Navigating the forbidden:

Exploring religious and sexual identity conflict through the lens of law

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ABSTRACT

This thesis considers the tensions that lesbian or gay ("L/G") religious people experience between their sexual and religious identities and how they negotiate these tensions. Specifically, it analyzes the challenges of evangelical Christian men who identify as 'ex-gay' and Orthodox Jewish women who identify as lesbian. Most of the people who are the focus of this research live within religious communities—situated within a more secular state framework (the USA)—that disavow same-sex attraction as a matter of religious principle and law. This dissertation is informed by a feminist methodology and a legal pluralism and critical legal pluralism theoretical framework. A legal pluralist and critical legal pluralist theoretical lens draws out the legal norms relevant for these L/G people with respect to sexuality and intimate relationships. The application of this framework illuminates the unique negotiations that these people undergo with respect to sexuality and explains the significance of a religious worldview to their normative choices. Ultimately, the legal analysis reflects the complexity and depth of these legal subjects. Feminist methods are used in the legal commentary, emphasising connections between personal, first-hand narratives and legal analyses of inequality, advocacy and gendered power relations. This thesis draws on narratives provided by L/G Christian or Jewish people, including memoirs, media articles, documentaries, blog contributions and online interviews. This analysis concludes that, for most of the L/G people in this work, their sexual and religious identities are dynamic and will remain contested. This thesis argues that some Orthodox Jewish women engage in productive dialogue between their sexuality and religious concepts of self, and this dialogue can take the form of legal negotiations and rule creation within their Orthodox communities. By comparison, ex-gay Christian men assert a transformative concept of self that claims to totally efface their gay orientation, replaced by a self-professed 'ex-gay' Christian identity.

RÉSUMÉ

Cette thèse porte sur les tensions entre leur identité sexuelle et religieuse que vivent les personnes religieuses lesbiennes ou gaies (L/G), et sur la façon dont elles et ils gèrent ces tensions. En particulier, elle analyse les défis que rencontrent des hommes chrétiens évangéliques qui se définissent comme "ancien-gai" et des femmes juives orthodoxes qui se définissent comme lesbiennes. La plupart des personnes qui font l'objet de cette recherche habitent dans des

communautés religieuses (situées dans un cadre étatique plus laïque, celui des États-Unis) où l'attirance pour les personnes du même sexe est interdite par la religion et par la loi. Cette dissertation est réalisée sur la base d'une méthodologie féministe et des approches théoriques du pluralisme juridique et du pluralisme juridique critique. C'est sous l'angle de ces approches théoriques que sont dégagées les normes pertinentes pour ces personnes L/G en ce qui a trait à leur sexualité et à leurs relations intimes. L'application de ce cadre théorique met également en lumière le travail unique de négociations internes auxquelles se livrent ces personnes en matière de sexualité, et explique l'importance de leur vision religieuse du monde pour leurs choix normatifs. Ultimement, l'analyse juridique révèle la complexité et la profondeur de ces sujets de droit. Dans le contexte de la discussion juridique, des méthodologies féministes sont employées pour mettre en évidence les liens entre les témoignages personnels considérés et l'analyse des inégalités, de la défense des droits et des relations de pouvoir genrées. Cette thèse s'appuie sur des témoignages de personnes L/G chrétiennes ou juives, communiquées notamment sous forme de mémoires, d'articles de presse, de documentaires, de blogues ou d'entrevues. L'analyse conclut que la majorité des personnes L/G représentées dans cette étude ont des identités sexuelle et religieuse dynamiques qui sont vouées à demeurer en tension. En particulier, la thèse présentée veut que les femmes juives orthodoxes mettent en dialogue de façon productive leur sexualité et leur identité religieuse, des dialogues qui prennent parfois la forme de négociations légales et de création de normes au sein de communautés orthodoxes. De leur côté, les hommes chrétiens anciennement gais mettent de l'avant une conception transformée d'eux-mêmes où leur orientation sexuelle est complètement effacée, remplacée par une identité autoproclamée de chrétien anciennement gai.

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Dedication

To Kenneth. Thank you. For your fierce intelligence, your thoughtful mind, your wit, and for your love and belief in me.

To misquote a great man: you love someone because they sing a song only you can hear.

A great woman wrote: True journey is return.

These are how I think of you.

INTRODUCTION

This dissertation presents the stories of two groups of religious people dealing with competing religious and sexual identities: evangelical Christian men who identify as 'ex-gay' and Orthodox Jewish women who identify as lesbian. These people live complicated and contested lives, and this thesis aims to mirror this complexity by illustrating the different roles that law can play in creating and limiting identity. Ultimately, I contend that while we might never fully understand the identity choices these people make, we can build a compelling picture of their lives, their normative worlds and their identity dilemmas from examining how they engage with law. We then begin to see them as nuanced selves: rule abiding, rule creating and as sites of ongoing negotiation and navigation.

I began this project with the goal of investigating the 'legal world' of deeply religious people who identify as lesbian or gay ("L/G").[1] What I intended to find through this

[1] Initially, I intended to include religious community members who identify in different ways across the sexuality and gender spectrum. However, as my research grew more targeted to gay or lesbian experiences, I realized the importance of respecting diversity across LGBTQIP2SAA communities (I explain this acronym below). That is, the experiences of gay or lesbian religious people do not necessarily reflect the challenges that a trans religious person ("trans" here inclusively describes people whose gender identity or expression differs to that associated with the sex they were assigned at birth) might experience in the same religious community. To conflate these experiences would not only be inappropriate and perhaps discriminatory, it could also damage the integrity of this research and further research relating to different communities. For these reasons, I limited the scope of my research to lesbian and gay/ 'ex-gay' religious people in distinct Christian and Jewish religious communities.

In Canada in 2018, the full acronym representing queer communities is Lesbian, Gay, Bisexual, Transgender, Queer, Questing, Intersex, Pansexual, Two Spirited, Asexual and Ally (LGBTQIP2SAA). I decided it would be inappropriate to use this acronym to reference members of different queer communities in my work, given the limited focus of my research to lesbian or gay religious people and concerns about generalizing the experience of other non-heterosexual and non-cisgender religious people. However, using the shorter, more common 'LGBT' acronym also seemed inappropriate, as its use suggests the inclusion of bisexual and/or transgender religious people in this research, when this is not the case. For these reasons, I shortened the acronym further to 'L/G' to represent the experiences of gay/ 'ex-gay' men or lesbian women in Christian and Jewish communities. In other parts of this work, I use the 'LGBT' acronym when reporting on state or international initiatives that affect L/G communities, as this reflects the language most often used in international and national instruments and legislation relating to sexual orientation and gender identity. For example, the United Nations Human Rights Council used LGBT as the preferred acronym in its 2011 Report on discriminatory laws and acts of violence on the basis of sexual orientation and gender identity and its subsequent 2015 Report. See: Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights, discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, A/HRC/19/41 (U.N. General Assembly, 2011). Although I note that, as of 2018, the United Nations Free & Equal Campaign against Homophobia and Transphobia states that it recognises the universal equality rights of Lesbian, Gay, Bisexual,

inquiry was that law (arising from different authorizing frameworks, both state and religious) was at the centre of this analysis. I expected that the experiences of L/G people living in select evangelical Christian and Orthodox Jewish communities would provide the necessary 'evidence of things not seen' to support firm conclusions about law.[2] However, the religious people I was beginning to meet—through their memoirs, sociological studies, documentaries and published interviews—began to insist that this inquiry was not properly 'about' law, at all. The stories of ex-gay Christian men and lesbian Jewish women were not waiting to be neatly catalogued into an evidence base demonstrating the interaction of different legal orders: they were driving my inquiry towards the recognition of their divergent sexual and religious identities and asking the question of whether the identities could ever be harmonised, reconciled or simply remain inimical. Thus, my search for critical interplay between state legal frameworks and religious normative orders became a story about how religious and queer men and women experience sexual and religious personhood, and how law can indicate, navigate and delineate these identities.

This shift in the project was the result of my introduction to the worldview of two very different groups of religious people, even though I had never met any of them in person, and even though they are unlikely to find much in common in their real worlds. I wanted to learn about these people from the perspective of a legal commentator: what rules they see as binding, how they negotiate or reject norms, and how they balance competing identities in the shadow of strict legal obligations. My initial plan was to pursue this project as an empirical study, but difficulties of community access and resource limitations made this impracticable.[3] However, I discovered that there was much I could

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Transgender and Intersex people. United Nations Human Rights Office, "UN Free & Equal | About", (2018), online: *UN Free Equal* <https://www.unfe.org/about/>.

[2] James Baldwin, *The Evidence of Things Not Seen: Reissued Edition* (New York: Henry Holt and Company, 1985). Baldwin's references the definition of faith presented in Paul's Letter to the Hebrews, 11:1. "Now faith is the substance of things hoped for, for the evidence of things not seen."

[3] As I discuss later in this introduction, I am an outsider to both religious groups, as I identify as a secular woman without community ties to either Christianity or Judaism. With this background, accessing ultra Orthodox Jewish communities in the United States or Canada presented a significant difficulty. As I discuss in detail in chapter 5, ultra Orthodox communities resist any secular interference and are particularly concerned about secular narratives that explore their communal and religious world. Therefore, I decided that I would be unable to access these communities and ask women to tell their stories without compromising their safety.

learn about these people from first and second-hand sources. While some of this information came from academic literatures, much of it was provided by first-hand narratives of men and women living in closed religious communities. From these narratives, I built my understanding of the lives of these people and their interaction with different legal environments.[4]

The first group I focus on is that of Christian men who undergo reparative therapy or conversion therapy in the hope of transforming their sexuality from gay to heterosexual.[5] Over the three years that I searched for their stories, I became intrigued by the intensity of their faith and the confounding challenge of their self-professed 'ex-gay' sexual identity. evangelical Christian men who identify as ex-gay worship in communities that are united by their commitment to a 'sexual orientation change' Christian message. This message is that a heterosexuality is the natural state of all people, ordained by God and described in Genesis, and that men and women who want to transform their sexuality from homosexual to heterosexual can do so by actively engaging with Christianity. Ex-gay communities can be residential programs or are geographically dispersed communities of ex-gay people that are connected by evangelical churches. These churches offer reparative therapy counselling services, preach the ex-gay message of transformation through prayer and witness, and support Christian ex-gay conferences and events.

Ex-gay Christian communities are often found in the western and southern United States (several of the highest-profile communities were found in South Carolina, Kentucky, California and Texas), but they have an active online presence across the United States and, through evangelical mission work, to queer communities across the world. As part of my journey into this community, I found narratives written by men still living in ex-gay communities, and by those who reported they had successfully completed their ex-

[4] As I explain later in the introduction, this thesis is structured according to the different environments in which these legal subjects experience their faith, the law, and social events. Therefore, a detailed research methodology for the narrative and academic source material that I drew on for both Christian men and Orthodox Jewish women is found in the chapters that analyze the specific religious communities in which these two groups of people live. That is, chapter 4 for the evangelical ex-gay Christian communities, and chapter 5 for Orthodox Jewish communities.

[5] Reparative therapy, also known as conversion therapy, describes pseudo-clinical and religious practices that claim to transform a person's sexuality from a queer identity to heterosexual. I outline the clinical and religious history of reparative therapy in the United States in chapter 4, and relate these practices directly to the experiences of Christian men living in ex-gay communities.

gay journey. I found interviews and memoirs written by men who had left these communities and who reported that reparative therapy in a Christian context was abusive and harmful. Several of them had tried to commit suicide while they were living in ex-gay communities, or soon after they left. I found interviews with women who had married ex-gay men, and empirical studies of married couples (male-female) who reported they were still struggling with the 'ex-gay journey' but remained committed to it. Ex-gay Christian messages vary depending on the evangelical church that espouses them. However, there are strong connections in the theme and content of religious rules that govern these communities. These rules are based on certain evangelical doctrinal foundations: that the heterosexual family is the central unit of Christian life, that one can only be free to find salvation by offering obedience to Christ, and a traditional understanding of gender roles that separates the 'strong masculine' from the 'submissive feminine' to achieve a strong, balanced Christian marriage. Ex-gay Christian missions are also characterised by the central evangelical themes of witness (to hear one's confession and to openly confess sins), repentance and personal revelations of the divine.

The second group of religious people are Orthodox Jewish women who identify both as lesbian and Orthodox. I began my journey into this community by conducting foundational research into the different forms of Orthodoxy, the history of Jewish law (*Halakha*) and the rabbinical prohibition of lesbian sex and relationships. In this initial research, I began to discover hidden communities of women and girls, physically and spiritually separated from men by law and custom, and located within domestic, female spaces. In an abstract sense, Orthodox women are situated in marriage, in motherhood and in domesticity. In a physical sense, they are situated in the female spaces of the home, the kitchen and the mikvah (ritual bath). Orthodox women live within a hierarchical, patriarchal community that disavows the potential for a public female identity to exist and strictly enforces gender segregation in everyday life.

I looked for narratives by Orthodox women who, despite acknowledging their lesbian identity as immutable, also continued to live within their Orthodox religious community. I found this described the situation of many of the Orthodox and lesbian women whose stories I read. Their commitment to Orthodoxy remained firm, even though almost all

Orthodox rabbinates remain committed to the position that lesbian sex and intimate relationships are explicitly forbidden as a matter of religious law. The strength of this normative position is demonstrated by the fact that Orthodox communities (often more devout communities) can be dangerous places for lesbian women. Some women reported that rabbis and community morality committees threatened that they would lose custody of their children or be shunned by their family and declared *apikorus* (heretic) if they came out as lesbian. Orthodox women in the United States who interviewed Orthodox women also reported cases of physical violence committed by men against lesbian women such as rape, beatings or acid attacks. Other punishments included lesbian women being denied access to family religious events, made to move out of their village, or the children of lesbian women being deemed 'damaged goods' by matchmakers. Yet, even in these contexts, these women viewed their religious identity as a non-negotiable aspect of self, and a source of personal fulfillment.

(1) Contributions to scholarship

1. A juxtaposition of antithetical religious groups

This dissertation makes two contributions to legal scholarship. The first contribution comes from the juxtaposition of two antithetical religious contexts. This study presents an unusual set of comparisons about religion, law and identity, which highlight points of convergence and difference in terms of how these religious people use law to navigate identity. The Christian men and Jewish women I write about have striking differences in terms of religious beliefs and practices, and in terms of their historic engagement with the secular mainstream. As a starting position, their religious faiths both disavow the validity of the other. Whereas evangelical Christians consider that the coming of Christ as Messiah satisfied the Abrahamic Covenant, Orthodox Judaism considers the Hebrew Bible to be the ultimate statement of divine purpose, and that the Messianic Covenant is still to be realized. Ex-gay Christians are taught that Judaism is an historical religion, necessary to contextualise the coming of Christ, but that Jews are not offered a place in heaven without converting to Christianity, which means accepting Christ as the Messiah. By comparison,

Orthodox Jews believe that they are the Chosen of *Hashem* (the Name, God),[6] which means they have been singularly chosen to enter into a covenant with God, provided they keep His law.[7] For Orthodox Jews, Christians are unbelievers who cannot be counted amongst the Chosen.[8] In light of these religious positions, I suspect that both groups would firmly reject the possibility of there being any similarities between how they live or how they experience their religious faith. Further, for those Christian or Orthodox people who sit at the extremes of their group—in terms of the intensity of their faith and their belief in the literal truth of their religious doctrine—to engage in this type of comparison is to do violence to their beliefs.

However, despite these undeniable differences, I found there to be significant crossovers and connections in terms of how L/G Christians and Orthodox Jews experience religion as a compelling set of norms, how the leadership of these two groups address the concept of LGBT identities (particularly L/G identities), and how L/G members of these communities experience religious law. In this investigation, I show that both ex-gay Christian men and lesbian Orthodox women share a deep, personal commitment to their religious faith and to the social and communal obligations that are constitutive of that faith. Members of both communities described a longing to belong to a religious faith that touched all aspects of their lives, even where that faith required personal obedience that many described as overwhelming. Both Christian men and Jewish women indicated that the overarching benefits of having a close, interconnected faith community outweighed the negative of having their personal lives scrutinised for compliance with religious rules.

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[6] Deborah Feldman, an orthodox woman who a memoir detailing how she left her Hasidic community, writes: "The true name for God is devastatingly holy and evocative; to utter it would represent a death wish, so we have safe nicknames for him instead: the Holy Name, the One, the Only, the Creator, the Destroyer, the Overseer, the King of All Kings, the One True Judge, the Merciful Father, Master of the Universe, O Great Architect, a long list of names for all his attributes." Deborah Feldman, *Unorthodox: The Scandalous Rejection of My Hasidic Roots* (New York: Simon and Schuster, 2012) at 30.

[7] "For you are a holy people to *Hashem*, and *Hashem* has chosen you to be his treasured people from all the nations that are on the face of the earth." Deuteronomy, 14:2. See also: Jewish Virtual Library, "The 'Chosen People'", online: <http://www.jewishvirtuallibrary.org/the-quot-chosen-people-quot>.

[8] There has been far greater cooperation between Jews and Christians over the last century, with branches of both faiths 'even speaking of a common Jewish-Christian tradition'. However, there remains strong opposition on the part of Orthodox Judaism to commit to any faith dialogue with Christians. See: Rabbi Louis Jacobs, "Historic Jewish Views on Christianity", (2017), online: *My Jewish Learning* <https://www.myjewishlearning.com/beliefs/Issues/Jews_and_Non-Jews/Attitudes_Toward_Non-Jews/Christianity.shtml>.

Likewise, almost all Christian men and Jewish women accepted that their religious faith had rules about the 'correct' way to present masculinity and femininity within the religious community and the family unit, and that these rules were relevant to their lives. This presentation of gender difference was markedly similar across both faiths, with women exhorted to demonstrate hyper femininity at home and in public (although the degree of public presentation of the female body varied greatly between Christian and Jewish communities) and men encouraged to realize a masculine identity of the 'head of the household' that requires total separation from the domestic and parental roles of women. In this way, both groups share a deep respect for the patriarchal organization of their Christian or Orthodox Jewish communities.

However, by far the most significant connection between these groups of queer religious people was their commitment to religious law as a compulsory element of their lives. For both Christian and Orthodox people, the importance of religious regulation transcended the level of habitual practice or custom. It formed a bedrock of expectations and requirements that define the boundaries of being a good Christian or Jew. These rules explicitly ruled out the possibility of a queer identity as forming part of this good religious life. The foundational nature of religious rules on sexuality influenced the leadership of both groups to actively reject secular rights frameworks and philosophies that promote human rights (notably civil liberty rights), the recognition that there is a spectrum of human sexuality and gender identity, and the value of equality guarantees. Ex-gay Christian communities and Orthodox communities dealt with the potential intrusion of these secular frameworks in markedly similar ways that reflected the tense relationship between secular legal norms and religious concepts of valid personhood. Management of the risk of secular intrusion usually took the form of internal community policing by religious leaders, negative information sharing about the risks of engaging with the secular world, and the creation of an effective shield/sword narrative about the need to protect and promote religious law in relation to the issue of sexual identity.

2. Using (critical) legal pluralism to discover dilemmas of identity

The second contribution to scholarship relates to the way this dissertation uses and develops a legal pluralism and critical legal pluralism theoretical framework. My analysis

of the different identity struggles that religious L/G people experience (in the context of two closed religious communities) is focused through the theoretical lens of legal pluralism and critical legal pluralism. The 'law' of this inquiry is a complex normative order that has developed, over time, as an integral aspect of religious faith and as personal responses to that faith. Thus, I make a tentative claim that a more positivist conception of 'law as rules' might manage our public actions, but it can be harder to argue that this law also compels us to understand, celebrate or reject our identities. However, here I focus on a situation in which law plays that role: in analyzing how and why L/G members of certain religious communities experience deep dissonance between their identities, and in determining that—at least in part—this conflict is caused by their deep commitment to laws which forbid the expression of their sexuality.

Legal pluralism accepts that law exists in semi-autonomous social fields of our world; and that different law can apply meaningfully for people within these fields either instead of state legal regulation, or in addition to it.[9] It is not new to assert that religious legal frameworks, where they exist as strong normative orders over a distinct population, can operate separately to state legal frameworks and can influence a group's adherence to that state framework.[10] This investigation takes that position as its starting point. However, this investigation goes further than establishing the potential application of a legal pluralist analysis to these communities. Rather, I assert that we can learn something meaningful about conflicts of identity in religious communities when we apply a legal pluralist and critical legal pluralist perspective to that search for identity. Exploring how people internalise a deep sense of legal obligation and analyzing how they respond to rules that govern aspects of their identity, constitute valuable steps to understanding the difficult choices that people make to subsume or recognise different aspects of their

[9] John Griffiths, "What is Legal Pluralism?" (1986) 1:1 Leg Plur Unoff Law 1; Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7:4 Law Soc Rev 719; Roderick A Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism Part I: General Themes" (1998) 15 Ariz J Int Comp Law 69 [Macdonald, Metaphors of Multiplicity 1998].

[10] This position reflects the work of many legal pluralist scholars that has informed this work, including notably: Shauna Van Praagh, "The Chutzpah of Chasidism" (1996) 11:2 Can J Law Soc, online: <https://papers.ssrn.com/abstract=1457334>; Shauna Van Praagh, "Sharing the Sidewalk" (2010) 8 Can Divers 6; Campbell, Angela, *Sister wives, surrogates and sex workers: outlaws by choice* (Farnham, Surrey: Ashgate Publishing Company, 2013); Howard Kislowicz, "Sacred Law in Earthly Courts: Legal Pluralism in Canadian religious expression litigation" (2013) 39 Queen's Law J 175.

personhood. My goal is to discover how some religious people (accepting that I cannot generalise beyond the specific experiences presented in this work) construct or recognise different sexual and religious identities for themselves, drawing on legal pluralist and critical legal pluralist theories of law. This involves following different personal journeys and relationships that are built within socio-legal contexts that deny the validity of L/G identities. In both contexts, religious law is the norm which defines L/G religious people as Other. It demarcates their stories about sexuality and sexual desire as 'outsider narratives'. It shapes their 'who am I?' question as a moral enquiry and it polices their answers. Thus, I examine how religious L/G people respond to the central role that religious law plays in their lives. Do they affect change to it? Do they accede to its dominant narrative? Do they subvert certain norms, only to accept others as binding? Do they believe that it is divinely inspired?

In the case of 'closed' or conservative religious communities that exist within the formally secular legal framework of the western state, much of the law that applies to community members is sourced from community-specific, religious normative orders. These legal orders are sometimes formal, hierarchical and organized in legal codes (such as *Halakha*) and are sometimes more informal, unwritten or verbal rule sets that are applied by religious leaders (such as the legal norms that operative in ex-gay Christian communities). In some cases, religious L/G people demonstrate critical responses to law that suggests that they are in fact a 'site of law' themselves. I consider these situations where people either improvise their own law or remake a traditional law anew through the lens of critical legal pluralism, which refocuses the inquiry of 'where and what is the law' away from the religious legal order to the legal subject. A critical legal pluralist analysis illuminates the value of practices which help individuals resolve disagreements with a religious community about their religious and sexual identity or develop different concepts of identity to adjust to censure of their sexuality. This type of analysis is valuable in my discussion of the narratives of Jewish lesbian women, set out in Chapter 6.[11]

[11] I take as my model for critical legal pluralism (and its development of the definitions of legal pluralism): Martha-Marie Kleinhans & Roderick A Macdonald, "What Is a Critical Legal Pluralism?" (1997) 12 Can J Law Soc 25. I discuss this model and further adaptations of the model, in chapter 2 at 95 - 100.

(2) A feminist method approach

In terms of choosing and analyzing source material about L/G religious subjects, I utilise a feminist method, which is characterised by flexibility, curiosity and non-neutral advocacy for the interests of the feminist subject. This method enabled me to access and value personal narratives about identity conflict that would likely go unexplored in a similar project with a more doctrinal method. This approach afforded significance to the personal stories of L/G members of evangelical Christian and Orthodox Jewish communities, and elevated these narratives to a higher status in terms of identifying inequality and highlighting how queer religious people engage in rule breaking/abiding acts in relation to religious law. A feminist lens enabled me to draw lines of social and political connection between L/G religious people in these communities (notably in terms of anonymous story sharing online), and to paint a clearer picture of the legal and cultural impediments to identity recognition and celebration that exist within these communities.

As a first step, adopting a feminist methodology encouraged me to look for first-hand accounts of religious people, and to favour second-hand sources that value personal narratives as sites of legal knowledge, and that engaged in nuanced qualitative data collection methods. During my research, I discovered that asking questions about sexual and religious identity from a feminist perspective complemented a legal pluralism analysis of law and legal frameworks. By this I mean that the feminist subjects of this work (either an ex-gay Christian man or a lesbian Orthodox woman) are complex beings who view their sexual and religious identities through divergent legal and social lenses. To critique those lenses and their effect on the self, we need to employ legal pluralism and, in some cases, critical legal pluralism, as a theoretical inquiry. However, to access those complex selves as a site of law, we first need to let the men and women tell their stories so that we can discover what they know about law and identity. This is the significant role played by feminist method in this investigation. It enables me to listen critically to the stories, interviews and memoirs provided by religious men and women, and begin to value the choices and negotiations they make about law with respect to their identities.

Adopting a feminist method also enabled me to explore different presentations of queer sexuality, the gender binary and the segregation of masculine from feminine in practice

and in rule. Asking queer feminist questions of texts such as 'what does it mean to be male or female in this religious world?' and 'how transgressive is it to be lesbian/gay in this context?' let me hear the creative and contrastive answers of Christian men and Jewish women to these questions. Likewise, exploring how evangelical Christian and Orthodox Jewish communities value and enforce the gender binary in terms of marriage, parenthood and gender segregation also gave valuable insights into the operation of religious legal frameworks that affect L/G religious people. In chapter 3, I argue that the possible limitations of a traditional feminist method approach to a discussion of queer sexuality can be overcome by the introduction of key queer feminist and queer theory elements into a feminist inquiry. Thus, I am flexible in how I recognise and interrogate the feminist subject when I consider the experience of self-identified ex-gay Christian men, who seek to give effect to their Christian identity by effacing their gay identity through the realization of their masculine self. Equally, I critique the goals of secular feminism in my discussion of legal negotiations by lesbian Orthodox women that do not seek to challenge the patriarchal structure of their religious faith.

(3) Mapping out the thesis

In designing this thesis, I wanted to give the clearest presentation of the Christian and Jewish 'selves' who are centre of this inquiry. I also wanted to acknowledge, through the design of *my* story, the importance of the theoretical and method frameworks that shaped their stories. I wanted to emphasize that these people are three-dimensional, active social characters influenced by different external environments, their own personal histories and their relationships. To paraphrase Rod Macdonald on the legal subject, they are not the "anthropomorphized individuals" found in Charters of Rights and standards of proof.[12] They are individuals confronted by contrasting norms about religion and sexuality that arise from their different worlds: state, religion, family and intimate connections. In this difficult normative context, they make choices about how to live, whom to love, and how to identify as religious, and/or as queer. To this end, I have organized this thesis into discussions of the different worlds in which these people live so that, with each chapter, we can get closer to having a complete picture of their lives. This

[12] *Ibid* at 42.

enables me to present these different worlds as interlacing sources of authority and relevance for people, rather than as oppositional worlds that do not cross.

Chapter 1

I begin in chapter 1 with a discussion of the current international and national 'moment' we inhabit in terms of tensions between LGBT rights and religious freedom. I have begun here because both evangelical Christian and Orthodox Jewish communities in the United States (and in other western jurisdictions) have opposed the progressive realization of equality rights in public and private life over the last twenty years. Therefore, public culture wars fought between progressive equality rights versus traditionalist concepts of freedom of religion do impact some of the people in this story, even though they might only feel the impact indirectly and over a long period of time.[13] Notably, I read narratives by former ex-gay Christians and by 'Off the Derech' Orthodox Jews[14] which presented the experiences of formerly-religious people living in, and then leaving, closed religious communities in the United States.[15] These narratives indicated that state law progressions towards LGBT equality rights have limited, but observable, relevance to L/G people living

[13] See: James D Hunter, *Culture wars: the struggle to define America* (New York: BasicBooks, 1991). The term 'culture wars' implies a conflict between traditionalist and progressive values.

[14] 'Off the Derech' is a Hebrew phrase that translates to mean 'off the path'. Traditionally it is understood to mean someone who has left the path of traditional religion and observance. It is often used as a pejorative term to describe those who have left Haredi communities by community leaders, but it has recently been reclaimed by a growing community of ex-Orthodox Jews in the United States who seek to support other Jewish men and women to leave orthodox communities in safety. Off the Derech (or, 'OTD') is also the name of a support organization run by a group of these formerly Orthodox Jews. See: Off the Derech, "What is Off the Derech?", online: *Derech* <http://www.offthederech.org/about/faq/>.

[15] I discuss these narratives and these findings in detail in chapters 4, 5 and 6, respectively. The most relevant gay narratives (as opposed to ex-gay narratives) that provided critical comments of ex-gay Christian communities are: Drew Vandyche, *Been there, done that: one man's misguided attempt to de-gay himself through Jesus*, kindle ed. (self-pub, 2015); Peter Gajdics, *The Inheritance of Shame* (Long Beach: Brown Paper Press, 2017); Arana, Gabriel, "'My So Called Ex-Gay Life'", *Am Prospect* (2015), online: <http://prospect.org/article/my-so-called-ex-gay-life>; John Paulk, "To Straight And Back", *Polit Mag* (19 June 2014), online: <https://www.politico.com/magazine/story/2014/06/life-as-ex-ex-gay-paulk-108090.html>. For the Orthodox Jewish community, some of the most informative narratives about community responses to secular legal and social developments were written by men and women who are now Off the Derech. However, most of these people did not identify themselves as L/G. See, for example: Shulem Deen, *All Who Go Do Not Return: A Memoir* (New York: Graywolf Press, 2015); Anouk Markovits, *I am Forbidden* (New York: Random House, 2013); Leah Vincent, *Cut Me Loose: Sin and Salvation After My Ultra-Orthodox Girlhood* (New York: Penguin, 2015); Feldman, *supra* note 6. There was one longform memoir I found by an openly lesbian woman who now identifies as OTD, but still identifies as Jewish. This memoir was a valuable source, as it corroborated the experiences presented by other OTD people, but with the added lens of a lesbian experience. See: Leah Lax, *Uncovered: How I Left Hasidic Life and Finally Came Home* (She Writes Press, 2015).

within closed religious communities. We can infer a general claim from these narratives that public rights debates at a state level operate as 'secular background noise' that can spark personal awareness of queer identity questions that might otherwise remain unrealized. This 'secular background noise' is now more likely to be heard (or tuned in to) in the Internet age, which has created an avenue for secret, queer self-discovery. However, the narratives of ex-gay Christians and lesbian Orthodox women who remain within their faith group, demonstrate that public, secular discussions about rights also exhort these religious communities to resist secular intrusion in the life of their community as far as possible. From this perspective, state laws that touch on the protection of LGBT minority groups and/or that seek to limit certain activities of religious communities in relation to equality rights, threaten the survival of the community.

Thus, in chapter 1, I outline the key areas of conflict between LGBT equality rights and religious rights at the level of state law. I focus on deep philosophical divergence between religious and secular concepts of rights, freedoms and the appropriate role of state law in governing aspects of public and private life. Given that most of my religious subjects live within religious communities located in the United States, this Chapter focuses mainly on the development of equality law and religious freedom frameworks in that national jurisdiction, but situates that discussion in a broader international, western democratic context. The aim of this comparative element is to demonstrate that the United States is not an outlier jurisdiction in terms of the development of equality and religious freedom rights over time, but rather is generally consistent with the experience of other western jurisdictions such as Canada and the United Kingdom.

In this chapter, I analyse the effects of the public/private divide that impacts the application of state laws to the actions of religious communities. This analysis demonstrates that there is a clear line of demarcation between areas capably governed by state law—those areas where religious communities engage with the outside, public world—and areas where religious communities enforce their own normative orders upon community members—those areas of law that relate to the private and faith-based activities of the religious community. This discussion of the limitations of state law

frameworks anticipates a more detailed, community-specific investigation of relevant religious laws that apply in relation to sexual identity and relationships.

Chapter 2

In chapter 2, I suggest one answer to the question posed at the end of chapter 1. Namely, how can we get a more comprehensive and rounded picture of the legal environment in which these L/G Christian and Jewish people live? The answer that I give (accepting that there could be other, valid responses to this question) is that we should analyze the norms and actions of their closed religious communities through the lens of legal pluralism and critical legal pluralism. This answer engages actively with the lives and choices of legal subjects, and thus respects individual agency. I set out the elements of legal pluralism and critical legal pluralism with reference to legal theory scholarship, and I address relevant criticisms of legal pluralism, notably the difficulty of defining 'law' with sufficient certainty to ground legal commentary of non-state legal frameworks. I then critically discuss relevant scholarship applicable to a legal pluralist analysis of religious normative orders and set out the benefits of applying a critical legal pluralist analysis to the Christian and Jewish contexts that are the subject of this work.

I conclude this chapter by highlighting some of the opportunities and limitations of taking this theoretical position, in terms of achieving a more nuanced understanding of the normative demands upon, and choices made by, L/G members of these religious communities with respect to identity. I argue that viewing these contexts through the lens of a (critical) legal pluralism builds a richer, more complex image of religious and sexual identity, and I argue that we should see the imposition of religious law in both communities as a normative force that explains (at least in part) the struggle that these people engage in for recognition, safety and fulfillment.

Chapter 3

In chapter 3, I introduce and defend the feminist method that I adopt in analysing the experiences of L/G religious people. This chapter builds on the conclusions of chapter 2, as I explore how best to collect and analyze the narratives of L/G religious people, to answer necessary questions about their views of religion, law and identity. This chapter

begins with an historical overview of the feminist method approach, moving from the development of the method in the 1970s and 1980s (the second wave period) into the 1990s and 2000s (the third and fourth wave periods). I then consider the benefits and limitations of applying feminist method to queer subjects, and address some of the concerns raised in queer feminist theory and queer theory scholarship that, by adopting a feminist analysis of some queer projects, a researcher fails to sufficiently consider complex issues of sex, intersectionality and queer sexualities. As a response to these concerns, I explore areas of useful theoretic overlap and interaction between feminist method and queer theory: with the aim of enriching my feminist method with queer theory elements. To this end, I adopt Adam Romero's suggestion that the flexibility and responsiveness of feminist theory should be maximised to accommodate issues of gender identity and queer subjectivity.[16]

Lastly, I briefly discuss the 'identity synthesis' model of queer identity development (promoted by queer theorists) and query this model on the basis of narratives provided by Jewish lesbian women and—albeit less consciously—by ex-gay Christian men. I suggest that, given the compelling nature of religious identity in these Christian and Jewish communities, the realization of a 'synthesised identity' is an unlikely outcome for many L/G people. Rather, I suggest that an evolving dialogic/conflict identity model more honestly reflects the ongoing 'conversation of identities' that many deeply religious L/G people in this work describe.[17]

The last three chapters of this thesis discuss the religious community 'worlds' in which these Christian or Jewish people live and analyzes how they navigate these communities with respect to sexual identity. This focus on the religious community 'world' reflects the fact that maintaining a devout religious life and a strong religious identity are a central concern for the L/G people represented in this work. Thus, in chapters 4—6 I present a textured view of life within different religious communities, examine the laws about

[16] Adam P Romero, "Methodological descriptions: 'Feminist' and 'Queer' Legal Theories" in Fineman, Jackson et al. eds, *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Surrey: Ashgate Publishing Limited, 2009) ("Feminist and Queer Legal Theory") 179.
[17] Tova Hartman Halbertal & Irit Koren, "Between 'being" and "doing": conflict and coherence in the identity formation of gay and lesbian Orthodox Jews'" in McAdams, Josselson et al. eds. *Identity Story: Creating Self in Narrative* (Washington, DC: American Psychological Association, 2006) 37.

sexuality and intimate relationships, and consider personal responses of L/G community members to these laws. In these chapters, I draw on conclusions reached in earlier chapters to more effectively situate this analysis in different cultural, political and theoretical frames, with the goal of finding the 'best' answers about identity conflict and reconciliation.

Chapter 4

Chapter 4 analyzes one extreme of the reconciliation/subordination spectrum for identity: evangelical Christian religious practices that claim to fundamentally alter the sexual orientation of a person from gay to straight. I provide an overview of the legal, clinical and religious history of reparative therapy, noting its close relationship to evangelical Christianity and its foundation in the literal acceptance by evangelicals of Biblical rules against homosexuality. I develop the argument—introduced in chapter 1—that conservative Christian communities in the United States have developed an antagonistic position to state laws prohibiting discrimination and recognising the naturalness of sexual and gender diversity. This position encourages evangelical Christians to reject the promotion of equality rights protections as an attack on religious freedom. I argue that the continued prevalence of faith-based reparative therapy practices and ex-gay churches and missions, demonstrate this rejection of state law and an inward turn to Christian normative orders in these communities.

In this chapter, I explore the practices of dedicated ex-gay Christian communities and their members through analysis of primary and secondary sources about the ex-gay Christian experience, in particular, two ethnographic studies which present interviews, memoirs and correspondence from members of two ex-gay communities in the United States.[18] I also review testimonials and online resources authored by Christian pastors and counsellors who are active within ex-gay evangelical churches and community outreach programs. I analyse rules, practices and sanctions that are applied consistently within the evangelical ex-gay normative order from a legal pluralist perspective, and

[18] My research methodology section detailing my research methods and source collection for this community can be found in chapter 4 at 139 - 140.

conclude that certain key norms and sanctions are recognisable as law.[19] I develop this analysis to argue that, these laws—notably, the foundational rule of the unlawfulness of homosexuality— create a compelling, ultimately divisive, environment for gay men who also identify as evangelical Christian. This in turn helps to explain the choices these men make to ultimately identify as 'ex-gay' Christians and to completely disavow their previous gay identity.

This Chapter also analyzes the personal experiences of families involved with ex-gay communities. I discuss the dilemmas of gender identity and the binary of masculine/feminine experienced by ex-gay Christian men, focusing on how they are taught to resolve their 'gender confusion' by reasserting traditional religious views of femininity, marriage and the strength of the patriarchy within the family and church as building blocks for a strong, masculine identity. I also discuss the important normative role played by the wives of ex-gay men: how they learn to 'do femininity right' and act as marital enforcers of a heterosexual norm which accords with the religious rules against homosexuality. The role of women as interrogators, investigators and markers of 'heterosexual success' in these ex-gay communities presents an interesting counterpoint to the experience of orthodox Jewish lesbian women as legal objects within a male-dominated legal order.

Chapter 5

In chapter 5, I situate the issue of lesbianism within Jewish religious law (*Halakha*), by performing an historical and legal analysis of halakhic laws that prohibit same-sex attraction and relationships between women. I begin this chapter by providing a broad definition of Orthodox Judaism, and defining categories of Orthodox communities, to more precisely situate the narratives of women that come from a wide range of different Orthodox communities. I note that, while all Orthodox Jews commit to living their lives in accordance with *Halakha*, there are significant doctrinal and historic differences

[19] In this analysis, I apply Howard Kislowicz's analysis for determining when a religious rule/sanction could be classified as forming 'part of Law's family.' I first introduce Kislowicz's 'aspects' in chapter 2. Kislowicz, *supra* note 10.

between modern Orthodox, ultra Orthodox and Haredi Jews, and I set out a brief outline of the contours of Orthodoxy, with a focus on communities within the United States.

I begin my legal analysis of halakhic rules by analyzing the biblical prohibition against homosexuality, as this forms the basis of later positions taken in relation to same-sex attraction between women. I then specifically investigate the proscription of lesbian relationships and same-sex lesbian orientation: finding that the level of transgression imposed by Talmudic law is substantially lower than the biblical prohibition of male homosexuality. While this analysis necessarily employs a legal pluralist perspective to appreciate Jewish law as an operative legal framework, there is little necessary work to be done to situate Jewish law as (a) a legal system that functions and applies in a manner and form recognizable by secular legal frameworks and (b) as the primary legal system that is operative on Orthodox Jewish lesbian women. I conclude this chapter with a discussion of some potential reinterpretations of the *halakhic* positions that relate to lesbian relationships and sexual activity. This discussion draws on recent rabbinical commentary that presents different options for reviewing the current blanket prohibition on 'homosexual activity and relationships' within Orthodox Judaism, and offers a more progressive, flexible interpretation of Jewish law. I situate these more flexible interpretations within the broader feminist movement within modern Orthodox Judaism, noting that progressive change in Orthodox readings of *Halakha* are increasingly being made possible by the growing demand of Orthodox women for a more inclusive place in religious life.

Chapter 6

In chapter 6, I discuss the narratives of lesbian, Orthodox women from a feminist and (critical) legal pluralist perspective, with a view to identifying how different women respond to the religious, legal prohibition of their lesbian identity. This chapter draws on the legal analysis I developed in Chapter 5 about the regulation of lesbian sex by *Halakha*. However, in this chapter, I ground that analysis by considering how women living in different Orthodox communities respond to law. I begin this chapter by describing the research methodology I employed to find first-hand accounts by women living within Orthodox communities, and I explain the variety of narrative sources from

documentaries, anonymous blog contributions, online interviews, media articles and personal memoirs and short-form written narratives.[20] I collected narratives, interviews and creative work from women across the spectrum of Jewish Orthodoxy, from Haredi Orthodox communities (the most traditional and conservative communities, that require an almost total degree of conformity to religious legal norms) through to modern Orthodox communities (which are more progressive and flexible in their interpretation of religious rules).[21] I note that the religious and legal experience of lesbian Orthodox women varies considerably depending on the strictness of their community and on the degree of isolation of that community from the surrounding social, political and legal environment.

I analyze the different first-hand accounts of lesbian Orthodox women in terms of how they manage, hide and (in some cases) negotiate for, their lesbian identity within their community. This analysis blends elements of legal pluralist approach and feminist method, recognizing that there were significant feminist elements operating within the different ways that Orthodox women negotiated for their lesbian identity, within the context of patriarchal authority. This analysis draws on the legal pluralist analysis and concepts of critical legal pluralism that I introduced in chapter 2. Notably, I adapt Macdonald and Kleinhans' model of the modern self as a complex site of law with reference to negotiations made by Orthodox women in relation to sexual identity.[22] I also apply Wendy Adams' proposal that understanding the choices that legal subjects make when confronted with normative options involves a degree of creative improvisation and

[20] My research methodology section detailing my research methods and source collection in relation to this religious context can be found in chapter 6 at 229 – 233.
[21] In chapter 5, I provide a historical overview of the key doctrinal and customary differences between different Orthodox communities; with a focus on the Orthodox communities that are active in the United States. The term 'Haredi' is a generally accepted collective noun to group together the strictest Orthodox communities within Jewish Orthodoxy, which is the only branch of Judaism to require literal adherence to *Halakha* and to strictly disavow any non-heterosexual identity. See: Menachem Friedman, "The Haredi (Ultra Orthodox) Society- Sources, Trends and Processes" (1991) Jerus Inst Isr Stud Res Ser 1, online: <http://en.jerusaleminstitute.org.il/.upload/haredcom.pdf>.
[22] I provide a detailed overview of Macdonald and Kleinhans' concept of a critical legal pluralism in chapter 2. See: Roderick A Macdonald & Martha Marie Kleinhans, "What Is a Critical Legal Pluralism" (1997) 12:25 Can JL Soc 25.

narrative selection.[23] Where relevant, I reference my analysis of *halakhic* rules against lesbian sex and relationships to clearly identify when women critique, negotiate with or interpret the operative legal framework. This analysis applies to those situations where women seek to challenge a rule or to interpret it either purposively or technically, to achieve a limited recognition of a lesbian relationship by her husband and rabbi.

In considering different narratives through a feminist lens, I group stories according to themes of feminist empowerment, feminist and queer identity, connection between women and the struggle to contend/negotiate with the dominant, patriarchal religious norm. Ultimately, I conclude that, for some lesbian women, the 'master' narrative of religion does not always have to be in dialogic opposition to the sexual self, even where both narratives will remain essential. Rather, I saw that as lesbian women begin to navigate religious law to achieve a recognition (however partial) of their personal identity, the tension between the two identities might lessen to the point that a productive dialogue, rather than conflict, can exist between them.

(4) Limitations, exclusions and explanations

It is a truth universally acknowledged by doctoral candidates that no research project can address every theoretical or practical research question. In scoping this research project, I made the decision not to pursue lines of inquiry that would have pushed this work into the fields of political and feminist theory, even though I recognise that these are valuable lenses for the study of religion and law. Thus, I began my analysis of identity formation in these religious communities with the assumption that the ex-gay Christian men and lesbian Orthodox women I studied had made genuine choices to remain within their religious worlds.[24] I took this position to discover the relevance of the *legal* environments that these people inhabit to their decisions about identity; isolated (as far as possible) from other constraints upon their agency. Further, I sought to test the application of a

[23] Wendy Adams, "'I made a promise to a lady': Critical legal pluralism as improvised law in Buffy the Vampire Slayer" (2010) 6:1 Crit Stud Improv, online: <http://www.criticalimprov.com/article/view/1083/1707>.

[24] As I discuss in chapter 2 and again in chapters 4 and 6, the concept of making a 'genuine' choice does not imply this choice is value-neutral or risk-free. Of course, there are difficult cultural, religious and legal pressures that the people in this work face in terms of choosing a religious/secular world. These pressures inform the critical research of this thesis.

critical legal pluralism perspective that describes rule abiding/breaking decisions as a postmodern 'narrative choice' taken within a self that is a complex site of knowledge exchange.[25] For these reasons, I did not actively engage with the (feminist) agency dilemma, as I did not interrogate in depth whether these identity choices should be classified as the result of free independent agency, or as choices fundamentally constrained by internalized oppression and patriarchal power dynamics.[26] However, in chapter 6, I adapt elements of a feminist critique to refute the suggestion that lesbian Orthodox women might be considered truly physically and psychologically 'free' to make choices between conflicting normative demands of religion and sexuality. This feminist analysis informs my conclusions about the legal negotiations these women engage in with rabbis and husbands about their sexual identity.

Likewise, I do not focus substantial attention on the appropriateness or availability of exit rights for L/G members of closed religious communities. However, I acknowledge that many L/G people who experience discrimination and/or exclusion because of their sexual orientation choose to leave their community and move into more open religious

[25] Feminist liberals have presented the female self in similar terms to a critical legal pluralist analysis when discussing the feminist agency dilemma. For example, consider Kathryn Abram's discussion of the liberal feminist self: "These theories [liberal feminists] … describe a pervasive, plural social construction of the subject, in the context of intersecting power inequalities. These latter accounts, however, do not deny the possibility of self-definition or self-direction among women or others similarly constituted." Kathryn Abrams, "From Autonomy to Agency: Feminist Perspectives on Self-Direction" (1999) 40:3 Wm Mary Rev 805 at 806.

[26] The feminist agency dilemma provides a critical account of women's self-determination in different contexts. Feminist investigations of women (and queer subjects) in illiberal religious communities often conflict over the expression of choice as victimhood (where women only make choices because of a long history of internalized oppression) or as agency (where women are taken to choose their religious adherence freely and rationally). There is an evolving, interdisciplinary literature on feminist choice/agency in religious contexts, that includes targeted literatures addressing rational autonomy and adaptive preferences. See, for example: Susan Moller Okin, "'Mistresses of Their Own Destiny': Group Rights, Gender, and Realistic Rights of Exit" (2002) 112:2 Ethics 205; Abrams, *supra* note 25; Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Boston: Cambridge University Press, 2001); M. Friedman, *Autonomy, Gender, Politics* (New York: Oxford University Press, 2003); Martha C Nussbaum, "Sex, laws and inequality: what India can teach the United States" (2002) Winter Daedalus 95; Serene Khader, *Adaptive Preferences and Women's Empowerment*, Studies in Feminist Philosophy (Oxford, New York: Oxford University Press, 2011); H E Baber, "Adaptive Preference" (2007) 33:1 Soc Theory Pract 105; Maria R Ruiz, "Personal Agency in Feminist Theory: Evicting the Illusive Dweller" (1998) 21:2 Behav Anal 179; Carlos A Ball, "This is Not Your Father's Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective" in *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Farnham, Surrey: Ashgate Publishing Limited, 2009) 289; Eléonore Lépinard, "Autonomy and the Crisis of the Feminist Subject: Revisiting Okin's Dilemma" (2011) 18:2 Constellations 205.

communities, or leave their faith altogether. The availability of exit rights to minority communities, and the question of how to support of people who seek exit, are issues that have been well explored in law, philosophy and political theory.[27] Exit as a solution for L/G minorities within closed religious groups is an issue that is peripherally relevant to this work, as many first-hand accounts of L/G Christian and Jewish people are provided by those who have already left their community and are now able to tell their identity story in safety. The focus of this work, however, is those L/G people who recognise the dilemma of resolving their sexual orientation identity with their religious faith, but who nevertheless still wish to remain within their religious community. For these people, exit is not a viable option, or is an option of last resort. Further, in many of the narratives I read, 'exit' from a community is never final. This is partly because of the profound impact of religious belief, rituals and practices on personal identity formation, and partly because of the complex webs of community, social life and family that are built up in closed religious communities. Thus, the experiences of the L/G people set out in this work tend to oppose the 'strong exit rights' liberal answer to questions of queer identity within conservative religious communities.

I identify as an 'outsider' in terms of religious faith and background, to both closed religious communities I study, and to the experiences of L/G people who live within these communities. As far as possible, I endeavour to analyze and critique their different stories with respect and appropriate objectivity, while still honestly presenting their concerns and fears about identity reconciliation as they intend them. In some chapters, this involves me presenting viewpoints which offend secular rights positions (such as the insistency, by ex-gay Christians, that homosexuality is a curable disease); or which might offend the deeply-held beliefs of religious groups (such as my interrogation, as a secular woman, of *halakhic* prohibitions against lesbianism and same-sex attraction). Further, I

[27] See for example: Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1996); Okin, *supra* note 26; Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003); Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass.: Harvard University Press, 2002); Avigail Eisenberg & Jeff Spinner-Halev, *Minorities Within Minorities: Equality, Rights and Diversity* (Cambridge, Mass.: Cambridge University Press, 2005); Daniel M Weinstock, "Beyond Exit Rights: Reframing the Debate" in Avigail Eisenberg & Jeff Spinner-Halev, eds, *Minorities within Minorities: Equal Rights and Diversity* at 227; Jacob T Levy, "Sexual Orientation, Exit and Refuge" in Avigail Eisenberg & Jeff Spinner-Halev, eds, *Minorities within Minorities: Equality, Rights and Diversity* at 172.

know that for some people in the broader LGBT community, treating the conservative responses of religious groups to questions of sexuality and gender as a form of law, is an ethically questionable position to take. However, where this work takes me to sensitive ethical places, I maintain the objective goals of this work: to assess how L/G religious people negotiate for their sexual and religious identity, without favouring or arguing for one perspective. This thesis seeks to demonstrate, not that a legal prohibition against same-sex orientation is valid in some objective sense, but rather that this prohibition is respected as law by some religious L/G people, and their position deserves critical scrutiny and analysis.

Lastly, there are some methodological and structural limitations of this thesis that require brief explanation. First, I acknowledge that I have drawn upon a relatively small number of primary narrative sources (relative in the sense of other legal commentaries on religious communities) that inform conclusions about the legal choices the L/G religious people make. This is the result of historical underreporting of queer experience in both Christian and Jewish communities, and the fact that this is an issue that is only recently becoming the focus of legal and religious scholars. This investigation comes at a high point of tension between equality rights and religious freedom rights around the world: notably in relation to the growing social, political and legal recognition of sexual orientation and gender identity diversity. The issues of how LGBT minority communities and individuals enforce equality rights against religious communities (and *vice versa*) in liberal democracies are increasingly recognized as pressing issues warranting significant public and academic interest. For some scholars, the central question is simply when and to what degree to exempt religious communities from state laws, or how to fairly determine formal conflicts between equality rights and freedom of religion.[28] However, when challenges between equality and freedom of religion rights intersect *within* closed

[28] See, for example: Joel Harrison & Patrick Parkinson, "Freedom Beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society", SSRN Scholarly Paper ID 2673323 (Rochester, NY: Social Science Research Network, 2014); Ira C Lupu, "Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights" (2015) 7 Ala Civ Rights Civ Lib Law Rev 1; Kelly Catherine Chapman, "Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States" (2012) 100 Georgetown Law J 1783; James M Oleske, "State Inaction," Equal Protection, and Religious Resistance to LGBT Rights", SSRN Scholarly Paper ID 2589743 (Rochester, NY: Social Science Research Network, 2015).

religious communities, a different point of legal, social and cultural tension is reached, as the matter then becomes how minority members of that community manage issues relating to their community status, treatment and identity. In this dissertation, I have therefore accessed as many narratives and presentations of the queer religious self as I could find within evangelical Christian and Orthodox Jewish communities to address this question. However, I acknowledge that our understanding of the people within these communities is a work in progress.

Further, I acknowledge that there is a structural imbalance in this thesis, in that there are two dedicated chapters addressing the religious normative environment of Orthodox Jewish women, and only one chapter that addresses the religious environment of evangelical ex-gay Christian men. This imbalance reflects the diversity of these unique and different characters. The necessary analysis of an evangelical ex-gay Christian legal order required me to identify common threads of legal norms and sanctions across a diverse group of Protestant ex-gay communities; to discover an operative legal framework that applied to ex-gay men within these different communities. I then link the compelling nature of this framework to the finding that ex-gay men commit, in legal and spiritual terms, to the sexual orientation change Christian paradigm. This approach reflected the piecemeal and specific nature of the Christian 'ex-gay' message, in that there is less evidence of consistent, traditional religious doctrines that have formed over time into an organized, chirographic and hierarchical legal order.

Jewish law (*Halakha*) was substantially different source material. *Halakha* is hierarchical in nature, organized and codified. While there are divergences in how it has been interpreted by ancient and modern rabbinical sources, these sources are themselves organised in legal texts. Therefore, there was more contextual work to do in terms of setting out the history of *Halakha* and determining how it applies to different Orthodox communities, before I could discuss how lesbian women operate within this legal framework. Therefore, I decided to include a chapter (chapter 5) that set out the legal history of *Halakha*, that analyzed the specific legal texts that apply to female sexuality as opposed to male sexuality, and that gave space to the rabbinical voices that govern female sexuality in Orthodox worlds. This also gave me an opportunity to engage in a critical 'call

and response' exercise, with chapter 5 presenting male, authoritarian perspectives on the halakhic regulation of lesbian identity, and chapter 6 presenting the female voices responding to this regulation. I felt that such an exercise was helpful, given the patriarchal structure of the communities in which these women live, and the feminist method that informed this dissertation.

This structural choice is not intended to diminish the significance of 'the Law' to ex-gay Christian communities, or to their members. Nor does it suggest that one legal analysis is more complete than the other. Rather, it simply reflects that there are differences in how Jewish and Christian legal orders apply to these two groups in terms of history, complexity and specificity; there was less historical context required for one, and more required for the other. Here, I note Roderick Macdonald's reminder to legal scholars that we should be hesitant to give primacy to chirographic and codified legal orders in a legal pluralist analysis: it is important to also seek out those patterns of norms that exist in social worlds beyond the written word of law.[29] The legal pluralist analysis I apply in chapter 4, adopting Kislowicz's aspects, is intended to engage in precisely this sort of legal commentary, and to open a discussion about legal norms that apply in the 'ex-gay' Christian world.

[29] Roderick A Macdonald, "Custom Made—For a non-chirographic Critical Legal Pluralism" (2011) 26:2 Can J Law Amp Soc Rev Can Droit Société 301 ("Custom Made, 2011"), online: <https://www.cambridge.org/core/journals/canadian-journal-of-law-and-society-la-revue-canadienne-droit-et-societe/article/custom-madefor-a-non-chirographic-critical-legal-pluralism/15171EE3D3AFAEEE712DC9D24B877E6C>.

Chapter 1

The 'Contested Moment'

Situating current tensions between equality rights and religious freedom

Introduction

This first chapter discusses national legal and political frameworks that apply to minority Christian and Jewish normative orders within western democratic states, notably the United States. I first give an overview of the contentious legal, social and political context of rights debate within western democracies. Second, I analyze the state legal framework that operates to limit and enable different activities and rights claims of religious groups and LGBT people in public life. Finally, and most importantly for this work, I set out the limitations of applying a state legal order to the internal actions of a private religious community in areas where tradition (legal, religious and philosophical) place the religious community beyond the state law mandate. In this context, I make the case for a second level of legal analysis—a legal pluralist analysis—that can go beyond the bounds of state law to interrogate the operation and applicability of non-state legal orders within conservative religious communities with a degree of subjectivity and sensitivity to individual and group experiences.

Much of the focus of this chapter is on recent legislative and judicial developments within the United States. This focus reflects the geographical location of most of the L/G people who are the subject of this work.[30] This jurisdictional focus makes possible an in-depth discussion of two issues that inform the larger study of sexual and religious identity reconciliation in certain religious communities: the religious position that sexual identity can be altered via reparative therapy, and the question of whether lesbian sexual identity

[30] I qualify this statement by writing 'most' of these people, because some of the Jewish women who contribute to online discussions and blog forums deliberately leave their location unknown or unspecified. They might identify that they live 'some of the year' in Brooklyn and 'some of the year' in Israel or Montreal, for example. However, as my major blog contributors are centred in New York and most refer to Haredi communities in Brooklyn, I have focused on the United States as the most relevant jurisdiction to most of the women who contributed online interviews or wrote blogs about their experiences.

can be recognised and accommodated by Jewish religious law. However, I do not mean this focus to suggest that the political and legal environment in the United States is unique in terms of the relationship between state law and those people who identify as religious and L/G. In fact, research for this dissertation suggests that a similar balance between state equality rights and freedom of religion rights as those described in this chapter also exist in Canada and the United Kingdom and, to a limited degree, in Australia.[31] That is, in these jurisdictions, congruent lines of analysis support the general conclusion that state law preserves a relatively thick secular/religious boundary in relation to the recognition of equality rights for LGBT identifying people. This line reflects the State's intention to respect the right of religions and religious adherents to freely express their beliefs in private, and to do so in public in a way that is qualified by the limited operation of equality guarantees. In these jurisdictions, conflicts between equality and religious rights are most likely to arise where the equality rights of a non-religious group or person clash with the religious freedom rights of a religious person or organization operating in an area of public life, such as employment, accommodation, service provision or family services (such as foster care or adoption).[32]

By comparison, the private enjoyment of religious freedom, including the freedom to hold diametrically opposed views to the state law position on the naturalness and lawfulness of non-heterosexual identities, and the freedom to promote those views within one's religious communities, is comparatively unfettered by state law. As I develop below, the scope of this freedom includes the religious education of children and minors, the appointment of religious community leaders such as priests and rabbis, rules about how

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[31] Of course, there are substantial differences in the constitutional separation of powers in these jurisdictions, and in terms of the different means of recognizing equality and religious rights as they apply in public life. I engage in a brief review of equality rights and freedom of religion as these are protected in the United Kingdom and Canada in this chapter at 55 – 58.

[32] This reflects the trend in matters litigated in the U.S. and other jurisdictions. See for example: *United States v Windsor*, 570 US 774 (2013) [Windsor]; *Settlement Agreement, Baker v Wildflower Inn*, 2012 Vt Super Ct; *Charlie Craig and David Mullins v Masterpiece Cakeshop Inc and Jack C. Phillips,* No. CR 2013-0008 Colo Civil Rights Comm.; *Elane Photography, LLC v Wilcock*, 2013, No. 33,687 NMSC; Mark Joseph Stern, "11th Circuit Rules Title VII Does Not Prohibit Anti-Gay Discrimination in Deeply Confused Opinion", *Slate* (10 March 2017), online: <http://www.slate.com/blogs/outward/2017/03/10/_11th_circuit_rules_title_vii_does_not_prohibit_anti_gay_discrimination.html>. It also reflects the trend in commentary on religious freedom versus equality issues in the United States as I discuss further below. See: Harrison & Parkinson, *supra* note 28; Chapman, *supra* note 28; Andrew M Koppelman, "Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law" (2015) 88 South Calif Law Rev 619.

families are constituted, how marriages performed and dissolved, and who may join these communities, and, in the case of some L/G people, who are forced to leave them.

This chapter proceeds in two parts. In the first part, I give an outline of the contentious political, social and legal environment in which LGBT equality rights and religious freedom rights are negotiated in liberal democracies today, with a focus on the United States. I argue that, contrary to the equality-rights positive tone of much of the academic commentary written immediately following the legalization of marriage equality in the United States in 2015 (arguably the high point for equality rights in this debate), the current legislative environment is far less certain. This is partly a result of consistent, long-term positioning by conservative religious groups to (a) limit the extension of constitutional and legislated equality rights to sexual orientation and gender identity minorities and/or (b) to effect practical exemptions for religious communities from any such rights guarantees or anti-discrimination legislation. These positions have direct and indirect impacts on L/G members of these religious groups, as I discuss further below. Here, and in chapter 2, I argue that the complexities of the state legislative and judicial environment and the push-pull relationship between equality rights and freedom of religion, creates more impetus for religious communities to actively 'opt out' of secular state law, as far as possible. As part of this opting out process, religious communities often prefer their own normative customs and laws on topics like same-sex marriage, gender equality and the acceptability of homosexuality and lesbianism within their community.

The second part of this chapter contextualises my analysis of evangelical Christian and Orthodox Jewish communities in the United States: locating them within relevant state legal frameworks. Here, I briefly outline the constitutional guarantee of equality rights to LGBT people, the constitutional right to freedom of religion and speech (including free exercise and free expression) in the United States and note relevant federal and state legislation. I then briefly outline legal issues that are relevant to evangelical Christian and Orthodox Jewish communities in terms of how they interact with the state: regulation of reparative therapy techniques, marriage equality, hate crime legislation, anti-discrimination law and religious freedom statutes. To provide a broader context, I briefly outline the trends of legislative and judicial developments in terms of equality guarantees and freedom of religion exemptions in Canada and the United Kingdom. The purpose of

this comparative overview is simply to conclude that a similar trend of progressive social change in favour of LGBT equality rights, offset by continuing dissent by religious groups, is also observable in other liberal democracies.

This second part of this chapter concludes with a discussion of the significance of the public/private divide in state law concerning the internal operation of religious communities. Here, I take the position that, while there is substantial legal scrutiny on the activities of religious organisations and adherents in public life, this scrutiny falls away sharply as soon as we move into the daily practices and religious customs of closed religious communities. Thus, I conclude that, while state regulation of certain matters has an impact on both Christian and Jewish closed communities (notably criminal law and property law matters), the general impact of state law dealing with human rights issues is not felt at all, because of the degree of isolation and insulation that exists between secular law and life within a self-regulating religious community. I suggest that this is partly the doing of state law, as it has defined a clear public/private delineation on religious matters which requires a high level of tolerance of internal religious behaviours and practices. Lastly, I contend that the shortfalls of a doctrinal analysis in this area indicate the need for another, more contextual analysis of normative frameworks and legal negotiations that take place *within* certain evangelical Christian and Orthodox Jewish religious communities. This part introduces the analysis of chapter 2, in which I make the case for the application of a legal pluralist and critical legal pluralist framework to identify how law works in these religious communities.

Part I

(1) The 'Political and Social Moment': progressive realization of equality rights and deep courses of religious dissent

1. The social moment

In June 2015, the United States Supreme Court handed down *Obergefell v Hodges*: a 4:3 majority decision which legalised same-sex marriages across all American states.[33] In

[33] *James Obergefell, et al., Petitioners v. Richard Hodges, Director, Ohio Department of Health, et al.*, 576 SC __ (2015) ("Obergefell"). In *Obergefell*, a 4:3 majority of the Court held that all states must recognise same-sex marriage licenses validly granted in other states, by virtue of the equal protection clause of the 14th Amendment and the due process clause of the 5th Amendment of the United States Constitution.

June 2015, same-sex marriage was already legal in 36 American states and the District of Columbia, but prohibited or not recognized in 14 states.[34] *Obergefell* was greeted with widespread celebration by LGBT-identifying people and their allies across America as a victory for equality and human dignity, in terms similar to the recognition of formal race equality in the 1964 *Civil Rights Act*. By the time of the decision, the Human Rights Campaign (HRC) (a non-profit lobby group with the mission of achieving LGBT equality) reported poll results that public opinion in America on same-sex marriage had almost reached 60% approval levels, having crossed the significant 50 % mark in 2011 and built steadily on that figure over time.[35] Polling results also show that, in the year after *Obergefell* was decided, the number of same-sex marriages within the identified LGBT community increased by 22%.[36] Gallup estimated that about 123,000 same-sex marriages took place across the United States between 2015 and June 2016.[37]

The *Obergefell* decision has been equally criticized as undemocratic judicial activism,[38] and applauded as judicial recognition of a long-standing constitutional right to equality.[39] Internationally, the *Obergefell* decision situated the United States in a growing category of western nations that have recognized same-sex marriage as lawful at a national level, following intense debate about the challenge marriage equality poses to genuinely held religious beliefs.[40] The Netherlands became the first country to legalize same-sex

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[34] The states that banned same-sex marriage prior to the Supreme Court's decision in *Obergefell* are Alabama, Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee and Texas. See: Brian Resnick & Nora Kelly, "What Are States With Same-Sex Marriage Bans Doing Now?", *The Atlantic* (26 June 2015), online: <https://www.theatlantic.com/politics/archive/2015/06/what-are-states-with-same-sex-marriage-bans-doing-now/448503/>.

[35] Steven Shepard, "Poll: 60 percent of likely voters back gay marriage", *POLITICO*, (13 February 2015) online: <http://politi.co/1B5Xay9>. The HRC poll was conducted from January 25 – 31, surveying 1000 likely voters. The margin of error was plus or minus 3.1 percentage points. Respondents were also asked to react to a quote from the Family Research Council, that 'permitting same-sex marriage across the country could be met with a 'revolt' or a 'revolution'. 70% of pollsters disagreed with that statement, including 57% of Republicans.

[36] Marina Koren, "Gay Marriage in the U.S., After Obergefell v. Hodges", *The Atlantic* (22 June 2016), online: <https://www.theatlantic.com/news/archive/2016/06/gay-marriage-obergefell-hodges/488258/>.

[37] *Ibid*.

[38] Augusto Zimmermann, "Judicial Activism and Arbitrary Control: A Critical Analysis of Obergefell v Hodges 556 US (2015) - The US Supreme Court Same-Sex Marriage Case" (2015) 17:1 Univ Notre Dame Aust Law Rev, online: <http://researchonline.nd.edu.au/undalr/vol17/iss1/4>.

[39] Kenji Yoshimo, "A New Birth of Freedom?: Obergefell v. Hodges" (2015) 129 Harv Law Rev 180, online: <https://harvardlawreview.org/2015/11/a-new-birth-of-freedom-obergefell-v-hodges/>.

[40] Pew Research Center, *Gay Marriage Around the World* (Washington: Pew Research Center, 2017).

marriage in 2001, with Spain and Canada the next to pass legislation (following judicial decisions that prompted this change) in 2005.[41] Twenty-seven countries now allow same-sex marriage: Australia is the most recent country to pass marriage equality legislation in December 2017, following a controversial voluntary plebiscite.[42] All of those twenty-seven countries are in the developed world, with the exception of South Africa, which is the only developing nation and only African nation to legalize same-sex marriage.[43]

Widespread social celebration of the *Obergefell* decision reflected, for many Americans, the national mood on LGBT rights generally and marriage equality specifically. Commentators reported that the decision was reflective of a steady progression towards the recognition of equality rights, resulting from a growing public respect for the values of sexual autonomy, dignity and integrity. For example, a March 2017 Gallup poll indicated that 64% of U.S. adults were of the view that same-sex marriage should be recognized as valid under the law. This is a 3% increase on the 2016 results (taken eight months after *Obergefell* was decided), and a 30% increase from the first poll on same sex marriage taken in 1996.[44] Support for same-sex marriage has also steadily increased across the political spectrum in the United States since *Obergefell*. While registered Democrats report the highest level of support for marriage equality, 74% in June 2017, nearly half of registered Republicans now support same-sex marriage. In 1996, just 16% of Republicans supported it.[45]

In the social context of 2015, it is perhaps understandable that some equality law scholars were confident that the 'LGBT rights battle' had been decisively won, that this win was sealed with the *Obergefell* decision, and that the remaining legal question would be how best to fairly accommodate a dwindling number of genuine religious dissenters.[46] This

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[41] In terms of Canada, the relevant legislation is the *Civil Marriage Act,* SC 2005, c 33. [Civil Marriage Act].
[42] *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).
[43] Jesse Lubitz-Chase, "Mapped: Countries Where Same-Sex Marriage Is Legal", *Foreign Policy*, (7 June 2017) online: <https://foreignpolicy.com/2017/07/06/mapped-countries-where-same-sex-marriage-is-legal/>.
[44] Lucy Westcott, "More Americans support same-sex marriage than ever before, a new poll found", *Newsweek* (15 May 2017), online: <http://www.newsweek.com/same-sex-marriage-support-highest-level-americans-609256>.
[45] *Ibid.*
[46] On this point, see for example: Ira C Lupu, "Moving Targets: Religious Freedom, Hobby Lobby, and the Future of LGBT Rights" (2015) 7:1 Ala Civ Rights Civ Lib Law Rev 1; Andrew M Koppelman, "Gay Rights,

followed a trend of scholarly interest in prospective constitutional clashes between LGBT equality rights and the free exercise and religious expression rights of religious communities across western liberal jurisdictions.[47] In this environment, warnings that religious freedom still posed a genuine threat to the substantive recognition of sexual and gender identity equality were criticized as failing to properly take account of the 'national moment'.[48] For example, in his 2014 Note on the *Hobby Lobby* decision,[49] Paul Horwitz commented that, while the political 'moment' in which *Hobby Lobby* was decided showed that same-sex marriage and LGBT rights were hotly contested social and legal issues, it also demonstrated that the significance of religious accommodation as an important element in federal law was substantially weakening:

> Contestation over religious accommodations has moved rapidly from the background to the foreground. Accommodations by anyone – courts or legislatures – have been called into question… Whether religion is "a good thing" – whether it ought to enjoy any kind of unique status, and whether that status should find meaningful constitutional protection – has itself come up for grabs.[50]

Religious Accommodations, and the Purposes of Antidiscrimination Law" (2015) 88 South Calif Law Rev 619, online: <http://lawreview.usc.edu/issues/past/view/?id=1000018>; Paul Horwitz, "The Hobby Lobby Moment", SSRN Scholarly Paper ID 2516853 (Rochester, NY: Social Science Research Network, 2014); Alan E Brownstein, "Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry", SSRN Scholarly Paper ID 1725610 (Rochester, NY: Social Science Research Network, 2010); Michael Kent Curtis, "A Unique Religious Exemption from Anti-Discrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context", SSRN Scholarly Paper ID 1921364 (Rochester, NY: Social Science Research Network, 2011).

[47] See, for example: Johnson, Paul & Vanderbeck, Robert M, *Law, Religion and Homosexuality* (Abingdon, Oxon: Routledge, 2014); Harrison & Parkinson, *supra* note 28; Joel Harrison, "Debating Rights and Same-Gender Relationships" (2016) 4 J Law Relig State 194; Horwitz, *supra* note 46.

[48] Scholars and practitioners who wrote to criticize existing religious exemptions and proposals to strengthen religious freedom laws in light of the victory in *Obergefell* include: Taylor Flynn, "Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace", SSRN Scholarly Paper ID 1975006 (Rochester, NY: Social Science Research Network, 2011); Louise Melling, "Will We Sanction Discrimination?: Can 'Heterosexuals Only' Be Among the Signs of Today? (UCLA Law Review Essay)" (2013) 60 UCLA Rev Disc, online: <https://www.aclu.org/other/will-we-sanction-discrimination-can-heterosexuals-only-be-among-signs-today-ucla-law-review>.

[49] *Sylvia Burwell, Secretary of Health and Human Services, et al., Petitioners v. Hobby Lobby Stores, Inc., Mardel, Inc., David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett; Conestoga Wood Specialties Corporation, et al., Petitioners v. Sylvia Burwell, Secretary of Health and Human Services, et al.* 573 US 2751 (2014). [*Hobby Lobby*]; Horwitz, *supra* note 46. In *Hobby Lobby*, the majority (5:4) held that the non-profit exemption mechanism, designed to exempt religious organizations from elements of the federal Affordable Care Act, could be extended to objecting closely-held for-profit corporations, in a way that neither "impinged on the plaintiff's religious belief[s], nor failed to serve [the government's] stated interests equally well." In practice, this meant that Hobby Lobby Stores could refuse to provide health insurance coverage for unmarried female employees seeking contraceptive care.

[50] Horwitz, *supra* note 46 at 159.

Horwitz argues that the current national conversation about rights conflict has everything to do with the changing social climate that, *inter alia*, shows that many Americans value religion less than at any other time in their national history, and value LGBT equality comparably more;[51] factors which combine with high levels of public interest in LGBT rights contestations (like marriage equality) to generate a new socio-legal culture of tolerance and equality.

Placing the comparative social value of equality rights (as strengthening) and protections and carve-outs for religious freedom (as weakening) within an environment of public celebration about same-sex marriage and political support for LGBT equality, lends support to the equality-positive outlook of commentators. However, this assessment fails to assess the depth and consistency of the divide between religious conservative values and those of the progressive political left in the United States. Further, despite strong claims by the Christian Right in the United States that the 'gay equality movement' has successfully taken over the public debate on rights issues and has enabled courts to silence religious expression and limit religious freedom,[52] there are in fact significant moves being made against LGBT equality at a political and popular level that oppose these claims.

For example, at the social level, there are rising markers of an increase in violence and harassment against LGBT people, notably gays, lesbians and trans people, in America over the last five years. On 12 June 2016, Omar Mateen, a 29-year-old security guard, shot and killed forty-nine people and wounded 58 others in the Pulse nightclub in the (then)

[51] Horwitz, *supra* note 46 at 171 - 172.

[52] I discuss some of these positions, and the evangelical churches and organizations that posit them, in greater detail in chapter 4. In terms of identifying the 'Christian Right' as an operable political lobby group, I note Susan George's research on the political impact of evangelical Christian leadership within the American Republican Party and the text and following television production of *With God on our Side* which details the rise of conservative, evangelical Christian leadership within Republican politics (at all levels of government) in the United States from 1945 to present. Susan George, *Wiley: Hijacking America: How the Secular and Religious Right Changed What Americans Think* (Cambridge: UK: Polity Press, 2008); William Martin, *With God on Our Side: The Rise of the Religious Right in America* (Broadway Books, 2005); Didi Herman, *The antigay agenda: orthodox vision and the Christian Right* (Chicago: The University of Chicago University Press, 1997); Christine Robinson &, Sue E. Spivey "The politics of masculinity and the ex-gay movement" (2007) 21:5 Gend Soc 650.

worst mass shooting in U.S. history.[53] The FBI classified the Pulse shooting as a hate crime, after Mateen's father reported that his son may have been motivated by anger towards the LGBT community, and because Pulse was a gay club.[54] The Pulse shooting is part of a larger trend of LGBT-targeted violent crime. The 2013 and 2015 FBI statistics show that sexual orientation motivated roughly 20% of all reported hate crimes in those years. The only factor that accounted for more was race.[55] However, it is discrimination— at both a direct and a systemic level— that most negatively affects LGBT Americans.[56] Mark Potok, a senior fellow at the Southern Poverty Law Centre, reported that, in 2017, discriminatory attitudes towards LGBT people were still common across the country, despite recent advances in formal equality rights jurisprudence and legislation.[57] Discrimination takes the form of exclusion from services or accommodation, being refused an employment opportunity or employment benefit, or a person being verbally or physically harassed on the basis of their sexuality or gender identity. Potok continues:

> LGBT people have been vilified for as long as any of us can remember, and vilified in a particularly nasty way… They're described as perverts, as people who seduce children, as people who engage in horrible, unnatural practices. There's all kind of hatred in this country, but it's rare to have a group described in such incredibly demeaning terms.[58]

The Pew Research Centre recently completed research demonstrating that, even though a majority of Americans supported the legalization of same sex marriage, in 2016, 48% of U.S. adults thought that businesses should be able to openly discriminate against same-sex couples by refusing to provide them services like catering, transport or flowers, where

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[53] As of time of writing, the worst mass shooting in U.S. history is the 1 October 2017 Route 91 Festival shooting, where Stephen Paddock shot and killed 58 people and wounded more than 500 others. CBS/AP November 6, 2017 *Two of the deadliest mass shootings in U.S. history come just 35 days apart* (CBS).

