

Obergefell v. Hodges
Or: Same-Sex Marriage in the US and Conservative Judaism
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I remember where I was when I first heard the news on June 26th. We were having a family breakfast at Daily Treat's outdoor seating on Ridgewood Avenue, enjoying our wonderful village in the summer, when I glanced at my phone after noticing an alert vibration, and saw the headline. My eyes teared up and Alla asked what was wrong. I showed her. "Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide."

I mentioned on Rosh Hashanah that I had decided to devote my high holiday sermons this year to important decisions of the past term of the United States Supreme Court. This was the big one, and I will tell you the story of why it was so important to me personally. Our text for this evening is the consolidated case of *James Obergefell et al., Petitioners v. Richard Hodges, Director, Ohio Department of Health, et al.; Valeria Tanco, et al., Petitioners v. Bill Haslam, Governor of Tennessee, et al.; April DeBoer, et al., Petitioners v. Rick Snyder, Governor of Michigan, et al.; Gregory Bourke, et al., Petitioners v. Steve Beshear, Governor of Kentucky.*

This is actually a good topic for Yom Kippur because tomorrow afternoon's Torah reading provides the most important sentence in the history of the debate on homosexuality in Judeo-Christian culture, even though it is not cited once in the combined 98-pages of the Court Opinion and Dissenting Opinions released on June 26th. "You shall not lie with a man as one lies with a woman," the Torah

says. "It is an abomination." That verse, though not created in a vacuum, has driven millenia of cultural, legal and religious condemnation of same-sex relationships, a condemnatory attitude that is only being uprooted now before our very eyes.

I became fascinated, some might say obsessed, by the question of homosexuality and Jewish law when it was addressed directly by the Conservative Movement's Committee on Jewish Law and Standards in 1992. That committee of twenty-five rabbi and six others deliberated for a year until it resolved in March of 1992 that Conservative Judaism must uphold "the traditional prescription for heterosexuality," refusing to authorize the ordaining and investiture of gay and lesbian rabbis and cantors and declining to authorize same-sex religious ceremonies. That decision was essentially reversed in 2006, but more on that later. In 1992 I followed the deliberations closely, and was present at the Jewish Theological Seminary for the final session where the decision was made. I was a college sophomore at the time, and had made the one-hour-and-forty-five-minute drive from Wesleyan to New York City to watch the historic meeting. Rabbi Joel Roth, who was the committee's chair, insisted that it meet in the large auditorium so that anyone who wanted to could observe, in the interests of full transparency. The auditorium was filled all day with faculty members, students and area rabbis who watched as the members of the Law Committee gave their speeches on why they would vote the way they would vote.

It was only nine years since the Seminary's famous decision to admit women to the rabbinical school. Many expected this is to be a similar

history-making moment. But in the end, the paper that argued for a change in the law received but a single vote. The most dominant viewpoints were the seemingly compromise position of Rabbi Elliot Dorff, who called for an interim commission to be followed by renewed discussion on the Law Committee in two years' time (there was a controversial commission and the Law Committee did revisit the issue again, but it took fourteen years rather two years), and a powerful negative ruling argued by Rabbi Joel Roth in 116 pages of what I found to be a gripping page-turner. While I don't know of anyone else in the world who has described that work as a "page-turner," there was much anticipation regarding what Rabbi Roth would write, as his had been the most persuasive and influential of the papers considered between 1979 and 1983 on the question of the ordination of women.

Rabbi Roth was the one who had found a way, through creative halakhic argument, for Jewish law to permit women rabbis. Now, nine years later, the once-young Talmud professor was now Dean of the Rabbinical School and Chairman of the Law Committee, and many in 1992 waited with great anticipation on what would happen now.

Rabbi Roth and other other respondents had already released drafts of their papers, so the results were much a foregone conclusion before the actual meeting. Nevertheless, the drama was felt throughout the interested Jewish world. Upon my return to Wesleyan, I remember spending that Shabbat afternoon at the campus rabbi's house, where a group of a dozen students gathered eagerly to hear what I had to report. I had brought back copies of the

papers to share, and, as I recall, in the midst of my excited retelling of the arguments and speeches back and forth, one of my friends ran out of the room in tears. What I did not understand then was that what was for me an exciting academic question, was for others existential.

