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RETHINKING RELIGIOUS OBJECTIONS (OLD-TESTAMENT BASED) TO SAME-SEX MARRIAGE

Doron M. Kalir*

ABSTRACT

In Obergefell v. Hodges, the Supreme Court closed the door on one issue only to open the floodgates to another. While recognizing a constitutional right for same-sex marriage, the Court also legitimized religious objections to such unions, practically inviting complex legal challenges to its doors. In doing so, the Court also called for an "open and searching debate" on the issue. This Article seeks to trigger such debate.

For millennia, objections to same-sex marriage were cast in religious and moral terms. The Jewish Bible ("Old Testament"), conventional wisdom argues, provided three demonstrable proofs of the Bible's abhorrence of same-sex intimacy: Genesis' Story of Creation, the tale of the City of Sodom (after which the dreadful term "sodomy" was coined), and the Levitical prohibition on same-sex intimacy. All three have reached near-axiomatic level over the years.

This Article, however, offers a fresh look into these axioms, questioning their very validity. The conventional interpretation, it argues, fails to read the text in its proper context. It also fails to acknowledge the basic premise—the three "organizing principles" on which the entire Jewish Bible is founded. Accordingly, a new, narrower and more congruent interpretation is offered, which properly recognizes the dignity, equality, and empathy of the original text.

Religious objections to same-sex marriage are not merely academic. They have inflicted tremendous injury on members of the LGBTQ community. It is time to put those behind. The "open and searching debate" the Court has called for should instruct us all to move towards a more just, fair, and open society.

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

—James Madison

INTRODUCTION

In its seminal Obergefell v. Hodges, the Supreme Court closed the door on one issue only to open the floodgates to another. Recognizing a constitutional right to same-sex marriage, the Court undoubtedly announced "even more

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than a landmark civil rights decision.\(^3\) Yet the Court intentionally left open the issue of religious objections to such marriages, practically inviting complex legal challenges to its doors.\(^4\) In doing so, Justice Alito has warned "that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."\(^5\) Justice Kennedy, for the Court, replied that "those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate."\(^6\) This article is an attempt to ignite such "open and searching debate."

To state the obvious, objections to same-sex intimacy were cast for millennia in religious and moral terms. The Supreme Court, for the most part, not only refused to challenge such perceptions but appeared to condone them.\(^7\) This article argues, however, that traditional religious objections to same-sex marriage that rely on the Hebrew Bible (“Old Testament”) are far from well founded. Those objections, in large part, have little support in the text. They have even less support when properly read in context. And they have the least support when considered against the interpretive organizing principles of the Hebrew Bible. Accordingly, the article argues, the logical conclusion must be that nothing in the biblical text suggests objection—religious, moral, or otherwise—to same-sex intimacy, or, as a result, to same-sex marriage.

The article proceeds in three parts. Part I introduces the subject-matter of the “open and searching debate” on religious objections to same-sex marriage. It begins with a brief survey of pertinent Supreme Court statements on the issue. It then continues with a presentation of three main objections to same-sex marriage as they appear in the biblical text: the story of Creation; the Tale of the City of Sodom (after which the dreadful term “Sodomy” was coined); and the Levitical (alleged) prohibition on, and imposition of the death penalty for, homosexual intimacy. It concludes with a short note on the enormous cost exacted by these religious objections on members of the LGBTQ community.

Part II is a primer on reading the Jewish Bible as legal text. This part argues that since the biblical text carries legal ramifications—or, at the very least, since many a legal decision were influenced by, if not entirely based upon, ideas imbedded in the biblical text—it should be interpreted as a legal text. Among other things, such classification entails contextual reading, as part of the whole edifice, rather than reading each verse in isolation (as has been the case until now). In addition, each verse should be interpreted according to three organizing principles governing the entire Torah: first, the notion that every person was created in the Image of God (“equality”); second, that the principle that each of us should treat our fellow persons, or “neighbors,” as ourselves (“dignity”); and finally, the principle that biblical interpretation is a human, majority-based—rather than divine—endeavor (“democracy”).

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5. Obergefell, 135 S. Ct. at 2642–43 (Alito, J. dissenting) (emphasis added). It is the humiliating treatment of homosexuals, rather than their detractors, by “governments, employers, and schools” throughout history that is well documented; Justice Alito’s remark, turning the tables on historical facts, is nothing short of breathtaking. See infra, Section I.G.
6. Id. at 2607 (emphasis added).
7. See infra Section I.A.
Armed with these insights, the article turns back—in Part III—to the religious objections introduced in Part I. Reexamining each of them, the article concludes that the first two objections—the Story of Creation and the Tale of Sodom—lack any textual support for the claim they purport to represent. Neither mentions, let alone forbids, same-sex intimacy. Further, there is no reason in logic or in principle to read them as objecting to same-sex intimacy. Finally, the current objections fail to correspond to any of the organizing principles just identified, let alone to all three. Thus, both stories should be rejected as grounds for religious objection to same-sex intimacy. The third Biblical premise—the Levitical prohibition—presents a more serious interpretive challenge. On its face, it contains a clear textual prohibition on same-sex intimacy. Yet read properly in context, and in particular light of the three organizing principals, that objection, too, fails. Instead, the interpretive process leads to the conclusion that the correct reading of the Levitical prohibition should apply only to intra-family, incestuous homosexuality. Once all three religious objections are presented in their new interpretive light, I conclude by pointing to several advantages of such understanding of the Biblical text.

I. "OPEN AND SEARCHING DEBATE" ON RELIGIOUS OBJECTIONS

A. The Supreme Court and Religious Objections

Obergefell's clarion call to engage in "open and searching debate" was not the Court's first foray into the subject of religious objections to same-sex marriage. Far from it. In fact, nearly every time the Court dealt with any aspect of LGBTQ right it either acquiescently affirmed, or felt compelled to add, a "moral" dimension to its legal opinion. Those "moral" admonitions, as Geoffrey Stone persuasively demonstrated, were a thinly veiled cover for the Justices' religious beliefs. Thus, the Court has not only been engaging in that "open and searching debate" for years, but, to a large extent, contributed to shaping it. Some examples may be helpful.

1. The Early Cases

The early cases, also known as the "dark ages" of LGBTQ litigation, began somewhat surprisingly with a same-sex marriage case. In 1971, Jack Baker, a University of Minnesota student, asked to marry his male partner. The Minnesota Supreme Court refused. In a brief opinion, the court invoked the Bible to explain that "the institution of marriage as a union of man and woman ... is as old as the book of Genesis." Affirming, the Supreme Court dismissed the

8. See Geoffrey R. Stone, Sex and the Constitution xxvii-xxxii (2017) ("[O]ur social mores and our laws governing sexual behavior are deeply bound up with religious beliefs and traditions ... A central theme of Sex and the Constitution is that American attitudes about sex have been shaped over the centuries by religious beliefs—more particularly, by early Christian beliefs—about sex, sin, and shame. A nettlesome question in constitutional law is how courts should cope with that history in a nation committed to the separation of church and state ... As an often furiously divided Supreme Court has wrestled with these issues, it has struggled to distinguish between religious conceptions of sin and morality, on the one hand, and constitutionally impermissible animus, on the other."); see also Annette Gordon-Reed, Our Trouble with Sex: A Christian Story?, N.Y. REV. OF BOOKS (Aug. 17, 2017) (book review), https://www.nybooks.com/articles/2017/08/17/trouble-with-sex-christian-story/ ("Writing confidently and expertly about several centuries of American laws regulating sex, Stone shows that the line between moral and religious reasoning was almost always illusory.").


Four years later, in 1976, the Court faced a challenge to the criminality of Virginia's sodomy law. Petitioners asked to declare such criminality unconstitutional. Denying the request, the District Court explained that "the longevity of the Virginia statute does testify to the State's interest and its legitimacy . . . . [I]t has ancestry going back to Judaic and Christian law." To emphasize the point, an accompanying footnote cited in full the two well-known verses from the Book of Leviticus allegedly prohibiting same-sex intimacy.

The Supreme Court affirmed in an even shorter decision, consisting all of two words.

The Court waited a decade before taking another same-sex case. Bowers v. Hardwick featured the Court's first reasoned treatment of the subject. At issue was another state law criminalizing same-sex intimacy. This time, however, the Court could not simply affirm by a single sentence as the lower court ruled in favor of the gay couple. The Hardwick Court split five-to-four, reversing the appellate court and holding the criminal prohibition constitutional.

Justice White's opinion for the Court drips with moral opprobrium. It begins with an incendiary framing of the question before the Court: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." It reminds us that "[p]roscriptions against that conduct have ancient roots." It goes on to compare consensual same-sex intimacy to "adultery, incest, and other sexual crimes." Concluding, White notes that "[t]he law . . . is constantly based on notions of morality, and if
all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 26

Chief Justice Burger's concurrence 27 was even more infused with religious zeal:

As the Court notes, the proscriptions against sodomy have very "ancient roots." . . . Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching. 28

Justice Blackmun's dissent (for four justices) presents a moral polar opposite. It begins by re-framing the issue, calling upon Justice Brandeis' memorable formulation of the right to privacy:

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than [Stanley v. Georgia] was about a fundamental right to watch obscene movies . . . Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." 29

Not hesitating to confront the moral controversy head on, Blackmun continued:

But the fact that the moral judgments expressed by statutes like [the Georgia law] may be "natural or familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." 30

Turning to the Biblical language itself, Justice Blackmun reminded us how important the division is between church and state:

The assertion that "traditional Judeo-Christian values proscribe" the conduct involved cannot provide an adequate justification for [the Georgia law]. That certain, but by no means all, religious groups condemn the behavior at issue, gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that [the Georgia law] represents a legitimate use of secular coercive power. A state can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. 31

26. Id.
27. See Stone, supra note 8, at 478 (describing Burger as "[a] lifelong Presbyterian, who was clearly disturbed by the very existence of Hardwick's claim").
29. Id. at 199 (Blackmun, J., dissenting) (citations omitted) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
30. Id. (alteration in original) (quoting Oliver W. Holmes, The Path of the Law, 10 HARV. L. REV. 457, 469 (1897)).
31. Id. at 211-12 (alteration in original) (footnote omitted) (citations omitted); see also id. at 216 (Stevens, J., dissenting) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."). Years later, Justice Kennedy—writing for the Court—would quote this dissent and remark: "Justice
2. The Kennedy Era

The year 1996 marked a turning point for same-sex jurisprudence. It was not only the first year same-sex activists prevailed in a Supreme Court battle in their decades-old fight; it also marked the first time Justice Anthony Kennedy authored the opinion for the Court. A new era was ushered in: no longer were same-sex acts—and same-sex activists—seen as a judicial pariah; they were now treated with dignity, equality, and respect. And Justice Kennedy was this era’s main architect.

A devout Catholic, Justice Kennedy tended to keep a strict separation of “church and state” in his judicial opinions; indeed, one will be hard-pressed to find a biblical quote or a reference to the “Judeo-Christian tradition” in his treatment of LGBTQ rights. Yet the introduction of Kennedy’s approach did not quite eliminate the moral and biblical condemnation from the Court’s opinions; rather, they were simply relegated to the dissent. Thus, in one dissenting opinion after another, Justice Scalia and other Justices reminded their readers of the moral and religious abomination associated—in their mind—with such acts.

The first Kennedy-era case was Romer v. Evans. There, three Colorado cities passed laws proscribing discrimination based on sexual orientation. The State of Colorado, by a constitutional amendment, repealed these local laws. Writing for a six-to-three Court, Justice Kennedy immediately signaled the new direction in which the Court was heading: “The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination . . . .” This, Kennedy reasoned, cannot be tolerated by the Constitution: “We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do.”

This tolerant, forward-looking, and dignifying view was not shared by all. Justice Scalia, who was joined by Chief Justice Rehnquist and Justice Thomas, began his dissent with a reference to a distant past: “The constitutional amendment before us here is not the manifestation of ‘bare . . . desire to harm’ homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the effort of a politically powerful minority to revise those mores through use of the laws.” Echoing earlier comparisons by the Court to other crimes, Scalia went on:

I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even “ani-

Stevens’ analysis, in our view, should have been controlling in Bowers and should control here.” Lawrence v. Texas, 539 U.S. 558, 578 (2003).

33. Adam Liptak, Surprising Friend of the Gay Rights Movement in a High Place, N.Y. TIMES (Sept. 1, 2013), https://www.nytimes.com/2013/09/02/us/surprising-friend-of-gay-rights-in-a-high-place.html (quoting Professor Michael Dorf, a former clerk, as saying “what Earl Warren was to civil rights and what Ruth Bader Ginsburg was to women’s rights, Kennedy is to gay rights”).
34. See, e.g., Toobin, supra note 21, at 224 (“[Justice Kennedy was] a conservative man by most definitions of that term. A devout and observant Catholic, he needed no instruction in the religious and moral prohibitions on homosexual conduct. He was, simply, a man who had been transformed by the changing world around him.”). But see Bruce Allen Murphy, Scalia: A COURT OF ONE 152 (2014) (“Unlike Scalia’s devoutly conservative Catholic immigrant father, Kennedy was raised by Catholic parents based in the more openly inclusive religious mores of Sacramento, California.”).
37. Romer, 517 U.S. at 627.
38. Id. at 635.
39. Id. at 636 (Scalia, J., dissenting) (citation omitted).
mus" towards such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in Bowers.40

Justice Scalia did not stop at comparing same-sex intimacy with murder. He reminded us of "the view that homosexuality is morally wrong and socially harmful;"41 he presented arguments on behalf of those who wish to retain the social disapproval of homosexuality;42 he called the amendment a "reasonable effort to preserve traditional American moral values;"43 and he concluded by noting that the amendment in question "is designed to prevent piecemeal deterioration of the sexual morality favored by the majority of Coloradans .... "44 Alas, his was only the dissenting view.

Seven years after Roemer, in 2003, it was time to revisit Bowers and the criminalization of same-sex intimacy itself. Lawrence v. Texas45 did just that. Justice Kennedy authored the opinion overruling Bowers. Again, Justice Scalia wrote the dissent, vehemently objecting to the new moral order.