[54] Emma Green, "The Extraordinarily Common Violence Against LGBT People in America", *The Atlantic* (12 June 2016), online: <https://www.theatlantic.com/politics/archive/2016/06/the-extraordinarily-common-violence-against-lgbt-people-in-america/486722/>.

[55] Federal Bureau of Investigation, "Hate Crime Summary", online: *Hate Crime Summary* <https://ucr.fbi.gov/hate-crime/2015/resource-pages/hate-crime-2015-_summary_final>. It is important to note, as the SPLC has, that hate crime statistics are known for under-reporting, particularly in terms of target characteristics of the victim. This is because of the difficulties in identifying aggressor motivation and other flaws in local police hate crime reporting.

[56] In part II below, I outline the coverage of state anti-discrimination laws in the United States that offer protection on the basis of sexual orientation and gender identity. Coverage is patchy at best, and there is no federal statute prohibiting discrimination against LGBT people in employment or government service provision, although there is an interpretation of Title VII of the *Civil Rights Act* that extends its coverage to include gay, lesbian and bisexual status.

[57] Green, *supra* note 54.

[58] *Ibid*.

the discrimination is done because of religious belief. In a 2014 study, one in every four Americans indicated that they believe, for religious reasons, that homosexual sex is never morally acceptable.[59] In the same survey, 46% of adults agreed that trans people should be required to use the bathroom of the gender they were assigned at birth. The 2016 Pew Centre survey also indicated that 35% of Americans still believe that homosexuality is morally wrong and should not be given support in state law.[60] These positions are most likely to be motivated by the respondent's religious belief. For example, among the 35% of those who say that homosexual behaviour is wrong in the 2016 survey, a large majority (75%) of that group say businesses should be able to refuse any service to same-sex couples if the business owner has religious objections to homosexuality.[61] The report demonstrated that the largest religious group with these objections were people who identified generally as white evangelical Protestants. By comparison, most religiously unaffiliated Americans (i.e., those who identify as atheists or agnostics or describe their religion as "nothing in particular") take the opposite views to Protestants on these issues.[62]

The Pew Research Council concluded that the results of the recent LGBT/religious liberty poll demonstrated that American society remains deeply divided on this issue, and neither side can be said to have 'won' the case for or against LGBT discrimination or religious freedom:

> The U.S. public appears polarized on these debates, just as it is on many other aspects of American politics. One of the goals of the survey was to see how many Americans feel torn because they can understand where both sides are coming from on these issues. The short answer is: not many.
>
> Few people express sympathy for both points of view in the debate over religious freedom vs. non- discrimination when it comes to businesses providing services for same-sex weddings. Indeed, two-thirds of adults say they sympathize "a lot" or "some" with only one side or the other (36% with the view that businesses should be required to serve same-sex couples, 31% with the view that they should be able to refuse service for religious reasons),

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[59] Frank Newport, *Religion Big Factor for Americans Against Same Sex Marriage, Gallup*, Gallup Poll Polling Report (Washington, D.C.).
[60] Pew Research Center, "Where the Public Stands on Religious Liberty vs. Nondiscrimination", (28 September 2016), online: *Pew Resource Centre Religion in Public Life Project* <http://www.pewforum.org/2016/09/28/where-the-public-stands-on-religious-liberty-vs-nondiscrimination/>.
[61] *Ibid.*
[62] *Ibid.*

> while just 18% express sympathy for both points of view. This pattern – few people expressing sympathy for both of these opposing perspectives – is evident across every major religious and demographic group analyzed in the survey.[63]

Other countries have also experienced strong religious objection to same sex marriage and LGBT rights, similar to the experience in the United States. In France, polls taken in 2013 just before President Francois Hollande signed same-sex marriage into law, showed that only a bare majority of French adults supported the law,[64] and anti-gay marriage protests, openly supported by the Catholic Church, were volatile and dangerous, with crowds in the thousands meeting in Paris, Marseilles and other urban centres to protest the law on religious grounds.[65] Similarly, in Australia, the government held a controversial plebiscite on the marriage equality issue in 2017, with the 'Vote No' on marriage equality campaign funded and managed by the Australian Christian Lobby and the Australian Council of Presbyterian Churches.[66]

2. The legal and political moment

The deep philosophical divide between LGBT equality rights and religious liberty is also demonstrated in recent legislative and political developments in the United States, with a strong populist and right-wing trend emerging in national politics and in red (Republican voting) states with records of previous conservative positions on religious liberty.[67] In 2018, the following eight American states have *Religious Freedom*

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[63] *Ibid*.

[64] CBC News, "France's parliament passes gay marriage bill", (12 February 2013), online: *CBC News* <http://www.cbc.ca/news/world/france-s-parliament-passes-gay-marriage-bill-1.1365498>.

[65] "Big anti-gay-marriage rally in Paris", *BBC News* (26 May 2013), online: <http://www.bbc.com/news/world-europe-22671572>; "Hollande signs gay marriage bill", *BBC News* (18 May 2013), online: <http://www.bbc.com/news/world-europe-22579093>.

[66] See: Michael McGowan, "Sydney Anglican diocese donates $1m to no campaign for same-sex marriage vote", *The Guardian* (9 October 2017), online: <http://www.theguardian.com/australia-news/2017/oct/10/sydney-anglican-diocese-donates-1m-to-no-campaign-for-same-sex-marriage-vote>; Rob Stott, "Australia's Messed-Up Public Vote on Same-Sex Marriage", *Daily Beast* (30 October 2017), online: <https://www.thedailybeast.com/australias-messed-up-public-vote-on-same-sex-marriage>; Francisco Perales & Alice Campbell, "Who supports same-sex marriage in Australia? And who doesn't?", *ABC News* (31 August 2017), online: <http://www.abc.net.au/news/2017-08-31/same-sex-marriage-who-supports-it-and-who-doesnt-hilda-data/8856884>. The plebiscite was passed by 61.6% of eligible Australians who cast a vote. Nearly eight out of every ten Australians expressed their view on the issue. See: Australian Bureau of Statistics, "Australian Marriage Postal Survey 2017", (15 November 2017), online: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0>.

[67] This has been seen as part of a larger, 'populist' trend in western political life which has been the focus of discussion since the Brexit referendum in the United Kingdom in June 2016, the rise in popularity of the Front Nationale in France, the election of Donald Trump in the November 2017 election and the significant

Restoration Acts (RFRA) pending: Colorado, Georgia, Kentucky, Hawaii, Oklahoma, Virginia, Washington State and West Virginia.[68] In terms of the introduction of discriminatory legislation, the Movement Advancement Project (MAP) and HRC report that over 100 anti-LGBT bills in 29 states were introduced in 2017, and in 2016, approximately 220 anti-LGBT bills were introduced in state legislatures.[69] These bills mostly seek to repeal anti-discrimination legislation, or to advance pro-discrimination legislation, but some deal with specific areas of service provisions such as foster homes and adoption.[70] The MAP reports that, by June 2017, the bulk of anti-LGBT bills were comprised of 45 religious exemption bills to amend anti-discrimination protections at state levels. Those bills would let people, churches and—in some cases—religious corporations cite genuinely held religious beliefs as a defense, including enabling people to decline to marry a same-sex couple. Of the six bills that passed state congresses in 2017, four of these provided blanket religious exemptions and two of them—in South Dakota

gains made by the Alternative for Deutschland (AfD) far-right party in the September 2017 German federal election. Religious engagement in these elections, both for and against populist candidates, was marked. In the United Kingdom, for instance, UKIP MPs took anti-LGBT stances on marriage equality, discrimination and religious liberty, but then clashed with the Church of England and Catholic Church positions on poverty alleviation measures, austerity and support for the National Health Service. On the rising trend of populism in Europe and the UK, see: Yascha Mounk & Martin Eiermann, "2017 Was the Year of False Promise in the Fight Against Populism", *Foreign Policy* (29 December 2017), online: <https://foreignpolicy.com/2017/12/29/2017-was-the-year-of-false-promise-for-populism/>. For a human rights based analysis of the rise of populism across the world, see: "World Report: The Dangerous Rise of Populism | Global Attacks on Human Rights Values", (12 January 2017), online: *Hum Rights Watch* <https://www.hrw.org/world-report/2017/country-chapters/dangerous-rise-of-populism>.

[68] Sarah Fowler, "Nation reacts to Mississippi's 'Religious Freedom' bill", (31 March 2016), online: *Clarion Ledger*, <http://www.clarionledger.com/story/news/2016/03/31/national-reactions-religious-freedoms-bill/82463028/>. This is in addition to the twenty-one US states that already have enacted their own Religious Freedom Restoration Acts. These states are: Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas and Virginia. In addition, another 10 states have RFRA-like provisions provided by judicial decisions: Alaska, Hawaii, Ohio, Maine, Massachusetts, Michigan, Minnesota, Montana, Washington and Wisconsin.

[69] Susan Miller, "Anti-gay bills have LGBT rights activists 'playing defense'", *USA Today*, (1 June 2017) online: <https://www.usatoday.com/story/news/nation/2017/06/01/onslaught-anti-lgbt-bills-2017/102110520/>; Hayley Miller, "100 Anti-LGBTQ Bills Introduced in 2017 | Human Rights Campaign", *Hum Rights Campaign* (7 March 2017), online: <http://www.hrc.org/blog/100-anti-lgbtq-bills-introduced-in-2017>.

[70] The HRC continually monitors legislative developments across states. In July 2017, it was tracking more than 100 bills introduced in the following 29 states: Alabama, Arkansas, Arizona, Colorado, Florida, Georgia, Hawaii, Iowa, Illinois, Indiana, Kansas, Kentucky, Minnesota, Missouri, Mississippi, North Carolina, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wyoming. See: Miller, *supra* note 69.

and Alabama—allow state-funded adoption and foster agencies to refuse to place children with same sex couples.[71]

At the executive level, in 2017 the Trump administration stalled federal anti-discrimination legislation that was originally introduced by the Obama administration with the purpose of preventing LGBT discrimination in public sector employment,[72] and issued a Religious Liberty Executive Order that commentators have interpreted as being a direct attack on LGBT equality rights and on the reproductive rights of women.[73] The Executive Order describes religious liberty and religious expression as both a vital addition to the public square and as properly exempt from interference from government:

> It shall be the policy of the executive branch to vigorously enforce Federal law's robust protections for religious freedom. The Founders envisioned a Nation in which religious voices and views were integral to a vibrant public square, and in which religious people and institutions were free to practice their faith without fear of discrimination or retaliation by the Federal Government.[74]

President Trump also refused to issue a Pride Month proclamation on 2 June 2017, breaking tradition with the eight-year practice of President Obama. The President's refusal to issue a proclamation forced federal agencies to withhold their own Pride materials.[75] The President also filled high-level public-sector roles with candidates who

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[71] Susan Miller, "Anti-gay bills have LGBT rights activists 'playing defense'", *USA Today*, online: <https://www.usatoday.com/story/news/nation/2017/06/01/onslaught-anti-lgbt-bills-2017/102110520/>.

[72] Originally introduced in 2011 as the *Employment Non-Discrimination Act*, H.R. 1397, 112th Cong. (2011) ("ENDA") with 160 cosponsors and pending in the Senate as S. 811, 112th Cong. (2011) with 41 cosponsors. The Bill remains before the Senate and has not been heard in committee in either chamber either in the 114th or 115th Congress. Jennifer Pizer et al. make a strong case for the introduction of ENDA in their summary of the patchwork coverage of anti-discrimination law for LGBT employees across the United States. See: Jennifer C Pizer et al, "Evidence of Persistent and Pervasive Workplace Discrimination against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits" (2011) 45 Loyola Los Angel Law Rev 715, online: <http://heinonline.org/HOL/Page?handle=hein.journals/lla45&id=737&div=&collection=>. In February 2017, the federal Attorney-General Jeff Sessions indirectly indicated that the Trump administration would not support the passage of the Bill when he filed submissions in a federal court matter arguing that Title VII of the Civil Rights Act does not prohibit discrimination against gay and bisexual federal employees. See: *Zarda v Altitude Express Inc, Brief for the United States as Amicus Curiae* (2017).

[73] Amanda Marcotte, "Trump's 'religious liberty' executive order is meant to legalize anti-LGBT discrimination — and may be unconstitutional - Salon.com", *Salon*, (4 May 2017) online: <http://www.salon.com/2017/05/04/trumps-religious-liberty-executive-order-is-meant-to-legalize-anti-lgbt-discrimination-and-may-be-unconstitutional/>.

[74] Donald J Trump, *Presidential Executive Order Promoting Free Speech and Religious Liberty* (2017).

[75] Jacqueline Klimas, "Trump's failure to issue Pride Month proclamation called 'deeply disappointing'", (2 June 2017) online: *POLITICO* <http://politi.co/2rsXpC4>.

have publicly expressed their opposition to LGBT equality rights. These include Roger Severino, Director of the Office for Civil Rights at the Department of Health and Human Services, who previously worked to oppose the Office's integration of the Affordable Care Act on the basis that it provides protection for gender identity in federally-funded programs.[76] Trump also appointed controversial Department of Education Secretary Betsy DeVos, whose family provided substantial funding to the Family Research Centre and Focus on the Family (both organisations that support reparative therapy and believe that homosexuality is a curable mental health condition).[77]

In addition to legislative and executive developments, there is also ongoing uncertainty about judicial positions on same-sex equality in public life, in terms of Court decisions that will follow *Obergefell*. Notably, on 4 June 2018, the Supreme Court ruled in favour of Jack Phillips, a Colorado baker who refused to make a cake for a same-sex couple.[78] Justice Kennedy's opinion for the majority rested largely on the conclusion that the Colorado Human Rights Commission had "treated Phillips unfairly by being hostile to his sincere religious beliefs."[79] Amy Howe, official reporter for the SCOTUS blog, notes that the majority did not rule on one of the central rights arguments raised by the parties: whether compelling Phillips to provide a service to a same-sex couple would violate his right to freedom of speech in addition to his religious freedom rights. The majority also left open the question of whether a future case dealing with similar facts could be decided differently if the tribunal of first instance was found to have treated the religious interests of a respondent "neutrally and fairly."[80]

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[76] Sophia Oster, "The LGBTQ Community under Trump: Interview with Sharita Gruberg", (29 May 2017) online: *Heinrich Böll Found* <https://www.boell.de/en/2017/05/29/lgbtq-community-under-trump-interview-sharita-gruberg>.

[77] In Senate committee hearings, DeVos argued that she had never personally provided donations to Focus on the Family, arguing that documents indicating that she was not a director of her mother's multi-million-dollar foundation in recent years. IRS records indicate that the Edgar and Elsa Prince Foundation has donated over five million dollars to Focus on the Family and other evangelical Protestant organisations since 1990. See: Dan Merica, Aaron Kessler & Sara Ganim, "Betsy DeVos' 'clerical error' dates back to nearly two decades", *CNNPolitics* (18 January 2017), online: <http://www.cnn.com/2017/01/18/politics/betsy-devos-focus-on-the-family-foundation/index.html>.

[78] *Masterpiece Cakeshop, Ltd, et al, Petitioners v Colorado Civil Rights Commission, et al*, [2018] 584 US __ (2018).

[79] Amy Howe, "Opinion analysis: Court rules (narrowly) for baker in same-sex-wedding-cake case [Updated]", (4 June 2018), online: *SCOTUSblog* <http://www.scotusblog.com/2018/06/opinion-analysis-court-rules-narrowly-for-baker-in-same-sex-wedding-cake-case/>.

[80] *Ibid.*

Horwitz, in his 2015 analysis of *Hobby Lobby*, wrote that the extension of due process and equal protection guarantees to LGBT communities was a relatively settled matter of law that reflected settled contemporary social values.[81] Horwitz's conclusion is situated in time at the end of the Obama administration, when the promotion of anti-discrimination legislation was a national issue and when *Obergefell* was to be handed down in a matter of weeks. This was also the year that the Human Rights Campaign issued a position paper titled 'Beyond Marriage Equality' that argued for a range of statutory protections for LGBT status across a wide spectrum of public life, and that relied on judicial and legislative equality gains in areas like adoption, federal employment, foster care and spousal benefits.[82] However, we can see that the 'national moment' of 2018 is substantially different to that of 2015. In this current judicial and political environment, it is reasonable to suggest that judicial perspectives on LGBT equality rights could shift or are already shifting.[83]

The goal of this opening brief is simply to demonstrate that the legislative and political environment that LGBT and pro-religious freedom commentators felt they inhabited at the high-tide mark of *Obergefell* in 2015 has altered substantially in a short period of time. Whether this shift feels sudden (it may be so for LGBT activists and equality law commentators) or whether it feels more like a continual slow march towards a more conservative view of rights (a perspective favoured by evangelical Christians in the 'Christian Right' and, some LGBT lobbyists on the ground), it is observable, measurable and has effects for both groups. In this 2018 'national moment', critical discussions of

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[81] Horwitz, *supra* note 46.

[82] Human Rights Campaign, *Beyond Marriage Equality: A Blueprint for Federal Non-Discrimination Protections* (2014).

[83] The suggestion has been made that the Supreme Court could even reconsider its decision in *Obergefell*. However, while overturning its precedent is, of course, open to the Court, it is unlikely that a matter raising the same facts and points of law at issue will arise. Matters that deal with other aspects of LGBT equality versus religious freedom have been decided in the negative by the Court in 2018, notably its decision in *Masterpiece Cakeshop, Ltd., et al., Petitioners v. Colorado Civil Rights Commission, et al.*, *supra* note 78.. Further, with the introduction of RFRAs across states, more litigation on conflict of rights issue seems likely. A conservative judgment on the question of due process and equal protection would not need to re-decide *Obergefell* in order to limit the applicability of its ratio to related equality rights issues. For a thoughtful discussion of these issues see: Matt Baume, "Could Republicans Undo Marriage Equality? Yes -- And Here's How", *Huffington Post* (19 December 2016), online: <http://www.huffingtonpost.com/entry/could-republicans-undo-marriage-equality-yes-and_us_58582040e4b0d5f48e1651ab>; see also: Howe, *supra* note 79.

conservative religious responses to sexuality and gender identity are given new currency and relevance, particularly for people who inhabit both a queer and religious world within the United States.

Part II
(2) The state legal framework balancing equality and religious freedom rights

In this part, I analyze how relevant state law that applies to LGBT equality rights and religious liberty operates in relation to the identity issues experienced by queer people living within certain evangelical Christian or Orthodox Jewish communities. This discussion attempts to demarcate a meaningful space between secular and religious law in religious communities, as this space is where most individual legal relationships and negotiations tend to happen. The Christian and Jewish religious legal frameworks that apply to these particular communities are then discussed in further detail in chapter 2; defined and scoped by a legal pluralist framework. In this part, I begin with an overview of the state legal environment in the United States that deals with sexual orientation discrimination, LGBT rights, religious freedom and state tolerance of the internal practices of religious groups.

This state law overview is necessary because, as I will develop further in chapter 2 and in chapters 4—6, high-profile state law developments (like the social and political developments discussed in part I above) can influence individual L/G members of closed religious communities in limited and indirect ways. Developments in state law are related to social and political dialogues about rights protections, which then inform discussions about religion and equality at more informal and local levels. Thus, even while the L/G people who are the subject of this work are actively discouraged from interacting with state law, we know from narratives of those who have left these religious communities that these issues are increasingly being investigated by L/G religious people (often via the Internet). It is thus important to consider what developments in state law might form the basis of these discussions. Further, the boundaries of this state law framework not only inform how religious communities engage with the state in relation to rights claims and

disputes, but also influences how negatively those communities view state attempts to interfere in what they consider to be private, community issues.

This analysis starts with the outline of equality guarantees and the right to religious freedom as these concepts are recognised in United States law; although a similar analysis could also be carried out in relation to rights-balancing in other western states, allowing for jurisdictional differences in how rights frameworks are designed. In the United States, there is recognition of a foundational right to religious freedom that flows from the constitutional guarantees of the Free Exercise Clause and the Establishment Clause of the First Amendment to the United States Constitution.[84] In his treatise on the difficulties of mapping the Church-State divide in modern America, Noah Feldman argues that the Founders recognised the high-stake challenges and rewards for protecting religious diversity in the Constitution, seeing this diversity as integral to the "people as sovereign" American experiment. Feldman concludes that this viewpoint provided the basis for the Establishment Clause.[85]

The scope and application of religious constitutional guarantees, notably the free exercise right, have altered substantially over time, with varying connections to state legal obligations operating to limit a person's access to the right. The Free Exercise Clause states that Congress shall not pass laws prohibiting the free exercise of religion. Commentators tend to split constitutional free exercise jurisprudence on temporal lines between pre- and post the 1990 Supreme Court decision of *Employment Division v Smith*, with the former being more rights protecting and the latter tending to constrain the exercise of religious rights in areas of public life.[86] In *Smith*, a Native American religious rite that involved taking peyote contravened an Oregon state law against recreational drug

[84] U.S. Const. amend I.

[85] "How could the state establish the religion of the sovereign if this sovereign people belonged to many faiths? … This new model of popular sovereignty called for a new church-state arrangement. The framers rose to the occasion. For the first time in recorded history, they designed a government with no established religion at all. The Articles of Confederation that preceded the Constitution remained silent on religion. The Constitution in its original form went further by prohibiting any religious test for holding office. And the first words of the First Amendment to the new Constitution… stated that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Noah Feldman, *Divided by God: America's Church-State Problem and What We Should Do About It* (New York: Farrar, Straus and Giroux, 2006) at 5 - 6.

[86] Marci A Hamilton, *Employment Division v. Smith at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, SSRN Scholarly Paper ID 1839963 (Rochester, NY: Social Science Research Network, 2011); Lupu, *supra* note 46; Horwitz, *supra* note 46.

use. The Supreme Court held that the state could deny unemployment benefits to a person fined for violating a state prohibition of recreational drug use, even when the drug was part of a religious ceremony or rite. Justice Scalia, writing for the majority, held that an individual's religious beliefs do not excuse them from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate.[87] The Court also clarified that the Free Exercise Clause did not confer rights on state officials to resist or not enforce generally applicable legal duties just as it did not shield individuals from responsibility. Justice Scalia spoke directly to the question of legislative versus judicial activism, asserting that those religious groups who seek exemptions from legal requirements should look to the legislature or executive for redress rather than to the judicial branch. *Smith* did not constrain the rights of political actors to create non-discriminatory religious practice exemptions from applicable laws: an outcome that Justice Scalia pre-empted by suggesting a legislative solution to the question of federal protection for religious actions.

There was a significant cultural and political backlash against *Smith* from conservatives and progressive liberals alike. Robin West took a liberal feminist position, criticizing the decision as undermining the fundamental right of free exercise that minority religions needed to resist becoming the targets of monolithic state control.[88] Similar positions were taken by commentators by virtue of the nature of the religious community affected by the decision: namely Native American religions that are burdened by increasing expansion of government laws and projects onto sacred land. Similarly—although for different reasons—conservative commentators argued that the Court took deliberate steps to limit the autonomy of all religious groups in their private activities, regardless of their size or minority status in American society.[89]

Congress responded to the *Smith* decision with the *Religious Freedom Restoration Act* (RFRA) of 1993, passed by a unanimous House of Representatives vote and a nearly unanimous Senate vote (both Houses were Democrat controlled). The RFRA reinstated the requirement that strict scrutiny be used when determining whether the Free Exercise

[87] *Employment Division, Department of Human Resources of Oregon v Smith*, [1990] 494 US 872 [*Smith*].
[88] Robin West, "Foreword: Taking Freedom Seriously" (1990) 104 Harv Law Rev 43.
[89] As noted above, Horwitz argues that the commentary on both liberal and conservative sides that criticized Smith for limiting religious exercise is no longer possible in the more secular present.

Clause had been violated.[90] The RFRA states that a neutral law can burden a religious belief as much as one that was designed to interfere with religion, and therefore states that the "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[91] While the RFRA was struck down as unconstitutional in terms of its application to the states,[92] it continues to have federal application.[93]

In relation to the interaction between protected constitutional rights at federal and state levels; the current distribution of state-wide laws 'reveals a stark mismatch' in terms of coverage.[94] Whether a state will have healthy protections for religious freedom, for equality rights, or for both sets of rights, can be generally predicted based on an assessment of (a) the position of the state in relation to marriage equality and (b) the degree of religiosity of the state.[95] This conclusion was reached by Kelly Chapman in her research that focused on an empirical study of religious commitment at a state level relative to opposition to anti-discrimination legislation.[96] Alabama is one example of Chapman's thesis: it has an RFRA in its state constitution that includes broad, pre-*Smith* concepts of Free Exercise rights, and has no state-wide laws that forbid discrimination in employment, public accommodation or public services.[97]

In terms of sexual orientation and gender equality rights, the 5th and 14th Amendments of the U.S. Constitution have become "the most significant sources of protection for sexual

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[90] This reinstated the *Sherbert* test that the Supreme Court had curtailed in *Smith*. *Sherbert v Verner et al., Members of South Carolina Employment Security Commission, et al.*, 374 US 398 (1963) [*Sherbert*]; *State of Wisconsin v Jonas Yoder, Wallace Miller, and Adin Yutzy*, 406 USC 205 (1972) [*Wisconsin v Yoder*].
[91] *Religious Freedom Restoration Act of 1993*, 42 USC ch. 21B (1993) [Religious Freedom Restoration Act].
[92] *City of Boerne, Petitioner v P. F. Flores, Archbishop of San Antonio, and United States*, 521 US 507 (1997).
[93] *Alberto R Gonzales, Attorney General, et al, v O Centro Espirita Beneficente Uniao do Vegetal et al*, 546 US 418 (2006); *Hobby Lobby*, *supra* note 49.
[94] Lupu, *supra* note 46 at 45. In his recent book, Nelson Tebbe argues that disputes arising because of conceptual rifts between religious freedom and LGBT equality can be resolved by applying a method of 'social coherence', based on the way people reason through moral problems in everyday life. Although his legal arguments go beyond the scope of this work, Tebbe's thesis could be the focus of further critique of potential mediation of private religious and equality law issues in a state law framework. Nelson Tebbe, *Religious Freedom in an Egalitarian Age* (Cambridge: Harvard University Press, 2017).
[95] Chapman, *supra* note 28.
[96] *Ibid.*
[97] Christopher C Lund, "Religious Liberty after Gonzales: A Look at State RFRAs", SSRN Scholarly Paper ID 1666268 (Rochester, NY: Social Science Research Network, 2010).

freedom and civil equality."[98] *Obergefell* is one of the most recent cases to apply due process and equal protection to LGBT rights.[99] However, the decision in *Obergefell* built on two decades of evolutionary constitutional jurisprudence that focused on the application of the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution. In this line of cases, the Supreme Court increasingly recognised equality rights for LGBT people in areas of their public and private life where they had been traditionally excluded or disadvantaged. These included the right to constitute a protected class for hate crime or anti-discrimination legislation (in 1996),[100] the right to liberty to engage in lawful intimate and sexual relationships (which required the decriminalization of same-sex intercourse in Texas) (in 2003),[101] and the right to enjoy spousal benefits and meet spousal liabilities under relevant federal and state legislation (in 2013).[102] This recognition and development of rights by judicial decision was also mirrored by gradual state legislative developments in the areas of anti-discrimination law and family law (in the 1990s–2000s) that recognised the rights of same-sex couples in terms of federal and state benefits and taxes and evolutionary developments in federal law in the area of employment, the repeal of the *Don't Ask, Don't Tell* prohibition against gay and lesbian people serving in the military[103] and the identification of LGBT sexual orientations and gender identities as a relevant class for federal hate crime legislation.[104]

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[98] Lupu, *supra* note 46 at 6.
[99] *Obergefell*, *supra* note 33.
[100] *Romer v Evans*, 517 US 620 (1996). In a 5-4 decision, the Supreme Court held that a constitutional amendment in Colorado preventing the state, municipal or local governments from identifying gay, lesbian or bisexual communities as a protected class for the purposes of discrimination or anti-hate crime legislation violated the Equal Protection Clause of the Fourteenth Amendment.
[101] *Lawrence v Texas*, 539 US 558 (2003). In a 6-3 opinion delivered by Justice Kennedy, the Court held that the Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause of the Fourteenth Amendment.
[102] *United States v Windsor*, *supra* note 32. The Court made three findings on questions before it. Relevant here is its third holding, in relation to the question of constitutionality of the Defense of Marriage Act, 1 & 28 USC 1996 [DOMA]. The Court held that states have the authority to define marital relationships and that DOMA goes against legislative and historical precedent by undermining that authority. The result is that DOMA denies same-sex couples the rights that come from federal recognition of marriage, which are available to other couples with legal marriages under state law. The Court held that the purpose and effect of DOMA is to impose a "disadvantage, a separate status, and so a stigma" on same-sex couples in violation of the Fifth Amendment's guarantee of equal protection.
[103] *Don't Ask, Don't Tell Repeal Act of 2010,* Pub L No 111 - 321 Stat. 124 at 3515, 3516 and 3517.
[104] *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act 2009,* (codified as an amendment to the *National Defense Authorization Act for Fiscal Year 2010* (H.R. 1913 2009, S. Amdt 1511 2009)). The

There are few protections for LGBT identities in U.S. federal law. The *Violence Against Women Act* is the only federal statute that explicitly forbids discrimination based on sex or gender,[105] and there are no statutory definitions of sex that explicitly reference non-heterosexual identities as a target group for protections.[106] The definition of 'sex' in section 2000 of Title VII of the *Civil Rights Act* 1964 (Civil Rights Act) has been broadly interpreted to cover sexual orientation and gender identity discrimination, but this interpretation is not settled.[107] In the 2016 decision of *Hively v Ivy Tech*, the 7th Circuit Court of Appeals held that Title VII protections do extend to gay and lesbian employees who suffer discrimination,[108] consolidating two decades of persuasive Supreme Court jurisprudence on relevant issues[109] and consistent submissions from the Equal Employment Opportunity Commission (EEOC) in employment matters before lower courts.[110] However, commentators expect the *Hively* decision to be appealed to the Supreme Court.[111] In July 2017, Attorney-General Jeff Sessions directed the Department of Justice to file an *amicus curiae* brief on sex discrimination under Title VII of the *Civil Rights Act*: in the first of a line of cases due to be heard by federal courts on the question of workplace harassment and discrimination on the grounds of sexual orientation. The

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Bill was signed into law by President Barack Obama on 28 October 2009, having been originally proposed in 1999 as a response to the murders of Matthew Shepard and James Byrd Jr., both young men who identified as gay. See: "The Obama Administration's Record and the LGBT Community", (9 June 2016), online: *whitehouse.gov* <https://obamawhitehouse.archives.gov/the-press-office/2016/06/09/fact-sheet-obama-administrations-record-and-lgbt-community>.

[105] *Violence Against Women Act,* Title IV, § 40001-40703 of the *Violent Crime Control and Law Enforcement Act,* 42 USC § 13701 - 14040 (1994) [Violence Against Women Act].

[106] Lupu, *supra* note 46 at 6.

[107] *Civil Rights Act of 1964,* 42 USC 1964. [Civil Rights Act].

[108] *Hively v Ivy Tech Community College of Indiana*, No.15-1720 (7th Cir. Appeals 2017) per Wood CJ at 2.

[109] Notably, *Price Waterhouse v Hopkins*, 490 US 228 (1989), in which the Supreme Court held that the practice of gender stereotyping falls within Title VII's prohibition against sex discrimination; and *Oncale v Sundowner Offshore Services Inc*, 523 US 75 (1998), in which the Court clarified that it makes no difference if the sex of the harasser is (or is not) the same as the sex of the victim. For a sex-positive feminist critique of *Price Waterhouse v Hopkins*, see: Vicki Schultz, "The Sanitized Workplace Revisited" in *Feminist Queer Legal Theory: Intimate Encounters Uncomfortable Conversations* (Surrey: Ashgate Publishing Limited, 2009) at 65. But, for a cultural feminist response that prefers a broader definition of 'sex' under Title VII in employment, see: Mary Anne Case, "A Few Words in Favor of Cultivating an Incest Taboo in the Workplace" in *Feminist Queer Legal Theory Intimate Encounters Uncomfortable Conversations* (Surrey: Ashgate Publishing Limited, 2009) at 153.

[110] *David Baldwin v Anthony Foxx, Secretary, Department of Transportation (Federal Aviation Administration) Agency,* Appeal No. 0120133080, 2015, EEOC.

[111] Mark Joseph Stern & Mark Joseph Stern, "A Thunderbolt From the 7th Circuit", *Slate* (5 April 2017), online:
<http://www.slate.com/articles/news_and_politics/jurisprudence/2017/04/the_7th_circuit_rules_that_anti_gay_employment_discrimination_is_illegal.html>.

Department of Justice position is now that sexual orientation is not expressly or implicitly covered by the sex protection provisions of Title VII of the *Civil Rights Act*.[112]

In terms of state protection of LGBT rights, twenty-two states (and the District of Columbia) have state anti-discrimination laws that prohibit discrimination based on LGBT status in employment, housing and public accommodations, although all of these statutes also have limited exemptions built in for religious organizations and people of faith who offer services to the public.[113] As set out above, several states (notably 'Red States', a shorthand for Republican voting states) do not have anti-discrimination protections for LGBT status or identity to cover public areas of life such as education, employment, goods and services provision and accommodation.

The relatively fast-paced development of equality jurisprudence in relation to LGBT identity rights (over the last twenty years) in the United States generally reflects contemporaneous, political and judicial developments in other western jurisdictions, although there are differences in terms of the relative time-period when social and judicial consideration of LGBT rights issues began and then increased pace. Here, I give a quick review of the rights framework of two other western jurisdictions. This overview is intended to situate my discussion of L/G religious people within a broader environment of rights debate at a national and international level. This debate increasingly takes the form of states formally recognising the validity and value of LGBT identities while simultaneously accommodating a substantial minority of religious dissent on these issues through exceptions in legislation and in constitutional religious protection provisions.

In Canada, the first case to consider same-sex marriage was heard in 1974, where the Manitoba Court of Appeal held that, despite neutral wording of the *Marriage Act for the Province of Manitoba*, the heterosexual foundation of marriage was 'necessarily implied' in the statute and the common law definition of marriage (between one man and one woman) was to be maintained.[114] While the next provincial case to challenge *North* was not heard until 1994 (and would ultimately be unsuccessful),[115] the intervening period saw

[112] *Zarda v Altitude Express Inc, Brief for the United States as Amicus Curiae* (2017).
[113] Lund, *supra* note 97; Chapman, *supra* note 28; Curtis, *supra* note 46.
[114] *North v. Matheson*, [1975] W.W.D. 55, 52 D.L.R. (3d) 280 (Man. Co. Ct. (Winn.)).
[115] *Leyland v Ontario, (Minister of Consumer and Commercial Relations)* (1993), 104 D.L.R. (4th) 214 (Ont. Div. Ct.) at paras. 14–104.

a slow increase in legislative recognition for LGBT people in Canadian life, which was then exponentially increased by targeted LGBT-rights litigation in the 1990s to recognise equality rights claims for LGBT people and same-sex union rights.[116]

In 1995, Supreme Court of Canada unanimously held that 'sexual orientation' was a protected ground under section 15 of the *Canadian Charter of Rights and Freedoms* (Charter),[117] enabling equality rights claims to be brought on the basis of LGBT status.[118] In 1998, *Vriend v Alberta* established the right to be protected by a provincial human rights code in areas of public life like employment or the provision of services, on the basis that such an omission violated section 15 of the Charter.[119] In relation to same-sex unions, in 1999 the Supreme Court held (in an 8-1 opinion) that the definition of 'spouse' (requiring opposite sex identification) in the Ontario *Family Law Act* was unjustifiable sexual orientation discrimination.[120] This last decision laid the groundwork for marriage equality, with the Supreme Court finding that the limitation of the obligation to provide maintenance to heterosexual couples not only "ran contrary to the prohibition on discrimination, but also had no justification within a free and democratic society."[121] Same-sex marriage ultimately became legal Canada in July 2005 by Act of Parliament,[122]

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[116] In relation to the significance of LGBT community mobilisation and strategic litigation, see: Christine Davies, "Canadian same-sex marriage litigation: individual rights, community strategy" (2008) 66: Spring Univ Tor Fac Law Rev 103.

[117] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the Canada Act (UK) 1982, c 11 [*Canadian Charter of Rights and Freedoms*], section 15.

[118] *Egan v Canada*, [1995] 2 S.C.R. 513. In *Egan*, the complainants were a same-sex couple who sought a supplementary pension provided for by the federal *Old Age Security Act* for heterosexual couples only. The Court ultimately did not uphold the complaint. The Court showed deference to Parliament's choice to define the range of beneficiaries of public benefits in its reasoning.

[119] *Vriend v Alberta*, [1998] 1 S.C.R. 493.

[120] *M v H*. [1999] 2 S.C.R. 3. The facts of this case are similar to those of *Windsor*. The case involved a dispute between two women who were in a long-term same-sex relationship. When the relationship broke down, one of the women sought financial support from the other under the Ontario Family Law Act. Whereas in earlier cases such as *Egan* the benefits at issue were provided by government scheme, here the redress required support from a former partner. On this basis, there were no grounds to exercise deference to Parliament and the Court held that this case could be distinguished from *Egan*.

[121] Daniele Gallo et al, *Same-sex couples before national, supranational and international jurisdictions* (Berlin: Springer-Verlag, 2013) at 80.

[122] *Civil Marriage Act* 2005, *supra* note 41. See also: *Reference re Same-Sex Marriage* 2004 SCC 79, [2004] 3 SCR 698.

two years after Ontario and British Columbia became the first two provinces to explicitly legislate for marriage equality.[123]

The human rights climate (in terms of the recognition of equality and freedom of religion) in the United Kingdom is similar to that Canada and the United States, in that it is characterized by gradual, slow development of the expectation of human rights and recognition for LGBT people stemming from changes to the criminal law in the 1960s-1980s. There was then a slow period of social evolution (with relatively little change in substantive rights), followed by the relatively swift recognition of formal equality rights across all areas of public life in the 1990s to 2000s, as a result of European Union legislation and jurisprudence that increasingly recognised LGBT equality rights under anti-discrimination, hate crime legislation and administrative and family law. In the United Kingdom (UK), prior to the implementation of the *Human Rights Act 1998*, protection against workplace discrimination on the grounds of sexual orientation followed legislative change at the European common market level. In 2000, the Employment Equality Directive (Directive) outlawed discrimination in the workplace on the basis of sexual orientation (as one of many grounds).[124] The UK regulations implementing the Directive initially included broad exceptions allowing for discrimination on the basis of sexual orientation where employment requiring a particular sexual orientation was 'a genuine occupational requirement'. Similarly, there were wide derogations in respect of employment by or for an organized religion.[125] Aidan O'Neill considers that these 2003 changes to workplace discrimination laws "marked something of a watershed in legal, political and social attitudes towards homosexuality in the UK … The overwhelming political consensus in this country appears to be to ensure the full equality before the law for all purposes for everyone in the UK, gay or straight."[126]

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[123] As Gallo et al. note, while the legal concept of marriage is exclusively a federal matter for the Canadian Parliament, powers over the celebration of marriage are vested in the provinces. Gallo et al, *supra* note 121 at 84.

[124] European Union: Council of the European Union, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, 27 November 2000, OJ L 303, 02/12/2000 P. 0016 – 0022.

[125] *Employment Equality (Sexual Orientation) Regulations, 2003* (UK), No. 1661.

[126] Aidan O'Neill, "A Glorious Revolution? UK Courts and Same-Sex Couples" in, *Same-Sex Couples before National, Supranational and International Jurisdictions* (Berlin: Springer, 2013) at 188.

Given the UK's constitutional embodiment of an Anglican Church of England, the state imposes a universal duty to marry couples on the Anglican Church (in England and Wales) by operation of general law.[127] However, the *Same Sex Couples Act* of 2013 provides an exemption to this general rule on the basis of sexual orientation: same-sex marriages are prohibited in the Church of England.[128] Express provision is also made in both the *Civil Partnerships Act 2004* and the *Same Sex Couples Act 2013* that nothing obliges a religious organization to solemnize or host civil partnerships or same-sex marriages if the religious organization has an objection to doing so.[129]

This brief overview of legal developments in two other western jurisdictions in relation to the promotion of LGBT equality rights demonstrates the marked success of political movements that have pressed for the recognition of human rights for LGBT communities over the last twenty years. However, while LGBT lobbyists would assert that there is still a long way to go before substantive equality for sexual orientation and gender identity minorities is realised in these jurisdictions, religious leaders who oppose marriage equality and LGBT rights might respond that they have already felt significant, negative changes to their legal right to religious freedom as a direct result of recent legal developments to protect equality. Overall, this discussion of the shifting nature of public debate on issues such as discrimination, sexual autonomy, the importance of recognising and respecting queer identity and the significance of religious liberty demonstrates that we are not yet close to reaching consensus on how to resolve these issues of rights conflict.

It is difficult to accurately assess how these state law developments are observed by L/G members of closed religious communities. However, those who leave their faith communities and move into the secular world often report that legal and social developments relating to substantive equality do have an impact in terms of helping them realize their queer identity. There is the example of Abby Stein, a woman who came out openly as transgender in 2015, two years after she went 'off the derech' and left her

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[127] *Ibid* at 192.
[128] This differential treatment on the basis of sex was held to be discriminatory in breach of Art 14 when read together with the Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 [*European Convention for the Protection of Human Rights*], Art 12 in *R (in application of Baiai) v Secretary of State for the Home Department*, [2008] UKHL 53; [2008] 3 WLR 549.
[129] *Marriages and Civil Partnerships (Approved Premises) Regulations,* 2005 (UK) No. 3168 reg. 3A.

Hasidic community in Brooklyn.[130] Stein notes that, while still living as a man and within her Haredi community, she attended a morality rally at New York City's Citi Field in 2012, where over 10,000 Haredi Jewish men protested the risks posed by the Internet to Haredi Jewish life.[131] Stein reported that she carried her smartphone with her to the rally.[132] By 2012, Stein had made contact with Footsteps, a Jewish non-profit that helps religious Jews transition from religious life to more secular worlds.[133] Footsteps reports that, of the 1,100 people they have helped leave ultra-Orthodox Judaism, approximately twenty percent identify as LGBT.[134] Stein states that she first began researching LGBT blogs in secret some years earlier when she was still living in her community. She writes that her sense that she was 'different to other men' helped to contextualise her loss of religious faith. However, after she had left her religious community and while she was trying to move further into the secular world, she began to experience terrible depression and feelings of isolation, as she was sure that she was the only Orthodox Jewish person who had experienced gender dysmorphia:

> She was in a deep depression and unable to leave her house when she went online and found Trans Lifeline, a helpline for transgender people in crisis. She ended up chatting with a Lifeline volunteer for three hours. After that conversation, she finally decided to come out to a therapist and seek support at New York City's LGBT Community Center. A month later, Stein began her second blog, aptly titled The Second Transition, about her journey as a transgender woman.[135]

Abby's story is instructive, as it indicates the limited, but definite relevance of equality developments in law and society for minority LGBT communities within religious groups. Abby built a tentative understanding of the nature of her difference from others within her Haredi community through her engagement with resource materials about LGBT

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[130] Abby Stein is believed to be the only ordained female Orthodox rabbi in the world. She first left her Hasidic community in 2012, and transitioned fully to identifying as a woman in 2015. Stein now works as a trans activist, offering online support to other young people living within closed religious communities who might identify as trans. See: Abby Stein, "Leaving my Ultra-Orthodox Home and Finding my Trans Self: Part One", online: <http://abbychavastein.com>; Abby Stein, "The Second Transition", (2015), online: <http://thesecondtransition.blogspot.com/>.

[131] Michael M Grynbaum, "Ultra-Orthodox Jews Hold Rally on Internet at Citi Field", *N Y Times* (20 May 2012), online: <https://www.nytimes.com/2012/05/21/nyregion/ultra-orthodox-jews-hold-rally-on-internet-at-citi-field.html>.

[132]Carrie Nelson, "For this transgender Orthodox Jew, blogging was her lifeline", (8 December 2015), online: *Daily Dot* <https://www.dailydot.com/irl/transgender-orthodox-jew-abby-stein/>.

[133] I discuss Footsteps' work and membership further in chapter 6.

[134] Nelson, *supra* note 132.

[135] *Ibid*.

rights and identity that she found online, and built on that understanding with conversations with other trans people with whom she connected online and through her blog writing about her personal experiences.[136] Her connection with Footsteps and Trans Lifeline are important indicators that secular values of equality are positively identified as relevant by some LGBT-identifying members of closed religious communities, no matter how strictly these communities try to shut out secular values. As I discuss further in chapter 4, there are similar break through moments in ex-gay communities when ex-gay men leave the movement and decide to live openly as gay and Christian. Some high profile ex-gay leaders, such as John Paulk (who was a public representative for the Exodus movement for over fifteen years), have now published narratives about their movement from ex-gay evangelism into more rights-protective Christian contexts.[137]

However, the relevance of secular legal and social developments to L/G members of closed religious communities should not be overstated. As I develop in the following chapters of this thesis, for many people within closed religious communities, progressions towards equality rights in state law frameworks serve only as 'background noise' of changes that are occurring in another context and happening to other people. This is the result of the application of other, religious legal orders that dominate their lives. Some people living within the ex-gay Christian and Orthodox communities that are the focus of this thesis considered that these progressions in state law do not apply to them. Going further, many also believe that state law influences present a risk to the moral and physical separation of their community from the secular mainstream. However, when religious people do seek to make change in their lives because of sexual identity, this background noise can become louder, more insistent, and more normatively relevant.

(3) Religious privacy: does state law affect the internal life of religious communities?

As I set out above, the legal and cultural landscape of rights debate regarding LGBT equality rights and religious freedom remains very much under development, certainly in the United States. However, the demarcated legal space for rights conflict that I discuss

[136] Judy Bolton-Fasman, "Introducing Abby Stein", online: *The Forward* (20 November 2015) <http://forward.com/sisterhood/325156/introducing-abby-stein/>.
[137] Paulk, *supra* note 15.

above only covers disputes that arise in formally regulated areas (such as employment, family services and public accommodation) where both religious and LGBT claimants have competing and legitimate claims. The key element in these cases is 'conflict'. That is, in cases where there is an LGBT equality interest and a religious free exercise interest, there is almost always substantial disagreement between the parties as to the content of their legal rights, and this transforms a philosophical or moral position into a legal matter. This will be the case even in areas of life where there is a greater expectation of privacy and tolerance of religious views, such as in family law or laws that deal with reproduction, surrogacy and adoption of children. In most cases, there is still an oppositional element to legal claims that pushes them within the bounds of state determination. For example, the question of whether Alabama can fail to recognize Georgia's decision to accept adoption applications from same-sex couples requires members of the Alabama state legislature to have strong religious beliefs that oppose the notion of same-sex parenting (the religious interest), and requires a legal issue dealing with LGBT rights to arise (the equality interest). This case involved a same-sex couple who divorced contesting custody of their adopted child, after the non-biological parent of the child moving to Alabama, where they were found to have no parental relationship to the child.[138]

The legal landscape for people who live within closed religious communities is more limited, at least from the perspective of the degree of intervention of state regulation into their social and religious life. In liberal democracies like the United States and Canada, there is a constitutional expectation that illiberal religious groups have the right to live separately from the secular mainstream, so far as is possible, in accordance with law. Indeed, the expectation that religious groups in the United States can live lawfully without state interference is a long-held principle that is reflected in the judicial distinction between the freedom to hold a religious belief (virtually unlimited) and the freedom to act

[138] In relation to family and spouse benefits, Supreme Court decisions have worked to harmonize different state laws to recognise equality in terms of parenting, adoption and foster care of children. In *V.L. v E.L*, the Supreme Court, by unanimous vote, overturned the ruling of the Alabama Supreme Court that Georgia was not entitled to grant the plaintiff, V.L. (the lesbian adoptive mother of a child), adoption rights because Alabama law only recognised the parental rights of E.L (the biological mother of the child). The Supreme Court held that the Full Faith and Credit Clause of Article IV, ss1 required Alabama to "recognize and give effect to valid judgments rendered by the courts of its sister States." *VL v EL et al.*, 577 US ___ (2016), [2016] US (Sup Ct) per curiam at 3.

on or manifest that belief (limited by law and competing rights to some degree).[139] As in other liberal democratic traditions such as the UK, Canada and Australia, this approach reflects a general trend in liberalism of separating the private activities of illiberal or conservative religious groups from their public activities or engagement in the public square (particularly in areas generally unconnected to religion), and to treat these activities differently in law.[140] The 'belief/action' distinction is also a guiding principle for determining the limits of religious freedom rights in international human rights law.[141]

The belief/action principle creates a strong trend in case law that matters that deal exclusively with the interests of minority members within a religious community are the concern of that community, rather than the state. Thus, in the United States, state and federal governments defer to religious communities on issues such as the right to provide and limit education in accordance with religious faith,[142] faith-based exemptions from providing medical procedures such as sterilizations and abortions[143] and eligibility for faith-based teaching or leadership appointments in a religious institution.[144] In addition, religious organizations may still manage their own employee benefit policies to include or exclude certain domestic partnerships including same-sex marriages, and can lawfully eliminate the payment of family benefits to employees altogether.[145] Further, religious organizations and institutions that have a charitable or religious purpose are entitled to

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[139] In the United States, the belief/action distinction is seen to classify the Supreme Court's position in *Smith* on the question of when the state must demonstrate a compelling interest to interfere with a person's free exercise rights. In *Smith*, the Court departed from its broader application of the compelling interest test in *Sherbert v Verner*, where a 7-2 majority held that the state's eligibility restrictions for unemployment compensation imposed a significant burden on Sherbert's ability to freely exercise her Christian faith. Furthermore, there was no compelling state interest which justified this burden on her Free Exercise rights under the First Amendment. *Sherbert*, *supra* note 90.

[140] See, for example on this point: Eisenberg & Spinner-Halev, *supra* note 27; Jeff Spinner-Halev, *Surviving Diversity: Religion and Democratic Citizenship* (Baltimore: John Hopkins University Press, 2000); Barry, *supra* note 27; William A Galston, "Two Concepts of Liberalism" (1995) 105:3 Ethics 516.

[141] *C v United Kingdom*, [1983] Dec & Rep 142 at 147 (ECHR); *McFarlane v Relate Avon Ltd*, [2010] EWCA Civ 880; [2010] I.R.L.R. 872; 29 B.H.R.C. 249; *Pichon Sajous v France*, [2001] ECHR 898 (ECHR); *Ahmad v United Kingdom,* [1982] 4 EHRR 126 (ECHR); Jean-Francis Renucci, Director Centre d'études européennes sur les Droits de l'Homme, *Article 9 of the European Convention on Human Rights*, Human Rights Files 20 (Strasbourg: Council of Europe, 2005).

[142] *Wisconsin v Yoder*, *supra* note 90.

[143] Christian Fiala & Joyce H Arthur, "'Dishonourable disobedience'–Why refusal to treat in reproductive healthcare is not conscientious objection" (2014) 1: Supplement C Woman-Psychosom Gynaecol Obstet 12, online: <http://www.sciencedirect.com/science/article/pii/S2213560X14000034>.

[144] *Hosanna-Tabor evangelical Lutheran Church & School v EEOC*, 565 US 171 (2012).

[145] Lupu, *supra* note 28 at 30.

tax exemptions at federal and state level.[146] The Internal Revenue Service guidelines states that churches and synagogues automatically qualify for federal income tax exemption.[147] In all states with anti-discrimination laws, there are exceptions granted to religious organizations and institutions in terms of how they manage their business and their relationship with religious members.[148] Likewise, Title VII of the federal *Civil Rights Act* has a religious exemption provision that covers all employment benefits and activities of religious employers.[149]

In 2007, Martha Minow noted that the religious exemptions offered in American civil rights laws (federal and state) proceed on a tiered basis, with religious groups receiving no exemptions from laws prohibiting race discrimination, some exemptions from laws prohibiting gender discrimination and "explicit and implicit exemptions" from rules forbidding sexual orientation discrimination.[150] Minow concludes that this hierarchy of legal sanction is not only the result of limited constitutional recognition of equality rights on the basis of gender and sexual orientation (writing in 2007, Minow's comment reflects the Supreme Court's decisions on autonomy and equal protection in *Lawrence v Texas* and *Romer v Evans* but predates *Windsor* and *Obergefell*) but also the result of a recognisable conflict between secular legal expectations of equality and deep-held religious commitments that conflict with anti-discrimination law. Minow cites Robert Cover's discussion of law and normative communities to explain the rift between some religious understandings of sexuality and their relative lack of commitment to secular equality guarantees.[151] Minow notes that, while such a viewpoint can invite the 'disturbing' assumption that government law, even constitutional law, is only one normative source among many, for many religious people this is the lived reality, which

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[146] *Walz v Tax Commission of the City of New York*, 397 US 664 (1970). This reflects the status of religious organizations and institutions in other liberal democracies as well.
[147] Internal Revenue Service, *Tax Guide for Churches and Religious Organizations* (2015).
[148] Chapman, *supra* note 28.
[149] *The Civil Rights Act of 1964*, *supra* note 108.section 2000e-1, 702: "This subchapter shall not apply to an employer with respect to the employment of… a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."
[150] Martha Minow, "Should Religious Groups Be Exempt from Civil Rights Laws?" (2007) 48:4 Boston Coll Law Rev 781, online: <http://lawdigitalcommons.bc.edu/bclr/vol48/iss4/1>.
[151] Robert Cover, "The Supreme Court, 1982 Term - Foreword: Nomos and Narrative" (1983) 97:4 Harv Law Rev 62. Cited in Minow, *ibid* at 825.

explains why their protected, private legal space must be fought for and maintained, and public space should remain contested.[152] Minow writes:

> But such rival views, rooted in texts, shared histories, and collective narratives, provide vital meaning and value in people's lives. Nurtured by groups smaller than the state, and exemplified by religious communities, meaningful subcommittees generate norms embedded in texts and histories that organize many people's lives and lend them both order and significance.[153]

Where group interests and religious beliefs of the community run afoul of the state (for example, the criminal law against polygamous marriage, or the expectation that all drivers will carry photographic ID on their driver's licence), legal mechanisms for determining a balance between a state interest and the extent of harm done to the religious interest operate to govern the interaction.[154] However, where group rules and activities appear to be lawful in form and have little, if any, impact on non-group members, the general rule is that these activities are to be tolerated rather than interfered with. Thus, as set out above, we can anticipate that general rules against drug trafficking, or prohibitions against child labour are treated as rules that religious communities must follow without exception, while rules against discrimination are designed to allow discrimination on certain grounds, where that action is required by religious belief. In the case of recognising sexual and gender equality in terms of rights of women, girls and LGBT people, we can apply Minow and Cover's analysis to find the expectation that religious views on these issues can conflict lawfully with the general, secular expectation of equality and that, certainly within religious communities, these views can trump equality rights.

Of course, there are instances where the internal practices or rules of an illiberal religious community are investigated by state authorities; but, even in these cases, there will generally be a nexus between the religious activity and another external rights holder and/or an explicit breach of state law that raises the conflict above informal community

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[152] *Ibid* at 826.
[153] *Ibid* at 825.
[154] The first example is the subject of Angela Campbell's empirical study into polygamous communities in Bountiful, British Columbia. Angela Campbell, *Sister Wives, Surrogates and Sex Workers* (Surrey: Ashgate Publishing Limited). The second example is that of the Supreme Court of Canada decision of *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567. In that case, the Court held that the State's requirement that all Alberta residents carry a driver's licence with a photograph on it was a proportional and reasonable limitation on the religious freedom right of the Hutterite community, that had argued the requirement was an unreasonable limitation on their religious freedom, given their sincerely held belief that taking photographs was a sin according to scripture.

negotiation into the field of state regulation. Here, I present one example of a dispute that both indicates this separation between the public and private activities of a closed religious community, and that demonstrates how this religious community positioned certain activities as outside state law. In 2014, the current affairs radio program *This American Life* (TAL) investigated a long-running dispute between a local school board in East Ramapo, New York State and a Hasidic Jewish community which, over the last fifteen years, had become the majority population in the school board district, with every two out of three children born into an Hasidic family by 2010.[155]

The conflict arose when Hasidic families first moved into the area (around thirty years ago) and protested high property taxes. Unlike most other children in the district, Hasidic children attended single-sex Yeshiva schools, yet their Hasidic parents were still levied for taxes to cover public school budgets. Steve White, a previous school board director, said that he met with local rabbis and was warned that if the issue was not dealt with, rabbis would instruct Hasidic Jews to go to the polls in large numbers and vote down public-school budgets.[156] However, ultimately, this did not happen because rabbis and the school board worked out a deal:

> Steve White: The original deal that was made… was, if we don't investigate whether or not there's education going on in the yeshivas, then the rabbis won't tell their people to vote down our school budget.[157]

Years later, another issue arose. Federal regulations tied significant funding for specialised disability services to the requirement that children with disabilities be placed in a state-affiliated, mainstream school. For Hasidic families and communities, this presented a significant difficulty, because it would involve removing a child from a Yeshiva school and sending them to a non-religious public school. A spokesperson for the Hasidic community, Yossi Gestetner, told TAL that the failure of the school board to

[155] Ira Glass, *This American Life: A Not-So-Simple Majority* (Chicago: Chicago Public Radio, 2014).
[156] Other Orthodox Jewish commentators note this clash between secular democratic processes and minority religious interests in the United States. Deborah Feldman, for example, notes that when she lived in Ramapo in 2009, she felt that the police and local officials resented the participation of Hasidic Jews in municipal elections, because they were aware that Hasidic voters were not voting for 'secular interests'. "When elections roll around, we swarm the voting booths, checking the slots the rabbis tell us to, electing politicians who will allow us to bend zoning regulations and manipulate funds and resources for our own agendas." Feldman, *supra* note 6 at 289.
[157] Glass, *supra* note 155.

directly allocate disability funding to Yeshiva schools was an act of "hatred, of anti-Semitism". In response to a question about the applicability of the federal and state law position on disability funding, Gestetner told the interviewer that state law on this question has no relevance for his community:

> Don't throw around 'the law'. I mean, law was used to agitate against people all the time. So, if the law is broken, don't force the district to spend a million dollars to fight this damn law. Change the law and finish (sic). It's never an argument to me – like, well, it's against the law.[158]

Following the standoff about disability services, the majority of the East Ramapo school board gradually was taken over by Hasidic Jewish members, even though no Hasidic children were enrolled in district public schools. The school board then took controversial decisions to close two public high schools and sell the land to Yeshiva schools, to cancel elective programs such as art and music at local high schools and to provide disability funding directly to Yeshiva schools. In 2012 and 2014, East Ramapo was investigated by the New York Department of Education for corruption and mismanagement and was found to have breached state and federal regulations on the allotment of disability funding, and to have engaged in substantial 'financial mismanagement' of public funds.

The TAL story is told from the perspective of the non-religious minority of public school children and parents living in East Ramapo, rather than the perspective of the Hasidic community. However, the story raises issues about the legal and ethical relationships that exist between the state and closed religious communities, notably, the degree to which a religious group can/should be exempted from state regulation. Some rights-based questions to pose might be: how does this conflict between the state and the Haredi community affect the education rights of Haredi children who are educated in Yeshiva schools? Or, what rights issues are involved in terms of the treatment of children with disabilities being taught within Yeshiva schools? The TAL story does not address these questions. Rather, the point at which the conflict between the religious community and the public became an issue for determination is when the interests of public school children and their parents were involved. Or, in other words, an ethical and legal conflict

[158] *Ibid.*

was only identified when an external rights holder alleged a breach of law by a religious organization in a regulated area of life: public education and the levying of state taxation.

This expectation of limited state involvement in the business of religious organizations (particularly where that business relates to religious education) has also historically created difficulties for investigating breaches of the criminal law. For example, this has been an identified issue hampering the investigation of widespread allegations of child sexual and physical abuse by priests and school religious leaders in the Catholic Church in the United States and, more recently, in Australia.[159] Another example of this type of state regulation investigating religious practices is the attempted regulation of reparative therapy in the United States. I discuss state regulation and attempted prohibition of reparative therapy further in Chapter 4.

If we consider situations where religious groups are free to manage their internal belief structures, or where their conduct only affects religious community members, the *legal* conflicts discussed above do not occur with any frequency. There are few, if any, cases in the United States, Canada or the United Kingdom where a minority member of an illiberal religious organization has brought a civil rights or other legal complaint against their religion or religious organization, while they remain a member of that community.[160] This is partly because discrimination and human rights frameworks are designed to govern public conduct rather than regulating private interactions and partly because of the wide scope of religious exemptions from anti-discrimination laws. Non-reporting or

[159] There has been a Royal Commission into numerous allegations of child sexual abuse by Catholic priests, teachers and lay clergy ongoing in dioceses across Australia ongoing since 2009. The final report was issued in December 2017. Individual prosecutions arising from the Royal Commission are still ongoing. In 2016, the terms of reference for the Commission were extended to inquire into the internal policies and procedures of the Catholic Church authorities in Australia in relation to child protection and child-safe standards, including responding to allegations of child sexual abuse. See: Royal Commission into Institutional Responses to Child Sexual Abuse, *Terms of Reference and Final Report,* (Sydney, 2017).

[160] A response to this position might be that Jewish women have lobbied successfully for changes to Canadian and Ontario family law provisions governing civil divorce in terms of the use of the *get* by Jewish men in religious divorce proceedings as a bargaining tool for greater financial settlements. However, I would respond by saying that this is a less a form of criticism of Jewish law and more an attempt to reconcile aspects of *get* rabbinical jurisprudence with family law provisions to enable women to avail themselves of civil and religious legal protections. The benefit sought is not a disavowal or disagreement with the application of the Jewish law as it applies to the *get*. For a helpful commentary of these changes within Canadian family law, see: Pascale Fournier, "Halacha, The 'Jewish State' and The Canadian Agunah: Comparative Law at the Intersection of Religious and Secular Orders" (2012) 44:65 J Leg Plur Unoff Law 165.

underreporting of human rights challenges within groups also occurs because of the compelling nature of religious law and the legal relationships that exist with these communities, as identified by Minow, Cover and legal pluralist scholars who write on the operation of religious law as a separate normative order to state law. I discuss these contributions further in Chapter 2, in the context of making a case for a legal pluralist analysis of illiberal religious communities in relation to the regulation of sexual orientation and gender.

There is also relatively less doctrinal, *legal* commentary on rights clashes that take place within the quasi-private space of religious community life, comparatively to litigated conflicts that that take place in areas of public life.[161] This relative lack of attention on legal relationships within religious communities can partly be explained by a liberal autonomy perspective whereby people who live in closed religious communities do so having freely chosen a religious framework over a secular one,[162] and that, provided they have real opportunities to exit the community, their right to live within this community should be respected and not overly-interrogated.[163] A relative lack of discussion of minority legal issues within illiberal religious communities can also be explained by the fact that religious adherents are reluctant to publicly raise issues or disagreements they might have with their religious community. This reluctance could be due to the real fear of exclusion or punishment. It could also be due to a belief that their issue or disagreement with community norms is the outlier, and it is their responsibility to conform to group

[161] I stress the term 'legal', because of course, the design and maintenance of religious community relationships are a central issue for humanities disciplines, notably philosophy, feminist theory, sociology and anthropology. Also, this is a relative assessment, comparable to the large number of doctrinal analyses of rights conflict in public life. Of course, there is legal scholarship that focuses specifically on the normative frameworks of minority communities, their membership and on the relationship between minority communities and the secular mainstream. Many of these critiques are situated in the field of legal pluralism. See for example: Van Praagh, *supra* note 10; Campbell, Angela, *supra* note 10; Shachar, Ayelet, "Religion, state and the problem of gender: new modes of citizenship and governance in diverse societies" (2005) 50 McGill LJ 49; Kislowicz, *supra* note 10; Howard Kislowicz, "Freedom of Religion and Canada's Commitments to Multiculturalism" (2012) 31 Natl J Const Law 1; Michal Gilad, "In God's Shadow: Unveiling the Hidden World of Victims of Domestic Violence in Observant Religious Communities" (2014) 11 Rutgers J Law Public Policy 471; Lisa Fishbayn Joffe & Sylvia Neil, eds, *Gender, Religion, and Family Law: Theorizing Conflicts between Women's Rights and Cultural Traditions* (Waltham, Mass: Brandeis, 2013).

[162] However, I note Jacob Levy's critique of choice theory and exit rights in relation to the participation of LGBT minorities within certain religious communities: Levy, *supra* note 27.

[163] For commentaries on this autonomous liberalism approach, see: Kymlicka, *supra* note 27; Emily R Gill, *Becoming Free: Autonomy and Diversity in the Liberal Polity* (Lawrence: University Press of Kansas, 2001). But for a view of the limitations of 'hard exit', see: Weinstock, *supra* note 27.

norms rather than dissent. My research on evangelical Christian and Orthodox Jewish communities demonstrated that, as a first position, young people in these religious communities who identify as L/G are most likely to stay closeted longer than non-religious people.[164] They also tend to first seek information and assurance from their community about same-sex attraction and moral expectations of sexuality.[165] Research also indicated that young people who identify as religious and LGBT are statistically far more likely to experience depression, anxiety and mood disorders and to consider self-harm or suicide than young LGBT people living outside a religious community or without religious influence.[166]

Thus, we can see that private relationships between religious families and communities are more likely to be managed within the religious community rather than by state intervention from the outside. Further, state law will be reluctant to rule on the relative incompatibility of religious beliefs and doctrine where these conflict with state equality guarantees, even where this lack of regulation corresponds with negative health and safety outcomes for religious adherents. In the areas of minority rights, LGBT people within some religious communities (notably the subjects of this thesis) are presented with starkly divergent positions on the lawfulness of their sexual orientation or gender identity. To seek state protection of their sexual orientation, they would need to either demonstrate that their community has breached a state law where the state has a compelling interest to intervene in religious matters (such as the criminal laws against murder, manslaughter or assault) or they would need to exit their community and move into either a religious community with different rules about same-sex attraction or into a secular, state-monitored space. For many people in religious communities, these are simply not real

[164] Sandra L Faulkner & Michael L Hecht, "The negotiation of closetable identities: A narrative analysis of lesbian, gay, bisexual, transgendered queer Jewish identity" (2011) 28:6 J Soc Pers Relatsh 829.
[165] Naomi Mark, "Identities in Conflict: Forging an Orthodox Gay Identity" (2008) 12:3 J Gay Lesbian Ment Health 179; Haya Itzhaky & Karni Kissil, "'It's a Horrible Sin. If They Find Out, I Will Not be Able to Stay': Orthodox Jewish Gay Men's Experiences Living in Secrecy" (2015) 62:5 J Homosex 621.
[166] Jeremy J Gibbs, "Religious Conflict, Sexual Identity, and Suicidal Behaviors among LGBT Young Adults" (2015) 19:4 Arch Suicide Res Off J Int Acad Suicide Res 472. Gibbs also notes that, a strong correlation, exists between level of religiosity and negative attitudes toward homosexuality. Due to these factors, LGBT persons who mature in a religious community context report experiencing increased discrimination and internalized homophobia (negative attitudes, beliefs, feelings, and stereotypes about LGBT people that is directed inward by someone with same-sex attraction or feelings of discontent with one's biological gender. See also: Steve Chalke, Ian Sansbury & Gareth Streeter, *In the Name of Love: The Church, Exclusion and LGBT mental health issues* (Oasis Foundation, 2014).

choices, as to leave their community entails cutting ties with their deeply-held religious faith, their families and a close network of religious, professional and social ties. Such a choice also assumes that these L/G religious people (often young people) have a sophisticated understanding of state civil rights law and secular identity politics that they can rely on when determining challenges between their sexuality and their religious faith. As I develop further in chapters 4–6, the evidence provided by L/G religious people in evangelical Christian and Orthodox Jewish communities generally does not support this position.

If we accept that a doctrinal analysis of how state law applies to the internal conduct of religious communities does not take us very far, then we need to engage in another type of legal analysis to get a clearer view of what motivates and limits lesbian and gay members of closed religious communities. Specifically, we need to investigate what normative orders operate within these communities and how they impact their members. We need to investigate religious positions on what is 'natural sexuality' and determine how persuasive gay and lesbian people living within these communities find religious law on these matters. We should also analyze the negotiations and mediations that go on within religious communities about sexuality, to see whether there are relationships and arrangements being made that remake or alter religious legal positions. This analysis is the subject of Chapter 2: where I apply a legal pluralist framework to religious communities and contribute commentary to existing scholarship on the intersections between religious law, critical legal pluralism and sexual identity.

Conclusion

The purpose of this chapter has been to situate the rights conflict between equality rights and religious liberty rights in public and private legal contexts. I have presented an overview of the state legal frameworks that operate to codify and limit these rights in different areas of public life: with a focus on the United States, as this is the primary jurisdiction of the Jewish and Christian communities that are the subject of this thesis. However, I have suggested that the starting position of a strong public/private divide between religious liberty and equality rights is one recognised across other western liberal jurisdictions including Canada, the United Kingdom, and at international law. This

starting position accepts that religious freedom has greater normative force the closer one moves to religiously motivated activities, events and the organization of a religion. Its normative force lessens, and the force of equality rights increases, as we move into areas of public life that are traditionally disconnected from religion, such as the provision of general services, non-religious employment and the operation of the open market. However, there are still significant areas of conflict that arise in public life between LGBT people asserting equality and religious organizations and religious adherents asserting their right to religious freedom.

In part I of this chapter, I situated these conflicts in the current 'political moment' of the liberal West, where equality rights are seen by many as ascending and as connected to progressive, secular values of equal citizenship, but where there we can still find deep pockets of genuinely-held religious dissent. In the United States, this political moment has recently been made more complex by a strong counter-cultural, pro-religious conservative message introduced into public debates to counter LGBT gains in Supreme Court decisions and in 'Blue state' (Democrat held) legislatures. The future of these debates remains relatively uncertain, with public opinion deeply divided on religious freedom versus equality issues.

In part II of this chapter, I described the limitation of a doctrinal analysis in evaluating the private and quasi-private activities of religious organizations and groups, because the state treats these matters as religious, private as properly beyond state regulation. There are strong arguments for this tolerance approach to religious freedom, notably in terms of religious rights and autonomy claims. As Minow notes, there are also powerful arguments in favour of tolerance that secular liberals can understand in terms of respecting the rights of other minority cultures to manage their own affairs without interference, including ethnic and linguistic minorities within the liberal state.[167]

This work does not seek to engage in the philosophical debate about the value of tolerance versus strong or weak interventionalist liberalism as a means of managing illiberal religious groups. Rather, I argue that we can accept that state law has limited application to the internal operation and management of religious groups, particularly in relation to

[167] Minow, *supra* note 161 at 782.

subject matter that does not contravene or limit state law. Positions on the naturalness of heterosexuality and the lawfulness or unlawfulness of gay or lesbian sexuality clearly fall within the category of matters that the state deems religious bodies can determine for themselves. This freedom of determination has substantial impacts for gay and lesbian members of those communities when they are situated within a broader equality/freedom of religion rights debate in the larger secular world beyond their community.

L/G members of closed religious communities are therefore faced with a secular framework of equality rights that, in order to access, they must reach beyond the bounds of their own religious faith and often the rules of their community. We know that many of them do not do this and choose to stay within their community, even after they are confronted with sanctions and warnings about their sexuality. At this point, these people become largely invisible to state rights legal conflicts and other areas of state regulation. And it is for this reason that we need another, better investigation of how these people manage conflicts between their religious faith and their sexual identity: an investigation that goes beyond a multiculturalism or autonomy liberalism concept of tolerance and beyond a positivist emphasis on state law. The legal pluralist and critical legal pluralist analysis of these communities that I propose provides much-needed evidence of the internal legal structures that monitor sexuality within illiberal religious communities, and the dialogue that goes on between gay and lesbian religious people and their communities.

Chapter 2

Legal pluralism and critical legal pluralism: discovering law in closed religious communities

In this chapter, I address the following question: where and what is the law that applies to matters of sexuality and same-sex relationships in closed religious communities? I start from the conclusions reached in chapter 1: namely, that some 'private matters' such as sexual identity and sexual behaviour *generally* remain under the governance of individual religious communities, in accordance with state constitutional protections of religious freedom and principles of religious self-governance. I say 'generally', because of course there are instances where state law intervenes in religious law matters, for example, Canadian laws responding to *agunoth* (Orthodox women trapped in unwanted religious marriages). The central issues for determination are then clarified as: how to classify the normative responses of these religious communities to questions of sexuality; how best to investigate how co-existing legal orders operate on their members in relation to matters of sexuality, and how to value and interpret the responses of individual religious people to these normative positions. In this chapter, I address these questions by applying a legal pluralist and critical legal pluralist framework to the Christian and Jewish communities that are the focus of this investigation.

When I began this investigation, I started from the premise that this work would analyze the challenges that queer religious people, living in closed religious communities, faced in terms of avoiding or exiting their religious normative environment. I was sure the analytical focus would be on how people shifted their allegiance from religious self to LGBT self, and how they transitioned into living within a state law framework that gave greater space to their sexual identity. I envisioned an investigation that was about conflict between state law and religious law, where two legal orders offered starkly different choices about religion and sexuality, and where religious people moved between different legal orders and their concomitant rules and obligations. However, as I began to research ex-gay Christian communities and the experiences of lesbian Orthodox women, I realized that this position was unsustainable, as it did not reflect the lived experiences of these

people. Rather, what I began to see reflected the approaches of strong legal pluralism and critical legal pluralism scholarship, whereby 'law' is both made and negotiated from without and within the community and the self.

In chapters 4—6 of this thesis, I examine the status and application of two normative positions on sexuality that are held by different branches of Christianity and Judaism. These positions are informed by a central, foundational norm held by religious authorities in these communities: that homosexuality is against God's will and to act upon homosexual feelings is to act contrary to religious law. A serious sanction flows from the foundational norm.[168] These normative positions can be articulated in the following ways:

1. The religious group insists that sexuality is mutable (can be altered) and must be altered to comply with religious law. This position justifies the use of reparative therapy and other faith based sexual orientation change efforts by gay evangelical Christian men who identify as 'ex-gay' when they have successfully completed their 'ex-gay journey'.[169]
2. Religious law is somewhat less clear on the question of the unlawfulness of lesbian sexuality (comparative to its prohibition of male gay sexuality), but nevertheless forbids the practice of lesbian sex or lesbian relationships without exception. This position informs the identity experience of Orthodox Jewish women who identify as lesbian and who live within Orthodox communities.[170]

In the first part of this chapter, I summarise the established theoretical ground that defines the elements of a legal pluralist analysis relevant to socio-legal and critical legal scholarship. I then identify and respond to a key criticism of legal pluralism: notably, that it refuses to define 'law' as distinct from other customary or normative ordering systems that affect social life. Insisting that a non-state derived normative system is legal rather

[168] This central norm has its original biblical source in Leviticus 18:22 and 20:13. The premise that I begin from is that both religious communities consider the prohibition against homosexual sex and relationships to have a Biblical (that is, foundational) source. All authorities agree that the prohibition in Leviticus is the most concise statement of this Biblical prohibition, although additional verses in Genesis and Deuteronomy and later verses in Corinthians in the Second Testament are also relied on by evangelical Christian Churches as evidence that God mandates only heterosexual marriage and procreation. I discuss these scriptural sources in chapter 4, in the context of ex-gay Christian communities.
[169] This community is the focus of chapter 4.
[170] This community is the focus of chapters 5 and 6.

than sub-legal or a pattern of habitual practices is relevant for my study of ex-gay Christian communities, given the informal and often unwritten (non-chirographic) organization of legal norms in those communities. This discussion prefaces the in-depth discussion of this issue in chapter 4, where I apply Howard Kislowicz's discussion of key aspects of legal religious norms to Christian communities in the United States and make the argument that certain norms in these communities can be taken to be part of 'Law's Family'. This analysis concludes that, when we consider the impact of these norms as law, we can build a meaningful explanation of how and why ex-gay Christian men view their gay sexuality as transgressive and why they remain committed to sexual orientation change.

