

## Homosexuality Revisited

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*This teshuvah was approved by the CJLS on December 6, 2006, by a vote of thirteen in favor, eight opposed, and four abstaining (13-8-4). Voting in favor: Rabbis Joseph Prouser, Adam Kligfeld, Robert Harris, David Wise, Loel Weiss, Baruch Frydman-Kohl, Philip Scheim, Mayer Rabinowitz, Leonard Levy, Joel Roth, Paul Plotkin, Vernon Kurtz, Jerome Epstein. Opposed: Rabbis Elliot Dorff, Robert Fine, Myron Fenster, Daniel Nevins, Myron Geller, Gordon Tucker, Avram Reisner, Susan Grossman. Abstaining: Rabbis Kassel Abelson, Aaron Mackler, Alan Lucas, Pamela Barmash.*

### שאלה

Should the CJLS Consensus Statement of Policy Regarding Homosexual Jews in the Conservative Movement, adopted on March 25, 1992, by a vote of 19 in favor, 3 opposed and one abstention be modified or retracted?

### תשובה

The Committee on Jewish Law and Standards devoted its entire year's discussion in 1991-92 to several papers which were submitted to it on the subject of homosexuality. Four papers were adopted by the Committee in addition to the Consensus Statement. Of the four papers, mine received the greatest number of positive votes (14), and the fewest number of negative votes (3).

It is my opinion that neither the *halakhah*, nor the science, nor the morality have changed in the intervening years. What has changed, of course, is the degree of public ferment, which has increased dramatically. One might reasonably ask of me, therefore, why I should submit yet another paper to the Law Committee when, in fact, I do not retract what I have already written, and wish it to be clear that whatever is written in this

paper presupposes the entire previous paper, which should be presumed as applicable in its entirety.<sup>1</sup> The answer to why I write again is simple: This paper is intended to provide reactions to ideas which have been expressed and which have gained fairly wide credence since our earlier deliberation, and to critiques which have been voiced against what I have already written. Therefore, this paper is organized not as a new and thorough discussion of the issue, since I think that has already been done, but as comments on specific ideas and critiques, intended to demonstrate that they are insufficiently persuasive to convince us to change our Consensus Statement of 1992.<sup>2</sup>

### Homosexuality versus Homosexual Acts

I believe that it was absolutely clear in my original paper that what is prohibited is homosexual acts (regarding which I shall have more comments below), and not an orientation or attractions or fantasies. Therefore, in both the original paper and in this one, the reader should understand that whenever the word “homosexuality” is used in the context of discussion of prohibition, the intent is to forbidden homosexual acts, and the word “homosexuality” is used as a shorthand for that.

### What are Leviticus 18:22 and 20:13 About?

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<sup>1</sup> That paper is online at [www.rabbinicalassembly.org](http://www.rabbinicalassembly.org), and in print on *Responsa 1991- 2000: The Committee on Jewish Law and Standards of the Conservative Movement* (New York: The Rabbinical Assembly, 2005).

<sup>2</sup> I have decided not to footnote every idea to which I am reacting. Some have been expressed by more than one person, and some of the ideas may even have been expressed by authors that I am unaware of. In general, however, the views to which I am reacting are found in Rabbi Steven Greenberg, *Wrestling with God & Men: Homosexuality in the Jewish Tradition* (Madison, Wisconsin: The University of Wisconsin Press, 2004); Michael Satlow, *Tasting the Dish: Rabbinic Rhetorics of Sexuality* (Atlanta, Georgia: Scholars Press, 1995); Michael Satlow, “They Abused Him Like a Woman; Homoeroticism, Gender Blurring, and the Rabbis in Late Antiquity,” *Journal of the History of Sexuality*, 5:1, July 1994; David Brodsky, “The Conservative Movement’s Policy on Homosexuals and Homosexuality: Halakha or Homophobia?” to be published (I believe) in an upcoming issue of *Conservative Judaism*; Rabbi Simchah Roth, “Dear David, Homosexual Relationships: A Halakhic Investigation,” distributed to the CJLS for informational purposes only, and published originally on the Keshet website (<http://keshetjts.org/>); and Jay Michaelson, “A Response to the Roth Tshuvah on Homosexuality,” delivered (I believe) at a Keshet day of learning in February 2004, and available online at <http://www.metatronics.net/spirit/rothresponse.325.doc>.