Typically, Kennedy's opinion in Lawrence is based on liberty rather than biblical references; on freedom rather than sexual mores; and on privacy rather than moral opprobrium. Still, in order to overrule Bowers, Kennedy had to tackle the moral, canonical, and biblical implications of the opinion. To do so, Kennedy first confronted Bowers' assertion that "proscriptions against that conduct have ancient roots."46 That was factually wrong, Kennedy declared: "[F]ar from possessing 'ancient roots,' American laws targeting same-sex couples did not develop until the last third of the 20th Century."47 But time was never the real issue, and Kennedy knew that:

It must be acknowledged, of course, that the Court in Bowers was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."48

Justice Kennedy then addressed Chief Justice Burger's concurrence. He noted that:

As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by the Chief Justice Burger

The sweeping references by Chief Justice Burger to the history of Western Civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in the opposite direction.

40. Id. at 644.
41. Id. at 645.
42. See id.
43. Id. at 651.
44. Id. at 653.
47. Lawrence, 539 U.S. at 570 (citations omitted).
48. Id. at 571 (emphasis added) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)).
Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in Bowers would deny them this right. 49

Kennedy then concluded: "[Bowers'] continuance as precedent demeans the lives of homosexual persons . . . Bowers was not correct when it was decided, and it is not correct today. . . . Bowers v. Hardwick should be and now is overruled." 50

Justice O'Connor, concurring, also commented on the moral dimension of the case:

This case raises a different issue than Bowers: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute than bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. 51

And she concluded: "A law branding one class of persons as criminal based solely on the State's moral disapproval of that class . . . runs contrary to the values of the Constitution." 52

Justice Scalia, again dissenting with Justices Rehnquist and Thomas, continued his crusade against the morality of same-sex intimacy:

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable"—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity . . . . The Court embraces [today] Justice Stevens' declaration in his Bowers dissent, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." This effectively decrees the end of all morals [sic] legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review. 53

It is then that Justice Scalia went on a tirade, which, unfortunately, became infamous in the annals of LGBTQ jurisprudence:

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.

. . . It is clear from this that the Court has taken sides in the culture war . . . . Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. 54

Fortunately, this "lifestyle"-based opinion was rejected by the Court.

49. Id. at 571–74.
50. Id. at 575–78.
51. Id. at 582 (O'Connor, J., concurring).
52. Id. at 585.
53. Id. at 599 (Scalia, J., dissenting) (citations omitted) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).
54. Id. at 602.
Twelve years following Lawrence, in 2013, the Court heard the case of Edith Windsor, who lawfully married her same-sex partner according to state law. Federal law, however—the Defense of Marriage Act ("DOMA")—denied her recognition of this marriage. The question before the Court was whether DOMA was constitutional. Writing for a five-to-four Court, Justice Kennedy held it was not:

DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.55

Justice Scalia's dissent was, at this point, all but predictable. Joined in full only by Justice Thomas, and in part by Chief Justice Roberts, Scalia begins his opinion by quoting his Lawrence dissent, where he stated that "the Constitution does not forbid the government to enforce traditional moral and sexual norms."56 He then asserted that he was willing to cast aside "traditional moral disapproval of same-sex marriage (or indeed of same-sex sex)," for "perfectly valid—indeed, downright boring—justifying rationales for [DOMA]."57 Scalia continued by claiming that "to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements . . . ."58 Reflecting on history, he asserted that the institution of opposite-sex marriage had been "unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually of human history."59 Finally, Justice Scalia described the majority opinion as "a lecture on how superior the majority's moral judgment in favor of same-sex marriage is to the Congress's hateful moral judgment against it."60

The current last word on the legality of same-sex relations was provided in 2015, when the Court recognized the right to same-sex marriage. Obergefell v. Hodges, however, rarely discussed the morality of same-sex relations. Instead, it returned to the Levitical prohibition—and to the religious beliefs of those who support it—in a surprising way: the recognition of the right to marry, asserted the dissent, jeopardizes the religious freedom of those who oppose it.

Justice Kennedy's opinion for the five-to-four Court did not evade the issue:

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.62

Near the end of his opinion, no doubt in response to some of the concerns raised by the dissent, Kennedy addressed the issue once again:

56. Id. at 795 (Scalia, J., dissenting).
57. Id.
58. Id. at 797.
59. Id. at 798.
60. Id.
61. See 135 S. Ct. 2584, 2584.
62. Id. at 2602 (emphasis added).
Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.63

It is then that Kennedy makes his invite for "open and searching" debate.

The dissenting Justices were not convinced. The Chief Justice, for one, wrote:

Today's decision . . . creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution.

Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations. The majority graciously suggests that religious believers may continue to "advocate" and "teach" their views of marriage. The First Amendment guarantees, however, the freedom to "exercise" religion. Ominously, that is not a word the majority uses.64

Justice Scalia dedicated a major portion of his dissenting opinion—by now joined only by Justice Thomas—to religious concerns. He began with an astounding allegation: "[T]he majority's decision threatens the religious liberty our Nation has long sought to protect."65 He then goes on to survey the history of religious liberty in America, where marriage is not merely a civil union but "a religious institution as well."66 He then warns that "[i]t appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples."67 He then castigates the majority opinion as

[1]ndicat[ing] a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.68

Scalia ends this part of his dissent with a stern warning: "[T]he majority's decision short-circuits [the political] process, with potentially ruinous consequences for religious liberty."69

Similar concerns were raised by Justice Alito. Writing for three dissenters, he warned that the Court's opinion "will be used to vilify Americans who are unwilling to assent to the new orthodoxy."70 He noted that the majority "com­­­parses traditional marriage laws to laws that denied equal treatment for African-Americans and women,"71 adding that "[t]he implications of this analogy will be exploited by those who are determined to stamp out every vestige of dis-

63. Id. at 2607.
64. Id. at 2625 (Roberts, C.J., dissenting) (citations omitted).
65. Id. at 2638 (Scalia, J., dissenting).
66. Id.
67. Id.
68. Id. (citations omitted).
69. Id. at 2639.
70. Id. at 2642 (Alito, J., dissenting).
71. Id.
sent." He then concluded by assuming "that those who cling to old beliefs will be able to whisper their thoughts [only] in the recesses of their homes . . . ." It is now time to introduce these "old beliefs."

B. The Case for Religious Objections

As Harvard theologian Peter Gomes has noted, "among religious people who wish to take the bible seriously there is no more vexed topic today than that of homosexuality." That vexed topic, to the extent it relies on Old Testament text to justify religious objections to same-sex marriage, is rooted in three primary Biblical sources: The Genesis story of creation ("Adam & Eve, not Adam & Steve"); the tale of the City of Sodom (for which the dreadful term "Sodomy" was coined); and two verses in the Book of Leviticus, which seem to forbid entirely, and then threaten to punish by death, any act of same-sex intimacy between men. We turn now to briefly introduce the case for each of these religious objections.

1. The Genesis Story of Creation

The Genesis story of creation places heterosexual relations as its ideal. First, when God created man, He does so with an explicit emphasis on men and women: "So God created man in his own image, in the image of God created he him; male and female created he them." Indeed, God's very first order to the "male and female" he just created was to engage in heterosexual sex: "And God blessed them, and God said unto them, Be fruitful and multiply, and replenish the earth." Those verses prove—so goes the argument—that God intended to create "Adam and Eve, not Adam and Steve." The paradigmatic relationship described in the Bible is that of a man and a woman, not of persons of the same sex. Indeed, the text goes on to describe what today we consider as marriage between a man and a woman: "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh." That paradigm is not limited to humans, as the story of Noah's Ark proves, but rather to all animals: "And of every living thing of all flesh, two of every sort shalt thou bring into the ark, to keep them alive with thee; they shall be male and female." By creating a "man and a woman", by ordering them to "be fruitful and multiply", by describing opposite-sex marriage as the ideal; and by emphasizing the need for procreation for all living things—the story of creation clearly demonstrates the Bible's strong preference for opposite-sex relations and, concomitantly, its clear denunciation of other couple models, especially same-sex marriage.

72. Id.
73. Id.
75. Genesis 1:27 (King James). Unless otherwise noted, the translation from the Hebrew will follow King James Bible ("KJB") version. Small annotations in parenthesis, e.g., [And], will denote my corrections from the Hebrew original.
76. See Genesis 5:2 ("Male and female created He them; and blessed them.").
77. Genesis 1:28.
78. GOMES, supra note 74, at 149.
2. The Tale of Sodom

The second basis for religious objection to same-sex intimacy can be found in the Tale of Sodom. According to this argument, "[t]his story has been interpreted in Christian theology as revealing God's condemnation of same-sex sex."81 Indeed, "[t]he story of Sodom in Genesis 18 and 19 is generally accepted as the biblical source for prohibition against homosexual behavior . . . [It] is popularly believed to demonstrate God's abhorrence of homosexual acts and to embody his most profound prohibition against them."82 It also led to the coining of the (unfortunate) term "sodomy," likely by Peter Damian in the eleventh century,83 which was later used for criminalization of same-sex intimacy.

The tale of Sodom begins in Genesis Chapter 18, when God reflects on the sinful ways of its residents and considers whether to annihilate them all: "And the Lord said, Because the cry of Sodom and Gomorrah is great, and because their sin is very grievous; I will go down now, and see whether they have done altogether according to the cry of it . . . "84 Abraham, in turn, who is "standing before God," began to beg for the Sodom people's lives while engaging in one of the greatest moral arguments of all time: "That be far from thee to do after this manner, to slay the righteous with the wicked: and that the righteous should be as the wicked, that be far from thee: Shall not the Judge of all the earth do right?"85 The next chapter begins with another, though related, story: two persons—"angels" as they are described by the text86—arrive at Sodom, and are welcomed by Lot, Abraham's nephew. Much like his uncle, Lot is very generous to the strangers arriving at his door. He pleads with them to spend the night with him. While they initially refuse, they finally accept his invitation (after some persuasion). They then enter Lot's home, enjoy a proper meal, and prepare for the night. It is then that the "Sodom" story begins:

But before they lay down, the men of the city, the men of Sodom, compassed the house round, both old and young, all the people from every quarter: And they called unto Lot, and said unto him, Where are the men which came in to thee this night? Bring them out unto us, that we may know them. And Lot went out at the door unto them, and shut the door after him, And said, I pray you, brethren, do not so wickedly. Behold now, I have two daughters which have not known man; let me, I pray you, bring them out unto you, and do ye to them as is good in your eyes: only unto these men do nothing; for therefore came they

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81. STONE, supra note 8, at 14.
82. BYRNE FONE, HOMOPHOBIA 75–77 (2000).
83. See Michael Carden, Interpretation to Genesis, in THE QUEER BIBLE COMMENTARY 37 (Deryn Guest et al. eds., 2000). Incidentally, the identification of a geographic place with an LGBTQ tendency is not unique to the City of Sodom: The Greek island of Lesbos comes to mind, as well as the city of Florence in Italy. See, e.g., Claudia Roth Pierpont, The Secret Lives of Leonardo Da Vinci, NEW YORKER (Oct. 16, 2017), https://www.newyorker.com/magazine/2017/10/16/the-secret-lives-of-leonardo-da-vinci ("But the crime that the [Florence city] government was really trying to control was sodomy, so notoriously prevalent that contemporary German slang for a homosexual was Florene.").
85. The meaning of the term "Angels" (in Hebrew: "Mal'achim"), as used here, is not entirely clear. The Biblical text sometimes uses "Angels" to denote simple human messengers. See, e.g., Numbers 22:5 (The original Hebrew refers to "Mal'achim, while the KJB version translates as "messengers."). The reverse is also true: sometimes the Biblical text uses the term "man" to denote an angel, as in the story of Jacob's struggle with the Angel. See Genesis 32:25. Also, Abraham's welcoming of the three Angels—all described in the text as "men." See Genesis 18:2. Finally, sometimes divine angels are referred to as "angels of God," eliminating any interpretational doubt as to their identity. See, e.g., Genesis 28:12 (the story of Jacob's ladder).
under the shadow of my roof... And the [city people] pressed sore upon...
Lot, and came near to break the door.\(^{87}\)

Despite the standoff, the story ends well: the mystery guests save Lot and his family while hitting the mob surrounding the house with blinding lights. Later, the city is destroyed, while Lot and his family escape.\(^{88}\)

The religious-objection argument advanced by this story is that the men of Sodom—young and old—wanted to "know" the guests in the Biblical sense, \(i.e.,\) to have sex with them.\(^{89}\) Even Lot, goes the argument, knew that; why else would he offer his daughters, who had "not known man," to the angry mob? Clearly, the story is infused with moral opprobrium by God toward the town people who wanted to harm the guests in this specific, sexual manner. It is for \(that\) wrong that their city was destroyed by God. Clearly, goes the argument, such untoward behavior should be prevented for all time. Such actions, in fact, should be penalized and punished. These acts should be termed "sodomy."

3. The Levitical Prohibition on Same-Sex Intimacy

The third and final basis for religious objections to same-sex intimacy is the most direct. Two verses in the Book of Leviticus seem, at first blush, to completely prohibit any act of same-sex intimacy, and then to threaten those who perform such acts with the death penalty. In the Jewish tradition, these two verses created almost the sole basis for an entire edifice of anti-gay law.\(^{90}\)

The first verse is Leviticus 18:22. It states, in its entirety: "[And] Thou shalt not lie with mankind, as with womankind: it is abomination."\(^{91}\) The second verse is Leviticus 20:13. It states, in its entirety: "[And] If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them."\(^{92}\)

Here the argument is straightforward. It is textually-based. The Bible, the argument goes, clearly forbids same-sex intimacy. It even threatens death upon anyone who dares to engage in such acts. Surely, the argument goes, if same sex intimacy is prohibited, then same-sex marriage—which is premised upon such acts and are designed to perpetuate them—could not be tolerated.