The second part of this chapter introduces a critical legal pluralist conception of legal orders and makes the case for its inclusion in this work. I analyse the relationship between *critical* legal pluralism and legal pluralism (essentially, one of theoretical evolution from community-based legal orders to the negotiation of an individual agent with legal orders) and explain why this approach is necessary to define and explain some of the interactions that occur in Orthodox Judaism between lesbian women and legal authorities. I suggest that a critical legal pluralist lens also elucidates certain aspects of the complex relationship that these women have with rabbinical law and its enforcement by rabbis.

In this last part of this chapter, I conclude by recognising some of the opportunities of taking this theoretical approach in terms of achieving a more critical understanding of the normative demands upon, and choices made by, queer members of these two religious communities. I argue that viewing these contests through the lens of a plurality of legal orders builds a richer, more comprehensive image of religious and sexual identity, and I argue that we should see the imposition of 'Law' as a normative force that explains (at least in part) the struggle that these people engage in for recognition, safety and fulfillment. I also outline how a legal pluralist and critical legal pluralist theoretical viewpoint complements the feminist method that I have applied in this investigation, with emphasis on how these two approaches clarify difficult issues of personal choice, dominant legal narratives and overlaps between legal orders that characterise ex-gay evangelical Christian and Orthodox lesbian communities.

(1) Legal pluralism: an evolving definition of law in a choice-rich world

Legal pluralism relies on a foundational proposition of 'pluralism' that we live in a choice-rich society, made up of "competing, overlapping, constantly fluid groups… with entirely heterogenous principles of membership and social functions."[171] John Griffiths, in his seminal 1986 article that makes the case for legal pluralism as reality, defines legal pluralism as "the presence in a social field of more than one legal order."[172] In making this definition, Griffiths separates his analysis of law from previous theories of pluralism espoused by M.B. Hooker, Leopold Pospisil, John Gilissen and Jacques Vanderlinden.[173] This severance was based largely on Griffith's assumption that all of these theories relied upon a conception of law that assumed the formative requirements of state-made law (uniformity, universality and recognition),[174] that assumed a hierarchy of legal orders that elevated state-made law, and, on that basis, disregarded the operation of legal orders that were community-specific in application and design.[175]

Griffiths argues strongly for a definition of legal pluralism that deals more with the norm-creating nature of law, rather than its form. On this basis, he is supportive of the 'living law' model proposed by Eugen Ehrlich.[176] Ehrlich argues that social associations and the

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[171] John Griffiths, "What is Legal Pluralism?" (1986) 24 J Leg Plur 1. Here, Griffiths paraphrases Ehrlich's concept of 'living law'. Macdonald begins his discussion of legal pluralism from this starting position, and returns to it in his later analysis of critical legal pluralism.

[172] *Ibid*.

[173] MB Hooker, *Legal Pluralism - An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Oxford University Press, 1975); Leopold Pospisil, *Anthopology of Law: A Comparative Theory* (New York: Harper & Row, 1971); Leopold Popisil, "The structure of society and its multiple legal systems" in *Cross-Examinations: Essays in Memory of Max Gluckman* (Leiden: E.J. Brill, 1978); Jacques Vanderlinden, "Le pluralism juridique: essai de synthese" in *Le Pluralisme Juridique* (Brussels: Universite de Bruxelles, 1971) 19; John Gilissen, "Introduction a l'etude comparee du pluralisme juridique" in *Plur Jurid* (Brussels: Universite de Bruxelles, 1971) 7.

[174] Griffiths critiques these theorists on separate bases and with degree of precision that I have failed to capture. This generalization of his critique of these theories is mine, not his. However, in each case, Griffiths does draw together his critique under the general themes that I have identified. For example, there is a tendency to perceive of law as the property of society as a whole (Pospisil) and to confuse genuine pluralism with different representations of centralism, thereby to favour state-made law as a site of legal pluralism (Gilissen) or to assume a hierarchy of systems of legal obligation which places the rule of a national system above informal legal orders, because in the case of a clash of obligations, that rule will prevail (Hooker).

[175] Griffiths, *supra* note 3 at 14, 15. Griffiths cogently argues that a preoccupation with the form of legal systems and the requirements of uniformity and recognition, particularly shut out rules that are community-specific in form and substance, as is the case in religious law. "If a church requires or forbids X of its members, while state law is indifferent to Z (as no rule at all concerning it), Vanderlinden would apparently not regard this as a situation of legal pluralism." at 14.

[176] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, translated by W. Moll (Cambridge: Mass.: Harvard University Press, 1936).

ordering of those associations include a system of rules ('rules of conduct') that apply separately to 'rules of decision' which are the concern of state courts. These systems include moral rules, religious norms, rules of honor, of etiquette and of fashion.[177] The normative element of these rules is found in how they regulate lives, rather than their form. Griffiths approves of Ehrlich's recognition of the chaotic nature of social associations that govern human interaction. He also approves of Ehrlich's insistence that we should not confuse the laws of decision with the rules of conduct and that a descriptive conception of law must deal with rules of conduct as its central concern, as these rules actually guide human social behaviour rather than laws of decision, which merely regulate law-breaking at a state level.[178] Ehrlich's theory here elides with Griffiths' antipathy to legal centralism and his rejection of state law as the necessarily superior legal system. However, Griffiths criticizes the theory for lacking an independent criterion of 'the legal' and for the lack of a concrete definition of 'social associations'.[179] Griffiths also pre-empts Macdonald's interest in individual negotiations with legal orders by questioning why Ehrlich's classification of internal social ordering did not include the machinations and movements of individuals within these groupings, when his theory leaves vital space for such "individual legal behaviour".[180]

Ultimately, Griffiths agrees with Sally Falk Moore's descriptive model of normative ordering, which (he asserts) relies less on a substantive definition of 'law' itself and more on the question of what exactly should be observed to discover law (law's locus). [181] Moore proposes a model that examines the small parts of complex societies, and focuses on multiple 'semi-autonomous small fields' that generate their own rules and customs internally, but are also vulnerable to rules and decisions that emanate from the world

[177] Griffiths, *supra* note 171 at 23.
[178] *Ibid* at 26.
[179] Griffiths correctly notes that Ehrlich's conception of law was designed to address specific weaknesses in the German legal system, notably the failure of courts to take relevant 'laws of conduct' into account when determining cases. For this reason, much of the detail of his theory is adapted to specific ends, which weaken its more general application.
[180] *Ibid* at 29.
[181] Sally Falk Moore, "Law and social change: the semi-autonomous social field as an appropriate subject of study" in *Law as Process: an Anthropological Approach* (London: Routledge & K. Paul, 1978) 54; Griffiths, *supra* note 171 at 29.

beyond them.[182] Moore defines a social field that contains law not by its corporate structure or its membership, but rather by its ability to generate rules and induce compliance to them.[183] Semi-autonomous fields can also encompass several independent associations that interact through 'complex chains' of obligation and reciprocity. Griffiths approves of Moore's descriptive definition on several bases; most importantly being the absence of a necessary 'parent state' in her conception of law. Semi-autonomous fields can involve a hierarchy of relationships, but do not depend on one external source of law for validity. Thus, Griffith places much value on Moore's rejection of instrumentalism as a valid legal concept, as her semi-autonomous fields operate as legal orders within the social 'normative vacuum' –the space between the state legislator and the legal subject – that legal centralism characterizes as non-legal and non-compelling.[184]

Roderick Macdonald, writing ten years after Griffiths, approves of his general definition of legal pluralism and his rejection of the assumption that legal centralism and legal monism are 'traditional' theories of law that accurately define the field of legal theory. Macdonald also agrees with Griffiths that legal pluralism should not be considered new,[185] noting that legal centralism only became the predominant model in the nineteenth century, following the introduction of the Napoleonic Code across Western Europe and the introduction of the *Judicature Acts* in the United Kingdom.[186] Macdonald then suggests a relatively broad definition of legal pluralism as a radically heterogenous concept that recognizes the plurality of citizens, associations and legal orders as well: each

[182] Moore, *supra* note 181 at 55–56. Griffiths' cites two of Moore's investigations in which she applied her descriptive theory of law; being the traditional Chagga of Tanzania and the garment industry in New York in the 1970s. In both instances, Moore's purpose was to show that external legislation on these spaces did not achieve its intended effects, precisely because of the semi-autonomy of the social field in which it had to operate. Griffiths, *supra* note 171 at 30.
[183] Moore, *supra* note 181 at 57–58.
[184] Griffiths notes the positivist theory of instrumentalism that the legislator's command is received by the subject of a rule, uninfluenced by the social medium through which it passes. This 'social space' is also known as the 'normative vacuum'. Griffiths, *supra* note 171 at 34.
[185] Macdonald references investigations of customary legal systems and social conceptions of law that go back to medieval England and Nordic law. See: Macdonald, "Metaphors, 1998" *supra* note 9 at 74–75 This insistence on the reality of legal pluralism throughout human history are echoed by Tamanaha in his later critiques of legal pluralist scholarship, including Macdonald. See: Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2007) 29 Syd Law Rev, online: <https://papers.ssrn.com/abstract=1010105> (Tamanaha, "Understanding Legal Pluralism, 2007").
[186] Macdonald, "Metaphors, 1998", *supra* note 9 at 75.

operative in different ways in the same social space and operating independently of each other.[187]

Macdonald's thesis of legal pluralism as the descriptive definition of law relies on the central philosophy of postmodern theory that society is indeterminate and disordered (echoing Griffith's description of the chaotic nature of social life). Within this chaotic present, it is unrealistic to assume a monist conception of state law that can adequately answer questions of human obligation and conformity. Rather, because people have competing sites of interaction that are also sites of legal regulation, "the root conceptions of normative interaction within and among them must also themselves be plural."[188] Macdonald then makes a strong ideological claim about the value of legal pluralism as a theory of law: we should adopt a pluralist viewpoint to undercut the implicit hierarchies of normative orders and to "valorize otherwise suppressed, normative orders and normative discourses."[189]

Macdonald acknowledges historical criticism aimed at legal pluralism for undermining the 'rule of law' and, to some extent, social expectations of that rule. In response, Macdonald argues that such an understanding of legal pluralism misconceives the intellectual point of the exercise. Rather than undermining the validity of state law as a legal order, legal pluralism merely invites us to ask three central questions of any proposed legal order to determine how it operates and whether it is a legal order:

1. How is the exercise of power legitimated and what are the institutional forms and criteria of legitimation?
2. What are the principles of social ordering and what are the diverse criteria of procedural due process?
3. What are the criteria of substantive justice appropriate to these multiple institutional forms and processes of social ordering?[190]

[187] *Ibid* at 76.
[188] *Ibid* at 78.
[189] *Ibid*.
[190] *Ibid*.

(2) Strong legal pluralism: informal and community legal orders

Griffiths' definition of legal pluralism, adapting Moore's locus of law in a pluralist conception of our social world, became the touchstone for legal pluralist scholars writing in the 1980s and into the 1990s. Much of the focus of this scholarship was on the interaction between two legal orders (where one was state law and one external to the state) operating on the same subject or in the same field, rather than a focus on the independent, discrete operation of smaller, non-state legal orders. Sally Engle Merry, for example, defines legal pluralism as "a situation in which two or more legal systems coexist in the same social field."[191] She agrees with Griffiths that legal pluralism is properly concerned with moving further from the false ideology of legal centralism, and suggests critical attention to other forms of ordering and their interaction with state law.[192]

Merry further contextualises Griffiths' history of legal pluralist scholarship from the 1960s – 1980s and discusses the two categories of 'classical' and 'new' legal pluralism. She explains that legal pluralism began in the study of colonial societies with a focus on how an imperialist nation imposed a codified legal system on societies with different existing legal systems, but then began to explore further examples of legal pluralism within industrial countries such as countries in Europe and the United States. Other theorists— notably Macdonald, Masaji Chiba and Brian Tamanaha— identify these two categories as 'weak' (classical) and 'strong' (new) legal pluralism.[193] Classical, or weak legal pluralism (which includes the investigation of colonial and post-colonial societies and customary, non-western legal systems) is of far less relevance to this work than is 'new' legal pluralism, which is focused more on semi-autonomous fields that operate within modern nation states or, as Tamanaha summarises the position: "strong legal pluralism is aimed at home." Given that the Christian communities and most Orthodox Jewish communities that are the focus of this work are located within a modern nation state framework (the

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[191] Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law Soc Rev 869, online: <http://www.jstor.org/stable/3053638>.
[192] *Ibid*.
[193] Merry, *ibid*, 872 – 874. Macdonald, *supra* note 29 ("Custom Made, 2011"); Brian Z Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism" (1993) 20:2 J Law Soc 192 ("Folly of the Social Scientific, 1993"); Brian Z Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27:2 J Law Soc 296 ("Non-Essentialist Version, 2000"); Masaji Chiba, "Other phases of legal pluralism in the contemporary world" (1998) 11:3 Ratio Juris 228.

United States), I have chosen not to investigate the development of classical legal pluralism further in this analysis. However, it is important to note the historical relevance of classical legal pluralism to the evolution of strong legal pluralist scholarship.[194] Merry defines the interests of strong legal pluralist scholars as being to "document other forms of social regulation that draw on the symbols of the law, to a greater or lesser extent, but that operate in its shadows, its parking lots, and even down the street in mediation offices."[195] Merry, like Griffiths, approves of Moore's conception of the semi-autonomous legal field as a locus for non-state legal orders, because this conception draws no definitive conclusions about the nature and direction of influence within certain fields. This allows room for resistance and autonomy within them.[196]

Tamanaha defines strong legal pluralism as the presence, in a semi-autonomous social field, of more than one legal order.[197] Tamanaha makes clear that this definition of 'strong' legal pluralism applies more comfortably to the identification of informal and community legal orders that operate within western states, rather than plurality within a state law framework itself.[198] Macdonald is more descriptive in his analysis; setting out three general claims that are common across the work of strong legal pluralists. I summarise these three claims as follows:

1. All human societies and cultures are plural;
2. Within any particular category of human activity, we confront norms that conflict and cannot be resolved; and

[194] Merry is correct to identify three ways in which classical legal pluralism contributes to the development of new legal pluralism scholarship. These are: (1) analysis of the interaction between normative orders that are fundamentally different in terms of underlying structure. (2) Attention to the elaboration of customary law as historically derived. (3) Delineation of the dialectic between normative orders. The last point is particularly relevant to the development of new legal pluralism because, in modern states, non-state forms of normative ordering can be more difficult to see than in classical colonial societies. Merry, *supra* note 191 at 873.
[195] *Ibid*.
[196] *Ibid*.
[197] Tamanaha, "Understanding Legal Pluralism, 2007" *supra* note 185 at 202.
[198] Tamanaha is sharply critical of attempts of strong legal pluralists to define a legal subject of inquiry in much of legal pluralist scholarship that focuses on informal legal orders. However, he approves of Griffith and Merry's identification of rule-based orders that operate within the state 'normative vacuum' and approves of Moore's definition of the semi-autonomous field, to the point that this can identify a locus in which legal orders can operate. His disagreement with Griffiths' thesis arises in relation to Griffith's claim that some of these orders are 'legal' without having recourse to a final, concrete definition of law. Tamanaha claims that this definition should be sourced from within the definition of state legal orders rather than independently of them. See: Tamanaha, "Folly of the Social Scientific, 1993" *supra* note 193 at 201–202.

3. This failure to resolve conflicting norms is caused by independently foundational claims that we make based on our commitment to different basic faiths. We (as legal agents) are therefore confronted with 'tragic choices', as the fact of choosing one course of action requires us to violate another set of deep beliefs that we continue to hold, despite our contrary action.[199]

Viewed from the perspective of legal agents, we see that Macdonald's three claims for strong legal pluralism echo Robert Cover's narrative of how different minority groups hold allegiances to an independent, foundational belief or *nomos* that governs their legal actions within the modern state. Cover gives the example of Mennonite and Amish communities within the United States creating a distinct legal narrative of 'insular autonomy' that separates them from secular understandings of constitutional authority. Here, Macdonald's 'tragic choice' of legal agents can be redrawn as 'no choice at all': the religious narrative creates a constitutional understanding of obligation that eclipses a secular, monist concept of legal authority.

> Typically… communities with a total-life vision, a nomos entirely of their own, find their own charters for the norm generating aspects of their collective lives. The state's explicit or implicit acknowledgment of a limited sphere of autonomy is understood from within the association to be the state's accommodation to the extant reality of nomian separation.[200]

Tamanaha's critique of strong legal pluralist scholarship is partly based on his understanding that much of its research work is done in the field of legal anthropology and socio-legal studies: fields that require scientific methodological and theoretical rigour. By comparison, he notes that this rigour is lacking in the postmodern theoretical approach to law taken by strong legal pluralists. While Macdonald agrees with Tamanaha that the dominant mode of strong legal pluralist scholarship has been social-scientific, he disagrees that this classification implies certain methodological requirements to demonstrate the true "nature of things legal".[201] Rather, Macdonald views the mission of the strong legal pluralist scholar as being to criticize and investigate the operation and interactions of different legal orders, without suggesting a totalizing solution or defending a holistic conception of 'Law' that can be applied in each case. I agree with Macdonald's

[199] Macdonald, "Custom Made, 2011" *supra* note 29 at 303.
[200] Cover, *supra* note 151 at 32.
[201] Macdonald, "Custom Made, 2011" *supra* note 29 at 309.

proposal about the goals of strong legal pluralist scholarship. Loosening the methodological reins a little, while still making critical inquiries about legal agents, actions and orders, enables legal scholars to ask deep questions about how and why legal agents act in certain ways in different cultural contexts, without the imposition of a social scientific method of observable data, comparative analysis (often with the frameworks of state legal orders) and rigid definitional terms. For this investigation, focusing on the motivations of religious L/G people in terms of how they respond to rules about sexuality, and relying on personal narratives to explain their different social contexts, enables me to gain a more complete picture of their religious and sexual identities and the conflicts they experience in trying to reconcile/manage these identities.

(3) Reframing law as sign, symbol and map

Merry draws on postmodern critical theory, notably Foucault's *Discipline and Punish*,[202] to argue that 'Law' is not just a system of rules but, rather, a system of thought and obligation that internalises certain relationships and power structures as natural and compelling: these modes of thought are then inscribed in institutions that exercise coercion and suggest compliance.[203] As I discuss further below, this postmodern context of legal pluralism complements a feminist method approach to analyzing the effects of law upon minority groups and individuals. Just as legal pluralism requires us to think critically about law's language, its employment of signs, and the relevance of power structures and internalised violence to legal orders, so too does feminist method and theory. Of course, as I discuss in chapter 3 of this work, much of contemporary legal feminist theory also draws on postmodern and poststructuralist positions to situate its interests in the power dynamics of the patriarchy: this explains its 'bottom up' method of interrogating gender inequality in law.

If we consider law from this postmodern viewpoint, Merry suggests that we should also envisage the study of law as a hermeneutics project, where words are keys to

[202] Michael Foucault, Alan Sheridan (trans), *Discipline and Punish: The Birth of the Prison*, second Vintage Books ed (New York: Vintage Books, 1991).
[203] Merry, *supra* note 191 at 890. I have summarized Merry's position as drawing solely on Foucault's critique of state-designed apparatuses of discipline. However, as I have noted, she also draws on structuralist and post-structuralist theories of hermeneutics as relevant to a postmodern conception of legal pluralism.

understanding the social institutions and cultural formulations that surround them and give them meaning.[204] This concept builds on the understanding of different and plural legal orders that intersect with one another, thereby imposing different obligations on subjects, dependent on their social location. Here, Merry approves the conclusions of Bonaventure de Sousa Santos, who argues that legal pluralism is one of the key elements of a postmodern view of law.[205] Santos uses the structure of a map to suggest that Law is a system of signs, asserting that there are two ideal-typical sign systems which law uses to symbolize our reality. These systems are:

1. The Homeric style: where everyday reality is described in abstract and formal terms through conventional "cognitive and referential signs";[206] and
2. The Biblical style: which presupposes an image-based legality, where interactions are inscribed in multilayered contexts and described "in figurative and informal terms through iconic, emotive and expressive signs."[207]

Santos argues that these two 'styles' of writing law are perpetually in tension and challenge one another for dominance in each social space. Santos classifies the modern state legal order as predominately Homeric in form, but with Biblical elements that shine through. For example, codes of ethics and rules governing transnational contracts draw on "emotive and expressive signs" of Biblical law in expressions like common interest, trustworthiness, good faith and cooperation, even while they employ the Homeric style in their formal terms of art.[208] Santos therefore argues for 'interlegality', a concept of different (or plural) legal spaces "superimposed, interpenetrated and mixed" in our minds and our actions. This mixing of our different linguistic understandings of law is framed by Foucault's concept of power structures and disciplinary technologies. If we adapt

[204] *Ibid*.
[205] Boaventura de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14:3 J Law Soc 279.
[206] Examples of Homeric style legal signs include the law of contracts, formal legal disputes, the wording of general legislation. Santos explains this style of law as translating the everyday experience into a 'succession of disparate solemn moments', whereby the individual and specific is streamlined into a general experience of law. *Ibid* at 295.
[207] *Ibid* at 295–296. Santos explains this style of law as representing the 'sublime and tragic' elements in our everyday experience of law, a patterning where a descriptive attention is paid to different deep meanings, morality and the need for interpretation, the historical context and a 'preoccupation with the problematic'.
[208] *Ibid*.

Foucault's presentation of the disciplinary state institutions to other sites of legal obligation, then we see that power is not simply based on prohibition of an action, but also "on the positive formation of norms and the shaping of individuals to fit these norms."[209]

(4) Determining 'what is Law' with certainty?

A key critique of legal pluralism has been how one should define 'law' as distinct from other social orderings, if it can indeed be found anywhere and everywhere.[210] I discuss this critique of legal pluralism in some depth here, because I anticipate this to be one of the substantive criticisms that can be directed to my analysis of ex-gay Christian communities as having a definable religious legal order that compels its members to act in certain ways and to hold certain normative positions. My case is that it is not merely individual faith and tenets of belief that compel ex-gay communities and members of those communities to make negative claims about homosexuality, gay marriage and sexual identity. Rather, these beliefs form part of a *nomos* that translates into strict rules that men and women must follow to be part of their social and religious world. To make this case, much rides on the identification and classification of certain positions as legal, in addition to being normative and/or customary in nature.

The concern about 'what is law' is a definitional anxiety that is connected to the primary justification of the reality of legal pluralism: that we live in a chaotic, disordered social world, where the opportunities for normative orders abound, and where these orders often do not resemble the monist, centralist, positivist and chirographic descriptors of state law.[211] Tamanaha correctly notes that this anxiety of definition of legal orders has been a recurring, difficult issue for those strong legal pluralists who insist on identifying legal orders that require no state connection, are informal, or work in tandem with community norms and expectations that can obscure the line between law and non-law.

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[209] Merry, *supra* note 191 at 886.
[210] Tamanaha, "Understanding Legal Pluralism, 2007" *supra* note 185 at 27.
[211] Here, I use Macdonald's descriptors of legal positivism/centralism that, he argues, only accurately describe a 'statist form of legal enterprise'; thereby failing to reflect the legal nature of informal, community legal orders that can be plural in number and in form. Macdonald, "Custom Made, 2011" *supra* note 29 at 308–309.

There are two responses to the question 'what is law?' that guide contemporary legal pluralist scholarship. The first is a disavowal of a norm-based definition of law (the position held, although in weakening degrees, by Tamanaha) and the second is the critical, 'legal agent' definition of law that supports the claim that we can identify law by virtue of how its subjects act (a position developed by Macdonald, which evolves into a critical legal pluralist position).[212] I argue that we can apply elements of both responses in order to identify informal legal orders and how they work, without needing to provide a holistic descriptive definition of one ideal-typical legal order. This conclusion rests on Macdonald's critique of the preoccupation with rule-based legal orders preferred by legal positivists and realists.

Tamanaha places historical attempts to define 'law'—as distinct from other forms of normative ordering systems—in two categories. The first category, originally proposed by the anthropologist Bronislaw Malinowski, is that law is found in social relations, rather than in ordering systems.[213] However, this classification is so broad as to render law indistinguishable from any other social relationship, which forms the basis of Tamanaha's critique of this position. The second category is the centralist conception of law as a constitutional order made up of primary and secondary rules of conduct which determine the validity of primary rules.[214] However, as legal anthropologists have cogently argued, this definition fails when applied to legal orders in societies which lack institutionalised norm enforcement and where sources of law are localized, moveable and flexible. If we

[212] This position is also, in effect, one that Tamanaha reaches in his 2007 paper on global and local legal pluralism. Tamanaha does not refer to Macdonald's writings in his targeted history of strong legal pluralism. Macdonald, by comparison, discusses Tamanaha's earlier critiques of strong legal pluralism at some length in his 2011 article on the development of a critical legal pluralist definition of law. See: Tamanaha, "Understanding Legal Pluralism, 2007"*supra* note 185 ; Macdonald, "Custom Made, 2011" *supra* note 29.

[213] Tamanaha, "Understanding Legal Pluralism, 2007" *supra* note 185 at 28; citing: Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Routledge, 1926). Tamanaha credits Malinowski as a pioneering theorist who is a primary source for strong legal pluralism. Others, such as Merry, place him more comfortably within the weak legal pluralist tradition, given his focus on customary legal systems and legal anthropology.

[214] HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). Tamanaha also references Weber and Hoebel as contributing to this approach. Tamanaha notes that Hoebel defines a social norm as legal only if: "its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting." Likewise, he notes that Weber requires a special enforcement group or class of persons for legal norms. See: Tamanaha, "Folly of Social Scientific, 1993" *supra* note 193 at 200.

discard the second definition of law as failing to take account of any degree of (legal) pluralism in social life, then how do we deal with the breadth and vagueness of the first?

Merry pre-empts Tamanaha's concern about the 'postmodern chaos' risk of legal pluralism by warning that there is a danger in setting lax or low limitations on such a broad definition of 'non-state law':

> Where do we stop speaking of law and find ourselves simply describing social life? Is it useful to call all these forms of ordering law? In writing about legal pluralism, I find that once legal centralism has been vanquished, calling all forms of ordering that are not state law by the term law confounds the analysis.[215]

Likewise, Woodman, in his historiography of strong legal pluralism, weighs the basic elements of Griffiths' and Marc Galanter's definitions of legal pluralism and concludes that legal pluralists have so far been unable to identify a clear, consistent line that separates legal from non-legal normative orders.[216] The conclusion then, must be "that law covers a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control."[217]

Tamanaha focuses his essential critique on Griffiths' definition of legal pluralism as requiring acceptance of both state legal norms and other forms of normative ordering within social fields as law, with Griffiths' overarching goal being the conceptualisation of a social-scientific definition of law. He notes that, in later writings, Griffiths questioned his original conception of legal pluralism and became convinced that, what he had previously identified as 'legal pluralism', should more accurately describe 'normative pluralism', as it is impossible to define a final social-science conception of law.[218] Tamanaha notes that Moore refused to apply the term 'law' to her own concept of the

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[215] Merry, *supra* note 191 at 878.

[216] Griffiths, *supra* note 171; Marc Galanter, "Justice in many rooms: courts, private ordering and indigenous law" (1981) 19 J Leg Plur 1.

[217] Gordon Woodman, "Ideological Combat and Social Observation: Recent Debate about Legal Pluralism: The Journal of Legal Pluralism and Unofficial Law: Vol 30, No 42" (1998) 30:42 J Leg Plur Unoff Law, online:<http://www-tandfonline-com.proxy3.library.mcgill.ca/doi/abs/10.1080/07329113.1998.10756513>.

[218] John Griffiths, "The Idea of Sociology of Law and its Relation to Law and to Sociology" (2005) 8 Curr Leg Issues 49. See also: Tamanaha, "Understanding Legal Pluralism, 2007" *supra* note 185 at 34. Griffiths cites two of Tamanaha's earlier articles as helping him come to the conclusion that it is impossible to wholly conceptualize law for social scientific purposes: Brian Z Tamanaha, "An Analytical Map of Social Scientific Approaches to the Concept of Law" (1995) 15:4 Oxf J Leg Stud 501 (An Analytical Map); Tamanaha, "Folly of Social Scientific, 1993" *supra* note 193.

semi-autonomous social field, and later critiqued Griffiths' means of defining law as encompassing the 'whole aggregate of governmental and non-governmental norms of social control, without any distinction drawn as to their source.' [219] Moore then qualified the norms that she identified in non-governmental fields as being 'non-legal' obligatory norms, arguing that it was still important to draw a distinction between legal and non-legal orders when classifying social behaviour.[220] Tamanaha writes that, in light of these revisionist positions, legal pluralism stood in a strange position at the beginning of the twenty-first century, without consensus as to the definition of its base element: law.

Ultimately, Tamanaha resolves the issue in a similar way to Macdonald (although he seeks different theoretical goals). Tamanaha's position in 2007 is that one can still do meaningful research in the field of legal pluralism, which means that one may present strong arguments about situations where 'social actors identify more than one source of law within a social arena'.[221] This is because we can apply Griffiths' starting definition of 'pluralism' to reach the position that "[l]aw is a folk concept, that is, law is what people within social groups have come to see and label as law."[222] This position accepts that there is no universal definition of law that we must apply every case to determine the validity of legal norms. However, this position requires that legal pluralists not make totalizing claims about the success of their theory writ large. Tamanaha suggests that theorists rename legal systems as 'normative systems' to avoid definitional strife and be prepared to make specific arguments about how non-governmental legal orders operate upon specific groups or fields. This flexible definition of law is relevant to this project, given its interest in the normative demands placed on religious people from within their religious tradition, and the claim that these demands are more persuasive than those of the surrounding state law framework.

This simple, conceptual model of legal pluralism, based on the interactions of legal agents and their identification of legal orders that operate within certain social fields, dovetails

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[219] Sally Falk Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949 - 1999" in *Law and Anthropology: a Reader* (Oxford: Blackwell, 2005). Quoted in: Tamanaha, "Understanding Legal Pluralism, 2007" *supra* note 185 at 34.
[220] Moore, *supra* note 219.
[221] Tamanaha, "Understanding Legal Pluralism 2007" *supra* note 185 at 36.
[222] *Ibid* at 35.

with the model of legal pluralism proposed by Macdonald as critical rather than social-scientific. It is also largely consistent with Macdonald's three claims about strong legal pluralism summarised above.[223] In comparison to Tamanaha's anxiety about the definition of law in plural fields, Macdonald, in his paper on non-chirographic legal orders, warns against 'legal evangelicalism' or the trend to literalism, in viewing the words of state legal texts as incontrovertible sources of law that suppress or disavow other forms of law, particularly where those forms are unwritten and acceded to by custom or group tradition. Macdonald remains relatively sanguine, almost unmoved, by the criticism that legal pluralism is not an analytical model of law, urging that the question of definition should not be an obstacle to meaningful research of legal orders:

> This is not an invitation to chaos. Legal pluralism, like all conceptions of law, presupposes that certain questions will be addressed. At some point there is a difference between law and economics and between law and basket weaving. But a critical legal pluralism is relatively catholic about the ideological foundations of normative systems, acknowledges the contingency of notions such as 'efficacy', and accepts that its descriptions will always be works of the imagination, no matter how much they are informed by empirical investigation.[224]

Tamanaha and Macdonald's final positions on legal pluralism effectively switch gears on legal pluralist scholarship by urging scholars to depart from empirical rigour and qualitative models of determining 'what is law' and looking critically at certain social fields to find what people within these treat 'as law'. If we look at the actions of legal agents, their motivations, their fears of reprisal, their sense of belonging, their customs and rules (both written and unwritten), we develop an understanding of the distinct legal orders that operate tangentially upon them, or might only operate when they move between different fields. These types of investigations invite a researcher to actively apply legal pluralism to determine not just where non-state legal orders exist, but also how community and social legal orders help to define and direct the legal subjects who live within them. I apply this type of a legal pluralist lens to interrogate how ex-gay Christian

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[223] I say 'largely' consistent, because Macdonald's third claim about the 'tragic actions' taken by legal agents suggests a degree of agency in how legal agents make and refuse legal actions, which Tamanaha's critique does not explicitly embrace. Macdonald's three claims about legal pluralism were situated in a broader discussion about the need to understand individual agency within legal orders, which was Macdonald's concern in creating the model of 'a critical legal pluralism'. I maintain though, that the significance of agency in identifying which legal system is operative on a person within a particular field is a commonality shared by both theorists.

[224] Macdonald, "Custom Made, 2011" *supra* note 29 at 326.

communities and Orthodox Jewish communities relate to their L/G members and to discover meaningful ways in which L/G members of these communities define themselves through the lens of religious law.

(5) Religious legal pluralism: starting positions

In this section, I discuss two models of working with religious legal pluralism that has been instructive in designing the investigation into law that is operative upon ex-gay Christian and Orthodox Jewish L/G people. I begin by acknowledging that not every normative order will be 'legal' in the sense that its application, impact and conflict with other legal orders, can be meaningfully investigated as a subject for legal pluralist analysis. It can be difficult to identify the location of a legal order in religious communities, where there are multiple layers of norms that overlie multiple aspects of every day life. Some of these norms are cultural and traditional, some are deeply personal interpretations of doctrines of faith, and some are 'legal' in nature, in terms of being norms that compel action. Therefore, in borderline cases, it is helpful to refer to certain principles, or 'aspects' of religious regulation that tell us when a religious action or rule is 'part of Law's family'.

First, Tamanaha makes certain claims about religious legal orders that are helpful in determining the place of law in a religious community. Tamanaha specifies 'religious/cultural normative systems' as one of six systems of normative ordering in social arenas that go beyond the ambit of state law.[225] Tamanaha asserts that these six systems commonly make the following claims, which in turn identify them as 'normative orders' that affect social spheres:

1. They possess binding authority;
2. They are legitimate;
3. They have normative supremacy; and
4. They have control over matters within their scope.[226]

[225] Tamanaha, "Understanding Legal Pluralism, 2007" *supra* note 185 at 36–37.
[226] *Ibid*.

Tamanaha describes religious normative orders as viewed as special and distinct by their members. The application of state law to these orders is often contested by their members and by religious leaders. Religious communities are governed by certain rules of conduct that have a religious character, and are often set out in written texts, commentaries and edicts, as well as in informal mechanisms that exist with norm-enforcing functions.[227] Tamanaha acknowledges that, although religious normative ordering systems are usually different in form from state legal systems, they often contain a subset of norms that have specifically legal characters in two ways: (a) recognition by an official legal system; and (b) recognition as legal on their own terms.[228] In terms of the second form of recognition, religious communities often have a body of what members consider 'customary law', that applies to the group entirely apart from norms that are recognized by the official legal order of the state. I take this to mean that Tamanaha accepts that certain 'religious law' norms (even if he would not describe them as 'legal' in the strict positivist sense) are viewed as legally compelling from within, even where there is no equivalent or subject-specific rule that operates from without (that is, sourced in state law).

To give an example of such a rule that applies to the communities in this thesis: there is a foundational norm within some Christian and Jewish communities that forbids any homosexual interactions or relationships between men or women. This norm was also an operative part of State criminal laws throughout the 20th century in many western states. Yet, for at least twenty years, this prohibition has no longer existed in state law. In fact, contrary norms have developed at a state level that extend rights to LGBT people. Nevertheless, the religious law norm that operates in relation to homosexuality within certain religious communities is still viewed as legal and operative by members of those communities, despite different positions being taken by national, state and local governments on this issue.

Tamanaha's description of religious normative orders deliberately sidesteps the question of whether the 'normative elements' of religious adherence – that members take to be legally binding – constitute 'law' as recognised in state legal orders. In Tamanaha's earlier writings on legal pluralism, he argued strongly for a definitional distinction between state

[227] *Ibid* at 38–39.
[228] *Ibid* at 39.

law norms and social norms that sought to act as law in certain contexts, on the basis of deep qualitative differences between the two.[229] His argument was that social norms are different from norms that are recognized and applied by legal institutions because the latter involves 'positivizing' the norms- so they are generally enforceable when they are recognized as such by legal actors. Thus, the real difference between a norm of non-state law and a 'law norm' is that, where a social norm ceases to be a norm of its community, it ceases to have compelling or legal status. However, a law norm remains law whether or not it remains part of the social life of the group to which it applies.[230]

I could argue that Tamanaha's definitional distinction between 'religious normative order' and 'legal order' (as he understands the normative force of state legal norms) is only theoretical. I can make that case by accepting Macdonald and Tamanaha's critical, postmodern description of the sites of non-state legal pluralism; that is, where the act of strictly evaluating religious norms against formalist legal norm criteria gets us no closer to identifying how and why people respond to normative commands, and so is not a useful inquiry for legal pluralist scholarship. However, the relevant question for a legal pluralist analysis is what motivates the religious person to behave in accordance with certain rules? What do they see as 'law'? If a religious institution affects the life and actions of its members according to Tamanaha's four principles of legitimacy, control, authority and normative supremacy, then there is an operative normative order that is a proper subject for a legal pluralist analysis.

However, instead of critiquing Tamanaha's conditional acceptance of religious orders as 'normative', but not necessarily 'legal', I turn to the work of Howard Kislowicz, who builds on and develops Tamanaha's model. Kislowicz, in his work on religious normative orders in the context of Canadian Charter jurisprudence, persuasively argues that a centralist response to a claim of religious legal normativity "does violence to the common understanding that there is something called religious law embodied in written and oral traditions that is subject to multiple interpretations."[231] Kislowicz applies James Tully's approach of grouping terms on the basis of a 'family resemblance' to evaluate how

[229] Tamanaha, "Non-Essentialist Version, 2000" *supra* note 193; Tamanaha, "An Analytical Map, 1995" *supra* note 218.
[230] Tamanaha, "Non-Essentialist Version, 2000" *supra* note 193 at 315.
[231] Kislowicz, *supra* note 10 at 194.

religious adherents view different religious rules as law.[232] This hermeneutic method of determining 'Law' as it exists in non-state orders imports aspects of Santos' description of postmodern law as sign, symbol and map, and elements of Macdonald's critical legal pluralism that relies on the actions and responses of legal agents to determine where legal norms lie in religious doctrine.[233] Tamanaha's four critical elements of a religious normative order are echoed substantially (although not exactly) Kislowicz's aspects. Kislowicz requires more of his religious obligations before they reach the status/level of 'law', than Tamanaha's requirements for a religious 'normative order'.

Kislowicz identifies five aspects of obligations that are capable of classifying different elements of religious orders as properly belonging to Law's family. Kislowicz developed these aspects following qualitative interviews with different participants in three religious freedom cases decided by the Supreme Court of Canada in the period 2004 - 2009.[234] In each case, religious participants claimed to follow a set of religious norms that Kislowicz then scrutinised for legal character. His five aspects are as follows:

1. That the religious subjects symbolize their practices as rules, and view them as obligatory in meaningful ways.
2. That religious, legal practices flow from higher principles within a larger tradition.
3. That the religious practices at issue are regulated in detail and have practical effects on the lives of practitioners.
4. That there is interpretation and discussion about the import and nature of religious obligations and their provenance.
5. That there is a religious community that draws on religion to make basic social ordering decisions.[235]

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[232] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); Kislowicz, *supra* note 10 at 185. Kislowicz draws connections between Santos' idea of legal pluralism as not merely a feature of social fields, but also an internalised aspect of the individual, and Tully's position that the 'experiences of cultural difference is internal to a culture' and individuals experience otherness in a way that is internal to their own identity'. Citing Tully *ibid* at 13.
[233] Kislowicz, *supra* note 10 at 185.
[234] *Syndicat Northcrest v Anselem,* 2004 SCC 47 [2004] 2 S.C.R. 551; *Multani v Commission scolaire Marguerite-Bourgeoys,* 2006 SCC 6 [2006] 1 S.C.R. 256; *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37 [2009] 2 S.C.R. 567.
[235] Kislowicz, *supra* note 10 at 194–196.

Kislowicz's aspects and his analysis of different religious legal orders within Western states are a useful guide for my investigations into Jewish and Christian legal orders. His aspects of religious law are neither religion-specific nor norm-specific and he provides a thoughtful, reasoned critique of previous legal pluralist and critical legal pluralist scholarship in justifying those aspects. Kislowicz argues that one can apply a legal pluralist framework to certain religious norms to locate 'Law' and that such work can enable legal, critical analyses of difficult topics of choice, faith and identity. In Chapter 4, I apply Kislowicz's argument to the religious practices and tenets of ex-gay Christian communities and their application of the Biblical prohibition against homosexual sex and relationships. I conclude that, while not all elements of Christian custom and norms can constitute religious law, certain rules, sanctions and remedies that inform the 'sexual orientation change' position taken by ex-gay Christian communities are law for the people who live by them.

In chapter 5, I deal briefly with the application of a legal pluralist framework to Jewish law in general, and specifically to halakhic prohibitions of lesbian sex and relationships. I deal with these issues only briefly, because the framework of Jewish law shares similarities in form and structure with state legal orders far more readily than do the Christian norms that I analyze in relation to male same-sex attraction and relationships. As I will discuss in more detail in chapter 5, the written history of *Halakha* has codified bodies of norms, that are set down in written (and unwritten) texts and legal commentaries, and that provide formal religious adjudicative and governance institutions. Further, *Halakha* has a specifically 'legal' status in the sense that it is both recognised as legal by other official legal systems, and is recognised as operative law by Orthodox Jews on its own terms.[236] Those sections of *Halakha* that deal with homosexuality, lesbianism and family structure therefore meet both Tamanaha's stricter test of 'legal norms' (that they remain legally compelling over time to their target group) and Macdonald's three claims about strong legal pluralist inquiries.

[236] Tamanaha, "Understanding Legal Pluralism, 2007" *supra* note 185 at 39.

(6) A critical legal pluralism: law reimagined and improvised by legal agents

In this research, religious L/G people sometimes demonstrate critical, nuanced responses to law in which they either improvise their own legal response or remake a traditional rule. I analyze these actions through the lens of critical legal pluralism, which refocuses the inquiry of 'where and what is the law' away from the religious legal order to the legal subject. In their introduction to critical legal pluralism, Macdonald and Martha Kleinhans developed the legal pluralist model by introducing the concept of law as a knowledge that is transformed, adapted and improvised by the legal subject. Here, the central concern of legal pluralism, being the identification of the legal order that compels legal subjects in certain situations and places, is turned on itself, and the matter for inquiry becomes how the individual legal agent is responsible for accessing and transforming law within a legal order. In this inquiry, legal subjects are "law inventing and not merely 'law abiding'".[237] Central to this individual model of legal relations is the understanding that legal subjects are not 'exclusively constituted by law'.[238] That is, people are not obedient as a matter of course. Rather, Macdonald and Kleinhans urge us to think of people as legal agents, who interact with different legal orders in intelligent and varied ways that depend on their context, social relationships, traditions and other competing normative demands. For Macdonald and Kleinhans, it is the particularity and diversity of individuals acting within legal orders (an echo of the postmodern 'chaos' of social relations) that enables them to adapt and transform rules that an outsider view might consider to be inflexible:

> Legal subjects are not wholly determined; they possess a transformative capacity that enables them to produce legal knowledge and to fashion the very structures of law that contribute to constituting their legal subjectivity. This transformative capacity is directly connected to their substantive particularity.[239]

Macdonald and Kleinhans' model of individual legal pluralism distances itself from strong legal pluralism in its rejection of legal positivity and monism.[240] They note that, even in strong legal pluralism scholarship, there is a desire to classify 'real sites of law', which

[237] Macdonald & Kleinhans, *supra* note 22 at 39.
[238] *Ibid* at 37.
[239] *Ibid* at 38.
[240] *Ibid* at 39.

requires one to first acknowledge state law as the ascendant model in order to subvert its power and resist its application in certain non-state social fields.[241] Here, Macdonald and Kleinhans note the historical anxiety of legal pluralists to agree on a binding definition of law and legal fields and their interest in arguing for legal monism within even small, informal sites of law, to give their work legitimacy as 'legal scholarship'.[242] By comparison, a critical legal pluralism denies the position that law is an independent social fact. It argues for the recognition of heterogeneity within and between legal orders, where these "inhabit the same intellectual space".[243] Where Macdonald and Kleinhans speak of 'heterogeneity', this translates as the different ways in which legal agents respond to their normative environments.[244]

A critical legal pluralism is a hermeneutic, postmodern conception of law that requires the researcher to accept that the legal subject carries within them a multiplicity of identities, and starts from the assumption that all experiences of normativity "merit consideration from a legal point of view."[245] That is, any legal directive is only as enforceable as its human subjects enable it to become, whether this directive originates from state made law, community customs or religious tradition. Macdonald and Kleinhans envisage the individual legal subject not as a "modern, anthropomorphized individual of economics, political science and *Charters of Rights*",[246] but rather as a layered, self-referential narrative, a "multiplicity of selves".[247] This 'legal self' is overlaid by different normative demands, concepts of identity and ethical and moral commitments. S/he is continually exploring the variety of possible selves that they wish to project: which means they are heterogeneous in both identity and motivation. In this

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[241] *Ibid* at 32.
[242] The anxieties about definitions and structure of non-state legal fields and subjects that Macdonald and Kleinhans identify echo Tamanaha's concern that legal pluralism cannot provide a stand-alone descriptive definition of law, because of the logical need to identify 'legal orders' by applying legal positivist definitions of law and legal action.
[243] Macdonald & Kleinhans, *supra* note 22 at 32.
[244] Macdonald and Thomas McMorrow apply this concept of a critical legal pluralist approach to intimate normative arrangements in their investigation of how different conceptions of marriage can be analysed through a critical legal pluralist lens. See: Macdonald, Roderick A & McMorrow, Thomas, "Wedding a critical legal pluralism to the laws of close personal adult relationships" (2007) 1 Eur J Leg Stud, online: <http://hdl.handle.net/1814/6853>.
[245] Macdonald & Kleinhans, *supra* note 22 at 40.
[246] *Ibid* at 42.
[247] *Ibid*.

presentation of the modern self we see a clear link between the legal exploration of the self in critical legal pluralism and Santos' hermeneutic understanding of law as symbol and map for social relations.[248] Law, in a critical legal pluralist sense, is consciously made and remade by individuals as they operate within their social location, and is situated more in language and sign than in external machinery.[249]

Kleinhans and Macdonald suggest that we can locate personal understandings of law by interrogating how legal subjects respond to 'internormative conflicts'. This reconciliation or resolution of normative conflict cannot simply be the subject of a study of legal orders (or a 'top down' analysis), as the conflict is identified only by its recognition by the legal subject herself. Thus, we must investigate how the legal subject responds to normative challenges they experience within their own worlds (a 'bottom up' analysis).[250] Such an investigation requires us to see the legal subject as dynamic, thoughtful and creative in her responses to legal challenges, rather than passive, receptive and mechanical. To elucidate this point, I give an example of a critical legal pluralist inquiry that arises in this work.

Many of the Orthodox Jewish women who spoke about their identity challenges also questioned their roles as wives, mothers and as naturally heterosexual women that are the gendered expectations of Jewish law.[251] These normative positions are applied to Orthodox Jewish girls and women from a young age and are recognized by lawmakers

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[248] Macdonald and Kleinhans make the connection between law, hermeneutics and the multiple self when they imagine law as 'a mode of giving particular sense to particular things in particular places, a critical legal pluralism shifts inquiry toward hermeneutic thinking–to thinking of law as 'meaning… not machinery'. *Ibid*.

[249] There is a theoretical link to be drawn here with Judith Butler's theory of gender as performance and construct, which questions the social and biological imperative of heteronormativity. Macdonald and Kleinhans argue that the modern self puts on and takes off concepts of law as they redefine their normative environments, just as Butler suggests that modern concepts of gender are performed, removed and remade, depending on the location of the self within patriarchal society. Both theories of gender and legal pluralism are centred on the idea of the complex and atomized person as a site of normativity, rather than a recipient of it. I discuss Butler's theory of gender performativity further in Chapter 3. See: Judith Butler, *Gender Trouble: Feminism and the subversion of identity* (New York: Routledge Press, 1990).

[250] This classification of 'bottom up' analysis deliberately echoes a feminist method approach to legal research. I will discuss the value of contextual, subjective reasoning, and the introduction of a 'bottom up' approach, further in Chapter III. I have drawn the 'top down', 'bottom up' classifications of legal order/legal subject reasoning here to indicate synergy between my theoretical and methodological approaches to religious legal inquiries. However, I acknowledge that Macdonald and Kleinhans do not employ this classification of different theoretical approaches to normative inquiries. Rather, they suggest the classification of state law versus individual legal experience as 'macro/micro'.

[251] I discuss these normative expectations and their specific sites in *Halakha* further in chapters 5 and 6.

and community leaders as fixed normative positions. However, some Orthodox women who identify as lesbian are challenging these positions in creative ways, testing these boundaries to find ways to live with their lesbian partners, to live with or leave their husbands, or to build new leadership roles for themselves within their faith communities. For religious Jewish women who live in Canada or the United States, their understanding of sexual and gender identity is further informed (although to far lesser degrees, depending on the religious community they inhabit) by the surrounding secular legal culture of increasing acceptance of LGBT identities and equality rights. We can then begin to see these women as complex sites of understandings about internormative conflicts about gender, religious faith, sexual identity and human partnership. Examining the legal orders that they operate within (secular, familial, community) will only ever reveal discrete sections of these normative challenges. Only by evaluating the understanding of legal normativity held by the women themselves, can the researcher really understand how they are informed by different legal orders, and how they test and bend these orders to match their other normative commitments.

Wendy Adams applies Macdonald and Kleinhans' critical legal pluralism model to cultural sites of inquiry that go beyond traditional legal orders, such as popular culture narratives and motifs.[252] Despite deep differences between the substance of these inquiries and my work in religious law, Adams applies several innovative concepts of law in her adaptation of a critical legal pluralism that I find to be useful in considering how religious legal subjects act creatively within their legal worlds. Adams responds to critiques of legal pluralism and critical legal pluralism as inviting anarchy and postmodern anxiety by answering that we can still judge and weigh legal choices made by individuals with a degree of certainty. However, we are no longer looking for an arbitrary 'right' answer (which suggests a positivist concept of right and wrong); rather we are looking to identify "the most persuasive account of what is an appropriate response to a situation."[253] This concept of favouring reasonableness in interpretation over fixed judgment emphasises the narrative, autobiographical elements of critical legal pluralist

[252] Adams, *supra* note 23; Wendy A Adams, *Popular culture and legal pluralism: narrative as law* (London: Routledge, 2017). In her 2017 book, Adams visits different normative sites of popular culture including films, television, literature and graphic novels to explore different expressions of legal pluralism.
[253] Adams, *supra* note 23.

research: individual decisions and normative matrices will necessarily vary. Thus, Adams proposes that:

> [I]mprovisation is an ideal metaphor for understanding law, particularly from the theoretical perspective of critical legal pluralism. Judgment is always a response in the moment; the specificity of understanding what one is obliged to do at a particular time in a particular set of circumstances defies the application of a fixed and immutable script.[254]

Adams also argues that we should see individual judgement as implying choice, as opposed to fidelity to an immutable position. Thus, even where legal subjects are forced to submit to dominant narratives, we can still see law-creating subjects of critical legal pluralism working to reconcile competing and conflicting narrative options in different moments. I am less sure of this position than Adams, which is perhaps a reflection of our different fields of inquiry. In this investigation, it is difficult to simply apply expectations of individual choice and improvisation to the lived experiences of ex-gay men and Orthodox lesbian women, both of whom live in deeply constrained normative environments. Choice and subjectivity can be difficult to discern in cultures that reify group justice, substantially limit individual expression and decision-making, and can reject dissent to normative faith positions as indications of subversion, mental illness or innate weakness. However, in some situations, I have still discovered people willing to exercise individual choice and to critically evaluate the legal 'scripts' they have been given. Certainly, this evaluation or exercise of choice has not always resulted in change to the normative status quo. However, the willingness of subjects to engage with questions and challenges to their normative environments is indicative of a degree of choice and awareness of their internormative conflicts.

Adams also argues that a commitment to a dominant narrative (determined by an individual) can constitute adherence to a normative expectation, even where that expectation cannot be resolved with the rulebook of a social field. That is, we can understand deep, normative commitments made by individuals as contributing to their understanding of 'law', where those positions go beyond the justifications for a rule given by a certain legal order.[255] Different views on same-sex marriage can provide an example

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[254] *Ibid*.

[255] Adams gives the example of the different motivations of a character in the popular TV show *Buffy the Vampire Slayer*, Spike, who transforms himself into a double agent, male protector and violent killer in different series of the show, depending on his different moral motivations.

of this position on dominant, normative narratives. Different dioceses of the Anglican Church across the world have taken a plurality of views on the acceptability of same-sex marriage for Anglican Christians. The normative justifications of these positions are put in different terms, despite a shared understanding of the binding position taken by the Church of England (reaffirmed at the Lambeth Conference in 1998) that homosexuality and same-sex relationships are unlawful and incompatible with Scripture.[256] Some Anglican churches argue for same-sex marriage within the church on the basis that Christ's message is one of love and respect for human capability for compassion, which is a narrative that supersedes scriptural rules against homosexuality.[257] However, the Sydney Anglican diocese, in the recent same-sex marriage debate in Australia, argued that the dominant narrative must be that of family values and 'natural heterosexuality', and that Christ's love of his church is that of a parent for a child which can only be given form by heterosexual marriage.[258] Still other churches argue that the dominant narrative is inclusivity and value of diversity, embodied by Christ's love for the outcasts, the poor and the disenfranchised. This narrative argues that Christ's crucifixion and resurrection is a celebration of these themes.[259]

This example demonstrates that, even within faith communities, there are often divergent narratives that are presented as justifying divergent positions on religious legal issues. These narratives are used by leaders and individuals to justify an alteration or amendment of a once-agreed position, arguing that the narrative itself has more ethical and moral justification than the rule. Adams identifies this positioning as "the improvised legal meaning of circumstances."[260] She crafts the argument that legal subjects can improvise legal negotiations and reconciliations for themselves through their deep commitment to other moral and ethical narratives that either complement or resist the

[256] See: Anglican Communion Office. *Lambeth Conference, Resolutions Archive from 1998*, (1998) online: http://www.anglicancommunion.org/media/76650/1998.pdf. Section 1.10 - Human Sexuality.
[257] Harriet Sherwood, "Scottish bishop defends same-sex marriage: 'love means love'", *The Guardian* (3 October 2017), online: <http://www.theguardian.com/world/2017/oct/03/scottish-bishop-defends-same-sex-marriage-love-means-love>.
[258] McGowan, *supra* note 66.
[259] Paige Cockburn, "These religious leaders are putting dogma aside to support same-sex marriage", *ABC News* (7 September 2017), online: <http://www.abc.net.au/news/2017-09-07/religious-leaders-thinking-differently-about-same-sex-marriage/8878680>.
[260] Adams, *supra* note 23.

majority position taken by a legal order. Adams characterises these moral and ethical narratives that inform legal improvisation as 'genre guidelines', and focuses on popular culture examples of genre-switching to indicate narrative shift. However, I contend that we can adapt Adams' representation of genre-switching to explain the different narrative commitments that people hold on an individual basis, that in turn explain their creative responses to legal orders that also touch on these commitments. In Chapter 6, I apply Adams' concept of improvisation and dominant narrative to the concepts of personal relationships and marriage. My goal is to demonstrate how some Orthodox lesbian women improvise law for themselves, in line with deep narrative commitments to love, partnership and their religious faith, and in opposition to other narratives of illegality, expulsion and suppression of their lesbian identity. I argue that these women actively engage with lawmakers and enforcers (rabbis, community groups and their husbands) and suggest different legal commitments for themselves that share substance, if not form, with their Orthodox religious narratives of family and religious commitment.

(7) Legal pluralism and critical legal pluralism in this work: opportunities and complementarities

There are several outcomes that are achieved by applying a (critical) legal pluralist framework to investigations into the Christian and Jewish communities that are the focus of this dissertation, and I set these out below.

1. Understanding group and individual positions on sexuality as 'law'

First, situating this investigation as a legal pluralist endeavour has enabled me to better understand the autobiographical choices that queer, religious legal subjects make about their identity within larger groups (their religious community and the state). Viewing aspects of religious doctrine, custom and norms that disavow same-sex activity as law (in the sense of obliging deep commitment by adherents) creates a compelling narrative that explains why many ex-gay Christians see themselves as being on a lifelong journey to heterosexuality that requires them to isolate themselves from other gay men, and equally why many lesbian Orthodox Jewish women refuse to leave their marriages and their religious community after they come out as lesbian, even when they suffer discrimination, condemnation and social isolation. In this way, applying a legal pluralism framework

encourages me to look more critically at questions of compulsion and choice in terms of queer religious people, and to conclude that there is an ineluctable combination of both elements in how they variously identify as queer, non-queer and religious.

Within both the Christian and Jewish communities that I researched, there is a strong, communal belief that religious laws that disavow homosexuality are deeply compelling. Even in the case of some modern Orthodox interpretations of *Halakha* as allowing some forms of same-sex attraction (lesbian rather than gay), the legal sanctions had to be carefully parsed, interpreted and reframed before a more conciliatory position could be reached by lawmakers. These more modern interpretations of *Halakha* are not, in any way, mainstream thinking on these legal issues: Orthodox rabbinates across the world remain firm in the condemnation of both lesbian and gay identities. In the case of Baptist and Pentecostal ex-gay communities, the Biblical sanctions against same-sex intercourse and relationships are applied without any exception, and dissent is punished by community expulsion. To apply Cover's position on religious groups and legal norms, these religious groups have a constitutional *nomos* that endorses a certain position on same-sex attraction, and that position is generally applied inflexibly by these communities. I apply Cover's view of faith-based communities and state law here, because he identifies key issues of law, narrative and *nomos* that reflect how these L/G religious people view themselves and their religious legal worlds. Their starting position as religious and L/G is unacceptable to their community and they accept this as the applicable normative position. Understanding that these religious people see themselves as subject to 'law' regarding their sexuality helps us to understand why they might (or might not) choose to challenge their religious identity. It also explains how other members of their religious community view queer attraction as unlawful and helps to define their view of other, attendant issues like parenting, marriage and the treatment of women. Understanding the compelling nature of religious law does not require one to excuse its abuses or the damages it can cause. Rather, the aim is to develop a more complex, critical understanding of the motivations of queer religious communities and people who live within them.

Applying a critical legal pluralist framework also reveals the significance of individual choice in these constrained normative environments. Even as Christian and Jewish L/G

subjects recognised their outsider status in terms of religious law that applied to them, they also engaged in an autobiographical investigation of their identity that, in some cases, led them to comply more fully with the dominant narrative, while in other cases, led them to resist that narrative and negotiate a more accepting legal position for themselves within their religious community. Here, Macdonald and Kleinhans' presentation of the individual as a 'site' of law helped to separate individual choices about identity from the imposition of norms from above. For example, when ex-gay Christian men leave their religious community to live 'out in the world' as gay but then choose to return to their church and actively engage in reparative therapy, this choice involves a complex interplay between their understanding of the compelling nature of religious norms and the resignation of their gay sexual identity to that norm. Leaving and then returning to the jurisdiction of a legal order demonstrates a degree of choice, even if that choice is severely constrained.

Likewise, considering the individual as potentially 'law creating' rather than as 'law abiding' identifies the actions of lesbian Jewish women as negotiating, challenging and resolving questions about their sexuality within the bounds of halakhic positions on lesbian identity. As I explore in Chapter 6, there are several narratives where women appreciate the technical elements of Jewish law codes as they apply to lesbian sex and partnership, and then negotiate lacunae within these codes to find lawful solutions for themselves to befriend women, sleep with women and (in some cases) enter into lesbian partnerships. Taking a subjective view of law in these cases—that is, seeing it through the eyes of the subject rather than the legal order— revealed the creative choices that these women make to negotiate with their legal environment. If one were to take a purely objective approach to these examples of individual legal action, this perspective would likely present these 'choices' as outlaw moves or unlawful resistance to an inflexible norm. A critical legal pluralist perspective allows more flexibility to discover the self as a site of legal knowledge and to appreciate how people can critique power and negotiate within this site of law.

2. Connections between religious law and state legal orders

Positioning religious normative orders beyond the bounds of western state law that has created and enforced formal equality guarantees for same-sex attracted people, is an integral part of this investigation and is central to the argument that queer religious people engage in identity conflict and reconciliation processes that are different from those in secular environments. So too is the understanding that these legal orders (religious, state) do not exist in a positivist hierarchy of legal orders with state law at the pinnacle. Rather, they overlap and diverge throughout the body of the religious community and the body of the religious person.

As I set out in chapter 1, there are relatively thick lines drawn between public and private concerns that dictate how queer people experience state law in closed religious communities. These lines are also generally recognised by state institutions and law enforcement, although there are of course disagreements about when a matter will be subject to state versus religious jurisdiction and there are areas where state law does intervene in religious community life, such as aspects of family law. The (un)lawful status of sexual and gender identities of community members are specific areas of regulation where the state has historically ceded authority to religious groups. The subject-matter of queer sexuality and the relationship to religious faith is therefore a valid area for a strong legal pluralist analysis.

It follows that a monist, centralist conception of law, or even a weak legal pluralist model, cannot reflect the plural nature of law and social relationships that operate in these environments. As I have argued above, the interrelationship between individual sites of legal knowledge, community religious norms and (at the outer periphery) state law that exist in these case studies, requires a critical legal analysis that is sufficiently flexible to identify non-state law in religious communities, to recognise a diversity of advocates and decision-makers on questions of sexuality, and to reflect the different ways that state *and* non-state legal orders exert influence on religious individuals. Such an analysis also needs to be mindful of the symbolic and linguistic nature of law, and the significance of the individual as a map and evolving site of legal narrative.

To demonstrate what I mean, let me give an example of the difficult relevance of state law to the religious legal subjects of this investigation. As I introduced in chapter 1, while the central premise of this thesis is that religious groups impose religious laws on their members and that these laws are compelling and dominant, there is a second, limited claim that the parallel development of equality rights-protecting state law norms outside these communities have an indirect impact on queer religious individuals. Most religious people who provided narratives about their identity challenges indicated that they are aware that LGBT rights (notably, the right to same-sex marriage) are issues being actively debated at the national state level. Some people also indicated that they are aware of rights-protecting developments in human rights legislation and family law issues, such as same-sex couples being eligible to adopt children. In some cases, this knowledge of state law developments entrenched support for a dominant anti-same sex narrative favoured by their religious group. However, in some other cases, this recognition of a divergence between state and religious law informed the choice of religious people to make changes in their lives to accommodate their sexuality, despite the position of their religious faith. For example, Leah Lax, a Haredi woman who wrote a memoir about coming out as lesbian and leaving her religious community, ends her narrative by describing her elation at watching the Houston pride parade in June 2003, two months after the Supreme Court decided *Lawrence v Texas*:

> Two Houston men standing up in a yellow Volkswagen convertible with top down, John Lawrence and Tyron Garner, roll slowly down the street…they had just won their case with the Supreme Court, striking down sodomy laws across the country… Up and down the street for blocks, hanging a hundred deep over fences, crowded on rooftops, thousands of people are waving and cheering, and I am one of them.[261]

The conclusion of Lax's memoir stresses that she comes to identify, and not identify, with more than one dominant legal narrative. She still considers herself to be Jewish, but is no longer a member of the Hasidic community that disavowed her sexuality. In terms of state law, we can see from her description of the 2003 *Lawrence v Texas* parade that Lax allows knowledge of changes within the secular legal world about sexual identity to reach up to her from the street. She informs herself of these changes and takes confidence in them, but remains wary of taking on the state normative position wholesale.

[261] Lax, *supra* note 15 at 341.

As I presaged in chapter 1, the *degree* of relevance of state law to people in closed religious communities is difficult to pinpoint with certainty, and it is impossible to determine merely by looking at how religious communities respond to state law developments. As with other formal institutions, certain Christian and Jewish religious bodies take a formal position that rejects the authority of state law LGBT-rights developments, and argue that their opposition to these developments are uniform and consistent. However, a closer review of how legal subjects within these communities respond to state law developments paints a more complex picture of people responding to 'outsider law' in more subtle ways, and sometimes taking more nuanced positions than their communities endorse. A critical legal pluralist approach allows me to interrogate these positions as a valid subject for legal analysis, rather than viewing these activities as personal, social relationships that occur in the social 'normative vacuum' between formal written law and law in action.

3. Complementary approaches: legal pluralism and feminist method

The methodological approach I apply to discover the identity challenges of L/G religious people was based on my analysis of first-hand narratives of people who lived within closed religious communities. This strategy was informed by the principles of legal feminist method, which seeks to present contextual, personal stories to highlight where and how law limits the agency of women and (adapting queer theory elements) gay and lesbian people.[262] While still in the early stages of this research, I began to realize the strong complementarities that exist between (critical) legal pluralism and feminist method. First, both theory and method require a researcher to recognize the centrality of the self as a site of power and law. This involves a critical interrogation of Macdonald's modern legal subject 'as an irreducible site of normativity':[263] where the modern self is not merely the site of power transfer (for example, discipline applied from a legal order to a person) but is also the site of power relations, as one person responds creatively to legal norms about sexuality and makes choices about the imposition of rules upon them. Second, in addition to the legal subject, both feminist method and strong legal pluralism emphasise

[262] I discuss the critical elements of feminist method in legal scholarship in detail in chapter 3 and provide a comprehensive literature review of relevant scholarship on feminist method and queer theory method. Here, I sketch an outline of the elements that I claim legal pluralism, critical legal pluralism and feminist method share, and make claims about the value of these shared elements to this investigation.
[263] Macdonald & Kleinhans, *supra* note 22 at 44.

the existence of law within a variety of informal, personal and communal places (the self and the religious community), and require a researcher to identify where and how different legal orders create dominant narratives that compel obedience, or create space for negotiation. The feminist goal of contextual reasoning, or taking a 'bottom up' approach to critiquing power imbalances in terms of gender, has strong connections with legal pluralist claims to emphasise the healthy operation of diverse, communal and social legal orders that resist the model of legal centralism.

Third, a critical legal pluralist approach and feminist method both deal with the fraught issue of personal choice versus compulsion or obligation when examining how legal subjects respond to normative limitations. A feminist method encourages a researcher to grapple with the question of how a sexual minority or person might resist patriarchal power in law, and to view that person as experiencing not merely intersectional limitations, but also as an intersectional subject, for example, where an Orthodox woman who identifies as female, a lesbian, a mother and a person of faith. Similarly, a critical legal pluralist conception of legal theory looks for ways a legal subject might develop genre-hybridism (to adapt Adam's term) and respond to dominant narratives by improvising law in ways that challenge the normative status quo. In this work, the issue of whether ex-gay Christian men and lesbian Orthodox women exercise choice in remaining within their religious communities is difficult to resolve. Religious law can compel legal subjects to adhere to a narrative that disavows their sexual identity and presents heteronormative power relations as natural and lawful; one can still identify choices made by legal subjects to either accept that narrative and seek to change or hide their queer identity, or to resist it in certain spaces, while adhering to it in others.

In the religious context chapters of this thesis, I make tentative claims about how ex-gay Christian men 'choose' their adherence to a conversion therapy narrative, and stronger claims about how lesbian Orthodox women adapt elements of feminist resistance to make choices about identifying themselves as gay and still claiming to live a devout Jewish life as wives and mothers. Ultimately, I claim that the application of both a feminist method approach to and a critical legal pluralist analysis of these communities and individuals helps achieve a more critical, informed understanding of their normative environments and how they 'live the law'. The application of this legal analysis and feminist method

gives voice to those religious individuals who make informed choices about their sexuality and religion. Further, these theoretical approaches encourage us to view these choices in their context and resist the temptation to simply judge whether they would be recognised as 'feminist' or as 'queer positive' choices in an external secular world.

Conclusion

In this chapter, I have outlined the theoretical approach to law that has framed my investigation into ex-gay Christian and lesbian Orthodox communities. I have highlighted the value and limitations of a legal pluralist analysis and described its evolution over time from a socio-legal, descriptive definition of legal orders into a critical, hermeneutic appraisal of how law is viewed, applied and resisted by legal subjects. This last evolution of legal pluralism has brought us to an analysis of a critical legal pluralism, which centres on the self as the site of legal relations. I have dealt specifically with the key criticism of legal pluralism, being the difficulty of identifying 'what is law' in social legal orders that may not resemble the normative structure or be classified by enforcement or governance institutions. I have argued that a strong legal pluralist analysis can be applied both to elements of ex-gay Christian communities and to the Jewish codes of law (*Halakha*) which govern the lives of members of those communities. Lastly, I have outlined some of the key theoretical and methodological advantages to applying a (critical) legal pluralist framework to the subject of this thesis, and explained how such a framework complements the feminist method that I set out in the following chapter.

Chapter 3

A feminist method approach to queer subjects: telling stories of law through a feminist lens

Introduction

In this chapter, I introduce the feminist method approach that I adopt in this dissertation to analyse the sexual and religious identities of L/G members of evangelical Christian and Orthodox Jewish religious communities. The aim of this method is to give voice to marginalised L/G people within certain closed religious communities, and to determine how they manage, resolve or negotiate their sexual identity with their religious faith. [264] These investigations necessarily depend on outsider narratives that are 'outside' the perspective of the religious communities and are also 'outside' the perspective of political feminist and LGBTQQIP2SAA political and social movements.[265] These narratives are outsider from the perspective of their religious communities because of the normative religious frameworks which forbid recognition of their sexual identities. Further, they are 'outsider' because of the external forces exercised upon L/G members of their communities to obscure, reject or change their sexuality to conform to the heteronormative status quo. Importantly, and perhaps counter-intuitively, these narratives are also often outsider from the perspective of secular feminist and queer politics. This is because the L/G religious people who are the subject of this analysis remain within their closed religious communities and because religion remains a significant, identifying element of their lives. Queer theory and queer feminist theory rely on a core assumption that minority sexual/gender identities deserve to be fully expressed

[264] As I noted in the introduction, the majority of people who make up these target communities self-identify as either 'ex-gay' (men who admit to being gay or experiencing a strong movement towards a gay identity, but who claim to now be heterosexual) or women who identify as lesbian. In this chapter, I also use the terms 'queer identity' and 'queer politics' as apposite descriptors used by queer theorists to describe the inclusive, diverse grouping of sexual and gender-identity minorities within modern society. 'Queer' used to be a discriminatory or hate speech epithet designed to denigrate gay and lesbian identity, but was reclaimed in the 1990s by the LGBT community and is now used as a theoretical and political definitional term. It is commonly used in queer theory and queer feminist theory.

[265] Again, as I outlined in the introduction, LGBTQQIP2SAA is the full and most inclusive sexual diversity acronym for the queer political movement. It stands for: Lesbian, Gay, Bisexual, Transgender, Queer, Questioning, Intersex, Pansexual, Two Spirits, Asexual and Ally. However, for ease of reference I generally use the umbrella term 'queer' to describe the relevant theoretical positions in this chapter.

and respected, and that heteronormative cultures and the patriarchy are responsible, in varying degrees, for the subordination of women and queer people and for unequal justice outcomes.[266]

However, for the people included in this investigation, heterosexual and heterogender norms frame most aspects of their lives, and the relevance of the patriarchy as a legal and customary force is an accepted, even welcomed, reality. Queer evangelical Christians and Orthodox Jews often continue to live within these communities even after they have 'come out' to some limited extent, despite facing dangers of psychological and physical harm. Discovering a feminist/queer method to describe this experience requires a degree of theoretical and methodological flexibility about the core goals of 'feminism' and 'queer identity'. Nevertheless, I believe that investigations into these communities demonstrate there is substantial merit to approaching these stories from a feminist lens, and, further, that this lens complements the legal pluralist theoretical approach that I have adopted to investigate the operation of law in these communities.

In this chapter, I first review the fundamental requirements and elements of feminist method—as distinct from activist feminist theory and practice—and explain how these elements are relevant to the experiences of the L/G people who are the focus of this investigation. I outline the history of feminist method, explain its development as a reactive, flexible, non-neutral methodology for telling women's stories, and critique Second Wave feminist elements such as the essentialist view of 'the woman question' and a failure to appreciate the significance of intersectionality and contextual reasoning as fundamental aspects of crafting a feminist project. I also argue that, as a feminist *legal* method, asking feminist questions complements a legal pluralist approach to identifying and critiquing legal frameworks that monitor and regulate religious communities. Lastly, I outline, with approval, the Third Wave feminist method, that challenges the gender/sexuality binary in the feminist subject, that reframes the critical investigation as

[266] For feminist theory arguments in support of this position, see: Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989); Robin West, *Caring for Justice* (New York: New York University Press, 1999); Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Cambridge, Mass.: Princeton University Press, 2008); Wendy Brown & Janet Halley, *Left Legalism/Left Critique* (Durham, North Carolina: Duke University Press, 2002). In terms of queer theory positions, see for example: Vivian Cass, "Homosexual identity formation: a theoretical model" (1979) 4:3 J Homosex 219; Halbertal & Koren, *supra* note 17.

'asking the gender question' and one that requires an intersectional, diverse approach to contextual reasoning and consciousness-raising.

Second, I discuss the significance of queer theory to the subject of sexuality/gender in religious law. I draw on the work of queer theorists such as Michael Warner, Francisco Valdes and Adam Romero and queer feminists (although the lines between these categories are often and deliberately shifting) such as Janet Halley, Judith Butler, Elizabeth Weed and Naomi Schor to inform my analysis about how to present the queer subject within feminism. I discuss different issues raised by queer theory that challenge feminist approaches, including the sex/gender binary, the role that gender plays in social and sexual dominance and the significance (or lack thereof) of the male/female biological and sociological divide that has been central for so much feminist theory. I situate these challenges within the contexts that I have chosen for this dissertation, acknowledging that there is obvious complexity in presenting a self-identified ex-gay man living in an evangelist Christian community as a queer, feminist subject. In this case, contextual reasoning about the impact of gender expectations and the interplay between 'asserted' heterosexuality and 'assumed' homosexuality demonstrate that feminist method and queer theory do have interesting, relevant things to say about this subject.

I conclude by adopting a queer theory line with respect to concepts of gender, sex and sexual orientation. I argue that such an approach adds necessary theoretical strength to this work as it properly informs a feminist method investigation of these queer subjects. The flexibility of this method—to invite critical interventions from queer theory into feminism—aligns with the fundamental goals of feminist method as a responsive, curious method that respects the feminist subject and disavows neutrality in discovering power-relations. I conclude that the question of reconciliation/sublimation of sexual identity to one's religious self is thoughtfully addressed by a queer-feminist method.

(1) Defining a feminist method approach to law

In his response to Janet Halley's provocative argument that queer theory does well to 'take a break' from feminism,[267] Adam Romero makes the case that 'taking a break' from

[267] Halley, *supra* note 266; Ian Halley, "Queer Theory by Men" in *Feminist Queer Legal Theory Intimate Encounters Uncomfortable Conversations* (Surrey: Ashgate Publishing Limited, 2009).

making substantive feminist arguments can give critical space to feminist methods to interrogate other projects. Using feminist methods in this way makes room for Halley's exhortation that feminist theory often needs to be revised, rethought and, (sometimes) left alone entirely, to enable meaningful engagement on topics that stand outside a heterocentrist feminist space. Romero's critique is that these types of investigations, including queer investigations, are enriched by viewing them through the lens of feminist method, even where the subject or theoretical basis for the work might not be traditionally feminist. In this way, Romero argues, we can still take Halley's 'break' if we need to, without losing the benefit of feminist methods to discuss queer issues.[268]

Romero describes feminist methodology as a self-critical, curious endeavour that challenges the "totalizing nature of grand legal theory" by emphasizing "lived experience, context, situation and specifics, not abstractions."[269] Romero situates his description of feminist legal theory as evolving, flexible and relational, citing Martha Fineman's descriptions of feminist legal theory set out in *At the Boundaries of Law*.[270] I find Romero's analysis of the difference between feminist method and activist legal theory useful for this investigation. However, before moving to his formula for applying feminist method in a modern, queer theory related subject, it is helpful to first consider Fineman's earlier description of a 'feminist legal theory project' and to embark on a brief literature review of the relevant feminist methods that evolved out of Second Wave feminism.[271]

1. Speaking Truth to Power

Martha Fineman described the feminist project as one that is inherently critical: a method that takes a stance that "is developed by adopting an explicitly woman-focused perspective, a perspective informed by women's experiences".[272] Feminist theory and method must also recognise the existence of a patriarchal bias in legal theory and practice and therefore its goal is to give voice to the women's perspective on legal thought.[273] This

[268] Romero, *supra* note 16 at 184–185.
[269] *Ibid* at 197.
[270] Martha Fineman & Nancy Sweet Thomadsen, eds, *At the boundaries of law: feminism and legal theory* (Routledge, 1991).
[271] Martha L Fineman, "Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship" (1990) 42 Fla Law Rev 25; Fineman & Thomadsen, *supra* note 270.
[272] Fineman, *supra* note 271 at 31.
[273] *Ibid*.

does not invalidate the feminist inquiry on the same basis of bias or partisanship. Rather, the feminist inquiry is a necessary perspective to redress this bias.[274] Fineman also presents feminist legal thought as necessarily activist. Not only must a feminist inquiry interrogate legal outcomes and institutions, but must also question fundamental legal concepts and understandings of power relations. Law, Fineman argues, is a power structure that confines and structures female oppression. For this reason, feminist method and theory must focus on political change as well as legal evolution.