For me, it was the theory that was so exciting. Conservative Judaism was still trying to explain how it was okay to have women rabbis. That was still new back then. Last April, by the way, Alla and I attended a Rabbinical Assembly conference and dinner celebrating the thirtieth anniversary of women rabbis in our Movement. We honored the whole initial cadre of women colleagues, most of whom are now retired. But that is how the years have flown by. The question, back in 1992, was that while Conservative Judaism could explain how halakhah—that is, Jewish law—could adapt to new times, and how Rabbi had always exercised flexibility in their treatment of precedent and handling of new questions, how far could that liberal approach go. Unlike the question of women rabbis, which was a new question, there were always gay and lesbian people. Unlike the issue of women rabbis and egalitarianism, upon which the Torah says nothing, here the Torah was quite explicit that a man who lies with a man as one lies with a woman has committed an abomination. How far could the liberal approach go in adjusting or changing a law so clearly laid forth in the Torah? How bound were we, that is to say, to the Torah text, to Scripture?

These were and still are big questions. For me, the question of same-sex marriage was the most important question that Conservative Judaism could

address because it was the perfect test case in seeing just how far Conservative Judaism could go in explaining the meaning of Torah in our own day.

I was fired up in 1992. I “confessed” last week on Rosh Hashanah that when I was younger I had wanted to become a lawyer. “So why did you become a rabbi?” someone asked me during the week. Thinking about it now, it was probably this debate in 1992 that brought me to decide to apply to rabbinical school. Yes, I was becoming a leader of our Jewish student community at college and that discovery of the joy in teaching others the way around tradition was essential. But there was also the element of the debate on the heady issues. I wanted to be at that table as I observed from the spectator seats in 1992. I wanted to engage the issues, and find a way to preserve our religious authenticity while removing the restrictions against gay and lesbian Jews.

I started to do that with some intensity five years later. I was studying in Israel for my third year of rabbinical school, and was working on a term paper for a course on contemporary issues in Jewish law. Our assignment was to write our own original opinion on a current question of our choice. I remember spending days at the library of the Hebrew University reading everything and anything I could find on Leviticus and on homosexuality. In the end I came up with about thirty pages of typed Hebrew with footnotes. It was, besides I suppose my PhD dissertation written years later, the most involved piece of research that I have written. And writing it in Hebrew was no piece of cake. I went over it with our Hebrew language instructor, who helped me immensely in fixing each sentence so that others could understand what I meant. I remember the files and files of

copies of articles and studies that I had gathered together, and spread out on my dining room table in my Jerusalem apartment as I worked on that project. In the end, my basic premise was an expansion of Joel Roth's approach, but in, of course, a more liberal direction. He had argued in 1992 that the reason why Jewish law forbids same-sex relationships is because of the strong value of marriage and procreation. The fact that gays and lesbians do not choose their sexual orientation and have no other avenues of healthy intimate relations, he argued, does not mitigate the tradition's preference for marriage and children, even if that conclusion seem cruel to those who cannot fulfill its ideal. The solution I proposed—and understand that I am giving you the bottom line here without the many pounds of supporting documentation—was that gays and lesbians can fulfill the ideal, that they *want* to marry and they can and want to have children. An evolution of how we understand the values of the Torah, I argued, will in fact strengthen its true essence.

A year or so later I revised the paper and translated it into English—so people might actually read it—while I was still at rabbinical school. And I later continued to revise it and merged it with another paper and it morphed into the form of a responsum I co-authored with my father, Rabbi Robert Fine, and Rabbi Myron Geller of Gloucester, Massachusetts, that I ended up having the honor of arguing before the Law Committee in 2006. But that was almost ten years after I wrote the first version of that, as a Hebrew submission of a term paper assignment in rabbinical school in Jerusalem. My professor gave the paper back to me with a note that he disagreed with every word, and a grade of “A+”.