There has been considerable attention paid to the question of what the verses in the Torah about homosexuality are *really* about. The goal and intent of those discussions is clear. After all, if one can claim that the Torah knew of only a certain type of homosexual behavior, it could obviously not be prohibiting a type of homosexual behavior that it didn't know about. And if, in fact, the Sages also really only knew of that type of homosexuality, they, too, could be talking only of it. The advantage to this approach is that it allows its proponents to affirm an ongoing commitment to the authority of the Torah and the Sages, and to affirm that their intent is to reconstruct the will of the Torah and the Sages, which has been so misunderstood. The arguments of this nature have taken several directions, and I shall react to them in turn.

1. The verses in Leviticus refer to cultic homosexuality

There is, in fact, not one shred of evidence that this is so, no matter how widely held the view may be. It is not essential to go into the types of evidence being adduced to support this claim. It is sufficient to note that all must rely ultimately on the claim that the *שדק* and *שדקת* of biblical literature refer to male and female cultic prostitution. One must admit that such an idea has had widespread acceptance even in the scholarly world. Now, however, it is clear that it is entirely a misperception,<sup>3</sup> and that there is no evidence whatsoever of sacred prostitution, either male or female in ancient Israel, or among the Mesopotamians. This argument has been made very persuasively by Joan Goodnick Westenholz of Tel Aviv University in an article entitled “Tamar, Qedesa, Qadistu, and Sacred Prostitution in Mesopotamia,”<sup>4</sup> and by our colleague Mayer I. Gruber of Ben

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<sup>3</sup> Probably based on an uncorroborated statement of Herodotus in the *Histories*, I, 199. See both of the articles which are mentioned in the next few lines of this paper.

<sup>4</sup> *Harvard Theological Review* 82:3 (1989), pp. 245 – 265.

Gurion University in Chapter Two of *The Motherhood of God and Other Studies*,<sup>5</sup> entitled “The Hebrew Qedesah and Her Canaanite and Akkadian Cognates.”<sup>6</sup>

However, it is more important to comment on the implications of the above for halakhic decision making than to dwell at length on the untenability of the claim that Leviticus is about cultic prostitution.

It is not at all uncommon for theories to come and go in modern scholarship. For a decisor of *halakhah* to latch onto some theory of modern scholarship and utilize it as a basis for rendering a far-reaching decision, especially one which permits what has long been considered forbidden, is risky at best and foolhardy at worst. Even if one assumes that the results of modern scholarship constitute a potentially valid datum in halakhic decision-making, an assumption which may well be false at least for some types of scholarship,<sup>7</sup> one must at least make certain that the thesis has left the realm of theory and entered the realm of fact. It takes a very long time for that to happen, as everyone involved in scholarship knows. In fact, it may never really happen. Theories can stand for a hundred years or more, and then be proved entirely false. And what should be done then? Reverse all of the halakhic decisions that had been predicated on that claim of scholarship? Everyone knows how difficult it is to undo established law, no matter how bad or poorly conceived that law may be. A far wiser course of action would have been to refrain from promulgating the law in the first place.

## 2. The verses in Leviticus refer to coercive relations between non-equals.

This thesis has become increasingly common. Its goal, clearly, is to imply that if the only type of homosexual behavior known either to the Bible or to the Rabbis was of such

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<sup>5</sup> Atlanta, Georgia: Scholars Press, 1992.

<sup>6</sup> See, also, page 160 of Baruch J. Schwartz’s *Torat Hekedushah (The Holiness Legislation)*, Jerusalem: The Magnes Press, The Hebrew University, 1999) for further proofs of the untenability of the “cultic prostitution” theory, and note 29 on page 161 for an extensive bibliography on the subject.