C. The Cost of Religious Objections

The price that LGBTQ persons had to pay due to these religious objections, merely for the object of their love, is simply hard to fathom. Harvard psychologist Steven Pinker may have summarized it best by exclaiming that,

At least since Leviticus 20:13 prescribed the death penalty for a man lying with mankind as he lieth with a woman, many governments have used their monopoly on violence to imprison, torture, mutilate, and kill homosexuals. A gay person who escaped government violence in the form laws against indecency, sodomy, buggery, unnatural acts, or crimes against nature was vulnerable to vio-

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87. Genesis 19:4–9 (alteration in original).
89. See, e.g., Daniel A. Helminiak, What the Bible Really Says About Homosexuality 45 (Mill ed. 2000) ("The verb 'to know' occurs some 943 times in the [Hebrew Bible]. In ten of those cases the word has a sexual meaning. The present text [of the tale of Sodom] is one of those ten.").
90. See, e.g., Steven Greenberg, Wrestling with God and Men: Homosexuality in the Jewish Tradition 3 (2004) ("Two verses in the Torah (Lev. 18:22 and 20:13) have been understood for millennia to prohibit same-sex sexual relations between men. Since Orthodox Jews believe that the Torah is the word of God, the Levitical prohibition against sex between men has the full weight of divine authority.").
91. Leviticus 18:22.
lence from his fellow citizens in the form of gay-bashing, homophobic violence, and antigay hate crimes.93

Hatred against gay people is indeed so universal across space and time that it was shared by the most sworn of enemies. For example, very little could culturally unite Nazi Germany, which developed the Enigma code, and World War II Britain, home to Alan Turing who cracked it, other than the persecution of and animus towards gay men.94

This shameful history was shared, until very recently, by the United States. As Judge Posner explained in 2014:

Because homosexuality is not a voluntary condition and homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world, the disparagement of their sexual orientation, implicit in the denial of marriage rights to same-sex couples, is a source of continuing pain to the homosexual community.

... [U]ntil quite recently homosexuality was anathematized by the vast majority of... the American people.... Homosexuals had, as homosexuals, no rights; homosexual sex was criminal (though rarely prosecuted); homosexuals were formally banned from the armed forces and many other types of government work (though again enforcement was sporadic); and there were no laws prohibiting employment discrimination against homosexuals. ... [T]o avoid discrimination and ostracism they had to conceal their homosexuality and so were reluctant to participate openly in homosexual relationships or reveal their homosexuality to the heterosexuals with whom they associated. Most of them stayed “in the closet.” Same-sex marriage was out of the question, even though interracial marriage was legal in most states. Although discrimination against homosexuals has diminished greatly, it remains widespread.95

Thirty years earlier, John Hart Ely used similar terms in his seminal Democracy and Distrust to explain why such discrimination should receive strict scrutiny: “Homosexuals for years have been the victims of both ‘first-degree prejudice’ and subtler forms of exaggerated we-they stereotyping.... It is therefore a combination of the factors of prejudice [against homosexuals] and hideability [by them] that renders classifications that disadvantage homosexuals suspicious.”96

Such cost—a systematic persecution, derision, humiliation, and animus—exerted by governments on their own citizens for no reason other than their love object cannot be justified. The very act of same-sex intimacy—consensually, and between adults—can cause no harm. Indeed, it never has.97 In 1955, the American Law Institute—adopting Mill’s harm principle—explained why such behavior should never be regulated: “[N]o harm to secular interest of

95. Baskin v. Bogan, 766 F.3d 648, 658–65 (7th Cir. 2014); see also Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) (“Because of the immediate and severe opprobrium often manifested against homosexuals once so identified public­ly.... it is fair to say that discrimination against homosexuals is likely... to reflect deep-seated prejudice rather than... rationality.”) (internal citation omitted); id. (“[H]omosexuals have histori­cally been the object of pernicious and sustained hostility....”)
96. JOHN HART ELY, DEMOCRACY AND DISTRUST 162–63 (1980).
97. Some claims that were made, during oral argument in the Supreme Court and elsewhere, regarding the possible damage to the institution of heterosexual marriage due to the recognition of same-sex marriage are so laughable they do not merit mention in an academic article. Cf. Doe v. Commonwealth’s Att’y for City of Richmond, 403 F. Supp. 1199, 1203–05 (E.D. Va. 1975) (Merhige, J., dissenting).
community is involved in atypical sex practice in private between consenting adult partners. Such behavior, in other words, is "not the law's business."

The notion, however, that such cost was mainly caused by religious and moral convictions makes it even harder to digest. The enforcement of morality alone, as H.L.A Hart has noted, "calls for justification." Even more, state enforcement of religious convictions, without more, is—and should be—constitutionally proscribed.

Perhaps most importantly, however, the entire edifice of state condemnation—and the horrendous consequences it brought over time—rests on the assumption that the Bible prohibits same-sex intimacy. But is that really the case? To that we turn now.

II. ON INTERPRETING THE JEWISH BIBLE AS LEGAL TEXT

Before we return to the verses cited in Part I, we should first examine the text in which they are included. For many, indeed most, this text—whether called the Old Testament, Five Books of Moses, or the Torah—is a holy text. Its source is divine. It tells the absolute truth, straight from the mouth of God. For others, it is an archeological artifact, an ancient book preserved, letter by letter, for thousands of years. For still others, it is a book of reflection, meditation, and solace. For the purposes of this article, however, we must approach the Jewish Bible as a legal text. By "legal" I mean a text that regulates human behavior; that assigns consequences (or sanctions) to violators; and that sets up a mechanism for enforcing such consequences. As we have seen, the relevant verses were indeed deemed to regulate certain aspects of human behavior (mainly same-sex intimacy); some of them (specifically the Levitical verses) prescribed specific consequences; and, as we have seen, these consequences were carried out by laws and courts for over millennia.

We begin this section by discussing the ramifications of treating the Old Testament as a legal text. We then identify the three interpretive organizing principles that will guide us in re-approaching the text in the next section.

A. The Bible as Legal Text

The first and foremost consequence of viewing the Bible as legal—as opposed to merely a divine—text is the immediate release of any preconceived notions as to its meaning. Indeed, if we truly want to conduct an honest interpretive inquiry into the meaning of the verses in question we cannot a priori

98. H.L.A. HART, LAW, LIBERTY, AND MORALITY 15 (1963) (quoting MODEL PENAL CODE § 207.5 cml at 277 (Proposed Official Draft 1955)).
99. Id. at 15.
100. Id. at 82.
101. See U.S. Const. amend. I.
102. See, e.g., STEVEN B. SMITH, POLITICAL PHILOSOPHY 91 (2012) ("There are many ways to begin to read the Bible. It can be read as a book of wisdom providing timeless lessons on life's most difficult problems. It can be read as a holy book given by God to Moses . . . . It can be read as a historical work providing archaeological and anthropological information about the world of the ancient Near East. Or it can be read, as I propose to do, as a political book.").
103. Indeed, without such an approach there is no point to our interpretive journey. See, e.g., Elia Leibowitz, New Reading in the Old Testament 20 (2016) (Hebrew) ("Those who believe that the Bible was authored by a super-natural entity, or . . . that at least the Five Books of Moses were written by the Holy Spirit . . . may probably not accept any discussion of the text that is, in its essence, a critical literary examination.").
104. I refer here, most broadly, to analytical positivism such as the Austrian view of "command theory." See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832), reprinted in GEORGE C. CHRISTIE AND PATRICK H. MARTIN, JURISPRUDENCE 517-664 (2d ed. 1995). The same binding result would apply, for the narrow purpose of this article, through viewing the biblical text as natural law.
assume that they bear the meaning long held by believers. As Israeli Professor
Eliah Leibowitz recently explained:

[The interpretation adopted by the first generations to the biblical text has
come, over the generations, almost inevitably identified with the text itself.
Over the course of centuries, every other interpretative option was rendered
obsolete, while the theistic meanings attributed to these stories became
engraved in the readers' mind as the only plausible interpretation.]

This cannot, of course, be our path here. Rather, adopting Leibowitz's
view, we will consider this text, "like any written text, [to be] in the public
domain [such that] anyone who wants to find out its meaning is allowed to do
so." We thus approach the Biblical text with an open mind and open heart.

The second implication of viewing the Bible as a legal text is the application
of a legal interpretive framework. Much like legal scholars continue to
debate the proper meaning of our Constitution, statutes, and laws, so should we
approach the biblical text. First, however, we must determine the nature of the
legal text at hand. Are the relevant biblical verses "constitutional" in nature?
Statutory? Common law? What is their order in the hierarchical structure of
the Biblical norms? While the text does not provide direct answer to these
questions, it does provide some clues. For example, we could consider the Ten
Commandments as the biblical equivalent of a constitution, or "the [s]upreme
Law of the Land." If that is the case, then the verses in question here—and
in particular the Levitical text, which was enacted following the Ten Command-
ments and pursuant to them—should be considered "statutory" in nature. How
then should one approach a biblical "statutory" text? Generally speaking, such
text should be approached like any other statutory text. Thus, while searching
for its meaning, we must embark on an interpretive process before settling on
one of the interpretive options. This option is never "self-evident." This is
especially true when the text in question, like here, is thousands of years old,
quaint, and often cryptic. As James Madison so eloquently reminded us, even
"[w]hen the almighty himself condescends to address mankind in their own

105. LEIBOWITZ, supra note 103, at 31 (Hebrew).
106. Id. at 36. He continues:
A written text is an independent entity, which existence no longer depends on the author.
The meaning the text has, or that can be attributed to the text—which is the art of literary
interpretation—depends only on the internal parameters of the text itself, such as the order
of the words, the grammatical structure, the choice of literary images and terms, and the
language games found there. . . . The level of authority each interpretation carries has noth-
ing to do with how close the interpreter is to the author, including if the interpreter is the
author itself. . . . Indeed, the author qua author has no advantage or priority as interpreter of
the text over any other person.

107. For the hierarchical structure of legal norms, see generally HANS KELSEN, THE PURE THEORY
OF LAW 221–30 (Max Knight trans., 2d ed. 1967).
108. See U.S. Const. art. VI, cl. 2 (Supremacy Clause). The notion that the Ten Commandments
are of constitutional stature was adopted by at least two Israeli Supreme Court Justices, both known
(Cheshin, J., dissenting) (Hebrew) (referring to the Ten Commandments to Jewish people's "first
Constitution," and concluding: "There was no doubt who has provided the People of their
Constitution; there was no doubt in His authority to do so . . . [T]here is no doubt that a Constitution
has been given."); see also Elyakim Rubinstein, The Ten Commandments—Through the Ages and in Israeli
"constitutional wonder" of the Ten Commandments) (Hebrew).
109. See, e.g., AHARON BARAK, PURPOSEFUL INTERPRETATION IN LAW 14 (2005) ("Even a plain text
requires interpretation, and only interpretation allows us to conclude that its meaning is plain.").
Barak is the most celebrated Israeli Chief Justice, considered by many as "the Israeli CJ. Marshall."
language. His meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated. 110

We can now begin our interpretive journey. The first step in searching for the proper meaning of the verses in question is the understanding that statutory interpretation is a "holistic endeavor." 111 Indeed, "he who interprets one line of statutory text, interprets the entire legislative edifice." 112 Accordingly, the biblical legal text, like any legal text, should be read in context. 113 And context is important. 114 Biblical scholars who examined the verses relating to the regulation of same-sex intimacy agree wholeheartedly. 115

What, then, is the proper context in which these biblical verses should be read? The proper context for these verses is the same context for the reading

110. THE FEDERALIST No. 37, at 197 (James Madison) (Clinton Rossiter ed., 1961); see also Max Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 866 (1930) ("The interpretation of words is a familiar technique of philology and theology, or, perhaps we might say, of theological philology. Words are found which in the case of the Bible are deemed to be the utterances of God. They are therefore unchangeable, eternal, and precise in content. Inadvertence or mere approximation is excluded.") (footnote omitted).

111. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc's., 484 U.S. 365, 371 (1988); see also Robinson v. Shell Oil Co., 519 U.S. 357, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); BAKAK, supra note 109, at 353 ("The interpreter should assume harmony within the legislative project and should avoid severing a statutory provision from the totality of legislation. Whoever applies a single statute, applies the entirety of legislation . . . ; the various statutes in a system exist as integrated tools, like different limbs of a single body. The way the body as a whole functions indicates the tasks designated to each statute."); WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 7 (1994) ("Statutory interpretation is a holistic enterprise.").

112. HCJ 695/91 Efrat v. Comm't of Population Registry 47(1) PD 749 (1993) (Hebrew); see also King v. Burwell, 135 S. Ct. 2480, 2483 (2015) ("But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme.") (internal quotation marks omitted).

113. See, e.g., Cont'l Can Co. v. Chi. Truck Drivers, 916 F.2d 1154, 1157 (7th Cir. 1990) ("You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meaning shared by interpretive communities."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012) ("Context is a primary determinant of meaning. A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts."); John F. Manning, What Does Textualism from Porphyrustis?, 106 Colum. L. Rev. 70, 75 (2006) ("Modern textualists understand that the meaning of statutory language (like all language) depends wholly on context.").

114. See, e.g., Pan. Ref. Co. v. Ryan, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting) ("The meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view."); SCALIA & GARNER, supra note 113, at 167 ("Perhaps no interpretive fault is more common than the failure to follow the whole-text cannon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

115. See, e.g., JAY MICHAELSON, GOD VS. GAY? THE RELIGIOUS CASE FOR EQUALITY 57 (2011) ("Yes, context is important"); Bradley Shavit Artson, Enfranchising the Monogamous Homosexual: A Legal Possibility, a Moral Imperative, 3 S'VARA—JOURNAL OF PHILOSOPHY & JUDAISM 15, 24 (1993) ("Context does have legal consequence. Whether or not homosexual acts take place in the context practiced in antiquity . . . or in a modern context . . . similarly ought to have legal consequence. It ought to make a difference."); Goldie Milgram, What Does Judaism Have to Say about Homosexuality, Jewish Same-Sex Marriages, and Ordination?, RECLAIMING JUDAISM, http://www.reclaimingjudaism.org/teachings/what-does-judaism-have-to-say-about-homosexuality-jewish-same-sex-marriages-and-ordination (last visited Dec. 29, 2018) ("However, a verse doeth not a moral code make, verses must be seen in the context of their larger rubric and through the lens of the times in which we live."); see also JEFF MINER & JOHN T. CONNOLLY, CHILDREN ARE FREE: REEXAMINING THE BIBLICAL EVIDENCE ON SAME-SEX RELATIONSHIP 9-10 (2002) ("If we want to interpret spoken or written statements accurately, we must carefully study the context in which the statements were made. Otherwise we can completely misunderstand what was intended. Theologians of all stripes (including the most fundamentalist) have long followed this rule when interpreting statements found in the Bible . . . a text taken out of context is pretext . . . . [Citing the two Levitical verses at issue, they add:] As we have seen above, if we wish to understand the true meaning of these verses, we must look at their context, both textual and historical.").
of all biblical verses: it is the entire Torah, or the whole Five Books. Indeed, much like Chief Justice Marshall, we, too, are looking for a "fair construction of the whole instrument."\textsuperscript{116} And the Torah has long since been considered a single legislative edifice, consisting of 613 laws.\textsuperscript{117} That has been the understanding of Jewish Law for generations. There is no reason to deviate from that holistic approach when examining the verses at issue here.

