are liberated from observance of moral laws because of Divine grace. See BELIEVE Religious Information Collection, Antinomianism, <http://www.mbsoft.com/believe/txn/antinomi.htm> (last visited Nov. 21, 2008) (quoting, *inter alia*, R.D. Linder, *Antinomianism*, EVANGELICAL DICTIONARY OF BIBLICAL THEOLOGY (Walter A. Elwell ed.) and Francis Aveling, *Antinomianism*, 1 CATHOLIC ENCYCLOPEDIA 564 (Charles G. Herbermann et al. eds., 1907)). It is now commonly used to refer to any anti-legal ideology, whether religious or secular. See, e.g., Mark Galanter, *The Three-Legged Pig: Risk Redistribution and Antinomianism in American Legal Culture*, 22 MISS. C. L. REV. 47 (2002); Emily Albrink Hartigan, *Unlaw*, 55 BUFF. L. REV. 841, 841 (2007).

a man commits are outside his body, but he who sins sexually sins against his own body. Do you not know that your body is a temple of the Holy Spirit, who is in you, which you have received from God? You are not your own; you were bought at a price. Therefore honor God with your body.<sup>134</sup>

In this passage, sexual morality is regulated not by external law (with the law negated, everything is permissible) but by internal discipline (i.e., knowing what is beneficial) and a uniting with God in spirit (as opposed to uniting with other people in flesh). Sexual immorality—as Boswell’s theory would suggest, this clearly means prostitution, regardless of the sex of the prostitute—is to union with God what physical circumcision is to spiritual circumcision: a lower, corporealized, and ultimately superseded form. It is a defilement of the “temple of the Holy Spirit.” In a sense, to the extent it is “natural,” i.e., bodily, it is “unnatural,” i.e., against the Divine purpose. That Divine purpose is realized when everything functions in an orderly, “natural” way, when the set rules of right and wrong are not simply obeyed but made redundant by the purification of the heart.

In sum, the epistles’ passages regarding homosexuality (if indeed that is their subject) reinterpret the same anxiety in a new religious-legal structure. In *Romans*, homosexuality uproots the “natural” law by which the body is subjugated to the spirit. In *Timothy* and *Corinthians*, it is an example of the sort of venality for which law is necessary, and beyond which Christians are meant to have passed. Spiritual Christians have grace. Carnal non-Christians have the law.

Before moving on, it is worth noting that the Pauline fear of heterosexuals suddenly abandoning heterosexuality for homosexuality has been given voice in recent years as well. Dr. Paul Cameron, a controversial former psychologist<sup>135</sup> and founder of the Family Research Council, has said that homosexuality is threatening precisely because it is so appealing:

Untrammelled homosexuality can take over and destroy a social system. If you isolate sexuality as something solely for one’s own personal amusement, and all you want is the most

134. 1 *Corinthians* 6:12–20.

135. Many of Cameron’s “findings” have been debunked, and he has been thrown out of the American Psychological Association and repudiated by the American Sociological Association for posing as a sociologist. HERMAN, *supra* note 5, at 77–78. Nevertheless, he is a primary “scientific” source for the NCR and a frequent speaker at NCR gatherings. *Id.*

satisfying orgasm you can get—and that is what homosexuality seems to be—then homosexuality seems too powerful to resist. The evidence is that men do a better job on men and women on women, if all you are looking for is orgasm . . . . It's pure sexuality. It's almost like pure heroin. It's such a rush. . . . Marital sex tends toward the boring end. Generally, it doesn't deliver the kind of sheer sexual pleasure that homosexual sex does.<sup>136</sup>

On its face, this argument is quite bizarre, at least in light of how heterosexuals normally describe their revulsion towards (rather than attraction to) homosexuality. Yet it is in fact an exact replica of the Pauline argument that homosexuality is pure pleasure (“the most satisfying orgasm you can get”), uncontrollable, self-directed—and thus unnatural.

Here, however, what is at best implicit in the passage from *Romans* is made explicit: because homosexuality is so powerful, it will “take over and destroy a social system.” Whereas in Paul's epistles the unnaturalness of the individual was bad enough, here chaos is written on the body politic as well. Ecstatic, powerful *eros* must be channeled, contained in procreative heterosexual marriage, or our very society may be destroyed. The price of pleasure is responsibility, and if it is given away, no one will do the hard, dreary work of civilization.<sup>137</sup>

The Hebrew Bible construes homosexuality in terms of cultic terms of purity and impurity, the New Testament in terms of “unnatural” bodily pleasure, but the concern is the same: order and chaos. In the Hebrew Bible, homosexuality is a form of improper blending. In the New Testament, it is an inversion of the “order of nature,” which is to say, the order of law regulating nature. It is to these deep concerns that we now turn.

### *C. Chaos and the Engenderment of Law*

By way of concluding this treatment of Biblical text, let us situate the issues adumbrated in the previous section within a foundational concern of Western religion, the triumph of order over chaos.<sup>138</sup> This is

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136. Quoted in Dreyfuss, *supra* note 11, at 41.

137. I am grateful to Linda McClain for this formulation.

138. Timothy Kandler Beal artfully captures the underlying tension between order and chaos in Western religious tradition.

[B]iblical tradition is fraught with tensions that go to the very core of its conceptions of the world and its creator God. On the one hand, it is confident in the stable, reasonable order of the cosmos, confident in our ability



the founding myth in the Bibles of Judaism and Christianity, and the underlying assumption of their moralities. It is central to the *Genesis* myth of God dividing light from darkness and bringing order out of chaos, and to the very concept of trans-historical values, of sin and forgiveness, and to the drama of Christ. In short, it is the essence of “right and wrong,” surely the central value of ethical monotheism.

Of course, there are multiple strategies for negotiating the relationship of boundary and the boundless. On the one hand, there are those that regard journeys into the boundless as sacred—shamanic traditions, perhaps, and chiliastic ritual, joining the Dionysian to the Divine. On the other hand, there are those which seek to demarcate zones of domesticity around the chaotic, or even to bury the forces of chaos, like the Furies entombed beneath Athens at the conclusion of Aeschylus’ *Oresteia*.<sup>139</sup> The former movement sacralizes death and the one who walks into its unbounded realms; the latter seeks to place death in a zone of confinement. The former rejoices in the power of the orgiastic, when boundaries are effaced; the latter carefully circumscribes that power within a taboo that is never transgressed.<sup>140</sup>

If it is possible to speak broadly, surely the dominant traditions within the Jewish and Christian religions tend toward the latter approach; these are religions of civilization. Judeo-Christian traditions did not invent the idea—Marduk’s defeat and division of Tiamat in the *Enuma Elish*, as well as other Babylonian and Sumerian texts, is a founding moment of civilization, and, like the battles depicted in the metopes of the Parthenon, represents the victory of order over chaos (often with a phallic symbolic structure, patriarchy over femininity).<sup>141</sup>

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to articulate that order and live according to it, and confident in God as founder and guarantor of that order; on the other hand, it is haunted by monstrous forms of profound disjunction and disorder, shadowy revelations on the edge between creation and uncreation, cosmos and chaos, and haunted by the lurking anxiety that God, like the world God created, is fraught with the same tensions.

TIMOTHY KANDLER BEAL, *RELIGION AND ITS MONSTERS* 89–90 (2002).

139. One of the themes of the *Oresteia* is the sublimation of vengeance into a public mode of justice, represented by the Furies being entombed at the foundations of Athens’ law courts. See Paul Gewirtz, *Aeschylus’ Law*, 101 HARV. L. REV. 1043 (1988); Jay Michaelson, *In Praise of the Pound of Flesh: Legalism, Multiculturalism, and the Problem of the Soul*, 6 J. L. SOC’Y 98, 122–24 (2005).
140. See MIRCEA ELIADE, *PATTERNS IN COMPARATIVE RELIGION* 15 (Rosemary Sheed trans., Univ. of Neb. Press 1996) (1949) (claiming the “sacred was at once ‘sacred’ and ‘defiled’”); GREENBERG, *supra* note 66, at 186–89; JEFFREY STOUT, *ETHICS AFTER BABEL* 145–62 (1988).
141. See STEPHANIE DALLEY, *MYTHS FROM MESOPOTAMIA* (rev. ed. 2000); WOLD, *supra* note 62, at 30–41 (discussing order in ancient near east); Thorkild Jacobsen, *The Battle between Marduk and Tiamat*, 88 J. AM. ORIENTAL SOC’Y 104–08 (1968).

Nor is the rejection of the Dionysian absolute; David dancing before the Ark,<sup>142</sup> folk festivals of orgiastic love, and, arguably, the blood rituals of the priestly cult, are but three examples of its persistence. But in general, Pauline Christianity regards orgiastic love and “lustful passions” as precisely the carnal, base instincts which the spirit is meant to rise above. And Biblical Judaism sanctifies not the ecstatic but the formal, not the chaotic but the ordered. Jewish Biblical narrative favors the tablets of the law, not the golden calf; Moses’ descent to the people, not his ascent to the ineffable; the precise rules and regulations of *Leviticus*, not the “strange fire” of Nadab and Avihu. Even amid the majestic theophany of the godhead at Sinai, the Biblical text spends less time on the power and glory of revelation than on what God tells Moses about tort law and damages.

In a sense, this is how it must be, for in a religion of civilization, the notion of boundary is essential. One does not organize clans, tribes, and nations without a healthy respect for hierarchy, law, and propriety—and within the Jewish tradition, the respect reaches its apotheosis. The Jewish God mandates civil and ritual law, and, notwithstanding the tendency of Biblical narrative to complicate the simplifying tendency of Biblical legislation, the overwhelming emphasis is on the need for order and boundary. Binaries of pure and impure, male and female, dark and night, Israelite and foreigner, and sacred and profane, are the essence of the Levitical writings, both in the body of *Leviticus* and in the “Holiness Code.” Indeed, the injunction “to discern between impure and pure” is repeated over and over again, in *Leviticus* 10:10–11 (“discern between holy and secular, and between impure and pure”), 11:47 (“to discern between impure and pure”), and 15:31 (“thus shall you separate the children of Israel from their impurity”).

Taking a cue from the Mary Douglas of *Purity and Danger*, we can see these concerns as reflecting the idealized plan of *Genesis* itself. Dietary laws divide water creatures from air creatures, air creatures from earth’s, and abhor transgression of the boundary.<sup>143</sup> God saw that it was good because now it was ordered, where before it was not. Or, taking a cue from the Mary Douglas of *Leviticus as Literature*, we can see the precision of the sacrificial offerings as mirroring the precision of the design

On the gendered aspects of this myth, see TIKVA FRYMER-KENSKY, *IN THE WAKE OF THE GODDESSES: WOMEN, CULTURE, AND THE BIBLICAL TRANSFORMATION OF PAGAN MYTH* 74–80 (1993).

142. 2 *Samuel* 6:1–23.

143. See MARY DOUGLAS, *PURITY AND DANGER* 4–6, 59–61 (1966); KEN STONE, *PRACTICING SAFER TEXTS: FOOD, SEX AND BIBLE IN QUEER PERSPECTIVE* 46–50 (2005); STOUT, *supra* note 140, at 156–61; Eskridge, *supra* note 22, at 1025–26.

of the tabernacle, and even the structure of the Biblical text itself.<sup>144</sup> Indeed the prohibitions, and the symbolism, extend even to garments: *shatnez*, the Biblically-proscribed blending of wool and linen, was prohibited both because it was sacred to the Egyptians (perhaps like *Leviticus*' forbidden sexual unions), and because it is an improper blending. Separateness was necessary for holiness. As Durkheim says, "[T]he negative cult is, in a sense, a means to an end: it is the condition of access to the positive cult."<sup>145</sup>

The borders drawn around sexual behaviour are of the same type, although perhaps in a more privileged and contested setting. We know that Paul lived in a societal context in which male prostitution was common. As for the priestly writer, it is not known whether the Levitical prohibitions, like the ban on *kedeshim* (sacred prostitutes) referred to actual chliastic ritual present in the Ancient Near East, or whether, particularly in light of the essential identity of Israelites and Canaanites, and the fact that, in Ken Stone's words, "the binary opposition between 'Israelite' and 'Canaanite' turns out, in large part, to be an effect of particular biblical discourses,"<sup>146</sup> the sexual distinctions were invented by Biblical authors seeking to demarcate pseudo-ethnic, rather than ethical-sexual, boundaries.<sup>147</sup> Whatever the historical facts regarding these practices, however, Israelite "border anxiety" (Stone's term again) clearly leads to a rigid creation and enforcement of sexual boundaries. Indeed, the very Hebrew word for holiness, *kadosh* (etymologically related to *kedeshim*), carries the meaning of "separate."<sup>148</sup> Jews are to be separate from non-Jews. The deathly (*tameh*) is to be separate from the pure (*tahor*). In the Hebrew Biblical system, binaries are necessary; they are

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144. MARY DOUGLAS, *LEVITICUS AS LITERATURE* 19–25 (1999) (refuting much of her earlier book's theories); STONE, *supra* note 143, at 60–64.

145. EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* 230 (Carol Cosman trans., Oxford Univ. Press 2001) (1912).

146. STONE, *supra* note 143, at 59.

147. *See generally* RANDY P. CONNER, *BLOSSOM OF BONE: RECLAIMING THE CONNECTIONS BETWEEN HOMEROETICISM AND THE SACRED* 67–81 (1993); WILLIAM G. DEVER, *DID GOD HAVE A WIFE? ARCHAEOLOGY AND FOLK RELIGION IN ANCIENT ISRAEL* (2005); FRYMER-KENSKY, *supra* note 141, at 200–02; GREENBERG, *supra* note 66, at 177; RICHARD A. HENSHAW, *FEMALE AND MALE, THE CULTIC PERSONNEL* (1994); SAUL M. OLYAN, *ASHERAH AND THE CULT OF YAHWEH IN ISRAEL* (1988); STONE, *supra* note 143, at 58–61; Johanna H. Stuckey, *Sacred Prostitutes*, *MATRIFOCUS*, Samhain 2005, <http://www.matrifocus.com/SAM05/spotlight.htm>. *But see* WOLD, *supra* note 62, at 44–61 (surveying other near eastern cultures' prohibitions on homosexuality).

148. For an overview of the connection between separation and holiness in Judaism, see LOUIS JACOBS, *THE JEWISH RELIGION* 245–46 (1995) ("The Hebrew word for 'holiness', *kedushah*, conveys the twin ideas of separation *from* and dedication *to* something . . .").

needed; they are holy. In the New Testament, even the binaries themselves on the wrong side of a more fundamental binary, that of letter/body and spirit. Thus, while the Torah's binarism is rejected, it is supplanted by a new and even more severe one.

Sexuality is not unique as a marker of order and chaos, but it is perhaps uniquely powerful as the site where religious law is engendered.<sup>149</sup> In the domain of sexuality lay the deepest taboos of civilization itself and the way power is organized within patriarchal families, tribes, and nations. Indeed, the primal revulsion many feel toward proscribed sexual acts such as incest and bestiality is of the same type as the disgust some feel toward homosexuality. As William Eskridge has discussed, quoting psychologist Paul Rozin:

[O]ur most primordial disgust responses arise out of emotional efforts to humanize our animal bodies and distance ourselves from physical functions that are "reminders of our animal vulnerability." Like prejudices, feelings of disgust are nonrational responses to physical phenomena, yet they may be underlying motivations for our rational discourses. Sexuality is an obvious site for disgust. Almost anything related to sex is disgusting to some people; some sexual practices are disgusting to almost all people; and almost all people feel their disgust intensely. Although most people engage in oral sex, and many in anal sex, a lot of Americans find these activities disgusting . . . . And their disgust-driven view that homosexual sex is immoral has persisted (even if at reduced levels) as the majority view during the twentieth century.<sup>150</sup>

Thus, it is not surprising that homosexuality has long been seen as subverting fundamental notions of order. Consider Rabbi Steve Greenberg's reading of the Levitical prohibitions on male homosexuality in light of misogyny, maleness, and penetrative sexuality, a reading which essentially translates *Leviticus* 18:22 as "Don't make a woman out of a man."<sup>151</sup> Consider the prohibitions on male homosexuality in light of Biblical, and later Talmudic and Kabbalistic, ideas of wasting seed, subverting progeny, and, as a consequence, undermining the social order

149. See generally ARNOLD VAN GENNEP, *THE RITES OF PASSAGE* (Monika B. Vizedom & Gabrielle L. Caffee trans., Univ. of Chicago Press 1960) (1909).

150. Eskridge, *supra* note 22, at 1023 (quoting Paul Rozin, Jonathan Haidt & Clark R. McCauley, *Disgust*, in *HANDBOOK OF EMOTIONS* 637, 642 (Michael Lewis & Jeannette M. Haviland-Jones eds., 2000).

151. GREENBERG, *supra* note 66, at 192–209.

itself. These and countless other examples suggest that what is at issue when it comes to proscriptions on homosexuality is not simply a sexual act between two men, but rather a deeper conception of social order, natural order, and (especially in the case of Paul) Divine order.

What is “natural” is here not what nature intends, but how God seeks to order nature. In the Hebrew Bible, order is inscribed within the material world, according to a set of dichotomies, including:

Sacred	Profane
Pure	Impure
Ordered	Chaotic
Clean	Unclean
Life (o: Life and death segregated)	Death (or Life and death mixed)
Israelite/What we do	Foreign/What they do (toevah)
“Apollonian”/orderly and prescribed ritual	“Dionysian”/cultic, ecstatic ritual
Lawful	Ecstatic/chiliastic
Boundary	Boundless
Creation/order	Pre-creation/chaos

In the New Testament, order is inscribed in the proper relationship between material/carnal/earthly and spiritual/heavenly. Indeed, this new law is a kind of anti-law, as it displaces the *nomos* with the *physis*. But notice how similar the dichotomies really are in form, if not in content:

Spirit	Letter
Spirit	Body
Spirit	Law
Physis (in heart)	Nomos (in text)
Order	Chaos
Circumcision of Heart	Circumcisions of Flesh
Live according to spirit	Live and die according to flesh, desire, carnality
New Testament	Old Testament

The specifics are different, but the principle of order is the same—and in both cases, sexuality is a primary (if not *the* primary) site where this order is engendered. Sexuality is where chaos ends and law begins.

So, while the NCR is wrong that the Bible is worried about its notions of family and ethics, the NCR is actually motivated by the same concerns as is the Bible: order and disorder. As before, so the structures of religion as the NCR understands it are inscribed in the site of sexuality, and as before, they are contested and threatened by homosexuality. That these ancient anxieties remain with us today, and that they are still tethered to the regulation of sexuality, is the subject of the next Part.

### III. THE IMPERFECT IS OUR PARADISE, OR, THE RIGHT IS MORE RIGHT THAN IT KNOWS

Are these ancient concerns about order and chaos, purity and impurity, at all relevant today? I argue that they are. In this Part, I suggest that the seemingly archaic concerns described in the previous Part are still quite alive today. Next, I note that these “concerns” are validated, at times gleefully, by proponents of queer theory and gay spirituality, two very different manifestations of GLBT thinking about religion; these proponents agree that non-normative sexuality undermines Biblical norms. Finally, I conclude that while homosexuality may not threaten “society,” it does seriously threaten a certain religious view of what society ought to be.

Normally, such rhetoric is simply mocked within progressive circles. How could more marriage and commitment “threaten the institution of marriage?” How could a few men kissing unravel “the fabric of our society?” Indeed, progressives usually ascribe such sentiments to homophobia, thus implying that they are hysterical outbursts so outrageous, and so nonsensical, that they prove that gay-hatred is nothing but fear.<sup>152</sup>

This assessment of anti-gay rhetoric is deeply misguided and dangerously oversimplified.<sup>153</sup> Of course, homophobia is a real phenomenon; as a gay-identified man, I experience it often. Fear is a ubiquitous and potent force in contemporary political discourse. But within a certain conception of religion (one held not merely by the thirty percent of Americans who identify with the NCR, but with a much larger majority who identify simply as religious) anti-gay rhetoric is far more coherent and grounded within fundamental (not *fundamentalist*) religious ideas than the progressive dismissal of it would tend to suggest. It is, indeed, precisely the same *agon* as before: sexuality is the site at which religious law is engendered . . . and contested.

152. See, e.g., Richard Kim, *Haggard Values*, THE NATION, Nov. 27, 2006, at 8. (describing homophobia as the “cement” that held together the values voter bloc); Barry D. Adam, *The Defense of Marriage Act and American Exceptionalism: The “Gay Marriage” Panic in the United States*, 12 J. HIST. SEXUALITY 259, 259–76 (2003) (arguing that the Defense of Marriage Act (DOMA) and state level “mini-DOMAs” were the result of a moral panic about homosexuality.)

153. In this regard, I find myself in agreement with Justice Scalia’s dissent in *Romer v. Evans*, which castigated the court’s characterization of anti-gay sentiment as mere “animus.” *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting). Scalia argued that because anti-gay opinions may be based on moral judgments rather than irrational hatred, the people of Colorado are “entitled to be hostile toward homosexual conduct.” *Id.* See Michaelson, *supra* note 4, at 1572–73.

*A. Secular vs. Religious: Can There be Private Order  
and Public Chaos?*

The most obvious way in which the displacement of Biblical values matters to religionists is that it is seen to represent a triumph of “secularism” or liberalism over a religious/religious-fundamentalist vision of a just society. Because this is a quite familiar theme of America’s *Kulturkampf*, I shall discuss it only briefly here; my view is that the redefinition of religion itself is more significant than the usual debates about the place of “religion” in society. Nevertheless, it is worth re-inscribing those debates within the categories we have just discussed.

For secularists and liberals, the ancient taboos regarding order and chaos are exactly that: ancient. These taboos reflect a time before the advent of modern science, in which life and death were far more precarious than they are today. They also reflect an ancient sense of tribalism, one based upon distinctions between “us” and “them” that are tied to ritual purity, religious piety, and worship of the tribal god. We would do well to discard both of these notions today.

As pluralists, of course, few liberals would argue for the wholesale replacement of religion. (Some have, of course—“neo-atheists” such as Sam Harris are notable examples.<sup>154</sup>) Yet ever since John Locke, philosophers have argued that, to the extent religious belief is not susceptible to public reason, it should be circumscribed within a “private” zone at once beyond the reach of the state and constrained from substantially influencing state policy due to its reliance on unavailable, non-public reasoning.<sup>155</sup> As John Garvey put it,

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154. Sam Harris explicitly rejects the pluralist/accommodationist approach to religion.

Either the Bible is just an ordinary book, written by mortals, or it isn’t. Either Christ was divine or he was not . . . . So let’s be honest with ourselves: in the fullness of time, one side is really going to win this argument and the other side is really going to lose.

SAM HARRIS, LETTER TO A CHRISTIAN NATION 5 (2006). Harris continues by arguing that “one of the most pernicious effects of religion is that it tends to divorce morality from the reality of human . . . suffering.” *Id.* at 25. In *The End of Faith*, Harris goes even further, arguing that “our technological advances in the art of war have finally rendered our religious differences—and hence our religious beliefs—antithetical to our survival.” SAM HARRIS, THE END OF FAITH 13–14 (2004).

155. See ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON 32–33, 86–96 (2000); JOHN RAWLS, POLITICAL LIBERALISM 30, 165 (1993); RICHARD RORTY, PHILOSOPHY AND SOCIAL HOPE 157 (1999); John Rawls, *The Idea of Public Reason Revisited*, in THE LAW OF PEOPLES 131–32 (1999).

[T]he liberal tradition . . . divid[es] the world into private and public spheres . . . . [T]he private sphere includes the interior life (my thoughts, emotions, and beliefs). It also includes my relations with people who share my thoughts, emotions and beliefs: my family, my church, and so on. The public sphere is the larger society outside my private life—the world of government and the market. In the liberal tradition religion is a private matter.”<sup>156</sup>

But both of these foundational arguments—that religion ought to be replaced, or at least be sequestered into the “private” realm—are not shared by religionists, even non-fundamentalist religionists. First, notwithstanding liberal political theory’s conceptions of progress, a large number of Americans believe that Biblical texts are irreplaceable sources for historical truth, ethical values, and human virtues.<sup>157</sup> Second, for many religionists, these concerns are expressed not in the private realm but precisely in the public one. Even if virtues and sins are private, the public polity is in large part defined by its stance in relation to them.<sup>158</sup> This leads to the traditional fundamentalist denial of the liberal public/private demarcation,<sup>159</sup> but also resonates with the Biblical vision of society as the map wherein order and disorder are drawn. As in *Deuteronomy*, which warns that *toevot* can “cause the land to sin,”<sup>160</sup> the conventional liberal boundary line between public and private life is not operative for many religionists. And, as in the Pauline epistles, public legal positions and institutions create moral facts.<sup>161</sup> Indeed, this is true even of non-religious concerns regarding homosexuality’s potentiality to disrupt the stability of family structures, with all of the attendant social

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156. John H. Garvey, *Fundamentalism in American Law*, in *FUNDAMENTALISMS AND THE STATE* 28, 38 (Martin E. Marty & R. Scott Appleby eds., 1993).

157. See sources cited *supra* note 2. Recent scholarly arguments for the necessity of religion in public life include MICHAEL PERRY, *UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY* 30 (2003); Ira C. Lupu, *The Lingering Death of Separationism*, 62 *Geo. Wash. L. Rev.* 230, 279 (1993) (arguing that “secular rationality” is not “conductive to the life of the spirit, without which it may not be possible for a nation to thrive”).

158. See JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA*, 89–90 (1984); Garvey, *supra* note 156, at 28–49 (describing American fundamentalism as a “markedly individualist form of religiosity,” but as seeing the point of secular law as being “the reform of other people’s behavior”).

159. See John H. Garvey, *Introduction: Fundamentalism and Politics*, in *FUNDAMENTALISM AND THE STATE*, *supra* note 156, at 13, 17–20.

160. *Deuteronomy* 24:4.

161. This is the converse of my argument in *On Listening to the Kulturkampf*, *supra* note 4, at 1589–1604, that changes in societal understandings (there, regarding “family”) change constitutional law.



benefits such structures are said to have. If heterosexual families have public functions, to suggest that homosexuality is purely a private affair is incoherent.<sup>162</sup> In all cases, it is precisely in the *public* realm that order/disorder is embodied. Thus, the public/private distinction, even if it were to be adopted in some cases, cannot be sustained for religionists when applied to concerns of order and chaos.