<sup>7</sup> This is a complicated subject, for a thorough discussion of which this is not the appropriate forum. See, however, Chapter 11 of my book *The Halakhic Process: A Systemic Analysis* for some thoughts on the subject.

a nature, then whatever prohibitions exist must apply only to those types of behavior, and not to loving, caring and monogamous homosexual relations.

First let us comment briefly about the biblical texts in Leviticus.

**a.** There are attested ways that the Bible refers to coercive sexual relations. It uses verb forms like <sup>8</sup>ענה or תפש ושכב.<sup>9</sup> The use of the root שכב does not itself indicate coercion or rape.<sup>10</sup> Of course, the context can indicate coercion, as, for example, in Genesis 34:7, where the prior context had defined it as coercive with the word ויענה. The incest lists of Leviticus 18 and 20 do not indicate any type of coercion. The context obviously makes it clear that the acts are negative and unacceptable, but not that they are the exercise of coercion or power.

**b.** As all responsible halakhists know, what matters most is not the Torah itself, but the Torah as seen through the eyes of the Sages, who are its authentic authoritative interpreters. So, even if it were true that the Bible perceived of only coercive, non-equal, non-loving homosexual relations, what would matter halakhically is what the Rabbis perceived. And, there the evidence is also clear. I have already shown in my earlier paper on the subject that the Rabbis were clearly able to conceive of monogamous and loving homosexual relations, and that the texts quoted to prove the contrary in fact do not do so at all. There is no need to repeat all of that now.

What is important to add here, however, is the conclusive proof now available to demonstrate that the rabbinic passages are not purely theoretical statements of the possibility of conceiving of monogamous and loving homosexual relationships. In 1994, John Boswell published a book entitled *Same-Sex Unions in Premodern Europe*.<sup>11</sup> He demonstrates virtually beyond question that in the Graeco-Roman world there were four types of homosexual unions: exploitation of males owned or controlled, concubinage, lover relations, and formal unions. I shall leave to each reader of this paper to peruse the

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<sup>8</sup> See, for example, Gen. 34:2; Deut. 22:24,29; II Sam. 13:14,22; Ezek. 22:11.

<sup>9</sup> See Gen. 39:12 and Deut. 22:28.

<sup>10</sup> See, for example, Gen. 19:32,33; Gen. 26:10; 30:15,16; Ex. 22:15; II Sam. 11:4.

<sup>11</sup> New York: Villard Book.

book, and will suffice with several quotations, each followed by the page number in the book on which it appears.<sup>12</sup>

It is probably wrong to imagine that “lover” and “beloved” were clearly defined positions or roles: ancient writers often express uncertainty about who played which part in well-known relationships – or in any relationship – and the same terms are employed in Greek to describe heterosexual relations that are largely unrelated to such stereotypes. A better way for an English speaker to understand the terms would be to connect them to our habit of saying that someone “admires” someone else in a romantic context; one person is thus the “admirer” and the other the “admired” (though this expression is less common). Although this does suggest some inequality, it does not describe, in any detail, what will happen (or has taken place) between the two, and its use may arise from circumstances as different as one person’s being more vocal about his or her feelings than the other or a significant inequality in the interest the two parties have in each other. Being the “admired” does not necessarily mean being unmoved, having no reciprocal feelings, or needing to be persuaded.” (57-58)

In fact, in addition to the more sensational aspects of Roman sexuality presented – as sensational – by imperial literature, there were also many same-sex couples in the Roman world who lived together permanently, forming unions neither more nor less exclusive than those of the heterosexual couples around them. (65)

Hadrian and Antinous were doubtless the most famous romantic couple in imperial Rome of the second century, although there was no legal relationship between them; both were free men united simply by love, and when Antinous died tragically Hadrian grieved for him publicly as he would have for a wife. (66)

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<sup>12</sup> I note, importantly, that quoting from Boswell in no way necessarily intimates agreement with his essentialist theory of homosexuality – that is, the claim that there have been people in all times and places who were essentially homosexual, not that different from today’s homosexual community. I am aware, and think that Rabbi Leonard Levy will deal with in detail, of the fact that most current scholarship of gay history rejects the essentialist theory. I am unqualified to judge, which only reinforces my conviction that basing halakhic decisions upon current theories of scholarship is risky at best. Nonetheless, the quotations from Boswell still serve the important function of demonstrating that, whether the people in question were essentially homosexual or reflected what a person could do (not what a person could be), is not relevant here. What is relevant is that, either way, Boswell has demonstrated clearly that there were monogamous and loving relationships among men, and that is the point that is critical to an evaluation of the claim regarding which this part of my paper is addressed.