What is the meaning of reading a verse in the context of the entire Torah? Surely we cannot read the entire five books into the few verses in question. We need, rather, some organizing principles—some interpretive "lighthouses" to guide our way through the fog of interpretive options.\textsuperscript{118} To be sure, the notion of using certain guiding principles when reading a legal text is not a novel idea; as Justice Frankfurter has reminded us, the correct contextual approach for every statute "demands awareness of certain suppositions."\textsuperscript{119} What, then, are those "certain suppositions" when it comes to reading the Torah as a legal text?

B. Three Organizing Principles

Of the many possible interpretive principles appearing in the Five Books, three are pertinent for reading any biblical text. These are the "organizing principles" of the Hebrew Bible. First among them is the principle that all persons were created "in the image of God."\textsuperscript{120} Second is the principle, later adopted as the universal Golden Rule, requiring each of us to "Love thy Neighbor as Yourself."\textsuperscript{121} Third and final is the principle that the interpretation of the Torah is "not in Heaven,"\textsuperscript{122} but was rather rendered to humans, and is therefore a rational (rather than a theological) endeavor. I turn now to briefly introduce each of these principles. Such introduction is crucial, as each of the principles independently—let alone all three of them in the aggregate—casts serious doubt on the validity of the current interpretation of the verses in question. Thus, the current view—according to which one should view same-sex intimacy as an abomination, a disgusting aberration of human behavior, and as immoral behavior—should be reexamined in light of these organizing principles. I introduce each of them in turn.

1. בצל אלוהים ברא שאור: In the Image of God He Created Him

The very first Chapter of the First Book of Moses includes a divine-like description of the creation of mankind:

יוצר אלוהים את adam בצלמנו ובראשנו... יברח אחריו ואלוהים את adam בצלמנו בצלם אלוהים ברא שאור וברא אבות...

\begin{enumerate}
\item \textsuperscript{116} McCulloch v. Maryland, 17 U.S. (1. Wheat.) 316, 406 (1819).
\item \textsuperscript{117} See Deuteronomy 33:4 ("Moses commanded us a law"). "Law" meant "Torah" in the Hebrew original. Talmud Babylon, Makkot 23a ("Six hundred and thirteen Mitzvot (laws) were ordered on Moshe; three hundred and sixty five 'do not,' as the number of days of the sun [year], and two hundred forty eight 'do,' against the number of body parts in each person.").
\item \textsuperscript{118} See Drucilla Cornell, From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation, in LEGAL, HERMENEUTICS—HISTORY, THEORY, & PRACTICE 147, 161 (Gregory Leyh ed., 1992) ("We can think of [an interpretive] principle as the light that comes from the lighthouse, a light that guides us and prevents us from going in the wrong direction.").
\item \textsuperscript{119} Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 537 (1947); see also Bond v. United States, 334 S. Ct. 2077, 2088 (2014) ("Part of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions.") (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).
\item \textsuperscript{120} Genesis 1:27.
\item \textsuperscript{121} Note that this guiding principle appears between the two verses in Leviticus—the one prohibits same-sex acts. See Leviticus 18:22. The other imposes a death penalty. See Leviticus 20:13.
\item \textsuperscript{122} Deuteronomy 30:12.
And God said, Let us make man [Adam] in our image, after our likeness. ... So God created man [Adam] in his own image, in the image of God created he him; male and female created he them.

The notion that every person was created in the image of God is one of the founding principles of Jewish thought. It serves as an interpretative organizing principle of the entire body of law known as Jewish Law. As Israeli Supreme Court Deputy Chief Justice Menachem Elon—Israel’s preeminent Jewish Law scholar of the modern era—has noted in one of his opinions:

“In the image of God He created him,” serves as both the theoretical and the philosophical foundation for the unique stand adopted by Jewish Law towards the sacredness of human life—the sacredness of the image of God with which every person is created—which is considered a supreme value. It is from that foundation that Halacha [Jewish Law] derives many of its views on a wide variety of issues.

But it is not merely the sacredness of human life—every human life—that the opening verses of Genesis require us to honor; the notion that every person was created in the image of God also leads us to recognize the value of equality, and therefore dignity, with which every person should be treated. As Deputy Chief Justice Elon noted in another case:

One of the founding principles in the world of Jewish Law is the notion of human creation in the image of God (Gen. 1:27). The Torah opens by reciting this principle, and it is from there that the Halacha derives its most basic notions of human value, which is found in each person—every person, without exception—as well as the requirement to treat every person with equality and love. He [Rabbi Akiva] used to say: how pleasing is a man for being created in His image; an extreme pleasantness is attached to him by virtue of being created in the image of God, as the Torah said (Gen. 9:6): "In the image of God he created man." Of great interest here is the debate between two of the most well-known Tanna’im regarding the human value that should govern in the relationship between one person and another: "And love your neighbor as yourself" (Lev. 19:18) ... R. Akiva says: This is an essential rule of the Torah; while Ben Azai says: This is the story of the dawn of mankind ("in the day God created man, in the image of God he created him." (Gen. 5:1))—this is even a more essential rule of the Torah. According to R. Akiva, in examining the relationship between one person and another, the primary value is the requirement to treat one another with love, and to love mankind. Conversely, according to Ben Azai, the primary value is that of human equality, as each and every person was created in the image of God. But these two values—equality, and the love of mankind—have morphed to establish the very foundation of Jewish Law throughout the ages.

Other Jewish Law scholars have noted the sacred bond between being born in the image of God and equality.

123. See Menachem Elon, Jewish Law: History, Sources, Principles Vol. I-IV (2003). The late Justice Rabbi Menachem Elon, who also served as a law professor at the Hebrew University Law School and at NYU Law School, is best known as the author of this monumental work.


125. CA 2/88 Neiman v. Chairman of the Election Comm. 39(2) PD 225, 298 (1985) (Hebrew) (emphasis added) (citations omitted). Cf. Bowers v. Hardwick, 478 U.S. 186, 218–19 (1986) (Stevens, J., dissenting) ("Although the meaning of the principle that ‘all men are created equal’ is not always clear, it surely must mean that every free citizen has the same interest in 'liberty' that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.").

126. See, e.g., George P. Fletcher, In God’s Image: The Religious Imperative of Equality Under Law, 99 COLUM. L. REV. 1608, 1616 (1999) ("Both of these ideas of Genesis 1—the act of creation ex nihilo
than mere equality; it portends that every person enjoys the sacred—and legal—right to human dignity.127 As Israeli Supreme Court Chief Justice Aharon Barak has noted:

Human Dignity has deep roots in Jewish Law. It occupies a special place in Jewish thought. According to the world of Jewish Law, all the dignity in the world was delegated from the creator, who is the King of Dignity ("Melech Ha'Kavod"). Human dignity is derived from the dignity of God, because all humans were created in the image of God: "And God created man in his own image; in the image of God He created him." (Gen. 1:27) . . . Human dignity means that the image of God, which exists in every person, should not be violated. Indeed, human dignity—or, as it is sometimes known as “the dignity of persons”—is a central tenet of Jewish Law. . . . According to Jewish Law, the starting point for other people’s dignity is your own dignity, as viewed by yourself; the dignity of your neighbor should be equal—in your own eyes—to yours.128

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

In the spectrum of Jewish-Law values, human dignity is second only to God’s dignity; but just below that divine dignity, and right beside it, the notion of human dignity—sometimes known as “the dignity of persons”—has occupied a central place all on its own. Not only has human dignity received divine authority, its very existence is a necessary conclusion of the creation story by which a person was created “in the image of” or “the likeness of” God. Rabbi Akiva’s statement, “how pleasing is a man for being created in His image; an extreme pleasantness is attached to him by virtue of being created in the image of God,” was later described as “a founding principle in our sages’ understanding of the value of every human being. The dignity of persons is a necessary conclusion from the fondness that God feels towards each person.”129

So central is the notion of human dignity to Jewish Law that the Talmud went so far as declaring it "supersedes a negative commandment of the Torah."130 Based on that lesson, human dignity has been used in a variety of

127. To properly understand the notion of dignity, see IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALES 102 (H.J. Paton trans., 1984) (1785) (“In the kingdom of ends everything has either a price or a dignity. If it has a price, something else can be put in its place as an equivalent; if it is exalted above all price and so admits of no equivalent, then it has a dignity.”).

128. AHARON BARAK, INTERPRETATION IN LAW, VOL. III: CONSTITUTIONAL INTERPRETATION 404-05 (1994) (Hebrew). The link between those two concepts—God’s image and human dignity—is not unique to Judaism, of course. See, e.g., Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, 19 EUR. J. INT’L L. 655, 658 (2008) (“The Catechism of the Catholic Church incorporates this idea of Man as made in the image of God as central to its conception of human dignity.”).

129. HAIM H. COHN, BEING JEWISH 419 (2005) (Hebrew). Before serving in the Israeli Supreme Court, Dr. Cohn served as Israel’s first Attorney-General. In this capacity, he was charged with enforcing the laws—mostly those left behind by the British rule—including the law against same-sex acts. Haim Cohn instructed the Israeli Police not to enforce that law. Much later in life, Cohn, who was born and raised in Germany, reflected on this episode:

I was of the opinion that it was my duty not to enforce a law I considered to be amoral. We have demanded the German Judges to not enforce the Nazi laws, which they considered amoral. And I think this duty applies to every Judge and every Attorney-General who should never assist in executing laws which, by their conscience, are considered amoral.


Halachic contexts—from letting a wedding ceremony proceed on Shabbat, to allowing women to read Torah in public.

The biblical principle of human dignity entails other legal implications as well. In particular, it was invoked (by the Israeli Supreme Court) to rule on a variety of constitutional issues, including the dignity of same-sex couples. For example, in 1994, the Court held that the same-sex partner of an airline employee cannot be discriminated against in terms of workplace benefits due to his sexual orientation. Later, the Israeli Court recognized as legal an adoption made by a same-sex couple—first in California, and then in Israel. Finally, although in Israel marriages of Jewish couples may still be conducted only in accordance with Orthodox Jewish Law (which prohibits same-sex marriage), the Israeli Supreme Court was willing to recognize, and then legally register, same-sex marriage as long as they were legally recognized in the jurisdiction in which they were conducted.

The notion of human dignity was also prominent in U.S. Supreme Court same-sex jurisprudence, and for the same reasons. It was Justice Kennedy—who introduced the notion of human dignity into discussion of same-sex intimacy. For example, ruling that same-sex acts cannot be considered a criminal offense, Justice Kennedy wrote:

> It suffices for us to acknowledge that adults may choose to enter upon this [same-sex] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Ten years later, in United States v. Windsor, Justice Kennedy relied heavily on the notion of human dignity to strike down Article 3 of DOMA, which defined the term “marriage” as applying only to heterosexual couples. Time and again, Justice Kennedy emphasized the notion of human dignity as standing at the core of his decision to hold the section unconstitutional. Memorably, he noted that the “history of DOMA’s enactment and its own text

131. Shabbat—the Jewish rest day—is usually reserved for prayer only. No other activity (including wedding ceremonies) is allowed. For that and other human dignity exceptions to the strict Shabbat rule. See generally Nahum Rakover, Human Dignity, DAAT, http://www.daat.ac.il/daat/kvod-4.htm (last visited Jan. 30, 2019) (Hebrew).


133. It is important to note that the right to human dignity was written into Israeli Basic Law in 1992. See Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1454 p. 90 (as amended); BARAK, supra note 128, at 403-569.


137. See The Rabbinical Court Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139, § 2 (1953) (Isr.) (“Marriage and divorce of Jewish people in the State of Israel will only be conducted in accordance with the Laws of the Torah.”); Israeli Government view of Liberal Jewish Streams, ASSOCIATED PRESS (July 22, 2015), http://www.rudaw.net/english/middleeast/22072015 (“Israel’s Orthodox rabbinical establishment wields a monopoly over key aspects of daily life, such as marriage, divorce and burials. Reform and Conservative rabbis are not recognized, and their movements are largely marginalized. Most Jews in Israel, while secular, follow Orthodox traditions.”).


139. See supra Section I.A.


142. The term “human dignity,” including its several derivations, is mentioned no less than twenty-four times in Justice Kennedy’s opinion for the Court.
demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.\footnote{Windsor, 570 U.S. at 770 (emphasis added); see also id. at 769 ("By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.") (emphasis added). Cf. Michael J. Sandel, Justice: What’s the Right Thing to Do? 254 (2007) ("The debate over same-sex marriage is fundamentally a debate about whether gay and lesbian unions are worthy of the honor and recognition that, in our society, state-sanctioned marriage confers.").}

Two years later, in \textit{Obergefell}, the notion of human dignity was featured prominently in the decision to recognize a constitutional right to same-sex marriage.\footnote{\textit{Obergefell v. Hodges}, 135 S. Ct. 2584, 2596 (2015) ("Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.") (emphasis added).} Memorably, the opinion of the Court concludes with the following statement: "[Petitioners] ask for equal dignity in the eyes of the law. The Constitution grants them that right."\footnote{Id. at 2608.}

Indeed, the notion of human dignity, together with its Jewish-Law corollary, the notion that every person was created in the image of God, are simply incongruent with the current interpretation of the biblical text relating to same-sex intimacy. It cannot stand to reason that the same Bible that crowned each person as the child of God, allowed a certain group to become a target of ridicule, persecution, and discrimination simply due to their love object. Indeed, both the Israeli and U.S. Supreme Courts have arrived at that conclusion. Several Jewish commentators have found the tension irreconcilable.\footnote{See, e.g., Rebecca Alpert, \textit{Like Bread on the Seder Plate: Jewish Lesbians and the Transformation of Tradition} 19-20 (1998) ("We must address the question of how lesbians can live as Jews when the sacred text that tells us we were created in God’s image also tells us that male homosexual acts are punishable by death and that the lesbian acts are associated with ‘the practice of Egypt.’ These are contradictory notions: if God created all human beings in the divine image, then men who love men and women who love women must also be part of the divine plan.") ; see also id. at 39 ("Contemporary commentators see a contradiction between Leviticus 18:22 and the idea as stated in Genesis that we were all created in God’s image. This contradiction must be resolved. We must assume that those of us who were created lesbian and gay are also in God’s image, and that acts central to our identity cannot therefore be an abomination.").} The time has come to introduce "in God’s image" into the "religious objection" debate.