Now, we may still sit comfortably here on our twenty-first century perch and ascribe such concerns to simple fear and ignorance. Yet I suggest this is deeply mistaken, for at least two reasons. First, on a purely pragmatic level, conventional liberal secularism is, most likely, a minority opinion within American popular discourse. When, in the 1990s, Michael Lerner and others proposed that progressives could succeed only by speaking to deep religious needs, it was easy to dismiss the notion as airy, even New Age. But after the evangelical vote reelected an evangelical president in 2004, religious discourse became hard politics. Despite forecasts that internal scandal and political disillusionment have mitigated the evangelical movement's power,<sup>163</sup> the 2008 election only ingrained religious discourse more deeply in American politics.<sup>164</sup> In a world of progressive liberals, religion still sits on the other side of the garden wall from politics. But in the political wilderness, there are no such contrivances.

Second, even for non-fundamentalist religionists, saying "religion doesn't matter" undermines the hope that religion does have something useful to say about politics—for example, that lightening the yoke of the oppressed is a Divine mandate. Should liberal religious communities be

162. See McClain, *Love, Marriage, and the Baby Carriage*, *supra* note 29, at 2152–54.

163. David D. Kirkpatrick, *The Evangelical Crackup*, N.Y. TIMES MAG., Oct. 28, 2007, <http://www.nytimes.com/2007/11/11/magazine>.

164. This chapter of the ongoing drama of American religious/political development was still being written as this Article went to press. Already, the election has seen a former evangelical preacher win multiple primaries, a former baiter of the Christian Right proclaim that America is a "Christian nation," a Mormon declaring that his general faith matters enormously but the specific articles of it matter not at all, and the Democratic nominee demonized as a Muslim. See Bill Carter, *Rivals CNN and Fox News Spar Over Obama Report*, N.Y. TIMES, Jan. 24, 2007, <http://www.nytimes.com/2007/01/24/us/politics/24obama.html>; Patrick Healy & Michael Luo, *Edwards, Clinton and Obama Describe Journeys of Faith*, N.Y. TIMES, June 5, 2007, <http://www.nytimes.com/2007/06/05/us/politics/05dems.html>; Jodi Kantor & David D. Kirkpatrick, *Pulpit was the Springboard for Huckabee's Rise*, N.Y. TIMES, Dec. 6, 2007, <http://www.nytimes.com/2007/12/06/us/politics/06huckabee.html>; Michael Luo, *Romney, Eye on Evangelicals, Defends His Faith*, N.Y. TIMES, Dec. 7, 2007, <http://www.nytimes.com/2007/12/07/us/politics/07romney.html>; Dan Gilgoff, *Beliefnet.com, John McCain on Islam, Mormonism, America as a Christian Nation*, [http://www.beliefnet.com/story/220/story\\_22001\\_1.html](http://www.beliefnet.com/story/220/story_22001_1.html) (last visited Sept. 11, 2008).

satisfied with “[r]ender[ing] unto Caesar the things that are Caesar’s . . . and to God the things that are God’s?”<sup>165</sup> Not many Jews will be, believing that tort law is a matter of heavenly concern and that social justice is a central religious mandate. Nor will many Christians, who believe that the City of God is to be built on Earth. And nor will many Muslims, who see the political and religious as inextricably intertwined. To utterly divorce deep-seated religious concerns about order and chaos from the very ground on which such questions are to be played out reduces religion, as Stephen Carter argues, to a “hobby.”<sup>166</sup>

Third, and perhaps most importantly, the conventional secular/religious split is insufficient here, because religion, almost by definition, reflects and addresses deep, fundamental concerns. Equating religion and phobia (homo- or otherwise) is a condescending, pseudo-secular rationalism which reduces to psychoanalytic pathologies the ancient tribal magics of a dozen civilizations and our own enduring psychological truths. This really is the culture war of which the Radical Right complains: a campaign to stamp out religion itself. It is one thing to argue against the distortions of religion on the part of fundamentalists or others, or to insist that ancient codes and dogmas be updated to accord with our evolving sense of ethics and morality. It is quite another, however, to attempt to reduce some of the deepest impulses of Western religious life to mere dysfunction. These totems and taboos are powerful, and have been strengthened, not lessened, by the increasing speed and mechanization of civil society.

So, for practical as well as theoretical reasons, simple recourse to public/private separationism, while perhaps an important stance in the ongoing American *Kulturkampf*, does not do adequate justice to the public, deep-seated, and perhaps psychologically grounded concerns in play relative to liberated sexuality. As I have already said, the question of liberated sexuality, as a subset of the question of order and chaos, presents an even more fundamental challenge to traditional religion, not just to its domain, but to its very nature. It is to that subject that I now turn.

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165. *Mark* 12:13–12:17. *But cf. Matthew* 22:15–22:22; *Luke* 20:20–20:26.

166. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 23–33 (1993); Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 *DUKE L.J.* 977, 995 (1997).

*B. Religious vs. Religious: The Progressive Revolution*

If the struggle regarding homosexuality cannot be reduced to the familiar culture war between secular and religious, what is it? My claim here is that it is actually a struggle between two different stages in the development of religious consciousness, as expressed both individually and communally, with secularism caught in the middle. These two religious communities speak the same language but with utterly different meanings. And because to move from one stage to another involves the destruction of the earlier stage, liberated homosexuality is exactly the kind of antinomian, disordering force that it was feared to be in the Bible.

Within conservative religious structures, liberated homosexuality is a real challenge to Western religion, because it elevates the truth of subjective experience over the way sacred text has been interpreted for the last two thousand years.<sup>167</sup> It seeks to liberate the self from the *nomos*, to regard the stirrings of the soul as at least co-equal with the demands of Scripture. And, in unlinking sexual pleasure, sexual expression, and sexual being from the inherited norms of culture and civilization, gay liberation (which by its own internal logic demands women's liberation) threatens the containment of *eros* which is the cornerstone of Western religious civilization itself.

As we will see, these "challenges" have been understood by some theorists of religion as necessary steps in the evolution of religious consciousness itself. However, regarding such change as an "evolution" is, to say the least, not uncontroversial; it tends to be seen more as a revolution than a progression. In other words, in overturning ancient codes of order and chaos, progressive religious arguments about sexuality actually play into those exact concerns of order and chaos. That is to say, the NCR have it right, in a sense, that liberated sexuality threatens "religion," in that it does threaten religion of a certain stage. From that stage, the next ones look like pure chaos.

My analysis here is informed by the developmental models proposed by several different theorists, particularly as synthesized by Ken Wilber.<sup>168</sup> In his work, Wilber suggestively aligns a number of cognitive

167. For a British approach, see Theo Hobson, *A Pink Reformation*, GUARDIAN, Feb. 5, 2007,

[http://commentisfree.guardian.co.uk/theo\\_hobson/2007/02/a\\_pink\\_reformation.html](http://commentisfree.guardian.co.uk/theo_hobson/2007/02/a_pink_reformation.html) (arguing that homosexuality is a threat to the Anglican Church's moral authority on par with the Reformation of the 16th Century).

168. See KEN WILBER, *A BRIEF HISTORY OF EVERYTHING* 5–8 (2000); KEN WILBER, *INTEGRAL SPIRITUALITY* 58–70 (2006). For an application of Wilber's theories to

and religious developmental models. One of Wilber's primary contributions is his observation of congruities between individual and societal development models—including those of Jean Piaget;<sup>169</sup> Robert Kegan, who proposes five stages or “orders” in cognitive development;<sup>170</sup> Suzann Cook-Greuter, who traces the development of ego;<sup>171</sup> James Fowler, who identifies “stages of faith” in the religious life;<sup>172</sup> Lawrence Kohlberg;<sup>173</sup> the systems of “Spiral Dynamics”;<sup>174</sup> and others. Based on these models and associated cross-cultural research, Wilber identifies eight stages in the development of world religions, which occur across cultural contexts (with variations, of course) and which parallel stages in cognitive and social development. Although the details of the different systems vary somewhat, and Wilber himself frequently revises his understanding of them, a recent iteration of the first seven stages (oversimplified, and without the many variations and qualifiers) is as follows:<sup>175</sup>

1. *Archaic/instinctual*. Basic survival clans, with an undifferentiated approach to reality. Core concerns are survival and sensorimotor operations. Essentially pre-cognitive, basic, animalistic. Food, water, clothing, sex. Analogous to sensorimotor (Piaget), pre-conventional/obedience (Kohlberg). (For convenience, Wilber assigns colors on

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constitutional law, see generally Christian J. Grostic, *Evolving Objective Standards: A Developmental Approach to Constitutional Review of Morals Legislation*, 105 MICH. L. REV. 151 (2006). Of course, the content of these stages varies greatly from culture to culture; the theoretical underpinning of the models is that the overall structure does not. See LAWRENCE KOHLBERG, *THE PSYCHOLOGY OF MORAL DEVELOPMENT* 250–52 (1984); see also DON EDWARD BECK & CHRISTOPHER C. COWAN, *SPIRAL DYNAMICS: MASTERING VALUES, LEADERSHIP, AND CHANGE* 40–47 (1996) (noting that stages “determine *how* people think or make decisions in contrast to *what* they believe or value”); Grostic, *supra* note 168, at 154.

169. See generally JEAN PIAGET, *THE ESSENTIAL PIAGET* (Howard E. Gruber & J. Jacques Voneche Gruber eds., Basic Books 1977); JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (Harcourt, Brace & Co. 1932).
170. ROBERT KEGAN, *THE EVOLVING SELF* (1982).
171. Susanne R. Cook-Greuter, *Maps for Living: Ego-Development Stages from Symbiosis to Conscious Universal Embeddedness*, in *MODELS AND METHODS IN THE STUDY OF ADOLESCENT AND ADULT THOUGHT* 79 (Michael L. Commons et al. eds., 1990).
172. JAMES W. FOWLER, *STAGES OF FAITH* (1995).
173. LAWRENCE KOHLBERG ET AL., *MORAL STAGES* (1983). But see Carol Gilligan, *In a Different Voice: Women's Conception of Self and Morality*, 47 HARV. EDUC. REV. 481–517 (1977) (critiquing Kohlberg's model as androcentric).
174. See generally BECK & COWAN, *supra* note 168.
175. Adapted from WILBER, *INTEGRAL SPIRITUALITY*, *supra* note 168, at 58–70 (citing, *inter alia*, BECK & COWAN, *supra* note 168).

- the spectrum to each of these stages. Stage One is “Infrared.”<sup>176</sup>)
2. *Magic/animistic*. Animistic, symbolic logic, magical powers, magical universe filled with spirits. Concerns are safety and security. Typical of many folk religions. Also associated with extended family kinship groups and ethnic tribes. Analogous to pre-operational (Piaget), pre-conventional/self-interest (Kohlberg). (“Magenta.”)
  3. *Egocentric/polytheistic*. Impulsive, egocentric. Individual emerges from group. Polytheistic conceptions of multiple powerful deities (Spiral Dynamics: “PowerGods”); may or may not have ethical component. Associated with tribal structures and feudal empires; power and action. Analogous to conventional/conformity (Kohlberg).<sup>177</sup> (“Red.”)
  4. *Mythic/absolutist*. Monotheistic, self-protective, conformist, conventional; conceptual logic. Single “power god” replaces many gods, one literal truth defeating others; myth as absolutely true. Purposeful, absolutistic, interested in stability. Associated with patriotism, nationalism, “conventional faith” (Fowler), pre-modern Western religion. Analogous to formal-operational (Piaget), moral judgment (Kohlberg). (“Amber.”)
  5. *Rational/conventional/multiplistic*. Rationalistic, ethical, scientific. Rationality supplants literal/authority-mediated truth and myth, conscientiousness replaces conformity, individuality replaces group. “Achievist” in aim, multiplistic, success-oriented, autonomous. Typical of Enlightenment scientism, Reform religious movements, Western liberalism. Also associated with modernity; post-nationalist capitalism;<sup>178</sup> the industrial

176. Unfortunately, the system of spiral dynamics has its own color assignments, in which stages one through five are beige, purple, red, blue, orange, and green. Wilber fudges his own spectrum to align with these colors, which have been in use for a decade, omitting the color yellow and using “infrared” as a color. I follow Wilber’s color coding here, since both are obviously arbitrary.

177. Here Wilber’s and Kohlberg’s models diverge somewhat. Kohlberg proposes two conventional stages, the first valuing conformity and the second valuing “law and order.” These stages are essentially both elements of Wilber’s stage four. Conversely, Wilber distinguishes between two fundamentally egocentric stages, the magic/animistic Stage Two and the egocentric/polytheistic Stage Three; both of those two roughly map onto Kohlberg’s pre-conventional self-interest stage. This difference is not of import to the present project, however.

178. Cf. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999).

age; corporatism; economics as contrasted with patriotism (*cf.* liberals and neo-conservatives vs. Christian conservatives); first-wave feminism. Rational critique of stage-four norms. Analogous to post-formal/systemic (post-Piaget), post-conventional/social contract orientation (Kohlberg). (“Orange.”)