> From this perspective, feminism is a political theory concerned with issues of power. It challenges the conceptual bases of the status quo by assessing the ways that power controls the production of values and standards against which specific results and rules are measured. Law represents both a discourse and a process of power. Norms created by and enshrined in law are manifestations of power relationships.[275]

Fineman asserts that work that claims a feminist method should identify alternative power relationships and structures to the status quo. Fineman suggests that, while this element of feminist method is tied to the need for political theory and structural change, it is also a separate characteristic, because of its link to a methodological characteristic of feminist theory: the significance of oppositional work. Fineman asserts that, in fact, "the larger social value of feminist methodology may lie in its ability to make explicit oppositional stances vis-à-vis the existing culture. The task of the moment for feminism may be to transform society by challenging dominant values and defiantly refusing to assimilate."[276] Fineman presents feminist theory as evolutionary in nature, a characteristic which enables its targets and processes to develop alongside its challenges. "Feminist methodology at its best generates contributions to what is recognized as a series of ongoing debates that start with the premises that "truth" changes over time as circumstances change and that gains and losses, along with recorded wisdom, are mutable parts of an evolving story."[277] Romero summarizes Fineman and Katherine Bartlett on this point as stating that, in this regard, feminist method *is* feminist theory.[278]

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[274] *Ibid*.
[275] *Ibid* at 32.
[276] *Ibid* at 33.
[277] *Ibid* at 33–34.
[278] Romero, *supra* note 16 at 186.

2. The danger of essentialism

Fineman describes the 'difference' challenges within feminism in the early 1990s, as a divisive force. "Advocates of difference… faced the possibility of being labeled "essentialists" – those who advocate a belief in an "essential womanhood" that exists outside of language and society, and who are insensitive to race, class and other differences among women."[279] However, for 1990s Fineman, the differences between 'women' as a category are less relevant to feminist methods than emphasising their shared gender experience, which separates them from men and from the structures put in place to ensure patriarchal domination. She therefore advocates for the position that, whatever the cultural and physical differences between women, it is their shared goals and strengths that give a collective shape to feminist inquiries:

> Women from different cultures, classes, races, and economic circumstances might argue about conclusions, tactics, and values, but they also understand a common gendered-life reference point that unites them in interest and urgency around certain shared cultural and social experiences.[280]

For Angela Harris, this suggestion of synthesis of purpose and identity in feminist theory is deceptive and unwanted.[281] In 1990, Harris critiqued both Catherine MacKinnon and Robin West on similar bases to some of the arguments put by Janet Halley fifteen years later in *Split Decisions*. Harris noted that, in both power feminism and cultural feminism, the essentialist claim that there is one unitary, 'essential' female experience not only silences and devalues minority voices within feminism, but also works to silence those minority voices by the same patriarchal status quo that feminism seeks to oppose.[282] For Harris, it is the flexibility, instability and reactionary nature of feminist methods that can help us to avoid racist and discriminatory essentialism. Harris argues that a search for 'truth' in feminist theory must require an investigation of identity and self: which in turn

[279] Fineman, *supra* note 271. For Fineman's further (and later) consideration of feminist theory elements, see: Martha L Fineman, "Introduction: Feminist and Queer Legal Theory" in *Fem Queer Leg Theory* (Surrey: Ashgate Publishing Limited, 2009) 1; Martha Albertson Fineman, *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (New York: Routledge, 2010).
[280] Fineman, *supra* note 271 at 37.
[281] Angela Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42:3 Stanford Law Rev 581. See also: Martha Minow, "Identities" (1991) 3:1 Yale JL Hum 97.
[282] Harris, *supra* note 281 at 601–602.

requires us to employ methods of strategy, contingency and a focus on relational connections rather than on 'artificial essentialisms' bound by sexual determinants.

> Thus, "how it feels to be colored Zora" depends on the answer to these questions: "'Compared to what? As of when? Who is asking? In what context? For what purpose? With what interests and presuppositions?'... [Q]uestions of difference and identity are always functions of a specific interlocutory situation-and the answers, matters of strategy rather than truth.[283]

Harris' critique of feminist theory and method as risking essentialism anticipates and parallels other feminisms that focus upon non-essentialist concepts of 'woman/womanhood' and interrogate the gender/sexuality divide to support more diverse feminist inquiries and critiques.[284] Here, we return to Romero's discussion of Halley's *Split Decisions* and his suggestion that her rejection of feminist theory can really be transformed into a more self-critical feminist method, rather than rejected entirely.

3. Unmasking the patriarchy, or 'asking the ~~woman~~ gender question'

Romero cites Nancy Levit and Robert Verchick's fundamentals of feminist methodology as being (1) unmasking of patriarchy, (2) contextual reasoning and (3) consciousness-raising.[285] Levit and Verchick argue that the first goal, to unmask the patriarchy, requires feminist research to "ask the woman question", in Katharine Bartlett's terminology.[286]

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[283] *Ibid* at 611.

[284] For other, seminal postmodern feminist and postcolonial feminist scholarship that engaged in active rethinking of the 'female' subject as non-white, non-European, and/or as marginalised by white feminist theory see: Spivak, Gayatri Chakravorty. "Can the subaltern speak? Reflections on the history of an idea" in Rosalind C. Morris, ed, *Reflections on the History of an Idea: Can the subaltern speak?* (New York: Columbia University Press, 2010) 21; bell hooks, "Postmodern Blackness" in *Feminist History Reader* (Milton Park: Oxon: Routledge, 2006) 191; Audre Lorde, "An Open Letter to Mary Daly" in *Feminist History Reader* (Abingdon, Oxon: Routledge, 2005) 295. In gay and lesbian studies (and developing into) queer theory in the 1980s–early 1990s, theorists began to question the theoretical line between sexuality and gender and to reject essential categories of female/woman and between male/female as a biological or linguistic divide in determining the feminist subject. See on this point: Joan Wallach Scott, "Gender: A useful category of historical analysis" in *Feminist History Reader* (Milton Park: Oxon: Routledge, 2006) 133; Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990); Gayle Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality" in *Deviations: Gayle Rubin Reader* (Durham, NC: Duke University Press, 2011); Gayle Rubin, "Blood Under the Bridge: Reflections on 'Thinking Sex'" (2011) 17:1 GLQ J Lesbian Gay Stud 15.

[285] Romero, *supra* note 16 at 186; Nancy Levit & Robert R M Verchick, *Feminist legal theory: a primer* (2016). Romero refers to the 2006 edition of Levit & Verchick. I have reviewed the most recent edition, which also includes these three fundamental elements of feminist method in legal writing (at location 875 - 880). My online edition of Levit & Verchik 2016 is the kindle edition, which has location numbers rather than page numbers. This explains the location number identification in this reference and following.

[286] Levit & Verchick, *supra* note 285 at 875–891; Katharine Bartlett, "Feminist Legal Methods" (1990) 103:4 Harv Law Rev 829.

This necessitates a close reading of women's personal experiences in the real world and then to show how law's unequal consequences might be corrected. Levit and Verchick note that, in many cases, "asking the woman question" requires a feminist to look at the real impacts of regulation, including using data to reveal how seemingly neutral laws contain a gender bias, either for or against women.[287]

Romero is critical of framing the first of these fundamentals as 'the woman question'. He argues, in line with Halley, that this gendered framing of the inquiry "seems to presuppose the subordination of women to men, or females to males" in a theoretical, if not practical, sense.[288] Romero suggests that we might recast 'unmasking patriarchy' as 'asking the gender question' in feminist work. Considering the difficult identification of sex, gender and sexual orientation that is presented in my work, this is a useful amendment of these three pillars of method. As Romero argues, when cast as a 'gender question' generally, the method "is released from any substantive and prescriptive commitments attendant to a characterization in terms of patriarchy,"[289] and does not necessarily invite one of the stock, outcome-oriented feminist positions that Levit and Verchick identify as flowing from an 'unmasking of the patriarchy' method: including, ending women's subordination and/or increasing women's power.[290]

What would be wrong with either of those outcomes, if we apply unmasking the patriarchy as a fundamental element of method to feminist work? One difficult element, as postmodern, poststructuralist and queer theorists such as Francisco Valdes, Romero and Judith Butler have identified, is finding a place for queer people who might form part of a feminist project and who might deserve or want a 'feminist outcome', but don't satisfy the essentialist criteria of 'woman' that, historically, feminist theory has required.[291] Another problem for this category of feminist issues is the inapplicability of traditional

[287] Levit & Verchick, *supra* note 285 at 935.
[288] Romero, *supra* note 16 at 186.
[289] *Ibid*.
[290] Levit & Verchick, *supra* note 285 at 893; Romero, *supra* note 16 at 186–187.
[291] MacKinnon, *supra* note 266; West, *supra* note 266. I have referenced MacKinnon and West here, as representatives of dominance (power) feminism and cultural feminism respectively. While acknowledging the clear differences between these two feminisms, both prefer an 'essentialist' definition of Woman that makes little, if any, space for queer subjects or, as Harris commented, for women of colour who have competing, intersectional identities beyond that of 'woman'. "Like MacKinnon, West's 'essential' women all turn out to be white." Harris, *supra* note 281 at 605.

feminist outcomes to queer feminist questions. Romero explicitly addresses these issues by aligning the fluid nature of 'gender' as a definitional term with the evolutionary, flexible and responsive nature of feminist methodology. If we do not need to pin down the woman at issue in our work with biological or performative certainty, then we do not need to presuppose any substantive agenda by asking the gender question.

> Gender is not the property of any one theory, let alone subordination theory specifically. The concept of gender is not properly studied through any one framework or discipline or with any particular vision or past in mind.... Indeed, "asking the gender question" could end up advocating that women give up power to men in some realms, such as caretaking.[292]

I accept Romero's amendment to the 'woman question' in queer feminist methodology. 'Asking the gender question' is a useful feminist method element that links queer theory concepts of gender, sexuality and identity with feminist methods. Thus, in this work, I ask 'the gender question' in terms of power relations that operate in both religious contexts and this informs the legal analysis and feminist critique of male and female subjects. This questioning takes me to different theoretical places in each case, and leads to a different engagement with religious legal frameworks. I elaborate further on the significance of 'asking the gender question' further below.

4. Contextual reasoning

Contextual reasoning requires a researcher to closely inquire into social and personal histories of their subjects, relative perceptions between subjects (not just of gender, but this is a key matter for inquiry) and overall context.[293] This type of contextual inquiry gives form to the feminist maxim that "the personal is political". Levit and Verchick cite Mari Matsuda's explanation of how and why the feminist 'personal' is political,[294] but I find myself drawn to Carol Hanisch's 1969 paper 'the Personal is Political' as a persuasive forerunner of Matsuda's analysis.[295] Hanisch's critical presentation of herself in the context of community 'group work'—where she worked with other women to discuss their

[292] Romero, *supra* note 16 at 187.
[293] Levit & Verchick, *supra* note 285 at 935.
[294] Mari J Matsuda, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice" (1986) 16 NMLRev 613.
[295] Carol Hanisch, "The Personal is Political" in Shulie Firestone & Koedt, eds, *Notes from the Second Year: Women's Liberation* (New York: Radical Feminism, 1970).

different lives and analyse their struggles—reveals the sharp divide between theoretical feminist privilege (of knowledge, education and socio-economics) and the real, practical disadvantage that characterises gender inequality. Hanisch views the politicisation of the personal as an eloquent, effective way to overcome this divide and bring feminists together:

> One of the first things we discover in these groups is that personal problems are political problems. There are no personal solutions at this time. There is only collective action for a collective solution. I went, and I continue to go to these meetings because I have gotten a political understanding which all my reading, all my "political discussions," all my "political action," all my four-odd years in the movement never gave me. I've been forced to take off the rose colored glasses and face the awful truth about how grim my life really is as a woman. I am getting a gut understanding of everything as opposed to the esoteric, intellectual understandings and noblesse oblige feelings I had in "other people's" struggles.[296]

Ann Scales argues that contextual reasoning must include researchers taking a critical 'look to the bottom' in their legal research, applying Matsuda's definition of 'the bottom' as the situation of an actor situated within/among the "usually obvious structures of social hierarchy" that disadvantage them in structural ways.[297] This requires a feminist investigation to employ an intersectional analysis of relevant historical, political and moral judgements that can explain inequality in a holistic sense rather than a linear, causal relationship between law and disadvantage or, as Scales puts it, "the dead-endedness of the subject/object divide".[298] Scales links this type of contextual reasoning to 'asking the gender question'; as a bottom up inquiry will assume the identification of certain groups and group members (white, male, patriarchal) that have the legal power to "define, appropriate and control the realities of others."[299] Discovering where inequality lies, and for whom, is a contextual analysis that works constructively with a legal pluralist analysis of community norms and sanctions. Social hierarchy can create structural inequality as effectively (or more effectively) as can legal frameworks. In religious communities where religious law has more normative force than state law, a bottom up

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[296] Carol Hanisch, "The Personal Is Political: the original feminist theory paper at the author's web site", (February 1969), online: <http://www.carolhanisch.org/CHwritings/PIP.html>.
[297] Ann Scales, *Legal Feminism, Activism, Lawyering and Legal Theory* (New York: New York University Press, 2006) at 109; Mari Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 Harv Civ Rights- Civ Lib Law Rev 323.
[298] Scales, *supra* note 297 at 109.
[299] *Ibid* at 110.

investigation of the legal and community context that informs member behaviour is critical to developing a comprehensive understanding of identity issues.

Scales aligns this feminist method to the realization of intersectionality in identity and discrimination by legal feminists and by Law (writ large). Scales gives the historical example of women of colour who, in the 1980s, argued sexual harassment cases *as* women of colour rather than (a) as race discrimination and (b) as sex discrimination cases. Scales urges courts and activists to see injustice from the perspective of the whole person whose dignity has been silenced, rather than presenting that person as a series of legal classifications that have 'nothing to do with each other'. When we connect this non-privileged, look to the bottom reasoning with the conflict between religious and sexual identities that exists for L/G religious people, we see the value of a methodological 'look to the bottom' and contextual reasoning for this type of inquiry.

5. Consciousness-raising

'Consciousness raising' describes the process of sharing individual narratives, journeys and experiences and to derive collective meaning or significance from the sum of these, so as to understand and challenge structures of oppression. Levit and Verchick assert that consciousness-raising enables "women to begin to view their lived experiences not as isolated incidents of patriarchal insensitivity… but rather to see these as evidence of broader societal oppression" and to therefore enable them to "more easily unmask hidden biases and identify appropriate personal contexts in which to examine issues."[300]

Levit and Verchick cite different forms of narrative development and sharing in feminist legal theory that can raise shared consciousness of shared injustices and support structures, from the formal (for example, amicus briefs cited in family law disputes that tell a story of a mother's connection with her child) to the informal (blog sites such as The Mary Sue and Jezebel, that share feminist news and stories online). Relevant for my work in terms of Christian and Jewish communities, Levit and Verchick emphasise that the process of storytelling, discovering collective experiences and sharing those experiences

[300] Levit & Verchick, *supra* note 285 at 951.

is the priority for feminist method, not the end result. The argument here is that "sharing stories is good *per se* and helps build "spiritual and human values" in itself."[301]

This emphasis on the process rather than outcome of narrative sharing is important, because this project does not progress toward a traditional 'feminist outcome' through its presentation of shared experiences and collective consciousness.[302] Rather, the outcome is to give voice to, and understand, the legal environments that queer subjects operate within in certain religious communities and to discover how these subjects use law to limit and include/exclude their sexual identities. As we will see, there can be informal, negotiated outcomes for queer subjects within religious communities that are illuminated by the dual employment of (critical) legal pluralism and feminist methods (such as narrative sharing, consciousness raising and unmasking legal orders as systemically unfair). As such, this work seeks to investigate identity outcomes for L/G members of religious communities, but not in a strict 'carrying a brief for feminism' way that Halley would recognise as a goal of power feminism or cultural feminism. Rather, this work shares similar feminist goals to Angela Campbell's investigation of the operation of law on women in fundamentalist Mormon communities:

> This book aspires to be shaped by the experiences and perspectives of those who live under, construe and contest law and thereby deepen law's engagement with the lives of women whose accounts and knowledge have not traditionally formed part of law's canon. It does so by postulating that personal narrative and experience offered by those historically deprived of access to formal justice institutions can enrich perspectives on complex legal and social problems.[303]

The feminist goals of my work align with that of Shauna Van Praagh and Angela Campbell in that, in conservative Christian and Orthodox Jewish communities, access to secular law and justice institutions that recognise their sexual identity as valid may be *formally*

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[301] *Ibid* at 981.

[302] Angela Campbell summarises Halley's treatise on the 'three elements of any feminist undertaking', focusing on her critique of MacKinnon and West in *Split Decisions*: "it perceives distinctions being drawn between women and men; it accepts that women have historically been, and continue to be, subordinated to male interests; and it seeks to counter such subordination while improving women's justice outcomes." Halley shorthands these three feminist elements as: 'M/F, M>F and carrying a brief for F". Campbell, *supra* note 154 at 5; Halley, *supra* note 266 at 22. In terms of feminist and legal pluralism investigations into identity and religious communities that informed Campbell's approach, see: Van Praagh, *supra* note 10. "Van Praagh's analysis [of Chasidic communities in Montreal] demonstrates how layering feminist and critical legal pluralist lenses lends itself to identifying the contradictions and fluidity in women's experiences." Campbell, *supra* note 154 at 7.

[303] Campbell, *supra* note 154 at 5-6 (footnote omitted).

possible (in the form of guaranteed exit rights and secular rights guarantees that exist outside their religious community) but, in many cases, is not *substantively* possible without irrevocably splitting the person from their community, their religious faith and, in many cases, their families. Thus, these L/G subjects experience religious law in a top-down, hierarchical way, and experience state law in a distant, peripheral way. An exercise to understand the legal frameworks and gender stereotypes that operate on queer religious people, and a sharing of their stories beyond their own communities, encourages awareness of secular law developments and, in some cases, increases interaction with non-religious queer communities and allies who could provide support while also respecting a person's deep personal faith.

(2) Adapting a feminist method to tell queer stories

Historically, the relationship between feminism and queer theory is fraught. Much of the fighting between these two theories is done on the ground of gender and sexual identity. Several questions rise out of this debate that are relevant for this dissertation, given the significance of 'queer' identity to the people whose stories I tell, and the significance of heteronormative gender assumptions about law and people by their religious communities. These questions are directed not only to the multi-stranded and diverse feminism project, but also to queer theory projects, where there is deliberate obfuscation about just who is the queer subject, and what queer theory is designed to critique. Is it productive to maintain a theoretical separation between gender as a feminist issue and sex/sexuality as a queer theory issue? Are questions of sexuality and sexual identity the *de facto* purvey of queer theory? Must a feminist analysis focus on male dominance and the subordination of women theory as a starting point for discussions of gender and identity? Specific to this work: is it ever helpful to discuss matters of identity, gender and sexuality about queer men and women from a *feminist* perspective? These questions deserve attention as I reflect on points of intersection between feminism and queer theory.

Halley writes that, from the beginning of the postmodern era (the early 1980s), feminism has been forced to confront a new emphasis on "subject formation rather than brute domination as the really trenchant application of power to persons", a focus shift that

gave rise to productive splits in feminist discourse.[304] Queer theory, sex-positive feminism and transgender politics emerged in these splits to offer answers to definitional questions of gender, sexuality and power relations in ways that both were and were not 'feminist'. These different theoretical positions also opened the door to discussions of queer and male sexuality as relevant to feminism. I do not adopt Halley's positioning on the value of separating queer theory from feminism, either on a theoretical basis or methodological basis.[305] However, her statements about the limitations of power and cultural feminisms to address queer issues, notably those relating to minority sexual and gender identities, are relevant to this work.

1. Defining 'queer legal theory'

To consider how queer theory elements can influence feminist methods, I begin by introducing the queer theory project and providing a definition of queer legal theory. Michael Warner considers that the publication of Michel Foucault's *History of Sexuality* in 1976 (in French, rather than the later English translation) is the true beginning of queer theory.[306] Foucault's thesis opened discussion of sexuality as a stabilised state of being rather than a natural state that was structured by modern society "as a field of regulation, therapy and liberation simultaneously".[307] For Warner, Foucault's work made possible a 'coming of age' moment for queer theory (as it did for feminism) when, in a postmodern context, the concept of 'sexual orientation' as a strictly biological trait was questioned and compared to the concept of sexual orientation as a social construction (the essentialism/constructionism debate).[308] This dialectical shift also empowered queer

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[304] Halley, *supra* note 266 at 37.

[305] Rather, I approve of the arguments made by Culbertson & Jackson and Romero in critiquing Halley's position taken in *Split Decisions*: that her view of 'feminism' is relatively reductive, in that she defines much of postmodern feminism and queer feminism out of her target area, thereby arguing that certain works 'take a break' from feminism when they may not be doing that, or do not need to. I discuss this further below. Romero cites Butler's *Gender Trouble* and *Against Proper Objects* as queer works that 'have a lot to say about gender', and as feminist works that 'have a lot to say' about sexuality and that they do this without 'taking a break'. Romero, *supra* note 16 at 195. Tucker Culbertson & Jack E Jackson, "Proper Objects, Different Subjects and Juridical Horizons in Radical Legal Critique" in *Feminist and Queer Legal Theory Intimate Encounters Uncomfortable Conversations* (Surrey: Ashgate Publishing Limited, 2009) 135 at 147.

[306] Michel Foucault, *Histoire de la sexualité, tome 1 : La volonté de savoir* (Paris: Gallimard, 1976).

[307] Michael Warner, "Queer and Then?", *Chronicle of Higher Education* (1 January 2012), online: <http://www.chronicle.com/article/QueerThen-/130161>.

[308] Francisco Valdes, "Queering Sexual Orientation: A Call for Theory as Praxis" in *Feminist and Queer Legal Theory Intimate Encounters Uncomfortable Conversations* (Farnham, Surrey: Ashgate Publishing Limited, 2009) 91.

theorists (including feminists) to question the type of relationship that needed to exist between sex, gender and sexual orientation, and to challenge the association between gender typicality with majority heterosexuality.[309]

Queer theory then began to evolve out of the 'gay and lesbian studies' movement of the 1970s, the beginning of which can be tentatively marked by the first law review symposium on 'sexual orientation' held in 1979.[310] The goals of first wave sexual orientation legal scholarship were to create and recognise a critical discourse about sexual orientation that raised issues of discrimination against sexual minorities, notably gay and lesbian people and worked to counter that discrimination.[311] Valdes describes this 'first wave' scholarship as evolving into 'second wave' queer theory scholarship in the 1990s.[312] For Valdes, the goals of second wave queer scholarship relate to sexual identity and sexuality, are multifaceted, and require activists and theorists to shift focus from formal equality discussions to more complex subordination and intersectional discourses that build on outsider scholarship from postcolonial and postmodern history, sociology and feminism.

> Queer legal theory of the second stage would aim affirmatively to dismantle interlocking systems of sociological stratification based on sexual orientation *and* various intersecting forms of identity, such as class, race, ethnicity, **gender** or immigration status.[313]

Valdes' definition of the current queer project is broad and multipurposed. He argues that the productive evolution of queer legal theory will *require* intersectional analysis of other forms of disadvantage in addition to sexuality and the treatment of sexual minorities; to ignore the intersections between colour and sexuality is to assert a false dichotomy

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[309] MA Case, "Disaggregating gender from sex and sexual orientation: The effeminate man in the law and feminist jurisprudence" 1 Yale Law J 105; Katherine M Franke, "The central mistake of sex discrimination laws: The disaggregation of sex from gender" 1 Univ Pa Law Rev 144; Francisco Valdes, "Queers, sissies, dykes, and tomboys: Deconstructing the conflation of 'sex', 'gender', and 'sexual orientation' in Euro-American law and society" (1995) 1 Calif Law Rev 83.
[310] Valdes, *supra* note 308; Rhonda Rivera & et al, "Sexual Preference and Gender Identity: A Symposium (1979)" (1978) 30 Hastings Law J [xi].
[311] Valdes, *supra* note 308 at 92.
[312] Warner credits the first, public employment of the term 'queer theory' in a non-pejorative sense to Teresa de Lauretis, who organised a conference called 'Queer Theory' at the University of California, Santa Cruz, in 1990. Warner, *supra* note 307 at 98; David Halperin, "The Normalization of Queer Theory" (2003) 45 J Homosex 339.
[313] Valdes, *supra* note 308 at 92 (emphasis added).

between "sexual orientation" and "race" or "ethnicity" that denies the shared social and legal barriers to these persons and groups.[314]

So, the queer theory project respects diversity, intersectionality and has developed a postmodern concern with sexuality and gender as forms of power relations that are less natural than they are constructed. Yet, beyond a list of theoretical commitments, queer theory remains deliberately evasive as to the limits of its core project. Michael Warner and Lauren Berlant wrote in 1995 that "queer theory is not the theory *of* anything in particular, and has no precise bibliographic shape … Queer publics make available different understandings of membership at different times, and membership in them is more a matter of aspiration than it is the expression of an identity or a history."[315] For Romero, Valdes' centring of future queer theory on the 'sexuality project' is unnecessarily reductive and in fact works against the requirement that intersectional scholarship (including critical race theory and postmodern feminism, for example) be considered queer.[316] 'Queer', Romero argues, cannot exclude non-sexuality based inquiries on that basis alone. Rather, Romero asserts (borrowing from David Halperin) that, in queer legal theory and method, the term 'queer' is best understood as a methodological description (a frame) rather than a substantive concept (a target).

> [Q]ueer method refers not to a positivity but to a positionality vis-à-vis the normative. Thus the method of queer theory involves an oppositional or non-normative inquiry into law and legal things…. While specific queer projects certainly can and should do as Valdes suggests, queer legal methods ought not to be defined in connection with substantive agendas and commitments.[317]

This definition of queer theory as a methodological introduction to non-normative inquiries complements the use of feminist method to discuss queer subjects. In my discussion of feminist method, I adopted Romero's amendment to the element of unmasking the patriarchy, agreeing that the right tactic in an investigation where queer theory and feminism seem to dovetail is 'to ask the gender question', and to embrace all the attendant uncertainties about gender and sexual identity that this entails, rather than

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[314] *Ibid*.
[315] Lauren Berlant & Michael Warner, "What does Queer Theory teach us about X?" (1995) 110 PMLA 333.
[316] Romero, *supra* note 16 at 192.
[317] *Ibid* at 192–193. Citing David Halperin, *Saint Foucault: Towards a gay hagiography* (New York: Oxford University Press, 1995).

cutting off discussion of queer issues and sexuality as beyond the scope of a feminist inquiry. Equally, 'asking the gender question' enables discussion about heteronormativity, the homosexual subject as Other, and a discussion of the biological versus social concept of gender. This leads to the following inquiries relevant to my work: How much safer is it for a woman to be a mother or wife compared to identifying as a lesbian in Orthodox Jewish communities? How do Christian 'ex-gay' men adopt patriarchal gender roles and reject other personas as unnatural and unlawful? How can lesbian sex not be considered a 'sexual act' in biblical law, while male-male sexual relations are prohibited by death? Does the separation between male and female sexual regulation in religious law demonstrate inherent gender hierarchy?

Asking these questions, framed in feminist narrative and informed by queer legal theory, leads to a more creative and thoughtful consideration of the queer subject as the minority member of heteronormative religious communities. These subjects are not just 'ex-gay', 'queer' or 'lesbian', but are also male, female, a minority voice in an unfriendly majority, a feminist, and/or an anti-feminist, a legal object, or an agent of change. Romero explains that, once we view 'queer' as a methodological description, queer theory and feminism can "rightly collapse" together, as they will employ similar methods and strategies to analyse a non-normative subject, and can engage in a range of theoretical investigations that would otherwise go unexplored.[318]

A legal pluralist analysis of religious law is an intersectional answer to the socio-legal issue of identity politics in closed religious communities that benefits from a blended feminist/queer methodology. In the case of lesbian Orthodox Jewish women, I assert that some of the negotiated positions reached between queer subjects and rabbinical authority constitute improvised law that fuses the concept of queer identity with traditional *Halakha* positions on weddings, marriage and partnership. This investigation requires investigation of the different feminist, queer, legal and sociological relationships that exist in Orthodox Jewish communities and how these can evolve when lesbian subjects actively challenge heteronormative religious law. Thus, the methodological description of queer

[318] Romero, *supra* note 16 at 194.

theory presented by Romero provides another useful, oppositional inquiry into the operation of law in religious communities.

2. Managing the points where feminism and queer theory intersect

Katherine Franke situates the beginning of the queer vs feminism debate with Gayle Rubin's 1984 article *Thinking Sex*, in which Rubin suggests that feminism was "best equipped to analyze and address gender-based subordination and that a different discourse was needed to adequately analyze sexuality."[319] Likewise, Elizabeth Weed asserts that, however much queer theory might have worked to resist theoretical consistency, one uniting position for queer theorists is that "considerations of sex and sexuality cannot be contained by the category of gender" and, therefore, it cannot be contained as a subset of feminism.[320] So, is the line of demarcation sufficiently clear? Feminism takes responsibility for the discourse of gender and gender-related subordination (based on a heterosexual and heteronormative hierarchy) and all things relating to sexuality, including sexual identity, sexual play and orientation, is the exclusive purvey of queer theory. However, there is the recurring issue of overlap and interconnection, as Butler notes in "Against Proper Objects":

> Can sexual practices ever fully be divorced from questions of gender, or do questions of gender persist as the "unconscious" of sexual play? Such a question is not meant to return us to the pathos of an irrefutable "sexual difference", but to suggest that the "break" with gender always comes at a cost and, perhaps also, with its spectral return.[321]

Butler's concern about splitting of gender and sexuality here builds on her formative analysis in *Gender Trouble* of gender as a performative construct. Butler suggests that we reconsider 'gender' and 'sex' (not elided, but similarly explained) as a series of internalised, performed repetitions that are conditioned to be normal/abnormal by the frameworks of modern society.[322] Halley notes that Butler's thesis does not argue for or

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[319] Rubin, *supra* note 284; Katherine M Franke, "Theorizing Yes: An Essay on Feminism, Law and Desire" in *Feminist and Queer Legal Theory: Intimate Encounters Uncomfortable Conversations* (Surrey: Ashgate Publishing Limited, 2009) 29.

[320] Elizabeth Weed, "Introduction" in Elizabeth Weed & Naomi Schor, eds, *Feminism meets queer theory* (Bloomington: Indiana University Press, 1997) at viii.

[321] Judith Butler, "Against Proper Objects" in *Fem Meets Queer Theory* (Bloomington: Indiana University Press, 1997) ("Against Proper Objects") at 3.

[322] "Gender is the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being." Butler, "Gender Trouble" *supra* note 249 at 43.

against a view of heterosexuality as normal or ascendant, but rather takes the position that the male/female distinction repeatedly exists as "an infliction – a law- that one was doomed to repeat, again and again and again, whether in becoming a girl or a woman or in becoming a boy or a man."[323] In this matrix of gendered performance, feminism should promote 'gender trouble': that is, repeat gender recitations in a different, subversive way that makes queerness possible.[324] Here, Butler blurs the hard line between gender and sexuality and argues that putative attempts to carve out (unshared) theoretical ground for queer theorists and feminists create "chiasmic confusion in which the constitutive ambiguity of "sex" is denied in order to make arbitrary territorial claims,"[325] rather than ensuring clean theoretical categories. The search for 'proper objects' in both queer theory and queer feminist theory in turn leads to internal violence erupting between minority communities "at an historical moment in which the struggles between them need to be put into a dynamic and empowering interplay."[326]

Halley argues that many of the current issues surrounding equality, law reform and governance no longer fit within a power feminist or cultural feminist frame.[327] She suggests that queer projects that move beyond the constraints of the traditional feminist project engage with issues of gender and sexuality in compelling ways that reveal, among other things, the real necessity of 'inequality' outcomes in some gender debates. For example, Halley analyses Duncan Kennedy's article *Sexy Dressing* as a piece of *queer* legal scholarship, and argues that Kennedy's conclusions about sexual politics and sexual regulation – that the 'truth' and the 'real' are not the grounds on which we can base cost-benefit assessments about heterosexual desire, domination/subordination and pleasure/resistance – are more realistic than the 'feminist conclusion' which, for Halley,

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[323] Halley, *supra* note 266 at 137.
[324] "[G]ay is to straight not as copy is to original, but, rather, as copy is to copy. The parodic repetition of "the original"... reveals the original to be nothing other than a parody of the idea of the natural and the original." Butler, "Gender Trouble" *supra* note 249 at 31. Ellen Armour and Susan St. Ville elaborate on Butler's gender as performance thesis: "To perform is to re-cite but to recite is not necessarily to repeat. Citations can be faithful reiterations, but iteration is made possible only by the space between the copy and the copy. No repetition is exactly the same. It is this space that opens up possibilities for subversion and change." Ellen T Armour & Susan M St Ville, *Bodily Citations: Religion and Judith Butler* (New York: Columbia University Press, 2006) at 7.
[325] Butler, "Against Proper Objects" *supra* note 322 at 8.
[326] *Ibid*.
[327] Halley, *supra* note 266 at 167.

requires agreement that structurally, laws diminish women against men (M>F) and exhorts theorists to propose legal outcomes to redress that balance and increase equality outcomes ('to carry a brief for F').[328] Halley argues that this formula, when applied to the question of why and how men objectify and assault women for 'sexy dressing' is not sufficiently complex:

> A much better fit, it seems to me, is the nonrealist picture of law Kennedy sets out in *Sexy Dressing*: a complex system of legal rules sustaining a tolerated residuum of abuse, plenty of false-positive accusations and convictions, strategic actors politically engaged in the system at all levels – all in a legal system that looks more like a social semiotics than a mandate for the vindication of any one single Truth.[329]

I consider Halley's presentation of the feminist project to be overly-prescribed. As Romero has pointed out, there are many different feminisms, and postcolonial and postmodern feminist theorists take a different view of the priorities of gender, sexuality and race to power and cultural feminism.[330] In terms of the question of whether one has to 'take a break' from feminism to engage in valuable queer research, I prefer the position of Culbertson and Tucker who argue that the best way to consider the queer/feminist divide is to look critically at the subject of study and then apply reasoned critique to any subject that deals with sexual difference (including sexuality and/or gender) and that subordinates or critiques that difference through power relationships, codified in certain arrangements and practices.[331] In terms similar to Butler, Culbertson and Jackson warn that separating queer theory from feminism (and *vice versa*) can have the effect of only telling half the story of an injustice, or of excluding a necessary topic of inequality, such as "those racial, economic, national and other Others who are never really either in or out of this inside/outside framework."[332] This position accords with that of Romero, who argues that, if legal theorists really are faithful to the shifting, uncertain nature of the Queer subject, then they must accept that a hard line between proper objects of study is illusory. Further, there is real danger of obscuring valuable subjects for queer and feminist study on the basis of definition alone.

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[328] *Ibid* at 174.
[329] *Ibid* at 185.
[330] Romero, *supra* note 16 at 182.
[331] Culbertson & Jackson, *supra* note 305 at 138.
[332] *Ibid*.

The theoretical struggle between sexuality and gender is relevant to my work because, as Butler warns, the search for 'proper objects' in queer/feminist projects has led to unnecessary gaps in theoretical coverage of certain 'queer' and 'feminist' issues that would otherwise be valuable for an interdisciplinary and intersectional analysis. The subjects of this dissertation (queer, conservative and religious people) are too often overlooked or disregarded as a valid area of research because there are assumptions drawn about whether these people 'fit' within either a queer theory or feminist category. For example, self-identified 'ex-gay' Christian men might classify themselves out of the LGBTQQIP2SAA community (on a sexuality basis: 'it's immoral and unnatural to be gay'), but the LGBTQQIP2SAA community equally does not reach out to include them in the queer theory project, either on a practical or theoretical level. Does that mean that study of this group is not a 'proper object' for queer theory? Similarly, when Orthodox lesbian women distance themselves from third wave feminist movements because they find them aggressively secular and sex-positive,[333] does this mean that their goal to be recognised as lesbians by their families and Rabbi, while still dressing conservatively and upholding traditional family structures, is not a feminist one? If a queer project is intended to question normative frameworks and critique laws for structural injustice to sexual minorities, and a feminist project is intended to discover and interrogate the patriarchy in the same way, then in this project at least, to mark a strict division between sexuality and gender is unhelpful. Matters of sexuality and gender are both relevant to the two communities in this work, and both are directly relevant to the legal frameworks that are the subject of critique. Separating them from each other, or arguing for exclusion of a community of queer people from a political movement because they are not 'traditionally queer' or 'traditionally feminist', is at odds with the theoretical and methodological foundations of both projects.

For this reason, my analysis imports definitions and discussion points that speak to a subject's sexuality, sexual preference and gender; and there are deliberate moves between queer theory and feminist method as the subject demands them. In framing this

[333] Judith Plaskow, "Sexual Orientation and Human Rights: A Progressive Jewish Perspective" in the *The Coming of Lilith: Essays on Feminism, Judaism, and Sexual Ethics, 1972 - 2003* (Boston: Beacon Press Books, 2005).

methodology, my starting position is to always 'ask the gender question'. As I situate injustice, I note that part of the answer to the gender question may well be that 'gender is only part of the issue', and my task will then be to consider how the law governs sexuality and the expression of that sexuality. For example, an investigation of gendered concepts of law are relevant to my examination of Christian regulations that have the form and substance of a legal sanction against sexuality. In my analysis of ex-gay Christian communities, I draw on first-hand accounts of wives of ex-gay men who are coached to 'do femininity right', that is, to wear pretty clothes, to stay fit and thin, to bear children and be proud housewives: all as a constant reminder of the biblical position against their husbands' wayward, queer sexuality. This presentation of gender inverts Halley's view of the feminist project in that Christian women apply persuasion through tactical submission to assert authority over their husbands. This is an unusual occurrence in communities where gendered law traditionally situates the husband and father as the legal authority.[334] While these women are definitely not 'carrying a brief for F' in the strict sense of Halley's definition, they are asserting a justice outcome for themselves and their families, as they see it. In this case, gender and sexuality operate in a lawful/unlawful binary and the (ex)-gay man is the site of this legal exchange. Separating out the queer/feminist aspects of this subject would risk failure of seeing the whole story and would limit the depth of the legal commentary.

(3) Conclusion: the value of a (queer) feminist method

Finally, there are considerable benefits to combining queer theory and feminist approaches to the issue of sexual and gender identity when considering the identity struggles that exist for queer people living within religious communities. The determination of whether (and if so, how) queer religious people can maintain a healthy personal identity that relates to their sexuality, while still maintaining a strong connection with their religious faith, is a central concern of this work. When considering potential religious communities for my case studies, I looked for groups of people who do not

[334] I discuss this gender dynamic further in chapter 4, drawing on Michelle Wolkomir's interviews with wives of ex-gay Christians. For a treatise on tactical submission by Christian women to exert influence within religious communities see: R Marie Griffith, *God's Daughters: Evangelical Women and the Power of Submission* (Berkeley: University of California Press, 1997).

necessarily first identify with a secular queer or feminist perspective on sexuality and gender. Equally, I looked for religious communities that encouraged a strong connection between religious law and custom and the personal lives and relationships of members of that community. The result of these inquiries is the discussion of two different presentations of identity in people of different genders and with different sexual orientations/preferences. I employ a flexible and intersectional feminist method to present identities: one that gives voice to queer theory concepts of sexuality as a construct or evolution rather than biological imperative. Framed by this method, my analysis has sufficient critical depth to suggest links between religious law, secular law and identity representation, while still respecting the personal choice and identity definitions given to themselves by the men and women in Christian and Jewish communities.

As I conclude this chapter, I point to ways in which feminist method and queer theory make productive contributions to the discussion of sexual identity formation. I elaborate further on these contributions in chapter 6, when I discuss how Orthodox lesbian women engage in a dialogue between their religious and queer identities. In their sociology/psychology study of Orthodox Jewish lesbian and transgender women and gay men (2006) Irit Koren and Tova Hartman Halbertal usefully summarise the queer theory research discourse of queer identity formation in young subjects as following this trajectory:

(a) A general sense of feeling different;
(b) Manifestations of disassociation and stages of coming out to oneself; which then culminates in
(c) An identity crisis point, at which point the young person recognises the stigma that attaches to their sexual identity (and potentially gender identity); moving to
(d) Stages of integration, affirmation and identity synthesis.[335]

Koren and Halbertal note that, comparatively to studies of gay Catholics, L/G Orthodox Jews tend to experience identity progression in a dialogic pattern; with the master identity narrative of their religious belief contesting their personal narrative of sexual self. They suggest that, contrary to theories of identity reconciliation and synthesis, in this

[335] Halbertal & Koren, *supra* note 17 at 46–47.

group, “the picture that emerges is rather of two mutually exclusive selves that, following formative periods of intense conflict and struggle, manage ultimately to achieve a working coexistence within the same body and mind.”[336] Contrary to the synthesis or reconciliation model of identity proposed above, both the religious and sexual identity are experienced in essential and non-negotiable terms. This idea of dual identities in constant conflict and movement opposes the constructivist concept of gay and feminist identity as essential or non-optional, proposed by Butler and other constructivist theorists in the 1990s.[337] It also challenges older, more established model of synthesized identity which charts the progression of minority identity development, advanced by theorists such as Vivian Cass.[338]

In this dissertation, Koren and Halbertal’s general conclusions about dialogic identity formation (rather than identity synthesis) resonate with some of the stories told by lesbian Orthodox Jewish women. I also suggest similar outcomes in relation to the identity struggle of ex-gay Christian men (although in different terms, as ex-gay Christian men begin from the position that their queer identity will be successfully transformed through obedience to their Christian identity). However, the creation of a sexual identity synthesis and reconciliation model by queer theory and psychology literatures provides a useful framework to structure my examination of L/G religious and sexual identities in two religious contexts. Further, the queer feminist position that the L/G self is an essential aspect of personhood informs my reading of narratives of L/G religious people about the dilemma of their dual identities. Ultimately, I conclude that the reconciliation model of sexuality is unrealized in these two contexts, just as the ‘sexual change transformation’ identity model proposed by ex-gay Christians is unsustainable. However, adopting a mixed queer theory and feminist method to choosing narratives and selecting questions to ask about sexual orientation, gender and religious identity, enables me to reach this conclusion.

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[336] *Ibid* at 39–40.
[337] Butler, "Gender Trouble" *supra* note 249; Judith Butler, *Bodies that Matter: On the Discursive Limits of “sex”* (New York, Routledge, 1993).
[338] Vivienne C. Cass, “Homosexuality Identity Formation: A Theoretical Model” (1979) 4:3 J Homosex 219, online: <https://doi.org/10.1300/J082v04n03_01>.

In this chapter, I have summarised the history of feminist methodologies and set out relevant queer theory contributions and challenges to feminist theory and method. I have demonstrated that both feminist method and queer theory are flexible, non-neutral and able to value personal narratives and interpersonal connections as political and legal events. I have made the case that, by adopting queer theory elements into a feminist methodology, we can present a clearer picture of queer legal subjects who experience law and debate matters of identity in complex, disparate ways. Lastly, I have I have drawn on queer theory constructs of identity to inform my investigation into L/G Christian and Jewish legal subjects. I have argued that queer and feminist models of L/G identity as non-negotiable and reconciled with competing senses of self are useful starting points for this investigation. In the next three chapters that follow, I adopt the queer, feminist method set out above to present stories of identity in different religious and legal contexts.

Chapter 4

"The Unrighteous Will Not Inherit the Kingdom of God"

Ex-gay Christian communities, reparative therapy and religious law

> Or do you not know that the unrighteous will not inherit the kingdom of God? Do not be deceived: neither the sexually immoral, nor idolaters, nor adulterers, nor men who practice homosexuality, nor thieves, nor the greedy, nor drunkards, nor revilers, nor swindlers will inherit the kingdom of God. And such were some of you.[339]

Introduction

On 18 December 2014, seventeen-year-old Leelah Alcorn committed suicide by throwing herself in front of a semi-trailer truck on a Cincinnati highway.[340] Before leaving home, Leelah left an online suicide note in which she despaired for her ability to live openly and safely as a woman. Leelah wrote that she had first come out to her mom when she was 14 years old, but had been told that "God doesn't make mistakes" and that "she would never live as a real girl".[341] When Leelah came out as gay at high school at age sixteen (as a transitional position to identifying as transgender) her parents removed her from school and sent her to a Christian reparative therapy camp where she was prescribed anti-depressants and sessions of intense bible study to 'cure her homosexuality'.[342] Two months before she died, Leelah reached out to an online LGBT forum where she spoke openly about wanting to kill herself after her parents forced her to undergo reparative therapy.

> The [sic] would only let me see biased Christian therapists, who instead of listening to my feelings would try to change me into a straight male who loved God, and I would cry after every session because I felt like it was hopeless and there was no way I would ever become a girl. Eventually I lied to them and told them I was straight and that I was a boy, and then the derogatory speech and neglect started to fade. I tried my absolute hardest to live up to

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[339] 1 Corinthians 6:9-11, *The Bible* Authorized King James Version.
[340] Jon Blistein, "Trans Teen Pens Heartbreaking Suicide Note", *Roll Stone* (30 December 2014), online: <http://www.webcitation.org/6Xh3GvvEx>.
[341] Sarah Malm, "Trans teen leaves suicide note blaming her Christian parents", *Daily Mail* (30 December 2014), online: <http://www.dailymail.co.uk/news/article-2891267/Transgender-teenager-leaves-heartbreaking-suicide-note-blaming-Christian-parents-walking-tractor-trailer-highway.html>.
[342] *Ibid*.

> their standards and be a straight male, but eventually I realized that I hated religion and my parents. [343]

In a response to criticism about her failure to acknowledge Leelah's transgender identity, Carla Alcorn responded by saying "we loved him [Leelah] unconditionally. We loved him no matter what. I loved my son. He was a good kid, a good boy." Carla acknowledged that Leelah had told her that "she was transgender", but said that she did not accept her gender identity for religious reasons.[344] Leelah's death quickly became a flashpoint for the tension between religious freedom and LGBT rights in America, with a focus on the rights of young people and children living within Christian communities.[345]

In online responses to human rights claims put by LGBT activists following Leelah's death, some evangelical Christian commentators responded by asserting that transgender identity and homosexuality are mental disorders that can be cured through reparative therapy and prayer, and that 'Joshua' had died because he was not yet cured of his homosexual illness. For example, Christian commentator Libby Anne describes this evangelical perspective of the tragedy of the Leelah Alcorn story as a sorrowful narrative that inverts the causation of teen suicide from the 'harmful Christian community' to 'harmful gay lies' about a lifestyle choice that only alienates and injures young people:

> To evangelicals…. These teens… committed suicide not because they were bullied or made to feel worthless, but rather because they were gay. Being gay is a "destructive lifestyle" that leads to high suicide rates, spiritual darkness, devastating diseases, and, finally, death…The solution is not to tell these teens that "this is how you are and you can't change" but rather to work to change these teens so that they can live long happy godly lives. [346]

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[343] Leah Alcorn, "Is this considered abuse?", (October 2014), online: *Reddit Asktransgender* <https://www.reddit.com/r/asktransgender/comments/2km6yt/is_this_considered_abuse/>.

[344] Ashley Fantz, "Ohio transgender teen's mom: 'He was an amazing boy'", *CNN*, (31 December 2014) online: <http://www.cnn.com/2014/12/31/us/ohio-transgender-teen-suicide/index.html>.

[345] Jessica Valenti, "Homophobic, transphobic parents make abusive homes. Let's help LGBT kids get out", *The Guardian* (5 January 2015), online: <http://www.theguardian.com/commentisfree/2015/jan/05/homophobic-transphobic-parents-abusive-homes-lgbt-kids>; Michael Brown, "Did Christian Parents Drive Their Child to Suicide?", *Charisma News*, (31 December 2014) online: <https://www.charismanews.com/opinion/in-the-line-of-fire/46616-did-christian-parents-drive-their-child-to-suicide>.

[346] Libby Anne, "Leelah Alcorn and Evangelical Storytelling", (4 January 2015), online: *Love Joy Fem* <http://www.patheos.com/blogs/lovejoyfeminism/2015/01/leelah-alcorn-and-evangelical-storytelling.html>.

In this chapter, I analyse, through legal pluralist and feminist lenses, the normative environment that authorizes reparative therapy and renders it compelling for evangelical Christian communities in America. I situate ex-gay communities and ministries within the broader framework of evangelical and fundamentalist Christian movements in the United States, and I explain the different definitional positions that are taken in relation to Christian doctrine by these ministries: notably the prohibition against homosexuality in the Old and New Testament and the emphasis on the family as the natural, *lawful* living state for practicing Christians. I make the argument that viewing religious norms as 'law at work' in the field of ex-gay ministries and in the selves of ex-gay people gives a deeper, more nuanced understanding of the identity conflict that ex-gay evangelical Christian men experience between their sexuality and their religion.

The first part of this chapter outlines the research methodology and sources that informed my analysis of the ex-gay movement in the United States. I summarise the different stages of my research into evangelical Christian ex-gay ministries, and discuss in detail the two ethnographic sources that form the foundation of my legal analysis, set out in part III. I also discuss the different limitations and boundaries of this research in terms of group identification: explaining my focus on the lived experience of ex-gay Christian men rather than women, and on my focus on evangelical Christian ex-gay narratives rather than similar narratives that exist in other religious faiths. Lastly, I argue that the prevalence of ex-gay ministries and supportive Christian churches in indicates that this issue remains a relevant subject for legal analysis, despite the recent dissolution of the high profile ex-gay ministries Exodus International and Love in Action.

In part II of this chapter, I explore the limitations of doctrinal analyses of ex-gay Christian communities, and the limitations of state law responses to the issue of reparative therapy and other religious interventions to transform sexuality. This discussion demonstrates the benefits of legal pluralist and critical legal pluralist inquiries into how law operates and affects identity in these communities. This discussion frames my later argument that evangelical religious law (discovered through a legal pluralist analysis) has contextual significance to the identity dilemmas of ex-gay Christian men. In this part, I set out the current legal position on reparative therapy in the United States in 2018 and explain the limitations of state-law responses to reparative therapy and related religious practices.

As I argue in chapter I, these limitations centre upon the strength of constitutional protections of religious freedom, and the attendant freedom given to religious groups to determine private community matters, including those matters that relate to marriage and the recognition of sexual identities. I provide an historical overview of reparative therapy and explain its symbiotic relationship with evangelical Christianity. I argue that that the transformation narrative of sexuality relied on in ex-gay communities requires both a strong belief in certain religious rules and norms, and personal faith in the pseudo-science basis of clinical reparative therapy. I then outline the narratives of gender damage/development and the 'absent father/strong mother' that are favoured by reparative therapy clinicians and the religious ex-gay movement.

In part III of this chapter, I apply a legal pluralist framework to analyze law that is operative within ex-gay communities. I make the case that the nature of the normative/legal order and legal relationships that operate (in a hierarchical model) between ex-gay Christians and their religious communities are appropriate subjects for a legal pluralist framework.[347] I briefly discuss the application of Tamanaha's and Macdonald's criteria for social legal orders that operate separately to state-made law and resist its interference.[348] I apply Tamanaha's threshold criteria for the recognition of a religious normative order; particularly the requirements that a religious normative order is seen as special and distinct by its members and that this system has normative supremacy over matters within its control.[349] In relation to these criteria, I begin my legal pluralist analysis with a brief discussion of the normative background of evangelical Christianity in the United States, with a focus on the significance of fundamentalism and literalism in terms of how ex-gay communities apply religious doctrine.

I then continue the legal pluralist analysis in depth, by applying Howard Kislowicz's five aspects which can identify when some religious practices and internal regulations have the normative quality applicable to a legal order and can therefore be considered to

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[347] I discuss Tamanaha's and Macdonald's different models of strong legal pluralism and their criteria for social normative orders in chapter 2 at pages 90- 92. See: Macdonald, "Custom Made, 2011" *supra* note 29; Tamanaha, "Understanding Legal Pluralism, 2007" *supra* note 185; Tamanaha, "Folly of Social Scientific, 1993" *supra* note 193.
[348] Tamanaha, "Understanding Legal Pluralism, 2007" *supra* note 185; Macdonald, "Metaphors, 1998" *supra* note 9.
[349] Tamanaha, "Understanding Legal Pluralism, 2007" *supra* note 185 at 42.

properly belong to 'law's family'.[350] I apply these aspects to the specific Christian rules that apply in an ex-gay community environment: with a focus on rules concerning gender expectations, family structure and the biblical injunctions against homosexuality. Kislowicz's five aspects are as follows:

1. That the religious subjects symbolize their practices as rules, and view them as obligatory in meaningful ways.
2. That the legal practices flow from higher principles within a larger tradition.
3. That the religious practices at issue are regulated in detail and have practical effects on the lives of practitioners.
4. That there is interpretation and discussion about the import and nature of religious obligations and their provenance.
5. That there is a religious community that draws on religion to make basic social ordering decisions.[351]

In this part, I combine a legal pluralist analysis with a feminist method to highlight the significance of gender in ex-gay family relationships: briefly exploring what role the feminine woman plays in encouraging 'healthy gender identification' (good mother, good wife, bad mother, bad woman) and considering how gender is relevant to the legal relationships that develop in reparative therapy contexts and within ex-gay evangelical communities. I unpack the significance of gender distinctions in reparative therapy norms and religious doctrine and accept the historical significance of the subordination of the female in these discourses. I also seek to understand this subordination from an ex-gay perspective and from a gendered perspective of the woman/wife/mother of ex-gay men. Lastly, I make some comments about the application of a more individualised, legal subject focus of law in these communities, adopting Adams' perspective of normative choices as narrative selection. I note that this critical legal pluralist lens is only of some relevance to ex-gay communities, as the legal framework that endorses reparative therapy does not make much space for individual negotiations or agency within its bounds.

[350] Kislowicz, *supra* note 10 at 194–196.
[351] *Ibid*.

Part I
(1) Research methodology and sources

1. Academic literature review

Academic discussion of the constituency, motivation and legal interests of the ex-gay evangelical Christian movement is an evolving, but still relatively underdeveloped, area of research. Feminist and queer theory commentaries of ex-gay ministries and the political movement of the Christian Right in North America have tended to focus on the impact of religious doctrine and practices on minority rights (particularly the rights of women),[352] and on the risks posed to equality rights discourse by anti-feminist and anti-LGBT political positions taken by the Christian Right.[353] In light of the aims of this thesis, I began research by conducting a wide academic literature review that focused more on the motivation, operation and membership of ex-gay Christian communities rather than their political or sociological significance to the outside political and social world. I centred this initial investigation in the fields of LGBT and gay and lesbian studies, psychology and mental health, legal scholarship, sociology, social anthropology and religious studies.

I found sources in the medical literature that discuss the types of clinical and religious practices that commonly make up 'reparative therapy' as this term is understood in psychological literatures, and that identify the serious negative medical impacts of reparative therapy, particularly in relation to the health of young people and children.[354] I investigated whether sexual orientation change efforts ("SOCE") are recognized in medical literatures as potentially effective or beneficial in any way. The purpose of addressing these questions was to discover the degree of 'otherness' of ex-gay ministries

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[352] Robinson, Christine & Spivey, Sue E., *supra* note 52 at 665.
[353] Robinson, Christine & Spivey, Sue E., *supra* note 52; Christine Robinson, "Exporting inequality? The globalization of the ex-gay movement." in *Soc Issues Glob Context* (Boston: Pearson, 2007); Chapman, *supra* note 28; Amy L Stone, "The Impact of Anti-Gay Politics on the LGBTQ Movement" 10:6 Sociol Compass 459; Oleske, *supra* note 28; George, *supra* note 52.
[354] Beckstead, Lee A, "Cures versus choices: agendas in sexual reorientation therapy" (2002) 5:3–4 J Gay Lesbian Psychother 87; Judith M Glassgold, Lee Beckstead, Jack Drescher, Beverley Greene, Robin Miller & Roger Worthington, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (Washington, D.C.: American Psychological Association, 2009); Jack Drescher, "I'm your handyman: a history of reparative therapies" (2002) 5:3–4 J Gay Lesbian Psychother 5.

and reparative therapy compared to conventional, secular medical practice and prevailing medical attitudes to sexuality and gender identity. In other words, my goal was to test whether the ex-gay experience should be situated as an extreme outsider narrative (to the secular, medical mainstream) that resists intervention.[355] I found that, with the exception of two controversial studies that were published in 2003 and 2007,[356] the great majority of psychological sources strongly reject the claim that SOCE practices can ever be effective in altering sexual orientation, and that they have not been found to have any quantifiable, beneficial outcomes in terms of mental and physical health.[357]

In addition, I found excellent sources in the areas of mental health and counselling, queer theory and sociology literatures about the negative social, and familial impact of reparative therapy on ex-gay and ex-lesbian people over time: in relation to identity crises, self confidence and crises of faith.[358] I also found useful sources in progressive

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[355] This is a contentious issue for ex-gay Christian communities and clinical therapists, who are of the view that mainstream psychological opinion has been unduly influenced by secular politics, and that reports and studies favourable to the success of SOCE are underplayed or suppressed. I discuss this position further below.

[356] Only the 2003 Spitzer study and the 2007 Jones and Yarhouse study (cited below), suggest there is any potential for change in sexual orientation as a result of ex-gay reparative therapy. Both of these studies were based on personal reports of change in sexual habits and feeling over time. See: Spitzer, Robert L, "Can some gay men and lesbians change their sexual orientation? 200 participants reporting a change from homosexual to heterosexual orientation" (2003) 32:5 Arch Sex Behav 403; Stanton L Jones & Mark A Yarhouse, *Ex-gays? A longitudinal study of religiously motivated change in sexual orientation* (Downers Grove: IL: InterVarsity Press, 2007).

[357] In 2012, Dr. Spitzer apologized for his 2003 paper, noting that the small source community denied reliable outcomes in reporting, that the article was not peer reviewed prior to publication, and that the method of data collection was flawed. See: Robert L Spitzer, "Spitzer Reassesses His 2003 Study of Reparative Therapy of Homosexuality" (2012) 41:4 Arch Sex Behav 757. See also: Jack Drescher & Kenneth J Zucker, *Ex-gay research: analyzing the Spitzer study and its relation to science, religion, politics, and culture* (New York: Harrington Park Press, 2006). Likewise, the Jones and Yarhouse study was criticized in medical literatures as having flawed methodology in terms of data collection and reporting and posing 'fuzzy' questions about sexual habits that could not be properly tested against the research goals. Critics also noted that the Jones and Yarhouse study was published by Intervarsity Press, an evangelical Christian Fellowship organization. See: Patrick Chapman, "A Critique of Jones And Yarhouse's 'Ex-gays?' – Part 3 | Ex-Gay Watch", *Ex Gay Watch* (26 November 2007) online: *Ex-Gay Watch* <https://exgaywatch.com/2007/11/a-critique-of-jones-and-yarhouses-ex-gays-part-3/>. In terms of critique of the Jones & Yarhouse data set and methodology, see also: Alex M Johnson, "Choosing research to prove your point", *msnbc.com* (29 June 2005), online: <http://www.nbcnews.com/id/8392940/ns/politics/t/choosing-research-prove-your-point/>; Jeffry G MA and LP Ford, "Healing Homosexuals: A Psychologist's Journey Through the Ex-Gay Movement and the Pseudo-Science of Reparative Therapy" (2002) 5:3–4 J Gay Lesbian Psychother 69.

[358] Ellingson, Stephen et al, "Religion and the politics of sexuality" (2001) 30:1 J Contemp Ethnogr 3; Beckstead, Lee A., *supra* note 354; Kimmel, Michael S, "Masculinity as homophobia: fear, shame and silence in the construction of gender identity" in *Theorizing Masculinities* (Thousand Oaks: CA: Sage Publishing, 1994); Robinson, *supra* note 353.

Christian religious publications addressing the issues of pastoral care and inclusion of LGBT Christians by different Christian churches, which touched on the subject of ex-gay ministry as one of the most extreme Christian responses to same-sex attraction. [359] While this academic research was instructive and helpful, it was also polarizing: as scholars, medical experts, religious affiliates and commentators all took sides on the contentious issue of reconciling same-sex attraction with Christian ex-gay doctrine. It also became clear that there are serious ramifications for addressing ex-gay communities and reparative therapy proponents as equal players in the politically charged LGBT equality rights debate.

2. First-hand accounts of ex-gay communities: finding the legal subject

After conducting the initial literature review (set out above), I began to search for analyses that examine the life of ex-gay Christian communities: their structure, their teachings and the experiences of their members. At the time of writing, there have only been three empirical studies of ex-gay Christian communities in the United States, all undertaken from a sociological and ethnographical viewpoint.[360] Two of these studies were instrumental for this investigation, as they provide detailed descriptions of the teachings and daily life events of ex-gay communities. In 2006, Michelle Wolkomir published *Be Not Deceived*, a study of the experiences and struggles of gay and ex-gay Christian men undergoing reparative therapy and faith-based practices offered by an Exodus-linked Christian group which she calls 'Expell'.[361] Wolkomir's Expell community consists of seventeen men, who are members of local conservative Protestant churches, including Southern Baptist, Assembly of God, Church of Christ and several interdenominational

[359] J Edward Sumerau, Irene Padavic & Douglas P Schrock, "'Little Girls Unwilling to Do What's Best for Them': Resurrecting Patriarchy in an LGBT Christian Church" (2015) 44:3 J Contemp Ethnogr 306; Margaret A Farley, *Just Love: A Framework for Christian Sexual Ethics*, 1st ed (New York: Continuum International Publishing Group Inc, 2006); Chalke, Sansbury & Streeter, *supra* note 166; Jim Y Trammell, "'Homosexuality Is Bad for Me': An Analysis of Homosexual Christian Testimonies in Christianity Today Magazine" (2015) 14:1 J Media Relig 1; Daryl White & O White Kendall Jr, "Queer Christian confessions: spiritual autobiographies of Gay Christians" (2007) 5:2 Cult Relig Interdiscip J 203.

[360] Ponticelli, Christi, "Crafting stories of sexual identity reconstruction" (1999) 62 Soc Psychol Q 157; Michelle Wolkomir, *Be Not Deceived: the Sacred and Sexual Struggles of Gay and Ex-Gay Christian Men* (New Brunswick: Rutgers University Press, 2006); Erzen, Tanya, *Straight to Jesus: Sexual and Christian Conversions in the Ex-Gay Movement* (Berkeley, CA: University of California Press, 2006).

[361] Wolkomir, *supra* note 360 at 26.

evangelical churches.[362] Wolkomir is unwilling to pinpoint the location of the Expell ministry, stating only that it is located "in a southern city, just above the Bible Belt."[363] Wolkomir's study involved a comparison of the experiences of the seventeen members of the Expell community to that of members of a Californian LGBT-inclusive church group that she calls 'Accept'. The goals of her analysis are to comparatively analyze the difference social experience of Christians who seek to reconcile their queer sexual identity with their strong religious belief that homosexuality is forbidden by God. Taking what legal scholars might identify as a pluralist approach to her investigation of the Expell group, Wolkomir stresses that her investigations are informed by prevailing political and social norms about LGBT status in the secular community. However, she also critically considers the values and norms of ex-gay Christian men within their specific Christian environment. "My purpose… is not to undermine the groups but to make sense of them within the current cultural and political context."[364]

Also in 2006, Tanya Erzen published *Straight to Jesus*, an ethnographic study of ex-gay Christian men living within a closed, live-in reparative therapy community in San Rafael, California, called New Hope.[365] Erzen conducted interviews with the pastor and community leader of New Hope, Frank Worth, and with a number of residential ex-gay members over several years (at least thirty men agreed to be interviewed). This number includes men who had left the program and chosen to live what New Hope terms 'the gay lifestyle' and those men who were long-term residents and leaders of the New Hope community. New Hope is connected to the Church of the Open Door, an evangelical church that "preaches the transformative message of change through Christ".[366] Both Open Door and New Hope are active ex-gay ministries today, and New Hope continues to offer a drop in and residential ex-gay program for men.[367] Erzen's thesis about the lived experiences of the ex-gay community members she interviewed at New Hope is that the 'ex-gay' community structure teaches members to overcome their homosexuality through

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[362] *Ibid*.
[363] *Ibid* at xiii.
[364] *Ibid*.
[365] Erzen, Tanya, *supra* note 360; New Hope Ministries, "New Hope Ministries: web testimonies of members and ex-members", online: *New Hope Ministries* <https://www.newhope123.org/>.
[366] "Church of the Open Door: San Rafael, CA", online: *Church Open Door San Rafael CA* <https://www.opendoorsanrafael.com>.
[367] New Hope Ministries, *supra* note 365.

a complex, rule-driven process of Christian conversion. She notes that: "implicit in this conversion is sacrifice, a journey and a sound understanding that different identities are at play in each person and remain contested, but one needs to cede to the other."[368] In similar terms to Wolkomir's investigation, Erzen stresses the importance of both critical objectivity and empathy in presenting the complex identity issues, human fears and faith politics that she encounters at New Hope. At the end of her introduction, she candidly voices a fear for the reception of her work that, in giving voice to individual ex-gay members without engaging in critical judgment of those voices, she might be assumed to defend the ex-gay Christian worldview on objective terms. Erzen responds to this criticism by comparing it to the disappointed phone calls she received from her ex-gay interviewees when she showed them the conclusions of her research.

> Hank's critique of the project as not sympathetic enough to his pain and misery is as valid as the critique that blames the ex-gay movement for adding to the pain and misery of gay men… who have struggled to build lives despite homophobia, persecution and discrimination. Somewhere in between those two places, I have sought to find a space for both the everyday lives of men like Hank and Curtis and the political implications of the ex-gay movement as a whole.[369]

As Wolkomir and Erzen's ethnographic studies were completed more than ten years prior to this work, I undertook further research of more recent, first-hand narratives of ex-gay and gay Christian men who had undergone clinical reparative therapy, or who had recently lived in ex-gay Christian communities. I focused on ex-gay communities in the United States, but also looked further afield to Canada and the United Kingdom. I also researched online networks of evangelical Christians that advertised reparative therapy or that provided information on religious positioning and rules in relation to same sex attraction, same-sex relationships and same-sex marriage. This body of supporting literature was intended to check the currency and relevance of the analysis and conclusions reached in *Be Not Deceived* and *Straight to Jesus* and to inform my legal analysis of the types of religious rules, faith-based practices and clinical procedures that are commonplace in evangelical Christian ex-gay ministries today. As I develop further below, these first-hand narratives written in the ten-year period after Wolkomir and

[368] Erzen, Tanya, *supra* note 360 at 3–4.
[369] *Ibid* at 4.

Erzen published their sociological studies describe a normative environment that closely resembles the New Hope and Expell ex-gay communities.

I was only able to find a relatively limited number of additional sources dealing with the sexual identity crisis faced by ex-gay and gay Christian men, which reflects the fact that this issue remains under-researched and under-reported. However, I found some useful first-hand accounts that informed this investigation, including memoirs, longform blog posts and a documentary that included interviews with men who now identify as ex-ex-gay or gay. These sources were produced in the last ten years and all addressed the lived experience of ex-gay evangelical Christian men.[370] I also reviewed secondary sources dealing with reparative therapy practices and the issue of sexual identity challenge. These sources included mainstream and Christian media articles in which ex-gay and gay Christians were interviewed about their experiences with reparative therapy and their personal experiences of Christianity,[371] and media reports of attempts to ban reparative therapy through legislative reform or litigation.[372] I also reviewed online and print

[370] See: Arana, Gabriel, *supra* note 15; Peter Gajdics, "I Lost Six Years of My Life to Gay Conversion Therapy", (17 May 2017) *VICE*, online: <https://www.vice.com/en_ca/article/vv5qnx/i-lost-six-years-of-my-life-to-gay-conversion-therapy>; Gajdics, *supra* note 15; James Guay, "My Hellish Youth in Sexual Conversion Therapy and How I Got Out", *Time* (15 July 2014), online: <http%3A%2F%2Ftime.com%2F2986440%2Fsexual-conversion-therapy-gay%2F>; VICE, *Living Through Gay Conversion Therapy* (2015); van Dyche, *supra* note 15; Paulk, *supra* note 15; Thom Cooper, "Whosoever: Life After Exodus", online: <https://whosoever.org/v3i4/exgay.html>.

[371] Schlanger, Zoe & Wolfson, Elijah, "Ex-ex-gay pride", *Newsweek* (1 May 2014), online: <http://www.newsweek.com/ex-ex-gay-pride-249282>; Zoë Schlanger, "The Death of a Jewish Ex-Gay Therapy Organization", *Newsweek* (18 December 2015), online: <http://www.newsweek.com/life-and-death-jewish-exgay-therapy-organization-406898>.

[372] See: Jonathan Merritt, "The Downfall of the Ex-Gay Movement", *The Atlantic* (6 October 2015), online: <https://www.theatlantic.com/politics/archive/2015/10/the-man-who-dismantled-the-ex-gay-ministry/408970/>; Fallon Fox, "Leelah Alcorn's Suicide: Conversion Therapy Is Child Abuse", *Time* (8 January 2015), online: <http://time.com/3655718/leelah-alcorn-suicide-transgender-therapy/>; Erik Eckholm, "In a First, New Jersey Jury Says Group Selling Gay Cure Committed Fraud", *N Y Times* (25 June 2015), online: <https://www.nytimes.com/2015/06/26/nyregion/new-jersey-jury-says-group-selling-gay-cure-committed-fraud.html>; Johnson, *supra* note 357; Malm, *supra* note 341; Paula Mejia, "Suicide of Transgender Teen Sparks Heightened Advocacy for Trans Rights", *Newsweek* (30 December 2014), online: <http://www.newsweek.com/suicide-leelah-alcorn-transgender-teen-sparks-new-advocacy-trans-rights-295724>; Melissa Steffan, "Alan Chambers Apologizes to Gay Community, Exodus International to Shut Down", *Christ Today* (21 June 2013), online: <http://www.christianitytoday.com/news/2013/june/alan-chambers-apologizes-to-gay-community-exodus.html>; Valenti, *supra* note 345.

resources published by ex-gay Christian churches, support groups and reparative therapy providers,[373] and testimonials by members and leaders of current ex-gay ministries.[374]

These sources helped to identify the different guises that sexual orientation change efforts take in evangelical Christian communities today and helped to draw tentative lines between pseudo-clinical reparative therapy efforts and less formal, faith-based rules that groups like Expell and New Hope live by. In reviewing source material, I limited the inclusion of first-hand accounts of ex-gay men to those that could be independently verified as the work of the author. Thus, I included some testimonials of ex-gay 'success stories' published on Christian network and ministry websites, where these testimonials were attributed to an identifiable source.[375] Where these sources were unattributed or anonymous, I did not include them as evidence of the experiences of ex-gay men in Christian communities.[376] However, I have relied on these sources as evidence of the

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[373] For example: John Paulk & Anne Paulk, *Love Won Out: How God's Love Helped Two People Leave Homosexuality and Find Each Other* (Carol Stream, Ill: Tyndale House, 1999); Joseph Nicolosi, *Reparative Therapy of Male Homosexuality A New Clinical Approach* (Northvale: NJ: Jason Aronson Press, 1991); Voice of the Voiceless, *Campus Climate Report 2014* (2014); Alan Medinger, *Growth into Manhood: Resuming the Journey* (Colorado Springs, Col.:WaterBrooks Press, 2000); Elizabeth R Moberly, *Homosexuality: A New Christian Ethic* (Cambridge: UK: James Clarke & Co., 1983); Ron Citlau, *Hope for the Same-Sex Attracted: Biblical Direction for Friends, Family Members, and Those Struggling With Homosexuality* (Bloomington, MN: Bethany House, 2017); Adam T Barr & Ron Citlau, *Compassion without Compromise: How the Gospel Frees Us to Love Our Gay Friends Without Losing the Truth* (Bloomington, MN: Bethany House, 2014); Deborah Barr, *All Things New: A Discipleship Ministry for Healing for Overcoming the Effects of Same-Sex Attraction and Sexual Brokenness* (Self-pub, 2014). The texts by Medinger (2000) and Moberly (1983) are referenced across different ex-gay ministry sites, including Voice of the Voiceless, the New Hope Ministry and the Restored Hope Network. They are considered to be seminal resources for evangelical Christian reparative therapy.

[374] Jason Thompson, "Freedom from a Secret", (2015), online: *Freedom Secret Restored Hope Netw* <http://www.restoredhopenetwork.org/index.php/resources/stories/15-stories/20-freedom-from-a-secret>; Frank Worthen, "Born Anew to a Living Hope", (2016), online: *Some Such Were You Restored Hope Netw* <http://www.restoredhopenetwork.org/index.php/resources/stories/15-stories/29-frank-worthen>; "Video Testimony Links | Ex-gayTruth.com", online: <http://ex-gaytruth.com/video-testimony-links/>; Anita Worthen, "Mother-Son Relationships", online: *New Hope Blog* <https://www.newhope123.org/mother-son/>; New Hope Network, "Transformational Stories", online: *Restored Hope Netw* <http://www.restoredhopenetwork.org/index.php/resources/stories>; Carolina New Song Ministries, "Will's Testimony", (10 April 2013), online: *Carol New Song Ministries* <http://carolinanewsong.org/wills-testimony/>; Carolina New Song Ministries, "Thomas' Testimony", (8 April 2013), online: *Carol New Song Ministries* <http://carolinanewsong.org/thomas-testimony/>; Focus on the Family, "Do People Change from Homosexuality? Hundreds of Stories of Hope and Transformation (Part III)", (2016), online: <https://getpocket.com/a/read/1071330868>.

[375] For example, the New Hope Network publishes testimonials of high-profile ex-gay ministers and activists. Each source is clearly identified and the author's full name is provided. See: New Hope Network, *supra* note 374.

[376] For example, the Carolina New Song Ministry publishes anonymized 'testimonials' of ex-gay men. See: Carolina New Song Ministries, *supra* note 374; Carolina New Song Ministries, *supra* note 374. Focus on the Family and Voice of the Voiceless also provide anonymized testimonies of ex-members. See: Focus on

positions taken by those Christian ministries about the ex-gay movement and gay and lesbian 'lifestyles', and as supportive evidence that identified some consistent rules and customs that are enforced in different ex-gay communities in relation to sexuality and gender.

3. Limitations and boundaries: a focus on ex-gay men

In this chapter, I focus on the identity conflict experienced by self-identified ex-gay Christian men who worship as evangelical Christians. I narrowed my focus to this group, after doing significant exploratory research (summarised above) which demonstrated that, while there is a growing body of sociological, religious, pop-cultural and medical literature that discusses the lives of ex-gay Christian men, there is a relative lack of published analysis and primary sources about the experiences of lesbian and ex-lesbian evangelical Christian women. That is not to say that Christian women do not report their experiences. As part of my initial research, I found one sociological account of evangelical Christian positions on same-sex attraction in the Bible Belt written by Bernadette Barton. Barton's book included interviews with lesbian women who had gone through reparative therapy in Kentucky and who have now left their evangelical Christian communities because of their reparative therapy history.[377] In addition, both Erzen and Wolkomir discuss ex-lesbian reparative therapy initiatives in their texts. However, both also note that the large majority of their qualitative data about ex-gay communities came from ex-gay Christian men; an outcome reflective of the fact that women were either not allowed in the residential community (in the case of New Hope) and that there was only one ex-lesbian woman who regularly attended meetings as a member of Expell.[378] Erzen comments that, in her view, poor awareness of female sexuality and 'women's issues' in evangelical Christian communities in general have contributed to "inequity in the ex-gay

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the Family, "Leaving Homosexuality", (9 June 2014), online: *Focus Fam* <http://www.focusonthefamily.com/socialissues/sexuality/leaving-homosexuality/leaving-homosexuality>; Voice of the Voiceless, "Voice of the Voiceless", (2017), online: <http://www.voiceofthevoiceless.info/>; Thompson, *supra* note 374.