2. \textit{לְאָהֵמְבַח לַרְדֵּשׁ יָסָרָא}: Love Your Neighbor as Yourself

The second organizing principle that governs interpretation of all Biblical verses is the notion that each of us should treat the other in the same manner we would have liked to be treated. Nestled between the two same-sex intimacy Levitical verses discussed earlier—the alleged prohibition against same-sex acts (Lev. 18:22), and the death penalty for their performance (Lev. 20:13)—lies the seminal principle of "thou shalt love thy neighbor as thyself."\footnote{\textit{Leviticus} 19:18.} As we have
seen, the great Rabbi Akiva—on whom the Talmud teaches that Moshe himself could learn Torah from—declared this principle “an essential rule of the Torah.” This principle is universally accepted today, known across both religions and cultures as the Golden Rule. Not only does it serve as one of the Torah’s leading interpretive principles, it also said to encompass the entire Torah in one sentence. That, according to the famous story—perhaps the most famous of all Jewish-Law stories—about Rabbi Hillel:

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

Beyond the genius—and ingenuity—of condensing the Five Books of Moses to a single sentence, Hillel’s formula is important to consider as an organizing interpretive principle. As Rabbi Telushkin has noted: “The fact that Hillel is willing to offer so brief an explanation—fifteen words in the popularly spoken Aramaic—indicates that there is a central focus to his understanding of Judaism, one that provides him with a standard that later enables him to modify certain Torah laws in a manner that will shock other rabbis.”

Using the standard of the Golden Rule, it is easy to conclude that no person—let alone a group—should be discriminated against solely on the basis of their love object. Indeed, if we consider the duty of treating each other with the same dignity and respect we accord to ourselves, surely we cannot expect the “other” (or others) to be constantly diminished, harassed, or persecuted for no reason other than their sexual orientation. Indeed, in general philosophical discourse, the Golden Rule has been invoked frequently in relation to social equality. As Thomas Nagel explained:

You are to ask not just “What shall I do?” but “What should anyone in my position do?” and the answer comes from subjecting your conduct to standards acceptable from everyone’s point of view at once, or the points of view of all those affected—suitably idealized and combined.

... [T]his interpretation identifies the core of Kantian morality with some form of equal consideration for all persons, as a limit on the pursuit of one’s own interests—not by maximizing aggregate welfare as utilitarianism requires, but by mandating certain forms of decent treatment of each person individually.

The need to provide “decent treatment of each person individually,” as Nagel puts it, must entail the need for non-discrimination of persons on the basis of their sexual orientation. A biblical text that puts the interpretive principle of Love Your Neighbor front and center would be hard-pressed to be reconciled with the notion of such blunt discrimination. Therefore, one should make every interpretive effort to avoid such incongruent result. As Jay Michaelson observed, “[t]here need be no contradiction between the commandment to

148. See TALMUD BABYLON, Minschot 29:2.
149. The source of this quote is not identified.
151. TALMUD BABYLON, Shabbat 31a.
love our neighbors as ourselves and the handful of biblical verses that have troubled us for so long."  

3. "יִֽהְיֶ֥ה בְּשֵׁ֔מַיָּ֑ם: "It is Not in the Heavens"

The third and final organizing principle is "it is not in the heavens." While slightly more cryptic than the first two principles, it is no less important, and perhaps even more influential, in understanding the Biblical text. It appears only in the last of the Five Books, Deuteronomy, almost as a concluding remark to the entire interpretive edifice. There, the author pauses to remind us of the obvious: while Biblical laws were written by divine authority, they are meant to be followed—and therefore be interpreted—by ordinary people. For that reason, these laws are written in a way that can and should be understood by such people. Then the author adds an important caveat, warning us about the interpretive authority that should guide us while trying to understand Biblical commands:

For this commandment [law] which I command thee this day, it is not hidden from thee, neither is it far off. It is not in heaven, that though shouldst say, Who shall go up for us to heaven, and bring it unto us, that we may hear it, and do it? Neither is it beyond the sea, that though shouldst says, Who shall go over the sea for us, and bring it unto us, that we may hear it, and do it? But the word is very nigh unto thee, in thy mouth, and in thy heart, that though mayest do it.  

The Torah itself, in other words, tells us that each of us is responsible for reading it, understanding it, and following it on our own. In fact, it warns us explicitly about those self-proclaimed religious "authorities" who vow they have a direct access to the heavenly interpretation or to another divine inspiration. There is no point and no reason, says the Torah, to ascend to the heavens, or to cross the high seas (an enormous feat back when the text was written) to achieve the interpretive result; rather, much like with Dorothy's ultimate realization, the answer is already here, in our minds and in our hearts.

The notion that biblical interpretation is not a heavenly task but rather an earthly mission should serve as an important interpretive insight. It allows, essentially, every person to approach the text on their own terms. It suggests that no person—regardless of their religious pedigree—is "above" others or better equipped to understand the biblical text. Even further, the principle can be used to show why the Bible seeks a "dynamic," rather than static, interpretation: if its words are open to interpretation by every generation, with its own readers on their own terms, surely different generations may view the same text differently. Much in the form William Eskridge espoused for all statutory law, biblical interpretive journey cannot "freeze" at the time the Torah was written. Rather, it should accord itself to current moral and social needs: 'God gave the Torah . . . on Mount Sinai. Subsequently God relinquished the right

154. MICHAELSON, supra note 115, at 56.

155. Deuteronomy 30:11-14; see also ETZ HAYIM: TORAH AND COMMENTARY 1170-71 (2001) ("Surely, this Instruction which I enjoin upon you this day is not too baffling for you, nor is it beyond reach. It is not in the heavens, that you should say, 'Who among us can go up to the heavens and get it for us and impart it to us, that we may observe it?' Neither is it beyond the sea . . . . No, the thing is very close to you, in your mouth and in your heart, to observe it.") (verse numbers omitted).

156. See, e.g., JASON P. ROSENBLETT & JOSEPH C. SITTESSON, JR., NOT IN HEAVEN: COHESION AND COMPLEXITY IN BIBLICAL NARRATIVE I (1991) (noting that "the[se] three bare words themselves [may] authorize[ ] the independent, earthbound, arguments of literary critics").

to interpret and change the law. This responsibility was given by God to the sages of each generation who were charged with interpreting the law according to the needs and problems of their own time.\textsuperscript{158}

The awesome responsibility that comes with assuming a novel interpretation—an interpretation that may, in some instances, contravene the original meaning of the text—did not escape Jewish-law sages. Yet they insisted that the authority of interpretation should remain with the people, rather than at the hands of an assumed “God.” That view held firm even at the site of alleged Divine presence. This is, in essence, the well-known story of Achnai’s Oven. It begins with a Halachic dispute over the Kashrut (Jewish appropriateness) of an oven that was found unclean. On one end of the dispute stood Rabbi Elazar, a major authority on Jewish Law; on the other, a group of rabbis, led by Rabbi Joshua, who—merely due to their number—constituted a majority opinion. Rabbi Elazar, however, was not willing to surrender to the majority so easily:

After failing to convince the Rabbis logically, Rabbi Eliezer said to them: If the halakha is in accordance with my opinion, this carob tree will prove it. The carob tree was uprooted from its place one hundred cubits . . . . The Rabbis said to him: One does not cite halakhic proof from the carob tree. Rabbi Eliezer then said to them: If the halakha is in accordance with my opinion, the stream will prove it. The water in the stream turned backward and began flowing in the opposite direction. They said to him: One does not cite halakhic proof from a stream . . . .

Rabbi Eliezer then said to them: If the halakha is in accordance with my opinion, Heaven will prove it. A Divine Voice emerged from Heaven and said: Why are you differing with Rabbi Eliezer, as the halakha is in accordance with his opinion in every place that he expresses an opinion?

Rabbi Yehoshua stood on his feet and said: It is written: “It is not in heaven” . . . . Since the Torah was already given at Mount Sinai, we do not regard a Divine Voice, as You already wrote at Mount Sinai, in the Torah: “After a majority to incline.” Since the majority of Rabbis disagreed with Rabbi Eliezer’s opinion, the halakha is not ruled in accordance with his opinion . . . . The Holy One, Blessed be He, smiled and said: My children have triumphed over Me; My children have triumphed over Me.\textsuperscript{159}

This Divine recognition—extremely unique in the annals of Jewish Law—that “My children have triumphed over Me,” is designed to send a strong message to those who claim that they, and only they, “speak the words of God.” For according to this story, it only takes a majority of mostly unidentified sages, who present an intellectually-defensible interpretive option, to overcome any other interpretive opinion—even that of God Himself.\textsuperscript{160} Surely, if this is the case when it comes to God, it must be true for all of His purported representatives.\textsuperscript{161}

\begin{enumerate}
\item[160.] As Israeli Supreme Court Justice Moshe Silberg have noted, commenting on this story: “If the law is to follow a majority, one must act in accordance with this law, even if the one involved in litigation is the giver of the Torah Himself.” Izhak Englard, Majority Decision vs Individual Truth—The Interpretation of “Oven of Achnai” Hagada, 15 TRADITION: J. ORTHODOX JEWISH THOUGHT 137, 139 (1975).
\item[161.] The notion that the sages, rather than purported “prophets” are the binding authority in Judaism has long root. See, e.g., Maimonides (Rambam), Introduction to the Interpretation of the Mishnah, DAAT, http://www.daat.ac.il/daat/mahshevet/hakdama/2-2.htm (last visited Jan. 30, 2019) (“For it already has been said, (Deut. 30) It is Not in the Heavens. And the Lord, Blessed is He, has ordered us not to study from the prophets, but rather to learn from the sages, people of knowledge, reason, and opinion.”) (Hebrew).
\end{enumerate}
The interpretive principle of "Not in the Heavens" has been used extensively by Jewish Law.\textsuperscript{162} It may easily be applied in the context of same-sex marriage as well; in fact, it already has.\textsuperscript{163}

In considering a new interpretative meaning to Biblical same-sex intimacy according to this principle, in particular one that deviates from (and in fact opposes) previous understandings of the text, one should consider the social costs associated with the current understanding. We have demonstrated, if only in a nutshell, the tremendous damage caused to the LGBT community as a result of the current interpretation.\textsuperscript{164} But as Rabbi Dorff and others have noted, even without the immense social costs, the current understanding of the text borders on the absurd, in that it demands every LGBT person to do the impossible—lead a life of complete celibacy without ever choosing it:

[T]he premise of [the demand of every Jewish person to become holy to God] is that it is essentially possible . . . . The Torah is possible—it is the gift of life, not a path for suffering and destruction of the physical self . . . . In demanding that observant homosexuals avoid all sexual contact for life, [however,] the halakhah is not asking for heroism but inviting failure.\textsuperscript{165}

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

The law is given cogency and support by the ongoing story of the community that seeks to live by the law. This is true no less for religious than for secular communities, and it is precisely what Robert Cover had in mind when he wrote that "for every constitution there is an epic." The ongoing, developing religious life of a community includes not only the work of its legalists, but also its experiences, its intuitions, and the ways in which its stories move it. This ongoing religious life must therefore have a role in the development of its norms, else the legal obligations of the community will become dangerously detached from its theological commitments.\textsuperscript{166}

Indeed, if the interpretation of the verses regarding same-sex intimacy is "Not in the Heavens," we must make every effort to seek one that is congruent with current social norms, as well as with the other organizing principles of the

\textsuperscript{162} For a review, see Shimon Kalman, 'It Is Not in the Heavens'—And the Rule of Law, 203 \textit{Ha’Ma’ayan} 49 (2013) (Hebrew).

\textsuperscript{163} See Moss & Kern Ulmer, supra note 158, at 78.

\textsuperscript{164} See supra Section I.C.; see also Dhruv Khullar, Stigma Against Gay People Can Be Deadly, \textit{N.Y. Times} (Oct. 9, 2018), https://www.nytimes.com/2018/10/09/well/live/gay-lesbian-light-health-stigma-laws.html ("For decades, we’ve known that LGBT individuals experience a range of social, economic, and health disparities—often the result of culture of laws and policies that treat them as lesser human beings . . . . LGBT youth are three times as likely to contemplate suicide, and nearly five times as likely to attempt suicide.").

\textsuperscript{165} \textit{Dorff}, supra note 130, at 9.

\textsuperscript{166} Rabbi Gordon Tucker, Halakhic and Metahalakhic Arguments Concerning Judaism and Homosexuality, in \textit{RABBINICAL ASSEMBLY} 19 (2006), https://www.rabbincallassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/tucker_homosexuality.pdf (citing Robert Cover, \textit{Nomos and Narrative}, 97 \textit{Harv. L. Rev.} 4, 4 (1984) (emphasis added)). For a nuanced articulation on the connection between professor Cover's seminal article and same-sex marriage, see Jay Michaelson, \textit{Chaos, Law, and God: The Religious Meaning of Homosexuality}, 15 MICH. J. GENDER & L. 41, 113 (2008) ("In a Coverian sense, law is itself a religious force, even laws which, from a conventional perspective . . . are entirely secular in nature. This is especially true because, for Cover, law is 'a system of tension or a bridge linking a concept of a reality to an imagined alternative.' In other words, law does not merely regulate; it aspirers, connects the 'is' to the 'ought.' Thus to simply maintain that same-sex marriage is a species of pluralistic value of 'live and let live' is to ignore the fact that that value is, itself, a religious value . . . that, when applied to religious questions such as marriage, is a theological argument. 'Live and let live' denies the aspirational intent of religious law, or at least, replaces one nomian aspiration with another.") (footnote omitted) (quoting Robert Cover, \textit{Nomos and Narrative}, 97 \textit{Harv. L. Rev.} 4, 4 (1983)).
biblical text—those of human dignity, equality, and tolerance towards all humanity. To that we turn now.