6. *Pluralistic/relativistic.* Pluralistic, relativistic, anti-hierarchical, multicultural, conjunctive. Typical of New Age spirituality; critiques of Eurocentrism and rationality. Also associated with anti-globalization, renewed regionalism, radical egalitarianism, holistic environmentalism, communitarianism, “naive” relativistic postmodernism; the “New Left,” different-voice/second-wave feminism; the information age; values of harmony, equality and consensus. Analogous to post-formal/paradigmatic (post-Piaget), post-conventional/universal (Kohlberg). (“Green.”)
7. *Integral/systemic.*<sup>179</sup> Aware of development and recognizing value of different stages. Return of concept of hierarchy but without traditional structures of Stages One through Five. Universal but not necessarily egalitarian (qualitative distinctions are maintained). Unlike Stage Six, Stage Seven understands values of Stages Five and Six to be positive, “non-natural” values, reflecting Stage Seven’s integral postmodernism. Similar to post-formal/cross-paradigmatic (post-Piaget), seventh-stage transcendental morality (Kohlberg).<sup>180</sup> (“Teal.”)

Essentially, a Wilberian analysis would suggest that the debate regarding homosexuality and religion is not one taking place within a particular stage, resolvable according to agreed-upon vocabularies and methods of argument. Rather, the debate is one between stages—specifically, between the “mythic” Stage Four (traditional, revelation-based monotheism, but here with remnants of Stage Three or even Stage Two taboos) and a combination of the rational Stage Five (conventional secularism) and pluralistic Stage Six (a post-religious, post-secular pluralism)

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179. Wilber and other theorists actually propose several “integral” stages, but these are not germane to our analysis here. For our purposes, the most relevant aspect of Stage Seven and beyond is that development does not stop at Stage Six’s non-discriminating pluralism.

180. See LAWRENCE KOHLBERG with Clark Power, *Moral Development, Religious Thinking, and the Question of a Seventh Stage*, in *THE PHILOSOPHY OF MORAL DEVELOPMENT* 311 (1981) (discussing the adoption of a “cosmic” perspective).

found throughout progressive religious and “spiritual” communities). Such a debate is necessarily and fundamentally about meta-issues, specifically what “religion” is, since it looks different at each stage. To Stage Four, religion is fixed, divine in origin, communally determined, and based on authority. To Stages Five and Six, it is to some degree evolving, human, individual, and based on conscience, reflection, or spirituality. This is what happens all the time when stages of religion collide—they really are arguing about the proper stage of religion, as projected onto a particular substantive issue. Consider, by way of comparison, the bitter struggles in the Hebrew Bible between Stages Three and Four: the episode of the Golden Calf, Elijah and the prophets of Baal, the first three of the Ten Commandments. Obviously, these are not debates merely about rites or images, but about the nature of God and religion themselves.

Importantly, and notwithstanding the tendency of one stage to see a previous one as corrupt and superseded (e.g., monotheism has superseded paganism, rationality has superseded religion, spirituality has superseded cold rationalism), all cognitive and religious structures have elements of previous stages embedded within them. One does not move on to operational logic by forgetting sensorimotor operations like using one’s hands. Rather, the “higher” is built on the “lower,” transcends, includes, and depends on it, in a way the “lower” does not depend on the “higher.” Likewise in religious development: while developmental stages may pretend to leave behind earlier ones—e.g., the “rational religion” of Stage Five leaving behind the “superstitions” of Stages Three or Four—they rarely do so in actuality. For example, while the literal meanings of ancient myths may be discarded, their symbolic and psychological meaning is eventually rediscovered, because it never really went away in the first place. This point is relevant because the basic needs underlying ancient taboos about order and chaos (Stage Three, or, speculating here, perhaps even basic sexual taboos from Stage Two) and the ancient rules regarding the permitted and forbidden (Stage Four) are not simply dismissed by Stage Five rationality or Stage Six pluralism. They may be transcended in their literal meaning, but the issues they address remain. Moreover, as we will revisit in the conclusion of this Article, it is possible to have knowledge of “later” stages without actually entering them; this is the difference between describing them in third-person terms and experiencing them as first-person realities.

Finally, stages are procedural rather than substantive. A particular stage does not determine what one believes, but rather how one believes

it.<sup>181</sup> This is true both within stages and between them. A Hindu may refrain from eating beef and a Jew from eating pork, but both obey what is essentially a Stage Three or Stage Four prohibition. Less obviously, however, the same belief may be held at different stages. Someone at Stage Four may not steal because God proscribed it. Someone at Stage Five may not steal because it is ultimately inefficient, unethical, or destructive of civil society. And someone at Stage Six may not steal because it is spiritually detrimental to do so.<sup>182</sup> Stages do not determine content, only process. They are less the vocabulary of ethical or religious life than the grammar of it.

With the taxonomy set forth here, it is now possible to contextualize both the taboos against homosexuality set forth in the previous Part, and the difference between the conventional religious/secular argument described above and the religious/religious one I am about to discuss.

First, taboos against homosexuality are not all of the same stage. Concerns about monotheism and society, as conventionally understood, are indeed Stage Four issues. But core concerns about family integrity are even deeper Stage Two or Stage Three concerns, related to structures of family and essentially magical conceptions of purity and impurity. Hebrew Bible concerns about purity and impurity, derived from priestly sources, are more like Stage Three battles against the forces of contamination than the Deuteronomist's Stage Four battles of monotheism against polytheism, yet they are also situated within that Stage Four dichotomy. Likewise, New Testament concerns about natural and unnatural are, in a sense, Stage Four religious issues, but really they go back to much older legal proscriptions and societal formations. Indeed, law itself, though conceptualized in foundational myths (e.g., the *Oresteia*) as being an institution of mythic structure (Stage Four) in opposition to earlier notions of revenge (Stage Three), is present in all of these stages—including, of course, in codes of revenge themselves. Law is not a creation of one stage or another; it exists in all of them.

Second, the clash between mythic religion and secularism is a classic battle between Stage Four and Stage Five, between revealed authority and rationality, dogma and scientific inquiry. This is the supposed distinction

181. See, for example, Kohlberg's "Heinz Dilemma," an ethical dilemma evaluated according to six moral stages. LAWRENCE KOHLBERG, *Indoctrination Versus Relativity in Value Education*, in *THE PHILOSOPHY OF MORAL DEVELOPMENT*, *supra* note 180, at 6, 12–22. Each stage yields both positive and negative answers to the dilemma, but arrives at those answers in a distinctive, stage-specific way (e.g., fear of punishment at Stage One, recognition of human rights at Stage Five, etc.). *Id.* at 17–19.

182. For that matter, someone at Stage Three may not steal because he or she follows an honor code proscribing stealing, and someone at Stage Two because of a fear of punishment.



between “church” and “state,” reductively depicted—though it is hopefully now clear how incomplete the standard binary is.

This clash is, however, only part of the story. Those who argue for gay rights and other liberal positions on the basis of religion are also involved in a different struggle between Stages Four and Six. This dispute reveals itself upon a close reading of the seemingly banal arguments for gay rights routinely made by religious advocates for sexual minorities. These Stage Six arguments are sometimes thought of as less threatening or more accommodating than standard rationalistic, secular, or otherwise liberal Stage Five claims. But, as we will see, they are actually more destructive of mythic notions of order. Consider some of these popular Stage Six arguments:

- God made me according to God’s will, sexuality included.
- God loves all of us.
- Plenty of other Biblical sexual proscriptions are ignored as our thinking has evolved (e.g., intermarriage, intercourse during menstruation), and some approved activities have fallen into disrepute (e.g., polygamy, levirate marriage, sex with slaves).
- The Bible doesn’t really prohibit homosexuality, only male anal sex under certain conditions (coercion, cultic practice, etc.).

All are quite simple in form. But notice that all are really saying that religion itself is to be taken on a post-mythic, rather than conventionally mythic, basis—that it should be the religion of Stage Six rather than the religion of Stage Four. That is:

- God made me according to God’s will, sexuality included, *despite what the Bible seems to say about homosexual acts being a wrong choice, and because of my experience of sexuality as un-chosen and wholesome.*
- God loves all of us, *and that should trump what the Bible seems to say about sexual behavior being a choice, because of my experience of sexuality.*
- Plenty of other Biblical sexual proscriptions are ignored as our thinking has evolved, *and that should include apparent Biblical proscriptions against homosexuality, because of my experience of sexuality.*
- The Bible doesn’t really prohibit homosexuality, only male anal sex under certain conditions; *the way tradition has in-*

*terpreted the Bible must be wrong, because of my experience of sexuality.*

In other words, the experiences, whether one's own or another's, of sexuality as a trait, sexual repression as an evil, and sexual expression as a sacred path to love, form the essential underpinning of Stage Six readings of the Bible. Implicitly, this means that Biblical dogma is susceptible to evolution and reinterpretation as experience dictates. This essentially liberal value is a consummate Stage Five principle. Indeed, as Stage Six notes, we all may not even agree on what the "right" reading of law is at any one time and so must respect multiple meanings.

But these Stage Five and Six principles remain controversial at this moment in our culture's religious development. Stage Five's insistence that sexuality is a trait, and that sexual expressions therefore are not merely acts, may well be grounded in science, humanism, and personal experience—but this grounding responds to values internal to Stage Five, not Stage Four.<sup>183</sup> Likewise, the Stage Six insistence on *sexual-nomian* pluralism and the value of personal experience are in accord with egalitarianism and pluralism more generally—but these, too, are not Stage Four values. Indeed, because Stages Five and Six deliberately overturn the foundations of Stage Four, they are seen *from that stage* as being destructive of order itself.

As threatening as the rationalists or secularists of Stage Five may be to the mythic-religionists of Stage Four, the progressives of Stage Six may seem even worse. Religious progressives and traditionalists are talking past each other, using a common religious vocabulary to refer to two entirely different systems of thought. The moral voice of the Religious Right is mythic: the Torah is true, Jesus died for your sins, miracles happen, and God is watching. But the voice of religious progressives is post-mythic: the Torah is important, the myth of Jesus is about forgiveness, miracles happen every day, and God is everything. Traditionalists, when they speak of religion, are referring to a mythic-stage world of absolute truth, which lies beyond the reach of experience—which, indeed, must shape and judge experience. To traditionalists, non-coercive, non-mythic spirituality, grounded in personal, experiential, and mystical practices, is deeply threatening to normative, mythic, rule-oriented religion. Spirituality threatens to detach the experience of religion from the fixed rules and myths that enable religion to be a form of social ordering and control.

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183. See Grostic, *supra* note 168, at 158–172 (using a developmental model with analogous stage delineations, characterizes the Supreme Court's approach to morals legislation as strictly Stage Five, with some emergent Stage Six values); WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 15–50 (1996) (making the case for same-sex marriage on the basis of formal equality).

Without taboo, without “values,” and without guilt, what is left of religion?

Everything is left, according to post-mythic religious progressives: the pursuit of justice, spiritual experience, community, kinship. Religious progressives may use the same words as traditionalists, but they rarely put much truck in the mythic level of religion. To progressives, that sort of religion is tied to ethnocentrism, particularism, sexism, homophobia, and a dozen other beliefs that progressives, as a rule, tend to disfavor.

Now let us return to the issues of order and chaos that we discussed in the previous part. Religious progressives, though they may share a vocabulary with religious conservatives, do not share the conservative belief that the authoritative texts of mythic religion are the sole source of enduring values or the sole path to salvation. Unlike rationalists of the Fifth Stage, religious progressives may recognize the deep psychic power of taboos about order and disorder. But, unlike mythic-religionists of the Fourth Stage, religious progressives also do not believe that overturning some of mythic religion (or bracketing it, or reinterpreting it) will really end the world. Indeed, preserving that world is likely seen as less important than recognizing the dignity of human beings alive today.<sup>184</sup>

In fact, religious progressives are likely to believe that real religion, the kind God *really* wants, *requires* us to reinterpret, reread, and revolutionize.

But to traditional, mythic religionists, all this is nothing less than the destruction of the religious-mythic worldview and the end of religion itself. As a general matter, this sense of destruction can be felt from any stage—the next stage always looks like pure anarchy, and often like a previous stage. For example, from Stage Four, the secularism of Stage Five looks like a loss of moral center. Likewise from the rationalist Stage Five, the spirituality of Stage Six looks like Stage Three paganism or Stage Four irrationality, and the relativism of Stage Six looks like a loss

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184. For a classic stage-six, spiritual-conscience based religious approval of homosexuality, see, e.g., Rosenthal, *supra* note 68, at 534–35 (“Whether the prohibition of homosexual intercourse [in Jewish texts] is motivated by a loathing of pagan cultic practices, disapprobation of the rape of defeated enemy warriors, or simply revulsion at the idea of a man being ‘womanised’ in a society where women were regarded as necessarily passive and submissive, it certainly has no claim whatever on the conscience of any gay person today.” (quoting Mark Solomon, *A Strange Conjunction*, in *JEWISH EXPLORATIONS OF SEXUALITY* 82 (Jonathan Magonet ed., 1995)). Contrast the classic Stage Five, rationalist-consequentialist religious approval of homosexuality articulated in Rebecca T. Alpert, *Religious Liberty, Same-Sex Marriage, and Judaism*, in *GOD FORBID* 124, 127 (Kathleen Sands ed., 2000) (“[S]ame-sex marriage is understood as a religious value because it provides economic justice, creates stable, committed relationships, and fosters support for childrearing.”).

of moral center.<sup>185</sup> This is how it is: from any stage, a subsequent stage looks more like a previous one.