Although writers sometimes infer from the literary stereotypes of the fourth-century Athens that all ancient homosexual relationships were temporary and age-related, the evidence suggests, as noted above, that this picture is exaggerated even for Athens, and homosexual relationships in the rest of ancient Europe were certainly far more varied and flexible than this, probably not very different from their heterosexual counterparts. (71)

In antique romances male lovers usually have permanence, exclusive relationships precluding similar relations with other men, not necessarily excluding a heterosexual marriage; they appear to be unions characterized by general equality, although there is sometimes an age differential, and the idea that one party will be the “lover” and one the “beloved” persists even in the face of social realities militating against it. (72)

This popular ideology of sex as involving an older or more powerful or richer male deriving pleasure through insertion from a younger or poorer or dependent male or a female should not be confused with a description of reality, any more than the English insult “f\_\_k you” should be taken to indicate either the likelihood of sex between the speakers involved or the belief that performing the act in question always and everywhere humiliates or demeans the other party. The same inarticulate stereotypes and rhetorical shorthand for sexual power in the ancient world almost certainly yielded in private, then as now, to a more flexible reality, responsive to the complex varieties of individual human desires and passions. (79)

So much, then, for the idea that the only type of homosexual relationship known to the ancients, including the Rabbis, was of the coercive or controlling or age-differentiated couple. And what Bosell demonstrates for male homosexual relationships, Bernadette Brooten does for female homosexual relationships in her book, *Love Between Women: Early Christian Responses to Female Homoeroticism*.<sup>13</sup>

c. It is amazing that those who argue that the Rabbis meant only homosexual relationships of non-equals ignore the fact that if the David and Jonathan biblical tale is to be understood as reflecting homoeroticism, as many wish to intimate or claim outright, then the Bible itself recognizes the possibility of a loving relationship between equals.

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<sup>13</sup> Chicago: University of Chicago Press, 1996.

And if there are any hints of a homosexual relationship in the Rabbi Yohanan and Resh Lakish tales of Bava Mezia 84a, it, too, is a relationship between equals. Finally, note the one actual instance of homosexual intercourse mentioned in rabbinic literature, Yerushalmi Sanhedrin 23c,

רבי יודה בן פזי סלק לעיליתא דבי מדרשא וראה שני בני אדם נזקקין זה לזה אמרו ליה  
רבי הב דעתך דאת חד ואנן תרי

Rabbi Yehudah ben Pazi went up to the attic of the academy and saw two men having intercourse with each other. They said to him, “Rabbi, take note that you are one, and we two.”

This passage, too, gives no indication that the actors are anything but equals. And, while it probably cannot be proved absolutely, the phrase שני בני אדם seems to imply also that they are probably of the same age, or, at least, not very far apart in age.<sup>14</sup>

Thus, there is no evidence to support the claim that the prohibition against homosexual acts in Leviticus refers, either in the Bible or for the Rabbis, to coercive acts carried out between non-equals.

### 3. The verses in Leviticus refer to humiliation and denigration, as a woman.

This claim is not entirely divorced from the previous. If it is the case that there were loving homosexual relationships between equals (and that has already been demonstrated above by the quotations from Boswell) then it follows that even if one can find myriad statements that reflect the use of intercourse as a sign of humiliation or denigration (as one certainly can), and even if one can find myriad references to the fact that being penetrated is to be “woman like” (which one can certainly find, and for obvious reasons), it would not follow from these myriad quotations that a legal prohibition against intercourse between two males is prohibited because the penetrated partner is being humiliated or denigrated. Remember what was quoted from Boswell above:

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<sup>14</sup> Were they unequal, the language would probably be something like העבד ורבו, האב ובנו, הרב ותלמידו, האב ובנו, העבד ורבו.