III. RETHINKING RELIGIOUS OBJECTIONS

Armed with the new interpretive toolkit, we now return to the passages introduced earlier as the three current basis for Old-Testament based religious objections to same-sex intimacy. We examine each passage and conclude that the current "isolated-text" interpretation should be set aside in favor of an interpretive result that is contextually-based, is fully congruent with the three interpretive organizing principles, and is much more fair. We conclude with a call for a change of heart.

A. Rethinking the Story of Creation

According to the religious-objection argument, Genesis' Creation Story is only about "Adam and Eve, not Adam and Steve." It is about procreation, not intimacy qua intimacy. And it is about marriage between a man and a woman, not between two men. Thus, the Creation Story exalts the virtues of only one sexual paradigm. Clearly, therefore, it denounces all other paradigms of sexual relations, particularly those relating to same-sex.

There is one glaring issue with this argument: its assumptions—as many and as established as they appear—fail to lead to the conclusion. In fact, they lead nowhere near it. While it is correct to assume that the text speaks in favor of one paradigm of sexual behavior, nowhere does it suggest that it speaks against another. Indeed, the Bible may favor other forms of sexuality as well, it may be neutral towards them, or it may denounce them. Textual support is needed to establish any of these conclusions. But the “argument by omission” as presented here without textual support is extremely dangerous to make, especially in light of its dire social costs. Moreover, in light of several interpretive options—which remain open when the text, as here, is silent—we must, as we have seen, prefer an interpretation that is more congruent with the organizing principles; an interpretation that aligns itself with human dignity, with equality, with love for one another, and with current social norms. None of these notions lead to the interpretive result espoused by the religious argument.

The weakness of the Creation Story argument has been keenly observed recently by several leading theologians. Jeffrey Siker, for example, noted that such "argument from silence" is one of the weakest forms of argument. Daniel Helminiak went even further, arguing that,

[T]he Adam-and-Eve-not-Adam-and-Steve argument depends on a logical fallacy—the ad ignorantiam argument, argument by appeal to the unknown, argument based on assumptions about what was not said. The argument runs like this: since the Bible does not actively support homosexuality, it must be that the Bible condemns it. But this conclusion does not logically follow. What would follow is simply that we do not know the biblical mind on the subject . . . . An endorsement of heterosexuality would imply a condemnation of homosexuality only if the two were mutually exclusive, and either-or choice . . . . But such a choice is not realistic . . . . Obviously, then, [for those who make the argument]
their opinion does not depend on the Bible. On the contrary, their reading of the Bible depends on their personal opinion.169

And Peter Gomes observed:
The creation story in Genesis does not pretend to be a history of anthropology or of every social relationship. It does not mention friendship, for example, and yet we do not assume that friendship is condemned [by the Bible] or abnormal . . . . The creation story is the basis and not the end of human diversity, and thus to regard it as excluding everything it does not mention is to place too great a burden on the text and its writers, and too little responsibility upon the intelligence of the readers, and on the varieties of human experience.170

Even beyond the direct disproving of the "argument by omission," one cannot separate the Genesis story from the context in which it appears. That context—the heterosexual marital model appearing in the Book of Genesis—is morally questionable by many of today's standards. For example, the First Father, Abraham, had one wife and one concubine who bore his first child.171 His grandson, Jacob, had two wives and two concubines who bore his many children;172 more importantly, these two wives were sisters.173 Surely those who argue in the name of Genesis' heterosexual model would not espouse such marriage structures today. But Genesis, as a whole, either represents the only proper way for marriage (including the marriage of siblings), or it merely demonstrates some models of marriage, while omitting the discussion of others. There could be no logical third way.

The inescapable conclusion is that the "Adam and Eve, not Adam and Steve" argument cannot hold. It has no textual support. It ignores the Genesis-marriage context. It wishes to learn much—too much—from omission. And it goes directly against the three interpretive organizing principles. The more reasonable interpretation of the Creation Story is that it presents one model of sexual relations. To be sure, this is an extremely important model, one that guarantees the continuity of the human race (a crucial consideration at the time of a nascent society). Moreover, until today, by far most couples follow the model of heterosexual marriage (statistically speaking).174 The Genesis model described in the Story of Creation is therefore not in danger, even 3,000 years after being introduced. It still stands, today, as a wonderful manifestation of heterosexual love. There is no need, no reason, and no good justification to load it with negative implications as well.

B. Rethinking the Tale of Sodom

According to the religious-objection argument, the Tale of Sodom demonstrates God's moral opprobrium towards homosexual relations. The all-male mob surrounding Lot's home wanted to "know"—i.e., to have sexual intercourse with—the two male guests. Such behavior, the argument goes, was considered so abhorrent in the eyes of the Lord that He destroyed the city and all its residents because of it. Today we, too, should condemn such behavior; in fact, we should name it "sodomy" and proscribe it by law.

169. HELMINIAK, supra note 89, at 101-02.
170. GOMES, supra note 74, at 150.
173. See id. at 29:20-27.
174. According to Judge Posner, at most only four percent of the population, at most, are homosexuals. See Baskin v. Bogan, 766 F.3d 648, 668 (7th Cir. 2014) ("No one knows exactly how many Americans are homosexual. Estimates vary from about 1.5 percent to about 4 percent.").
Much like the Creation Story, however, the Tale of Sodom has not a shred of textual support. The issue before us is the biblical attitude towards adult, consensual, and voluntary sexual acts of intimacy between same-sex partners. This story is so far removed from this model—and this issue—that it is hard to contemplate how it has ever become the basis for any serious argument, let alone centuries-old criminal punishment, against same-sex intimacy. The Tale of Sodom discusses (the threat of) rape, not consensual, voluntary relations. It discusses a mob, not a loving, single partner. And it discusses all that after God has already noted—and informed Abraham—that “their sin is so grave.” which means that the decision to eviscerate the city had very little to do with their last act of wickedness.

Note how far removed this story is from a reasonably-understood restriction on same-sex intimacy. First, it says nothing about such behavior when conducted between two consenting adults. Second, even if a single person would have wanted to “know” these guests against their will, this would still constitute rape. But this story not about a single person attempting to rape someone of the same sex: it is about an out-of-control mob wishing to torture two guests—who happen to be of the same gender—in a sexual way, against their will. This is a heinous crime, one that might easily lead to the victim’s death. Surely such a factual background has nothing to do with the regulation of same-sex voluntary intimacy. Third, and importantly, the restriction on rape—either by a single person or a crazed mob—applies regardless of the victim’s gender. Whether the mob wanted to know a man or a woman, any such “knowledge” would clearly constitute rape. Thus, the notion that God’s denunciation of a mob’s mentality aiming at raping innocent guests equals, somehow, a negative statement on the morality of loving, consensual acts of same-sex intimacy between two willing adults seems far-fetched, at best.

Again, theologians took note. Peter Gomes wrote that, "Nowhere in the Old or New Testaments is the sin of Sodom, the cause of its sudden and terrible destruction, equated with homosexuals or homosexuality . . . Homosexual rape is never to be condoned; it is indeed, like heterosexual rape, an abomination before God. This instance of attempted homosexual rape, however does not invalidate all homosexuals or all homosexual activity."

Byrne Fone goes even further, suggesting that the: Sodomites' threat may allude not to rape, but to more murderous violence. In fact, there is no sexual conduct at all on the part of the Sodomites. Though the language of Genesis makes it difficult to assess their motives, it is clear about what they do. If the Sodom story advocates the punishment of homosexual acts, it does so even though no such acts are committed.

175. Genesis 18:20 (JPS Etz Haim Trns.).
176. See Gomes, supra note 74, at 151 (“It was God’s intention to destroy the city before the arrival of the angels, and so the punishment that befell the city had to do with its previous and notorious state of wickedness, and not with the menacing treatment accorded to the angels while they were partaking of Lot’s hospitality.”).
177. Indeed, the Bible includes a very similar story where the mob surrounding the house successfully demanded the guest to get out and be “known.” It ended with an all-night mutilation, and the guest’s death. That event nearly caused a civil war in Israel. See Judges 19:22-30.
179. See also Michaelson, supra note 115, at 60-61 (similarly rejecting the Sodom story as a rational basis for religious objections).
180. Gomes, supra note 74, at 152; see also Siker, supra note 168.
181. Fone, supra note 82, at 79.
Others have also noted the "homophobic violence" demonstrated by the story, culminating in "the threatened rape of the angels."\(^{182}\)

Thinking back to the three organizing principles, it is clear that a restriction on same-sex intimacy is simply incongruent with a story about an inflamed mob. Those people lost all notion of "God's image." They have failed to treat their guests—and their neighbor—as themselves. They could not meet any standard of decency—then or now. The notion that this story should instruct us as we shape our moral relation towards same-sex intimacy simply cannot stand.

What, then, are the lessons to be learned from the Tale of Sodom? There are several important lessons to the story, though all of them are far afield from any restriction on loving, consensual relations. First, many commentators note that the main lesson of the story relates to the duty of hospitality in the early Middle-East (a tradition that still holds today). According to this duty, the host bears absolute responsibility to protect his guests at all cost. Lot's admirable stand against the mob, defending his guests in the face of sure calamity,\(^{183}\) is a prime example of performing such duty nobly. Second, the Tale of Sodom shows that a moral stand on behalf of the innocent does pay off at times. In this case, Lot and his family were the only ones saved from the city that God eviscerated (but for Lot's wife, who insisted on looking back despite an explicit warning).\(^{184}\) Lot protected his innocent guests without any promise for payment or reward, but was ultimately saved for this act of kindness. If anything, therefore, the Sodom story is a lesson in kindness. Finally, the Tale of Sodom does tell us something about sexual norms: when a city descends to the level of a blood-thirsty mob, whose members aim at collectively raping, mutilating, and potentially killing innocent "others," the wrath of God should be upon them.

As for same-sex intimacy, the Tale of Sodom tells us nothing. Nothing at all. Nor should it be interpreted this way, again by way of omission. Lastly, and most importantly, consensual, loving relations between two people who were created in the image of God should never be referred to as "sodomy."

\(\text{C. Rethinking the Levitical Verses}\)

We now turn to the greatest interpretive challenge to the biblical text. Unlike the two previous basis on which religious objections seem to rely, the Levitical verses are not a mere narrative from which one could infer some notions of improper sexual behavior. Nor are the Levitical verses devoid of any textual mention of same-sex intimacy; they actually do explicitly contain such language. Further, the Levitical verses—unlike the two previous religious objections—can be read as, and are in fact, a part of a legal code (the Code of Levites, or the Priesthood Code),\(^{185}\) thus, they are not merely unbinding "narratives" from which later interpretations were deduced. Finally, the two verses in question—Leviticus 18:22 and Leviticus 20:13—seem to directly prohibit same-sex intimacy and to order the death penalty upon anyone daring to engage in it. For these reasons, the Levitical verses were used as the foundation, primarily in Jewish Law, of a remarkable—and extremely exclusory—edi-

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182. Carden, supra note 83, at 38.
183. For a review, see Helminiak, supra note 89, at 35–41 ("The Sin of Sodom: Inhospitality"); Stone, supra note 8, at 14–15; Carden, supra note 85, at 37.
185. See, e.g., Greenberg, supra note 90, at 75–76 ("[T]he Book of Leviticus . . . is primarily a law book—indeed, the sages call it Torat Kohanim, the priest's handbook.").
fice of law directed against gays, 186 lesbians, 187 and other members of the LGBTQ community. 188

The two verses, in other words, deserve a thorough examination. We begin, as every interpretive journey should begin, with the text. We then move to the context in which the text appears, in particular the Code of Holiness. We then consider several alternative interpretations, ones more congruent with the organizing principles we have mentioned. We conclude with an examination of a non-text: a different biblical source that should have, perhaps, included the restrictions included in Leviticus (if they ever existed), but does not.

1. The Text

We begin with the text. We examine the full text of the two short verses in three forms: first, as they appear in the Hebrew original; then, as they appear in King James' Bible; finally, as they should be translated today (according to the Hebrew original).

Leviticus 18:22 reads:

KJB: “Though shalt not lie with mankind, as with womankind: it is abomination.”

From the Hebrew: “And the male you shall not lie with the way one lies with a woman: it is an abomination.”

Leviticus 20:13 reads:

KJB: “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.”

From the Hebrew: “And a man who lies with a male the way one lies with a woman—both have committed an abomination: they shall surely be put to death, their blood is upon them.”

186. See, e.g., DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 190 (1988) (“[T]wo passages in Leviticus seem to prohibit male homosexuality more generally”); Milgram, supra note 115 (citing with approval Rabbi Artson as stating that “[t]he proscription of homosexual acts in Leviticus forms the basis for all later halakhic prohibitions of homosexual acts.”) (emphasis added).

187. Although the Bible never mentions female homosexual acts, Jewish Law sages were quick to adopt the restrictions against lesbians as well. See generally Admiel Kosman & Anat Sharbat, “Two Women Who Were Sporting with Each Other”: A Reexamination of the Halakhic Approaches to Lesbianism as a Touchstone for Homosexuality in General, 75 HEBREW UNION C. ANN. 37 (2004) (reviewing Jewish Law sources). The authors agree that “the Bible itself does not relate directly to female homoeroticism.” Id. at 42.

188. For a thorough review of Jewish Law restrictions based on these two verses, see CHAIM RAPPOPORT, JUDAISM AND HOMOSEXUALITY: AN AUTHENTIC ORTHODOX VIEW 1-35 (2004).