Consider, by way of analogy, the current debate over “intelligent design.”<sup>186</sup> To Stage Four religion, what is at stake is the mythic worldview itself—take away the literal creation story, and you destroy the foundation of religious life. Of course, to a Stage Five ethical-religionist or a Stage Six spiritual-religionist, this is nonsense—the valuable teachings of ethics and spirituality remain in place and do not depend on the mythic creation story.<sup>187</sup> But from the perspective of Stage Four, to deny the mythic basis of the law is tantamount to denying the law itself.

It is possible to maintain some kind of Stage Four worldview while adopting a more progressive stance toward gay rights. For example, one might maintain the overall tenets of a Stage Four religious worldview but adopt a Stage Five political worldview. That is, one might maintain a fidelity to authoritative, absolutist scripture in a “religious realm” but simultaneously maintain some notion of liberal democracy in a separate “political realm.” Not *all* fundamentalisms require the total conflation of public and private.

Alternatively, one might adopt readings of Scripture that maintain Biblical inerrancy but interpret Biblical text in a more liberal way, as John Boswell reads *Romans* as really about pederasty and Steve Greenberg reads *Leviticus* as about dehumanization and sexual violence. Of course, in both cases it could be argued that this is not really Stage Four religion, since values from outside the authoritative source (from reason, personal experience, conscience, liberal political theory, or somewhere else) are influencing the way that source is understood. My own view is that such strategies more accurately represent a Stage Five or Six religious consciousness, retaining the forms and rhetoric of Stage Four.

185. For that matter, Stage Six often confuses the qualified hierarchies of Stage Seven with the authoritarian hierarchies of Stage Four. Even Stage Three may regard stage Four’s iconoclasm and destruction of sacred space as a denuding of sanctity.

186. For two accounts of the debate from different viewpoints, see Johnny Rex Buckles, *The Constitutionality of the Monkey Wrench: Exploring the Case for Intelligent Design*, 59 OKLA. L. REV. 527 (2006), and H. Allan Orr, *Devolution: Why Intelligent Design Isn’t*, N. YORKER, May 30, 2005, at 40, available at [http://www.newyorker.com/archive/2005/05/30/050530fa\\_fact](http://www.newyorker.com/archive/2005/05/30/050530fa_fact).

187. It is also possible for a Stage Five (or later) consciousness to advocate a kind of intellectual duplicity: keeping “the masses” at Stage Four for their own good. Under this rationale, though ethical teachings do not actually depend on the truth of religious myth, such myth is required for most people to believe in the teachings. Leo Strauss’s work has often been interpreted in this way. See LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 6 (1st ed. 1953) (“Utility and truth are two entirely different things.”). For a general discussion of Strauss and “Straussians,” see ANNE NORTON, *LEO STRAUSS AND THE POLITICS OF AMERICAN EMPIRE* (2004).

As we will see, such a posture may be of both strategic and personal religious value. Strategically, it minimizes the extremity of the change and allows Stage Four religionists to continue with their fundamental life projects. And on an individual, personal level, it may well reflect the sincere beliefs of those who are committed to a Stage Four view of Scripture but who are vexed by the apparent immutability of homosexuality. For those who believe in (1) the Divine origin of the Bible, (2) a genetic or similarly immutable origin of homosexuality, and (3) a loving God who does not seek the repression of a fundamental aspect of human identity,<sup>188</sup> *Leviticus* simply cannot mean what it has been interpreted as meaning. Thus, interpretations which may seem forced or stretched are actually *less* forced than the alternatives, since they leave intact these fundamental beliefs. Indeed, one might suppose that evangelical Christianity is uniquely well-suited to such a reexamination, since it places such value on individual introspection and conscience.

There is precedent for such intra-stage reevaluation. The interpretation of inerrant Scripture rather than its overthrow was the strategy of most “fundamentalist” Christians in the decades following the Civil War. While prior to the war, Christians were divided as to whether the Bible condoned or forbade slavery,<sup>189</sup> today almost none would say that the Bible approves of slavery in the American context.<sup>190</sup> Perhaps, some

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188. *E.g.*, Rabbi Joel Roth, *EH 24.1992b, Homosexuality*, in COMM. ON JEWISH LAW & STANDARDS, RESPONSA: 1991–2000 (Kassel Abelson & David J. Fine eds., 2002), at 613–23, available at [http://www.rabbinicalassembly.org/teshuvot/docs/19912000/roth\\_homosexual.pdf](http://www.rabbinicalassembly.org/teshuvot/docs/19912000/roth_homosexual.pdf); Cardinal Ratzinger, *supra* note 66, at 205–08. *See also* Rosenthal, *supra* note 68, at 531–33.

189. *See generally* JOHN PATRICK DALY, WHEN SLAVERY WAS CALLED FREEDOM: EVANGELICALISM, PROSLAVERY, AND THE CAUSES OF THE CIVIL WAR (2002) (discussing religious support of slavery); EUGENE D. GENOVESE, “SLAVERY ORDAINED OF GOD:” THE SOUTHERN SLAVEHOLDERS’ VIEW OF BIBLICAL HISTORY AND MODERN POLITICS (1985) (same); FORREST G. WOOD, THE ARROGANCE OF FAITH: CHRISTIANITY AND RACE IN AMERICA FROM THE COLONIAL ERA TO THE TWENTIETH CENTURY 288–338 (1990) (same); *see also* STEPHEN L. CARTER, GOD’S NAME IN VAIN 83–99 (2000) (discussing religious opposition to slavery); VICTOR B. HOWARD, THE EVANGELICAL WAR AGAINST SLAVERY AND CASTE (1996) (describing the life of John G. Fee, a devoutly Christian abolitionist); KENNETH MOORE STARTUP, THE ROOT OF ALL EVIL: THE PROTESTANT CLERGY AND THE ECONOMIC MIND OF THE OLD SOUTH (1997) (examining the antebellum Protestant clergy’s perspective on the contemporary economy, including its defenses and critiques of the practice of slavery).

190. Of course, there are many who maintain that the Bible approves of, or indeed requires, practices some would consider discriminatory or racist; Bob Jones University’s ban on interracial couples is one well-known example. *See* *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983).

have argued, the same evolution will eventually take place in the case of homosexuality.<sup>191</sup>

Notwithstanding the availability of such hermeneutical strategies, however, relatively few people appear to be making use of them. On the Left, the loudest voices seem to argue either for a Stage Five liberal position, or for a Stage Six progressive-religious one. And on the NCR, most insist on a Stage Four religious view together with the traditional understanding of Biblical text. Unfortunately, the bedrock certainty of mythic religion is far easier to communicate than the multivalences, negotiations, and tensions of post-mythic religion; fundamentalism fills the pews in a way that reform religion and Stage Six spirituality still do not. For this reason, much of our culture's "debate" about homosexuality more closely resembles a shouting match among different worldviews separated by a common language.

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191. Cf. WEBB, *supra* note 60, *passim* (proposing hermeneutical methodologies for when Biblical verses are applied and when they are not). Webb does not advocate such a change; indeed, applying his methodology, he concludes that the Biblical prohibition should remain in place. *Id.* at 250–52. However, the methodology he proposes (and the analysis of slavery) could, in theory, lead to the opposite result within an overall position of Biblical inerrancy. I am grateful to Kevin Outterson for bringing Webb's book, and the analogy to slavery, to my attention. See generally HOMOSEXUALITY IN THE CHURCH, *supra* note 68.

By way of parallel, similar changes have begun in the area of environmentalism. While the dominant political motif is that Christianity aligns with free enterprise, many evangelicals have begun asking "What Would Jesus Drive" and advocating for religiously-motivated environmental laws. See, e.g., L.A. Kemmerer, *In the Beginning: God Created the Earth and "Ecoterrorism,"* in IGNITING A REVOLUTION: VOICES IN DEFENSE OF THE EARTH 156 (Steven Best & Anthony J. Nocella II eds., 2006); Lucia A. Silecchia, *Environmental Ethics from the Perspectives of NEPA and Catholic Social Teaching: Ecological Guidance for the 21st Century*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 659 (2004); Caryle Murphy, *A Spiritual Lens On the Environment*, WASH. POST, Feb. 3, 1998, at A1; Evangelical Environmental Network and Creation Care Magazine, <http://www.creationcare.org> (last visited Feb. 28, 2008). *But see* John C. Green et al., *The Christian Right's Long Political March*, in THE CHRISTIAN RIGHT IN AMERICAN POLITICS: MARCHING TO THE MILLENNIUM 1, 14 (John C. Green, Mark J. Rozell & Clyde Wilcox eds., 2003) (including environmentalists as "[a]mong the strongest opponents of the Christian Right"); A. Dan Tarlock, *Environmental Law: Ethics or Science?*, 7 DUKE ENVTL. L. & POL'Y F. 193, 200 (1996) ("Religion has not been and is unlikely to be a basis for a workable theory of environmentalism. Despite efforts to create a revisionist green theology of stewardship, religion remains more of a cause rather than a solution to environmental problems.").

*C. The Liminal as Holy Terror: A Queer Agreement*

Not only is liberated homosexuality deeply threatening to mythic structures of gender, law, and society, but many queer theorists know it. Of the many iterations of queer identity proposed in recent years, some of the most interesting connect homosexuality with liminality and an upsetting of sexual binarism and dimorphism.<sup>192</sup> Curiously, in both contemporary queer theory and contemporary gay spirituality—two discourses which almost never interact with one another, and which in many ways are diametrically opposed—binaries are the problem, and queerness is the remedy. In queer theory, gender and sexual dimorphisms are social constructions that invariably efface difference, administer power to the powerful, and subject the weak/disfavored to the rule of the strong/favored.<sup>193</sup> Dyads such as them/us, black/white, and female/male both oversimplify actual experience and invariably subordinate one side to the other. Both Levinas and Derrida have argued that even the basic dualisms of self/other and presence/absence contain within them the seed of oppression, marginalization, and subjugation; as soon as we divide, we begin to conquer.<sup>194</sup> Queer sexuality, by eluding the heteronormative expectations of gender and sexual role, can serve as “a potentially privileged site for the criticism and analysis of cultural discourses.”<sup>195</sup>

Likewise, though in a very different intellectual key, the leading writers of the half-anthropological, half-fantastical literature of “gay

192. On liminality generally, see Victor Turner, *Betwixt and Between: The Liminal Period in Rites de Passage*, in *THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL* 93 (1967).

193. See DAVID M. HALPERIN, “Homosexuality:” *A Cultural Construct*, in *ONE HUNDRED YEARS OF HOMOSEXUALITY*, *supra* note 74, at 41, 43–48 (1990); see generally GILBERT HERDT, *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* (1994); JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* (1995); EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990).

194. See Emmanuel Levinas, *Diachrony and Representation*, in *TIME AND THE OTHER AND ADDITIONAL ESSAYS* 97 (Richard A. Cohen trans., 1987); Jacques Derrida & Peggy Kamuf, *Like the Sound of the Sea Deep Within a Shell: Paul De Man’s War*, 14 *CRITICAL INQUIRY* 590 (1988).

195. DAVID HALPERIN, *SAINT FOUCAULT: TOWARD A GAY HAGIOGRAPHY* 61 (1995). *But see* Bersani, *supra* note 27, at 205–09 (questioning the impact of gay appropriation of heterosexual machismo). On the concept of heteronormativity generally, see Joan W. Howarth, *Adventures in Heteronormativity: The Straight Line from Liberate to Lawrence*, 5 *NEV. L.J.* 260, 260 (2004–2005) (defining heteronormativity as “the complex social, political, legal, economic and cultural systems that together construct the primacy, normalcy, and dominance of heterosexuality”). The term was coined in 1993 by Michael Warner. Michael Warner, *Introduction*, in *FEAR OF A QUEER PLANET* vii, xxi (Michael Warner ed., 1993).

spirituality” seek to reclaim for queer people (primarily gay men) the ancient roles of “those who walk between”—gender-variant people who often served as shamans, healers, and other intercessors with the infinite.<sup>196</sup> These writers draw on diverse traditions, from the gender-variant Galli of the classical world<sup>197</sup> to the 157 Native American traditions which held that people we would now label as gay or lesbian possessed two spirits, one masculine and one feminine, according them special significance in society (as medicine men/women, shamans, warriors, etc.).<sup>198</sup> Of course, our understanding of these “third-gendered” and “two-spirited” people remains greatly attenuated, but the evidence is considerable, ranging from the gender-variant *berdaches* or *winktes* of the Plains Indians (including the Omaha, Sioux, Iban, and Hidatsa peoples), to shamans of Siberia (including the Chukchi, Yakut, and Koryak tribes), the *basir* of Borneo, and the male *isangoma* of the Zulu. In such cultures, gays and lesbians exist to be sacred priests of the liminal.

Yet the liminal is sacred precisely because it is terrifying. In the moment of in-between, that point of inflection between what was and what is becoming, there is a taste of extinction. And precisely for that reason, because such moments occasion brief transverses of the ineffable, the liminal is sacralized by ritual, symbol, and myth.

Some cultures sacralize these chaotic, anarchic, and death-linked moments, but others—surely including Biblical Israel and Pauline Christianity—seek to circumscribe it. As we saw in the previous Part, Biblical Judaism sanctifies not the ecstatic but the formal, not the chaotic but the ordered. Likewise, Pauline Christianity disposes with external law only to replace it with an even more rigorous internal one, and with its quasi-ontological priority of the spiritual, lawful, and orderly over the fleshly and chaotic. Indeed, in later Christianity, most of the liminality-venerating religious practices just listed were regarded as heathenism, paganism, witchcraft, devil-worship, or worse.