And now we can fast forward to December 6, 2006. I was sitting on a Metro North train into Grand Central Terminal that morning, going over my speech I was to give at the historic meeting of the Conservative Movement's Committee on Jewish Law and Standards as it was scheduled to vote that day on the question of same-sex relations, and gay and lesbian rabbis and cantors. The meeting was held at the Park Avenue Synagogue, and was, again, quite public, with hundreds of individuals watching the proceedings as spectators, and a major press conference with the media held immediately after the vote. This time, there were a number of papers before the Committee, just as many in favor of a change as those opposed. Rabbi Roth and others had re-articulated the status quo, the paper that I wrote with my father and Rabbi Myron Geller was joined by another paper by Rabbi Gordon Tucker of White Plains, New York, with quite different arguments but the same conclusion, arguing for what amounted to a reversal of the key verse in Leviticus that we will read from the Torah tomorrow afternoon. And then there was a somewhat more centrist argument that found a way to permit same-sex relations and gay and lesbian rabbis but without the full acceptance that our approaches argued. That compromise approach, by the way, was the one that essentially won the day and has given direction to Conservative Judaism ever since. I am not going to go into detail of the arguments here, but suffice it to say that at the time, and still now, I was unsatisfied with that approach and I came to that final meeting with my speech in hand hoping to sway a few swing votes so that our paper could pass muster.

I remember the politicking leading up to that meeting. My father and I had taken Joel Roth out to dinner at Noah's Ark in Teaneck a week or so before, and I pleaded with him then to, if he could not support our paper, at least allow it to survive a procedural attempt to take it off the table. Rabbi Roth, you have to understand, was my most important teacher of Jewish law. Back in 1992, when I was still in college, he inscribed my copy of his book on Jewish legal theory with the words: "For David. May your love of and concern for halakhah forever remain as strong as now." Those words have always haunted me. We generally look forward to growth. Here, the teacher challenged me not to devolve! So I was very conscious of that, fourteen years later when, sitting across from my teacher at Noah's Ark in Teaneck, I had the hutzpah to say: "Rabbi Roth, if you don't allow our paper to go forward, then you are saying that you were a poor teacher!"

So that morning, December 6, 2006, I gave it all I had. It was a defense of our methodology to survive a procedural challenge. Joel Roth actually voted with our side there, to the consternation of many in the room. But we still lost the vote 12 to 9. It was close. In the end, the practical changes in the Conservative movement did go through. Our paper, and Gordon Tucker's, were filed as dissenting opinions and are still read along with the Opinions of the Committee. One study showed that the majority of Conservative rabbis preferred our approach over the official positions of the Committee. I liked that study. And Rabbi Roth and I are still friends—you may recall that he gave the keynote at my installation here at Temple Israel in 2009.

But that speech that I gave that morning was the most important speech of my life. I can say that now, even though it was not successful. I think, in the broader scheme of things, we are the product of our failures as much as our successes. And for me, the struggle was and is over the heart of Conservative Judaism, not over a particular committee vote.

I made the speech and it was well received. I had won the respect of those on the opposite end of the table, and I had personally participated in the historic moment.

I do tell this story in my book, *Passionate Centrism*, that is due to come out imminently, which I hope means before we start the class on it this spring! When I went over the final draft copy a month ago, I had to add one thing to this whole section, and that was an acknowledgment of *Obergerfell v. Hodges*.

The main point of contention, the issue at stake in the procedural vote that we lost before the Law Committee in 2006, was that we argued that halakhah, Jewish law, needed to take account of changing times. In the past, we argued, a gay or lesbian couple could never marry and raise children. Now, society has changed. Now, that gays and lesbians have the option of marriage and family, Jewish law needs to adjust and embrace that as underpinning the basic values that the Torah concerns itself with. "Has society really changed?" our colleagues asked us at the Park Avenue Synagogue in 2006. They did not directly challenge our methodological approach as we had precedent to back that up. The challenge was on our subjective read of society: had it really changed? We were able to point to a handful of states and nations that had same-sex partnership laws, but

they were able to respond by noting the majority of jurisdictions that did not. How were we to know that society would go along that path, and that same-sex marriage—we were still saying “unions” not “marriage” then—would become the law of the land? Now, a mere nine years later, we were right, as *Obergefell v. Hodges* has made same-sex marriage the law of the land.