[377] Bernadette Barton, *Pray the Gay Away*, kindle edition ed (New York: New York University Press, 2012). In chapter 5: 'Going Straight: The Ex-Gay Movement', Barton addresses the ex-gay movement in Kentucky, and includes interviews with several ex-lesbian and lesbian women who have undergone reparative therapy.

[378] Erzen, Tanya, *supra* note 360 at 30; Wolkomir, *supra* note 360 at 10. Erzen notes that there was a New Hope ministry for women from 1986 to 1990, but this closed when Frank Worthen (pastor and leader of New Hope) could not find a woman willing to work as House Leader and would not let men live in the women's ministry (at 30).

movement as a whole, which tends to be male dominated and focused on male homosexuality."[379] Wolkomir's investigation included interviews with the wives of several ex-gay Christian men who attended Expell. These interviews focus on the marital and sexual challenges these women face in light of their husbands confessed ex-gay identity and sexual activity.[380] These interviews were instructive for this research in terms of applying a feminist methodology to source analysis.[381]

My independent research of ex-gay primary sources indicated similar outcomes—in terms of the greater numbers of 'success stories' of ex-gay men compared to ex-lesbian women—that Erzen and Wolkomir describe. I also found that the majority of religious and 'clinical' resources offered on ex-gay ministry sites are directed more to men than to women.[382] Because of these data limitations, I centred my analysis on the lived experience and identity struggle of ex-gay Christian men, as I gained a far greater understanding of their normative environment and dilemmas of sexuality and gender. I did not attempt to generalise a female ex-gay experience out of male narratives, as this would run directly counter to a queer feminist methodology of this work, and would risk the integrity of the legal analysis. While I found the task of applying a feminist methodological framework to an ex-gay male identity to be challenging at points, it was equally rewarding. Further, applying a feminist lens to the legal experience of a queer male subject is a move supported by the queer theory and feminist scholars whose work informed this project.

4. Limitations and boundaries: evangelical Christianity in the United States

I focus my investigation on the legal world of conservative, evangelical ex-gay communities in the United States, rather than broadening my parameters to include other religious faiths and branches of faiths that advocate religious methods for 'healing homosexuality.' I acknowledge that the concept of sexual orientation change through

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[379] Erzen, Tanya, *supra* note 360 at 30. Erzen discusses the relative lack of reporting and analysis of ex-lesbian reparative therapy experiences and the male-dominated focus of the ex-gay movement in some detail in chapter 4, "Arrested Development" at 126.
[380] Wolkomir, *supra* note 360 at chapter 8, at 152.
[381] I discuss this element of Wolkomir's research and its relevance to my legal pluralist and feminist analysis in greater detail in Part III of this chapter at 170 - 175.
[382] This is despite the fact that there are some high profile ex-gay texts advocating reparative therapy through religious intervention that are written by self-identified ex-lesbian women, such as: Christine Moberly, *supra* note 373; Paulk & Paulk, *supra* note 373; Leanne Payne, *Crisis in Masculinity* (Grand Rapids, MI: Baker Books, 1995); Barr, *supra* note 373.

religious faith is not unique to evangelical Christianity. In the United States, there have been active ex-gay movements in both Orthodox Judaism (Jews Offering a New Approach to Healing, or "JONAH") and the Catholic Church ("Courage"). Both JONAH and Courage attended Exodus International ex-gay conferences in the 1990s and 2000s.[383] However, in 2015, JONAH was forced to close its doors after a New Jersey Superior Court found it acted fraudulently in offering reparative therapy to three young Jewish men and was forced to pay damages for physical and mental harm in an amount so significant that it bankrupted the organization.[384] By comparison, Courage, the Catholic ex-gay ministry, has markedly different theological goals and expectations to evangelical Christian ex-gay ministries. Rather than engaging in the reparative therapy narrative that advocates the certainty of sexual orientation change, Courage advises that gay men and lesbian women live "chaste lives, [and] dedicate [their] entire lives to Christ through service to others, spiritual reading, prayer, meditation, individual spiritual direction, frequent attendance at Mass and the frequent reception of the sacraments of Reconciliation and Holy Eucharist."[385] The aim of Courage is to isolate LGBT-identifying Catholics from sexual relationships and romantic connections of any kind. This does not accord with the goals of evangelical Christian ex-gay communities that view heterosexual marriage as the ultimate goal of reparative therapy.[386]

Comparatively to Catholic and Jewish organizations, different evangelical Christian ministries operating in the United States share significant theological, normative and sociological ground that identifies them as an 'autonomous social field' with sufficient definition and boundaries to support a legal pluralist analysis of their environments.[387]

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[383] Erzen, Tanya, *supra* note 360 at 46.

[384] Levine, Alexandra, "Jury decides against JONAH in landmark anti-gay conversion therapy case", *Forward Online* (25 June 2015), online: <http://forward.com/news/310914/jury-rules-against-jonah-in-landmark-gay-conversion-therapy-case/>; Schlanger, *supra* note 371; Eckholm, *supra* note 372. Under New Jersey law, plaintiffs can be awarded three times their actual financial losses, for a total award of $72,400 per person, plus lawyers' fees.

[385] Courage International, "The Five Goals of Courage", (2017), online: *Courage* <https://couragerc.org/resource/5-goals-courage/>.

[386] Erzen, Tanya, *supra* note 360 at 115–116; Wolkomir, *supra* note 360 at 152; Wolkomir, Michelle, "The story of romantic love, sexuality, and gender in mixed-orientation marriages" (2009) 4 23 Gend Soc 494 at 494; Wolkomir, Michelle, "'Giving it up to God' negotiating femininity in support groups for wives of ex-gay Christian men" (2004) 18:6 Gend Soc 735.

[387] See: Moore, *supra* note 9. I discuss relevant definitions of the autonomous social field as a locus for law in detail in chapter 2 at 77 – 80.

There are also explicit, reciprocal links between clinical and evangelical religious models of reparative therapy in terms of narratives about gender norms, the value of patriarchal power and corresponding risks of matriarchal influences, and Freudian concepts of damaged homo-gender development. These clear links between psychology and religion make possible a legal pluralist and feminist critique of religious laws relating to gender norms. As I develop below, ex-gay communities enforce strict rules delineating between traditional concepts of masculinity and femininity. These rules then require men to perform active 'gender work' to become more masculine and heterosexual. Simultaneously, this gender work is presented as necessary to recognise the natural state of mankind (heterosexual and dedicated to procreation). Theoretical conflicts between natural law and law as rules thus emerge in the normative framework of ex-gay communities, and these conflicts (or attempted reconciliations) are valid subjects for a legal pluralist analysis.

5. Why ex-gay communities should be a subject for legal analysis

The most compelling argument for a legal analysis of ex-gay ministries and their reliance on religious normative orders is the persistence and popularity of the ex-gay message within the evangelical Christian community. Research indicates that, despite recent legislative attempts to prohibit clinical reparative therapies for minors and despite growing public support for LGBT equality rights, ex-gay ministries have not closed their doors at the local level. Rather, the ex-gay movement remains a controversial aspect of American evangelicalism.[388] This is despite the fact that Exodus International—the first and most famous ex-gay ministry in the United States— closed its doors in 2013 after board member John Paulk and CEO Alan Chambers issued statements acknowledging that reparative therapy is harmful, cruel and does not work.[389] Paulk had made headlines

[388] I discuss these shifts in public policy and public positions in chapter 1 at 38 – 40.
[389] Paulk, *supra* note 15; PQ Monthly Staff, "John Paulk Apologizes for Ex-Gay Gospel, Wife Ann Says She'll Pray for Him", *PQ* (24 April 2013), online: <http://www.pqmonthly.com/update-john-paulk-apologizes-for-ex-gay-gospel-wife-ann-says-shell-pray-for-him/14177>; Melissa Steffan, "Former Ex-Gay Spokesman John Paulk Apologizes Amid Divorce", *News Report* (2 May 2013), online: <http://www.christianitytoday.com/news/2013/may/former-ex-gay-spokesman-john-paulk-apologizes-amid-divorce.html>; Trudy Ring, "Exodus International Shuts Down; Is This the End of the 'Ex-Gay' Movement?", (20 June 2013), online: <http://www.advocate.com/politics/religion/2013/06/20/breaking-exodus-international-shuts-down-end-ex-gay-movement>.

years earlier as an Exodus success story, when he published *Love Won Out* with his wife Anne, in which he detailed the success of Christian reparative therapy in achieving his sexual orientation transformation and enabling him to get married and have children.[390] However, in 2013, he renounced ex-gay ministry, filed for divorce and publicly came out as gay. Chambers also issued an apology to all members of the "homosexual community" for Exodus' thirty-year history of offering reparative therapy and for discriminating against all ex-gay Christians who it considered had "lapsed back into the gay lifestyle."[391] Chambers told *Christianity Today* that Christian ex-gay ministry "does not result in sexual identity shift in 99% of cases".[392] The closure of Exodus International was greeted with predictions that the ex-gay movement was becoming a fast-shrinking minority. Thus, in 2013, Wayne Benson, leader of the anti ex-gay group Truth Wins Out, commented that:

> In addition to Exodus's renunciation of reparative therapy, other blows to the movement include psychiatrist Robert Spitzer's apology last year for a study he did that was used to justify such therapy, research he now says was scientifically unsound; onetime ex-gay spokesman John Paulk's recent announcement that he is no longer ex-gay.... We are winning this battle, indisputably.[393]

However, despite the closure of Exodus, there are still many evangelical Christian ex-gay ministries—and churches that actively refer L/G members to ex-gay communities—active across the United States. In 2018, notable ex-gay ministries include the Restored Hope Network, Voice of the Voiceless, the Overcomer's Network, New Hope Ministries and New Carolina Ministries.[394] Further, the international arm of Exodus International (Exodus Global Alliance) continues to offer reparative therapy and Christian ex-gay ministry in other countries such as the Philippines, Indonesia and Malaysia.[395] Chamber's 2013

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[390] Paulk & Paulk, *supra* note 373.
[391] Merritt, *supra* note 372.
[392] Steffan, *supra* note 372; Merritt, *supra* note 372.
[393] Ring, *supra* note 389; Peter Weber, "The end of 'ex-gay' conversion therapy", *The Week* (20 June 2013), online: <http://theweek.com/articles/462985/end-exgay-conversion-therapy>.
[394] For example, the following ministries offer online networks, in person conferences and resources aimed at 'curing' homosexuality through Christian ministry. Wolkomir and Erzen's research suggests that there are many other, smaller ex-gay ministries within the United States that do not advertise online, but are supported by these larger evangelical organizations: Focus on the Family, *supra* note 374; Restored Hope Network, "Restored Hope Network", online: <http://www.restoredhopenetwork.org/>; "AFA.net - Our Mission", online: <https://www.afa.net/who-we-are/our-mission/>; The overcomers network, "The Overcomers Network -Mission, Values and Vision", online: <http://www.overcomersnetwork.org/enter.html>; Voice of the Voiceless, *supra* note 376; note 366; Focus on the Family, *supra* note 376.
[395] "Welcome to Exodus Global Alliance", online: *Exodus Global Alliance* <https://exodusglobalalliance.org/index.php>.

statement also made clear that, "local affiliated ministries, which have always been autonomous, will continue, but not under the name or umbrella of Exodus."[396] Previous board members of Exodus International are now leaders at other ex-gay organizations, such as Anne Paulk (ex-wife of John Paulk), who is now the Director of the Restored Hope Network.[397] When asked about the reach and impact of ex-gay ministries in an interview in March 2017, Paulk answered:

> We have 60 local affiliates all across the United States. They vary from small groups to quite large ones. … Probably multiple thousands a year are being ministered to. We also have online programs. For teens, there's an online program that 4,000 teens have gone through, and it's been very helpful for them. We have all sorts of resources out there.[398]

Online Christian networks like the American Family Association, Voice of the Voiceless and the Restored Hope Network offer a range of religious resources to combat homosexuality, including video and text testimonials of ex-gay men and women and resources for Christian schools and ministries that are available for purchase.[399] Online Christian networks also advertise residential ex-gay programs for men and women, such as New Hope,[400] and sell religious texts online that offer sexual orientation change through prayer, witness and commitment to the literal teachings of the Bible.[401] Some active ex-gay ministries are aligned with (or constitute arms of) national conservative Christian political action groups, like the Family Policy Alliance and Focus on the Family. Both Family Policy Alliance and Focus on the Family have publicly argued in favour of reparative therapy for same sex attraction, even when offered to children.[402] These groups also have ties to conservative Republican congressmen and, in the case of the American

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[396] Steffan, *supra* note 372.
[397] Warren Cole Smith, "Anne Paulk hasn't given up on ex-gay ministry", (3 May 2017) online: *Christian World* <https://world.wng.org/2017/05/anne_paulk_hasn_t_given_up_on_ex_gay_ministry>.
[398] *Ibid*.
[399] Stephen Black, "He Sent His Word to Heal Us", (2016), online: *Some Such Were You Restored Hope Netw* <http://www.restoredhopenetwork.org/index.php/resources/stories>; New Hope Network, *supra* note 374; Worthen, *supra* note 374; Carolina New Song Ministries, *supra* note 374; Carolina New Song Ministries, *supra* note 374; Barr, *supra* note 373; Barr & Citlau, *supra* note 373; Payne, *supra* note 382.
[400] NewWay Ministries, "NewWay Ministries, home of Dr. Larry Crabb", online: <http://www.newwayministries.org/>.
[401] For example: Citlau, *supra* note 373; Thompson, *supra* note 374; Medinger, *supra* note 373; Moberly, *supra* note 373.
[402] Focus on the Family, *supra* note 377; "Let Parents Parent: My Child. Our Path", (19 October 2017), online: *Fam Policy Alliance* <https://familypolicyalliance.com/issues/2017/10/19/let-parents-parent-child-path/>.

Family Association, direct ties to the Attorney-General of the United States, Jeffrey Sessions. Sessions spoke at their national convention in 2017 and advocated for their presence in Washington as "valuable support for family values."[403]

Therefore, despite recent challenges and setbacks, ex-gay evangelical communities continue to be an active and controversial element of evangelical Christianity within the United States.[404] However, negative responses by state law and public opinion to ex-gay ministry over the last decade has resulted in these religious communities turning even further away from the secular mainstream and relying substantially on their independent normative frameworks. This isolation response makes it difficult to discover the law that applies within these communities, and to understand the identity challenges that are faced by the ex-gay men who live within them. Thus, critiquing the legal environment of ex-gay communities requires a researcher to adopt a more flexible, pluralist analysis that builds on the work of doctrinal investigations into reparative therapy, which I set out in the next part of this chapter. This pluralist analysis should interrogate both the substance and form of the Christian sexuality transformation narrative and test the mandatory character of religious rules about sexuality and gender. I develop the case for this analysis, and sketch the normative framework for it, in part III of this chapter.

Part II

(1) The limitations of state law analyses and responses to reparative therapy and ex-gay communities

Doctrinal or comparative analyses of tensions between LGBT rights and religious freedom tend to explore the degree to which religious communities should be exempt from human rights legislation and/or constitutional rights guarantees, or discuss how best to balance

[403] American Family Association, *AG Sessions is a Religious Freedom Rockstar* (2017) (recording); ABC News, *Jeff Sessions addresses "anti-LGBT hate group," but DOJ won't release his remarks* (2017) (recording).

[404] Here, I oppose the position taken by some reports that Christian reparative therapy has effectively been sidelined or limited by legislation, following the closure of Exodus International and greater public awareness of the risks of sexual orientation change efforts. See: Merritt, *supra* note 372; Schlanger, *supra* note 371; VICE, *supra* note 370. Reports also focus on the increasing success of rights-positive LGBT movements in the secular mainstream or progressive Christian churches that attract religious young people to leave their more restrictive communities. See, for example: Chalke, Sansbury & Streeter, *supra* note 166. However, these reports do not address the persistent survival of the ex-gay movement and its political successes, which I discuss in this chapter.

freedom of religion and equality rights where they conflict.[405] However, other, creative investigations into the legal relationships and law that operates *within* religious communities are increasingly necessary. Doctrinal analyses cannot investigate the operating environments of religious communities in sufficient depth—given the principle of non-intervention of state law in private religious matters—and because of the deep suspicion that is often felt by religious communities towards formal rights protections under state law. Thus, evangelical Christian communities often react to secular legal prohibitions of discrimination and the extension of equality rights to LGBT-identifying people by arguing that these extensions of equality rights constitute a positive attack on freedom of religion and Christian legal norms. Some Christian groups go even further to claim that these attacks on religious groups are intended by equality legislation, rather than being merely a consequence of it.[406] These arguments rely on the presumption that constitutionally protected freedom of religion is not merely a liberty right, but is also a shield that protects against all unwanted state law incursions into Christian life. Publications on issues such as the right to treat same sex-attraction as an illness, and promoting family safety from 'the gay lifestyle' on Christian networks such as Focus on the Family demonstrate this position:

> We are concerned about homosexuality's impact on families, the church and our culture. There has been a growing and very successful effort to gain not just acceptance but approval for homosexuality in many areas, including the church, the media, business and education. Society and families always do best when individuals follow God's created intent for humanity.[407]

In response to the state law threat of expanding equality rights discourse and the progressive legal recognition of same-sex attraction as a natural expression of human sexuality, evangelical Christian communities promote a wholesale rejection of state laws that promote equality rights that embrace LGBT identity. This rejection then takes the form of an inward turn to the authority of Christian normative orders that assert

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[405] See, for example: David Glasgow, "Making Room at the Inn: Protecting the Expression of Sexual Identity in Anti-Discrimination Law" (2015) 40:1 Altern Law J, online: <https://papers.ssrn.com/abstract=2577320>; Johnson, Paul & Vanderbeck, Robert M., *supra* note 47; Lupu, *supra* note 28; Chapman, *supra* note 28; Koppelman, *supra* note 32.

[406] Tina Fetner, "Ex-Gay Rhetoric and the Politics of Sexuality" (2005) 50:1 J Homosex 71.

[407] Focus on the Family, "Homosexuality, Theology and the Church", (7 May 2015), online: *Focus Fam* <https://www.focusonthefamily.com/socialissues/sexuality/homosexuality-theology-and-the-church/homosexuality-theology-and-the-church>.

traditional family values and assume the naturalness of heterosexuality and the gender binary.[408] This inward turn encourages individual Christians to question the truth of secular positions about issues like equality, sexual orientation and gender identity. The Leelah Alcorn story is a personal, tragic demonstration of this distrust. Where this distrust is felt in social and legal education in Christian communities, the corollary is low or non-existent reporting of LGBT hate crimes and discrimination in education, public services, accommodation and employment.[409] The rate of discrimination reporting is made even more difficult by the fact that religious organizations have exemptions from federal and state anti-discrimination and civil rights legislation in terms of recruitment, employment standards and the provision of health and insurance benefits.[410] Therefore, a comprehensive discussion of the legal, social and familial tensions that exist between LGBT identifying evangelical Christians and their communities cannot be engaged in simply by considering state law responses to these issues: because to engage solely with the communities on this basis would fail to tell most of the story.

As of 2018, offering clinical reparative therapy services to minors is unlawful in California, Connecticut, Illinois, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and the District of Columbia.[411] In February 2016, New York Governor Cuomo announced regulations that would restrict reparative therapy by banning public and private health care insurers from covering the practice, and would prohibit mental health facilities from conducting reparative therapy on minors. However, the New York regulations do not ban the practice wholesale and do not apply to "religious practices."[412] At the federal level, on

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[408] For example: Jeff Johnston, "The Impact of Adding LGBT to Nondiscrimination Laws", (16 October 2014), online: *Focus Fam Freedom Threat Innocence Lost* <https://www.focusonthefamily.com/socialissues/religious-freedom/houstons-religious-freedom-problem/the-impact-of-adding-lgbt-to-nondiscrimination-laws>; Jim Daly, "Shouldn't People Be Allowed to Love Who They Want?", (10 June 2015), online: *Jim Daly* <http://jimdaly.focusonthefamily.com/shouldnt-people-be-allowed-to-love-who-they-want/>.

[409] Chapman, *supra* note 28.

[410] I outline religious exemptions from anti-discrimination legislation in the United States in chapter 1 at 52.

[411]Movement Advancement Project, "Conversion Therapy Laws", online: *MAP* <http://www.lgbtmap.org/equality-maps/conversion_therapy>.

[412] Movement Advancement Project, *Movement Advancement Project | LGBT Policy Spotlight: Conversion Therapy Bans*, Policy Spotlight (Washington DC, 2017) at 1. In 2017, the Colorado Senate Committee struck down a bill that would have banned reparative therapy for LGBT youth: US, HB17-1156 *A Bill that Prohibits Conversion Therapy Mental Health Provider: Concerning a prohibition on conversion therapy by a licensed mental health care provider, 2017,* Regular Session, Col. 2017.

19 May 2015, Rep. Ted Lieu (D-Calif.) introduced the *Therapeutic Fraud Prevention Bill* ("TFP Bill"). The TFP Bill classifies all reparative therapy as an unlawful fraudulent practice under the *Federal Trade Commission Act*. The law would also ban advertising that claims the therapy can successfully change a person's sexual orientation or gender identity. However, the Bill remains with the Subcommittee on Commerce, Manufacturing and Trade, having stalled there since 2015.[413]

There are also steps being taken at state and federal levels to protect reparative therapy providers, with an emphasis on the religious connections between Christian faith groups and the practice. In 2015, Oklahoma passed a State law protecting the rights of Christian groups who engage in conversion therapy, both for minors and adults. The Bill was introduced by Oklahoma state Rep., Sally Kern, who has publicly stated that "homosexuality is more dangerous than terrorism."[414] The Oklahoma law (and the position that freedom of religion encompasses the right to view homosexuality as a mutable characteristic) was openly supported by the Texas branch of the GOP in the State Convention in 2014.[415] At the Republican National Convention in 2016, delegates voted for a party platform that endorsed the right of parents to send children to reparative therapy programs, thus supporting the "right of parents to determine the proper medical treatment and therapy for their minor children."[416] In 2016, Vice President Mike Pence was closely questioned on his position on faith-based sexual change efforts, after the media uncovered a statement made during his 2000 congressional campaign calling for an audit of the *Ryan White Care Act*, [417] which provides federal funding for HIV/AIDS patients, in which he indicated that funding issued to LGBT organizations should be

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[413] US, H.R.2450, *Therapeutic Fraud Prevention Act*, 2015, Regular Session, 114th Congress, 2015-2016.
[414] Marie Diamond, "GOP Legislator: Homosexuality Is 'More Dangerous' Than Terrorist Attacks Because We Have to Deal With It Every Day", (9 September 2011), online: *Think Prog* <https://thinkprogress.org/gop-legislator-homosexuality-is-more-dangerous-than-terrorist-attacks-because-we-have-to-deal-with-cc43b78a30c/>.
[415] Lila Shapiro, "First Ever Law To Protect Gay 'Cure' Proposed In Oklahoma", *Huffington Post* (30 January 2015), online: <https://www.huffingtonpost.com/2015/01/30/gay-cure-law_n_6573710.html>.
[416] ABC News, *Gay "conversion therapy" advocates heartened by Republican electoral victories* (2017) (recording).
[417] *An Act to amend the Public Health Service Act to provide grants to improve the quality and availability of care for individuals and families with HIV disease, and for other purposes*, Pub L No 101-381, 104 Stat at 576 (1990) [Ryan White Care Act].

redirected to programs that "provide assistance to those seeking to change their sexual behaviour."[418]

The wide range of 'sexual orientation change efforts' that exist in evangelical ex-gay communities, and the challenge of constraining these activities within legal definitions of 'clinical reparative therapy', supports the case for a more nuanced legal analysis of identity challenge within ex-gay communities. Research for this work indicated that there are many faith-based practices of Christian communities that fall short of clinical definitions of reparative therapy and which are likely to be carried on despite any ban on clinical therapies under the auspices of church authority and the right to freedom of religious practice.[419] These activities expose gay evangelical Christians to intense challenge about their religious faith and sexual identity, tend not to be openly reported, and are difficult to monitor and police. Therefore, the prevalence of faith-based practices (which describe many of the rules that are the subject of this chapter) supports the case for a pluralist legal analysis of Christian positions on homosexuality within ex-gay ministries.

(2) Reparative therapy: links between psychology, gender theory and evangelical Christianity

Here, I give a brief history of reparative therapy, to contextualise and explain its symbiotic relationship with evangelical Christianity. This overview is also instructive, in that it demonstrates the reliance of clinical reparative therapy doctrine on traditional Christian positions on gender difference and gender power relations (strong man + submissive woman = heterosexuality). These positions are then related back (in a causative sense) to Christian laws that are rigidly applied to members of ex-gay communities. This interconnectedness between the religious rules of heterogender norms (doctrine), clinical treatment (science) and Christian practice (marriage) helps to explain why Christian

[418] Liam Stack, "Mike Pence and 'Conversion Therapy': A History", *N Y Times* (30 November 2016), online: <https://www.nytimes.com/2016/11/30/us/politics/mike-pence-and-conversion-therapy-a-history.html>.

[419] For example, VICE released a documentary on 5 March 2015 called "Living Through Gay Conversion Therapy". VICE had exclusive access to one of the hundreds of non-clinical gay-conversion-therapy groups, and sessions that operate in the United States and are operated either (a) directly by churches, or (b) are indirectly funded and supported by churches. At the Journey into Manhood program, men pay more than $600 to attend a weekend retreat where they participate in exercises and activities the staff members claim will help them battle their same-sex orientation. VICE, *supra* note 370.

norms about family structure and the unlawfulness of homosexuality are so compelling for ex-gay Christian men. This discussion thus provides necessary background for the legal pluralist analysis that I set out in part III, below.

The American Psychological Association defines reparative therapy as clinical therapeutic measures that are aimed at changing sexual orientation from homosexual to heterosexual.[420] The term 'reparative therapy' was first coined by Dr. Joseph Nicolosi, cofounder of the National Association for Research and Therapy of Homosexuality ("NARTH"), (now rebranded as the Alliance for Therapeutic Choice and Scientific Integrity ("Alliance")) and a founding member of Exodus International, in 1991.[421] Alliance is the national association (in the United States) for counsellors and psychologists who offer reparative therapy. Alliance acknowledges its strong ties to evangelical and Catholic churches who offer reparative therapy treatments. It is difficult to separate clinical arguments about the alleged success of psychoanalytical therapies to change sexual orientation from conservative religious arguments about the 'naturalness' of heterosexuality. For example, in January 2018, Alliance's webpage included a banner headline that read: 'a little light in the darkness as a new USA Today article explores the discredited "born that way" science myth.'[422] Dr. Jack Drescher traces the medical history of reparative therapy to Freudian psychoanalysis conclusions about unnatural homosexual tendencies in children and degenerative theory arguments.[423] Twentieth-century Christian therapists such as Charles Socarides, Sandor Rado and Nicolosi later developed a strong gender normative therapeutic position on sexuality, asserting that homosexuality is a desire to "fulfill a deficit in wholeness of one's original gender",[424] and that homosexuality must be seen as a psychological deficit or injury, which can be healed by constructing a heterosexual gender expectation in the subject. The practical application of these theories can be seen in the account of Gabriel Arana, a teenage patient of Nicolosi's in the 1990s:

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[420] Beckstead, Lee A., *supra* note 354 at 88.
[421]Nicolosi, *supra* note 373.
[422] "Alliance for Therapeutic Choice and Scientific Integrity (NARTH Institute)", online: *alliance* <https://www.therapeuticchoice.com>.
[423] Jack Drescher, *supra* note 354 at 7.
[424] Nicolosi, *supra* note 373 at 109–110; Jack Drescher, *supra* note 354 at 18.

> [There was] a worksheet that categorized different emotions under the rubrics of "true self" and "false self." The true self felt masculine, was "adequate, on par," "secure, confident, capable," and "at home in [his] body."
>
> Another sheet illustrated the "triadic relationship" that led to homosexuality: a passive, distant father, an overinvolved mother, and a sensitive child. I was closer with my mother than my father. I was shy. The story seemed to fit, which was comforting: It gave me confidence that I could be cured.[425]

In 2007, the American Psychological Association issued a full investigation into Sexual Orientation Change Efforts ("SOCE"). The 2009 American Psychological Association Report concluded that, after stringent clinical tests of methods, theoretical bases and reported outcomes, "efforts to change sexual orientation are unlikely to be successful and involve some risk of serious harm, contrary to the claims of SOCE practitioners and advocates."[426] The findings of the 2009 report led to the APA adopting a resolution in which it condemned reparative therapy and refused to accept applications from those therapists who engage in SOCE.[427]

Medical and legal proscription of reparative therapy in the United States seem to have moved the practice of SOCE further out of the realm of medical treatment and towards religious practice,[428] although to some degree this movement merely reflects the crucial connections between religious principles and reparative therapy that have long existed. As I noted in part I, the numerous expert recommendations, legislative bans on therapy for young people, and clinical reports that condemn reparative therapy for its harmful effects, work to reaffirm the strong counterculture argument put by ex-gay evangelical Christian ministries that there is a strong anti-religious bias in mainstream psychotherapy and medical practice, which deliberately do not report the successes of reparative therapy. For example, the Alliance website has a range of fact sheets critiquing the 2007 APA's statement that SOCE treatments increase the risk of teen suicide and self-harm. The Alliance factsheet states that these "statistics have been created to support an pro-homosexual agenda. In fact, they do not exist." [429]

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[425] Arana, Gabriel, *supra* note 15.
[426] Glassgold, Judith M. et al, *supra* note 354 at (v), 3.
[427] *Ibid* at 89–90.
[428] Jack Drescher, *supra* note 354 at 10. I discuss recent attempts to legislate against reparative therapy in Part I of this chapter, at 154 – 155.
[429] Alliance for Therapeutic Choice and Scientific Integrity (formerly NARTH), "Using the Tragedy of Suicide: teen suicide and the homosexual agenda", online: *Alliance*

For men who engage in reparative therapy and who identify as Christian, the warnings of the medical community about the risks of reparative therapy are seen either as deliberately misleading, or as tests of their faith. For example, Wolkomir reports that conservative Christian wives, on discovering their husbands were having gay experiences, wanted to learn about homosexuality and gay culture but, "because of their conservative Christian backgrounds, they distrusted secular sources of information" and instead turned to friends who were Christians, religious leaders and Christian websites about reparative therapy.[430] "Because this information was linked to Christianity, the women believed it trustworthy and granted it legitimacy, using it to begin to shape their understanding of homosexuality."[431] Likewise, Erzen records the energetic protest movement that ex-gay Christian ministries like New Hope and Focus on the Family engaged in when the American Psychiatric Association issued its position statement against reparative therapy in 2007. At the APA Christian protest in Chicago, Mike Haley, a New Hope ex-gay graduate who now works in the political lobbying arm of Focus on the Family, marched with his wife Angie. "The sign over their baby stroller proclaimed, "My daddy changed… now I exist…It's Possible."[432] These views, in turn, are causally connected to a firm belief that change in sexual orientation is possible for each gay Christian, despite there being little or no clinical foundation for this belief. The 2007 APA Report noted the strength of this counterculture narrative, stating that:

> [E]ven though the research and clinical literature demonstrate that same-sex sexual and romantic attractions, feelings, and behaviors are normal and positive variations of human sexuality, regardless of sexual orientation identity… the population that undergoes SOCE tends to have strongly conservative religious views that lead them to seek to change their sexual orientation nevertheless.[433]

The history of reparative therapy has a strong theological basis that is seen by commentators as justifying, rather than *ex post* supporting, pseudo-medical arguments concerning the efficacy of 'cures' for same-sex desire.[434] The political and theological

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<https://www.therapeuticchoice.com/using-the-tragedy-of-suicide>. See also: Restored Hope Network, *supra* note 394; Voice of the Voiceless, *supra* note 373.

[430] Wolkomir, *supra* note 360 at 162–163.

[431] *Ibid*.

[432] Erzen, Tanya, *supra* note 360 at 126.

[433] Glassgold, Judith M. et al, *supra* note 354 at (vi).

[434] Robinson, Christine & Spivey, Sue E., *supra* note 52; Jack Drescher, *supra* note 354; Beckstead, Lee A., *supra* note 354.

foundations of reparative therapy lie in the creation of Exodus International in 1976, when approximately sixty evangelical Christian delegates convened the first ex-gay conference devoted to "Christian outreach to minister to gays and lesbians".[435] The Exodus message of sexual redemption through Christian ministry has directly informed the reparative therapy position that homosexuality is a mental injury caused by gender confusion, and that this injury can be healed with counselling and a reaffirmation of traditional gender roles. In brief, the modern Exodus counselling format for ex-gay ministries is based on three elements:[436]

1. Homosexuality is a result of damaged/stunted psychological development caused by a childhood trauma or parental event that results in a failure to properly bond with a same-sex role model. In the case of men, this will often be the fault of an overbearing mother who replaces the proper, masculine role of the father and creates "confusion about proper mother-son bonding."[437] Therefore, at New Hope, Frank Worthen taught ex-gay men that "fathers transmit masculine strength to sons, and this masculine affirmation is what separates a male child from his mother. The deprivation of 'father-love, father-touch, and father-communication erupts in compulsions to touch and be touched by other men sexually."[438]
2. The emotional need for same-sex bonding becomes mistakenly sexualized at puberty, creating homosexual desire, effectively breaking down the 'normal' heterosexual desire for women, and redirecting it towards men. This latent awareness of same-sex desire can also be the direct result of an early or recent 'wounding' event. James Guay, who underwent ex-gay Christian therapy throughout his teenage years, writes: "I was guided to 'remember' an original wounding – in particular, sexual or physical abuse – that I had not experienced."[439]
3. The cure for same-sex attraction is based on the principle of 'redemptive prayer' and

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[435] Wolkomir, *supra* note 360 at 30.
[436] Even though Exodus International is no longer a reparative therapy provider, The Exodus Guidelines for sexual orientation change efforts—in force since the first Exodus conference in 1982—continue to operate as the guiding doctrine for evangelical Christian reparative therapy providers, including Alliance. For a history of the Exodus movement and its guidelines, see: Bob Davies, *History of Exodus International: An Overview of the Worldwide Growth of the "ex-gay" Movement* (Exodus International-North America, 1998).
[437] Worthen, *supra* note 374.
[438] Erzen, Tanya, *supra* note 360 at 105.
[439] Guay, *supra* note 370.

adherence to the literal words of the Bible, which require men and women to be heterosexual, (and, preferably) to marry and have children. "God, the Ultimate Father, will heal the psyche and return the person to healthy heterosexuality."[440] How this transformation is guided varies depending on the program of the ministry or church. In both Wolkomir and Erzen's communities (both originally connected to Exodus International), and in later first-hand accounts of ex-gay men, Christian rules about witness and confession (telling your story to others and seeking forgiveness for moral falls), obedience and submission to Christ, and building a family through Christian marriage, are consistent elements of the healing process. I discuss these elements further at part III of this chapter, where I identify them as Christian rules that are part of a compelling, normative order for ex-gay Christian men.

Part III

(1) Legal pluralism and ex-gay communities– first positions

As I outlined in chapter 2, a strong legal pluralism view of legal orders accepts that, within the modern state, certain religious groups are capable of constructing and enforcing the bounds of their own normative frameworks and these can successfully resist the intrusion or imposition of state law in relation to certain matters.[441] Macdonald describes these certain matters as being subject to "independently foundational claims" made on the basis of a "deep commitment to different basic faiths."[442] Tamanaha defines social or religious law that operates separately and differently to state law as a "folk concept, that is, law is what people within social groups have come to see and label as law."[443] These conceptual starting positions for law in a religious context are instructive for this context. The position I defend is that Christian religious proscription of same-sex intercourse,

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[440] Davies, *supra* note 436.
[441] I address the theoretical bases of this proposition in greater detail in chapter 2, part II, at 80, 90-91. Dr. Rowan Williams, the former Archbishop of Canterbury, affirmed this position in terms of the existence of religious minority communities' legal and ethical norms that operate at the exclusion of state law, particularly in relation to rules and customs about marriage, divorce and family law. See: Chaplin, Jonathon, "Legal monism and religious pluralism: Rowan Williams on religion, loyalty and law" (2008) 2 Int J Public Theol 418; Williams, Rowan, "Civil and religious love in England: a religious perspective", *The Guardian* (7 February 2008), online: <www.theguardian.com/uk/2008/feb/07/religion,world3>.
[442] Macdonald, "Custom Made, 2011" *supra* note 29 at 303.
[443] Tamanaha, *supra* note 185.

attraction and relationships relied on by evangelical ex-gay community leaders have the force of law for the men who live within these communities. Further, I claim that the detailed religious rules and codes of conduct which govern human behaviour in ex-gay communities operate as sanctions, rules and remedies that support and police the foundational position. This discussion proceeds first from a discussion of the Biblical rule against homosexuality (which I present as the primary, or foundational norm) and then progresses to a discussion of the specific religious practices, rules and community norms that act to enforce and support the foundational normative position.

First, I assert that the evangelical prohibition of male same-sex intercourse and relationships is a rule capable of satisfying a strong legal pluralism definition of a foundational or constitutional norm which, for evangelical Christians, has the force of law. To reach this conclusion, I begin by considering the legal character of religious doctrine in evangelical Christian ministries—notably their position on homosexuality—in the context of Tamanaha's four criteria for religious normative orders, namely: (1) that they possess binding authority over members of their community; (2) they are legitimate, (3) they have normative supremacy; and (4) they have control over matters within their scope.[444] The doctrinal dividing line between Orthodox Judaism (where the 613 mitzvot of the Old Testament, or Hebrew Bible, are considered to be the literal, binding Word of God) and fundamentalist and evangelical Christianity is the significance of the 'legal authority' of Jesus Christ as the personal saviour of all Christians.[445] Susan George, in her treatise on the rise of the Christian Right as a key player in modern American politics, observes that the term 'fundamentalist' is now ubiquitous for American Christian literalism and evangelicalism: in that it describes every Christian who "believes that because it is the Word of God, every word of the Bible is literally true and that he or she is on earth to act as a guardian and a propagator of that truth."[446] For evangelist Christians, the Last Supper defines the beginning of the 'New Covenant' between Jesus

[444] *Ibid* at 35–36. See also my discussion of this issue in chapter 2.
[445] Martin, *supra* note 52; Jose Casanova, "Evangelical Protestantism: from Civil Religion to Fundamentalist Sect to New Christian Right" in *Public Religions of the Modern World* (Chicago: The University of Chicago University Press, 1994) 135 at 135; George, *supra* note 52 at 111, 113.
[446] George, *supra* note 52 at 112–113. George does not go further into a definition of the Hebrew and Christian bibles, but her general point about literalism and a commitment to the unalterable nature of biblical doctrine is helpful, and corresponds to Casanova's definition of fundamentalist Protestantism in the United States. See: Casanova, *supra* note 445.

and mankind: an ongoing bond between Christians and God, which supersedes the Old Covenant of the Hebrew Bible, comprised of the Abrahamic and Mosaic Covenants.[447] The relevant Gospels describe Christ not merely as the son of God but as lawmaker and guide of a new Christian era, which is (roughly) supposed to start following Christ's resurrection. The significant New Testament text is Hebrews 8:6 – 10:

> Look, the days are coming, says the Lord,
> when I will make a new covenant
> with the house of Israel
> and with the house of Judah.
> It will not be like the covenant
> that I made with their forefathers
> at the time when I took them by the hand
> to lead them out of Egypt.
> Because they did not remember my covenant,
> I ignored them, says the Lord.
> This is the covenant I will make with the house of Israel
> after those days, says the Lord.
> I will put my laws into their mind,
> and I will write them on their hearts.
> I will be their God,
> and they will be my people.[448]

Providing a neat definition of conservative, evangelical Christianity is difficult, because the category of churches that identify as 'evangelical' is broad, and because there is internal dissent between denominations about modes of prayer, correct versions of the Bible and doctrinal differences about Covenant Theology and interpretation of the Scriptures.[449] However, a helpful, general definition of American evangelism is proposed by Didi Herman: "a coalition of organizations that is based, for the most part, on a conservative, evangelical Protestantism. This describes a specific set of beliefs that can be

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[447] The Abrahamic and Mosaic Covenants are still recognised as biblical law by Jews and by some fundamentalist Christian faiths today. Generally, they encompass the bond between God and mankind that was founded first by Abraham and then by Moses. Inherent in the notion of the Covenants is that these are agreements which designate how Jews and Christians should worship and live holy lives. There is a long and complex debate about Covenant Theology in religious literature, which I do not intend to engage in. For the purposes of this work, it is sufficient to note that evangelists most often hold to dispensationalism or Systemic Theology, which distinguishes between Israel and the Church based on Christ's heavenly kingdom, comparatively to God's promises to Israel to rule the earth. On this basis, "it is not right to think of Old Testament believers together with New Testament believers as constituting one church." This creates a theological separation between Judaism and Christianity and between the obligations in the Hebrew and Christian bibles. Wayne Grudem, *Systematic Theology* (Surrey: InterVarsity Press, 1994) at 860.

[448] *The Bible* Evangelical Heritage Version ed, Hebrews, 8:6-10.

[449] Martin, *supra* note 52 at 352.

reduced to two key elements: biblical inerrancy and premillennial dispensationalism."[450] The first tenet of Herman's definition links evangelical Christianity to fundamentalism, being the belief that the Christian Gospels and (to some extent) the Hebrew Bible, are to be read literally as the word of God. Further, for evangelical Christians, total belief in Jesus' authority over all life on earth is the "doctrinal bottom line", and the New Testament forms the basis of rules and promises for Christian lives as set out by Christ; both for life on earth and in the hereafter.[451] The expectation of fundamentalism is that treating the Gospels as literally true means that every aspect of one's life should accord with Christian rules, or one risks 'not being saved' by Jesus. Thus, many evangelical Christians, including the ex-gay Christian men who are the subject of this chapter, believe as a matter of faith that the Gospels are literally true and that the morality of their lives will be judged at a predetermined End of Days, when sinners will be punished by eternal damnation. The grace of Jesus Christ is something that ex-gay men and women must invite into every aspect of their lives; to succeed at transforming their sexual identity to heterosexual, and to save themselves from damnation. Where people 'fall' or 'fail' in their religious ex-gay mission, their failure is due to an inability to follow the rules and, therefore, is a failure to submit oneself to Christ. It is not a failure of the rule-system, which is divinely ordained.

In his text *Public Religions in the Modern World*, José Casanova notes that, while the inerrancy of the Bible as the Word of God had been a traditional belief for most Protestants since Luther, "the 'infallibility of Scripture was turned into fundamentalist

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[450] Herman, *supra* note 52 at 12.

[451] George, *supra* note 52 at 113."God has a plan for everyone and those who do not fulfill that plan can expect eternal torment in hell, just as those who do the will of God will be blessed and abundantly rewarded in the afterlife. The doctrinal bottom line is that Jesus is the Lord and Saviour of every individual on earth, no matter what religion that person may have been born into." The second tenet of Herman's definition is a belief in millennialism. This is an apocalyptic vision which predicts the end of the world through a particular reading of the Book of Revelations. Herman, *supra* note 52 at 12. There is also a radical, minority view of Christian law as the true legal system that is connected to millennialism and fundamentalism, where the Christian church has exclusive jurisdiction over all spiritual and moral matters, even where these are ostensibly covered by state civil law jurisdiction. This movement is known as reconstructionism and the system of law is known as theonomy (literally, 'Rule of God'). Reconstructionists argue that the authority of the state should be severely limited to a point where only the judicial branch exists, and only has authority to determine breaches of the criminal law. While a minority view within fundamentalist Christian belief, some high-profile leaders within the Christian Right such as Jerry Falwell have indicated support for reconstructionist texts. Martin, *supra* note 52 at 353. See also: Jason R Hackworth, *Faith Based: Religious Neoliberalism and the Politics of Welfare in the United States* (University of Georgia Press, 2012).

dogma only when Scripture was challenged by modern trends and ideas."[452] Thus, there was less consensus among evangelical Christians about which sections of the Scriptures were in fact 'fundamental' in the sense of being literally true, but there was a consistent rejection of modern readings that threatened this literal interpretation. That is, the form, rather than the substance, of biblical rules began to dictate obligation: "[t]he particular fundamentals, chosen rather arbitrarily, were not as important as the fact of proclaiming some fundamentalist tenet, some taboo boundary which could not be trespassed."[453] This discussion of the significance of literalism and fundamentalism in Christian evangelical faith demonstrates that two of Tamanaha's requirements for a religious normative order can be satisfied through the rigid form and normative supremacy of Christian biblical doctrine:

(1) binding authority; and (2) normative supremacy.

If we turn to the Biblical rules about homosexuality,[454] we see that Tamanaha's remaining two criteria (relating to legitimacy and the scope of relevant legal matters falling within the purview of the group) can be identified in the form of the rule and its context within evangelical Christian ministries. For many evangelical churches, the significance of the New Covenant is that the text of the New Testament is literally binding, while rules contained within the Old Testament lack a compulsive character, as their legal requirements were fulfilled by the Crucifixion. Thus, while Old Testament rules remain important guides of God's will and intention, they are not "mandatory rules" for Christians to follow.[455] By comparison, other evangelical ministries hold all elements of the Old and New Testament to be literally binding on Christians as the Word of God,[456] and some others consider Old Testament Levitical Law to be ancient demonstrations of

[452] Casanova, *supra* note 445 at 141.
[453] *Ibid* at 142.
[454] The two Old Testament texts commonly relied on by evangelical Christians in this regard are Leviticus, 18:22: 'Thou shalt not lie with mankind as with womankind: it is abomination"; and the corresponding sanction in Leviticus 20:13: "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." I discuss these sanctions as they are observed by Orthodox Judaism, in chapter 5. Here, as in chapter 5, I cite the Authorised King James Version (21st Century).
[455] Grudem, *supra* note 447 at 382.
[456] Martin, *supra* note 52.

God's will on certain legal matters, which are then given new legitimacy through their reaffirmation in the Gospels.[457]

Whatever Biblical text is observed as authority, the standard evangelical proposition in relation to homosexuality is that of a strict prohibition: that all homosexual conduct is sinful and against God's will.[458] In the case of Erzen and Wolkomir's ex-gay ministries, this position is justified by pastors and counsellors on the basis of a combination of Old and New Testament sources.[459] Wolkomir helpfully summarises Exodus' historical position on homosexuality, which are the guiding principles of evangelical ex-gay ministries and churches:

> Exodus has been firmly grounded in a theologically conservative, evangelical Protestant tradition… It has consistently reiterated conservative Christian arguments against homosexuality; homosexuality is clearly condemned in the Bible as a sin that defies God's will (as illustrated by the destruction of the Biblical city of Sodom), and homosexuals are perceived to be among the unrighteous, listed in 1 Corinthians 6:9, who "shall not inherit the kingdom of God… [T]he homosexual orientation is an expression of humanity's sinfulness—and cannot comfortably co-exist within the context of a total commitment to Jesus Christ.[460]

Likewise, the New Hope doctrinal statement clearly links the aims of ex-gay ministry to the normative significance of Biblical rules against homosexuality; not only in terms of a clear statement of purpose, but also in the legal 'signs and symbols' that map the mission statement:[461]

> We believe that the Bible is the inspired Word of God and is *infallible* and *authoritative* in its original writings…. We believe that the Bible teaches that all homosexual conduct is wrong and against God's *standards*. We believe that through making an *unconditional*

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[457] Thomas R Schreiner, *40 Questions about Christians and Biblical Law* (Grand Rapids, MI: Kregel Academic, 2010) at 50–52, chapter 8, "How Should We Understand the Use of Leviticus 18:5 in the Scriptures?".

[458] I note that this is not the final position accepted by all evangelical Churches. For example, Wolkomir's study included interviews with gay Christian men who attended an evangelical Metropolitan Community Church (MCC), where Biblical proscriptions of homosexuality have been read down, reinterpreted and parsed to embrace same-sex relationships between men and between women. Wolkomir, *supra* note 360 at 5, 19–21, 23, 26–27.

[459] Erzen, Tanya, *supra* note 360 at 18–19.

[460] Wolkomir, *supra* note 360 at 31.

[461] Here I draw on the concept of the Biblical style of law designed by Santos. The Biblical style 'presupposes interactions… where legal interactions are described through iconic, emotive and expressive signs. Here, the signs are inverted from emotional to calculating, from a language of faith to a language of law. See: Santos, *supra* note 205 at 295–296.

> commitment to Christ, we are empowered by Him who gives us victory over homosexual desires and leads us into a new life and a new walk that is within His will.[462]

The unique feature of the ex-gay ministry position on same-sex attraction—as compared to other evangelical positions that hold homosexuality to be a defiant sin of choice— is that it does not view homosexuality as a 'special sin', but rather as a normal sin of moral fall, tied to complex causative factors of damaged psychoanalytic development. Thus, ex-gay ministries reframe homosexuality as a clinical matter that is properly within the jurisdiction of Christian governance. Indeed, the ex-gay position is that the sin/sickness of homosexuality can *only* be properly addressed by Christian intervention. Erzen takes note of the totality of jurisdiction that ex-gay men at New Hope grant Christ in determining their sexuality when they join an ex-gay ministry. Thus, Hank differentiates between superficial change in his sexual behaviour, which will not last, and real healing—which is only possible through a transformed life in Christ: "Change with God is healing, but change without God is just change."[463]

This belief in the literal truth of Biblical proscriptions against homosexuality, coupled with a deep faith in the ability of Christian ministries to redeem a sinner through reparative interventions, combine to create an expectation of legitimacy of the position ('they are here to help me and I can change') and the recognition of exclusive subject-matter jurisdiction of the ex-gay ministry over a person's sexual and religious identity ('no-one else can help me and there is no other legitimate way for me to live'). Here, the authority of Biblical doctrine forbidding same-sex intercourse is combined with the Exodus/Alliance pseudo-psychological model of homosexual desire being caused by trauma and gender confusion in early life: to create a concept of a religious 'law' against being gay that has scientific and social currency. Wolkomir describes the relief that men in the Expell group felt when they adopted the Exodus narrative to simultaneously explain their homosexuality, demonstrate their commitment to reject it, and provide a pathway to redemption from it.

> [T]he men could use this explanation to reconceive their struggle with homosexuality as righteous behaviour. Because this explanation framed the men's problem as not of their own making, and yet required them to struggle to overcome it, their efforts to be righteous were especially virtuous, providing evidence of their status as good Christians.

[462] Erzen, Tanya, *supra* note 360 at 56 (emphasis added).
[463] *Ibid* at 76.

> Paradoxically, this reframing required that the men simultaneously distance themselves from homosexuality and embrace it as the ultimate temptation against which [they] were measured.[464]

The isolated nature of ex-gay religious ministries (in terms of physical and social isolation, as well as political) further separates their position on sexuality from state law protections of LGBT identities, and even from more progressive Christian positions about sexuality. Ex-gay men in residential programs live in a degree of physical isolation from 'the gay lifestyle', and programs are rigidly structured and monitored to prevent people from interacting with anyone from outside the church.[465] The New Hope residential program, for example, has four phases called 'protective parameters', where the time, activities and contacts of each man are policed by House Leaders and 'falls' (such as drinking alcohol, going out alone at night or talking outside to non-group members) are then 'judged' by House Leaders at group meetings.[466] Frank Worthen explains to Erzen that the parameters are necessary to ensure that the rules of New Hope are never deviated from:

> We have consistently seen that those who do well in our program have teachable spirits and willing, obedient hearts. You must be willing to share openly and enter the group discussions and to fully understand and apply the Christian principles being taught.[467]

In addition to physical isolation, ex-gay ministries are aware of their political and theological separation from majority viewpoints on the naturalness of same-sex desire, sex and relationships. Ex-gay ministries respond to this degree of isolation from the mainstream by viewing it as evidence of religious discrimination by the state and thus by reaffirming a Christian counter-culture narrative of the religious outsider. The reliance on religious norms to support community resistance against state law attempts to intervene in ex-gay ministries is a powerful legitimation tool: positioning evangelical religious faith as David to the state's secular Goliath (this Biblical imagery is mine). Physical and social isolation of ex-gay churches and programs therefore combines with

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[464] Wolkomir, *supra* note 360 at 115.
[465] Many ex-gay men described the choice of living openly as a gay man in secular society as 'living the gay lifestyle'. Erzen comments that this description has specific normative and emotional weight for ex-gay men, as it creates an image of a gay man as irresponsible, selfish and promiscuous. It is also non-optional. "Frank teaches that the only way to have a social world as a gay man or woman is through the bar scene… The lessons depict neighbourhoods like the Castro in San Francisco as hedonistic and completely oriented around sex. 'In urban areas, the lifestyle goes on for twenty-four hours a day. There is always a desire for the new, exploration, new people, new places.'" Erzen, Tanya, *supra* note 360 at 112.
[466] *Ibid* at 99.
[467] *Ibid*.

the political and religious isolation of the ex-gay narrative to create itself as a demarcated social field with only one source of law in relation to sexuality. For example, consider Focus on the Family's response to the Leelah Alcorn tragedy and the subsequent introduction of legislation to ban reparative therapy for minors:

> Legislation to ban SOCE is an intrusion by the government into the lives of those with unwanted same-sex attractions, behaviors or identities…
>
> We also speak out against these bans, because it affects freedom of speech and religion. People of our faith should be able to talk to and work with a licensed counselor to pursue goals that align with their deeply held beliefs.[468]

The combination of a closed, outsider narrative, the presence of a Biblical foundational norm that members consider to be literally true, and the assumption of supreme authority on the questions of whether homosexuality is a sin; is redeemable; and is changeable, are factors which combine to transform the evangelical, ex-gay position on homosexuality from an individual religious belief into a shared normative position that could be recognised by both Tamanaha and Macdonald's criteria for a strong legal pluralist analysis. In the section that follows, I develop my legal pluralist analysis of ex-gay ministries by applying Howard Kislowicz's five aspects of non-state legal orders in religious communities to specific rules and normative environments that are described in Erzen and Wolkomir's studies, and in more recent first-hand accounts of ex-gay religious communities.

(2) Developing the argument

Here, I apply Kislowicz's five aspects for determining the legal character of religious normative positions and practices to the areas of regulation that are foundational elements of ex-gay Christian ministry.[469] I develop the argument that Christian men living an ex-gay lifestyle are required to strictly abide by certain religious norms that govern sexual desire, behaviour and identity; and that specific Christian procedures that relate to witness, personal confession and submission compel ex-gay subjects to comply with foundational rules (in the language of evangelical Christianity: 'to submit to Christ's will

[468] Jeff Johnston, "'Sexual Orientation Change Efforts' – What's the Controversy?", (5 August 2015), online: *Focus Fam* <https://www.focusonthefamily.com/socialissues/sexuality/freedom-from-homosexuality/sexual-orientation-change-efforts-whats-the-controversy>.
[469] Kislowicz, *supra* note 10 at 194 - 196.

in all things'). As supporting propositions for these rules, ex-gay ministries teach members about the true Christian environments of family, community and Church as mandated by God. These propositions must be accepted as preconditions for Christ's love, one's inclusion in his Church, and the achievement of successful sexuality transformation.

1. *Religious subjects symbolize their practices as rules, and view them as obligatory in meaningful ways*

Above, I have set out the position that the Biblical prohibition against homosexuality and homosexual conduct is an unconditional, foundational rule for ex-gay Christian ministries. The significance of this rule to the life of ex-gay Christians is demonstrated in different ways. First, there is the deep, compulsive awareness of sin and guilt— reported by ex-gay men and that ex-gay organizations claim to heal— that arises from engaging in sex with men, gay relationships or other forms of gay intimacy. Focus on the Family includes this excerpt from Exodus founder Alan Medinger's book *Growth in to Manhood* on its information page about Regeneration, its dedicated ex-gay ministry:[470]

> [The gay Christian man] is in terrible conflict over the contradiction between what he believes is good behavior and what he is doing. He may feel like Paul, who wrote in Romans 7 about being driven to do the very things he hates… I would estimate that over 90 percent of the men who come to ex-gay ministries come because they sense a great conflict between their behavior and what they believe God wants for them.[471]

Different men in both the Expell and New Hope communities reported having almost a subconscious or emotional awareness of the Christian prohibition of homosexuality that prompted them to repent and change. This subconscious knowledge of sin often motivated their decision to join an ex-gay ministry and to recommit themselves to Christianity. Often, this recommitment is described in vivid terms of life over death, virtue over destruction: a choice to live life within the law and the community, rather than

[470] Medinger's book (which sets out the Exodus path to Christian healing, summarised above in Part II) remains a central reference text for ex-gay ministries in the United States today, despite the closure of Exodus International. Both Erzen and Wolkomir report that it directly informed their Exodus ministries, and it is included as a reference text on multiple ex-gay organizational websites today, including Voice of the Voiceless, Focus on the Family and Alliance. See: Erzen, Tanya, *supra* note 360 at 36, 103–104, 105; Wolkomir, Michelle, *supra* note 386 at 33–34; Voice of the Voiceless, *supra* note 376; Focus on the Family, *supra* note 376; Worthen, *supra* note 374; Medinger, *supra* note 373.
[471] Focus on the Family, *supra* note 376.

beyond it. For example, Tim (an Expell leader) tells Wolkomir that, after years of living a 'life of self-hate' as a lapsed Christian and gay man, one day:

> '[H]e heard a voice in his head say, 'if you stay here, you will die here. If you leave from here, I will give you life.' Tim believed God had spoken to him.... He recalled finding a piece of Scripture, 1 Corinthians 6:11.... No one ever told me I needed to be healed. Those words were so powerful to me. It meant that he could heal me.[472]

As Wolkomir comments, Corinthians 1:6, discusses the consequences of sexual immorality, including homosexual wrongdoers, and warns them that their sin is so great that they will not 'inherit the Kingdom of heaven' if they continue in their path. However, redemption is possible through obedience to Christ. Thus, Corinthians 1:11 tells sinners to 'uphold Jesus's teachings and to recognise that "when we are judged by the Lord, we are being disciplined so that we will not be condemned by the world."[473] This commitment to the Christian norm not only 'sustains' the men in the face of significant challenges of sexual desire, loneliness and identity conflict; it also directs their compliance. For example, Erzen interviews Darren, an ex-gay man who married a woman he met at the Open Door Church, who admits that he still must strictly police his sexual desires and habits to make sure that he lives within Christ's law about homosexuality:

> [H]e speaks openly about the fact that gay pornography is still a difficult and tempting area for him. After his wife "nailed him on it", he met with a support group at Open Door Church to reaffirm his heterosexuality... However, he conceded, I still have to watch where my eyes go." ... When his wife told him that she would leave him if he continued with his addiction, he determined to take more drastic measures. He told me that he visited every video shop in his town and nearby towns with a letter he composed. It read, "My name is Darren _____, and my wife is Trisha_____. Our phone number is _____. If you see me in here renting pornography please call my wife." It was like cutting off my own arm," he explained. "...I walked out of there and knew I could never go back.[474]

In a similar pattern of legal practice through obligation, the experiences of Christian wives in Wolkomir's Expell group demonstrate a strategic use of Christian rules about the supremacy of family life in commandments and the primary rule against homosexuality to compel compliance of the ex-gay Christian man. Part of the Exodus mission and the evangelical Christian view of gender relations is that female submission (of a wife to a

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[472] Wolkomir, *supra* note 360 at 63.
[473] *Ibid*; Evangelical Heritage Version, *supra* note 449 at Corinthians, 1:6. 1:11. I reference the Evangelical Heritage Version here, because this is the version preferred by Expell and thus by Wolkomir.
[474] Erzen, Tanya, *supra* note 360 at 170.

husband, of female authority to male authority), is a natural and necessary condition for a successful Christian marriage.[475] However, a higher act of submission to God also allows a wife to leverage biblical injunctions and rules in favour of heterosexual commitment. For example, two of the women in the Expell group spoke to Wolkomir about attempts their husbands made to leave their families and to start new lives as gay men. These wives used biblical rules against homosexuality, adultery and the Exodus expectation of the dominant masculine role in a Christian family to bring their husbands back within the community:

> …She told him that, while he could argue whatever he wanted about homosexuality, there was "nothing, and I mean nothing, in the Bible that made adultery okay. Adultery is sin and God hates it. You cannot do this." Phillip came home, as Beth said, because "nothing could relieve him from the guilt of adultery." In this instance, Beth invoked God's authority to persuade Phillip that he had to come home.[476]

When seen from a legal perspective of obligation, we can understand the reasons why wives would threaten their husbands with damnation and dying 'unsaved' and why men would respond to these sanctions by subsuming their queer identity and returning to their ex-gay community. These obligations and rules are intended to be literal, and their effect on the identity of the ex-gay man is physical, moral and spiritual compliance. Identifying the proscription of homosexuality and attendant rules about adultery, family structure and marriage that are linked to that rule as law within ex-gay communities is therefore significant to explain the transformation of sexual identity that ex-gay members of these communities attempt. These laws are viewed by evangelical Christians as literal and natural laws which in turn justify a number of difficult choices that ex-gay men make in order to live their life as a redeemed Christian. To live one's life as an openly gay man is not only to risk damnation (an individual religious sanction) but also to live one's life beyond Jesus' love and therefore to live in a place of no-law, or legal anarchy.[477]

2. *That the legal practices flow from higher principles within a larger tradition*

I have dealt with the proscription against homosexuality at some length in the sections above as a higher rule from which practices and actions flow in ex-gay communities; but

[475] For further discussion of the sociological and theological significance of submission by women in evangelical Christian societies, see: Griffith, *supra* note 334.
[476] Wolkomir, *supra* note 360 at 175.
[477] Erzen, Tanya, *supra* note 360 at 6–7, 10.

there are other evangelical Christian principles which directly influence strict ex-gay community rules about sexual desire, social and romantic behaviour and relationships with Christian women. Different programs have different structures and rule-based systems, but both Expell and New Hope strictly police all 'anti-social sexual activity' including masturbation, close physical contact between men (except when mandated by the program, when teaching pro-social masculine interactions) or viewing pornography, as these activities are known to encourage regression to 'the gay lifestyle'. At New Hope, the Steps Out rules forbid men from walking alone with another man a night or drinking alcohol and, in the first phase of the program, they are even forbidden from having a private conversation out of sight of House Leaders.[478] Men fill out 'accountability sheets' that list their illicit fantasies and then share them publicly, in an effort to discourage masturbation or other sexual rule-breaking.[479]

One guiding principle that informs these strict rules is the primary role of the family within Christian community. Pastors and church leaders in the ex-gay community rely on the Book of Genesis as proof that sex should be tied solely to procreation, that heterosexuality is mandated by God, and that the aim of sexuality is the coming together of the male and the female.[480] Medinger advises that all ex-gay men undergoing religious therapy should aim for Christian marriage as the demonstration of their 'ultimate transformation' into their masculine self.[481] Expell counsellors put it to Wolkomir that, as the family is the central unit of Christian community, any sexual activity that breaches that unit is not only sinful of itself, "but also goes against the greater principle of Christianity: to serve God through love."[482] Erzen notes that all the men she interviewed at New Hope wanted to get married and to have children, because this would mean satisfying part of God's plan for Christian men. Curtis, one of the youngest members of New Hope, told Erzen that, even though he has never had any sexual desire for women, "once I get to know my wife more, it becomes what God has intended for a man and a

[478] *Ibid* at 99–100.
[479] *Ibid* at 94.
[480] *Ibid* at 62; Greg Smalley, "Honoring Marriage", (20 January 2016), online: *Focus Fam* <https://www.focusonthefamily.com/marriage/gods-design-for-marriage/honoring-marriage>.
[481] Medinger, *supra* note 373 at 218.
[482] Wolkomir, *supra* note 360 at 12.

woman. I'll start seeing her differently. I'll start having those feelings for her."[483] The Exodus narrative also relies on the healing potential of Christian love and care, and the discovery of one's true heterosexual path through prayer and redemption. The name 'Exodus' was chosen to represent the Christian principle of freedom from sin and reparative love: "that individuals can be freed from slavery to their sexual sins".[484] In this way, ex-gay Christians are taught to consciously link their understanding of sinful/lawful sexuality and gender to Christian ideals of the family, procreation and a personal connection with God and Jesus. Through embracing Christ and being healed, they are promised the ultimate reward: living as a lawful Christian subject in the next life.

To undergo true sexual identity transformation, there are important legal and personal relationships that ex-gay men must develop: that is, the legal/religious covenant of marriage as a sacred devotion to God and the relationship of a good father to a family, with 'the good father' defined as the male role who provides, protects and leads decision-making. Wolkomir's interviews with ex-gay men and their wives stressed the importance of recognising the imperative of marriage, children and family life as not merely a bulwark against homosexual tendencies, but also a natural law that, when recognised as such, allows participants to serve their higher purpose within God's plan: creating the next generation of Christians. The significance of these principles of family, marriage and procreation are the impetus for strict rules that ex-gay men try to follow about desire, attraction and abstaining from 'homosexual fantasies' during their time in ex-gay counselling and afterwards, when they will keep working on their 'sexual identity transformation' so that they can identify as an ex-gay man who is happily married with children.

The second, perhaps most universal Christian principle that guides the practices and rules of ex-gay communities is the requirement that each Christian must ultimately submit to Christ in all things. The principle of obedience is sourced from a range of Biblical texts; Frank Worthen, founder of New Hope ministries, relies on Romans 13:1: "every soul should be subject to those in higher authority and all authority is from God."[485] Erzen

[483] Erzen, Tanya, *supra* note 360 at 118.
[484] Wolkomir, *supra* note 360 at 12.
[485] Evangelical Heritage Version, *supra* note 449 at Romans, 13:1; Erzen, Tanya, *supra* note 361 at 62, 73.

notes that, at New Hope, this awareness of a higher Christian authority is intended to suffuse the ex-gay man with God's love and with an attendant obedience to every aspect of life in the ex-gay community. Thus, "a person is supposed to be so filled and fulfilled by the love of God that submission and obedience do not feel like a sacrifice or imposition, even if this means abstaining from sexual temptations, listening to Hank [a house leader) and following all the New Hope rules."[486] The requirement to submit to God in all things is, of course, closely linked to the guiding principles of the proscription of homosexuality and the significance of family life in the Christian community. However, the requirement that ex-gay men submit to God's will in all things means that each small, detailed rule that governs one's daily life is a step towards both greater obedience to Christ and—counterintuitively—freedom from same-sex attraction. Worthen tells ex-gay men at New Hope: "God has given us free will. If you just surrender and do what God wants, you will change."[487] A plain reading of this dictate shows it to be a blatant contradiction in terms, unless the Christian community member cites it within the broader tradition of obedience to Christ. The principle of ultimate obedience has legal effect, when one considers the implications for evangelical Christians who are taught to believe that the Gospels are literally true. This principle therefore grounds Biblical rules about sexuality and family creation as the will of a God to whom one must submit in all aspects of life.

3. *That the religious practices at issue are regulated in detail and have practical effects on the lives of practitioners*

Ex-gay communities are environments where all aspects of life are closely regulated by prayer, church attendance, community meetings and group sharing, and frequent personal communion with pastors and counsellors. Specific rules and conventions apply not just in terms of sexual activities and desires, but also in relation to the development of 'masculine habits' and the prevention of 'feminizing characteristics'.[488] In the case of Wolkomir's Expell community, many of the men reported that, even though their

[486] Erzen, Tanya, *supra* note 360 at 73.
[487] *Ibid*.
[488] Medinger and other Exodus texts teach that ex-gay men must work on their masculinity to help them rectify the gender confusion they suffered when they developed 'their homosexuality' in childhood. There are a range of different activities that men must undertake. Erzen describes men at New Hope being banned from 'camping' (being sarcastic or imitating other men) because this can be an indicator of feminizing/gay mannerisms.

program was not residential, Expell counsellors encouraged the men and their families to closely police all of their behaviour and activities, to scrutinise them for 'homosexual tendencies', and to actively engage in masculine and feminine role playing at home.[489] In both case studies, the researchers emphasised the importance of group sharing, witness and confession to the ex-gay mission. Wolkomir notes that, for Expell group sessions, the element of personal shame was combined with the Exodus treatment principles of healing through forgiveness, repentance and submission. In these sharing experiences, there is a recurring motif of the righteous nature of the rule (Godly) and the sinful nature of shame, embarrassment and fear (Satanic). Wolkomir describes Josh's confession to the group in these terms:

> We gathered in a circle around Josh, who was sitting in the middle staring at the ground… Then, Josh (crying) told us the details of his homosexual encounter… The leader told him, "You must stop punishing yourself now. You have repented; God has forgiven you. We are all sinners, we all stumble, but the truly righteous, the truly faithful, get back up on the side of God. Feeling shame is normal… Then, don't give in, push away from it. Rejoice in your continued resistance in spite of Satan's attempts to draw you in. You are a child of God.[490]

All of these customs, regulations and practices are considered necessary to enable a successful sexual conversion, because when a subject does not actively engage with their Christianity (their connection to God) at all times, they risk of falling into sin. While falling is forgiven, the member of the community must always move back to the lawful, godly path and continue their journey. People who depart the community and who no longer actively engage with the Christian principles and rules which govern ex-gay life are not welcome to return. The community view is that men who leave their group to begin a same-sex relationship also choose to depart from the lawful, evangelical narrative, and are thus dedicating themselves to an unlawful path. These decisions are never presented as independent choices sanctioned by a different value system, and they are never accepted as an alternative to the ex-gay process. For example, Thom Cooper, a self professed ex-ex-gay man, writes movingly of his four-year Christian 'journey' through an Exodus Christian church. Thom writes that, while undergoing intensive therapy to cure

[489] Wolkomir, *supra* note 360 at 123–125.
[490] *Ibid* at 122.

his same-sex attraction, he fell in love with a man and realized that he was failing the program:

> Frustrated at my inability to control my mind, at some point I addressed God and told Him that I was accepting myself just as He had created me—as a gay man… At that point, I began a new life by accepting myself as a gay man. That acceptance has brought me great happiness and a new self-image that is positive, despite rejection by my dad and stepmother and my only brother…. When I advised the [Exodus] group of my decision, I was asked to leave. Although I have written the leader telling him of my gratitude for his efforts on my behalf, I have never had a response.[491]

Erzen's narrative of the ex-gay experience as journey rather than destination is apt. Ex-gay men accept that there will always be a risk of 'falling back' into sin. Rather than seeing this as a natural result of immutable sexual characteristics, religious (legal) subjects see this as the natural inclination of man to sin (in many ways, including but not limited to homosexuality) where they do not follow daily religious rules designed to safeguard their heterosexuality, strong masculinity and the natural family order.[492] However, failure to follow detailed, proscribed rules or, if one fails to follow these, to report that failure to authorities and seek repentance, means one is not willing to achieve sexual identity transformation through obedience. As we see from Thom's story, a failure to willingly comply with this procedural, rule-based system results in expulsion and isolation.

Curiously, if we consider this rule-based system in the context of feminist methodology, we see the Exodus view of gender to be self-contradictory: gender is both constructed by religious rules and adherence to an order, and yet is also a 'natural law', designated by Christian law as the natural state of man. Thus, heterosexuality is both work that ex-gay men need to do, and a natural state that they will realize as God's will when this work has been done. This dual classification is reflected in positivism debates about natural law and law as rules: when and why do people accede to the authority of a legal order and on what grounds. For example, evangelical Christians might relate the constructed/natural discussion back to the commandment against murder. Is it a natural state to live in peace, or a constructed reality that we consciously strive for, and attempt to ensure through criminal laws against murder and manslaughter? Ex-gay communities provide a complex, if inconsistent, answer to this question. This answer relies on the principles of

[491] Cooper, *supra* note 370.
[492] Erzen, Tanya, *supra* note 360 at 46–47.

(a) obedience to Christ and (b) the literal belief in Biblical rules about human interactions. The answer for ex-gay communities is that, where the Christian legal order has been interfered with—in terms of alterations to family structure and traditional concepts of strong masculinity and submissive femininity— same-sex attraction can result. Here, ex-gay ministry positions same-sex attraction as the tragic outcome of a failure to follow the higher principles set out in (2) above: a prohibition against homosexuality as unnatural and contrary to law, the centrality of the family and procreation within the Christian community, and the importance of practicing obedience to God through literal teachings of Biblical text. This failure to follow guiding principles within an order leads to a breakdown of authority and 'natural law', which leads in turn to the need for detailed, specific regulations to police the expression of that rule-breaking and the risk to the greater normative order.

Applying the natural law/law as rules metaphor, an ex-gay Christian might respond that ensuring the preservation of good social (and legal) order in society would result in fewer murders, as ordered, lawful communities would then naturally be more likely to comply with the Biblical law against murder. This answer does not interrogate the 'natural law/rules' binary. Rather, it holds it to be an unnecessary investigation. The evangelical legal order requires unquestioning adherence to the natural law of God's will through the Bible to justify detailed rules about 'doing heterosexuality right'; the detail and constancy of which give cause to question the naturalness of the foundational position. However, this is not an uncommon theoretical dilemma for religious orders attempting to explain and deal with the realities of LGBT identities, in the face of absolute religious rules against same-sex attraction.

4. *That there is interpretation and discussion about the import and nature of religious obligations and their provenance*

Here, I consider the significance of group discussion and therapy sessions in ex-gay communities. Christian decision-making, both in small family units and in the broader religious community, is both effected and reflected upon during group discussions. For both the Expell and New Hope communities, confession of same-sex attraction and activities and the 'offering up sin to God' element of reparative therapy group sessions are important aspects of the reparative therapy process. Further, they act as adjudicative and

remedial mechanisms, when members have transgressed or when people want to report frustration with their coping strategies and failure to follow Christian rules.

Kislowicz discusses this criterion in the context of "reasoned disagreement" about the specific form and operation of religious/legal doctrines. He connects diverse expert religious testimony about certain Jewish and Sikh legal customs to judicial disagreement about the content or meaning of legal regulations in state law frameworks, noting that "reasoned disagreement" is "a common feature of the religious norms studied here and the state legal system in Canada".[493] However, this element of internal disagreement about the structure and features of Christian laws is harder to find in ex-gay communities, which are hierarchically designed to prevent internal discussions about the applicability or interpretation of norms. There might be disagreement and dissent within groups over the degree to which (for example) wives should continue to subvert gender hierarchies within a marriage where she suspects that a man is committing moral failings, or when it is acceptable for a woman to apply for a divorce when her husband has left home 'to pursue the gay lifestyle'. However, in both Wolkomir and Erzen's studies and in later narratives, there was little evidence of substantive, reasoned disagreement arising between therapists, pastors and group leaders within ex-gay communities about how and when Christian regulations should apply. Wolkomir notes that, in the Expell context, rules against divorce, adultery and homosexuality were applied rigidly in all cases, sometimes to the detriment of sexual safety and financial security of Christian women.[494] Even when there were exceptions made (as in the case of one divorce), the group had to grant an informal 'exception' to the general rule on the basis that God had intervened to justify the action. [495]

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[493] Kislowicz, *supra* note 10 at 196.

[494] Wolkomir notes that, in her interviews with eight Christian wives of men who identify as ex-gay, several of them knew that their husbands were intermittently cruising on weekends and having unprotected sex with strangers, but refused to use contraception when having sex with their husbands because that was also against Christian rules. See: Wolkomir, *supra* note 360 at 152–179.

[495] The only case reported in both studies where a Christian wife sought a divorce was the case of Lee, in Wolkomir's Expell women's support group. Lee only filed for divorce after her husband had cleaned out their bank accounts, sold all joint assets and left town with his male lover. It was only after this that Lee, and the broader group, concluded that "God had removed Tony from her life so that she could heal and eventually build a marriage with a more godly husband" Wolkomir, Michelle, *supra* note 386 at 741.

I address this fourth criterion in two ways. First, we could see this lack of 'reasoned disagreement' about rule interpretation as a gap in the ex-gay normative order that, in its intransigence, begins to resemble a customary expectation rather than a legal system designed to sustain judicial disagreement. However, when we understand the foundational and incontrovertible nature of the Biblical rule against homosexuality, we see that any reasoned disagreement between rule-makers in these communities must stop short of questioning the interpretation or application of this norm (and other norms that flow from it), as it is the basis of the ex-gay normative framework. Further, if we accept this position, then norms that govern marriage, divorce, gender roles and that proscribe adultery equally cannot be broken down or reinterpreted. Like the proscription of homosexuality, these norms are primary rules that inform the more detailed rules that govern ex-gay sexual behaviours and ethics.