Quite clearly, there is a flat contradiction between civilizing boundaries on the one hand, and queered or otherwise effaced binarisms on the other (though obviously, this structure is itself a binarism that is susceptible to critique). Nor is the tension restricted to the margins of

196. See generally RANDY CONNER, *BLOSSOM OF BONE: RECLAIMING THE CONNECTIONS BETWEEN HOMEROETICISM AND THE SACRED* (1993); GAY SPIRIT: MYTH AND MEANING (Mark Thompson ed., 1987); TOBY JOHNSON, *GAY SPIRITUALITY: THE ROLE OF GAY IDENTITY IN THE TRANSFORMATION OF HUMAN CONSCIOUSNESS* (2004).

197. See CONNER, *supra* note 196, at 99–125; Will Roscoe, *Priests of the Goddess: Gender Transgression in Ancient Religion*, 35 *HIST. RELIGIONS* 195, 195–230 (1996).

198. See WILL ROSCOE, *CHANGING ONES: THIRD AND FOURTH GENDERS IN NATIVE NORTH AMERICA* 222–247 (1998); WALTER WILLIAMS, *THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE* 17–109 (1986).



sexual differentiation: not only men who have sex with other men, but inter-religious couples, single parents, and anyone following (or creating) alternative models of Jewish sexual-social life find themselves astride the boundaries of the halachic mainstream.<sup>199</sup> So does anyone who sees herself as both/and rather than either/or. The Levitical understanding of liminality is squarely opposed, perhaps even deliberately, to the sacralization of boundary-crossing found in certain shamanic cultures, hypothesized in the Ancient Near East, and celebrated by latter-day spiritual thinkers, many of whom are themselves constructing their views in deliberate opposition to Judeo-Christian religious thought. Obviously, these structures are symbolic, not literal; poetic, not political. Yet to the extent they inform not merely the superficial details of religious praxis but its very form and structure, the binary-disrupting queer finds herself in, ironically, a binary opposition to the Biblical ideal. The idealized vision of a sacred society constituted by law and boundary is in irreducible tension with a (non-)identity of liminality and blending.

Of course, for queer theorists, this may be a productive opposition, usefully problematizing some of religion's more troubling boundaries. (It is also, of course, an optional one; liminality is a function of self-actualization, not essential biology.) First, it invites us to reconsider Biblical "Judaism," and by extension the Jewish-Christian tradition, as being less the normative product of the priestly elite and more of a descriptive term, including precisely those practices of the Israelites which some sought to efface. Whose Judaism is it, anyway? Second, scholars tell us that sexual boundaries were largely drawn to differentiate Jew from "Canaanite"—essentially a social construction used to Other-ize aspects of Israelite practice that the priestly elite sought to name as foreign. Sexual pluralism thus leads to a much-needed corrective to parochialism and ethnocentrism, because in problematizing the rhetoric of social construction in the area of sexuality, it questions the same lines drawn, often with the same broad brushstrokes, between us/them, gay/straight, Canaanite/Israelite, even female/male. And finally, embracing sexual variance reminds us of Biblical multivocality. As Theodore Jennings has recently developed at some length, Biblical text has far more to say about homosexuality than two troubling verses in Leviticus;

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199. It is important not to overstate the gender dimorphism of the halachic system, however, which includes multiple gender and sex categories, including *tumtum*, *androgynos* (which appears over 300 times in the Talmud), and, by some counts, *avlonit*, *saris adam*, and *saris chama*. See Alfred Cohen, *Tumtum and Androgynous*, 38 J. OF HALACHA & CONTEMP. SOC'Y (1999); Rabbi Elliot Rose Kukla & Reuben Zellman, *Created by the Hand of Heaven: A Jewish Approach to Intersexuality*, TORAH QUEERIES, Apr. 21, 2007, [http://www.jewishmosaic.org/torah/show\\_torah/71](http://www.jewishmosaic.org/torah/show_torah/71).

homoeroticism is often utilized as a resource for exploring the dynamic between YHWH and Israel itself.<sup>200</sup> In this way, embracing the deeper significance of sexual liminality leads to a useful questioning of how the notion of boundary does exactly what postmodernists worry it does: prioritize, oppress, and dominate.

The opposition is there, not merely as a fantasy of the NCR but as a site for celebration for queer theorists. For this reason, many would argue that assimilationist language ought to remain predominant politically, for reasons of political expediency, and because privilege, however constructed or artificial it may be, should be available to all who would seek it rather than being restricted only to some. ("Maybe marriage is dyadic, limiting, and intrinsically heteronormative—but let me have it too if I want it.") Yet even if the assimilationist vocabulary is adopted in political discourse, the Levitical and Pauline interests in order are squarely opposed, perhaps even deliberately, to the sacralization of boundary-crossing celebrated by latter-day queer theorists and gay spirituality thinkers. That liberating homosexuality invites chaos is not merely the NCR's delusion.

We err if we suppose that legal and political debates regarding homosexuality are essentially legal and political. They are not. Nor are they predominantly between some monolithic "religion" and "secularism," or between a liberal conception of public and private and a fundamentalism that does not respect such boundaries. Rather these are religious debates, between two different forms of religion, each contesting a shared vocabulary and pointing in nearly opposite directions. What we are arguing about when we argue about the legal regulation of homosexuality is the nature of religion itself.

#### IV. NOT IDEAS ABOUT THE THING, BUT THE THING ITSELF: CONCLUSIONS

If it is true that religious arguments against homosexuality beg fundamental questions about the nature of religion in society—not just the *role* of religion in civil society, but the very nature of religion itself—then what is the proper approach for those who would advocate for greater liberties for gay and lesbian people in American society?

I make three proposals in this concluding Part. First, I address the ineluctably religious nature of the issue and propose how an integral approach to religious development is of more practical use than reductive claims about homophobia or fundamentalism. Second, and largely

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200. JENNINGS, *supra* note 74, at 25–66.

by way of example but with the backing of some empirical data, I suggest that policies which impact the “mythic” religious positions at stake—most notably, of course, same-sex marriage—will be far less publicly acceptable than those which do not. While an incremental approach is not necessarily advisable in all cases, at the very least there should be an understanding of the magnitude of deconstructing the mythic. Third and finally, I return to the evolutionary understanding of religious development and propose that only by entering into an authentic Stage Four conversation, with its categories and assumptions, is it possible to then shatter those assumptions with the force of personal experience. Such encounters, not policy debates, will ultimately bear the most fruit for advocates.

### A. *An Integral Reassessment of “Homophobia” and “Religion”*

To the extent that religion remains a primary source of value for the majority of Americans, it is unlikely that efforts to address the question purely as a legal matter will be sufficient. Indeed, even for those who are not personally religious, religious categories have thoroughly influenced secular law, particularly in the area of sexuality.<sup>201</sup> Of course, the basic liberal separation of public and private, discussed in the previous Part, remains operative. In theory (that is, liberal theory), one might thoroughly oppose homosexuality in some “private” sphere, but recognize for basic civil libertarian reasons that the apparatus of state power should not be used to enforce those views in “public.” Yet refusing to hold such a belief is not necessarily the sign of a failure of reason or patriotism, but rather a particular stage of religious development, in an ordered world that makes sense at that stage, even if it seems ludicrous from others—indeed, its preposterousness is precisely due to its foundational premises and internal consistency. As Stanley Fish remarked, “The American mind, like any other, will always be closed, and the only question is whether we find the form of closure it currently assumes answerable to our present urgencies.”<sup>202</sup>

Homophobia, useful as it is in describing the discomforts and irrational biases that gays, lesbians, and, *a fortiori*, transgendered people face every day of our lives, is not an accurate description of the Amber Stage

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201. See Backer, *supra* note 22, at 568–86 (discussing judicial use of “sodomy narratives” from popular culture); Eskridge, *supra* note 22, at 1029–1039 (describing judicial adoption of right-wing rhetoric of disgust and boundary maintenance).

202. STANLEY FISH, *Being Interdisciplinary Is So Very Hard to Do*, in *THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING, TOO* 231, 242 (1994).

of religious/cognitive development. Indeed, the label is as imprecise as labeling traditional conceptions of gender to be merely sexist, or tribal claims about religion to be merely ethnocentric. Of course, viewed from a liberal or post-liberal perspective, that is exactly what they are. Yet viewed from within a mythic universe, they are no more visible as bias than, say, our culture's pervasive anthropocentrism. On the contrary, viewed from within the mythic-religious system, they are as invisible as the air—and seemingly as fundamental.

The issue here is not homophobia per se, but the mythic form of religion, thoroughly embedding its anti-gay positions within an overall structure that gives meaning and purpose to millions of Americans. Viewed from within the mythic religious structure, one may no more extract the offending strand of dogma than remove just one stone block from a bridge: the entire edifice collapses. This explains how Focus on the Family's James Dobson can compare gay marriage to Pearl Harbor.<sup>203</sup> And it is why the Family Research Council maintains mythic-stage beliefs about efficacy of prayer.<sup>204</sup> They are all part of a single mythic-religious worldview. This is larger than homosexuality, or indeed sexuality as a whole; as I have suggested, sexuality is merely the site of a much larger debate, which is the ambit of religion itself.

Of course, contrary to the reductions of neo-atheists such as Sam Harris, it is not *religion* that collapses; there are millions of religious gays and lesbians in every religious community in America. Stage Four mythic religion does indeed collapse when autonomy trumps authority, and that is why liberated sexuality looks like chaos and disorder, whether it is couched in the secular liberalism of Stage Five or the progressive spirituality of Stage Six. But notwithstanding Harris's circular reductionism, mythic religion is not "real" religion, any more than progressive religion is—or, for that matter, than ancient tribal blood taboos or post-progressive integral spiritualities are.<sup>205</sup> If one asks the popular Christian question "What Would Jesus Do?" in a given situation, the answer will vary according to which Jesus one believes in. A Fourth Stage Jesus

203. See Michael Crowley, *James Dobson: The Religious Right's New Kingmaker*, SLATE, Nov. 12, 2004, <http://www.slate.com/id/2109621/>.

204. A recent publication of the FRC credited its prayer teams with the success of the troop surge in Iraq. *Prayer Targets: ENDA, Veterans Day, California Pastors for Marriage, Elections, Bella, Transgender Debate, Prayer Surge*, PRAYER TEAM (Family Research Council, Wash., D.C.), <http://www.frc.org/get.cfm?i=PW07K02> (last visited Feb. 12, 2008). Other "prayer targets" included the Employment Non-Discrimination Act and a film about abortion.

205. See Grostic, *supra* note 168, at 176–78 (showing how a Wilberian developmental approach to "evolving objective standards" helps resolve concerns that constitutional interpretation is merely subjective).

would likely condemn homosexuals as violative of the natural order, on the basis of authoritative scripture. A Fifth Stage Jesus might ask what policy makes the most sense for serving the social good. A Sixth Stage Jesus would likely love all human beings, and interpret holy writ to suit religious conscience.<sup>206</sup>

Moreover, in Wilber's model, all are "right" insofar as all reflect an authentic religious consciousness at different stages. Mythic Jesus is how (the Christian) God looks at Stage Four; loving, multicultural Jesus is how God looks at Stage Six. Likewise claims of law, social order, land, tribe, ritual, ethics, and other religious topics reflect stage-set viewpoints.

Nor does what Wilber calls an "integral approach" take a paternalistic attitude toward more "primitive" religious stages. On the contrary, these stages are the foundation for later ones, and while a house can stand without its upper levels, it cannot endure without foundation. Implicit in any descriptive hierarchy is a normative preference, and, indeed, each stage does see itself as superior to the previous ones. But one of the hallmarks of an integral vision (i.e., Stages Seven and above) is that this rigid sense of superiority disappears. Unlike those developmental models which conveniently place their originators at the top of the evolutionary ladder, Wilber's Stage Five is not necessarily better than Stage Four. It *is* more advanced, understanding Stage Four in a way Stage Four cannot understand Stage Five. And generally speaking, each stage represents a step forward in moral progress. But it is not necessarily better in every situation. For example, Stage Six has blindspots that Stage Five does not (e.g., it is unable to recognize the value in any hierarchy at all), and those blind spots could, in some circumstances, be more harmful than the shortcomings of the earlier stage (e.g., when a group is trying to "get things done" and needs a leader rather than consensus). Additionally, as mentioned earlier, some have proposed that Stage Four mentality is more conducive to an orderly society than a Stage Five or Stage Six one. Whether they are correct must be decided on the merits, not by the numbers.

Obviously, in our constitutional jurisprudence, there is little space for differentiating among these various stages of religious development. Nor should there be. But in the characterization of religiously significant legal issues such as gay rights<sup>207</sup> as simply being questions of "church and

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206. For that matter, a Seventh Stage Jesus would provide these multiple answers. A Third Stage Jesus would invoke ancient taboos, and a Second Stage one black magic and superstition.