189. The rest of the text, in this section, is translated by me from the original Hebrew source. A note on the Hebrew term appearing at the end of the verse—“To’e’a’evah.” Its translation here, to “abomination,” is but one interpretive option—though one preferred by most translators: the English Standard Version (“ESV”), the New American Standard Bible (“NASB”), King James Bible (“KJB”), the American King James Version (“AKJ”), the American Standard Version (“ASV”), Douay-Rheims Bible (“DR”), the Darby Bible Translation (“DBT”), the English Revised Version (“ERV”), and the Webster’s Bible Translation (“WT”). Other translators use “detestable” (e.g., NIV, Holman Christian Standard Bible (“HCB”), and the World English Bible (“WEB”)); “a detestable sin” (the New Living Translation (“NLT”)); “a detestable act” (e.g., NET Bible); “disgusting” (e.g., God’s Word Translation); and “abhorrent” (e.g., Etz Hayim). See Leviticus 18:22, BIBLE HUB, http://biblehub.com/leviticus/18-22.htm (last visited Dec. 18, 2018).

190. Leviticus 20:13. Here I almost verbatim follow the English Standard Version translation (save the omission of the “And” in the beginning of the verse), which reads: “If a man lies with a male
Immediately, one can observe the most glaring difference between the King James version and the Hebrew original: the omission of the word “And” at the beginning of each verse.\(^{191}\) This is important, as “And” suggests that the verses in question do not stand alone, as generations of interpreters have presented them; rather, they are a part of a larger whole, representing a continuation of several other verses.\(^{192}\) They must read, in other words, in context.

Before turning to the context, a short comment on the text itself. Since no man is able—literally—to lie with another man “the way one lies with a woman,” many a biblical commentator focused on the exact biological nature of the textual restriction.\(^{193}\) Others have suggested that the act alone may be prohibited, while separate expressions of same-sex intimacy are not affected.\(^{194}\) Still others considered the text as applying “only to cultic, coercive, or exploitative sex.”\(^{195}\) Finally, a prominent thinker on the issue offered to exonerate those who conduct such acts because of their diminished capacity to obey the law.\(^{196}\) Beyond those suggestions, many a commentator offer to simply ignore the text today, much like we have done with other Biblical texts pertaining to slavery, stoning, animal sacrifice, and other norms we no longer consider valid.\(^{197}\)

For the purposes of this article, however, I shall assume—following those who use the text for religious objections—that the text as included in these verses prohibits all versions of same-sex intimacy, not merely a single act.\(^{198}\) Similarly, I shall assume that—should the current interpretation stand—same-sex marriages, explicitly entered into in order to preserve and consecrate such acts, cannot be condoned.\(^{199}\)

2. The Context: The Book of Leviticus

The text, therefore, proscribes acts of same-sex intimacy between men. It is also a part of a larger context (“And”). What is that context in which this text appears? Both verses in question are a part of the Book of Leviticus. That as with a woman, both of them have committed an abomination: they shall surely be put to death; their blood is upon them.”

\(^{191}\) This omission is not unique to the King James version: of the twenty-two translations I have examined, only two—Darby Bible Translation (“DBT”) and Young’s Literal Translation (“YLT”)—include the word “And” at the opening of each verse. For a comparison, see Leviticus 20:13, BIBLE HUB, http://biblehub.com/leviticus/20-13.htm (last visited Dec. 18, 2018).

\(^{192}\) See, e.g., And, MERRIAM-WEBSTER DICTIONARY (11th ed. 2016) (defining And: “used as a function word to indicate connection or addition especially of items within the same class or type”).


\(^{194}\) See, e.g., GREENBERG, supra note 90, at 76–85.


\(^{196}\) See RAPPOPORT, supra note 188.

\(^{197}\) See GELLER, supra note 195, at 22.

\(^{198}\) For a very different view, claiming that the text originally permitted sex between men only to be amended later to its form today, see Idan Dershowitz, Revealing Nakedness and Concealing Homosexual Intercourse: Legal and Lexical Evolution in Leviticus 18, 6 HEBREW BIBLE & ANCIENT ISR., 510 (2017).

\(^{199}\) I find it fascinating, in that respect, that several Rabbis have recently allowed same-sex marriage to take place, while concomitantly continuing to prohibit the very act on which such marriages are based. See, e.g., DORFF, supra note 130, at 19 (“The explicit biblical ban on anal sex between men remains in effect. Gay men are instructed to refrain from anal sex.”). With all due respect, in my mind this is not an appropriate (or even plausible) solution.
book—its structure, purpose, and content—constitutes, an important layer in their contextual understanding.

The Book of Leviticus—Va'Yikra נַּוֶּ֣יְקְרָ֫ה (“And He called”) in the original Hebrew—is the third of the Five Books of Moses (“Torah”). As Rabbi Greenberg notes, this Book “lacks the narrative sweep of the other books of the Bible. It is primarily a law book—indeed, the sages call it Torah Kohanim, the priests’ handbook.”200 The Book is divided into three main parts: First, the laws of sacrifice as practiced by the priests (Chs. 1-10). Second, the laws of purity and holiness, as related to both priests and families in general (Chs. 11-25), of which the text in question is a part. And finally, some blessings and curses relating to God’s covenant with the Israelites.201 Of the three, the first portion of the Book—the laws of sacrifice—has no real implications today. In fact, it has not been practiced for nearly 2,000 years.202 Thus, at the outset one has to consider the fact that a large part of the Book of Leviticus is, in essence, obsolete.

It is the second part of the Book—sometimes known as the “Holiness Code”203—in which the two verses reside. What is the subject-matter of that part? Professor Baruch A. Levine, a noted expert on Leviticus, has identified the Jewish family—rather than the Jewish individual—as the main subject of the holiness code. In his words: “This section begins by ordaining the place and form of proper worship of the God of Israel. It then defines the Israelite family and details improper sexual behavior, including incest . . . . Chapters 20 to 22 contain more on the Israelite family and ordain specifically priestly duties . . . .”204 The focus on the family—rather than the individual—should therefore factor heavily into contextualizing the verses in question. The term “Jewish family” itself should be understood as relating to the extended family rather than a nuclear one; members of those extended families used to reside together in biblical times, working together as a single economic unit.205 A sexual regulation of such a unit was, therefore, required rather than merely warranted; much like the sexual regulation of the workplace is required today, and for the very same reasons.

The notion of “holiness” provides another key element for understanding the Levitical prohibition. As we have seen, the second part of Leviticus is known as the Holiness Code. Thus, Chapter 11, which opens that part, contains the following celebratory decree: “For I am the Lord your God; you shall sanctify yourselves and be holy, for holy am I.”206 Similar decrees appear both near the verse prohibiting same-sex acts,207 and the one ordering the death-
What does “holy” mean in that context, and how may it help us understand the same-sex prohibitions? The term “holiness” in Judaism is complex, multi-faceted, and often misunderstood. For our purposes, it would be useful to review the last iteration of the notion in the current context, four verses following the death-penalty verse: “And you shall be holy to Me for I, the Lord, am Holy; and I shall set you apart from other peoples so you shall be mine.”

A crucial element of the notion of Jewish holiness, therefore, is the uniqueness—exceptionalism, in today’s parlance—of the Jewish people. As Professor Levine, who coined this phenomenon “Holiness & Otherness,” explains:

The Sifra, a rabbinc midrash, conveys the concept of “otherness” in its comment to Leviticus 19:2: “‘You shall be holy’—You shall be distinct (prashim tihyeu), meaning that the people of Israel, in becoming a holy nation, must preserve its distinctiveness from other peoples. It must pursue a way of life different from that practiced by other peoples. . . . This statement also conveys the idea, basic to biblical religion, that holiness cannot be achieved by individuals alone, no matter how elevated, pure, or righteous. It can be realized only through the life of the community, acting together.

The Book of Leviticus deals, then, with the notions of family and holiness (exceptionalism); both refer to a community rather than the individual Jewish person; and both require joint effort by their members in order to achieve compliance. These two contextual notions should guide us as we arrive at examining the final layer in the contextual reading of the two verses—the chapters in which they appear.

3. The Context: Laws of Incest

As one commentator has noted, “if we are attempting to use . . . the [contextual meaning] of Leviticus 18 to infer (not impose) qualifications on the prohibition, then those qualifications must fit the context.” What is the proper context of Leviticus 18? Chapter 18 contains 30 verses. Following a traditional preamble, it opens with an important warning: “The acts performed in the Land of Egypt, where you have resided, you shall not perform; and the acts performed in the Land of Canaan, to which I shall lead you, you shall not perform; and in their laws you shall not follow.

This warning, we have seen, did not remain inconsequential; the entire body of Jewish law restricting lesbian relationship is built entirely upon this single verse. More generally, this opening reflects the notion of “holiness,” or exceptionalism, which is at the heart of the Book of Leviticus—and still defines

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208. See id. at 20:26.
209. See Leibowitz, Seven Years, supra note 202, at 523-526 (describing, inter alia, anyone who uses the term outside the realm of Emanah (Jewish Faith) as blasphemous).
211. See Introduction to Book of Leviticus, in The World of Bible—Ya'Ykra 9 (Baruch A. Levine, ed., 2000) (Hebrew) (“Leviticus’ Code of Holiness (Chs. 17-27) does not stem from the Mishkan [temporary temple] . . . but from God himself, who is the only holy being, and who sanctified not only His own Mishkan and its priests, but also the entire people of Israel. . . . Since the people of Israel were separated from other peoples and became holy to their God, they should distance themselves from any impurity, either physical or moral.”) (citations omitted).
213. Tucker, supra note 166, at 26-27.
214. See Leviticus 18:1-2 (“And God spoke to Moshe and said: Speak to the Children of Israel and tell them I am the Lord your God.”).
215. Id. at 18:5.
216. See Kosman & Sharbat, supra note 187.
much of Jewish practice today. But Leviticus 18:3 is only the opening of the chapter's two "book-ends": the other is verse 24, which states "do not defile yourselves in all these for these are the acts that defiled the nations that I am casting out before you." The structure of Leviticus 18, then, is of a set of decrees "book-ended" by the general warning for the Jewish people not to go in the ways of—or emulate the acts performed by—the nations around them.

What are, then, the acts that Leviticus 18 warns from, the acts that were "performed in the land of Egypt" and should be never repeated by the newly-formed Jewish people? The answer, which is key to our understanding of the same-sex restricting text, arrives immediately, and creates the contextual framework of the entire chapter. It reads:

"None of you shall approach anyone of his own flesh to uncover nakedness; I am the Lord."

In other words, the main subject-matter of Leviticus 18 is the restriction on sexual relations with blood relatives, or, as it is commonly known today, the laws of incest.

This should be clear, on its face, from the opening verses of Leviticus 18. It should also be clear from Chapter 18's structure, which includes the two textual "book ends." It also makes sense: since the focus of the text is the family (as opposed to the individual), the restrictions included in it should pertain to the family as well. As an aside, we may also examine whether such sexual practices were indeed used "in the Land of Egypt" at the time. Was incest
common practice in ancient Egypt? Recent scholarship suggests the answer may be "yes.\textsuperscript{223} Moreover, the Bible itself, reporting on pre-Jewish societies, mentions overt incestuous acts between a father and two of his grown daughters with little to no moral opprobrium.\textsuperscript{224}

Leviticus 18, then, deals with intra-family sexual restrictions. To make that point abundantly clear, the text does not stop at the general restriction. Rather, it goes on to specify, in great detail, each and every relative with whom such relations are prohibited. Thus, for example, the very first (almost self-evident) prohibition is on having sexual relations with a man’s mother.\textsuperscript{225} From there, the text specifies fourteen types of relatives with whom sexual relations are forbidden.\textsuperscript{226} Importantly, and crucially for our purposes, all the restrictions are aimed, by their gender-specific language, at men; and all the persons with whom such relations are restricted are female relatives. Not a single male relative is mentioned throughout the chapter.\textsuperscript{227}

Before arriving at verse twenty-two—almost the last prohibition mentioned in the chapter—let us pause for a moment to consider the rationale for incest laws. Why was there a need, during biblical times, to prohibit intra-family sexual relations? And why was there a need to do so in such great detail? For some, there is no point in looking for a reason; this is God’s will, and therefore it should be followed.\textsuperscript{228} Others, however, have offered a more practical explanation:

Rather, one suspects that incest laws were meant to make clear that members of the opposite sex in one’s household are not to be considered as possible sexual partners. A household would become impossibly “overheated” if sexually mature brothers and sisters, parents and children could regard each other as sexually available.\textsuperscript{229}

That makes great sense. As the extended household (or economic unit) included several family members of opposite sex and different ages, sexual reg-

\textsuperscript{223.} PAUL JOHN FRANDSEN, INCESTUOUS AND CLOSE-KIN MARRIAGE IN ANCIENT EGYPT AND PERSIA 36 (2009) (“In the literature on the incest problem, Ancient Egypt is frequently mentioned as the exception, where the alleged universal prohibition on incest seems to have been suspended, that confirms the rule.”); SIMON SCHEMA, THE STORY OF THE JEWS 98 (2013) (citing 2 BOOK OF MACCABEES, 9:10) (“While other nations were capable of violating even their mothers and daughters, such abhorrent practices—along with homosexual copulation—was forbidden to Jews.”).

\textsuperscript{224.} See, e.g., Genesis 19:32–35 (Lot and his two daughters).

\textsuperscript{225.} See Leviticus 18:7.

\textsuperscript{226.} The fourteen categories are (I adopt here the “you” and “yours” biblical form): (1) Your father’s wife (apparently, not your mother). See Leviticus 18:8. (2) Your sister. See id. at 18:9. (3)–(4) Your granddaughter—either from your son or daughter. See id. at 18:10. (5) The daughter of your father’s wife. See id. at 18:11. (6) The sister of your father. See id. at 18:12. (7) The sister of your mother. See id. at 18:12. (8) The wife of your father’s brother—your aunt. See id. at 18:8. This verse also contains, arguendo, a restriction of approaching the father’s brother (uncle) himself, and by that to contain a male—and not only a female—restriction; I doubt that possibility, mainly because I can see no reason to single out this specific male relative as a likely sexual target. In addition, verse 18:16 suggests that this verse refers only to the female mentioned therein. (9) Your daughter-in-law, your son’s wife. See id. at 18:15. (10) Your brother’s wife. See id. at 18:16. (11) Any woman and her daughter (presumably, of the same household). See id. at 18:17. (12) Any granddaughter (from the son’s side). See id. (13) Any granddaughter (from the daughter’s side). See id. (14) Any woman and her sister (presumably, again, from the same household). See id.