The second answer to this criterion is to view it as readily applying to the smaller, practical regulations that govern everyday life in ex-gay communities and that flow from the foundational Christian norms described above. Here, I consider Kislowicz's example of Sikh families giving evidence that the wearing of a miniaturized kirpan was not acceptable to them, even though some other Sikhs consider this to be.[496] Disagreement or dissent at this localised level of regulation is possible within ex-gay communities. There is some evidence that the detailed, day to day rules that govern ex-gay Christian men are challenged by members of these communities and interpreted by leaders on a case by case basis. Erzen notes that some house leaders at New Hope disagree about whether or not certain activities are 'rule breaking' in the sense of encouraging gay activities or moral failings. Thus, Evan, a New Hope member, argues to group leaders that he can smoke in front of women without breaking the rule against "two men sharing a cigarette" that is included in the New Hope program manual.[497] New Hope leadership also meets every few months to decide which community members are ready to move to the next phase in the program. This decision involves House Leaders considering evidence of rule breaking or rule abiding behaviour and making group decisions about individual progress.[498] This

[496] Kislowicz, *supra* note 10 at 195.
[497] Erzen, Tanya, *supra* note 360 at 99.
[498] *Ibid* at 99–100.

suggests opportunities for dissent and reasoned discussions about rule application, taken at an authoritative level within the community, that resemble judicial debate. As the rules that govern ex-gay male lives are incredibly detailed and specific, there is likely to be negotiation and dissent about the proper distance of these regulations from the foundational Christian norms that govern gender and sexual identity. That is, the closer informal rules are in purpose to foundational norms, the less likely there is to be discussion about their proper interpretation at the community or leadership level.[499]

5. *That there is a religious community that draws on religion to make basic social ordering decisions*

There are clear hierarchies of men/women, pastor/flock in ex-gay communities that transform the statements of these leaders from words of encouragement to words of law and embody strict social ordering. This ordering manifests not only in following the literal text of the Bible in human behaviour, but also in the behaviour of women in subverting standard Christian social orders (children-wife-husband-pastor-God) to 'jump' a level of authority to submit directly to God and the Church rather than continuing to submit to the authority of their husband, which has been compromised by homosexual behaviour. In this unusual model of Christian submission, wives reported that they transmitted their standard form of female submission (the 'good wife' who does not show aggression or dominance) to submission to God and increased dominance in their relationship with their husbands. Wolkomir reports that, in this way, wives reported some form of feminist empowerment:

> In many ways, the women's experience of submission was very rewarding. When the wives submitted to their husbands and God, they felt liberated… from the weight of their husband's struggle and the anxieties it caused…. Through submission, wives could further grasp some vestige of masculine authority. The end result was that submission felt like an act of empowerment, not oppression.[500]

Social ordering inherent in ex-gay communities therefore works on a range of different levels. Firstly, women try to reflect gender rules in their own marriage by modeling submission and 'doing femininity right'. Secondly, ex-gay men are taught to respect other male authority (clinicians and pastors of their church) as having legal authority that

[499] This type of reasoning suggests the 'easy/hard case' debate that is a feature of common law systems.
[500] Wolkomir, *supra* note 360 at 177.

cannot be put aside and that also embody strong masculine ideals that they should follow. Lastly, pastors and group leaders act in traditional roles as Church leaders, but also as judges, tribunals and police. Erzen reports that male Church leaders in New Hope play a dual role of supportive therapist (providing 'safe' same-sex friendship and paternal guidance for ex-gay men) and stern judge when men demonstrate behaviour that transgresses Christian rules: drinking, leaving the community, having gay sex or using the internet to look at 'male images'. Justifications for punishment of rule-breaking is clearly based on biblical statements and the Exodus reparative therapy guidelines: used interchangeably as sources of law.[501]

In Wolkomir's investigation, eight male Expell members and their wives came to Exodus for counselling after the husbands had 'come out': either as identifying gay desires or having admitted to having homosexual affairs while they were married. Wolkomir explains that the couples were taught a revised theological framework of their Christian faith that worked by combining pieces of psychological theories of homosexuality with aspects of religious belief to reconceive of homosexuality as curable psychological disorder or disease.[502] Wolkomir identifies several practical results of this treatment that closely reflect the authority of biblical pronouncements to a gendered hierarchy. Firstly, gay men have underdeveloped masculinity, which needs to be reasserted as the dominant norm to 'save' a man's heterosexuality.[503] Secondly, it can be a wife or mother's fault if a partner or son demonstrates homosexual tendencies, as she has therefore been 'doing femininity wrong' and has thus upended the lawful order of the heteronormative Christian family.

> This doctrine poses a spiritual hierarchy in which God, viewed as a powerful masculine authority, places men at the head of families to be responsible for provision, decision making and spiritual leadership, while women are helpers who care for the home.[504]

Any redistribution of a power dynamic in the home generates an imbalance that needs to be rectified. In many circumstances, this will be beyond a wife's ability to remedy. In those

[501] At New Hope Ministry, the men are taught to enforce rules of Christian conduct and 'heterosexual normalcy' upon each other, including the obligation to report on transgressors. Erzen, Tanya, *supra* note 360 at 98.
[502] Wolkomir, *supra* note 360 at 107.
[503] Wolkomir, Michelle, *supra* note 386 at 139, 161; Erzen, Tanya, *supra* note 360 at 6–7.
[504] Wolkomir, Michelle, *supra* note 386 at 139–140.

circumstances, she must adapt her traditional submission to her husband and submit to a higher lawful authority: God. Only through this 'strategic submission' can she truly realize her gender role as a Christian wife and mother and reassert normal gender roles, which create the required environment for heterosexuality. Ex-gay communities are a challenging queer feminism subject, as the voices of women in ex-gay Christian households see power and protection in their traditional wife/mother roles, rather than disadvantage and inequality. It is often the wives of ex-gay or gay men who push their husbands to undergo reparative therapy, and 'work harder' on themselves in the process, to reassert traditional gender roles and encourage their husbands and sons to assert authority over them in social and legal contexts. At the same time, these women sometimes appeal to their highest Christian authority—God's dictates on marriage and childbearing—to prevent their husbands leaving the family unit and coming out as gay.

Viewing ex-gay ministries and community rules as part of a religious legal order through the lens of legal pluralism allows us to better understand not only the motivations of struggling ex-gay Christians and their view of conflicted identity, but also to understand the depth of the commitment that ex-gay members make to their Christian community and their Christian worldview. This analysis can also help to frame and critique evangelical Christian attitudes to LGBT identity rights in a secular context, and to understand how normative Christian demands shape these attitudes. Further, in viewing the rules and customs of these communities as sources of law, we can better understand the significance of traditional gender roles in these communities: in terms of the strategic but subordinate role of women, and the importance of gender in maintaining Christian legal relationships between community and individual and between Christian individuals.

(3) A critical legal pluralist perspective? Reflections on the ex-gay nomos

Wendy Adams, in her discussion of a critical legal pluralism, argues that we can see individual judgments about normative commitments to imply a degree of choice in a personal narrative, even where legal subjects are ultimately forced to submit to a dominant narrative.[505] It is difficult to assess the degree to which ex-gay men are able

[505] I discuss Adam's interpretation of Macdonald and Kleinhans' theory of a critical legal pluralism in depth in Chapter 2 at 95 – 96.

make or remake their own legal narrative about their sexuality, due to the rigid, compulsory nature of their legal environment. There are few, if any, examples in the case studies of ex-gay men who successfully negotiate or interpret the rules that apply to their subjective journey from gay to straight married men while living within the bounds of the ex-gay normative order. The authorizing principle of Christian obedience to Christ is fundamentally at odds with the critical legal pluralist concepts of the legal subject as making and remaking his concept of law within a social location.

However, in both Expell and New Hope, there are stories of men who have multiple journeys in and out of reparative therapy (and who are willing to critically reflect on their reasons for returning to ex-gay ministries); and there are many stories of men like Thom and John Paulk who, after a long period of attempting to live within the law of ex-gay communities, choose to follow a different understanding of Christian rules and leave the ex-gay nomos altogether. The fact that ex-gay men do engage in critical self-reflection, and the fact that some of them leave and then return to the normative order after periods in the 'outside world', supports Adams' view that a degree of negotiation and self-analysis takes place in choosing their normative environment. A decision to join, or rejoin a rule system which requires such hard work to be done, every day, to police one's behaviour, interactions and thoughts is a decision that ex-gay men take seriously and, often, only after great internal struggle. Nevertheless, this point should not be mistaken to mean that ex-gay Christian men experience any degree of normative freedom *within* their community. Their freedom, as Frank Worthen puts it, is to choose to submit. Once that has occurred, their choices are severely constrained.

One could argue that the confessional, repentance model of ex-gay 'healing' encourages individuals to publicise their different understandings of the priorities of ex-gay norms: what constitutes a moral fall, what constitutes same-sex attraction, and what constitutes a valid response to events. To a large degree, these understandings are instrumental in shaping a person's response to ex-gay ministry, as they are encouraged to confess to one another and to forgive others as part of the commitment to transformation through healing. Or, to frame that conclusion in the terms of legal analysis: the ex-gay community invites individuals to reflect upon their selfhood and negotiate their understanding of Christian law to a limited extent. Of course, these narratives are only welcomed to the

extent that the men ultimately accept the authority of Christian law and God's will, and 'offer up their confession to Christ'. As we have seen, attempts to negotiate or challenge norms about the unlawfulness of same-sex attraction lead to the punishment of the individual through exclusion from the community, and silence.

In terms of potential challenges to the normative authority of ex-gay ministry; the schism that has recently opened in the ex-gay Christian world— due to the breakdown of Exodus International and the public statements of high-profile gay men who were once ex-gay— has led to increased debate about the normative value of the evangelical Christian rules against same-sex attraction. A rule-based system of law that relies on Biblical sources as both its constitutional document and its primary narrative encounters substantial challenges to its authority when former adherents claim that they can lawfully remain Christian, identify as gay, and that the detailed psycho-social rules of Christian reparative therapy do not work. How can a rule be God given, if the natural order it espouses as necessary for its enforcement, does not stand?

Conclusion

Empirical and sociological studies of ex-gay communities often note that the critical issue for researchers is whether gay Christians can permanently change their sexual orientation through reparative therapy. That is, is identity transformation ever possible in these circumstances? This inquiry then naturally relates to a second issue; examining the degree of harm that Christian reparative therapy causes to L/G people. In my investigation into ex-gay communities, I accept that both these questions have been substantially answered by expert analysis. Reparative therapy (and related religious practices) have been found to cause significant harm to children, young adults and adults who are treated by Christian counsellors for same-sex orientation. Further, there is little (if any) support for the proposition that reparative therapy can effect permanent sexual orientation change. Equally, I do not dispute the fact that banning clinical reparative therapy at a state level might work to limit the prevalence these practices. However, I have argued in part I of this chapter that merely banning clinical reparative therapy practices is unlikely to result in the eradication of religious reparative therapy practices, particularly those offered at a local community level. Further, I developed the argument

(introduced in chapter 1) that state law responses to Christian ex-gay ministries (such as bans on clinical reparative therapy, or extending legal rights to LGBT-identifying people) do not fully appreciate the identity dilemma that ex-gay Christian men experience between their religious and sexual identities. In making this case, I explained the historical mistrust of evangelical Christian communities in the United States of state law frameworks, notably those laws that relate to LGBT equality. This mistrust has led many Christian communities to opt out (as far as possible) from legal frameworks that promote anti-discrimination laws and protect LGBT rights. This exclusion subsequently alienates minorities within these communities—notably those Christians who identify as same-sex attracted—who then view religious community rules about sexuality as morally compelling and, in many cases, mandatory.

Failing to understand the normative strength and persistence of Christian rules about homosexuality not only leads us to misunderstand how religious law operates within ex-gay communities, but also to misunderstand how relevant these laws are for the identity conflict that gay Christian men face when confronted with religious and secular perspectives on sexuality. Thus, in this chapter, I have drawn on strong legal pluralism and critical legal pluralism to make the case that ex-gay evangelical Christian communities are tightly bound by laws that reinforce the naturalness of heterosexuality and outlaw homosexuality as unnatural and evil. These legal positions inform each other and are mutually reinforcing. These norms then inform Christian rules about gender difference, marriage and procreation, and authorise the punishment of transgressive, queer sexual behaviour. To make this argument, I have analyzed ex-gay narratives through a queer feminist lens; revealing them to be deeply personal stories of struggle between a realized gay identity and a religious normative order that compels them to change.

Ultimately, this investigation asks why queer Christian people would commit to a religious worldview that completely effaces their queer sexual identity. In my view, we must appreciate the relevance of Christian norms that enforce the unlawfulness of homosexuality and reward heterosexuality as directly relevant to this question. I have suggested that men living within ex-gay communities and those who live the rest of the lives as ex-gay or as struggling ex-gay Christians, experience all aspects of their lives

according to strict Christian laws that sets boundaries around their conduct, their relationships and their sexual impulses. The ex-gay men we meet remain deeply committed to the position that they cannot be good Christians and gay. For that reason, they accept the dominance of their religious identity over their sexual identity, without considering that there could be any productive dialogue between these two forms of selfhood, or that their religious faith might be able to lawfully encompass their sexual identity. Viewing the experiences of these ex-gay men through the lens of legal pluralism enables me to understand the relevance of Christian norms about sexuality to the identity conflict they experience. Christian law, for ex-gay evangelicals, is not merely a rulebook or framework, but rather is a complex spiritual and moral compass that guides them to fully realise their Christian identity and, in so doing, to disavow any potential of a gay identity.

Chapter 5

Problematizing lesbian identity, sex and love in *Halakha*

Introduction

I now turn to the second religious context of this dissertation: examining the normative environment and experiences of lesbian Orthodox Jewish women. As I introduced in chapter 2, I focus on the experiences of women living in Orthodox communities because Orthodox Judaism continues to take the most inflexible stance on same-sex relationships (male and female) as compared to other branches of Judaism. The inflexibility of this stance delineates a clear legal position to explore in this analysis, which contrasts to the more progressive recognition of sexual and gender diversity under state law, discussed in chapter 1. Further, in ultra-Orthodox (Haredi) communities, the influence of state law is excluded from religious community life as far as possible. The legal framework for community life is provided by rabbinical interpretations of *Halakha*. Thus, in these communities, state law only becomes relevant with respect to the interactions of non-Jews (or Jews who are not Orthodox) beyond the bounds of their community. It is not controversial, therefore, to view *Halakha* as it applies to issues of sexuality and the treatment of women as a legal order which operates separately to and (in some areas) contrary to state legislation. Orthodox Judaism therefore presents itself as a valuable context to explore how minority L/G members of Orthodox communities manage and resolve conflicts between their religious and sexual identities.

In this chapter, I outline the relevant legal issues that relate to the proscription of lesbianism by Jewish law and by Orthodox communities. First, I discuss the biblical prohibition of homosexuality that is often considered to be the foundation of other rules concerning the treatment of lesbian women and relationships. Then, I investigate the treatment of lesbian relationships and same-sex lesbian orientation (as distinct from male) by *Halakha*. I draw this distinction between male and female experience in law, because the legal proscriptions against gay and lesbian sex and relationships are different in form and substance. I analyze the legal rules that apply to lesbian women in Jewish life generally, with more detail given to those rules that apply to lesbian women who seek to

live an observant Orthodox life and (where relevant legal differences apply) an ultra-Orthodox (Haredi) life.

While this analysis necessarily employs a legal pluralist perspective to appreciate Jewish law as an operative legal framework, there is little necessary work to be done to situate Jewish law as (a) a legal system that functions and applies in a manner and form recognizable by secular legal frameworks and (b) as the primary legal system that is operative on Orthodox Jewish lesbian women. This is partly because of the nature of *Halakha* as effectively organized and systematized as a legal system and partly due to the relative isolation of Orthodox lesbian women from secular legal norms in relation to questions of sexuality, marriage and family creation.[506] That is, it is relatively simple to argue that, for lesbian Orthodox women, the Halakhic view of their sexuality has binding normative force, superior to that of any secular rules that relate to their sexual identity. I discuss this point in greater detail in chapter 6, when I discuss the lived legal experience of Orthodox lesbian women through first-hand accounts.

I situate this investigation broadly within the United States, where Orthodox Jewish communities are growing in number, and where this increase has resulted in these communities increasing their political and social influence within the American Jewish community as a whole.[507] Another reason for this focus on the experiences of Jewish women in the North American Diaspora is that this is where the majority of my primary and secondary sources about the experience of Orthodox Jewish lesbians are located.

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[506] This degree of isolation from secular legal norms increases as one moves from modern Orthodox to ultra Orthodox faith. As I discuss in greater detail in chapter 6, women who live in ultra Orthodox (also known as *Haredi* or *Hasidic*) communities are mandated to live their lives, as far as possible, separated from all secular influences. Of course, there is a degree of overlap and 'law pollution' from the secular world, which is reflected in the growing willingness of lesbian *Haredi* women to acknowledge their sexuality in secret and to tell their stories online and to each other. I discuss this development in chapter 6.

[507] A 2015 Pew Centre Report found that, (relying on 2013 census data) one in 10 American Jews are Orthodox. That is, 10% of the 5.3 million Jewish American adults identifies as Orthodox. The Report concludes that, based on a number of factors including family size, age of marriage of men and women and attitudes to contraception and family planning, "the total number of Orthodox Jews is growing, both in absolute numbers and as a percentage of the U.S. Jewish community." The Report concludes that, if this trend continues, Orthodox Judaism could shift the profile of American Jews in key issues such as religious practices and social and political beliefs. Pew Research Center, *A Portrait of American Orthodox Jews* (2015), online: http://www.pewforum.org/2015/08/26/a-portrait-of-american-orthodox-jews/ at 2; see also: Pew Research Center, "American and Israeli Jews: Twin Portraits from Pew Research Center", (27 September 2016), online: <http://www.pewforum.org/2016/09/27/american-and-israeli-jews-twin-portraits>.

Further, as noted above, these jurisdictions demonstrate a useful contrast of normative frameworks between increasingly progressive civil rights protections and LGBT status recognition in state law,[508] and the strict, prohibitive line against same-sex orientation and relationships taken by Orthodox Judaism.

I conclude this chapter with a brief discussion of some potential reinterpretations of *halakhic* positions that relate to lesbian relationships and sexual activity. This discussion draws on recent rabbinical commentary that presents different options for reviewing the current blanket prohibition on 'homosexual activity and relationships' within Orthodox Judaism, and offers a more progressive, flexible interpretation of the law. I suggest that one option, first put by Rabbi Robert Kirschner in 1988, fits most appropriately within a state legal understanding of purposive legislative development over time, and fits most appropriately to the issue of lesbian sex, given the relative leniency of historic *halakhic* prohibitions. Kirschner's view is that we can respect the purpose of *Halakha* while reinterpreting its rules appropriately for a modern application, provided we accept two premises. One, that *Halakha* is capable of interpretative change, and two, that "modern rabbinical authority recognizes the limits of ancient rabbinic knowledge."[509] As Kirschner argues, a strength of the Jewish legal framework is that it can accommodate this degree of flexibility.

(1) Jewish law and legal history: situating *Halakha*

Judaism has a hierarchical, text-based (although supplemented with oral traditions) system of religious law that closely resembles many of the forms and functions of a state legal system.[510] As a starting point, I note that there is far greater consistency and constancy in texts that inform the rules and practices of Orthodox Judaism comparatively to evangelical Christian churches. In chapter 4, I had to engage in a critical analysis of

[508] I discuss the trend in progressive recognition in state law in relation to equality rights of LGBT people in detail in Chapter 1 at 38 – 40, 50.
[509] Robert Kirschner, "Halakhah and Homosexuality: A Reappraisal" (1988) 37:4 Judaism 450 at 452.
[510] When speaking of a state legal system here, I draw on the comparative analysis of state legal systems and non-state normative ordering systems undertaken by Griffith in his definition of legal pluralism. I discuss Griffith's thesis in detail in chapter 2 at 76. See: For further analysis of how the frameworks and procedure of state legal systems have influenced the study of other non-state legal orders (either within, or beyond, the western state) see: Merry, *supra* note 191; Woodman, *supra* note 217.

certain foundational rules and rule-based practices that are common across ex-gay ministries, to make the case that certain of these religious rules constitute law for their adherents. By comparison, such analysis is largely unnecessary in this context. Jewish law is organized into a top-down framework, beginning with the primary rule of the Torah as the word of God given to Moses at Sinai, moving down to primary and secondary rules (the Mishnah and the Talmud) and finally to the creation of written (and unwritten) legal codes that still apply to most areas of life for Orthodox Jews today.

Here, I provide a summary of *Halakha* as it developed throughout history and how it applies to Orthodox Jews today. We start with the Torah. This is the authorizing or constitutive text of Jewish law, which all branches of Judaism believe to be the formative document of Jewish life and to communicate the word of the Divine to Man.[511] The Torah is made up of the five books of Moses: Genesis, Exodus, Leviticus, Numbers and Deuteronomy (known as the Pentateuch, also known as the books of law).[512] As with state legal frameworks, there are different positions as to how one should or could interpret the Torah in terms of its application to Jewish people today. Although perhaps an oversimplification, rabbis and scholars observe that the more Orthodox the branch of Judaism, the more literally rabbis interpret rules and customs set out in the Torah.[513] For the purposes of this discussion, I consider the Torah as a living legal document, but one which should be interpreted as its drafters intended, rather than as an inspirational text. As Rabbi Steve Greenberg states, Orthodox Judaism holds that the Torah is the literal word of God. The literal interpretation of its sanctions is therefore necessary to give voice to God's will in Jewish lives:[514] "Orthodox Jews do tend to agree on a number of

[511] Rebecca Alpert, *Like Bread on the Seder Plate: Jewish Lesbians and the Transformation of Tradition* (New York: Columbia University Press, 1997) at 18.
[512] Steve Greenberg, *Wrestling with God and Men: Homosexuality in the Jewish Tradition* (Madison, Wisconsin: University of Wisconsin Press, 2004).
[513] *Ibid*. Greenberg notes that, much of the internal variance within Orthodoxy in Judaism "hinges on the simple question of the meaning of modernity and how classical Judaism ought to engage with it." (at 19).
[514] *Ibid*. Noting though, that Greenberg also stresses the great diversity of practices and denominations within 'Orthodoxy' generally. "Orthodox Judaism is the least organized and most diverse of contemporary denominational movements. There is no central body governing synagogue life and no universally accepted source for contemporary halakhic rulings." (at 18).

fundamentals such as the divine origin of the Torah… the duty to study the Torah (both written text and oral tradition), and to faithfully observe Jewish law (*Halakha*)."[515]

In his book *Wrestling with God and Men*, Rabbi Greenberg summarizes the ancient codifications of biblical law, noting that since antiquity, rabbis have interpreted the Torah with creativity and resourcefulness. The richness of this rabbinical discussion is reflected in the "immense literature" on biblical law that was generated first in Judea and then in Babylonia.[516] In the second century, a Galilean Rabbi, Yehudah HaNasi, drafted a compendium of traditions and laws into the *Mishnah*. The Mishnah, while often inflexible in terms of its presentation of rules, often records multiple opinions. However, the Mishnah excluded some opinions on the basis that the exclusions captured only those views that were *beraita* (outside teaching). These were therefore of less authoritative significance for scholars and rabbis.[517] However, this somewhat terse rejection of dissenting opinions was not final. When the Mishnah was debated and its rules applied, the *beraita* material remained a valued source to clarify the hard language of the Mishnah.[518] By the fourth century, rabbis had collected these dissenting opinions into a supplementary legal text known as the *Tosefta*, which was relied upon as a supplementary source of law.

Rabbinical debates over the application of the Mishnah and the active meaning of the Torah spanned three centuries after the Mishnah was first written. Eventually, these debates were edited into two different works: the Jerusalem Talmud, which was redacted in the early part of the fifth century, and the longer, grander Babylonian Talmud, which began to be drafted in the fourth century, but was not finished until the middle of the sixth. The Babylonian assembly of rabbis debated new cases, analyzing decisions and explanations of earlier decisions in the Jerusalem Talmud. These discussions were eventually fixed in a formalized lexicon that form the bulk of the Babylonian Talmud.[519] Thus, what began as an oral legal tradition was gradually codified over 200 years into a

[515] *Ibid* at 18–19.
[516] *Ibid*.
[517] *Ibid*.
[518] *Ibid* at 19.
[519] Yosef Eisen, "The Babylonian Talmud", online: <http://www.chabad.org/library/article_cdo/aid/2652565/jewish/The-Babylonian-Talmud.htm>.

binding legal text. To scholars familiar with western state legal frameworks, the Talmud might seem less a codification of law and more a multi-voiced discussion about the Torah and Jewish legal practice. Greenberg describes the Talmud as a confusing but illuminating wellspring of law and normative discovery:

> It is difficult to characterize a literature as wide-ranging and as varied in modes and topical interests as the Talmud.... In it one finds legal maxims, hermeneutic arguments, long philological inquiries, legal battles, questions and answers, and fabulous legends.... The Talmud draws its excitement from delving through layer after layer of problems, stretching its inquiry over generations of scholars through prior rulings, hypothetical illustrations, and odd cases, raising possibilities, and then knocking them down.[520]

However, just as legal scholars in the United Kingdom might rely on Blackstone's Commentaries as a compass point for interpreting centuries-old legal traditions that inform modern English law, so rabbis and Jewish scholars rely on the Talmud as a dynamic resource to interrogate the more mystical points of law in the Torah and to situate contemporary legal issues as they arise. Each Book of the Torah— except Genesis— has its own *Midrash-Halakha* (interpretative code), which sets out and interprets the legal obligations set out in each Book. The *Midrash-Halakha* for Leviticus (the Book of Law) is the *Sifra*. By the beginning of the Eleventh Century, rabbinical disagreement over Talmudic debates and the fundamental openness of the Torah text, gave rise to a demand for a clearer legal text. Thus, at the beginning of the Eleventh Century, Rabbi Isaac of Fez (Alfasi) wrote a summarized Talmud that presented more concrete legal conclusions and fewer records of disputes and discussions about interpretation.

In the Twelfth Century, Rabbi Moshe ben Maimon (known in English as Maimonides, in Hebrew as RaMBaM) wrote the *Mishneh Torah* ('Second Torah'). This herculean, fourteen-book legal code was written in Hebrew rather than Aramaic, and was intended to be a practical, unified source of Jewish law, simplifying the complexity and interpretative variation of the Talmud. Maimonides claimed that it was the only book that Jewish legal scholars would need to determine the law. However, there were European traditions and customs that were not addressed in Maimonides' work. Thus, one hundred years after the *Mishneh Torah* was written, Joseph Caro drafted the *Shulhan Arukh*

[520] Greenberg, *supra* note 512 at 33.

(literally: 'set table'), with the notes and assistance of Rabbi Moshe Isserles. The *Shulhan Arukh* added European legal traditions to Maimonides' code and further simplified legal requirements and sanctions, so that they could be read and understood by any practicing Jew. Over the next four hundred years, the *Shulhan Arukh* came to be widely accepted by both Ashkenazic and Sephardic Jews as their core legal text. Unlike the *Mishneh*, the *Shulhan Arukh* presents biblical laws in a straightforward way, with a minimum of discussion or literary flourish.[521] Thus, we have the introduction of a stratified legal hierarchy within Judaism. Traditionally, rabbis debated and issued rulings on cases based on their studies in the Talmud, while the *Mishneh Torah* and *Shulhan Arukh* were more readily accessible for ordinary Jews who had not studied the Talmud. While the hierarchy of legal sources within the Jewish legal framework has shifted over time, the *Mishneh Torah* and *Shulhan Arukh* remain central legal texts relied on by rabbis to this day.

Greenberg notes that, despite the organization of legal and religious norms into these fixed frameworks, there have always been disagreements about the application of *Halakha* within Jewish communities: contention and debate is nothing new.[522] Consequently, just as there are different kinds of Orthodox Jews, so there are different legal obligations and different sources of religious leadership. Modern Orthodoxy is different to ultra Orthodoxy or *Haredi* Judaism in terms of degree of religious devotion and interpretation of *Halakha* and this has flow-on effects to practical elements of life such as clothing, where one can live, pray and work and relevantly for this project, community attitudes towards gender and sexuality, including the degree of responsibility and freedom accorded to women. Some modern Orthodox synagogues in the United States and Israel have begun to empower women to take on more public roles, including leading portions of the service and reading from the Torah,[523] roles that have historically

[521] Rabbi Jill Jacobs, "The Shulchan Aruch", online: *My Jew Learn* <https://www.myjewishlearning.com/texts/Rabbinics/Halakhah/Medieval/Shulhan_Arukh.shtml>.
[522] Greenberg, *supra* note 512 at 35.
[523] Greenberg cites the work of Mendel Shapiro, two Orthodox prayer groups have begun in Jerusalem and New York City, where the women are called up to the Torah for *aliyot*, to read from the Torah and to lead selected parts of the service. *Ibid*. For further resources on feminist engagement with Orthodoxy, see also: Tova Hartman, *Feminism Encounters Traditional Judaism: Resistance and Accommodation* (Waltham, Mass: UPNE, 2007); Tamar Ross, *Expanding the Palace of Torah: Orthodoxy and Feminism* (Waltham, Mass: UPNE, 2004); Yael Israel-Cohen, *Between Feminism and Orthodox Judaism: Resistance, Identity, and Religious Change in Israel* (Leiden: BRILL, 2012).

been denied them in halakhic literature (as being commandments that only men can fulfill). By comparison, ultra Orthodox communities believe the law in the Torah to be literally true, and any deviation from the word of law is forbidden.

(2) Defining Orthodox communities: who are 'the pious ones'?[524]

'Orthodox Judaism' is a collective term that describes a broad and diverse branch of Judaism. While there is general agreement as to the significance of religious observances and belief (notably, belief in the literal truth of the Torah and the centrality of *halakhic* rules to Jewish life), there is no centralized governing authority, and the term 'Orthodox' is applied to both neo or modern Orthodox communities and to deeply religious communities that are often described by outsider commentators as 'ultra Orthodox'.[525] Greenberg summarises the shared elements of Orthodoxy as follows:

> Among the more defining Orthodox practices are the honouring of the Sabbath and holidays by refraining from all forms of creative work, the kosher dietary laws, the sexual purity laws that restrict intercourse between husband and wife during and while after menstruation, and for men, prayer three times daily and the study of Torah.[526]

Some ultra Orthodox communities are known interchangeably as 'Haredi', 'Chasidim' or 'Hasidim'.[527] 'However, there are significant doctrinal and historic differences between Haredi sects, which secular commentators often elide or ignore. Aalya Fader (a sociologist who spent a year living with two Haredi communities in Brooklyn, New York) explains:

> [T]he Hasidic movement was distinct from other forms of orthodoxy in its emphasis on Jewish mysticism, the creation of a new style of worship, and a unique social

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[524] Joseph Berger notes that this is the literal Hebrew definition of Hasidim. Joseph Berger, *The Pious Ones: The World of Hasidim and Their Battles with America*, kindle edition (New York: Harper Collins, 2014).

[525] Some religious Jews view the term 'ultra Orthodox' as pejorative, as it seems to suggest that Jews who live more traditional lives are 'over the top' or 'extreme' or 'beyond normal'. Avi Shafran presents some of the key arguments against identifying religious Orthodox Jews as 'ultra Orthodox', asserting that describing a religious Jew as 'Orthodox' is the most appropriate nomenclature given its literal meaning of "rule abiding, traditional, conventional." See: Avi Shafran, "Don't Call Us 'Ultra-Orthodox'", *The Forward* (24 February 2014), online: <https://forward.com/opinion/193209/dont-call-us-ultra-orthodox/>. In this dissertation, I use the term ultra Orthodox and Haredi as a category tool to separate the customs of modern or open Orthodox communities from those which are more closed, traditional and rule-oriented. Orthodox rabbis such as Greenberg and Rapoport also use these terms to identify the different norms of Jewish communities with precision.

[526] Greenberg, *supra* note 512 at 18.

[527] Relevantly for this work, commentators agree that Haredi communities (including Hasidim) are united by "their absolute reverence for the written word of the Torah as written and oral law that binds all Jews, and which they consider to be the central and determining factor in all aspects of life." Raysh Weiss, "My Jewish Learning: Haredim", (2015), online: *My Jewish Learning* <http://www.myjewishlearning.com/article/haredim-charedim/>. See also: Friedman, *supra* note 21.

> organization… Hasidic Jews developed allegiances to different rebbes, who were charismatic, spiritual community leaders…. Hasidic sects were often named after the region where a rebbe's authority was established…. Other traditional Jews, based in Lithuania, opposed Hasidic Judaism from its beginning, arguing that religious authority should come from scholars in *yeshivas*… These Jews were called *misnagdim* 'opponents' of Hasidism) or, alternatively, 'Lithuanians' referring to their place of origin.[528]

Haredi sects are technically different, in turn, from 'unaffiliated' ultra Orthodox Jews who also live deeply religious lives, but who are usually unaffiliated from religious groupings known as courts. Haredi courts are often delineated based on the traditional teachings of certain rebbes. In New York, for example, Fader estimates there are over thirty different courts, with the most prominent being the Satmar, Lubavitch and Bobover.[529] Haredi' is a Hebrew word meaning 'trembling', with an implication of a great degree of piety and meticulous care in religious practice and worship, and is a useful collective term to describe ultra Orthodox communities, given their shared attitude to the sanctity of traditional life and Jewish law.[530] Haredi communities in the United States are generally made up of groupings of large, extended families who follow the strict teachings and interpretations of *Halakha* and do not welcome secular or modern interventions into Jewish life. Haredi communities accept traditional concepts of gender roles within families and the broader community and rely on a patriarchal hierarchy that polices rigid social and legal norms for matchmaking, marriage, family building, separation between the sexes, hygiene and sexual health. As in modern Orthodox communities, Haredi Jews live their lives as prescribed by the 613 edicts set out in the Hebrew Bible, but also mandate devotion to the literal words of the Torah in all aspects of life. Some Haredi communities reject any form of questioning of religious law as impious and ultimately illegal.[531]

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[528] Ayala Fader, *Mitzvah Girls: Bringing up the Next Generation of Hasidic Jews in Brooklyn* (Princeton: Princeton University Press, 2009) at 7.

[529] "Although Hasidic Jews in New York share many beliefs and philosophies, diverse courts or "circles"… they can be distinguished by a number of features that most prominently include their attitude toward religious stringency (*khumre*), religious interpretation and practice, language use, clothing and level of participation in North American life." *Ibid* at 9.

[530] Berger, *supra* note 524 at 22; Shafran, *supra* note 525.

[531] Ayala Fader, in her ethnographic study of two Haredi sects in New York, describes the Satmar sect as being particularly concerned with questioning (on any topic) as an indication of a lack of faith: "Satmar place a greater emphasis than other Hasidic groups on an unquestioning belief in God, which leads to an avoidance of questioning more generally." See: Fader, *supra* note 528 at 9–10.

At the beginning of Sandi Simcha DuBowski's documentary *Trembling Before G-d*, an Orthodox gay man describes his experiences with physical aversion therapy (a popular treatment of reparative therapists) and his rejection by his rabbi and parents because of his gay sexuality. He turns to face the camera and says, in tears: "how could the *Halakha* condone this? How could it? I can't believe it. And yet, it must be so. It is written."[532] The acceptance of Halakhic prohibitions and rules as binding law has been described as the determining factor of Orthodox Judaism and the thing that separates it from liberal Judaism.[533] Ronit Irshai explains that the term 'Orthodox' in English derives from the Christian concept of doctrinal literalism, or 'word of law'.[534] Thus, while Irshai's project is to recognise the potential of a feminist perspective that could empower women from within Orthodoxy, she accepts that this is the only available course of action for most Orthodox feminists, because of their acceptance of biblical law as a 'central and significant category that affects… their life in the most direct way possible.'[535] Orthodox women who wish to remain Orthodox, are, as Irshai understands, bound to live within Jewish law *as it is written*, which includes adhering to strict regulations about their dress, contact with men, contact with women, childbirth and sexual contact.

To situate the normative force of *Halakha*, I investigated the elements that made up modern Orthodox and ultra Orthodox (or Haredi) understandings of *Halakha*. Robert Kirschner argued in 1988 (and his position reaffirmed to some degree by Greenberg in 2006) that, even in liberal branches of Judaism such as Reform and Reconstructionism, the mandatory nature of *Halakha* is accepted as a foundational aspect of Judaism.[536] *Halakha*, as written in the legal codes, cannot be subverted or altered by individual rabbis or Jewish movements. Ultra-Orthodox rabbis within Haredi sects might identify liberal Jews as those who can be saved, but they do not consider them to be practicing Jews, because they do not live within the strict bounds of biblical law, and are therefore at risk

[532] Sandi DuBowski, *Trembling Before G-d* (Simcha Leib Productions, 2001).
[533] Greenberg, *supra* note 512 at 35; Rachel Biale, *Women and Jewish Law* (New York: Schocken Books, 1995) at 3; Lynn Davidman, *Tradition in a Rootless World* (Berkeley: University of California Press, 1991) at 28.
[534] Ronit Irshai, "Toward a gender critical approach to the philosophy of Jewish law (Halakhah)" (2010) 26:2 J Fem Stud 55.
[535] *Ibid* at 54-56.
[536] Kirschner, *supra* note 509.

of becoming heretics, or *apikorsim* ('Jews who cannot be saved').[537] By contrast, liberal Jews generally believe that *Halakha* represents an historical view of Jewish law and practices, one which is now alterable and can be read simply as allegory or as guiding principles, or amended in light of modernism and developments in Jewish society.[538]

Haredi communities enforce their separation from surrounding secular society—and from more liberal Jewish communities— as far as possible.[539] Within these communities, the practice of legal regulations about sex, religious observance and all aspects of family life are sourced from traditional rabbinical and biblical law. These laws indicate practical requirements that have remained largely unchanged for generations. Thus, in Satmar and Lubavitch communities in the United States, access to modern technology such as smart phones, laptops and the internet are strictly controlled by the community 'Modesty Committee' (appointed by the rabbi). In the New Square Skverer community, watching television and listening to the radio was a serious, punishable offense as recently as 2005, even though listening to secular news is not strictly prohibited by the Torah.[540] Shulem

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[537] For example, see: Deen, *supra* note 15 at 166. Deen writes that, as a Jew who left his ultra Orthodox Skeverer community, he is a heretic, an *apikorus*. "A heretic is lost forever. *All who go do not return*. The Torah scroll he writes is to be burned. He is no longer counted in a prayer quorum, his food is not considered kosher, his lost objects are not returned to him, he is unfit to testify in court. An outcast, he wanders alone forever, belonging neither to his own people nor to any other."

[538] For an excellent example of this type of reconsideration of halakhic rules in relation to same-sex attraction, see: Rabbi David Greenstein, "A Great Voice, Never Ending: reading the Torah in light of the new status of gays and lesbians in the Jewish community" in Lisa Grushcow ed, *Sacred Encounters: Jewish Perspectives on Sexuality* (New York: Central Conference of American Rabbis, 2014) 43 - 56 ("Sacred Encounters").

[539] Montreal has several urban neighbourhoods where Haredi communities live alongside mostly secular, French Canadian families. There have been several academic investigations into the isolation of these Haredi communities from their surrounding secular context. Notably, Shauna Van Praagh has utilised a legal pluralist framework to analyse the legal and social experiences of these Montreal communities. See: Gary Beitel, *Bonjour! Shalom!* (Imageries, 1991); Van Praagh, *supra* note 10; Van Praagh, *supra* note 10; Shauna Van Praagh, *Welcome to the Neighbourhood: Religion, Law and Living Together*, SSRN Scholarly Paper ID 2946431 (Rochester, NY: Social Science Research Network, 2016).

[540] However, some Orthodox rabbis take a different position on the law on this matter by applying relevant Talmudic rulings—and passages of the *Mishneh Torah*—about the risks of listening to 'joyous music' that is not religious. Therefore: "The Gemara (Gittin 7a) asks from where we learn that music is forbidden. The Gemara answers with a few possible verses, including "Do not rejoice, Israel, to joy like the nations" (Hosea 9:1). Commentators disagree about the extent of this prohibition. Rashi (Gittin 7a s.v. zamra) explains that this discussion revolves around singing while drinking liquor…In Mishneh Torah (Hilkhos Ta'aniyos 5:14), Rambam writes that after the destruction of the Temple, the Sages forbade playing musical instruments — even singing over wine is forbidden. Some take this to mean a two-tiered rabbinic prohibition: music with instruments is always forbidden, music without instruments is only forbidden with liquor. The reason seems to be that the underlying problem is joyous music. With instruments, the music is more joyous. Liquor also adds to the joy. This is the standard understanding of Rambam's ruling in his code, which Rav Ovadiah Yosef advocates in a responsum on the subject (Yechaveh Da'as 1:45)." R Gil, "Is Secular Music

Deen, a former Skeverer Orthodox Jew who was expelled from his community in 2005, describes his excitement at buying a forbidden radio in 1992:

> *Tape, AM, FM* were printed in tiny white letters along the ridge of the circular switch… "We'll do what everyone does", I had said, annoyed by the suggestion of impiety. Many of my friends had cassette players, and when the device came with a built-in radio tuner, there was a standard procedure for it: krazy glue (sic) the switch into the tape-playing position, paste a strip of masking tape over the station indicators, and put the antenna out with the next day's trash.[541]

The experiences of women within Orthodox communities are likewise dictated by the literal rules of the Torah, but the required degree of piety and forced observance of religious law will depend on the attitude their community takes to gendered religious rules. For example, in Lubavitch and Bobover communities in New York, women are forbidden to speak aloud in synagogue, to sing, or to read and study the Torah, even with other women.[542] Haredi women from Satmar and Skeverer sects shave their head the night before their wedding and wear clothes that, as closely as possible, mimic the conservative dress of nineteenth century Haredi Jews.[543] Joseph Berger describes the requirements of dress for women in a Brooklyn Lubavitch community in 2015:

> A Hasidic woman's clothes have more color [than a man's], but her outfit too generally shuns bright hues like red or orange and her blouse covers her arms at least to the elbows and often to the wrist; it is buttoned at the neck while her skirt falls halfway or more between the knees and the ankle. The contours of her figure are often hidden by an additional sweater and the legs are covered by densely woven stockings. With a married woman, that outfit is topped by either a wig, known as a *shaytl*, a turban or a kerchief wrapped around the head, the style differing with different Hasidic courts. In most cases, the hair underneath is either close-cropped or shaved.[544]

The requirement for Haredi women to shave their head or, at the least, crop their hair very short, relates to the mitzvah that a woman's uncovered hair is equivalent to physical

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Kosher?", (11 January 2018), online: *Torah Musings* <https://www.torahmusings.com/2018/01/secular-music-kosher/>.

[541] Deen, *supra* note 15 at 1871 (location number, rather than page numbers, are given in this kindle ed. of the text).

[542] Fader notes, though that "although they are not allowed to study Torah, or in some Hasidic schools, such as Satmar, even to read the Bible, lifelong education has become increasingly important for Hasidic women." Fader, *supra* note 528 at 23.

[543] This form of dress and comportment is modeled on the Agudas Yisrael group, a coalition of the Hasidism and Mitnagdim fundamentalist communities which came together in Poland in the late nineteenth century, and which is largely credited with the 'birth' of European Haredi Judaism. *Ibid* at 15.

[544] Berger, *supra* note 524 at 121.

nudity, and that to cover hair is an act of modesty and discretion that honours God.[545] Covering the hair can mean shearing and hiding the short hear under a wig or scarf (less observant) or it can mean shaving the head and neck completely and covering the skull with a wig (more observant). Below, Leah Lax describes her first encounter with the Haredi wig on her wedding day, aged nineteen. For Lax, this was a moment of excited anticipation, of removing her pre-Orthodox identity and adopting her new religious personhood:

> I pull off the new scarf. My hair, always freshly cut, is short, sleep tousled, a mass of Jewish waves that has always resisted training… but I don't linger a moment on the freedom I had just yesterday to walk out the street as is, uncovered. I rake the hair back from my face with my fingers and push it behind my ears. I duck my head and tug the elastic sides of the wig down over my head until the pressure is even over temples and crown and snug against the nape…. The woman in the mirror is a bit of a type, not exactly me. She looks older, poised, every wiggy hair exactly in place. I am gleeful. *Hasidic woman*![546]

Conversely, in modern Orthodox communities, women have successfully argued for greater participation and recognition in religious life. For example, the Jewish Orthodox Feminists Alliance, active since 2007, brings Orthodox women and men together to study and read the Torah.[547] In 2002, Tova Hartman and other Orthodox women in Jerusalem began their own synagogue: where women are welcome to take leading roles during services, after attempts to make their original synagogue more 'feminist friendly' were frustrated.[548] Modern Orthodox Jewish women also have more freedom in choosing who, when and how they will marry within their community,[549] and they often undertake

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[545] *Ibid*. The origin of the tradition lies in the *Sotah* ritual, a ceremony described in the Bible that tests the fidelity of a woman accused of adultery. According to the Torah, the priest uncovers or unbraids the accused woman's hair as part of the humiliation that precedes the ceremony (Numbers 5:18). From this, the Talmud (Ketuboth 72) concludes that under normal circumstances hair covering is a biblical requirement for women. Aliza Salzberg, "Hair Coverings for Married Women", (2015), online: *My Jewish Learning* <http://www.myjewishlearning.com/article/hair-coverings-for-married-women/>.

[546] Lax, *supra* note 15 at 28.

[547] "Jewish Orthodox Feminist Alliance (JOFA)", online: *Home: Jewish Orthodox Feminist Alliance* <https://www.jofa.org>. Greenberg notes the significance of JOFA to growing feminism within Orthodoxy, stating that members of JOFA seek to "honestly address texts and traditions with an eye toward female subjective experience and equal value. The organization is clearly an attempt to contemplate the possible halakhic innovations that these social and intellectual changes might inspire." Greenberg, *supra* note 512 at 258, fn 11.

[548] Hartman, *supra* note 523.

[549] Irit Koren, "Women, Resources, and Changing the Religious System: A Case Study of the Orthodox Jewish Wedding Ritual" in Lisa Fishbayne ed, *Gender Religion Family Law: Theorizing Conflicts between Women's Rights and Cultural Traditions*, (Waltham, Mass: Brandeis University Press, 2014) chapter 8, 213 -239.

tertiary education in secular universities. Tamar Ross reports cases in Israel where modern Orthodox women have chosen to delay marriage and childbearing until they have finished their university degrees.[550] Women who live in modern Orthodox communities also generally have far fewer rules to follow about religious dress, modesty and hairstyling than women living in more traditional Orthodox communities.

(3) The *Halakhic* prohibition against male homosexuality

For Orthodox Jewish women, the Torah is a patriarchal authority and represents the rules of such authority. As Judith Alpert puts it, "the Torah is only a partial record of [Jewish] early history. It contains that part of our story that men in positions of authority chose to record."[551] Not only is the Torah written by male scribes, its presentation of the female (both as sex and gender) is notable for absence. In the Torah, women almost exist in the shadow of rules. For example, the rules in the *Mishnah* regarding the prayer *mitzvah* (commandment) group women, slaves and minors together as those exempt from reciting the *Shema* and other prayer obligations. Biale explains that, although women did not necessarily have the same status as slaves and minors, they are grouped together with them in this *mitzvah* because they all share a secondary role in ritual Jewish life.[552]

This secondary role for women is clearly demonstrated in the difference between the Torah prohibition against gay sex (and, for some authorities, gay relationships and lifestyle) and the Talmudic prohibition against lesbianism. As is common for most of the *mitzvot* (commandments), the rules for men and women about family life, sexual intercourse and religious devotion are separate and often mutually exclusive.[553] In my research, I set out to examine sources about *Halakha* and lesbianism and intimate female relationships. Often, what I found were sources written by men that dealt at length with male homosexuality and homosexual sex, and which then simply stated the sections of the Talmud that render lesbian sex unlawful, without any elaboration on the rule. This was the case even with sources written by Reform or Reconstructionist rabbis. For example, Rabbi Michael Gold's book *Does God Belong in the Bedroom?* includes a chapter

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[550] Tamar Ross & Judith Plaskow, "Gender Theory and Gendered Realities: An Exchange Between Tamar Ross and Judith Plaskow" (2007) 13 Nashim J Jew Womens Stud Gend Issues 207.
[551] Alpert, *supra* note 511 at 36.
[552] Biale, *supra* note 533 at 28.
[553] *Ibid*.

devoted to homosexuality and the legal prohibitions against it, but merely mentions that, while the Torah condemns sexual activity between two men, "interestingly, it is silent about lesbianism."[554] Both Rabbi Gold and Rabbi Rapoport give examples of lesbian Orthodox women seeking their counsel about their sexuality and religious beliefs. Yet, in both cases, the Rabbis do not directly address concerns about how male same-sex activity is different in Jewish law to female sexual activity, and the related question of whether adopting a lesbian lifestyle is automatically contrary to Jewish law.[555]

Given that most of the modern legal sources rely so heavily on the prohibition against male same-sex relations, it is instructive to include a discussion of the rules and later interpretations of these rules before moving to the sanction against lesbian sexual relations. Further, a comparison of the two sets of legal prohibitions reveals the lack of academic interest and rigour that has been applied to lesbianism in Orthodox Judaism, and how legal arguments about the taboo nature of homosexual sex have coloured discussions about lesbianism, without specific recourse to legal sources that support these arguments. The Torah prohibition against male homosexual intercourse is set out in Leviticus, 18:22:

> Thou shall not lie with mankind as with womankind: it is *to'evah* (abomination).[556]

And the sanction that is applied for the breach of the prohibition is set out in Leviticus, 20:13:

> 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.[557]

Rabbi Greenberg and Rabbi Chaim Rapoport note that there are other negative commandments in Leviticus 18:7 and 18:14 which forbid (and impose more severe

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[554] Rabbi Gold Michael, *Does God Belong in the Bedroom?* (Philadelphia: Jewish Publication Society, 1992) at 140–141.
[555] Gold, *supra* note 554; Chaim Rapoport, *Judaism and Homosexuality: An Authentic Orthodox View* (Portland, Oregon: Valentine Mitchell, 2004) at 101.
[556] *The Bible*, Leviticus, 18:22, Authorized King James Version, online: thebiblegateway.com. Throughout this chapter, I reference the Authorized King James Version of the Biblical text (only because this version was relied on by several sources and I wanted to be consistent) but have included relevant Hebrew terms with English translations to contextualise rabbinical commentary, as necessary.
[557] *Ibid*, Leviticus, 20:13.

punishments in relation to) male homosexual intercourse between father and son and between a man and his 'father's brother'.[558]

The proscription in Leviticus 18:22 has been applied strictly by biblical law since antiquity although clearly the proscription to put transgressors to death by stoning is no longer observed. However, there continue to be acts of severe physical violence committed by Haredi men against members of the LGBT community, although it seems likely that these actions are carried out without community authorization or sanction. For example, an ultra Orthodox man, Yishai Schlissel, fatally stabbed a young woman in the Jerusalem LGBT Pride parade in 2015. Schlissel stabbed six people in the Pride march before being arrested. Benzi Gopstein—chairman of the right-wing group Lehava—responded to Schlissel's arrest by stating that, while his Orthodox organization actively protests the "abomination parade" taking place in Jerusalem, he still "opposes the stabbing of Jews." Gopstein then called on the police not to allow the parade to take place in Jerusalem again, to lessen the risk of these attacks. Schlissel had previously published anti-gay pamphlets that exhorted Orthodox Jews to "risk beatings or imprisonment" to uphold the *halakhic* rule against homosexuality,[559] and had already served a ten-year prison sentence after being convicted of stabbing three people in the Jerusalem Pride parade in 2005.[560]

From the sources reviewed for this project, a common sanction applied in the case of same-sex intercourse or relationships in ultra-Orthodox communities is the total excommunication of the L/G person from their faith community and, often, their family.[561] Support for this severe interpretation of the Leviticus proscription in modern

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[558] Rapoport, *supra* note 555 at 2, 7, 140 (fn 7).; Greenberg, *supra* note 512 at 78. Rapoport further notes that the commandments in Leviticus 18:7, 18:14 are interpreted in *Sanhedrin* 54b and by Maimonides, *Sefer HaMitzvot* as Negative Commandments nos. 342 and 351. Rapoport, *supra* note 555 at 140 (fn 7).

[559] BBC World Report BBC World Report, "Jerusalem Gay Pride attacker convicted", *BBC News* (19 April 2016), online: <http://www.bbc.com/news/world-middle-east-36081114>.

[560] BBC World Report, "'Repeat attack' at Jerusalem Gay Pride", *BBC News* (30 July 2015), online: <http://www.bbc.com/news/world-middle-east-33726634>; Yair Ettinger, Yarden Skop & Chaim Levinson, "6 Stabbed at Jerusalem Gay Pride Parade by ultra-Orthodox Jewish Assailant", *Haaretz* (30 July 2015), online: <https://www.haaretz.com/6-stabbed-at-jerusalem-gay-pride-parade-1.5381368>.

[561] The religious sanction of rejection and isolation of the gay person from their family, community and faith is repeated throughout multiple first-hand accounts of Orthodox L/G men and women. See, for example: DuBowski, *supra* note 533; Sandi DuBowski, "Trembling Before G-d: Turning A Movie Into A Movement", (8 January 2013), online: *Huffington Post* <https://www.huffingtonpost.com/sandi-dubowski/trembling-before-gd-turni_b_2428257.html>; Itzhaky & Kissil, *supra* note 165; Mark, *supra* note 165; Naomi Grossman, "Keshet: The Gay Orthodox Underground", *Keshet* (1 January 2001), online: <https://www.keshetonline.org/resource/the-gay-orthodox-underground/>; Vincent, *supra* note 15.

Jewish communities is said to be found in the severity of the Biblical prohibition. Rapoport explains that the categories of sins that describe forbidden sexual practices in the Torah constitute *giluy arayot*, or sins of illicit sexual contact, one of only three categories of transgression "where the person is obliged to forfeit his life rather than sin."[562] Talmudic statements on the severity of homosexual activity were codified by Maimonides in the Mishnah Torah:

> One who copulates with a male (*mishkav azchar*) or who brings a male upon himself: as soon as the penetrative act has begun if they were both adults they are to be stoned [according to the prescribed manner].[563]

As with state legal frameworks, the action to which the prohibition and sanction apply in relation to 'homosexual conduct' in Leviticus 18:22 and 20:13 is open to rabbinical (judicial) interpretation. Traditional Orthodox interpretations of the verse have been that the prohibition includes all homosexual activity of men, including relationships, romantic love, sexual touching and kissing as well as penetrative intercourse.[564] Rapoport, a proponent of a broad reading of the prohibition, argues that, as the category of sin applied to homosexual acts is that of an *arayot*, the correct reading must require a liberal interpretation of the commandment, in line with Talmudic decisions on the increased severity of sexual sins:

> [A]ny form of sexual intimacy is also forbidden…[and] in addition to the ban on active homosexual practices, wilfully engaging oneself in homosexual fantasy, self-stimulation and masturbation, or voluntary exposure to provocative material would also be a violation of Jewish Law.[565]

Put in similar terms to conservative Christian perspectives on the nature of homosexuality, this reading of Leviticus has become the founding stone for arguments for the necessity of reparative therapy for Jewish gay men in the United States.[566] The clinical

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[562] Rapoport, *supra* note 555 at 1.
[563] Maimonides, *Hilchot Issurei Bi'ah* 1:14, based on Mishnah and Talmud *Sanhedrin* 54a-b. See also: *Shulchan Arukh*, *Even HaEzer,* Chapter 24; quoted in Rapoport, *Ibid* at 1 - 2. Rapoport notes that, in addition to the verses in Leviticus, later writings in the Talmud also interprets Deuteronomy 23:18 to mean: "and there shall be no *Kadesh* (the Talmud indicates that this term means 'man designated for homosexual congress') amongst the Children of Israel.' *Ibid* at 140.
[564] Rapoport, *supra* note 555 at 2–3.
[565] *Ibid* at 2, 140, fn 10. The footnote cites in detail supporting sections from the *Mishneh Torah* and *Shulchan Arukh*.
[566] Jews Offering New Approaches to Healing (Homosexuality) or JONAH, was one high profile reparative therapy 'clinic' operating in New Jersey from the 1990s to 2015. As I mention in chapter 4 at 148, JONAH

and religious position is that, where *Hashem* (God) has placed the obstacle of homosexuality in a person's life, this obstacle must be overcome in order to live a Jewish life of marriage and procreation. Hashem sets no obstacles which cannot be overcome by a devout person. Thus, there is no such thing as a 'natural' homosexual inclination, but rather a set of rigorous tests that a religious Jew must live through before he becomes heterosexual.[567] This position was taken furthest, perhaps, by Rabbi Barry Freundel in the 1980s, who argued that, even if homosexuality may be a natural sexual orientation in 'general society', there are very few homosexuals living in Jewish Orthodox communities, because the biblical proscription against homosexuality influences the psyche of those loyal to the commandments:

> It is almost as if Halacha rejects the notion of an individual called a homosexual, rejects the necessity of the homosexual act for any individual, rejects the idea of an irrevocable homosexual orientation, and thus creates a society in which these ideals can, apparently quite successfully, be lived.[568]

At least in modern Orthodoxy, if not Haredi communities, there seems to have been movement on this position. Rapoport, in his treatise on *Halakha* and homosexuality, argues that, while the prohibition in Leviticus is final and does apply to all aspects of gay relationships (not just gay sex), we must accept that homosexuality is one position on a continuum of human sexuality, and that some people are simply born gay, lesbian or transgender.[569] For this reason, Rapoport is wary of recommending reparative therapy to same-sex attracted Orthodox Jews and entreats Orthodox rabbis to open their synagogues to gay and lesbian people and to offer them solace and support. However, rather than accepting gay relationships and sex as a natural aspect of human sexuality, Rapoport's position is that sinners must be supported and entreated to live a life of total celibacy; they should be encouraged to move in stages out of their gay lifestyle and into a Jewish

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was forced to close after two civil actions were taken against it by Jewish men on the basis of fraudulent clinical activity. Rabbi Arthur Goldberg, whom I cite later in this chapter, was the founder and head therapist at JONAH. He advertised JONAH services in Orthodox newspapers and spoke at Orthodox synagogues and religious conventions against homosexuality as unnatural and unlawful. See: Arthur Goldberg, "A Discussion with Rabbi Shmuel Kamenetsky on SSA" (2011) 12 Flatbush J Jew Law Thought 31.

[567] Norman Lamm, *Judaism and the Modern Attitude to Homosexuality* (publisher not identified, 1974); Goldberg, *supra* note 566; Barry Freundel, "Homosexuality and Judaism" (1986) 11: Spring J Halacha Contemp Issues 70.

[568] Freundel, *supra* note 567 at 77.

[569] Rapoport, *supra* note 555 at 33–35.

lifestyle that respects them as contributors to the community in ways other than family life and marriage.

Rapoport cites precedent for this position in the Talmudic categorization of sins that justify different community responses. The Talmud differentiates between the *mumar le-hachis* (defiant rebel) and the *mumar le-tei avon* (the lusting renegade). The defiant rebel sins because he wishes to indulge the illicit. He sees his wrongdoing and engages in it even in circumstances where he could choose to live a holy life.[570] The lusting renegade, by comparison, does not wish to sin, but does so out of compulsion or accident. Rapoport explains that the defiant rebel "must be treated as a religious outcast".[571] As such, he is not welcome in Shul or to seek the counsel of a rabbi. Even if his sinning is only against one law within *Halakha*, he is still deemed outcast from all Jewish society. This is due to the fact that, through his sinning, he has renounced his Jewish faith. By comparison, the lusting renegade must still be treated as "within the pale of the Jewish community."[572] In terms of gay men, Rapoport extends this reasoning to argue that the only motivation Jewish homosexuals have for transgressing the prohibition in Leviticus is natural compulsion and biology.[573]

Rabbi Greenberg has written extensively on the prohibition against homosexuality in Leviticus. Greenberg is the first openly gay Orthodox rabbi; he lives and works in Boston, Mass. and is an advocate for LGBT rights within the Orthodox world. Greenberg produced and supported *Trembling Before G-d*, the first documentary to reveal the hidden lives of Orthodox gays and lesbians in Israel and the Diaspora.[574] In 2006, Greenberg wrote *Wrestling with God and Man*, a philosophical exploration of *Halakha* position on homosexuality, that concludes with a reinterpretation of the Torah and *Mishneh Torah* texts that opens up aspects of gay and lesbian relationships and suggests that same-sex attraction can be lawful and sanctioned by *Halakha*. I discuss aspects of Greenberg's work

[570] *Ibid* at 34–35.
[571] *Ibid*.
[572] *Ibid*.
[573] Rapoport cites the writings of Rabbi Shlomo Riskin, who has argued that it is "cruel to condemn an individual from doing that which his biological and genetic make-up demand that he do. The traditional Jewish response would be that if indeed the individual is acting out of compulsion, he would not be held culpable for his act." Rabbi R Riskin, "Homosexuality as a Tragic Mistake", *Jerusalem Post* (30 April 1993); see also: Rapoport, *supra* note 555 at 61–62.
[574] DuBowski, *supra* note 532.

throughout the next two chapters to demonstrate how a flexible, responsive interpretation of religious law could empower lesbian Orthodox women to give legal effect to their sexual identity. At this stage, it is only necessary to note that Greenberg does not extend the prohibition in Leviticus to all aspects of gay relationships. Rather, he narrows its application to penetrative male intercourse that is carried out in violence.[575] For Greenberg, the language within the prohibition is intended to denounce humiliation, rape and violent sex between men, where one man is rendered powerless 'as a woman' (that is, held down/overpowered) and is treated sexually as a man might violently treat a woman, that is, raped.

(4) *Halakha* as it applies to lesbian women, sex and relationships

There is consensus in rabbinical literature and religious scholarship that there is no overt proscription of lesbian sexual activity or lesbian relationships in the Torah.[576] That is, the proscription against male same-sex relations (however widely or narrowly this is construed in later *Halakha* sources) does not apply to women. Rachel Biale states that, unlike adultery, prostitution and extra-marital sex, lesbianism is almost unheard of in *Halakha*. She posits that this absence might be because sexual relations between women were just not considered by the ancient Rabbis to be physically possible.[577] Rebecca Alpert asserts that this biblical silence on lesbianism is a further problem for Jewish women, even if it does ostensibly protect them from the severity of the biblical law against homosexual sex. For Alpert, the invisibility of lesbianism and female eroticism in the Torah "marks the invisibility of lesbian concerns in our tradition. This invisibility is the source of the pain Jewish lesbians often feel when we confront the tradition."[578] Furthermore, Alpert notes that, in the absence of a clear legal position on lesbianism, rabbis have interpreted the legal codes over time to forbid lesbian activity and

[575] Greenberg, *supra* note 512 at 80–82.
[576] Gold, *supra* note 554; Biale, *supra* note 533 at 196; Greenberg, *supra* note 512 at 86–87; Rebecca Trachtenberg Alpert, Ellen Sue Levi Elwell & Shirley Idelson, *Lesbian Rabbis: The First Generation* (Rutgers University Press, 2001); Plaskow, *supra* note 333.
[577] Biale, *supra* note 533 at 193.
[578] Alpert, *supra* note 511 at 26.

relationships. Silence in the legal codes, it seems, does not result in tacit allowance of the act.

The Talmud includes two indirect references to lesbianism which have been construed as a rabbinical prohibition against both lesbian relationships and sex. In both cases, the Talmud is clear that the female sexual acts are not considered parallel to male homosexuality in terms of the severity of transgression. The term used in the Talmud for women engaging in sexual acts is *mesolelot*. There is no direct English translation of this term and its definition has been debated. Rashi, in his commentary on the Talmud, defines the term as "like intercourse of male and female, they rub their femininity against one another."[579] Rabbi Greenberg provides a more detailed definition of *hamesolelot*, in the context of a Talmudic ruling about women engaging in extra-marital relations being classified as a *zonah* (prostitute) and therefore ineligible to marry a priest.[580] Greenberg notes that, in this Talmudic ruling, some discussion was given to female same-sex relations, and the question of whether this type of conduct also excluded women from marriage to priests of the Temple. A dissenting opinion on the central question relating to prostitution was given by Rabbi Eliezer, who also went on to discuss female-female sexual activity in his ruling. His findings later determined the law against female same-sex conduct:

> Rav Huna said: Women who rub against each other (*nashim hamesolelot*) are prohibited to marry a priest. And even according to R. Eliezer, who says that when a single man has intercourse with a single woman she becomes a *zonah*, that is true when the premarital sex was with a man, but sex with a woman is mere indecency.[581]

The second Talmudic reference to lesbianism is in Shabbat 65a, which tells the story of Rabbi Abba ben Abba, referred to in the Babylonian Talmud as the father of Shmuel (Abbahu d'Shmuel). Abbahu d'Schmuel forbade his two daughters from sleeping in the same bed. The Talmud interprets Abbahu d'Shmuel's reasoning as his fear of their future promiscuity:

> Abbahu d'Shmuel… did not permit [his daughters] to lie down together. Might this be a support for R. Huna, who says that women who rub with each other are disqualified for

[579] Biale, *supra* note 533 at 193. Biale quotes Rashi on Yevamot, 76a.
[580] Greenberg, *supra* note 512 at 87.
[581] *Ibid* quoting BT Yevamot 61b, Yevamot 61a.

> the priesthood [i.e. marriage to a priest]? No. He held that they should not become accustomed to [sleeping with] an alien body.[582]

Alpert queries the validity of Shmuel's concern that his daughters might become accustomed to another (male) body in their bed if they were allowed to sleep together, and that this would not prepare them for the traditions of marriage. She contends that the rabbis who wrote and edited these passages "clearly knew of female homoerotic behaviour but assumed that the women involved would certainly marry men."[583] Alpert's gloss on the story is that rabbis were fearful of female same-sex conduct, but thought that this was one of many female sexual interests that would wane when they were married. The greater concern was to ensure that young women did not expect a degree of sexual freedom that would not be met by their husbands and the law of *niddah* (menstruation regulations), whereby sexual conduct between a married couple is limited to approximately half the month.[584]

Greenberg and Biale assert that, in the absence of a Torah prohibition against lesbianism, the legal position on sexual intercourse should be clear. Lesbian sexual relations are held to be indecent, but not *arayot*, and thus do not constitute a punishable violation of biblical or rabbinical law.[585] The reason for this lesser prohibition is in the nature of the act. Biale explains that even Rabbi Eliezer, who advocated for the death penalty for single women who slept with single men, did not consider lesbian sex to be 'sexual intercourse'.[586] As sexual arousal and satisfaction can occur between women without any penetration, the rabbis did not consider lesbian sex to qualify as a 'sexual act' sufficient to meet the criteria of *giluy arayot*.

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[582] *Ibid* quoting BT Shabbat, 65a – b. See also: Alpert, *supra* note 511 at 31.
[583] Alpert, *supra* note 511 at 31.
[584] The laws of niddah are followed by ultra Orthodox and many modern Orthodox women today. The Torah source for these rules is Leviticus, 19:1. "And you are not to go near a woman to take off her clothes during the time when she has a flow of blood." The Talmud goes further than the biblical prohibition: proscribing that husband and wife must not share a bed, share food or touch one another while the woman is menstruating and for seven 'clean' days after her period ends. In some ultra Orthodox communities, women bring their underwear to their rabbi to receive his blessing that they can resume contact with their husbands. As a reference for the halakhic position on niddah, see: Biale, *supra* note 534 at 7, 10, 38, 40; Rabbi Denise L Eger, "Taharat Hamishpachah: a renewed look at the concept of family purity" in *Sacred Encounters: Jewish Perspectives on Sexuality* (New York: CCAR Press, 2014) 399 at 399–405; Blu Greenberg, *On Women and Judaism: A View from Tradition* (Philadelphia: Jewish Publication Society, 1981) at chapter 4; Lax, *supra* note 15; Davidman, *supra* note 534.
[585] Greenberg, *supra* note 512 at 88; Biale, *supra* note 533 at 194–195.
[586] Biale, *supra* note 533 at 194.

However, the traditional Orthodox view of lesbian sex is that it is prohibited to the same degree as penetrative homosexual intercourse between men. This stricter position is held on the basis of a single *Midrashic* text and later medieval commentary on Leviticus 18:3. This verse exhorts the Israelites not to mirror the laws and customs of Egypt and Canaan: "After the doings of the land of Egypt, wherein ye dwelt, shall ye not do: and after the doings of the land of Canaan, whither I bring you, shall ye not do."[587] The *Sifra* (the *midrashic* code for Leviticus) supplements the original biblical text with a commentary explaining which 'laws and customs' of Egypt and Canaan should not be followed:

> What would they do? A man would marry a man, a woman a woman, a man would marry a woman and her daughter, and a woman would be married to two men. It is about these customs that it is added, "in their statutes you shall not go".[588]

In the Twelfth Century, Maimonides integrated the two Talmudic references to *mesolelot* with the *Sifra* prohibition of same-sex marriage between women. By so doing, Maimonides characterized lesbian sex and relationships as a violation of law that has biblical, rather than merely rabbinical, weight. Maimonides makes his case by arguing that, even though the Talmud makes clear that the sexual act between women is not a biblical transgression, the commentary (*Sifra*) on Leviticus indicates that the 'female rebelliousness' that lesbian sex demonstrates does constitute a biblical transgression:

> Women are forbidden to engage in lesbian practices [*mesolelot*] with one another.... Although such an act is forbidden the perpetrators are not liable for a flogging, since there is no specific negative commandment prohibiting it, nor is actual intercourse of any kind involved... It behooves the court, however, to administer the flogging prescribed for rebelliousness since they performed a forbidden act. A man should be particularly strict with his wife in this matter and should prevent women known to indulge in such practices from visiting her and her from visiting them.[589]

For Rabbi Greenberg, Maimonides' concern about female sexuality is really a concern about male disempowerment rather than any concern about the nature of female intimacy. He notes that, despite female same-sex activity only meeting the category of

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[587] *The Bible,* Authorized King James Version, Leviticus, 18:3-4: "After the doings of the land of Egypt, wherein ye dwelt, shall ye not do: and after the doings of the land of Canaan, whither I bring you, shall ye not do: neither shall ye walk in their ordinances. 4 Ye shall do my judgments, and keep mine ordinances, to walk therein: I am the Lord your God."
[588] *Sifra*, 9:8. Cited in Greenberg, *supra* note 512 at 88.
[589] Moses ben Maimon (Maimonides), *Commentary on the Mishneh* (*Mishneh Torah*), Issurei Bi'ah 21:8. Quoted in Biale, *supra* note 533 at 195.

indecency, as opposed to the biblical prohibition against homosexual sex that is sanctioned by death, there is no parallel warning in the *Mishneh Torah* to wives to watch their husbands for signs of homosexuality or homoerotic relations with their male friends.[590] Rather, Maimonides' transferral of a lesser transgression to a biblical prohibition seems to be more about ensuring marriage stability and appropriate female behaviour within marriage. If women enjoyed sleeping with other women, they would not be fulfilling their obligations as wives and mothers, and this could be punished by a court (that is, it is an offense that a husband could refer to a higher legal authority).

Alpert takes a milder position than Greenberg on the *Mishneh Torah* ruling, arguing that the recognition of lesbianism as being a 'minor transgression', relative to homosexual intercourse, was remarkably lenient. Alpert suggests that this leniency in regulation stemmed from the fact that ancient and medieval rabbis did not consider lesbian behaviour to be a serious crime, and certainly not one that warranted the embarrassment men experienced in speaking openly about their lesbian wives to a rabbi or a rabbinical court. Alpert concludes that it is only since LGBT and feminist voices began making claims for legitimacy that "the response from traditional circles [to lesbianism] has been anger and revulsion."[591] Alpert's case, in brief, is that lesbian women have always existed in the space between halakhic rules about sex, marriage and procreation: their interactions largely unseen and unregulated. However, when lesbian and female identities began to be recognised as a challenge to patriarchal authority, then a stronger argument could be made for revitalising and extending Talmudic pronouncements against lesbian sex.

These interpretations of legal sources—that lesbianism is mostly disregarded as a sexual threat to men and thus is only relatively lightly punished at the Talmudic level—seem to be objectively defensible. Biale, in her treatise on *Women and Jewish Law*, republished in 1995,[592] states that, while she does not adopt or promote a feminist agenda, she advocates a clear reading of *Halakha* that "focuses on making as clear as possible the host

[590] Greenberg, *supra* note 512 at 88.
[591] Alpert, *supra* note 511 at 33.
[592] The first edition of *Women and Jewish Law* was published in 1984.

of gender-based assumptions, both explicit and subterranean, that inform the evolution of Jewish texts and traditions."[593] Biale therefore takes a relatively objective line in relation to the interpretation and history of religious laws and their nonlegal commentary (*Aggadah*), she focuses on how, when and why they affect a modern Jewish woman's life.[594] Biale's finding in relation to the debate about lawful/unlawful lesbian sex is that it cannot constitute a prohibited sexual transgression (*zenut*) because: (a) there is no explicit biblical prohibition against it; and (b) there is no actual penetrative intercourse taking place, which is a relevant consideration for traditional Jewish law.[595] Like Alpert, Biale speculates that the reason for the difference in legal treatment between male and female same-sex relations is that lesbianism existed, as it has always existed, in the lives of women, "but remained unknown to the men who made the decisions in matters of *Halakha*."[596]

Alpert's contention that the 'unseen, unheard' nature of lesbian sex has only relatively recently become an issue for Orthodox rabbis interpreting *Halakha* is also persuasive. A review of 'traditional' Orthodox rabbinical sources demonstrates that, in some cases, the argument for a biblical prohibition against lesbianism is overstated by rabbis without the citation of supporting *Halakha* or precedent. Consider, for example, Rapoport's response to a letter from an Orthodox lesbian woman who asks him:

> I understand that there is no biblical prohibition involved in lesbian activity. This is in contrast to male homosexual activity, which is considered to be a very severe transgression. Is this true?[597]

Rapoport's responds to the woman by stating simply that "lesbian sexual activity is forbidden according to Jewish law."[598] He concedes that the status of the prohibition against lesbianism does not carry the weight of severity that the prohibition of male homosexuality does, but concludes that, despite this difference: "at any rate, lesbian sex

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[593] Biale, *supra* note 533 at xiii.
[594] Biale notes, in her forward to the 1995 edition of *Women and Jewish Law*, that "Halakha has to be understood not only as a compilation of normative law but as the arena in which Jews have traditionally struggled to balance fundamental values with an understanding of their natures as human beings and as Jews, male and female." *Ibid* at xi.
[595] *Ibid* at 196.
[596] *Ibid*.
[597] Rapoport, *supra* note 555 at 104.
[598] *Ibid*.

remains forbidden and whatever the severity involved—as a negative commandment—must be avoided in all circumstances."[599] In the introduction to his book, Rapoport dismisses any difference between biblical and Talmudic sanctions for male and female same-sex relations. In fact, he concludes that, "since rabbinical injunctions must be adhered to with the same commitment as biblical law, this dispute does not give rise to much practical difference."[600] In similar terms, Rabbi Michael Kaufman briefly discusses the risk of lesbianism occurring between married Orthodox women, noting that it is a threat to marriage and to family relations. Like Rapoport, he refuses to qualify lesbianism as a lesser offence (lacking a biblical prohibition); rather he states that it is "forbidden according to Jewish law" and is, in any event, a "perversion of nature and the divine order" and "intrinsically a perversion."[601]

Alpert and Biale's conclusions about the historical 'secret and unseen' nature of lesbian relationships and sex, and their suggestions about the impact of patriarchal blindness of husbands and rabbis to 'women's business', offer a compelling explanation for raising the rule against lesbian sex to the level of a general prohibition. Approaching this issue from a legal studies perspective, I would add that the rationale for asserting a blanket prohibition against lesbian sex in Jewish law appears to rely less on interpretations of legislation or judicial precedent, and more on customs, traditions and social and familial expectations that have developed over time and now form a useful regulatory response to challenges to the traditional status quo. Here, I echo Alpert's point that it was the perceived threat of lesbianism and feminism within Judaism that encouraged a hardening of the legal position, rather than the lesbian relationships themselves.