207. This also applies to legal issues such as aid to parochial schools, prayer in public schools, public displays of religious symbols, etc.

state,” we radically oversimplify what those two terms mean. We recognize this as applied to “state,” which is commonly debated in constitutional scholarship. Yet differing visions of “church” receive comparatively little attention, not only among different religions but also among different visions of the meaning of religion itself. This tends to reduce religious thinking to its lowest common denominator and mischaracterize the nature of contentious disputes such as the instant one.

In short, both the claims that anti-gay religious sentiment is “homophobia” and that it is “religion” are incorrect. Certainly, homophobia is present in religious communities of every type and denomination. And certainly, were someone to write *Leviticus* 18 today, it would be fair to accuse him or her of homophobia. Yet homophobia is not the reason why gay rights ordinances, same-sex marriage, and antidiscrimination provisions are religiously significant. If legal activists seek to address these issues effectively, they must first understand what they are.

As a practical matter, it has been and will continue to be ineffective to treat a religious stage dispute as simply being about church and state, or rationality and homophobia. Nor will it work to condescend to the barely-literate Christians, patronizing them into seeing the light of Stage Five or Six. It is, as I will suggest below, possible to make authentic Stage Four claims about homosexuality—not just Scriptural arguments of the type cited earlier, but the kind of personal testimonies that make such interpretive moves necessary in the first place. But it is only possible to do so once the nature of the debate has been recognized and the advocate has agreed to place herself, in her particularity and with her history, into the Stage Four context of spirit, soul, and redemption. Understanding the path of moral development helps to navigate it.<sup>208</sup> Otherwise, we are, with increasing anger and frustration, simply failing to communicate.

### *B. How Not to Move from Mythic to Post-Mythic*

If it is true that homosexuality is religiously significant because it destabilizes the ordered world of mythic religion, then we should expect that those initiatives that most destabilize the mythic world will be met with the most opposition. This is exactly what has transpired in the case of same-sex marriage, most recently in 2008’s shocking setbacks to marriage equality in California and elsewhere. Studies have shown that

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208. See Grostic, *supra* note 168, at 176–78 (showing how a Wilberian developmental approach to “evolving objective standards” helps resolve concerns that constitutional interpretation is merely subjective).

same-sex marriage is supported by only 40% of Americans, compared with over 80% who support equal job opportunities for gays and lesbians.<sup>209</sup> Most interestingly, as a recent study has shown, public opposition to homosexuality in general rose markedly in close correlation to media coverage of gay marriage, particularly in the wake of the media coverage of *Lawrence v. Texas*<sup>210</sup>—coverage which overwhelmingly, despite the actual holding in the case, discussed same-sex marriage.<sup>211</sup> Interestingly, opinion shifted comparatively little in response to Massachusetts' same-sex marriage case, *Goodridge v. Department of Health*;<sup>212</sup> but the Persily study suggests that the public is influenced more by broad signals and media coverage than actual holdings.<sup>213</sup> As we have seen, the more “gay rights” is about marriage, the more even moderates will be against it.

Of course, there have been numerous analyses of the same-sex marriage debate, focusing both on the *Goodridge* decision<sup>214</sup> and the larger

209. Lydia Saad, *CA Ruling on Same-Sex Marriage Bucks Majority View*, GALLUP.COM, May 15, 2008, <http://www.gallup.com/poll/107305/Ruling-SameSex-Marriage-Bucks-Majority-View.aspx>; see also *Gay Rights*, *supra* note 7, at 236.

210. 539 U.S. 558 (2003).

211. *Gay Rights*, *supra* note 7, at 242–45. There is disagreement as to whether judicial decisions affect public opinion at all, and if so, how. Nathaniel Persily, *Introduction*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 7, at 3. Some suggest that public opinion does not change in response to Supreme Court constitutional cases. See, e.g., THOMAS MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 156 (1989); Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 N.W. U. L. REV. 985 (1989–90). Others argue that the Court helps shape public opinion by being a “republican schoolmaster,” teaching us civics. See Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 S.C.T. REV. 127 (1967); see also Christopher Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992); see generally VALERIE HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS (2003). And others note that backlash or polarization sometimes result. See HOEKSTRA, *supra*, at 9–10.

212. *Goodridge v. Dep't of Health*, 798 N.E.2d 941 (Mass. 2003) (ruling that same-sex couples cannot be denied the benefits of marriage under the state constitution).

213. *Gay Rights*, *supra* note 7, at 255–56. That *Goodridge* was a Massachusetts Supreme Court case rather than a U.S. Supreme Court case doubtless contributed to its lesser impact as well.

214. For the background of the decision by an attorney involved in the *Goodridge* litigation, see Mary Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1 (2005) (describing the political and legal ramifications of the *Goodridge* decision in Massachusetts and nationwide). Some of these cases include *Lockyer v. City of San Francisco*, 95 P.3d 459 (Cal. 2004) (invalidating the Mayor of San Francisco's decision to issue marriage licenses to same-sex couples without a judicial determination that the statute defining marriage was unconstitutional); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (upholding a ban on same-sex marriage but finding that same-sex couples entitled to benefits of marriage); and *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (finding a ban on same-sex marriage constitutional).

legal and structural issues in question,<sup>215</sup> some of which echo the themes of order and chaos I have discussed here,<sup>216</sup> and I do not wish at this time to add to these substantive debates on the merits. Yet whatever the policy perspective, discussions of “traditional marriage” (and whatever its opposite is said to be) are impoverished without a theoretical matrix for understanding the dynamics of tradition and change in religious communities. One often hears the “left” ridicule the “right” for its hyperbolic statements that same-sex marriage threatens traditional marriage, as if men married to one another were a legion of doom plotting against heterosexual couples. But insofar as “traditional marriage” is a particular socio-religious construct of Stage Four mythic religion, then same-sex marriage, which is a socio-religious construct of Stage Five liberalism and Stage Six progressive religion, does indeed “threaten” the earlier form; it threatens to supplant it with a later understanding not only of marriage, but of religion itself.<sup>217</sup>

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215. For an analysis of opposition to same-sex marriage, see Josephine Ross, *Sex, Marriage, and History: Analyzing the Continued Resistance to Same-Sex Marriage*, 55 SMU L. REV. 1657 (2002) (posing a theoretical model of how gay couples are “sexualized” by society, and thus opponents of same-sex marriage focus on the sexual acts between the partners as grounds for opposition to gay marriage). For an analysis in favor of legalizing same-sex marriage, see Erwin Chemerinsky, *Same-Sex Marriage: An Essential Step Towards Equality*, 34 SW. U. L. REV. 579 (2004) (describing how bans on same-sex marriage violate the Equal Protection Clause). On civil unions and gay marriage, see Greg Johnson, *Civil Union: A Reappraisal*, 30 VT. L. REV. 891 (2005) (describing the political impact of civil unions and the continued drive for full marriage equality in Vermont).

Some scholars advocate abolishing civil marriage altogether. See Edward Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2005). But see Maggie Gallagher, President, Inst. for Marriage and Pub. Policy, Keynote Address at the Regent University Symposium: Moral Realism and the Renaissance of Traditional Marriage (Nov. 8, 2004), in 17 REGENT U. L. REV. 185 (2004) (describing the sociological function of traditional marriage, which would be undermined by the legalization of same-sex marriage, and holding that the true benefits of marriage are not legal); McClain, *Love, Marriage, and the Baby Carriage*, *supra* note 29, at 2181–82; Rauch, *supra* note 34 (arguing that marriage serves vital functions by constraining male promiscuity and ensuring help-mates for times of distress).

For overviews of the struggle for same-sex marriage, and the necessity of federally-recognized marriage for parity in employment, antidiscrimination, and other areas of law, see Dean Agnos, *Employee Benefits and the Paradox of Same-Sex Marriages and Equal Rights*, 8 U. PA. J. LAB. & EMP. L. 543 (2005).

216. See, e.g., George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581 (1999); Lynn D. Wardle, *Is Marriage Obsolete?*, 10 MICH. J. GENDER & L. 189, 223–24 (2003).
217. See Feldblum, *Moral Conflict*, *supra* note 51, at 69–79 (discussing gradual evolution in moral-religious thinking about homosexuality, and the “belief liberties” of those



Of course, such a transformation may be desirable. Stage Four mythic religion, after all, is pre-democratic (Stage Five) and pre-pluralistic (Stage Six). It is not susceptible to rational inquiry (Stage five) and is precisely what Locke sought to separate from orderly democratic government. So there are good reasons why a pluralistic democracy would seek to circumscribe its influence, particularly when its non-rational and impermeable norms are yoked to the power of the state.<sup>218</sup> But let us not deny that same-sex marriage is a transformation. It is just that: specifically, a transformation from Stage Four mythic religion to Stage Five or Six post-mythic religion. In this light, the Christian Right's perception of itself as an embattled minority is not entirely paranoid. Moving from Stage Four to Stage Five or Six does look, from Stage Four's perspective, like a battle, even a "culture war"—though from Stage Five especially, the war is often undeclared.

All gay rights issues are not created equal, and my theoretical claim is that those that represent significant transformations in religion itself are more equal than others, a claim borne out by the disparities in policy positions cited above, and by the pattern of popular rejection of same-sex marriage, even in relatively moderate states and even in the context of a presidential election won by the Democratic party. Is the battle for same-sex marriage really the right one to fight? I leave that question for the strategists. Whatever the answer is, it is imperative at least to recognize that what is being changed is not purely a matter of politics or constitutional law, but of religion itself.<sup>219</sup> Even if same-sex marriage is worth the political struggle, the tools best suited to the job of advocacy will be those appropriate to the subject matter: religious reasoning, to an extent, but more importantly, as I describe in the next section, transformative religious experience. Advocates of gay rights must embrace the moral and the religious, because that is how most people seem to conceive of the issue. Abdicating the terms of Stage Four morality in favor

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who do not approve of it); Linda McClain, *The Evolution—or End—of Marriage?: Reflections on the Impasse Over Same-Sex Marriage*, 44 FAM. CT. REV. 200 (2006).

218. For example, religious norms may be incompatible with democracy because they cannot be tested and are not compatible with publicly accessible reasons. See sources cited *supra* note 155.

219. *But see* ESKRIDGE, *supra* note 183, at 52–60 (arguing that normalizing homosexual behavior according to existing marriage conventions improves gay people's lives and increases societal acceptance); Chai Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 141 (2005) [hereinafter Feldblum, *Gay is Good*] (arguing that "the debate around whether same-sex couples should be permitted to marry is as good a place as any to start" and that marriage provides an appropriate opportunity to make the moral case for homosexuality); Rauch, *supra* note 34, at 298–308.

of Stage Five liberalism or Stage Six identity politics is to fail to engage in the same conversation.<sup>220</sup>

This tendency to regard religious-legal questions as purely legal in nature stems from the way church/state questions are usually framed, which is how law conceives religion, rather than as how religion conceives law. As Robert Cover magisterially demonstrated, we live in worlds (plural) ordered and given value by law.<sup>221</sup> Public law does not merely arbitrate between different *nomian* universes; it is jurispathic as well as jurisgenerative, it can destroy as well as preserve.<sup>222</sup> In a Coverian sense, law is itself a religious force, even laws which, from a conventional perspective (Stage Four) 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.”<sup>223</sup> 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 (Stage Five) 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.

We do not move from mythic to post-mythic by pretending the change is not there, or by agitating for it in terms inappropriate to the task. I have suggested that the reason same-sex marriage is so different from same-sex civil unions and same-sex antidiscrimination protection is that marriage represents a change in the meaning of religion itself. If this is correct, then different tools will be necessary than those of purely political or legal advocacy. But what are they?

### C. Going to Hell for the Sake of Heaven

As a religious queer Jew, I experience the Divine in love, eclipsed in the closet. Whatever my theology, my experience is that mythic picture of reality is simply not true. Experience has a tendency to shatter

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220. See Feldblum, *Gay is Good*, *supra* note 219, at 156 (characterizing liberal political arguments as “missing the boat”). For Feldblum, it is not possible to evade the issue of whether gay sex is good or bad, as liberal theorists try to do. My argument is similar, though oriented around religion, not morality generally.

221. Robert Cover, Foreword, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (“We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.”).

222. *Id.* at 40–43.

223. *Id.* at 9.

dogma—and experience is precisely how Stage Four is transcended.<sup>224</sup> Not just any experience, though—only the kind of searing, soul-shifting experiences that generally accompany the process of sexual self-understanding, coming to know intimately that sexuality is indeed a trait and that its repression is a form of alienation from the self. Indeed, the “closet” is entirely too cozy a metaphor for the net of deception, self-hatred, repression, and denial that constitutes the life of a hidden homosexual: try for a day to lie to everyone you know about something that is of the utmost importance to you; to scold yourself, bitterly, every time you feel an urge to eat, sleep, or use the restroom; to repress those urges until you are starved, exhausted, and wracked with pain. And then, if you like, repeat it every day until something breaks.

For me, as for many gays and lesbians who wrestled with their identities prior to “coming out,” the something that breaks is nothing other than the bulwark of mythic religion: the subservience of the self to God mediated by authority. At the time of that breakage, I feared that the whole edifice of traditional Jewish observance and belief would fall with it. This is what a stage transformation looks like before it occurs. Instead, what emerged, for me, was a new openness, a more honest religiosity, a rich, experiential, pluralistic religious consciousness. I left behind the mythic world that had become a prison, and, to my surprise, a new world appeared, in which the mythic structures of the past are not so much refuted as surpassed. They still remain, with all their majestic force and power, but as forms, as narratives, not as science or dogma.