\textsuperscript{227.} The Book of Genesis does contain an example of a sexual harassment by a female of a refusing male—but the two persons involved were not a part of the same family, and only one of the them (the harassed male) was Jewish. See Genesis 39:7–12. Thus, this example does not seem to bear on the current text.

\textsuperscript{228.} See LEIBOWITZ, SEVEN YEARS, supra note 202, at 508 (citing the Ramban for the proposition that “the Torah does not forbid incest because it is morally wrong, but the opposite is true: because the Torah prevents us from doing so, it is morally wrong.”).

\textsuperscript{229.} See, e.g., ETZ HAYIM, supra note 155, at 688.
ulation was pertinent. But was the typical biblical household indeed so diverse in terms of members and age? Modern research suggests it was:

The nuclear family was the cornerstone of Israelite society in general and in village society in particular, but since the economy demanded large human resources the nuclear family joined with others in a larger unit, the extended family, which sometimes included up to three generations. The extended family included the (grand)father, (grand)mother, their unmarried daughters, their sons (married and unmarried), and their sons' wives and children. All of these lived in one four-room house or in a complex made of several attached houses. In addition, the compound housed unrelated people who were considered part of the extended family, including slaves, hired hands, and others.230

Indeed, the typical biblical Jewish family—the one the Levitical text targeted—resided in one household, and comprised of several generations of men and women, several of whom in sexually-active ages. Clearly the biblical author saw great utility in regulating and restricting sexual encounters within such a household, within such an extended family. Equally clear is the fact that most of the regulatory energy was aimed at preventing unwanted heterosexual relations: then,231 as now,232 this kind of relations have been the norm. But every norm has an exception, and other types of sexual relations still required regulation within the family. Thus, for example, regarding children, it was important to clarify that child sacrifice is unacceptable.233 Similarly, regarding wives (who were allowed generally to be “approached” by their husbands), it was important to clarify that they, too, are not always available sexually.234

4. Back to the Verses—Part of the Laws of Incest

Thus, finally, we arrive back at Leviticus 18:22, the only restriction aimed towards men with its subject matter being other males, as opposed to females.

230. BOROWSKI, supra note 205, at 22.
231. For discussion of the biblical “norm” regarding heterosexual relations, see part I.A.; see also RAPPOPORT, supra note 188, at 147 n.25 (“The Gemara derives the ban on mishav zachar (homosexual acts) for gentiles from Genesis 2:24.”). But the text of Genesis suggests no such restriction, of course; it merely describes the (statistically prevailing) practice of heterosexual marriage; it says absolutely nothing about other forms of marriage.
232. Though the issue defies conventional polling, even today, by several current estimates still ninety-six percent of American population is heterosexual. See Baskin v. Bogan, 766 F.3d 648, 668 (7th Cir. 2014) (“No one knows exactly how many Americans are homo-sexual. Estimates vary from about 1.5 percent to about 4 per-cent.”); Michaelson, supra note 166, at 141 (“According to our most reliable statistics, only 4% of Americans identify as gay or lesbian.”).
233. See Leviticus 18:21 (“And thou shalt not let any of thy seed pass through the fire to Molech . . . .”)
234. See Leviticus 18:19 (“And to ISHA during her period you shall not approach to uncover her nakedness”). The term ISHA, in Hebrew, means both “woman” and “wife.” While most understand (and translate) this verse as referring to women in general, both common sense, context, and other Biblical laws suggest that this verse only refers to wives. First, the verse assumes the woman in question, during non-period times, is allowed to be “approached” sexually. But according to the Ten Commandments—which have the weight of a constitutional norm, as we have seen earlier—one should refrain from either committing adultery. See Exodus 20:13. One should also refrain from coveting his neighbor’s wife. See Exodus 20:14. A restriction later expanded to include engaged women. See generally Deuteronomy 23-27. Accordingly, the “woman” in question cannot be someone else’s. Moreover, since the verse is located well within the two “book ends” of Leviticus 18, it would also make sense to assume that it is targeted at the women of the household. Since the unmarried women were already “ruled out” for sexual approach previously—as elaborated by the 14 categories mentioned earlier—it makes much more sense to assume that the ISHA which may be approached usually, but is restricted during her period, is one of the lawful wives, or concubines. It should be noted that, during biblical times, both before and after Leviticus, having multiple wives and concubines was the norm: from Jacob the Forefather (two wives (sisters) and two concubines to King Solomon (700 wives and 300 concubines). See Genesis 30:1-10; 1 Kings 11:3.
That restriction reads: "And a male you shall not lie with the way one lies with a woman: it is an abomination." \(^{235}\)

We have already noted that the verse begins with an "And," a clear indication of it being part and parcel of the entire preceding section. Note also its location, squarely between the chapter's two "book ends"—verses 6 and 24—which suggests that it is, and should be understood as, part of the laws of incest, the intra-family sexual restriction. Finally, consider the fact that the vast majority of intra-family sexual prohibition are aimed at heterosexual relations. Accordingly, the logical interpretive conclusion is that the text in question forbids same-sex relations only as part of the Laws of Incest, or intra-family same-sex relations.

Indeed, if the intra-household regime was aimed at preventing "overheating" of the extended family environment, as Professor Levine puts it, surely such rationale would apply if two family members of the same gender (here, only male) would have sexual relations. Even the phrasing of the prohibition—a phrasing parsed by many a Jewish Law scholar, as we have seen—seems to have the heterosexual relation as a model; instead of restricting "homosexuality"—as Halachic sources did with lesbian relations\(^{236}\)—the Torah text models the same-sex male restriction after the manner in which a man "lies with a woman."

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

The same logic, and therefore the same conclusion—that the verse relates only to intra-family, incestuous homosexuality—should apply to Leviticus 20:13.\(^{237}\) This verse, home of the notorious death penalty for same-sex acts, was long understood as allowing to execute both males partaking in homosexual intimacy, as they have committed "an abomination." First, it is important to note that in the past two millennia since it was inscribed, not a single death penalty was actually imposed for this violation.\(^{238}\) The death penalty language, therefore, should be considered more as a moral condemnation than a concrete legal authorization. More importantly, the death penalty verse resides well within the perimeters of the "Holiness Code," thus rendering it, yet again, well within the intra-family incestuous context. And, indeed, a quick review of

\(^{235}\) Le \(\text{viticus} \) 18:22.

\(^{236}\) See Kosman & Sharbat, supra note 187.

\(^{237}\) Le \(\text{viticus} \) 20:13 ("And a man who lies with a male the way one lies with a woman—both have committed an abomination: they shall be put to death, their blood is upon them.").

\(^{238}\) See Rapoport, supra note 188, at 137–39 n.4. The failure to impose the death penalty can be attributed mostly to the strict standards that were self-imposed by Jewish law: first, two witnesses were required to testify (both men, at the time); second, those two witnesses had to be eye-witnesses to a "live" violation of the rule; third, the two witnesses had to warn the couple engaged in the prohibited act of the capital nature of their offense; and the couple engaged—or the willing party, in the case of rape—had to acknowledge the warning but continue with the act nevertheless. See Samuel J. Levine, Capital Punishment in Jewish Law and its Application to the American Legal System: A Conceptual Overview, 29 St. Mary's L.J. 1037, 1045–52 (1998).
the other "death penalty" authorizations appearing in Chapter 20 reveals that they, too, are related to incestuously prohibited sexual relations. From a death penalty prescribed to a man who lies with the wife of his father (presumably not his mother), a female relative who cannot be approached according to Leviticus 18:8; to a death penalty for lying with a man's daughter in law, a sexual restriction first appearing in Leviticus 18:15; to a death penalty for lying with a woman and her mother, which is nearly identical to the sexual restriction appearing on Leviticus 18:17. All these penalties are prescribed for intra-family activity, and there is no reason to assume that the death penalty on same-sex acts is any different.

Recent theologian scholarship began also to recognize the "incest" interpretation to the Levitical prohibition. For example, in 2004, Rabbi David Milgram—a noted authority on the Book of Leviticus—included the possibility that "the homosexual prohibition [in Lev. 18:22] does not cover all male-male liaison, but only those within the limited circle of family." Two years later, in 2006, David Stewart proposed that "Leviticus 18:22 is an incest rule," which "extends the incest prohibition to all the male relatives of the same degree of relation as those forbidden [to] women in 18:6–18." Most recently, in 2009, Renato Lings wrote that "just as the overall aim of Lev. 18 and 20 is to ban incestuous heterosexual practices, Lev. 18:22 may well be there to ensure that homosexual incest is added to the list of proscriptions."

5. "The Dog that Didn't Bark"

Sometimes the text that is not written—"the dog that didn't bark"—provides us with important clues as to the meaning of the written text. Take the Torah's fifth and final book, Deuteronomy—"D'varim" ("words" or "commandments") in the Hebrew original. This book is also known as "Mishne Torah"—Secondary Torah, or Repetition of the Torah, which is the source of its English name. Accordingly, the book consists, at least in part, of a selective repetition of "highlights" of the laws and rules mentioned in the previous four books. When it comes to the sexual restrictions prescribed by Leviticus 18 and 20, the Book of Deuteronomy dedicates a special section to such laws, adding to each restriction the notion of being "cursed" for its violation. Thus, we learn that "[c]ursed is he who curses his father and mother"; and "[c]ursed is he who lies with his father's wife"; and "[c]ursed is he who lies with his father's wife"; and "[c]ursed is he who lies with his father's wife". The same rationale, however, as well as the intra-family connection, is apparent in both verses.

239. See Leviticus 20:11.
240. See Leviticus 20:12.
242. There, to be exact, the restriction is on lying with "a woman and her daughter." Leviticus 18:17. Here, in Leviticus 20:17, the death penalty is imposed for lying with "a woman and her mother." The same rationale, however, as well as the intra-family connection, is apparent in both verses.
244. David Stewart, Leviticus, in THE QUEER BIBLE COMMENTARY, supra note 83, at 98.
246. The term, of course, belongs to Sherlock Holmes. See ARTHUR CONAN DOYLE, THE ADVENTURE OF SILVER BLAZE (1892).
248. See id. at 981 ("Some of Deuteronomy's passages ... duplicate contents found elsewhere in the 'Torah.").
with his sister252 and more. Yet the restriction on same-sex acts is glaringly missing from that list. Not a word. Not there, and not in the entire Book of Deuteronomy. Such an omission, as well, may teach us that the scope of Levitical prohibition was extremely narrow—within the family—and, in any event, did not merit a mention in the summary of these rules in Deuteronomy.

**CONCLUSION**

For millennia, the Genesis Story of Creation, the Tale of Sodom, and—in particular—the Levitical prohibition on same-sex intimacy were interpreted as universal proscriptions on same-sex intimacy. Those who attempted to challenge such understanding were silenced, or labeled intellectually dishonest; the biblical text, it was argued, simply does not lend itself to any other interpretation.253 In this article, I attempted to present an intellectually-defensible alternative to this pervasive view. According to this reading, same-sex acts were prohibited by the Torah only within the confines of the extended-family, and for the same reasons that heterosexual acts were forbidden by the same Laws of Incest. Such interpretation, I have demonstrated, is more compatible with the three organizing principles according to which all verses in the Hebrew Bible should be read—the notion that every person was created in the image of God; the duty to love your neighbor as yourself; and the understanding that the interpretation of the Torah is not in the Heavens. Such interpretation, I argue, is superior in every respect to the current understanding, according to which all LGBTQ members are condemned to shaming, demeaning, and hateful attitude.

Understanding the biblical prohibition against same-sex acts as merely applying within the confines of the extended family is important for several reasons. First and foremost, it allows gay and lesbian people—who are not members of the same extended family—to freely engage in loving relationships. Second, and perhaps more importantly, much like the jurisprudential inevitability envisioned by Justice Scalia in *Windsor*, the recognition of the right to same-sex intimacy should be followed by a similar religious recognition of same-sex marriage. This is the path carved by the U.S. Supreme Court,254 and there is no reason for religious law—Jewish or otherwise—to not follow it.

Third, from a biblical-interpretation perspective, this interpretation allows us to "free" many of the wonderful texts included in the Bible that have so far been marginalized or improperly read. Take for example King David’s eulogy over the loss of his dearest friend, Jonathan: "So sorry am I for your loss, my brother Jonathan, as you have been so pleasant to me. Your love has been more wonderful to me than any woman’s love."255 The same is true when the Wise King advises us, in a language that is gender-specific to two males, that "[t]wo are better than one . . . [s]o when both of them shall lie together, it will be warm to both of them; and the one, how will he become warm?"256 These and other passages would now be able to be read in the same spirit they were written—a spirit of love, respect, and equality.

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252. Deuteronomy 27:22 (emphasis added).
253. See, e.g., Dennis Prager, *Homosexuality, the Bible, and Us—A Jewish Perspective*, PUB. INT., Summer 1993, at 60, 67 ("The onus is on those who view homosexuality as compatible with Judaism or Christianity to reconcile this view with their Bible. Given the unambiguous nature of the biblical attitude towards homosexuality, however, such a reconciliation is not possible. All that is possible is to declare: ‘I am aware that the Bible condemns homosexuality, and I consider the Bible wrong.’ That would be an intellectually honest approach.").
254. See supra Section I.A.
255. 2 Samuel 1:26.
Two verses in Leviticus, a story of the creation of a man and a woman, and a tale of a forbidden city have caused an untold amount of suffering to too many people of both genders. The religious freedom to argue on behalf of the Bible does not include a free license to treat others maliciously. This is particularly so when such attitude is not called for by the Bible itself. The time has come to end the suffering of LGBT persons on behalf of religion. It is time to turn those victims into full-fledged, respected members of their religious communities. It would make them better; it would make their religious communities whole; and it would correct, after too many years, one of organized religion's biggest mistakes. As the great Jewish Law sages have taught us—"If not now, then when?"257

257. Mishna, Pirkei Avot 1:14.