In a legal accounting, these conclusions about the links between custom, tradition and law give the rule against lesbian relationships and sex comparatively less weight to the biblical proscription in Leviticus. Of course, there are other operative concerns within biblical law that encourage rabbis to promote a conservative view of sexuality. The

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[599] *Ibid* at 10.
[600] *Ibid*.
[601] Michael Kaufman, *The Woman in Jewish Law and Tradition* (J. Aronson, 1993). Alpert notes that Kaufman's conclusions in this regard are 'bold', as they substantially misrepresent the distinction between biblical and Talmudic rules. Alpert, *supra* note 511 at 33–34.

commandment in Genesis 1:28 'be fruitful and multiply' legally only applies to men,[602] but the exemption of women from this *mitzvah* is complicated by the traditional customs of 'good' roles for Orthodox women: that is, marriage and childbirth.[603]

> [O]ne of the reasons that a woman is not commanded to get married is because she does not require the force of a commandment to do so. Based on the Talmud (TB *Bava Kamma* 110b), the *Meschech Chochmah* explains that the inherent desire that a woman has for the life-long companionship of marriage [and the natural yearning of a woman for motherhood], will work spontaneously.[604]

There are, of course, a range of *mitzvot* that apply specifically to women in terms of their sexuality, sexual activity with their husband, marriage, childbirth, *niddah* and religious observance.[605] While a detailed account of these additional legal obligations goes beyond the scope of this work, in general a review of the religious laws that apply to Orthodox Jewish women indicates a strong emphasis on the traditional concept of the family unit, the significance of procreation and marriage and female subservience to male authority.[606] There are, therefore, understandable customary and ceremonial arguments for Orthodox rabbis to call for a prohibition of lesbian activity and to cite *Halakha* as evidence for that proposition. Further, it is not unusual for people operating within a longstanding legal tradition to enforce custom and/or lesser rules where the *modus operandi* of the authorizing, primary rule has been lost or obscured. For example, in British common law, there is a popular adage that 'possession is nine tenths of the law',

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[602] Biale, *supra* note 533 at Chapter 8, Procreation and Contraception, at 198. Further, it is forbidden for a man to force his wife to have intercourse. "Even if she is not forced outright, as long as she is not amenable to intercourse, sexual relations are prohibited." Rabbi Mark Dratch, "I do? Consent and coercion in sexual relations" in *Sacred Encounters* (New York: CCAR Press, 2014) 587 at 597.

[603] For an explanation of how the exemption of women from this mitzvah does not preclude them from the obligation to have a family and procreate if they are able to according to *Halakha*, see: Rapoport, *supra* note 555 at 87–88.

[604] *Ibid* at 88.

[605] There are many texts that set out halakhic positions and their impact on the lives of women as mothers, wives and women of faith. In general, see: Biale, *supra* note 534; Davidman, *supra* note 534; Greenberg, *supra* note 585; Lisa Grushcow ed, *The Sacred Encounter: Jewish Perspectives on Sexuality* (CCAR Press, 2014).

[606] Noting, of course, that there are feminist incursions being made by Orthodox women into faith and family structures that were traditionally held only by men, as I have discussed above in this chapter. For example, Tova Hartman, discouraged by failed attempts to make her modern Orthodox synagogue more inclusive of women, together with other worshippers, created a new synagogue: Shira Hadasha ("a new song"), which opened in 2002. Since its opening, the mission has been to develop a religious community that embraces not only halakha and *tefillah* (prayer) but also feminist thought and participation of women. See: Hartman, *supra* note 523. See also: Israel-Cohen, *supra* note 523.

the common meaning being that she who holds an object or property has some defendable title to it. However, reliance on the adage has obscured the more nuanced legal rule which actually applies. The position in law is that:

(a) Bad title is superior to no title (that is, actual possession is superior to none); however
(b) Ownership of an object requires the right to possess as well as actual or constructive possession.

Common reliance on an adage over time has stretched its connection to a legal rule and has obscured the nature of the sanction itself. Perhaps the same could be said about *Halakha* prohibitions against lesbian sex and relationships. Time, translation and distance from the sources seems to have obscured the relatively mild nature of the legal sanction that was applied in the Talmud and later in the *Mishneh Torah*, and patriarchal authority of rabbinical leadership in Orthodox Judaism has left few women with a real opportunity to question the legal position on their sexuality. However, there are some women—whose stories are presented in the next chapter—who do question *Halakha* and choose to give expression to their same-sex attraction, albeit in different ways and to different degrees. I investigate the experiences of these women and the challenges they meet within modern and ultra Orthodox interpretations of Jewish law.

(5) Working with *Halakha* –a purposive reinterpretation?

In the last section of this chapter, I make an argument for a more inclusive, purposive reading of *Halakha*, supported by the legal sources referred to above about lesbian sex and sexuality, and by several progressive viewpoints about *Halakha* interpretation that have been put by Orthodox rabbis. The aim of this analysis is not to suggest that *Halakha* can simply be reworked or rewritten to meet the demands of LGBT people in the 21st Century.[607] In investigating options for more liberal interpretations of *Halakha*, I am

[607] Although, there are persuasive arguments put by Reform rabbis in this regard, particularly in terms of issues of sexuality, lesbian relationships and feminist readings of the Torah. See, for example: Greenstein, *supra* note 539; Rabbi Nancy H Wiener, "A reform understanding of To-eivah" in *Sacred Encounters: Jewish Perspectives on Sexuality* (New York: CCAR Press, 2014) 23 at 23–42; Rabbi Judith Z Abrams, "Personal reflection: Kol Ishah - sexuality and the voice of a woman" in *Sacred Encounters: Jewish Perspectives on Sexuality* (New York: CCAR Press, 2014) 97 at 97–100.

mindful of my outsider status vis à vis the Jewish community. However, I do suggest that, by testing the flexibility of this law and by working constructively with decision-makers (rabbis) within Orthodox communities, lesbian women may be able to locate appropriate support for their sexual identity within their legal tradition. In this way, they could find ways to live within the purpose and spirit of *Halakha*.[608]

Kirschner suggested that *Halakha* as written is afforded too much normative force within Judaism, particularly Orthodox Judaism.[609] His argument is that Orthodox rabbis—and, to some extent, Conservative and Reform rabbis also—view *Halakha* as inflexible, incontrovertible and as fixed in time. Following this view, rabbis are bound to apply the laws in relation to homosexuality (in terms of men and women) without applying any degree of discretion. There are clear conceptual links to be drawn between this fixed reading of *Halakha* and the constitutional theory of originalism.[610] Thus, Talmudic proscriptions against lesbianism, even if these are accepted as a lower level of transgression, still require women to live according to the terms of the prohibition. Even if an Orthodox rabbi accepts that a lesbian woman living with her partner is a 'lusting renegade' rather than a 'defiant rebel', the Talmudic and Mishnah Torah rulings on lesbian sex as indecent are still likely to lead him to counsel a woman to change her sexual practices to prevent her from continuing to sin. In some cases, rabbis faced with questions about the unlawfulness of lesbian relationships report that they are more comfortable counselling abstinence rather than heterosexual marriage.[611] Alternatively, as with advice given to gay men, some Orthodox rabbis still counsel that, if the woman could consider getting married to a man, then she should consider marriage as a "legal option to cure her of her unwanted lesbian sexual interests."[612] However, no sources reviewed for this

[608] I discuss particular cases and reports of these negotiations in chapter 6, below.
[609] Kirschner, *supra* note 509 at 451.
[610] Proponents of originalism in constitutional theory assert that the discoverable meaning of the Constitution at the time of its initial adoption is authoritative for the purposes of constitutional interpretation in the present. Despite being sharply criticized and critically 'laid to rest' in the 1980s, originalism persisted to become one of the leading constitutional theories in the United States in the 1990s – present day. See: Keith E Whittington, "The New Orginalism" (2004) 2 Georget J Law Public Policy 599; Antonin Scalia, "Originalism: The Lesser Evil Essay" (1988) 57 Univ Cincinnati Law Rev 849; Randy E Barnett, "An Originalism for Nonoriginalists" (1999) 45 Loyola Law Rev 611.
[611] This is Rapoport's advice given to a woman who questions whether it is right for her to get married when she is still attracted to women. See: Rapoport, *supra* note 555 at 104.
[612] *Ibid*. See also: Kaufman, *supra* note 601.

project suggest that Orthodox women actively seek out reparative therapy, although I acknowledge that this conclusion is only relevant to the particular women and communities analysed for this project.

Kirschner summarises the historical rabbinical approaches to the *halakhic* prohibition of homosexuality, and notes that one interpretative tactic has been to seek relief from the application of *Halakha*, by invoking legal categories of mitigation.[613] That is, one might argue that homosexuality qualifies as duress (*ones*) if we accept that it is a pathology that cannot be altered. The second line of reasoning Kirschner notes is that taken by Reform and Reconstructionist Judaism, which is that *Halakha* must be repudiated in part, in accordance with the expectations of modern standards of ethics and morality. Adopting this reasoning: "Judaism's teaching of love, dignity and commitment in human relationships is understood to supersede *halakhic* strictures concerning homosexuality."[614] Or, as Janet Marder, one of the first rabbis of the Reform Beth Chayim Chadashim synagogue (the first LGBT synagogue in North America) put it: "I do study halakhic pronouncements about homosexuality; I do try to understand the rationale behind them. But I am now quite willing to jettison them, without apology, in constructing my own version of Judaism."[615]

Orthodox rabbis might find obvious difficulties in accepting either of these approaches to the interpretation of Jewish law. In terms of the first approach—the application of *ones*—Orthodox rabbis have either: (a) refused to accept that homosexuality is a biological condition that cannot be changed by therapy or medical treatment,[616] or (b) have refused

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[613] Kirschner, *supra* note 509 at 451.
[614] *Ibid* at 450–451.
[615] *Ibid* at 450; Janet R Marder, "The impact of Beth Chayim Chadashim on My Spiritual Growth" (1985) 32: Winter J Reform Jud 35.
[616] In relation to rabbis who take the position that homosexuality is either a task to overcome, or a sinful lifestyle choice, see: Goldberg, *supra* note 567; Lamm, *supra* note 568; Freundel, *supra* note 568; *ibid*; Riskin, *supra* note 574. There is also an online petition called the Torah Declaration, currently signed by 223 rabbis in North America, that protests against 'any leniency in the position that homosexuality is a sin'. The Declaration goes on to say: 'The concept that G-d created a human being who is unable to find happiness in a loving relationship unless he violates a biblical prohibition is neither plausible nor acceptable… Struggles, and yes, difficult struggles, along with healing and personal growth are part and parcel of this world. Impossible, life long, Torah prohibited situations with no achievable solutions are not. We emphatically reject the notion that a homosexually inclined person cannot overcome his or her inclination and desire. Behaviors are changeable. The Torah does not forbid something which is impossible to avoid. Abandoning people to lifelong loneliness and despair by denying all hope of overcoming and

to allow mitigation of Jewish law in these circumstances, on the basis that sexuality is not an appropriate category for duress, given the severity of the sin.[617] In terms of the second approach—that elements of *Halakha* dealing with homosexuality and same-sex relationships between women be repudiated or substantially amended— even modern Orthodox rabbis, such as Greenberg, are clear that doing this degree of violence to the word of Jewish law goes directly against the "firm commitment to the halakhic system… the layered authoritative legal literature that implements the Torah's commandments and so governs Jewish life" that "is central to any definition of Orthodoxy."[618]

Kirschner offers another critique of these approaches; namely that they both assume that the meaning of rules set out in *Halakha* is monolithic and final. Thus, there can be no change to written *Halakha*, because "the law given in time now stands above time."[619] Kirschner argues that this literal reading of the Torah and legal codes, favoured by ultra Orthodox rabbis, ignores the evolving nature of Jewish law, which in fact relied on substantial dissent and disagreement among rabbis in response to the challenge of social changes taking place over long periods of time.[620] In fact, the number and variety of legal sources that have evolved within the Jewish legal tradition indicate that selective and circumstantial factors have always influenced the development of halakhic principles.

Kirschner gives the example of Rashi and his grandson Rabbenu Tam giving permission for women to recite the benediction before performing a positive and time-bound commandment to illustrate the evolving significance of the role played by women in Judaism. Previously women had been forbidden from reciting this benediction. As Kirschner observes: "obviously, *Halakha* was affected by the changing perception of the women's role in twelfth century Jewish life,"[621] sufficient to justify a change in regulation.

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healing their same-sex attraction is heartlessly cruel. Such an attitude also violates the biblical prohibition in Vayikra (Leviticus) 19:14 "and you shall not place a stumbling block before the blind." See: "The Torah Declaration", online: *Torah Declaration* <http://www.torahdec.org/declaration.html>. see also: Rosalie Saltsman, "Reflections and Feedback", *Jew Press* (8 December 2010), online: <http://www.torahdec.org/reflections-and-feedback.html>.

[617] Rapoport, *supra* note 555 at 61–62.

[618] Greenberg, *supra* note 512 at 13.

[619] David J Bleich, "Halakha as an Absolute" (1980) 29:1 Judaism 31 at 31–32; Kirschner, *supra* note 509 at 451.

[620] Kirschner, *supra* note 509 at 452.

[621] *Ibid.*

Kirschner and Greenberg agree that the Jewish religion is remarkable for its acceptance (set out in the Babylonian Talmud) that the Torah was "not given to angels, but to human beings" to determine as they see fit.[622] In their view, such a statement is meant to inspire human agency in remaking the law in creative ways, not to constrain it to a fixed concept of the will of the divine.

Kirschner's overarching argument is that halakhic change is possible if we accept: (a) that Halakha is capable of gradual change; and (b) that modern rabbinic authority recognizes the limits of ancient rabbinic language, with emphasis on the original meanings of Leviticus 18:22 and 20:13. In making this case, Kirschner argues in similar terms to Greenberg about ancient Jewish understandings of the risk of homosexuality, although they reach different conclusions on the evidence. Both Greenberg and Kirschner note that the ancient sources assumed that homosexuality was an act of volition, of defiant sin. However, Kirschner argues that homosexuality is in fact "an integral feature of human sexuality" that has been proven to be a constant, natural phenomenon reported throughout human history.[623] Greenberg makes a similar case in relation to the immutability of same-sex attraction, through his own personal revelation. "Only after many years of persistent denial, knocking my shins again and again into the hard truth and then coming back for more, was I able to fully acknowledge that I am gay. That there was no choice."[624] In 2018, there is substantial evidence to support Kirschner and Greenberg's view that homosexuality is an integral feature of human sexuality rather than a personal preference or lifestyle choice, and that same-sex attraction and relationships are enduring elements of social life. Without needing to take a side in the essentialism versus constructivism debate about causation of diverse human sexuality,[625] it is largely

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[622] *Ibid*; Greenberg, *supra* note 512 at 18.

[623] Kirschner's article was informed by the report of Alfred Kinsey *Sexual Behaviour in the Human Male*, first published in 1948, which was the first scientific report on the prevalence and diversity of human sexual behaviour. Incredibly, Kirschner notes that, in 1988, this volume was still the most reliable and relevant data reporting of sexual orientation and behaviour in western society. See: Alfred Charles Kinsey, Wardell Baxter Pomeroy & Clyde Eugene Martin, *Sexual Behavior in the Human Male* (Indiana: Indiana University Press, 1998).

[624] Greenberg, *supra* note 512 at 9.

[625] This is a sociological and psychological debate attempting to resolve the question of why certain sexuality and gender identities are present in humanity. According to classical essentialism, there are underlying true forms or essences, and these true forms are constant over time. Modern essentialism consists of a belief that certain phenomena are natural, inevitable and biologically determined. Social constructionism, in contrast, rests on the belief that reality is socially constructed and emphasizes language as an important

accepted—across a range of fields—that human sexuality is a continuum (this builds on the earlier model of the 'Kinsey Scale'). Some within this continuum have exclusive queer attraction to their own sex, while others have exclusive attraction to the opposite sex.[626] Further, in terms of reliable reporting of L/G sexual identities as a stable element in human society; the 2014 Williams Report, which analyzed the results of five different national polls of LGBT identities over five years, indicated that, between 5.2 and 9.5 million adults in the United States identify as LGB/T,[627] indicating that this figure had remained fairly steady since the previous national report in 2011, based on the National Survey of Family Growth and the General Social Survey.[628]

Applying Kirschner's reasoning to contemporary statistics and commentary about same-sex attraction, we can argue that homosexuality should no longer be subjected to the same level of prohibition as it was when the Torah was written. As an example of evolution in legal principle in response to social evidence, Kirschner cites the decision, taken in many Orthodox communities, to empower *heresh* Jews (people who are deaf or who have

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means by which we interpret experience. The impact of these theories on human sexuality are still debated in STEM and sociological literatures. See: Andrew Sayer, "Essentialism, Social Constructionism, and beyond" (1997) 45:3 Sociol Rev 453; John D DeLamater & Janet Shibley Hyde, "Essentialism vs. Social Constructionism in the Study of Human Sexuality" (1998) 35:1 J Sex Res 10.

[626] This is a necessary oversimplification of a large body of critical research into the measures and conceptual definitions of sexual orientations over time. This research spans medical, psychological, sociological and anthropological literatures. While there is often disagreement between subject matter experts about the appropriate categorization or presentation of the 'sexuality continuum', there is general acceptance of the continuum concept itself. For an explanation of the continuum model as it is applied in LGBT literature and counseling, see: Brian Mustanski, "What Does It Mean to Be 'Mostly Heterosexual?'", (18 September 2013), online: *Psychol Today* <http://www.psychologytoday.com/blog/the-sexual-continuum/201309/what-does-it-mean-be-mostly-heterosexual>. For a review of present debates about how to capture and represent the sexuality continuum in scientific and sociological literatures, and for summaries of the leading theoretical models of sexuality see: Cass, *supra* note 266; Fritz Klein MD, Barry Sepekoff PhD (cand) & Timothy J Wolf PhD, "Sexual Orientation": (1985) 11:1–2 J Homosex 35; John C Gonsiorek, Randall L Sell & James D Weinrich, "Definition and Measurement of Sexual Orientation" (1995) 25 Suicide Life Threat Behav 40; Randall L Sell, "Defining and Measuring Sexual Orientation for Research" in *Health Sex Minor* (Springer, Boston, MA, 2007) 355.

[627] Gary J Gates, *LGBT Demographics: Comparisons among population-based surveys* (UCLA School of Law: The Williams Institute, 2014). In this report, Gates notes that the various reporting methodologies for LGBT identities are becoming more nuanced and able to accommodate greater diversity in responses. Gates found that the proportion of adults who identified as LGB/T varied across the surveys from 2.2% in the NHIS to 4.0% in the Gallup data. These estimates imply that between 5.2 and 9.5 million adults in the United States identify as LGB/T.

[628] Gary J Gates, *How many people are lesbian, gay, bisexual and transgender?* (UCLA School of Law: Williams Institute, 2011). In this report, Gates notes that the total reported number of LGB/T (as in, lesbian, gay bisexual or transgender identities reported separately) was 9 million in total, making up 3.5% of the adult population.

speech disabilities) to take part in prayer ceremonies and be able to form the *minyan* (prayer quorum). The communities recognise that this accords dignity and respect to these members of their community, and have thereby amended *halakhic* rulings that saw *heresh* people as 'imbeciles' who lacked capacity to take part in religious ceremonies. Kirschner uses this example to demonstrate that *Halakha* has the capacity to recognize and reckon with advances in empirical knowledge. Kirschner reasons that, if we apply the same rules of progressive change based on empirical evidence regarding homosexuality, the prohibition regarding male and female same-sex relationships should be lifted. Thus he concludes, "the Jewish imperative is clear: to rescind the ancient denunciation of homosexuals and to recognise that all persons, in their unique sexual being, are the work of God's hands and the bearers of God's image."[629]

Greenberg's thesis on proposed change to *Halakha* on homosexuality is the most inclusive and progressive to date. Greenberg argues that the ancient sources on homosexuality in fact endorse the hatred of women and female sex, rather than seeking to shun or punish 'the homosexual' as a sexual entity. Greenberg interprets Leviticus 18:22 as an admonition not to rape another man, 'as one would dominate a woman.' Greenberg situates the death penalty for gay penetrative sex in the context of a violent, ancient world where it was more serious to rape another man than to rape a child or a woman because masculinity had a religious and political currency which femininity lacked.[630] Greenberg's interpretation of the term *mishkeve ishah* (to humiliate, to defile) in Leviticus is central to his argument. He notes that this term does not appear in any other Torah book. He notes that almost all the prohibitions in Leviticus 18 relate to sexual violations, which are less about familial obligation and promiscuity than about "the destructive power of sexual aggression."[631] Greenberg surmises that the sages therefore intended the sanction to mean a prohibition against "intercourse when the motive is not love but a demonstration of virile power, not connection but disconnection, not

[629] Kirschner, *supra* note 509 at 458.
[630] Greenberg, *supra* note 512 at chapter 13, 'The Rationale of Humiliation and Violence", at 202-210.
[631] *Ibid* at 206.

tenderness but humiliation and violence."[632] Reinterpreted and reframed in this light, Leviticus 18 therefore reads as follows:

Ve'et zakhar	And a male
lo tishkav	you shall not sexually penetrate
Mishkeve ishah	to humiliate
to'evah hi	it is abhorrent[633]

Greenberg acknowledges that his reading of Leviticus as a law against sexual domination and harm, done to men or women, is a radical approach to *Halakha* interpretation. However, his work to reach his conclusions is thoroughly done. He painstakingly works through the Torah and later *halakhic* texts, treating them as binding legal documents, while contextualizing certain rules using hermeneutics and gender theory. In legal theory terms, I would argue that Greenberg is a constructivist, and his reading of Jewish law is wholly purposive in form, yet also revelatory:

> It would be hard to say who among the scholars of these periods or even among Orthodox scholars today would have been or is now ready to acknowledge this coded future vision of gender equality. Sacred texts can only say what we are ready to hear. The reading of Leviticus 18:22 I have suggested has always been there.[634]

Greenberg's treatise is important for this work, as he is the only male Orthodox authority to openly recognize and discuss the disempowerment of women as an active force throughout Jewish law and, as a corollary of this, the relative invisibility of lesbian relationships and sex. While Greenberg's thesis deals more directly with gay sex rather than lesbianism (because of the overt inclusion of the Torah prohibition against gay sex, as opposed to the more convoluted Talmudic rules against lesbianism), I suggest that his thesis has important implications for the legitimacy of lesbian sex within Orthodox communities. To make a positivist argument: without recourse to Leviticus as the biblical anchoring position for a law against lesbianism (*in toto*), the Talmudic law against lesbian sex and sexuality must also fall away, or be diminished to a great degree, pursuant to the

[632] *Ibid* at 204.
[633] *Ibid* at 208.
[634] *Ibid* at 211.

procedural rules of *Halakha*. Alpert's view that the rule against lesbian relationships was only entrenched in religious custom and rabbinical writings in the twentieth century and beyond provides support for this position, and adds momentum to Greenberg and Kirschner's theses on the need for *halakhic* reinterpretation and flexibility in the area of sexuality. Further, even if we read the Talmudic and *Mishnah* rules on lesbianism as valid rabbinical law, we can interpret these words using Greenberg's hermeneutic and gender approach and explain their historical context more concretely, limiting their application to lesbian lives today almost completely.

Both Kirschner and Greenberg's approaches to interpreting *Halakha* are relatively radical for Orthodox Jewish law, and they would likely not have any currency in Haredi communities, where traditional *Halakha* observance has remained (as far as possible) unchanged since the eighteenth century. Nonetheless, change has begun to occur in modern Orthodox leadership and communities about the presence and validity of L/G identities and, to a lesser degree, transgender identities.[635] Even in Rapoport's treatise on the 'authentic' position on gay and lesbian Orthodox Jews (2004), there is a marked movement away from the 'homosexuality as illness' thesis and from the 'voluntary evil' perspective. Rapoport's advice to young gay and lesbian Jews to live alone rather than to marry and not to assume that clinical interventions will help to change their sexuality is, on the scale of Orthodox tradition, a significant movement away from the views of Norman Lamm and Arthur Goldberg (the founder of JONAH) who endorse heterosexual marriage and reparative therapy as appropriate 'cures' for an unnatural sexuality based on the argument that *Halakha* would not compel a Jew to live an 'unnatural life.'

As Greenberg notes in his introduction to *Wrestling with God and Men*, many Orthodox rabbis have overcome their previous fear of homosexuality, and now live with their discomfort about their inability to help L/G people find their place in Jewish life. He

[635] The stories of lesbian, gay and transgender identities within ultra Orthodox communities are slowly beginning to be shared more openly. In chapter 1, I noted the story of Abby Stein, who wrote a breakthrough blog post in 2015 about her transgender journey from male rabbi to woman. However, in leaving her Haredi community, Abby has also lost all connection with her family, who cannot accept her identity as a woman. See: Stein, *supra* note 130; Brigit Katz, "Amid a shifting tide of tolerance, transgender Jews search for faith and community", (23 February 2016), online: *Women in the World in Association with the NY Times - WITW* <http://nytlive.nytimes.com/womenintheworld/2016/02/23/finding-faith-and-community-as-a-transgender-jew/>; Bolton-Fasman, *supra* note 136.

muses that the reason for this shift in attitude "has as much or more to do with gender generally and with the change in the status of women specifically than with attitudes about homosexuality *per se*."[636] I tend to agree with Greenberg's conclusion. Progressive social and political movements towards sexual equality in Judaism, greater rates of female education (even in ultra-Orthodox communities), increased awareness of different sexual and gender identities and growing online connections between women are social factors that seem to be moving traditional communities towards some reconciliation with gay and lesbian religious Jews. However, while the legal traditions in relation to same-sex attraction and relationships remain unchanged, lesbian women will have to contend with the prohibitions in *Halakha* and their application by rabbis who disavow the legitimacy of their identity.

In this chapter, I have critically analysed the *halakhic* prohibitions against lesbian same-sex attraction, how they are applied and enforced within Orthodox Judaism, and how they differ from the *halakhic* proscription against male homosexual sex. I have also introduced two different suggestions for the reinterpretation or amendment of valid sections of *Halakha*, one based on the concept of reasoned evidence for *halakhic* change and the other based on a limited reinterpretation of the purpose of the Torah prohibition against homosexuality based on modern concepts of gender, feminism and sexual equality. In the following chapter, I test how Jewish Orthodox women negotiate, bend or supplement these *halakhic* rules on homosexuality, and test how these actions affect their view of their religious and sexual identities.

[636] Greenberg, *supra* note 512 at 45.

Chapter 6

Between shul and state: Orthodox lesbian women negotiate religious law

> *I want to make sure that you can't identify me. I'd like to help you. I want to help other women, but I need you to understand how important it is that I'm not identified… It's a very small community and if anyone finds out that I have anything to do with you or with this film about lesbians, it's going to ruin the lives of my kids.*[637]

Introduction

In this chapter, I analyze the experiences of some Jewish women who identify as lesbian and who live their lives in Orthodox Jewish communities where the accepted legal position is that same-sex relations between women are forbidden.[638] This chapter builds on the work of chapter 5, where I surveyed and presented the authoritative (predominately male) viewpoints on the management of female sexuality under Jewish law. In this chapter, it is the women's turn to speak. Here, I give primacy to the stories of lesbian women that address the conflict between their religious and sexual identities, and how they see themselves as either rule abiding, rule breaking, or rule creating in their responses to religious law. This analysis draws on the legal pluralist analysis and concepts of a critical legal pluralism that I introduced in chapter 2. I draw on Macdonald and Kleinhans' model of the modern self as a complex site of law with reference to negotiations made by Orthodox women in relation to sexual identity. That is, I recognise the modern self as able to integrate knowledge of different legal orders and customary expectations with personal social experience, and to invent and articulate responses to rules in intelligent ways.[639] The goal of this analysis is to more concretely explain the lived legal experience of Orthodox Jewish women, and to situate their experiences within the

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[637] Interview with Miriam-Esther, 'Orthodox mother of ten, Jerusalem', interview for the documentary by Ilil Alexander, *Keep Not Silent* (2004).
[638] In Chapter 5, I argued that the 'prohibition' of lesbian sex and relationships does not apply at the biblical level, and the prohibition at a rabbinical level is set at a far lower level of transgression than male same-sex activity and relationships.
[639] I provide a summary of Macdonald and Kleinhans' concept of a critical legal pluralism and discuss the application of this critical legal pluralist approach to religious legal subjects, in chapter 2. See: Macdonald & Kleinhans, *supra* note 22.

normative demands imposed on them by Jewish law. I also refer to Adams' adaptation of Macdonald's critical legal pluralism model, notably her proposal of understanding the choices that legal subjects make when confronted with normative options as involving a degree of creative improvisation and narrative selection.[640] My discussion of Orthodox Jewish women's engagement with *halakhic* rules against lesbian sex and relationships develops the analysis of *Halakha* set out in chapter 5. Here, we see that some women engage with their religious legal framework in creative ways that can be recognised as negotiation and rule interpretation. We also see that some women go further in advocating for their sexual identity. These women accept the normative supremacy of the prohibition against lesbianism, but actively negotiate with rabbis and their families to find creative, hermeneutic interpretations of *Halakha* that create a legitimate space for their lesbian identity.

In this chapter, I analyse first-hand accounts of Orthodox women through a feminist lens. As I outlined in chapter 3, this method involves analyzing personal narratives with a view to determining gender inequality and the impact of patriarchal power,[641] inquiring into the social histories of the feminist subject to contextualise personal stories,[642] and exploring how sharing individual stories builds a collective feminist meaning.[643] This last element enables a researcher to analyze how similarities across experiences of oppression, bias and discrimination can be amplified as evidence of societal and legal problems. Presenting the stories of women living law also highlights the value of informal support structures that exist in different feminist contexts. Here, I note the apparent value of online connections between lesbian Orthodox women. These connections generate social and political value, as they enable the transfer of knowledge and create safe spaces for queer women to develop friendships and relationships.

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[640] Adams, *supra* note 23.
[641] I describe this element as 'asking the woman/gender question' in chapter 3 at 115 - 117. In terms of commentary on 'asking the woman question/unmasking the patriarchy' in feminist method, see: Levit & Verchick, *supra* note 285; Bartlett, *supra* note 286; Romero, *supra* note 16.
[642] I identify this element as 'contextual reasoning' in chapter 3 and provide a discussion of relevant scholarship (at 117). In general, see: Hanisch, *supra* note 296; Mari Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 Harv Civ Rights- Civ Lib Law Rev 323.
[643] This element is known generally as 'consciousness-raising'. I discuss and reference this element of a feminist methodology in chapter 3 at 119. See, in general: Levit & Verchick, *supra* note 285 at 935.

My conclusions that follow in this chapter are organized by the feminist and legal pluralist themes that emerged from drawing together first-hand accounts of a diverse group of Orthodox Jewish women. At the outset, I must acknowledge that the feminist themes and legal trends that I observe across these communities cannot be generalised (in terms of assuming how other queer religious people might also respond to relevant religious law). This limitation reflects the small and anonymised source base of this investigation and its limited goals: to present a more complete picture of *these* queer, religious individuals.

In some areas of this thematic analysis, I deliberately draw together the goals of a legal pluralist theoretical approach and feminist methodology. This blurring of boundaries reflects the interrelationship between a feminist and legal pluralist investigation in this legal subject. As I develop further below, some of the legal negotiations that Orthodox lesbian women engage in are also feminist in nature; in these cases, there is value to broadening theoretical parameters of the commentary to get a fuller picture of the 'self'. Asking feminist questions about *how* women engage with religious law (including how they balance their social and familial responsibilities with their sexual identity claims) helps us to understand the complexities of their lives and to properly value their normative choices in this environment. However, defining the feminist legal subject in a religious context is a challenging endeavour, and one that it not the primary focus of the project. Thus, in some areas of the following analysis, I only tentatively engage with the 'agency dilemma' debate about the motivations and freedom of Orthodox women who choose to live within a patriarchal, religious environment. That is, I only engage in this discussion to the point that it is relevant to inform a legal pluralist critique of certain legal choices (or narrative selections) that Orthodox lesbian women make in response to religious law. The goals of this discussion therefore link back to the legal pluralist analysis that is the primary theoretical focus of this investigation.

(1) Research methodology: finding the legal subject

The parameters of this research subject (focusing on Orthodox Jewish women who identify as lesbian) were set for the following methodological reasons. First, I narrowed the focus of this investigation to the experiences of lesbian women, rather than widening this research to include a broader category of LGBT-identifying Orthodox people. I made

this choice for two reasons. First, while the total number of L/G Orthodox Jews in the United States remains unknown, a growing body of first-hand accounts and secondary academic sources published over the last fifteen years indicate that lesbian identity is increasingly recognised as an issue of gender, sexuality and equality demanding attention within Orthodoxy, both by rabbinical authorities and by Orthodox Jewish women.[644] Second, research demonstrated a relative lack of first-hand accounts that addressed different queer sexual and gender identities of Orthodox women, notably trans people.[645] This lack of reporting could be explained by the fact that recognising sexual and gender identity diversity is a difficult learning-curve for religious women who have lived their lives in relative isolation. Many lesbian women reported that their same-sex attractions were explained by parents and rabbis as childish fantasies. In Haredi communities where to be L/G is to be shunned, to suggest that one go beyond the straight/gay binary and explore gender fluid categories of self is an even more demanding endeavour. Alternatively, there is the suggestion that community exclusion of L/G people chills discussion and correspondence about queer identities and sexual preferences. Research for this work showed that, while the voices of lesbian Orthodox women are now being heard across different Orthodox communities and in the mainstream secular media, many lesbian Orthodox women are still deeply concerned with anonymity. Many women choose to 'come out' or discuss their potential lesbian identity only via anonymized reporting in films, documentaries and the blogosphere. Therefore, it seems reasonable to

[644] Naomi Grossman noted in 2001 that it was "impossible to get an accurate number of gay Orthodox Jews" as there is no official membership or consistent and safe means of self-identifying across different jurisdictions. Grossman, *supra* note 561. Research for this chapter indicated that in 2018 there is no agreement as to a percentage/total number of L/G Orthodox Jews. However, the number of L/G Orthodox online resources and media reports of L/G people within the Orthodox community, have increased substantially since 2001. For more recent sources discussing the difficulty of identifying a 'total number' of Orthodox L/G people, see: Yaakov Ariel, "Gay, Orthodox, and trembling: the rise of Jewish Orthodox gay consciousness, 1970s-2000s" (2007) 52:3–4 J Homosex 91; MJL Staff, "Orthodox Judaism and LGBTQ Issues", (2016), online: *My Jewish Learning* <https://www.myjewishlearning.com/article/orthodox-judaism-and-lgbtq-issues/>.

[645] Although I note that media reports of trans-identifying Orthodox young people are growing in number. In chapters 1 and 5, I gave the example of Abby Stein, a former Haredi rabbi who is now a young woman running an online support group for trans-identifying Haredi young people. I also note the 2010 essay by Joy Landin, that describes the challenges living with gender identity conflict within a Haredi community in New York in the 1990s. See: Joy Landin, "In the Image" in Miryam Kabakov, ed, *Keep Your Wives Away Them* (Berkeley, CA: North Atlantic Books, 2010) 141; Stein, *supra* note 130. On this point, see also: Uriel Heilman, "Even Orthodox Jews starting to wrestle with transgender issues", *Jewish Telegraph Agency* (5 April 2016), online: <https://www.jta.org/2016/04/05/news-opinion/united-states/even-orthodox-jews-starting-to-wrestle-with-transgender-issues>.

conclude that, in this environment, open discussion of gender fluidity or the potential of a person identifying as trans are topics also likely to be stifled by fear of exclusion or censure.

To explore the experiences of Orthodox women who identify as both lesbian and religious, I first completed a targeted academic literature review. I was most interested in the experiences of women who continued to live within their Orthodox community after they 'came out' (noting that, given the secrecy and stigma attached to lesbianism in these communities, 'coming out' often described self-realization of one's sexuality, rather than a public declaration). I did not limit this literature review to any one jurisdiction or academic field, given the difficulty of finding source material, the fact that legal literatures yielded few results, and the fact that Orthodox communities rarely seek state legal intervention in community matters.[646] I then began to look for first-hand narratives and media reports about Orthodox community life from Israel, the UK, Canada and the United States. I acknowledge that this variety of jurisdictions is greater than my investigations into the experiences of Christian ex-gay communities, which were largely limited to the United States. Despite this difference, I found there to be sufficient thematic and environmental consistencies between the two religious contexts to apply the same theoretical and methodological frameworks to them, and to test similar inquiries. I note significant areas of convergence and divergence in the experience of sexuality between these two groups in my concluding section of the dissertation.

Research demonstrated that much of the most relevant fieldwork and experiential research about lesbian Orthodox women has been done in the fields of social

[646] I discuss the antipathy of Haredi communities in the United States to state law court decisions and legislation in chapter 1 at 65 - 66, where I give the example of the East Ramapo school board dispute between the Haredi community and state education regulation. The contested relationship between Haredi communities, state law enforcement and civil and criminal courts has been the subject of investigative reports over the last ten years, particularly in relation to claims of pedophilia, family violence and custody disputes within communities. See, for example: Rachel Aviv, "The Outcast", *New Yorker* (3 November 2014), online: <http://www.newyorker.com/magazine/2014/11/10/outcast-3>; Sharon Otterman & Ray Rivera, "Ultra-Orthodox Jews Shun Their Own for Reporting Child Sexual Abuse", *N Y Times* (9 May 2012), online: <https://www.nytimes.com/2012/05/10/nyregion/ultra-orthodox-jews-shun-their-own-for-reporting-child-sexual-abuse.html>; Heidi Ewing & Rachel Gray, *One of Us* (Netflix, 2017); Hella Winston, "Meet the Shomrim—the Hasidic Volunteer 'Cops' Who Answer to Nobody", *Daily Beast* (15 May 2016), online: <https://www.thedailybeast.com/articles/2016/05/15/meet-the-shomrim-the-hasidic-volunteer-cops-who-answer-to-nobody>.

anthropology, feminist theory, sociology and psychotherapy/psychology. I therefore targeted my initial research within these fields.[647] As part of my academic literature review, I also reviewed queer theory literature and LGBT dedicated publications in mental health literature to present a fuller picture of the academic investigations that are done into this group and to assess the scholarship for its treatment of lesbian identity comparatively to its treatment of gay, bisexual or trans Jewish people.

This academic literature review demonstrated that my subject group and the broader exploration of sexual/religious/feminist identity in Jewish Orthodox women is under-researched and relatively under-reported.[648] This may well be the result of the ongoing taboo surrounding L/G disclosure in Orthodox communities, which in turn precludes the collection of evidence and the publication of identified data. It could also be a natural corollary of the preference of many L/G Orthodox Jews to share their experiences and learn about LGBT issues via the anonymity of the internet. As part of this search for first-hand accounts of Orthodox women, I found that the most recent, relevant sources were online. I reviewed websites dedicated to discussing *frum* (Orthodox) religious perspectives on LGBT identities and providing information about the naturalness of same-sex attraction. These websites are often designed to provide support and information for Orthodox people who identify as L/G, without compelling them to disclose their identity or to 'come out' in any way.[649]

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[647] See, for example: Halbertal & Koren, *supra* note 17; Mark, *supra* note 165; Judith M Glassgold, "Bridging the Divide" (2008) 31:1 Women Ther 59; Koren, *supra* note 550; Ariel, *supra* note 645; Elisa S Abes, "Exploring the relationship between sexual orientation and religious identities for Jewish lesbian college students" (2011) 15:2 J Lesbian Stud 205; Amy K Milligan, "Expanding sisterhood: Jewish lesbians and externalizations of Jewishness" (2014) 18:4 J Lesbian Stud 437; Julia C Phillips, "A Welcome Addition to the Literature: Nonpolarized Approaches to Sexual Orientation and Religiosity" (2004) 23:5 Couns Psychol 771.

[648] This is noted in several academic literatures, including LGBT studies, feminist theory and psychology and counselling resources. On this point, see: Abes, *supra* note 647; Randal F Schnoor, "Being Gay and Jewish: Negotiating Intersecting Identities" (2006) 67:1 Sociol Relig 43; Milligan, *supra* note 647.

[649] There are multiple self-help and anonymous websites for Orthodox people who identify as LGBT located in different jurisdictions across the world. Some provide information about leaving Haredi communities (for example, Footsteps, which provides services and support for Haredi Jews questioning their faith, and particularly Jews who identify as queer), some showcase anonymized blogposts by L/G Orthodox writers and collect news publications about Orthodox rabbinical responses to LGBT issues, and some provide online resources that deal with gender and sexual identity and Orthodoxy from a range of perspectives, but with a central theme of supporting diversity within Orthodox communities. See: ESHEL, "Eshel Online | Creating inclusive Orthodox communities for LGBTQ+ Jews and their families.", online: *Eshel Online* <http://www.eshelonline.org/>; "Orthodykes", online: *Orthodykes* <http://orthodykes.blogspot.ca/>; Footsteps, "Footsteps | Your life. Your journey. Your choice.", online: *Footsteps*

Wider research on Jewish religious history and *Halakha* yielded some first-hand accounts in the form of letters written to rabbis by lesbian women asking for help and guidance about Jewish law and lesbianism. In some cases, the questions posed to Rabbis from women in different jurisdictions have been extremely informative in terms of showing how Orthodox women rely on religious law to inform themselves about the legality of their sexual orientation. For example, one woman (living in Israel) wrote to Rabbi Chaim Rapaport (living in London, UK):

> I am an orthodox lesbian woman. I am neither 'in the closet' or 'out' of it. I am single…. A friend of mine, likewise a lesbian, made the terrible mistake of getting married under parental and peer pressure…. The marriage came to a sad end… I would therefore like to ask you for a clear answer on the following questions:
>
> (a) Does a Jewish woman have an obligation to get married?
> (b) Does a Jewish woman have an obligation to submit herself to conjugal relationships with her husband when she would be extremely uncomfortable with this?[650]

I reviewed multiple personal memoirs written by women and men who had lived within Haredi communities in the United States and Canada, but were then either expelled from their community, or chose to leave because they could no longer live within the strictures of *Halakha*.[651] I found valuable source material in the memoir of Leah Lax, a former Haredi woman who left her community in 2010 to begin a lesbian relationship.[652] Lax's detailed, careful descriptions of a woman's life in a Haredi community informed my religious law investigations, and her honest description of the simultaneous feelings of great loss and incredible freedom that she experienced when leaving her husband to live with her girlfriend informed the feminist method questions that directed this literature review.

Excepting Lax's memoir, the rest of the personal histories in this category of research do not have an identified queer connection. That is, the reason for the community member

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<http://www.footstepsorg.org/>; "About Havruta | חברותא – הומואים דתיים", online: *Havruta* <http://havruta.org.il/english>; "Keshet", online: *KESHET* <https://www.keshetonline.org/>; "Rainbow Jews - Celebrating LGBT Jewish History & Heritage in the UK", online: *Rainbow Jews* <http://www.rainbowjews.com/>.

[650] Rapoport, *supra* note 555 at 104.

[651] Deen, *supra* note 15; Markovits, *supra* note 15; Feldman, *supra* note 6; Hella Winston, *Unchosen: The Hidden Lives of Hasidic Rebels* (Beacon Press, 2006); Vincent, *supra* note 15; Ewing & Gray, *supra* note 646.

[652] Lax, *supra* note 15.

leaving their Haredi life was not explicitly connected to them exploring or acknowledging a non-heterosexual identity.[653] However, I learned much from the lived experiences of former Haredi Jews who no longer consider themselves ultra Orthodox and from those who do, but are no longer accepted by their community. Initially, I reviewed these memoirs only to learn about life within these closed religious communities. However, on a second reading of these works, I witnessed the courage and resourcefulness of women who tested the limits of religious devotion, independence, and their community's norms. In many of these memoirs, the toll of suddenly leaving homes, families and daily religious customs led to people suffering mental and physical illness, drug addiction, sexual harassment or assault and great loneliness.[654] Yet, in each case, the memoirs demonstrate remarkable respect for the illiberal religious world the writer left behind, in terms of remembering the family they can no longer connect with and the faith that guided their lives for so long. In many cases, the writers of these narratives still identify as Jewish, if no longer Haredi or Orthodox. Given that they helped me understand the identity dialogue/dissonance at play in these communities, these accounts were a valuable resource.

The richest source of first-hand stories by lesbian Orthodox women were collected in the 2010 anthology titled *Keep Your Wives Away from Them*, edited by Miryam Kabakov, the founder of the Orthodykes movement.[655] The Orthodykes movement, in Kabakov's words, is a collective of queer women, across different continents, who work to "navigate the many challenges to maintaining and integrating two seemingly disparate identities: religion and sexuality. Over time, many other groups [of us] around the Jewish world – social, support and online – formed and continue to come together to help other lesbian

[653] Deborah Feldman suggests that her mother was forced to leave their Haredi community because she was a lesbian. Feldman asserts that she first became aware of her mother's whereabouts after watching "a documentary about queer Orthodox Jews in America" (Feldman does not state whether this documentary was *Trembling Before G-d*, but the timeframes do align) where her mother was interviewed as a lesbian woman who had left the Orthodox community. See: Feldman, *supra* note 6 at 220–221.
[654] See particularly, Vincent's *Cut Me Loose* and Markovitz's *I am Forbidden*. Both works detail the stifling experience of being a young woman experiencing a sexual awakening as an adult yet being denied the opportunity to learn about or experiment with the notion of heterosexual sex and romantic love. See: Vincent, *supra* note 15; Markovits, *supra* note 15.
[655] Miryam Kabakov ed, *Keep Your Wives Away from Them: Orthodox Women, Unorthodox Desires: An Anthology* (Berkeley, CA: North Atlantic Books, 2010) ("Keep Your Wives Away From Them").

women achieve the same end."[656] Kabakov's anthology collects narratives from members of the Orthodykes movement and presents them alongside challenging Torah reinterpretations by feminist scholars, who argue for the active inclusion of lesbian women and concepts of queerness within Jewish Orthodox customs and biblical texts.[657] I first encountered the Orthodykes movement, an in-person, secret community of lesbians living in Israel, in the 2004 documentary, *Keep Not Silent*, which focuses on the experiences of three Orthodox lesbian women living in Jerusalem.[658] In addition, I also reviewed *Trembling Before G-d*, DuBowski's award-winning 2001 documentary.

Despite experiencing setbacks, in the form of member-only, confidential LGBT sites (which is to be expected with secret communities where the risk of being identified is serious), or poorly maintained blogs and websites that had not been reliably updated for several years, I kept searching for reliable first-hand narrative accounts of Orthodox women presented on online forums and blogs posts. Eventually, I found a collection of anonymized primary sources, mostly online interviews, blog posts and short memoir pieces, based on interviews with lesbian Orthodox women in the United States by a former Haredi woman writer, Goldie Goldbloom.[659] With the final entry for her blog dated December 2014, Goldbloom's collection of over forty five queer narratives follows thematically and chronologically from the publication of Kabakov's anthology in 2010 and the parallel publication, in blog or interview form, of her contributors' narratives online in the same period.[660] The anonymized narratives on Goldbloom's site accord in theme and content to the more polished narratives published in Kabakov's anthology and those accounts given in the academic literatures. I was therefore able to synthesize key themes across the spread of narratives, and to group responses and concerns according to a

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[656] *Ibid* at 17.
[657] Elaine Chapnik, "Women Known for These Acts" in *Keep Your Wives Away From Them* (Berkeley, CA: North Atlantic Books, 2010) 78 - 98; Charlotte Elisheva Fonrobert, "Regulating the Human Body: Rabbinic Legal Discourse and the Making of Jewish Gender" in *Keep Your Wives Away From Them* (Berkeley, CA: North Atlantic Books, 2010) at 99 - 126.
[658] Alexander, *supra* note 637.
[659] Goldie Goldbloom, "Frum Gay Girl", (2016), online: *Frum Gay Girl* <http://frumgaygirl.blogspot.com/>; Tova Benjamin, "Love Your Neighbor: An Interview with Goldie Goldbloom", (December 2014), online: *The Hairpin* <https://www.thehairpin.com/2014/12/love-your-neighbor-an-interview-with-goldie-goldbloom/>.
[660] For example: Tamar A Prager, "Coming Out in the Orthodox World (Lilith Magazine)", *Lilith* (2016), online: <http://www.orthogays.org/comingout_prager.html>.

reading of them as feminist legal texts. Below, I present my findings from these narratives and link the voices of the lesbian subjects back to the gendered interpretation of *Halakha* by Rabbi Greenberg, arguing that this reading of *Halakha* complements the work being done by lesbian women to negotiate with Orthodox rabbis and religious law for their sexual identity.

(2) Legal and feminist learnings about identity dialogue

Most of the narratives of Orthodox women that I collected are presented in a first-hand, fluid narrative format, where subjects of the female experience and voice are given primacy in the interview over the researcher's opinion or directed questions. This form of story-gathering enables interviewees to share deep personal stories. It also frees the interviewer to later engage in textual analysis of the interview, rather than having constraining it by closed, directed questioning.[661] In the counseling and mental health articles on lesbian experiences within Orthodox Judaism, this qualitative analysis was further nuanced by the addition of behavioural psychology theory explaining the physical and psychological responses to sexuality and gender identity crises.[662] This form of direct, open narrative complements the feminist method of this project, and enabled me to rely on the narratives as genuine representations of the women being interviewed.

Below, I analyze these narratives through a feminist lens. That is, I group stories according to themes of empowerment, feminist and queer identity, connections between women and the struggle to contend/negotiate with the dominant, patriarchal religious norm. The women speaking in these narratives share some unifying ideas and concerns about sexuality, religion and femininity that have remained surprisingly constant across almost fifteen years of reporting.[663] For example, different women from diverse

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[661] Halbertal & Koren, *supra* note 17; Dan McAdams, Ruthellen Josselson & Amia Lieblich, "Introduction" in *Identity Story Creat Self Narrat* (Washington, D.C.: American Psychological Association, 2006) 3; Annelie Branstrom Ohman, "Leaks and Leftovers: Reflections on the Practice and Politics of Style in Feminist Academic Writing" in *Emergent Writings and Methodology in Feminist Studies* (New York: Routledge, 2012) 27.

[662] Sari H Dworkin, *Female, Lesbian and Jewish: Complex and Invisible* (Boston, Mas., 1990); Mark, *supra* note 165.

[663] Chronologically, I begin my investigation of this group with the 2001 film *Trembling Before G-d* and conclude it with the publication of Leah Lax's memoir in December 2015. This period reflects the significance of the release of *Trembling Before G-d*: considered to be the first mainstream documentary

jurisdictions and time periods reported encountering some form of rejection from more secular feminist communities (external to their Orthodox home community). Similarly, many of the narratives demonstrate an appreciation of the communitarian values of Orthodox Judaism and cite the closeness of the community as a positive force within the lives of women. However, many women also report fear of religious community intervention in aspects of their lives. There are also revealing differences between the narratives that helped to inform the analysis. For example, some of the narratives directly discuss the differences between religious and secular law on L/G rights, while some do not. Some women are well-informed and educated about *Halakha* position on lesbian sexuality, and some are not. Most of the women live in the United States or Canada, but some live in Israel and speak online to American Jewish women about their sexual identity. Some women identify themselves as feminist (to a degree), while many would vehemently disagree with this description of their identity.

In chapter 3, I introduced Koren and Halbertal's critique of the synthesized identity model for queer identity in Orthodox Jewish communities.[664] After interviewing eighteen L/G Orthodox men and women in Israel, Koren and Halbertal found that it was more likely that their religious and sexual identities would remain contested, rather than being reconciled. This conclusion corresponds with themes I observed in this group in relation to the legal relationships, negotiations and narratives that some Orthodox women engage in about their sexuality. Like Koren and Halbertal, I remain skeptical of the synthesized identity model, because of its focus on the power of the individual to eventually reject their dominant (religious) culture and embrace sexual identity as an alternative base for selfhood. This does not reflect the deep commitment that I found some Jewish Orthodox women to have to their religious beliefs and the family and community connections that are bound to these beliefs. Thus, I would make a tentative (albeit limited) suggestion that, for some lesbian women whose stories contributed to this work, the 'master' narrative of religion seemed not to be in perpetual, dialogic opposition to the sexual self, even where both narratives appear to remain essential. Rather, I noted that some lesbian women

presenting snapshots of the lives of L/G Orthodox Jews across the world, which also began the international conversation about same-sex attraction and its status in Orthodox Judaism. See: Ariel, *supra* note 644.

[664] Chapter 3, at 132 – 133. Halbertal & Koren, *supra* note 17.

seem to navigate religious law to achieve a recognition (however partial) of their personal identity and, where that happens, the tension between the two identities lessens to the point that a productive dialogue, rather than conflict, can exist between them.

1. Awakenings of lesbian sexuality: delayed, confused, denied

The mysteries that surround same-sex desires in Orthodox communities work to deepen misunderstandings, fear and isolation for lesbian Orthodox women. The mysteries surrounding female sexuality and sexual desire in general can lead women to discover their queer identity much later in life than in the secular world. Many Orthodox women developed a queer sexual awakening only after they had become wives and mothers and were in long-term marital relationships. In 2008, Naomi Mark, an Orthodox Jewish psychologist interviewed several Haredi and modern Orthodox female clients who all self-identified as lesbian, but who were all still living within their Haredi communities in New York.[665] Mark's clients all reported that their awareness of their lesbian sexuality came late in their adult lives, often after they were married, because of their lack of understanding about human sexuality more generally. Mark describes the stringent rules that apply in Orthodox communities about men and women not touching each other, not talking to one another once they have reached puberty, and sanctions against masturbation and discussing procreation or even marital sex. One Haredi woman told Mark, "People ask how I got in touch with my gayness. Try asking about when I first got in touch with sexuality in any sense!"[666]

In Haredi communities, laws about the gender segregation of children and young people (at school and in public) and the tradition of marrying young and conceiving children quickly as a duty to God,[667] means that young women may not even realize they might be same-sex attracted until after they are married with children. For example, in Leah Lax's case, she had seven children before she even met a woman who identified as lesbian, and

[665] Mark, *supra* note 165 at 182.
[666] *Ibid*.
[667] Deborah Feldman describes the first time that she met her future husband, Eli, at their engagement party when she was sixteen. "We set a date in August, seven months from now. I won't see him more than once or twice until the wedding… I say goodbye after everyone leaves and try to imprint his face on my mind, because it's the one thing about him I know for certain. But the image fades quickly, and two weeks later, it's like I never met him." Feldman, *supra* note 6 at 131–132.

began to question her sexuality.[668] Goldie Goldbloom, the creator of *Frum Gay Girl*, states that, even though she thought she might be queer when she was 'pretty young', she had no firm idea about her sexuality until after she was married "because sexuality is such a taboo subject within Judaism." Goldbloom says that, before she realised that she was a lesbian, she "got married, had eight children, opened a boy's camp and a spiritual retreat… I don't know…. A whole bunch of things, pretty usual stuff for *frum* women."[669] As Shulem Deen writes, many young Haredi couples get married without knowing how sexual intercourse works between men and women, let alone what a same-sex experience might be.

> "Call me if there's any problem," Reb Shraga Feivish had said, and as we lay in bed some time later, we found that not all had been made clear. We needed more guidance. We looked over at the clock – 4:30, the green numbers read – and I hesitated but made the call anyway. Reb Shraga Feivish picked up on the first ring, as if he'd been waiting, then listened carefully to my questions about anatomy and friction and physiological responses of various kinds. He suggested we keep doing what we were doing, that it wasn't so difficult and we should, given enough time, figure it out.[670]

Temim Fruchter, a modern Orthodox woman writing about her first "transgressive, sexual" experience describes a boy asking to hug her when they were both sixteen. She identifies this moment as the first time she deliberately flouted the religious law *shomer negi'a* ('guarding the touch' against the touch of a boy or man) to satisfy her curiosity:

> Little did I know, my first transgressive sexual act, my first engagement with queer desire, was that first hug, the first time I looked *shomer* in the face and politely declined. He may have been a sixteen-year-old straight boy, but letting myself hug him was letting myself see that I wanted, and soon after, when I let myself, that I wanted so vividly differently from anything or anyone else I knew.[671]

Fruchter identifies opposite-sex contact here as transgressive and powerful, but also as a revelatory moment when she began to connect with her lesbian identity, although she did

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[668] Lax writes about meeting a woman, Rona, at a feminist conference in 1989. "Once I get home, Rona's face, her *I do exist*, will haunt me. I will remember my visceral fear when I heard her stand and announce herself as a lesbian in a public place. She will force me to pay attention to the disappointment I feel when Levi approaches after *mikvah*, the pained sense of isolation that he is not capable of taking away, the way he can never satisfy me." Lax, *supra* note 15 at 236.
[669] Yanir Dekel, "Interview with Frum Gay Girl - A Wider Bridge", *A Wider Bridge* (26 March 2014), online: <http://awiderbridge.org/interview-with-frum-gay-girl/>.
[670] Deen, *supra* note 15 at 184.
[671] Temin Fruchter, "The First Hug: A Story of Transgressions" in *Keep Your Wives Away From Them*, 6 at 7.

not identify it then. Leah Lax's memoir puts another gloss on this theme of delayed sexual awakening, as she describes her interview of a Haredi woman (on the agreement that she remains anonymous) about the significance of the *mikvah* (ritual bath) to her Jewish faith. As the woman speaks of her same-sex desires that she must "remove, remove, remove" in the cleansing bath, Lax suddenly recognizes her own marital reality in this narrative and, to a degree, experiences her own long-delayed sexual awakening:

> Tucking a stray wisp into her dishwater wig, [this woman] says she's worked for years to teach herself how to love her husband and how to let him love her. *Love from an instruction manual*... A hot flush of panic rises over me at these terrible words and the image of this woman taking a scalpel to her soul to cut away part of her being.... I had thought self-mutilation abhorrent, foreign, but something whispers at me, *I know the life she lives*... I have to get up, turn away, calm down.[672]

Other women challenged this theme of latent/unrealized sexuality. For other lesbian women, the realization that they were 'different' began when they were teenagers or even younger, and the knowledge that these feelings were sinful and transgressive arrived at almost the same time, reinforced by familial and community attitudes to *to'evah*.[673] For example, in a 2014 interview with Goldbloom (published on Frum Gay Girl), a woman identified only as a rebbetzin (the wife of a rabbi) in a Haredi community in Borough Park writes that she was always aware that she had feelings towards women, and has continued to have that feeling throughout her life, even though she refuses to act upon it and even though she did not have words to describe these feelings:

> I think the right thing to say is that I have been attracted to women all my life. When I got married though, I shut down that feeling. Of course, I got married. Nobody (sic) doesn't get married in my community, unless there is something very wrong with them.[674]

Likewise, Naomi Zaslow, a modern Orthodox woman (then teenager) growing up in Los Angeles in the 1980s, first became aware of queer identity at about six years old when her parents criticized a gay couple holding hands in a Kosher supermarket. Zaslow describes how she began to give voice to her queerness by reading parts of the Sabbath newspaper that her father would throw away as 'transgressive': often the gay and lesbian lonely-

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[672] Lax, *supra* note 15 at 314.
[673] In English, this translates as the 'abomination' of homosexuality. I discuss this prohibition further in chapter 5.
[674] Goldbloom, *Interview with a Rebbitzen* (2013) ("the Rebbitzen").

hearts column. However, rather than creating or empowering Zaslow's sense of lesbian identity, reading these secular information sources just gave an authoritative, Jewish voice that denied her sexual self:

> [T]he bi-weekly gay and lesbian column spilled across the linoleum tile on rumpled newsprint. And in that I found the answers to questions I didn't have the vocabulary to ask. The feelings I had for my girlfriends, the way I kept my friendships, how I wanted to dress, the jealousy, lust, wants, feelings- it all added up. Added up into a neatly packaged problem. I couldn't be gay.[675]

The divergence in the narratives on this question of delayed sexuality are underpinned by a shared understanding of the reality of religious law/community norms on lesbian relationships and same-sex relations between women. Whether the women interviewed recognized themselves as gay from a young age or only as mature women with husbands and children, all reported that they were told from an early age that lesbian activity was sinful and transgressive (of *Halakha*) and that those who engaged in lesbian sex would suffer exclusion and harm. This reporting indicates a sophisticated understanding of the nature of biblical sexual transgressions, notably in Haredi communities, where heterosexual contact is deliberately limited and hidden, where sexual intercourse is considered *kodesh* (holy), and where the beauty of a woman, and her potential to bring life into the world, is demonstrated by her commitment to modesty and discretion.[676] On one level, this tells us something about the deep, historical concern of rabbis to prevent lesbian activity and extra-marital relationships. However, on another level, this shared knowledge and fear of *hamesolelot* ('women who rub against each other') perhaps also speaks to patriarchal anxieties about the possibility of there being secret, hidden lines of communication existing between women. This perhaps links back to Alpert's thesis that it is the fear of unlawful *connections* between women (spiritual, familial, religious) that strengthens the legal prohibition against lesbianism, rather than fear of lesbian sex itself.

[675] Naomi Zaslow, "unOrthodox" in Miryam Kabakov, ed, *Keep Your Wives Away From Them* (2010) at 64.
[676] In *Keep Not Silent*, one of the three women interviewed describes the beauty of modesty and discretion (for women) in religious terms, noting that the religious edicts require her to keep her beauty for God, even before the eyes of her husband. Alexander, *supra* note 637.

2. The power of female connections–naming who you are

One shared theme across different narratives was the significance of connection—intellectual, emotional and physical—between lesbian Orthodox women. This support and shared experience empowered women to tell their stories to each other and to come out in relative safety. Where physical connection was not possible, online connections between queer women enabled them to honestly identify themselves as lesbian to a supportive audience and to then seek out narratives written by other queer women. In many of the narratives, a supportive 'coming out' process began with sharing between women in a community, rather than sharing between husbands and wives, to a rabbi, or in a clinical setting. What it is to share between 'women in a community' varies greatly, and seems to depend on the degree to which a woman identifies as Orthodox. Modern Orthodox women have greater opportunities to educate themselves openly about secular issues, to meet and discuss faith issues with other Orthodox women either in their faith community, or to have the freedom to access support networks via phone and online. However, for Haredi women, their access to secular education (beyond preparation for family life) is, comparatively, very limited. Women describe their lives as being closely monitored by other members of their religious community (male and female), which makes personal acts of narrative sharing, identifying allies, and informed consciousness-raising difficult.

For example, in *Trembling Before G-d,* Malkah and Leah, a modern Orthodox lesbian couple living in Florida, offer support to a Haredi woman who is married with children and who has fallen in love with another woman in her community. The camera follows Malkah speaking to this woman on the phone, offering to pray for her, but also reasserting her value as a lesbian woman who loves and is loved, regardless of her religious belief and community status. Sitting before the camera, both Malkah and Leah describe the situation that this woman is in, and why it is so important that they continue to offer her support in secret:

> We've had a girl here, who comes from an extremely Hasidic family, she is the full enchilada, the long wig, the Hasidic slip, the head scarf, the foam, the shaven head. She's gay. She was forced into getting married at seventeen… there was no option…. I thank God that I am not in her situation. Because she does have a lot to risk if she comes out. The community where she's from can take away everything. Take away her children… She can

> be thrown out of the community, shunned from her family, I mean, she's got a lot to risk. We both pray for her, we both try to help her, we are there for her.
>
> On the phone: well, what do you want help in? Alright. First of all, you are not lost. You have us. [interjection from Leah]: She's not lost! She's not alone! She's never alone as long as she has us![677]

Networks of support between Haredi lesbian women are often built via online communities. This is not merely because of the value of invisibility and anonymity that online connections offer, but also because women can be empowered to ask questions online about *Halakha* relating to marriage, sex and lesbian relationships *of other women* (something that, if they are Haredi, they cannot do openly) and to investigate secular developments in LGBT identity rights issues that are otherwise completely closed to them. In these contexts, accessing online resources specifically targeted to LGBT Orthodox Jews like ESHEL[678] and Tirtzah,[679] and connecting to blog forums like Frum Gay Girl, are important conduits for building connections between closeted lesbian *frum* women. Haredi women also report that, when they do share and connect with other queer women online, this process enables them to put a name to their sexual desires and identity, to realise they are not alone but are in fact part of a growing community, and even, in some cases, to begin to respond to patriarchal structures of oppression in their faith

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[677] DuBowski, *supra* note 532.

[678] While there are multiple online resources and networking sites for LGBT-identifying Jews across the world, it is important that sites speak specifically to Orthodox Jews, given the doctrinal and customary separation between liberal Jews and Orthodox Jews. ESHEL is an online and in person support network for LGBT-identifying Orthodox Jews in North America. Steven Greenberg and Miryam Kabakov are two of its co-directors. ESHEL'S mission is to "create community and acceptance for lesbian, gay, bisexual, and transgender Jews and their families in Orthodox communities. Founded in June of 2010, ESHEL provides hope and a future for Orthodox LGBT women, men, and teens… trains its members to speak out and act as advocates for LGBT Orthodox people and their families; ESHEL creates bridges into Orthodox communities to foster understanding and support; through community gatherings Eshel helps LGBT Orthodox people pursue meaningful lives that encompass seemingly disparate identities while also fulfilling Jewish values around family, education, culture, and spirituality." ESHEL, "Our Mission | Eshel Online", online: <http://www.eshelonline.org/about-new/our-mission/>.

[679] Tirtzah is an online community of *frum* queer women, that both connects women in person and publishes stories of lesbian experiences in the North American Orthodox world. Tirtzah clearly identifies its mission of connecting *frum* queer women and of bridging gaps between *halakhic* prohibitions of lesbianism and secular concepts of tolerance and celebration of sexual diversity. "We started this blog in order to share our stories of weaving together the queer and Jewish (and secular!) parts of our lives and explorations of halacha, community, dignity, yiddishkeit, gender identity and sexual orientation." Tirtzah, "About Us", (23 May 2008), online: *Tirtzah Community Frum Queer Women* <https://tirtzah.wordpress.com/about/>.

communities.[680] As Kabakov states, "the Internet has changed our lives in a big way… for a group that's been hidden it's a great thing. You can still hide and not be alone. You can learn. You can find a group that identifies the way you do and don't have to risk your life doing it."[681]

Goldbloom reports that she goes to great lengths in her interviews with closeted Haredi women to ensure their anonymity, because online contact with 'out' and other closeted women is often the only outlet they have for discussing their sexual identity, and this anonymity must be safeguarded:

> [The] lack of visibility has plagued the small but growing community of Orthodox people who are lesbian, gay, bisexual or transgender. The situation continues today, despite all the progress being made on LGBT rights in the secular world. Partially, this is because of lack of access to modern media, but partially it is because of the extreme forms of community censure to which Orthodox Jews who come out are often subjected. It is not unheard of for a parent to lose all access to their children, for acid to be thrown, for family members to sit shiva and mourn the gay person as if they are dead…
>
> Therefore, I generally conduct the interviews by phone after initial contact is made through email. I type the interview as the person speaks, and then send it to them for approval and changes. After they return it to me, I edit it and send it to them again for a final approval. I tell those whom I interview that if, for any reason, they become uncomfortable or feel they are in danger, even after the interview is posted, I will take it down. For those who need to conceal their identity, I change multiple details in the edited version.[682]

Some women who speak to Goldbloom report that, overall, they have experienced a positive, supportive connection with other women, but that their first sexual experience with a woman in their community led to isolation and loneliness rather than cooperation. That is, while they might know that one other girl or woman is 'different' like them (often the one who first made them realize they might have queer feelings), they do not necessarily associate this first connection with a sense of shared identity. This sense of connection comes later, when they are more mature, feel safer and more supported and able to be honest with themselves about their sexual identity. In many of the narratives

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[680] The importance of online sharing for building knowledge of queer identities and community building between queer people and allies in faith communities, is beginning to be increasingly recognised. See: Michael Orbach, "LGBT Orthodox Jews Find a Safe Space in Online Social Media", *Tablet Mag* (26 June 2013), online: <http://www.tabletmag.com/jewish-life-and-religion/136001/lgbt-orthodox-jews-online>.
[681] *Ibid.*
[682] Goldie Goldbloom, "Frum Gay Girl: an interview", (24 March 2014), online: *TriQuarterly* <http://www.triquarterly.org/interviews/frum-gay-girl>.

presented by Goldbloom, the knowledge that a woman is attracted to another woman alienates her from her identity rather than connecting her with it. For example, the Rebbetzin interviewed by Goldbloom in 2013, described her first sexual experience with a woman as the cause of great excitement but also sudden fear and danger, which she responded to by "shutting down all feeling":

> I met a woman like me [long ago]. We were together. It was terrifying, but also the best. We broke up right away, because it's too dangerous. I see her in the street sometimes and I still think of her.[683]

Likewise, another Satmar woman told Goldbloom that her first lesbian experience was with an older girl ("R") at an Orthodox high school in Brooklyn when they were both fifteen. She experienced a physical connection when they had an "innocent sleepover", where R touched her hand across their beds, and she felt "the biggest shock of your life… the world exploded. Just that!"[684] However, soon after this connection, she felt a shock of isolation and confusion, as she began to reconcile the experience with rules against girls being intimate. These feelings were magnified when her friend got married very soon after they confessed their feelings for each other:

> Soon after, the torment and the guilt and the confusion set in. I was always the one scratching my head and worrying, what are we doing? Is this normal. We always hid it. There was a secrecy. An added sense of shame and fear. It felt like love to me, but what did I know?[685]

The woman explains that she got married to a man soon after this (at seventeen), and realized that she had no 'normal' feelings towards her husband. She was counselled by her family and rabbi to end her friendship with R, on the basis that it is "abnormal for a woman to experience this degree of closeness with another woman once she is married." She then describes a feeling of dislocation in her sexual and emotional self that was never healed, even after having children and deliberately shutting out other women from her life. Her expectations of her ideal 'life' with R are strangely innocent of sexual feeling. She

[683] Goldbloom, the Rebbitzen, *supra* note 674.
[684] Goldbloom, interview with a Satmar Woman, *Satmar Lesbian Love Story* (2013) ("Satmar Love Story").
[685] *Ibid*.

merely wanted to continue the 'friendship' so that they could "raise our kids together, go shopping, plan dinners for our husbands and scheme about Purim costumes."[686]

Following first queer encounters, the delayed realization for lesbian Orthodox women that other women share their struggle between religious norms and sexuality, brings excitement and relief, if not openness in terms of 'coming out' to a broader community. Adult connections between women also are significant in enabling them to recognise their shared inequality, and to workshop reactions to legal/religious rules that contextualise their hidden sexual identity. Thus, in *Keep Not Silent*, Alexander shows a silhouette of queer women speaking together at a secret Orthodyke meeting during Sukkot in Jerusalem about *Halakha* that applies to sexual conduct between women.

> - "Mesolelot" means…
>
> -No, wait! – As in Egypt, women are forbidden to marry women in a marriage ceremony but the intimate act is not forbidden.
>
> -C'mon! When women marry each other, aren't they intimate?
>
> -The Bible doesn't dare say it.
>
> -What bothers me here is that we're trying to define things, that if a Rabbi heard, he'd say: "What are they talking about? This discussion is unrealistic." A Rabbi would say: "What do you want from me? Your lifestyle has no place in our community."
>
> -Why are we religious? For the sake of people, or for God?!
>
> -On Judgement Day, I'll stand only before God! Not before the community or any Rabbi. No Rabbi will ask me anything! And if they ask, they won't get an answer from me!"[687]

The hidden meeting is raucous, fun and energetic. These voices and identities are anonymized, but we can tell that each woman is well known to the others, and is trusted and respected. We can tell the degree of trust shared by the women in the group by the seriousness of the *halakhic* transgressions they are engaged in: these are lesbian women meeting together in secret, to discuss their (transgressive) sexuality and their relationship to God, while debating *Halakha* and reading the Torah aloud to support and challenge their arguments. There is a strong sense, for an objective commentator, that the Orthodykes participants (those women who contributed to Kabakov's anthology of

[686] *Ibid.*
[687] Alexander, *supra* note 637.

narratives, and the women who feature in Alexander's film) are generally well educated and informed about sexuality and queer identity issues. Thus, it is clear to see how these connections allow for the incorporation into personal experience of a larger, political awakening about female sexuality and the limits of religious law. For example, Mara Benjamin describes her first encounter with an Orthodykes meeting in New York as a transformative religious and sexual event:

> Over the course of the year, I experienced the gradual and seemingly impossible merging within myself of what had initially seemed to be the parallel worlds of Jewish learning and lesbian identity. The revelation that made this integration possible emerged from the social sphere, even more than from the intellectual sphere: I found *shleimut*, wholeness, in the act of learning the texts among other women who were as deeply invested in and troubled by them as I was.[688]

Benjamin explains that she was a visiting theology scholar from Stanford when she joined the Orthodykes. Gradually, as she begins to debate and learn at the Orthodykes meetings, she moves away from her formal Orthodox theology course, both intellectually and in terms of her faith. She is challenged and inspired by the intellectual investigations of women in the Orthodykes group who continue to struggle with *Halakha* sources that diminish the significance of women in Jewish life, rather than accepting these as 'good laws' that mandate their role within the Orthodox community, which is the requirement of her theology course. "The power of the afternoon of learning rested in the audacity of that group of queer women who made the story their own and who believed that their stories were part of Torah, too.[689] Similarly, other women in Kabakov's anthology have similar stories of well-educated women who experience a gradual connection with their lesbian identity and then search for other lesbian voices that might affirm the validity of that identity through a shared political and spiritual vision of feminism.[690] This is a gradual process, and one that requires great personal strength, and a connection with other women who support each other through the inevitable identity crisis.

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[688] Mara Benjamin, "Learning to be a Lesbian" in *Keep Your Wives Away Them* 126 at 131.
[689] *Ibid.*
[690] For example, see: Devorah Miriam, "Jerusalem Voices" in *Keep Your Wives Away Them* 36 at 36; Zaslow, *supra* note 675 at 60; Miryam Kabakov, "I Will See You on the Way Out" in *Keep Your Wives Away Them* 45 at 45.

However, what about those women who do not have significant educational opportunities and relative freedom of movement from the religious to the secular world? Goldbloom's interviews focus on women within Haredi communities where education is directed to teaching the requirements of a good Jewish life (preparation for marriage, family and household maintenance) and is usually completed by mid-high school.[691] Goldbloom's interviews with Haredi women who have 'come out' to some degree reveal a similar theme of initial discovery of a queer identity being both revelatory and isolating, and later, adult connection with other queer women being a supportive force that grounded queer identity and provided strength to challenge internal rules within the Haredi community. However, for many of these women, these later connections do not facilitate openness. Rather, they tend to enable women to live their queer lives in secret, albeit a shared secret.

For example, Goldbloom interviews a woman in her thirties who fell in love with one of her school friends, "she loved me, she said she did and so did I".[692] She then married when she left school and had several children. She reconnected with her girlfriend when they realized they had adjoining summer bungalows in upstate New York. The woman describes the hidden relationship that they enjoy each summer, while their husbands are away at work and they are there with the children. Despite this being a romantic experience, she explains that her mother in law also stays with her, and her partner's mother and sisters also stay in the next bungalow. For this reason, all their contact remains illicit and carefully monitored. In the last quote of the interview, the woman explains how she fits her lesbian identity and love into one season of her life, rather than claiming it as her whole lived experience:

> In between, in the winter, it feels like a long time to wait to see her again and I get the depression in the winter from not seeing her and not having that… Every summer, when I go to the bungalow, I wait on *shpilkes* [impatience, agitation] for that first knock, when she comes to my screen door, and there she is, still standing there, smiling her smile, the

[691] Deborah Feldman describes the limited education that she received in a Satmar community in Borough Park, New York in the late 1990s to early 2000s, when she finished high school at fifteen, without receiving a state diploma or any formal record of attendance. For further on Haredi education opportunities for women in New York communities, Fader also has a chapter summarising the religious requirements for education for Haredi girls from kindergarten through to early high school. See: Feldman, *supra* note 6 at 111; Fader, *supra* note 528 at chapter 1.

[692] Goldbloom, Interview with anonymous, *The Rov's Lesbian Daughter: Love at the Bungalow Colony* (2013) ("The Rov's Daughter").

> way she does, and with her face all shining, the way it always does. That's what I live for.[693]

In another interview, a woman tells Goldbloom that she is "gay, but has been married for twenty-five years." She lives in a Haredi community (she will not disclose which court) in New York and she has known she is queer since before she was married. However, she is too afraid to come out to anyone in the community. She tells Goldbloom that she might have felt less frightened and isolated when she was young, if there were other women she could have shared her feelings with, but now she is too old to reveal herself, and the risks to her family are too great.