This was not the result merely of a peak experience. Other mystics, of course, reach the opposite conclusions. They may have the same experiences (states), but they interpret them according to different categories of myth, nation, and Scripture (stages), and thus reach different, even terrifying, results. God loves us, therefore God *really* wants gay people to repent and become straight. Allah loves us, therefore Allah *really* wants the evil empire to be destroyed. The land is holy, therefore

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224. This is, of course, why experiential religious forms such as mysticism are feared and circumscribed by traditional religious normative structures. At the same time, the *anomian* experiential element is an irreducible component of the sorts of truth such mysticism seeks to reveal, for experience is the only way to “prove” its assertions. See KEN WILBER, *EYE TO EYE: THE QUEST FOR THE NEW PARADIGM* 33 (1983) (“When someone asks ‘Where is your empirical proof for transcendence?’ we need not panic. We explain the instrumental methods of our knowledge and invite him or her to check it out personally. Should that person accept and complete the injunctive strand, then that person is capable of becoming part of the community of those whose eye is adequate to the transcendent realm. Prior to that time, that person is inadequate to form an opinion about transcendental concerns. We are then no more obliged to account to that person than is a physicist to one who refuses to learn mathematics.”).

the land must be ours. George W. Bush is a mystic too, with a personal, mystical relationship with God. The naive cliché that spiritual practice will naturally lead to “compassionate” liberal political values is simply not true.

The truth is that transitory religious experiences are relatively cheap. Chant a mantra for four hours, or dance ecstatically, or pray or meditate for a few days, or take psychedelic drugs, and powerful and *potentially* transformative states will result. But the type of transformation they effect depends not on the state alone, but also on the *stage* of one's religious development. And moving through stages is expensive; the price is often deep personal pain.

There is a moment in *Huckleberry Finn* where Huck realizes he has a choice. He's been told all his life that if he hides runaway slaves, he will go to hell. But he's gotten to know Jim, a runaway slave, as a human being. What does he do—conform with his mythic religion, or listen to his heart? Huck's decision—“All right, then, I'll *go* to hell”<sup>225</sup>—is the epitome of moving from one stage to the next. The old mythic structure is discarded, and the real work of conscience begins. This is what happened to Paul himself, on the road to Damascus: an old religious structure crumbles in the face of shattering and unmistakable experience.<sup>226</sup>

But how can such experiences take place on a large scale, if they are more than mere experiences and require such investment of the self? And what is the proper role for such radical subjectivity in a consensual system of law and communication?

First, while only with a sustained personal encounter like Huck's with Jim is a human reality strong enough to force ideas until they break, such encounters are increasingly a part of our ordinary civic life. Media-mediated images of children in Alabama being sprayed by fire hoses, the gay teenager who kills himself, Rosa Parks, Matthew Shepard, Huck Finn, *Brokeback Mountain*—these are not theories and theoreticians, but people with narratives strong enough to dislodge ideas, and they are increasingly accessible.<sup>227</sup> Complementing such “negative” images must be, as Chai Feldblum has pointed out, a positive

225. MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* 271 (Walter Blair & Victor Fisher eds., Univ. of Cal. Press 1996) (1884).

226. On the relationship between religious value and transformative peak experience, see ABRAHAM H. MASLOW, *RELIGIONS, VALUES AND PEAK-EXPERIENCES* 24–29 (Penguin Books 1970). Maslow's text itself is a manifesto of Stage Six individualistic mysticism as against both Stage Five scientism and Stage Four dogma.

227. See Becker, *supra* note 6, at 208–09, 211–12 (citing SUZANNA DANUTA WALTERS, *ALL THE RAGE: THE STORY OF GAY VISIBILITY IN AMERICA* 3 (2001), and listing television shows featuring GLBT people).

moral/religious case for homosexuality as a path to love and sacredness, and, in my view, such a case may only be made on the basis of personal experience and testimony.<sup>228</sup> Simply knowing someone gay may be powerful enough for some; over the last twenty years, in which condemnation of homosexuality has fallen from 78% to 57%, and the number of people who said sexuality was a trait rather than a choice rose from 16% to 32%, the number of people who said they knew no gays or lesbians dropped from 54% to 27%.<sup>229</sup>

In other words, what is required is a shift in what we consider relevant to our legal and religious-legal conversations. If what seems to be a political/legal conversation is in reality one about the meaning of religion, then what is needed is not waving the flag of civil liberties, or demanding that people fence their religion into “private” places. Nor is it the closeting of our spiritual selves, even as we “out” our sexual ones. Such a conversation requires us to engage the Religious Right in their abandonment of polite conversation; to carry on the same kinds of religious conversations the Right does, with our full selves on view; and to take up the religious imperative to testify, to tell stories, and, on a personal level, share the heartbreaking honesty of the real. What is required is not third person argumentation but first-person testimony.

In a sense, these are religious imperatives, but they are also how law constitutes itself as well. As Cover put it:

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228. Feldblum, *Moral Conflict*, *supra* note 51, at 62–85; Feldblum, *Gay is Good*, *supra* note 219, at 144–56. As should be clear, I agree with Feldblum that the case for homosexuality should be a positive moral one, not just a negative liberal case for formal equality. I would add, however, that such a case cannot be made primarily philosophically or politically, or even in terms of the “human needs and capabilities for sex, care, and affection,” Feldblum, *Gay is Good*, *supra* note 219, at 177 (quoting CARLOS BALL, *THE MORALITY OF GAY RIGHTS: AN EXPLORATION OF POLITICAL PHILOSOPHY* 109 (2003)), because the moral issues involved are, for most Americans, religious in nature.

229. *Gay Rights*, *supra* note 7, at 235–36 (citing the Los Angeles Times Poll and the Gallup Poll). *Accord* KAISER FAMILY FOUNDATION, *Inside-OUT: A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC’S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION* 8 (2001) [hereinafter *Inside-OUT*], available at <http://www.kff.org/kaiserpolls/upload/New-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Public-sViews-Related-to-Sexual-Orientation-Report.pdf> (showing that in 2000, 73% quarters of respondents said they knew a gay or lesbian person, up from less than 25% in 1983 and 10% in 1969). On the relationship between personal knowledge of gay or lesbian people and ideological opinions about gay rights, see *Gay Rights*, *supra* note 7, at 251–53; see also Feldblum, *Moral Conflict*, *supra* note 51, at 79 (citing a poll showing that in 1992, 9% of respondents said that someone in their family was gay or lesbian, and that in 2003, 23% did).

The codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative. . . . To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the 'is' and the 'ought,' but the 'is,' the 'ought,' and the 'what might be.' Narrative so integrates these domains. Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms.<sup>230</sup>

Normative law itself is a narrative and as such has its own plot and symbolic meaning. But as narrative, it is susceptible to narrative, to interruptions in the plot and shifts in symbolic referent. A change in the meaning of religion is a change in the *nomos* that religion creates—and vice versa. And yet such changes need not involve revelations from the sky; as in Huck Finn's narrative, they are occasioned merely by the presence of the Other, the jurisgenetic potential of alterity.<sup>231</sup>

Truly to confront the Other, however, requires that the Other be present, i.e., not to "cover," to echo Kenji Yoshino's recent work on the way gays and lesbians (and others) are forced to "cover" their identity or to "pass" as the majority, even if they are no longer required to convert to it.<sup>232</sup> Obviously, some degree of covering is required for cooperative endeavors to exist; we cannot be our full selves all the time. Yet ironically, what is often "covered" in public discourse of so-called "moral issues" are the very factors that are necessary to move the conversation forward: personal narrative, personal experience, and personal transformation.<sup>233</sup>

230. Cover, *supra* note 221, at 10.

231. On the ethics of alterity as applied to jurisgenesis, see Jay Michaelson, *In Praise of the Pound of Flesh: Legalism, Multiculturalism, and the Letter of the Law*, 6 J. L. SOCIETY 98, 139–42 (2005) (discussing Levinas, *supra* note 194, at 109).

232. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 76–107 (2007). See also Backer, *supra* note 22, at 586–90 (discussing negative stereotypes of "flouting" sexual nonconformity); Knauer, *supra* note 8, at 482–83.

233. In this regard, I am in partial agreement and partial disagreement with Susan Becker's claim that "transformational learning" is a gradual process of "critical self-reflection of assumptions." Becker, *supra* note 6, at 200–07. While I agree with Becker that the greater visibility of GLBT people is causing a shift in attitude, and that a larger-scale shift in "meaning perspectives" is required, I am less of the opinion that critical reasoning and discourse plays a central role. Given the religious nature of the ideologies in question, I see religious events such as peak experiences and personal encounters are more determinative, and more of a crisis, for believers. See also Feldblum, *Moral*

Luckily, the time is right: the anarchic rhetorical structures of contemporary American religious and political discourse are precisely about personal narrative, personal experience, and personal transformation. So are the religious values and narratives of evangelical Christians, who, as I have already once mentioned, are uniquely disposed to value individual testimony, introspection, and review of cherished beliefs. Of course, my personal relationship with God is hardly the province of typical liberal discourse; it is, indeed, the antithesis of it. But it is the only way to carry forward the conversation. Will civil discourse suffer as a result? I'm not sure—but whatever its suffering is, it doesn't need the company of stifled, closeted gays and lesbians.

The move from stage to stage takes place when the force of experience compels it.<sup>234</sup> Ironically, this process of religious development is one in which religious gays and lesbians have ourselves modeled. To be a self-accepting gay or lesbian person, one generally must go through a certain process of negation and affirmation. First, in homophobic societies, one is told that how one loves is wrong—and often one believes it, sometimes, as I did, over many years of repression, self-loathing, and desperately trying to make things other than as they are. Then, at some point, to live a full life, one must learn for oneself that these statements are wrong, and that love is right. This inversion teaches, in an experiential way, the primacy of love, and is itself a font of poetry, art, and fullness of heart. As with Huck Finn, it also may entail a rejection of one's Stage Four mythic religious upbringing. But sometimes, it is followed by a third phase: a development of a unique mystical conscience, in which one has learned directly and immediately what it is to love, and then applies that love to God, "with your whole heart and might."<sup>235</sup> This process, in its different forms, engenders the queer mysticism we read in Rumi, Hafiz, and Judah Halevy; the poems of Whitman, Wilde, Sappho, and Shakespeare; the art of Michelangelo and da Vinci.

In other words, at first, the religious lesbian or gay man loves religion and, thus, hates her- or himself. Then she or he affirms the self and may hate religion. But sometimes, the two are reconciled. Yet even if this third option is chosen, gay religious consciousness is necessarily distrustful, because it has seen—and, more importantly, felt—how rules, codes, and even the operation of conscience itself can actually be tools of op-

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*Conflict*, *supra* note 51, at 100–122 (discussing belief liberties and ideological change).

234. Likewise the effort to make an intra-stage reevaluation, as in the case of slavery discussed earlier, is compelled by experience. No amount of hermeneutical skill will succeed if there is not the urgent motivation to accept it.

235. *Deuteronomy* 6:5.

pression and self-repression. It has known the reality of love and its repression. It will never go back. Of course, straight people may come to these realizations also. But religious gay people must.

Thus, when I turn to legal text, I do so with all of these understandings: with my distinctive approach to the text, with my embrace of love as religiously essential, and with my appreciation of love as ultimately valid. It is not difficult for clever scholars to find ways to prohibit and permit; indeed, to permit something explicitly prohibited in the Torah is said to be a prerequisite to be admitted to the Sanhedrin.<sup>236</sup> With proof-texts, everything is possible: bring in *Leviticus'* prohibition against anal intercourse, and I will bring in the love between David and Jonathan. Tell me about sexual governance, and I will remind you that "it is not good for man to be alone."<sup>237</sup> Cite from *Joshua*, and I will quote *Isaiah*. Rather, the question is *how* we are to read, *how* we interpret even our deepest spiritual experiences. In light of the plasticity of rational reasoning, the emotive/cognitive conditions in which we first approach the text become paramount, and the legal-hermeneutical process is itself conditioned by them.

This reconfigures the legal question, which now becomes less about the particulars of interpretation than about the nature and foundations of the interpretive act itself. What forms of evidence are useful in this legal debate? Ought I remain in the third-person analytical frame of the majority of this Article, or ultimately, is it essential to enter a different, more narrative mode of exposition in order to conclude it? Are we convinced of the truth of love, or do we continue to doubt it? And if we are, are we commanded, as the Talmudic sages felt themselves to be with regard to the "rebellious son" and other troubling Biblical laws, to read radically in order to guard the Bible conservatively?

The transformation progressives are asking for from our traditionalist counterparts is a deep one: it is to move from literal to figurative, from certain to uncertain, from simplicity to complexity. And yes, even from order to chaos—or at least, to a place in which the neat dichotomization of reality no longer holds sway over the emotional life. But there is no choice. Mythic religion will never accept sexual pluralism, because sexual pluralism undermines the idea of order, and subverts authority. Such chaos looks like the end of religion. And yet, the tragic and beautiful truth is that it is really the doorway to a new beginning, practically begging to be unlocked. Or broken down, by the force of joy or tears. ❁

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236. *BT Sanhedrin* 17a; see also *JT Sanhedrin* 4:22a.

237. *Genesis* 2:18.