But it's more than that. Much more than that. My initial tears when I read the New York Times headline off of my smartphone at the Daily Treat on June 26th were tears of excitement at the momentous change and the justice that could now be extended to gay and lesbian couples throughout our country. That, for sure, was enough reason for joy. But as I read the decision, and the dissenting opinions contributed by each of the four dissenting justices, I felt even more vindicated in all the efforts I had made in our own sector of religion in America. My argument had been that marriage *was* important, and that the way to argue for an acceptance of gays and lesbians in Judaism was through an expansive strengthening of marriage and family. When I was discussing this fifteen years ago with my students at Wesleyan, where I had returned to to serve for two years as interim Jewish chaplain, they explained to me that I was quite the conservative neanderthal in championing marriage, that oppressive bourgeois institution. I reveled in that. And so I celebrated when I read the moving words of Justice Kennedy at the beginning of the Court Opinion in *Obergefell*: “Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the

two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.” Over and over again through the Opinion, Justice Kennedy stresses that it is “the enduring importance of marriage” that drives the argument. “Far from seeking to devalue marriage,” he writes, “the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities.”

And if that wasn't enough, I found the essence of my struggle on the Law Committee written all over the Supreme Court pages. My print-out of *Obergefell v. Hodges* is filled with scribbles of Hebrew phrases in the margins. The jurisprudential debate between the majority and the dissenters is the same as that between me and my opponents in 2006. The dissenting justices here are angry that the Court made too activist a judgment in declaring a fundamental right (that is, the right to same-sex marriage) to be inherent in the Constitution even though it was not approved by a democratic majority of the States and certainly never entered the minds of those who ratified the Fourteenth Amendment where the guarantees of liberty and due process are to be located. But Justice Kennedy in the Opinion of the Court explained that “the nature of injustice is that we may not always see it in our own times.” That “the limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the fundamental right to marry is now manifest.” That “in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”

That is, that our understanding of the Just and the Right can change through time, and that the founding charter is meant to reflect that ideal at the time it is adjudicated, is far too radical an idea for the Chief Justice and the other dissenters to accept.

That is the real issue between the pages of *Obergefell v. Hodges*. While Justice Scalia's scholarship on what eighteenth and nineteenth century legislators intended is fascinating, that is not where I would look to understand what is just. And so too with Judaism. I can have a fascinating discussion with my colleagues and anyone else about what the original meaning was of any particular verse in Leviticus. But if the Torah is to have any meaning for us today, then it needs to speak to us today, in *our terms*, and we need to be empowered to read it *in our terms*. To put that in theological language, if God's voice is to be *commanding*, then it must be *present*.

I keep returning in my mind to that moment in college, in 1992, when I came back from the Law Committee all fired up by the ideas exchanged back and forth, on the theoretical matters of law and theology that were raised, that I lost track of the fact that my friend who was sitting right before me was taking in her own value and dignity through the twists and turns of my sophomoric mind. Here was a real human being who was struggling to find her place in a tradition that denied who she was at her core. I could not see at the time how blind I was in understanding that ideas and discussions like this do not exist in theoretical vacuums, but affect people's lives. While it is easy for me to say *Al Het* for my literally sophomoric insensitivity, Justice Kennedy reminds the nation that we are

talking about real people with real pain. We all now know the name Obergefell.

But do we know his story? Listen to Justice Kennedy:

Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems 'hurtful for the rest of time.' He brought suit to be shown as the surviving spouse on Arthur's death certificate.

As we read Leviticus 18 tomorrow afternoon, let us understand the Torah in the way it must be understood today, and let the memory of John Arthur be, for our country, a blessing.