> So why say anything? Why do anything at all? I am already not so young. When I was younger, a girl, I felt like I was connected to many other girls and I could talk and I could be myself with them, relaxed and... I don't know how to explain it. It wasn't such a big thing, a touch, a word. I didn't know I wouldn't feel so friendly when I got married.[694]

In some cases, open connections between women provide vital touchstones for Orthodox women to reassert their sexual identity in safety and in confidence. Some of the openly gay women that Goldbloom interviews state that they are putting their stories out in the world in the hope that their success at living lesbian lives and remaining *frum* might encourage others to do the same. A, a woman who identifies as a "happily married lesbian" tells Goldbloom that she has always identified as Orthodox, had fallen in love with a girl when she was sixteen, but then had experienced a great loneliness and test of faith, and so married a man in a Haredi community.[695] She lived that life for eleven years before she left her husband, came out to her community, and subsequently married her partner.[696] She left her Haredi community after she came out, because she was "convinced that she wasn't safe", and subsequently moved to a modern Orthodox community, where she was able to raise her children in an open lesbian relationship and still be a central part of an Orthodox religious community.

A uses Goldbloom's interview as a platform to reach out to closeted LGBT people in Haredi communities who might have had similar experiences. She explains how she and

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[693] *Ibid.*
[694] Goldbloom, Interview with anonymous, *Gay and married for 25 years* (2013) ("Gay and married").
[695] Goldbloom, Interview with anonymous, *Happily Married Lesbian* (2013).
[696] *Ibid.*

her partner organized a 'secret group' of Orthodox LGBT people in her shul community to attend Shabbat at her house in 2013. The meeting was significant because, even though she and her wife knew all these people, "they didn't know each other." As part of these outreach attempts, she organizes a "quiet, private get together" with Rabbi Steve Greenberg at their home, so that her guests could meet Greenberg and his family and start a more open conversation about Orthodoxy and queer identity. Goldbloom asks A what she felt was the significance of organizing what could be a controversial religious event in her home:

> There were two different feelings for me. I felt good, as a community organizer, knowing that I had done something positive, and that something was made better by giving these people the opportunity to connect to one another. And secondly, as an individual experiencing the moment, I felt empowered. Whenever I go through an experience like that, I stop and look at myself in the past, and remember when I felt alone, thinking that there couldn't possibly be anyone else like me… I lived with that loneliness for a long time. When moments like that *Seudah Shlishit* happen… of having so many other LGBT /Queer Orthodox Jews around me, I take that memory of sadness and loneliness and bring it into the in the light of the present and with that light shatter the sad memory.[697]

Not only do these personal/political connections between queer women empower the personal claiming of identity, but they are also a means of challenging accepted rabbinical (male) positions on female sexuality in a very female way. Women meet in secret and discuss the Torah. Women get together while they are married to men and live other lives with each other that are separate from their married lives. Women discuss how they physically transgress rules, while arguing that they should stay within the spirit of them. Together, women unmake and make relationships with one another that challenge the authority of *Halakha*, or perhaps simply take it at its word. Likewise, women who accept Goldbloom's invitation for an online interview take part in a legally and socially transgressive act of personal empowerment; they encourage other women within their community (and outsider communities) to recognise and discover lesbian identity, while remaining 'unseen and unregulated' in their physical lives. This elision of the narratives between the macro (political, rabbinical, male) and micro (personal, wife/mother,

[697] *Ibid.*

female) thus enables women to find each other and to challenge male religious authority in a safe way.

3. Unorthodox and outsider feminist stories

> Geo Bloom, a long-time thorn in the side of the Lubavitch community, has died… Her radical attempts to force the acceptance of gay people in Hassidic culture were met with intense and violent resistance and caused tremendous pain for her family… In her final months, she lived as a bag woman under the Williamsburg Bridge and was imprisoned on numerous occasions for spray-painting passing Hassidim.[698]

Geo Bloom's satiric epitaph (above) embodies her frustration as a Haredi woman who ostensibly lived a traditional, Orthodox life as a wife and mother, while simultaneously living a secret, lesbian fantasy life. Her narrative (part truth, part fiction) is told in fragmented episodes, presenting her love for another Haredi girl and her hurried marriage to a wealthy Haredi man, who misinterprets her as 'shuddering with lust' every time he approaches her for sex. She imagines herself finally as a physical and social outsider who finally demonstrates her rejection of her community by committing the ultimate legal transgression of suicide. The lesbian woman as outsider is a unifying theme of all stories that I read for this work, which dovetails neatly (if tragically) with the themes of isolation, sexual confusion and the desire for intellectual and physical connection with other women.

Very few of the *frum* women who provided narratives in different media seriously questioned their continued adherence to Orthodox Judaism, even after they began to identify as lesbian and therefore as an 'outsider' in their religious community.[699] Some of the women who spoke to Goldbloom, and some of the women who contributed to Kabakov's anthology, had experienced rejection from their Haredi communities after they came out, and this led them to move to more modern Orthodox communities or to remain hidden within their Haredi communities. None of the women interviewed were willing to disavow their sexuality (when given anonymity to protect them and their families in

[698] Geo Bloom, "You Lose These: A little review of my life in Eighteen Episodes" in *Keep Your Wives Away Them* (2010) 14 at 18.

[699] There are notable exceptions to this position, of course. Notably, Leah Lax left her Haredi community and now identifies as a Reform Jew. Some women who Goldblum interviewed, such as A, move from more observant to less observant Orthodox communities after they come out to their family and friends.

making that disclosure) and make the claim that 'they were now straight'. In this way, the women chose a markedly different course for their sexual and religious identity than the ex-gay Christian men discussed in chapter 4. All the Orthodox women presented in this chapter, whether they lived in Israel or in Orthodox communities in the Diaspora, remained committed to living within a Jewish community, and many spoke favourably of the Orthodox communities that they grew up in, even while describing these communities as oppressive and rights-restricting.

From a feminist perspective, the continued faith of these women in Orthodox religious life is remarkable, when we consider the familial and community rejection, disavowal and fear that they experience in their religious communities by recognising and insisting on their queer sexual identity. 'Coming out' in Orthodox communities is not only hazardous to the woman but also, in the case of Haredi communities, can lead her to being found unfit to be a wife and mother. A recurring fear throughout many of these narratives is that a woman's children will be immediately taken away if she acknowledges her lesbian identity to her husband or rabbi. A woman married for 25 years with ten children told Goldbloom that she first became aware of her lesbian identity when she opened a 'forbidden gay book' (the *Whole Lesbian Sex Book*) in the New York Public Library, in 2000.[700] She hid in the bathroom, crying, after she read pages of "this illicit book."

> If someone saw me there, without even reading books like that, I could have lost my kids. I could have been kicked out of my community. My mother and father would have sat shiva. They still might sit shiva. I still might get kicked out of the community. I still might lose my kids. Why am I doing this interview? It's dangerous. I should stop.[701]

In her memoir, Lax comes closest to moving away from Orthodox Jewish life after she leaves her husband and her Lubavitch community, but even then, she maintains religious holidays and connects with some of her children (including the three who have remained within the Lubavitch community) over matters of religious observance. Lax ends her memoir with a warning for women about the rigidity and conformity of ultra-Orthodoxy,

[700] Felice Newman, *The Whole Lesbian Sex Book: A Passionate Guide for All of Us* (Cleis Press, 2004).
[701] Goldbloom, "Gay and married" (2013) *supra* note 694.

but also an acknowledgement of the complex emotions that religious observance engenders:

> Today, my faith has been replaced with questions. I love the way unanswered cosmic questions leave open all possibilities… And yet I understand the need and hope people bring to religion, the refuge they seek there. One can find wisdom, community and warmth. In our confusing world, religion offers timeless beauty, structure, identity, continuity with our ancient past.[702]

In *Trembling*, we meet Malki, a Haredi woman from Borough Park, who speaks to DuBowski about her marriage as a young woman, followed by her divorce and her ongoing isolation from her family and immediate community.

> My ex-husband was very understanding. He knew that it wasn't a marriage made in heaven. I think deep down even my parents knew. I don't know if they knew what was going to happen after I got divorced, though. I think the times that they thought I was not *frum*, I was still *frum*. I still am. [But] I feel like I am an outsider. There is no place for me there.[703]

Yet, in 2001, Malki still lived in the same village in Brooklyn as her family. Malki never talks directly about when and how she came out to her parents. However, standing anxiously outside a family fairground – anxious because, she tells DuBowski, she is worried about being seen and confronted by members of her family– she tells Dubowski that she has not been in contact with her mother or her younger sister for seven years, at their request. Malki's experience of being relegated to the unseen and the unheard in a living community connects powerfully to Geo Bloom's description of herself as the broken vessel, a damaged reflection of the 'good Jewish woman', someone named Eve rather than Lilith, referring to fecundity and submission. For the Orthodox status quo, the lesbian identity Malki and Geo experience should literally remain unnamed, except insofar that something which must be shunned and removed like a splinter must be identified:

> What could this mean? A broken vessel, this one, true, a girl who loves other girls, not as a sister, not as a friend, but as a lover, what, pray tell me do, what *is* her name? Is it Sappho? No, that's Greek to us and we speak Hebrew here, or Yiddish. Tell us her name,

[702] Lax, *supra* note 15 at 341.
[703] DuBowski, *supra* note 532.

> by God, or we'll drag it out of you. What is her name? Spit it out, I say, and we'll spit her out.[704]

There is another outsider theme in these narratives that complements the fear of communal and familial isolation: the ongoing rejection by and of Orthodox lesbian women from secular feminist spaces. Lax explores this theme when she describes her first foray into open feminist discussion at a New York University conference in 1987. She is fearful to attend, but wants to learn about 'Jewish feminism' and thinks this is a valuable opportunity to share her religious ideals as a Lubavitch woman with other, more liberal Jewish women. Upon entering, Lax notices some books written by women she now knows to be respected feminist theorists,[705] but at the time, she did not know who they were. At the conference, she presents her statement on the value of the traditional role of women in Orthodox Judaism, arguing that Orthodoxy is the home of Jewish law and that, therefore, the traditional role of women is central to maintaining the Jewish faith.

> A hand shoots up. "Isn't that kind of arrogant?" she says. "There has been plenty of Jewish scholarship outside of the Orthodox community, and plenty of that was written by women." Scholarship of which I'm not aware. *Those books on the table when I came in…* "Thank you for that", I say. "I think I might have needed to hear it." The courage it takes to say this goes equally unheeded.[706]

Lax is confronted by a woman who is the president of an LGBT Jewish congregation, who says: "I'm a lesbian. Tell me, where in your picture of religion is there a place for me?"[707] Lax's reaction is instructive. She writes that her chest went "utterly hollow. *Go away*, I tell her, but no sound comes out." Lax tells the woman that she wishes there was an answer for lesbian women, but there simply is not, because there is no answer in the Law. However, as she stands there, she notes that this admission is, in itself, a breach of the mitzvot. "This is another one of my daring violations that go unnoticed. The Law says there is always an answer. The Torah contains all answers."[708] Lax's instinctive rejection of the lesbian questioner mirrors her own rejection by the reform feminists in the room. She presents a picture of herself as foreign and isolated, unwanted and 'in the wrong

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[704] Bloom, *supra* note 698 at 21.
[705] Lax tells us, in an aside, that these feminist writers were Judith Plaskow, Rachel Adler, Judith Hauptman, Gloria Steinem and Betty Freidan. Lax, *supra* note 15 at 232.
[706] *Ibid*.
[707] *Ibid* at 234.
[708] *Ibid*.

place', just as if she had stood in the male section of shul. Lax concludes the episode by describing herself leaving the crowd: "the smell of their freedom is already fading, changing nothing for me. I won't even try to attend other sessions. I don't belong here."[709]

Lax's description of some ultimate, but missed, connection between different concepts of the authoritative female voice and agency, is echoed by other Orthodox women, even if these experiences are not as expertly and self-referentially presented as by Lax. For Goldbloom's closeted lesbian women, their commitment to upholding the *mitzvot* and their relationships with their husbands and families are presented in normalized, heterosexual terms. In many of the narratives, the realization of lesbian identity comes before a marriage to a man, which the subject describes as a normal commitment that is to be expected and, in many cases, cherished. What is presented, then, is a list of 'failings' that these women have committed as Jews and women, in that they are unable to live fully in their marriages because of their lesbian identity. The Rebbitzen tells Goldbloom that she encourages "girls like I was" to live "normal lives, as far as possible."[710] The woman who writes about her 'summer life' with her girlfriend does not seek to leave her husband or her community to be with her partner. She resents her husband's constant requests for housekeeping and cooking, but she tells Goldbloom that "this is the world I live in. It would just be better if I did it with a woman."[711]

In her 2007 debate with Judith Plaskow about gender theory and feminism,[712] Tamar Ross acknowledges that equality goals sought by and for Orthodox feminists might be relatively modest by liberal standards, but argues that they are monumental by Jewish

[709] *Ibid*.
[710] Goldbloom, *the Rebbitzen*, *supra* note 674.
[711] Goldbloom, *Satmar Woman*, *supra* note 681.
[712] Plaskow argues (in brief) that Jewish feminist theory must be open to realizing more fluid concepts of gender and sexuality, and to merging these understandings, to enable respect for people who fall outside the heterosexual 'norm' that *Halakha* and *Aggadah* recognises in rigid terms. Plaskow also argues that radical feminism and intersectional concepts of sexuality found in gender theory, enable these concepts to gain ground in modern Jewish feminism, and should be progressed. "Because gender is defined by continuing profound disparities in power and access to resources that cannot be wished away, I am unwilling to relinquish the construct "women" either as a basis for social critique or as a foundation for organizing. On the other hand, I believe it is urgent to initiate a new, intensive and critical investigation of the persistence of gender roles and gender inequality in the Jewish community, leading to a new phase in the feminist transformation of Judaism." Ross & Plaskow, *supra* note 550 at 216.

Orthodox standards.[713] Ross gives the example of the gender studies department in Bar Ilan University in Israel, noting that this program supports an unusually high number of Orthodox women teaching and studying in the program, many with an "obvious awareness of radical feminist theory with regard to sex and gender, and [a] preoccupation with issues of women's equality".[714] Ross notes, however, that this feminist engagement of Orthodox women does not preclude them from engaging in deeply traditional religious practices, that in turn place them outside liberal feminist ideals of gender equality:

> Although they welcome unprecedented opportunities for women to study religious texts, engage in active careers outside the home, and militate for equal rights in home and marriage, many of them cover their hair, wear skirts rather than pants, attend synagogues with separate men's and women's sections, and recite traditional prayers suffused with male-centered God imagery.[715]

Ross suggests one key reason for "the compliance of Orthodox feminists with the deeper forces of binary distinction" might be because Orthodox women, in many contexts, lack the power of choice.[716] Here, she reflects some of the anxieties of women who told their stories to Kabakov and Goldbloom: that making 'feminist' choices to read secular books, go to university, cut one's hair, work openly in a male environment, and even wear 'modern' clothing, could result in censure by families and rabbis, and, at worst, the break up of family units that were "built up long before they (the women) were introduced to feminism."[717] Ross concludes that, on the question of choice: "Orthodox feminists have considerable social and emotional stakes in maintaining the sexual status quo, and they do so recognizing that their Jewish identity is a package deal."[718]

For some of the women interviewed, this concept of heterosexuality as a non-negotiable aspect of Jewish life is less of a choice and more a legal and cultural norm that closeted lesbian Orthodox women engage with, with varying degrees of compliance. Goldbloom's interviews with lesbian women who are now out in their Orthodox communities still reveal an initial desire to stay within a family group and a close, connected religious

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[713] *Ibid*.
[714] *Ibid* at 220.
[715] *Ibid*.
[716] *Ibid* at 220–221.
[717] *Ibid* at 220.
[718] *Ibid*.

community, carefully considered as an alternative to living a life outside Jewish law. In her interview with the woman identified as 'formerly married lesbian', Goldbloom asks her about her first realization that her life conflicted with community norms. She replies:

> I first realized I was a lesbian when I was 16… At that point I was just becoming frum and had a huge internal struggle that lasted years about whether I should become frum or give it up and be true to my heart. I concluded that giving up Yiddishkeit [Jewishness] was like giving up air and I eventually joined a chareidi community, married a man and started a family.[719]

This woman tells Goldbloom that she told her husband that she was secretly gay, but did not tell her rabbi or other community members. She lived in her Haredi community for eleven years before eventually leaving her husband and joining a more open Orthodox community, and marrying a woman. In this narrative, the woman is an outsider living within her community, but remains Orthodox after she has left it. She continues to keep a kosher home and to raise her children as Orthodox. She does not challenge the more unequal, gendered aspects of Orthodox teachings that still affect her life, rather, she describes the activity of living each day according to the *mitzvot* as making life "clear and simple" in an otherwise "muddy and complex world."[720]

Goldbloom does not ask her interviewees the direct question of whether they see themselves and their lives as a feminist gesture or action. From my reading, I think most of these women would dispute the characterisation of their identities and lives as feminist. Ross engages with *halakhic* limitations that are placed on lesbian relationships, and argues that a hard or sudden imposition of liberal values on Orthodox communities could in fact do more damage than progressive good to L/G people who exist within these communities. She makes this argument on the basis that traditionalist Rabbis within Orthodox communities, both Haredi and modern, fear the current mode of feminist discourse as symptomatic of the "new type of liberal hegemony, that is intent on creating its own dictatorship of the oppressed."[721] Here, Ross taps into conservative religious perspectives—also seen in evangelical Christian communities—that modern feminist thought deliberately "dismisses anyone who disagrees with the latest feminist ideology as

[719] Goldbloom, *Happily Married Lesbian*, *supra* note 695.
[720] *Ibid*.
[721] Ross & Plaskow, *supra* note 550 at 226.

irrational, homophobic and close-minded."[722] Ross argues that there is a real risk that Orthodox women take on this viewpoint, when it is expounded by leadership in Orthodox communities, even though they are the group most disadvantaged by it.

Ross defends Orthodox feminist goals that challenge existing male rules and limitations on formal equality for women, as being the realistic option for feminist development for Orthodox women. She describes Orthodox feminism as pragmatic and tied more closely to second-wave feminist goals than to radical or third-wave feminist concerns with gender theory and issues of intersectionality.[723] She argues that, in the long run, this pragmatic expression of feminism is likely to yield more tangible feminist outcomes for Orthodox women.[724] Significantly for this work, Ross argues that Orthodox feminism ultimately aims for the accommodation of women's equality within the constraints of tradition; which in turn leads to the adoption of an incremental approach to diminishing the effects of the patriarchy found within Jewish law. In turn, these incremental steps:

> also lead [women] to seek ways and means of negotiating with the tradition on its own terms in order to create more equitable realities only in those aspects which they find constraining.[725]

Writing in 2007, Ross remained circumspect as to whether the *halakhic* proscription of homosexuality—she does not distinguish between the prohibitions between male and female sexuality— could ever be effectively limited by these incremental steps towards gender equality. However, she argues strongly that the resolution of this issue, however achieved, will likely have "far less to do with gender theory" than with contemporary assessments of the ongoing moral, religious and cultural cost-benefit calculations about faith and identity that are "constantly being reinvigorated by Orthodox women."[726] Ross' presentation of a pragmatic, limited Orthodox feminism speaks directly to the goals of the different women who shared their stories of lesbian identity. For many of these women,

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[722] *Ibid*.
[723] I discuss the development of gender constructivism, intersectionality and identity diversity in the context of queer theory and its contributions to a feminist method, in chapter 3. For a thoughtful discussion of the significance of the gender binary and traditional gender roles to Orthodox feminism, see: Israel-Cohen, *supra* note 523.
[724] Ross & Plaskow, *supra* note 550 at 226.
[725] *Ibid* at 220–221.
[726] *Ibid*.

realizing some measure of gender equality in their lives translated practically into a recognition that their sexual identity was not recognised or respected by their religious faith. On this basis, many women made changes to their religious lives to respond to this limitation, and to take steps towards a different form of personhood which recognizes their claims both as lesbian and Orthodox. While these can be presented as feminist goals, they are limited by the constraints of the patriarchal authority in which they operate and are, to that extent, the efforts of an outsider group, both in religious and gender terms.

4. Improvising law and (re)negotiating the rules

In chapter 5, I offered two rabbinical arguments for a more inclusive reading of *Halakha* as it applies to lesbian relationships. These arguments claimed to be supported by the legal sources about lesbian sex and sexuality, and by progressive interpretations of *Halakha*. My argument in brief, relying on rabbinical comment by Greenberg and Kirschner is that while attempts to negotiate with religious law and/or to make law anew would not be supported by ultra Orthodox positions on *Halakha*, they are increasingly supported by modern Orthodox interpretations of the law. Here, I demonstrate that, by testing the flexibility of the law, and by working constructively with decision-makers within Orthodox communities, some women are working to find legal support for their sexual identity and lesbian relationships. I present several examples of women who have negotiated effectively with rabbis about the impact of *Halakha* on their lives and, in some cases, women who have interposed new interpretations of *Halakha* to support their marriage to women and their living arrangements that reflect the spirit of Jewish law, if not the word.

Tamar Prager, an Orthodox lesbian woman living in New York, tells the story of her long process in coming out to her devout extended family about her relationship with her partner, culminating in her wedding ceremony in 2006.[727] Tamar explains the steps she and her partner, Arielle, took to ensure that her marriage ceremony was as close to religious law as she could reasonably make it, while still maintaining distance from gendered aspects of the *erusin* (betrothal) and the *nissuin* (marriage) ceremonies. After much research, and after speaking to family members and to an Orthodox rabbi, Tamar

[727] Tamar A Prager, "Coming Out in the Orthodox World" in *Keep Your Wives Away Them* (2010) 51.

and Arielle decided upon a Jewish marriage ceremony based on the *Brit Ahuvim/Ahuvot* (Lovers' Covenant) that was created by Rachel Adler, which "relies on the laws of Jewish partnership as a foundation for creating an egalitarian Jewish marriage."[728] Tamar explained that it was important that their ceremony incorporated traditional Jewish themes of God and humanity, along with other, more modern themes of individuality, acceptance and community. At the ceremony, Tamar's father, an Orthodox Jew who had initially opposed her relationship, drew on his recent scholarship about lesbian Jewish traditions, and gave a *dvar Torah* (Torah reading) that both acknowledged his daughter's departure from aspects of Jewish law, but reaffirmed her legal 'space' as a devout Jew:

> *Lo tov heyot adam levado* – it is not good for man to be alone, my father quoted from the Torah portion in Genesis. "E'eseh lo ezer knegdo" – I will make him a "helpmate". My father went on to explain that the word *ezer* is gender-neutral. God did not say I will make Adam a woman, but simply a helpmate.[729]

This reinterpretation of the traditional, gendered divide in Genesis, to create space for same-sex unions, reflects the purpose of Greenberg's reinterpretation of Genesis as a celebration of the unity of humanity, rather than of the superiority of Man as 'God's image', grounded in his reading of the word *Adama* to mean 'humankind, or earthling' rather than 'Adam, or man'.[730] Greenberg, unlike Tamar's father, does not address the gender-neutral interpretation of *ezer* (helpmate) in Genesis 2:17 – 18, but he does argue that a purely heterosexual reading of the union of Adam and Eve demonstrates that the lesson of the Fall is not "Woman's inherent inferiority or wickedness" that must be contained by marriage, but rather indicates that the Sages were unwilling to identify heterosexual partnership as the natural state for human companionship:

> [T]his reading offers a trajectory for those of us eager to see the world healed when it comes to gender. The subjugation of females to males, punishment for sin in the garden, is seen by the sages as a fracture in the plan, a distortion of God's original intent… In various ways, women were silenced and controlled, infantalized and disempowered, as they were cared for, idealized and protected. However, the cracks in the fortress are visible, and the same sages point them out to us, reminding us that this is not the world as it ought to be.[731]

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[728] *Ibid* at 59.
[729] *Ibid* at 58.
[730] Greenberg, *supra* note 512 at 54.
[731] *Ibid*.

Orthodox rabbis might criticize Tamar's wedding ceremony as falling short of the requirements of *Halakha* and therefore as not legally recognized.[732] However, we can argue that are normative commitments shared between the two standards that operate in Tamar and Arielle's ceremony and in the traditional Orthodox ceremony. In both, religious requirements are law (and both standards respect that requirement), and within that religious framework, marriage 'laws' are central to the Orthodox project, which Tamar and Arielle are equally committed to. Further, a critical legal pluralist conception of Tamar and Arielle's wedding ceremony might understand it as a form of improvised law, which defies the "application of the fixed and immutable script" of the Orthodox wedding ceremony, but which gives effect to the deep purpose of partnership which that ceremony is designed to promote.[733] Seen in this way, the amended marriage ceremony is a legal relationship between Tamar and Arielle that reflects a shared understanding of the significance of marriage. Their improvised legal solution involves a creative reimagining of the gendered terms that are present within *halakhic* requirements, transforms its form in hermeneutic terms to apply it to their union, and then requires the same commitment to the purpose of the original legal obligation.

Wendy Adams, in her 2010 paper, argues that the act of making improvised law to meet a deep, ethical sense of obligation rather than enforcing obedience to an external rule, tends to create a greater connection between legal agents and the underlying responsibility they understand to bind them. Adams uses the example of moral obligation in a courtly love scenario: "I made a promise to a lady". The promise itself creates the sense of obligation and promotes action, even in the absence of an authorising force or law, or even in contravention of an existing one. In Greenberg's analysis of Genesis and Leviticus, a similar thread of legal reasoning appears: adherence to the spirit and principle of the Law *as compelling narrative*, rather than Law as text. Thus, Greenberg's reinterpretation of the marriage contract in Genesis between heterosexual couples as an

[732] Rapoport takes this position in relation to amendment of the marriage ceremony, See: Rapoport, *supra* note 555 at 45; Biale, *supra* note 533 at 192.
[733] The concept of 'improvised law' as a creative reinterpretation of legal obligation, is that of W. A. Adams. I introduce Adams' adaptation of the central ideas of Macdonald and Kleinhans' critical legal pluralism in chapter 2. Adams, *supra* note 23. See also: Adams, *supra* note 252.

imperfect union (in terms of both linguistic form and unequal power relations), gives lesbian couples the legal authority to create a similar contract between themselves:

> When we understand legal subjectivity from this perspective, we understand the significance of narrative commitment rather than reified rules as the origin of normative authority. Our capacity to create legal meaning is a function of our ability to commit to a narrative we find persuasive.[734]

We might ask, then, why this marriage ceremony is 'improvised law', rather than simply an acceptance of another set of rules, given that it involved aspects of a Reform marriage ceremony. The answer is that, for Tamar and other Orthodox Jewish women who seek to live within Orthodoxy as far as possible, the norms of Reform Judaism are not valid, alternate responses to *Halakha*.[735] Thus, I suggest that, for women who see themselves as marrying within the Orthodox tradition, the creative imagining of a marriage covenant with aspects of modern and traditional Jewish texts exists more comfortably between two traditions rather than as a rejection of one set of rules for another. Put this way, we could see the creation of a new marriage ceremony as one part of an ongoing legal conversation between the women and their religious community: a conversation that seeks to recognize their relationship as valid, while still maintaining a strong connection with *Halakha*.

Another example of potential 'improvised law' is found in the marital arrangements between Ruth, an Israeli Orthodox woman and her husband Boaz in *Keep Not Silent*.[736] Ruth has maintained a secret lesbian relationship with a close friend, Neta, for some years. Her husband, Boaz, tells the interviewer that he eventually became concerned after some years that Ruth was cheating on him with her girlfriend and that this was destroying their marriage. Boaz confronts Ruth and asks her to stop seeing her girlfriend. Ruth

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[734] Adams places this type of authorised remaking of law by narrative within Hume's argument of government rule by consensus and opinion rather than force: "as Force is always on the side of the governed, the governors have nothing to support them but opinion. It is, therefore, on opinion only that government is founded; and this maxim extends to the most despotic and the most military governments, as well as to the most free and most popular." Adams, *supra* note 23.

[735] I discuss some of the differences between Orthodox Judaism and other branches of Judaism in more detail in chapter 5. Here, the relevant legal distinction is that, while Orthodox Jews live their lives in accordance with *Halakha*, other, more liberal branches of Judaism do not require members to do this. *Halakha* has relevance as an historical framework but is not binding law that defines a person's connection to their faith. For further on the reform Judaism position on *Halakha*, see: Alpert, *supra* note 511; Alpert, Elwell & Idelson, *supra* note 576.

[736] Alexander, *supra* note 637.

commits to stopping the relationship, but soon after begins to suffer depression, anxiety and tells him that he will have to grant her a *get* (divorce), even after their rabbi warns her that, if she leaves her marriage, she will lose her children. Boaz then tells the interviewer about the legal steps they took to preserve their marriage:

> I realized that she's coping with something way beyond her. She can't… she can't deal… at that stage, I wasn't angry with her. I wasn't angry that she chose a woman. I spoke to a Hassidic Rabbi and another Rabbi, and others who said it's not a problem according to Jewish law. You can't divorce a woman because she's with another woman. Jewish law clearly defines that such an act isn't considered 'adultery'. It doesn't prohibit her from marrying a priest, and you're not obliged to divorce her. Although it's forbidden, it's not a cardinal sexual sin. A much greater problem would be if a woman doesn't cover her hair than if she decides to sleep with another woman.[737]

Ruth and Boaz negotiate an outcome: she will continue being intimate with her girlfriend, and will also remain in her marriage. They make this arrangement in secret, aware that if the wider community finds out about Ruth's lesbian partner, their children will suffer: "no-one will marry them, they will be shunned." They agree that Ruth will sleep at Neta's house about twice a week and will visit her on the other nights at around 7:30pm, returning home by 11:00pm. While she is away, Boaz looks after the children. After some time, Ruth and Neta seek permission from Boaz to have a 'friendly celebration' that is not a marriage, but is a declaration of their love for one another, in front of friends. Boaz tells Alexander that he found this difficult to accept, but that he understands Ruth is bound by two obligations:

> I can't judge how Ruth coped with her attraction to women, whether she did more than what was expected of her, or less. Why did God give us so very many commandments when no one ever succeeded to observe them all?! I don't know.[738]

Ruth and Boaz's solution is not without consequences. We see Neta tell Ruth that it is hurtful for her to hear that Ruth has sex with Boaz on the Sabbath, after she goes to the Mikvah, and that she doesn't want to "hear about your husband". We also see Boaz tell Ruth that he does not want her to lie to the children about the fact that she is still 'in the neighbourhood' when she goes to celebrate Neta's birthday. What if they see her on the street? There are other, more permanent consequences. Rachel, their oldest child, leaves

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[737] *Ibid.*
[738] *Ibid.*

home when she discovers that her mother is having a relationship with a woman and is eventually placed in another home by a social worker. Ruth is devastated by Rachel's anger at her, and the fact that she no longer has a relationship with her daughter. However, for all the upheavals and sadness, we see this as a genuine attempt by Ruth and Boaz to confront the realities of their marriage within the realities of their community.

This arrangement can be analysed from both legal pluralist and critical legal pluralist perspectives. First, drawing on the legal analysis of the *mesolelot* prohibition in *Halakha* presented in chapter 5, we see that Ruth and Boaz's rabbis applied the literal words of the Talmud warnings against lesbian relationships in their analysis: they ultimately accepted that the level of transgression is far lower than that of uncovering a woman's hair before a man, or prostitution. Therefore, this strict interpretation of the *halakhic* rules imposes at once a greater and a lesser legal obligation on marital partners. The obligation can be described as great, because Boaz is not able to grant Ruth a *get* on the basis that she is having a lesbian relationship. This rule constrains the free choice of both parties to leave their relationship. However, the rabbis then invert the prohibition of *mesolelot*, to achieve the lesser obligation of allowing Ruth to continue to see her girlfriend, while staying within her marriage and continuing to abide by the duties of marriage. Here, the strict application of the rabbinical rule against *mesolelot* is weighed against the higher level of sin that attaches to female modesty and the preservation of marriage, and lesbian behaviour is found to be less transgressive in form and substance.

If we consider Boaz and Ruth's 'solution' through the lens of a critical legal pluralism, we can understand their continued marriage as one which introduces a new, improvised set of rules about sexual conduct and romantic love. Boaz explains that, to him, marriage between men and women is sacred. Ruth also says that she only wanted a divorce after she was forbidden to see her girlfriend and continue a sexual relationship with her. Once she can live with both her husband and girlfriend on different days, she is willing to stay within the marriage. Here, the conflicting obligations to family life (a *mitzvah*) and to genuine partnership (a more modern expectation of partnership) form the bedrock commitments which ground the new legal relationships that Ruth and Boaz form. As Adams argues, improvisation and external law are not mutually-exclusive concepts. One

can imbue a new relationship with legal meaning applying external rules, while simultaneously reordering or remaking those rules to create new meaning and new obligations within a relationship.[739] In the case of Ruth, Boaz and Neta, the validity of their arrangement relies both on a literal reliance on the strict words of Talmudic law, and the transformation of those legal principles into a new set of family relationships that they consider to be law-abiding and to structure their lives.

In another story, also presented in *Keep Not Silent*, a woman (her name withheld) tells Alexander that, while she had never had a lesbian experience, she has always known that she was "deeply attracted" to women. She lives within a Haredi community in Jerusalem and is married with several children. She has dealt with "her struggle" by isolating herself from women, refusing to engage with friends and trying to limit her sexual or romantic thoughts about women, as she was told that she must do this "to live a holy life for G-d". However, after twenty years of isolating herself from women, she went to see a rabbi because she had begun to suffer severe depression and to feel as though she "could no longer see a part of herself." She tells Alexander that the rabbi told her she must remain in her marriage, that this was the foundation stone of Jewish life. However:

> Well, he didn't give me permission to have sex with a woman. He said he can't do that, but… he insinuated that if I needed a close relationship and… that I would be close with a woman, and that… part of that relationship would be to have sex, then in a roundabout way, he gave me permission to do that. It was different talking to a rabbi after the 20 years, because he saw that I did try and he did see that it's not going anywhere, and the Torah does believe that people should have love in their lives.[740]

Here, we see a woman and a rabbi seeking solutions to find some legal space for same-sex desire, even when that space is severely limited within the confines of marriage. The woman tells Alexander that she has lived her life in accordance with the *mitzvot* and does not wish to transgress. We understand that she has tried 'for twenty years' to live happily within her marriage and has recently been told by her rabbi that she must do 'whatever she can to keep her marriage together'. In other sections of the film, she tells Alexander that her fear of a lesbian relationship has as much to do with the risk to her husband and children as it has to do with her religious identity. However, once the rabbi finds space in

[739] Adams, *supra* note 23; Macdonald, Roderick A. & McMorrow, Thomas, *supra* note 244.
[740] Alexander, *supra* note 637.

Halakha for her to have a sexual connection with a woman, she develops a 'strong friendship' with a woman in her community and her mental health improves.

This narrative demonstrates the woman's engagement with religious law that does not seek to make it anew. Rather, it seeks to negotiate with a decision-maker to find a penumbral zone in which same-sex intercourse between women is not a serious sexual sin and will be ignored (not allowed) provided it does not threaten the stability of marriage and the family. This example of a negotiated outcome is a reminder of Alpert's argument that the 'silence' in the Torah about lesbian activity creates an identity vacuum where women do not exist but transforms that vacuum into a space where the lawfulness of lesbian activity can be debated. From this perspective, the rabbi's response to the woman's request can be seen as a strict application of *halakhic* rules, in similar terms to that of Ruth and Boaz. If we extend this example further, it could also be a demonstration of *Halakha's* relative capacity for interpretative flexibility on matters of female sexuality. Here, we can contrast this approach to Rabbi Kirschner's argument (as outlined in chapter 5) that Halakhic change on specific issues is possible, if we accept: (a) that *Halakha* is capable of gradual change, and (b) that modern rabbinic authority recognizes the limits of ancient rabbinic language. For Kirshner, the ancient sources assumed that homosexuality was an act of volition, of defiant sin. However, if we accept (as this woman's rabbi seems to, to some extent) that same-sex attractions and desires are an expression of an imperative and natural identity, then homosexuality should no longer be subjected to the same degree of prohibition as it has been previously.

There are, of course, challenges with the application of Kirschner's argument here. Some of these can be voiced as legitimate feminist equality concerns. The rabbi is not granting the woman freedom to live with a lesbian partner, nor is he allowing her grounds for divorce. The freedom to enjoy a sexual connection with a woman, while remaining married to her husband in a Haredi community, is a constrained option, offering little in the way of sexual freedom, and is likely to have significant negative emotional and psychological consequences for the woman and her husband. The rabbi has also not indicated that lesbian activity is acceptable under *Halakha*, nor that the woman will not be privately punished for her actions by her husband. From these perspectives, it is

difficult to see how this example demonstrates *flexibility* in the application of *Halakha*. However, when we compare this example to that of the Israeli lesbian woman seeking guidance from Rabbi Rapoport about whether she should remain celibate or marry a man as she is encouraged to do by her community, we see there is a degree of practical freedom granted here which seems to contravene Rapoport's reading of *Halakha*. As I noted in chapter 5, Rapoport responds to the woman's query by recommending that she live a celibate life without partnership, unless she finds that her 'homosexuality can be successfully treated.'

> [A] woman who is of homosexual orientation ought not to get married, unless there is some reason to believe that such a person will be able to become part of a successful marital union…until she can be reasonably confident that she will be able to fulfill her responsibilities as a wife.[741]

Placing Rapoport's position on lesbian activity within marriage on one extreme, we see the rabbi in this example demonstrating a degree of (perhaps) 'policy development' within, if not amendment of, the *halakhic* prohibition against lesbian sex. That is, we see movement in the policy position from lesbian women being told to marry and bear children, a position defended on the basis that lesbian sexual activity is unlawful and must be effaced. However here, we see a new position being put that until a woman can fulfil the requirements of a religious marital union, she should not marry. While this position does not recognise a lesbian identity as lawful, it does envisage it as possible within the world of Orthodox Judaism.

(3) Conclusion: Orthodox women navigate and negotiate religious law

In this chapter, I have presented a variety of first-hand narratives of lesbian Orthodox women dealing with their contested religious and sexual identities in different ways, yet all operating within the same religious legal framework. In some narratives reviewed for this work, notably those of Haredi women living in the United States in relatively closed communities, their preferred approach has been to subsume one's lesbian identity to their religious identity and to keep lesbian desires and relationships entirely secret (although, not disowned or denied). However, in these stories, I discovered that feminist

[741] Rapoport, *supra* note 555 at 105.

connections—in the private telling of stories and shared experience— still enable these women to recognise and preserve their lesbian identity and, in some cases, to come out to close family members and even their communities. This theme of female connection and contextual reasoning is integral to the feminist acts of identifying inequality through the telling of stories and transforming these narratives into acts of political and social awakening. Many contributors to Goldbloom's blog series spoke of the value of realizing they were not alone, and this realization brought with it senses of acceptance, empowerment and a shared knowledge of the locations of legal and physical limitations in their communities.

Many of these stories demonstrated the difficulty of trying to reconcile conflicting identities. They make clear that the realization of one's lesbian identity does not always result in the gradual tempering or diminishing of one's religious identity. Butler's gender theory analysis of the queer identity eventually gaining equal ground with a competing identity structure (in this case, the Orthodox religious self) does not readily apply to these Orthodox women who continue to live within their religious communities. Rather, these stories show that these women recognize that their identities will remain in constant conflict throughout their lives. Miryam Kabakov poignantly describes this ongoing identity contest as a form of faith/sexuality rebirth, one where she draws on the strength of other women going through the same process, with the hope of eventually discovering an 'undefined, unregulated' space where they can continue to challenge and learn from traditional faith and new, shared wisdoms:

> When I meet one of these women today, I think about the times we spent pushing up against one another trying to form new selves, like fetuses rolling around in a womb, kicking against its sides, but safe because there is no other place to go, and stronger because the little beings have stretched and pushed, growing their muscles and limbs. I do think we survived some war other than the one we were actually in, though we were not always sure what we were fighting against.[742]

Applying a legal feminist lens to these women's stories is a challenging task that requires having sensitivity to the ways in which the feminist goals of Orthodox Jewish women differ from those associated with secular, liberal feminism. Thus, we see that the goals of Orthodox feminism are more to do with negotiation with traditional, patriarchal law to

[742] Kabakov, *supra* note 690 at 50.

find an accepted space for women, rather than a wholesale rejection of that authority. Further, these investigations demonstrated that 'choice' is an important consideration. A feminist method must respect the choices that women make in illiberal communities, while still recognizing these choices as significantly limited by the rules of the society in which they live. As Ross and Alpert note, while feminist elements are present in the struggle for a recognition of the status of women as sexual beings and equal partners in religious life, the application of the term 'feminist' to these efforts is one that many of these women would contest. Nevertheless, some of the legal and social negotiations that these women have begun with their rabbis and husbands are feminist in nature.

As we have seen, sophisticated efforts exist on the part of some Orthodox women to remake or negotiate with *Halakha* as it applies to lesbian relationships and sex. Marriage was a significant element in these particular negotiations with Jewish law. Marriage is, in some cases, a necessary means of recognizing lesbian identity, as it enables some women to realize the difference between sexual feeling for her husband and sexual feeling for a woman. Marriage ceremonies between Orthodox women also generate unique legal solutions to the intractability of the Orthodox marriage ceremony, through the creation of a new marriage contract that accepts elements of *Halakha* but opens it to the values of individuality, love and female agency. Marriage also provided a curious, limited freedom for some women, who were, in some cases, able to negotiate legally 'unseen' sexual contact with women, while remaining in their (heterosexual) marriage and thus operating within the confines of Jewish law. The interventions and negotiations that I have discussed in this chapter might demonstrate (although only to a very limited degree, given the small number of available sources) that there is a desire for change within some Orthodox communities in terms of the application of religious law relating to lesbian relationships and sex. However, any practical implementation of more flexible interpretations of Jewish law must come as much from male, rabbinical sources as it comes from women who are willing to actively negotiate for the recognition of their sexual identity. This is because, for Orthodox women, such rethinking and negotiation requires male authority to interpret and determine the application of *Halakha*.

In these last two chapters, I have discussed certain aspects of Jewish law as it applies to lesbian sex and relationships and have sought to explain why this law is so compelling for

Jewish Orthodox women who identify as lesbian. In chapter 5, I outlined the history of *Halakha* and explained its long tradition as the relevant law for Orthodox Jewish communities. This discussion of *Halakha* as the primary normative order for Orthodox Jews contextualised the legal pluralist and critical legal pluralist analysis that I applied in this chapter, where I presented different ways in which Orthodox lesbian women are responding creatively to Jewish law as it is applied in their communities. As I prefaced in the introduction to this chapter, these two analyses are intended to be read as companion pieces. Chapter 5 presents the voices of the patriarchal legal authority of Orthodox communities, speaking on the topics of female sexuality and lesbian sex. By comparison, chapter 6 presents the female (sometimes feminist) voices of some community members who are navigating and negotiating religious law to find a space for their lesbian identity. The structure of the two chapters is intended to demonstrate the hierarchy of legal norms and social structure within Orthodox Jewish communities, with *Halakha* and rabbis at the pinnacle, and lesbian women at one of the lowest points of the community (in terms of power relations). When viewed from this perspective, the legal improvisations and feminist advocacy taken on by Orthodox women are all the more remarkable.

CONCLUSION

This thesis explores the identity challenges faced by two unique and contrasting groups of deeply religious people: ex-gay evangelical Christian men and lesbian Orthodox Jewish women. The central focus of this project is to understand how these religious people experience the conflict that exists between their religious faith and their queer sexual identities. Law, as it relates to sexuality and religion, is a central aspect of this conflict. Therefore, I have examined the legal norms that apply to these people using a legal pluralist and, where applicable, a critical legal pluralist analysis. As I preface in the introduction, the goal of this theoretical framework is not just to discover where law is located and how it works in these specific religious environments. Rather, the exploration of 'law' in this context provides an analytical lens that reveals the complex identity choices that these legal characters make. In pursuing this goal, I have researched the lives and interactions of people who live within devout religious worlds that are situated within a western democratic state (for most of the communities in this work, the applicable jurisdiction is the United States). Both the Christian and Jewish communities featured here determine (as far as possible) their own religious, legal and social order that operates separately to the state. These communities also isolate themselves from state legal orders in terms of rules governing religious observance, community membership and matters relating to the sexuality identity of their members.

In this concluding section of this thesis, I draw together some of the key findings that emerge from the preceding chapters. First, I discuss the value of aligning a feminist method approach to narrative with a legal pluralist theoretical framework to examine questions of identity. I note that there are challenging, yet also rewarding, outcomes that occur when we tell stories through the lens of feminism about subjects that might not, of themselves, readily appear to be 'feminist subjects'. Secondly, I outline the conclusions I have reached about identity contest and potential reconciliations for both groups of religious people featured in this work. I outline the ways in which the Christian and Jewish experiences I focus on differ in terms of how people manage conflict between their sexual and religious identities. Then, I outline the shared or connective experiences that bring these people together in terms of sexual and religious personhood. I focus here on

what I have learned about the authority of religious law within their social world and the weight of that law on their personal choices. Finally, I suggest some further scholarly explorations that could test the application of this legal pluralist/feminist approach to other religious minorities to improve understanding of their legal interactions and the challenges they face within their communities.

(1) The value of connecting legal pluralism and feminist method

I argue in chapter 2 that there are three key benefits to linking feminist method with a legal pluralist framework in this investigation. First, these two approaches are adept at uncovering informal experiences of law in social spaces (or fields) and then connecting these experiences to larger themes such as power transfer (or inequality) and identity challenge. Second, both legal pluralism and feminist method consider that the 'self' has its own value as a site of legal relations. Having this position as a starting point gives value to investigations of how that self experiences law, and rejects attempts to artificially harmonize the outcomes of different legal selves. This was important in this work, as there were substantially different legal 'selves' and outcomes in terms of how Christian men and Jewish women experienced religious law and navigated identities. Third, the difficult issue of voluntary agency versus compulsion (in terms of how and why people make normative choices in constrained environments) is addressed by feminists and by critical legal pluralist scholars in similar ways and to similar ends. Wendy Adams' suggestion that some legal subjects can respond creatively in their decision making—even when they are constrained by rigid and dominant narratives—relies on an understanding of the legal self as multifaceted and intersectional. These are also feminist terms that reflect the complexity of the queer subject in legal relations. Queer feminist method helps us to understand the narrative choices of L/G religious people by presenting them as creative and responsive to an intersecting range of external forces including gender, sexuality, faith and intimate relationships.

As I have shown, it is challenging, but rewarding, to apply elements of a feminist method to the family experiences of ex-gay Christian men. The voices of female subjects in ex-gay Christian households see power and protection in their traditional roles as wife and mother rather than disadvantage and inequality. In Michelle Wolkomir's empirical study

of ex-gay families, it is often the wives of ex-gay or gay men who push their husbands to undergo reparative therapy, and in the process, to reassert traditional gender roles and encourage their husbands and sons to assert authority over them in social and legal contexts. At the same time, these women rely on their subordinate relationship within Christian legal hierarchy to prevent their husbands leaving the family unit and coming out as gay. Thus, it seems that the identity that ex-gay Christian men want to achieve (ex-gay) is made possible by the imposition of female subordination and patriarchal power dynamics. This perspective of the ex-gay Christian subject was made possible by introducing a feminist method.

By comparison, it is problematic to meaningfully separate feminist method from a legal pluralism theoretical framework in my discussion of these Orthodox lesbian women, as there exists necessary elision between method and theory in this context. That is, the ways in which lesbian women interacted with feminism often informed their legal negotiations and rule interpretation in important ways. For example, many Orthodox women learned about their sexuality through their connections (online and real-world) with other queer religious women. Many women told their stories of empowerment or constraint in a feminist voice: emphasising the importance of female agency to them and demonstrating awareness of the limitations of that agency within their religious context. Further, some women actively engaged with their religious community as legal agents, arguing that they can reinterpret or improvise religious regulation and remain within the bounds of law. When women engaged in these negotiations, they did so to realise positive outcomes for their lesbian identity. In these cases, it can be difficult to draw clear lines between legal theory and feminist method, as feminist inquiries are a valid, essential aspect of the legal negotiations that women are making within their legal order.

However, there are also stories of Orthodox women that demonstrate there are important limitations on the application of a feminist perspective to this world. For example, most of the online interviews with Haredi women indicate that they could only recognise their lesbian identity as hidden and socially transgressive. These women spoke of the dangers of coming out, even to their family or to close friends. They described the risks of physical danger to themselves and the real chance that their children would be taken away from them, and that they would be expelled from their faith community. These stories pull

against secular feminist theory outcomes, as they suggest ongoing gender power imbalances and emphasise the reality of the suppression of female voices and agency. Where I encounter these stories, I have to draw back onto more neutral theoretical ground (provided by legal pluralism) and return to my central thesis inquiry: how do these lesbian Orthodox women navigate their sexual and religious identities? As with all investigations of complicated legal and social relationships, sometimes the outcomes of this inquiry are 'feminist' to a degree, and sometimes they are not. However, in these cases, applying a feminist method to scope the legal analysis provides valuable insights into the lived experiences of a diverse group of religious women.

(2) The reality of ongoing identity dialogue between sexuality and religion

For most of the Christian men and Jewish women whose stories are presented in this work, there will continue to be tension between their religious and sexual identities. As I note in chapter 3, this outcome contradicts the findings of 'identity synthesis' model posited by queer theorists and feminists. This model suggests that most L/G people will experience an 'identity crisis point' in terms of recognising the stigma that attaches to their sexual orientation, but that this crisis point is eventually followed by stages of integration, affirmation and eventual identity synthesis, as the person realises the fundamental nature of their queer identity.[743] The outcome of ongoing tension between religion and sexuality also contradicts the 'sexual orientation change is possible' position that is the foundation of reparative therapy and the ex-gay Christian movement. As I set out in chapter 4, while the men living within ex-gay communities (or who assert that they have successfully completed an ex-gay program) remain honestly committed to maintaining their ex-gay identity, many were equally honest about the fact that it was a continual struggle to do so. For these men, their adoption of the 'ex-gay' identity indicates to them and to others that they are on a journey to heterosexual identity, and that this journey might take the rest of their lives. Their commitment to this journey, in the face of what many acknowledge to be unavoidable internal and spiritual conflict, creates for them a sexual identity in consistent transition.

[743] I outline Koren and Halbertal's summary of the identity synthesis model and provide references for queer theorists and feminists who have adopted this model, in chapter 3 at 130 – 133.

By comparison, all the Jewish women presented in this work demonstrated a consistent recognition of themselves as lesbian, even when this recognition was not actively reflected in their public or private lives. However, this recognition was contextualised by their commitment to their religious faith and their understanding that their sexual identity (and their recognition of that identity) is either rule-breaking or rule-bending. The conclusion that religious and sexual identities remain in conflict was actively realised by those Jewish lesbian women who seek to find a legitimate place within Orthodoxy for their lesbian identity. Even those women who found safe, accepting spaces where they could live openly with their female partner admitted that this often meant leaving their original Orthodox community and, in some cases, cutting ties with their families and friends. In many cases, recognising the fact of their lesbian identity meant that women had to redefine for themselves what it was to be religious and to live within the law. Those women who are educated in *Halakha* were also aware that attempts to redefine their position within the law meant they had to engage in negotiations with their husband and rabbi that required them to acknowledge that they were committing a sin by recognising their sexual identity. Almost all Haredi women who provided online interviews were explicit about the fact that their religious identity would remain ascendant in terms of how they presented themselves to the outside world and that they would only recognise themselves as lesbian in secret.

However, there were outliers who did not conform to this tension/conflict model of identity. In chapter 6, we meet several women who felt they could openly reconcile their religious faith with their sexual identity. Goldie Goldbloom, a Haredi woman who interviews LGBT-identifying women in Haredi communities on an anonymous basis, continues to live within a more traditional Orthodox community and openly identifies as lesbian. Goldbloom devotes her life to opening dialogues with other Haredi women who can only safely 'come out' via the anonymity of online exchanges. Likewise, there are several women who are part of the Orthodykes movement, including its founder, Miryam Kabakov, who write that they were able, after much struggle, to bridge their religious faith and sexual identity through education and a reconstruction of their religious narrative. Thus, for several of the women in Kabakov's 2010 anthology, there was a genuine possibility of identity reconciliation. For these women, the negotiations they engaged in

to achieve positive recognition of their sexuality with rabbis, husbands and families were key to their ability to reconcile their religious faith with their sexual identity.

Ex-gay Christian men saw the ongoing tension between their religion and sexuality in a different light. The narrative of the ex-gay Christian movement is that each man is on a perpetual journey towards Christian morality and a heterosexual life. This narrative requires obedience to the normative position that there is no lawful alternative to the ex-gay identity. Thus, ex-gay men remain personally faithful to the Christian norms of obedience to Christ and the unlawfulness of homosexuality and remain committed to the position that to 'live the gay lifestyle' is to embrace sin and be condemned to hell. Within ex-gay communities, it is unthinkable to suggest that one might be able to live a Christian life and identify as gay, as this contradicts the normative foundation of the movement. Gay men who identify as 'survivors of the ex-gay movement' note that there is no possible overlap between one's gay identity and one's evangelical Christian identity (as espoused by ex-gay Churches). The identity struggle for ex-gay Christian men is situated in their fear of failing to conform to the Christian rule set (by falling back into 'the gay lifestyle'), and thus failing to give full effect to their religious identity. This fear is underpinned by their deep belief in the lawful nature of heterosexuality.

1. Points of divergence

Below, I have organized my reflections about identity reconciliation and tension in terms of where these two groups of people diverge in how they experienced and responded to identity challenge. The first point to note about how these groups differ in their experiences is that some Orthodox Jewish women actively contemplated a means of resolving their two identities, while all ex-gay Christian men were unable to engage with this concept, even at a theoretical level. As I develop in chapter 6, attempts by women to make a case for the recognition of their lesbian identity are situated in the context of religious law, with women debating the 'natural/unnatural' binary with their rabbis and husbands and responding to technical rules that govern their sexuality under *Halakha* with creative, improvised suggestions about compliance. In these cases, there was a formative understanding shared across Orthodox lesbian women that their lesbian identity was a bedrock part of themselves and could not be altered. This belief in the

innateness of their sexuality encouraged women to connect with other queer women in secret, to learn about LGBT issues and rights online and, in some cases, to publicly advocate for their right to share an intimate relationship with a woman. The prohibition of lesbian identity under Jewish law appear to be 'law as a rule of conduct' for these women, more than a 'natural law' which they feel compelled to obey. Even in Haredi communities where women faced the most serious risks in terms of physical harm and forced isolation from their families if they came out as lesbian, these sanctions did not prevent them from acknowledging their sexual identity in secret, and in learning more about that identity. Thus, while the norms of Jewish religious life were important and influential for Haredi lesbian women, they tended not to view these norms as contradicting the naturalness of their queer identity.

As I have set out above, ex-gay Christian men were unable to reconcile the idea of a homosexual identity with their understanding of a devout Christian life. For this group, the irreconcilable nature of religion and queer sexuality is grounded in the foundational positions that (a) to be homosexual is against God's will, and (b) that homosexuality can be transformed into heterosexuality through Christian ministry. These positions require unquestioning obedience to the ex-gay normative framework and to Biblical positions on the naturalness of heterosexuality. To develop the legal metaphor introduced above, we might see this as the natural law position that is accepted wholesale by ex-gay Christians. Men who live within the ex-gay nomos must, by virtue of this foundational position, accept that their gay identity is both transgressive and capable of permanent change. Once the commitment to this position is lost, the purpose of the ex-gay mission breaks down. Viewing the rules and expectations of ex-gay communities through the lens of legal pluralism enabled me to understand the counterintuitive, binary nature of ex-gay views of human sexuality: the gender binary is both natural law and a constructed rule that can be rigidly applied to bring about sexuality change.

This difference in terms of how both groups understood L/G sexuality within the context of religious belief can be explained by the degree to which each religious context rendered same-sex attraction and action unlawful. As I explain in chapter 5, the halakhic rules that outlaw lesbian sexuality are less severe than the biblical rule that forbids male

homosexuality, and can be navigated and interpreted as regulations of conduct, rather than as inflexible positions.[744] While many Orthodox rabbis continue to assert that there is no practical difference between the rules against male and female same-sex attraction, this position is undermined by other Orthodox rabbis and Orthodox feminists who point to the relative 'lesser severity' of rules that apply to female sexuality and lesbian sex as compared to male same-sex intercourse. In this context, women can engage in improvisations that make the most of gaps within legal coverage, as demonstrated by negotiations to remain married but to continue a lesbian relationship, or to maintain 'close relationships' with women that are not sexual in nature. This also explains, to some degree, the leverage that women can exert on rabbis and families when they argue for a lawful space for their lesbian identity within the framework of *Halakha*. However, the position in Christian religious law for ex-gay Christian men is far less flexible and remained more stable and less contested.

Ex-gay Christian men were also relatively less inclined to interrogate the religious rules that applied to them, compared to some Orthodox women. Christian men all reported that they understand that homosexuality is a sin and that they have an obligation to change their sexuality but were unlikely to cite religious sources to explain this obligation or to justify their continued acceptance of the ex-gay pathway to faith by referencing specific biblical norms. By comparison, there was a relatively sophisticated level of knowledge of *Halakha* among lesbian Orthodox women, even in those Haredi communities where women are not allowed to study the Torah. This could be linked to the tradition of debate and disagreement that is embodied in the Talmud as a cultural source able to make space for interpretative challenge. For women who live within

[744] Imbalances in how societies have regulated male and female sexuality are common in state law frameworks as well as religious. This imbalance reflects a historical lack of political and social awareness of lesbian sex and female sexuality in general. For example, the *Offences Against the Person Act,* 1861 (UK) 24 & 25 Vict c 100 imposed a prison term of hard labour between 10 years and life for any homosexual acts between men. Oscar Wilde was convicted of multiple offences under this statute in 1895. By comparison, there is no statutory offence for sexual relations between women in the United Kingdom. In 1921, three MPs attempted to amend the *Criminal Law Amendment Act*, 1885, (UK) 48 & 49 Vict. c 69 to include an offence of "any act of gross indecency between female persons shall be a misdemeanor and punishable in the same manner as any act committed by male persons under section 11." However, both Houses rejected the clause. There was concern that legislating lesbian sex would only draw 'female attention to the offence and encourage women to explore their sexuality.' See: The British Library, "A timeline of LGBT communities in the UK", (2018), online: *British Library* <https://www.bl.uk/lgbtq-histories/lgbtq-timeline>.

modern Orthodox communities, this sophistication often developed into the ability to advocate for their legal position with confidence. This outcome reflects the separate history and process of the two religious legal traditions. As I explained in the introduction, and again in chapter 5, evangelical Christianity is characterised by charismatic, personal experiences of faith that are loosely bound by specific religious legal rules. Ex-gay community leaders do reference specific scriptural texts that support their conclusions, but members of ex-gay communities are encouraged to embrace obedience to Christ (in practice, this means obedience to Christian rules and authorities) and to forego questioning religious texts as part of this obedience. Further, as I stated above, there is the foundational norm (homosexuality is a sin and sexuality transformation is necessary and possible) that presupposes the rightness of the ex-gay position on homosexuality and forestalls objective questioning. Further, those men who do reject the ex-gay normative framework leave their ex-gay communities (either on a voluntary or a forced basis), which means that they are not able to engage in critical discussions with current members about the interpretation of religious rules and prohibitions. This 'accept or leave' position protects the community from outsider interference in its world. It also prevents inclusive Christian churches from engaging in a dialogue with ex-gay churches about contrasting positions on Christian rules about homosexuality and same-sex attraction.

I expected that this unquestioning obedience to the terms of religious rules would also characterise the experiences of Orthodox women, but this was not generally the case. This was a surprising outcome in the research. The general, strict applicability of *Halakha*, its long history as a legal system and the fact that Orthodox Judaism does not allow women to become Torah scholars, were all factors that suggested that lesbian Orthodox women would be equally unquestioning in accepting 'the word' of religious law. Further, in Haredi communities, there are social norms (often given practical effect by modesty committees and rabbis) that discourage questioning on matters of faith or the purpose of *Halakha*. However, I discovered that many Orthodox women are active commentators on their legal tradition. As there are detailed halakhic regulations that apply to every aspect of daily life, Orthodox women are expected to understand these rules and apply them with accuracy, even when they are denied formal decision-making power. Perhaps this degree of familiarity with their legal tradition also equipped these women with critical legal

training sufficient to question it, or perhaps the compelling nature of their sexual identity forced them to confront it. In either case, when some lesbian Orthodox women were questioned about the relevant sections of *Halakha*, they demonstrated that they understood the sanctions against lesbian behaviour, could source these sanctions within Talmudic law and were aware that there were differences in law between the rules against male and female sexual 'transgressions'. This informed knowledge of the legal framework led some women to question rabbis about how to manage their lesbian identity with their marital obligations and led some women to reach out to other queer *frum* communities to develop their legal knowledge about the halakhic rules relating to female sexuality. This is one of the missions of the international Orthodykes movement.

These two groups also experienced their public and private worlds in distinct and varied ways. Orthodox women were keenly aware of the relevance of the public/private binary to their sexual identity. Haredi women reported that their public world (outside the home) is strictly segregated along gender lines and this segregation is marked by conservative dress and hairstyling to preserve female modesty and demarcated 'women only'/ 'men only' spaces such as the mikvah (for women) and the synagogue (for men).[745] In some communities, women and men are encouraged to walk on different sides of the street and to sit on different sides of buses and trains. In the private world of the home, there are still regulated female/male spaces. The rules of *niddah* maintain that women are unclean for seven days after the end of their period. In some Haredi communities, this rule is interpreted by rabbis to mean that their husband may not touch them, hand them food or make eye contact with them. The responsibilities of parenting, food preparation and house cleaning are all seen as traditional, female only responsibilities. Many Orthodox women reported that their first romantic contact was with other girls and that this was to be expected, as they were forbidden to be in close contact with boys from the age of 13.

This delineation between male/female and public/private spaces was significant for many Orthodox women, as it helped shape how they engaged with their lesbian identity.

[745] Although there are women only spaces within most Haredi synagogues which are partitioned and hidden from the male gaze.

Women reported that they felt safer exploring their lesbian identity in private and anonymous ways, which is why connecting with other queer women via the Internet was such an important means of learning about sexuality.[746] Some Haredi women reported that they were realistic about their limited ability to acknowledge their lesbian identity only to themselves or disclosed to outsiders on a purely anonymous basis. However, this did not mean that these women privately disavowed their queer identity. Many narratives presented women as willing to both maintain a public self of the good wife and mother and devout Jew, while remaining committed to the idea of their lesbian identity in secret. The number of American Haredi women (over twenty in 2013, and another twelve in 2014) who provided interviews for anonymous publication on Goldie Goldbloom's *Frum Gay Girl* blog indicate the importance of this public/private divide for lesbian Haredi women. Many women from modern and less traditional Orthodox communities also reported that they thought that maintaining a lesbian partnership in private was simply necessary to escape community scrutiny, which was part of maintaining the public/private distinction that they were used to.

Christian men adapted the public/private binary to promote their ex-gay identity in distinct ways that reflect the significance of gender norms to their Christian worldview. In a similar way to Orthodox Jewish women, these Christian men are encouraged to perform their gender in public; engaging in masculinity rituals such as dressing in conservative clothes and adopting masculine gestures and activities (firm handshakes, playing team sport) that emphasise their role as patriarch, decision-maker and husband. Like Orthodox Jewish communities, there is significant emphasis for ex-gay men to feminise women in this public space, to denote them as other, and thus to highlight the 'reality' of their masculinity. However, here the two experiences diverge, as ex-gay Christian communities cross the line between public and private in terms of the scrutiny of gendered behaviour. Ex-gay Christian men are encouraged to subject women to the

[746] Other models that map sexual identity, including the identity synthesis model I discuss in chapter 3, note that the gradual acknowledgement of one's queer sexual identity is a normal process for many same-sex attracted people, whether they are religious or not. Fears of familial and communal punishment and the recognition of stigma and discrimination often force young people to first explore their L/G sexual orientation in private spaces. However, as Koren and Halbertal argue, for devout religious people, the classification of queer sexuality as rule-breaking and thus hidden from social view, tends to be maintained rather than overcome.

male gaze in public. They are encouraged to talk publicly about their marriages to women, the problems they have within their marriages and how they spend time in this private space. Wives of ex-gay Christian men are encouraged to report to pastors and counsellors on their husband's sexual behaviours such as masturbation or watching gay pornography. Wives of ex-gay men also engage in a performance of femininity that complements male masculinity rituals. Wives reported that this performance should be maintained in both private and public spaces, as men are more likely to overcome 'homosexual urges' when they are presented with the feminine ideal of the wife and sexual partner within the home and can show off this feminine ideal outside the home. Ex-gay men also relied on their wives to act as witnesses and enforcers of heterosexuality in both public and private contexts. Thus, there were cases where men publicly shamed themselves for engaging in homosexual activities before their Christian support group and asked the group to report them to their wives if they suspected them of being at risk of a 'moral fall'. Wives therefore became a subordinate, but influential, compliance agent within the patriarchal hierarchy of evangelical communities.

This elision between public and private spaces in ex-gay communities, and the significance of gender as a performative element, has much to do with the continued struggle for sexual identity that characterises the ex-gay Christian life. Many stories of ex-gay men demonstrated their deep anxiety that their constructed/natural sexual identity—here, I refer to the counterintuitive 'constructed/natural' binary that classifies how ex-gay Christians view heterosexuality—would be damaged by unlawful actions taken in their private life. Thus, men seek to diminish their private experience of sexuality as far as possible. Masculinity done in private is risky: this is an unseen, unregulated space where men have historically acknowledged their sexual desires for men and, in some cases, acted on these desires. Thus, this space is de-sexualised and de-privatised by the introduction of religious enforcement (public repentance of private sins) and familial enforcement (the Christian wife as informant and police officer). However, the Christian and Jewish experiences of public/private spaces come together at one point. That is, the relative *value* of private, feminised spaces for Orthodox women and the relative *risk* of private, gay spaces for Christian men, reflect their shared recognition that their L/G identity is both

deeply challenging for their public religious self, and yet remains a constituent part of their private life.

2. Points of connection

For both groups, maintaining a deep connection to their religious faith was a definitive element of identity. Christian men and Orthodox Jewish women described their commitment to their faith—and the legal requirements of that faith—in remarkably similar terms. Their identification of themselves as L/G invariably caused confusion, social isolation and (in some cases) self-harm. Members of both groups were aware that L/G sexualities are forbidden (although in varying degrees and depending on the religious faith) by religious law and took this position seriously. L/G people of both faiths described the benefits of committing to a religious life that was all encompassing and traditional. They embraced literalism, in terms of religious leaders interpreting Biblical texts as literally true and practically compelling and welcomed faith into everyday aspects of their lives. When faced with punishments or the risk of exclusion from their faith community because of their sexuality, almost all people chose to stay within their community and to continue to adhere to most, if not all, of its laws. This deep commitment to religious faith and its rules informed my legal pluralist analysis of the laws relating to sexuality that are operative on these L/G religious people, as it highlighted which norms are considered to have the force of law by the community and its members. This was particularly useful in terms of identifying which Biblical positions and rules constitute 'law' for ex-gay Christian communities, where rules are less codified and structured than in the Orthodox Jewish context.

The significance of a personal religious identity empowered both Christian and Jewish people who were sanctioned, or experienced hardship, because of their L/G identity. Although Christian men responded to this hardship in markedly different ways to Orthodox Jewish women, there was a connective element of faith in this response. All of the people who told their stories, across both communities, stated that their personal connection to religion sustained them when they experienced challenges in terms of their sexuality. For Christian men, their desire to maintain or build their religious identity was the element that brought them to ex-gay Christian life. Nearly all the ex-gay Christians

who were interviewed at New Hope and at Expell communities identified as evangelical Protestants before they committed to sexual orientation change. Many described their feelings of guilt, isolation and anxiety at trying to live a Christian life within an evangelical context, which taught that their gay identity was unlawful and sinful. As I set out in chapter 4, the strictest faith position taken by evangelical churches in relation to male same-sex attraction is that it is technically impossible: 'God doesn't make mistakes'. Therefore, people who continue to identify as gay and Christian must be exiled and shunned, as they are deliberately sinning against God's law. Ex-gay Christian men then described the relief and joy they felt at being told by Christian leaders that their sexuality was a psychological illness that could be transformed in accordance with a strict range of religious rules that gave effect to the evangelical Christian message. Thus, evangelical Christian faith created both the necessary conditions for positive reception of the ex-gay Christian experience, and the markers of its success.

Orthodox Jewish lesbian women also described their personal religious faith as necessary, beneficial and restorative. This is even though many women also acknowledged that their religious communities were strict, interventionist and sometimes dangerous places for a queer woman to live. Nevertheless, their experience of the communal nature of Orthodox Judaism was formative, and most described their religious faith as a non-negotiable, positive aspect of self. Many women responded to punishments issued for transgressive sexuality (such as exclusion from their family and religious community) by engaging more actively with their Orthodox faith on their own terms. Thus, some Haredi women moved with their partners to more modern Orthodox communities where they could still live a devout life, but where they could openly express their sexuality. Other Haredi women (notably, some women in Israel) applied their knowledge of halakhic regulations against lesbian sex to negotiate a legally acceptable place for their lesbian identity within their familial and religious life. At the end of this spectrum, some Orthodox women decided to publicise their ultimate reconciliation of their religious faith with their sexuality; they offered their experiences as a blueprint for other *frum* women who also identify as religious and queer. For these women, asserting their continued commitment to Orthodoxy is a key part of their argument that a lesbian woman can live a good Jewish life. As I outline in chapter 5, Orthodox Jews do not consider that other branches of

Judaism live within the rules of *Halakha*. Thus, the experiences of other, non-Orthodox Jewish women who embrace LGBT identities and live an active cultural and religious Jewish life, are of very little normative relevance to Orthodox Jews.

Another point of connection between these two groups is how they are influenced by state law frameworks and legal developments in relation to LGBT equality rights. As I set out in chapter 1, in western jurisdictions, there have been substantial developments over the last twenty years in terms of increasing the rights of LGBT-identifying people. These developments are increasingly a matter of public interest and have resulted in a strong counter-cultural narrative being put by religious communities that focuses on the dangers posed by this positive recognition of sexual and gender diversity. In this contested environment, evangelical communities and Orthodox Jewish communities increasingly resist secular intervention in their activities and attempt to prevent their members from accessing the 'secular narrative' in relation to LGBT rights. It is difficult to tell with certainty whether these attempts at inoculation against secular rights narratives are successful. Certainly, religious communities assert that they are, and most of the people who are the subject of this thesis indicated that religious laws in relation to L/G sexuality are compelling for them. However, the stories of L/G formerly-religious people who seek exit from their community also provide evidence that people within closed religious communities are aware of state legal and social developments about LGBT rights to a limited degree. In chapter 1, I described this awareness as 'background noise' that provided a counterpoint for religious rules prohibiting queer sexuality. However, for both the Christian and Jewish communities that are the subject of this thesis, this awareness only crystallised into normative relevance when people decided to leave their community. This explains the limited relevance of religious exit narratives (narratives of those who have sought exit and from their community, rather than those who elect to remain within it) to this work.

This leads to the most significant point of connection between both L/G religious groups. For people within both communities, religious laws—that govern how gender is understood, how families are properly constituted and what sexual identities are lawful and unlawful—are of great normative significance. Thus, analyzing how they respond to these religious laws (by applying a legal pluralist lens) was central to understanding how

they managed the conflict between their religious identity and sexuality. The normative importance of evangelical Christian and Jewish religious laws as they apply to L/G sexuality was the shared ground that first drew me to these communities. As I note in the introduction, I believed that researching the faith experience of these religious people would demonstrate where the connections and divergences between state law and religious law appear in relation to sexuality. However, the outcomes of this research demonstrated that this type of inquiry would not get close to understanding the complex questions of identity that L/G people living in these communities answer in their everyday lives. Thus, the answers I have set out in this conclusion are both more complex and less clear than I predicted; but they are also far more interesting. I learned that people rarely answer 'legal questions' when they tell their stories. They often diminish or deny what an objective researcher would assume to be significant events (like developments in state law frameworks, for example), and they express startling, uncomfortable conclusions about what influences their actions (such as the value of submitting oneself totally to religious rules).

In the case of ex-gay Christian men, viewing their commitment to the ex-gay nomos as a matter of law (as well as spiritual conformity) enabled me to build a richer, more complete picture of their identity constraints and the connective relationship that exists for these men between Christianity as a force of law and the reparative therapy sexual change narrative. For Orthodox Jewish women, analyzing their actions as legal agents within a halakhic context enabled me to unpack the creative, independent ways that they use and adapt law to build a model of identity dialogue between their sexuality and religious self.

In the case of some Orthodox women, interesting outcomes also emerged when I considered them as sites of legal knowledge and exchange, using the language of a critical legal pluralist conception of law. In some cases, lesbian women could build their own legal narrative that encompassed elements of *Halakha*, but which also encompassed other normative commitments such as the value of human partnership, tolerance and fellowship. Women who designed their own marriage ceremonies, for example, incorporated aspects of the halakhic requirements for betrothal and marriage, while discarding the more unequal elements that underline the gender power imbalances in the traditional Orthodox ceremonies. Likewise, some women responded to rabbinical rulings

on the unlawfulness of lesbian partnership with creative improvisations that either respected the letter of the law, if not the spirit, or that respected the spirit of the law, if not the letter. An example of this first improvisation is the decision to stay married, but to spend time (including sexual contact) with a lesbian partner, on the basis that this is a less transgressive act than breaching other marital mitzvoth. An example of the second improvisation is the decision by one woman, with her rabbi's permission, to develop close friendships with women, while agreeing not to engage in sexual contact with these female friends. Both improvisations involved women openly acknowledging their lesbian identity to male authorities, and actively seeking for ways in which the law could make space for them. These improvisations and narrative choices demonstrated that, for some of the women in this research, there are active exchanges going on in terms of how they interpret and apply religious law, while acknowledging that this law remains the most significant normative context for them.

(3) Continuing the conversation: final reflections and future directions

While there are significant differences in terms of how these two faith groups address the dilemma of their L/G sexuality and their religious beliefs, I have brought them together through this legal pluralist analysis, informed by a feminist methodology. With this analysis, I hope to begin a critical conversation about complex identity dialogue for religious subjects, considered through the lens of law. Through my investigation of the different normative worlds that ex-gay Christian men and lesbian Orthodox women inhabit, I have demonstrated that these people are complex legal subjects who navigate their worlds in remarkably different ways, but also with notable points of convergence. In this thesis, I have tried to reflect the complicated negotiations that these people engage in between themselves and different religious authorities to either recognise or efface their L/G identity and, in so doing, to be able to live a satisfying religious life. I have suggested that we can learn something meaningful about how queer people live within religious communities when we apply a legal pluralist and critical legal pluralist perspective to their lived experience.

I hope that this work serves as part of a larger, continuing conversation about different forms of identity in religious and social life. As I set out in chapter 1 of this work, tensions

between religious minorities (and members of those minorities) and the progressively secular state continue to be pressing social issues and are a valuable topic for legal commentary. As I acknowledge in the introduction, while there are already many valuable legal critiques of different aspects of these tensions, there remain opportunities for critical legal scholarship that employs legal pluralism and feminist method to shed light on sensitive issues of faith and belonging in a divided world. Some opportunities for further research in this area might include investigating the legal experiences of LGBT-identifying people (not necessarily just those who identify as L/G) who are expelled from their closed religious communities and who also are parents of children living within that community. While researching this thesis, I became aware of the challenging legal issues courts face in reconciling issues of religious identity, sexual/gender identity and the best interests of the child in determining custody cases where a closed religious community contests a LGBT-identifying parent's right to custody. While I acknowledge that this is a small and defined area of focus, my research has demonstrated that there are significant issues of children's rights that are emerging in the LGBT-religious community sphere. There are also valuable opportunities for a feminist analysis of the legal experiences of Muslim individuals who also identify as lesbian or gay. Recent publications on this topic have focused on practical ways in which Muslim gay men living in the United Kingdom and Malaysia negotiate their competing religious and sexual identities, considering these experiences from a sociological and religious perspective.[747] A legal pluralist and feminist analysis could make contributions to this field of research by applying the framework I have introduced in this thesis to a new religious context.

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