This popular ideology of sex as involving an older or more powerful or richer male deriving pleasure through insertion from a younger or poorer or dependent male or a female should not be confused with a description of reality, any more than the English insult “f\_\_k you” should be taken to indicate either the likelihood of sex between the speakers involved or the belief that *performing the act in question always and everywhere humiliates or demeans the other party* (emphasis added).

Nobody is questioning that intercourse can, and sometimes is, used as a means of exercising power and inflicting humiliation and denigration, but there isn't a clue in the text of the Torah or the Talmud that that was the underpinning of the prohibition.

It isn't necessary to expand on the positive statements of the rabbis about love and marriage, and surely they did not consider acts of intimacy within it as acts of possession or denigration or humiliation. Of course women are “penetrated.” But that isn't necessarily a negative claim. It can be simply a factual one. Of course, it *can* be a negative statement about women, and reflect an attitude that they are inferior or there for men's control. But, it is simply untenable to refer to statements which clearly reflect such negative views and extrapolate from them to the claim that the very essence of the prohibition in Leviticus is based on a desire to prohibit such denigration. That is a claim that has to be proved, not asserted. It is every bit as logical to contend that the underpinning of the verse in Leviticus is to prohibit these acts, even though they are enacted between equals, with love and with no intent of denigration or humiliation. To argue as those who have proposed this argument do is to assume the conclusion in the argument itself, rather than have that conclusion follow from the argument. To argue that the prohibition against homosexual acts in Leviticus is a type of misogyny which it is immoral to leave stand, is misguided at best and absurd at worst.

Again a word about halakhic method. Surely it is the case that decisors may have predispositions to reach specific conclusions in specific cases. Indeed, having such a predisposition is not even to be considered a fault. But, there must be a difference between having a predisposition and being able to reach the desired conclusion in a defensible way. Imposing unproved and very questionable meanings on biblical verses is hardly in that category. Some have claimed that a good *poseik* does not come to the task

of decision making with any predispositions whatsoever. I claim that a good *poseik* is one who is sufficiently dispassionate to be able to tell whether his predispositions have blinded him to the indefensibility of his arguments.

Those who espouse the “humiliation, denigration, degradation, woman-like” theory see the verse in Leviticus 18:22 as forbidding the active partner to humiliate, denigrate, degrade, or treat as woman-like, the passive partner. But, there is no prohibition against being the passive partner – the humiliated one. The proponents of this view must find this surprising since the penetrated partner is the one who has subjected himself to humiliation and degradation, and who, in other societies, was considered, by their logic, to have committed the far greater violation, by turning himself into a woman.

Some of the attempts to solve or at least to react to this issue deserve a comment or two.

Rabbi Steven Greenberg, in his book *Wrestling With God and Men: Homosexuality in the Jewish Tradition*,<sup>15</sup> writes:<sup>16</sup>

This rabbinic exploration into active and passive sexual roles offers an interesting and important insight. The verse in Leviticus according to both R. Ishmael and R. Akiva is about active, rather than passive, partners. In other words, the central prohibition – the one concerning which there is no doubt – is that of penetration. The receptive party’s guilt is interpolated into the prohibition in one way or another, but he is not the main focus of the interdiction. This is particularly remarkable because in many societies men who penetrate other men are not considered deviant. It is receptive men who violate the given social order by playing a woman’s role in sexual intercourse. Whatever the reason or reasons that undergird the prohibition in Leviticus, the text appears to be concerned primarily with the man on top, the penetrating partner, and only in a derivative fashion with the receptive partner.

And later he wrote:<sup>17</sup>

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<sup>15</sup> Madison, Wisconsin, The University of Wisconsin Press, 2004.

<sup>16</sup> Page 84.

<sup>17</sup> Page 200-01.

It appears, then, that penile penetration in intercourse is understood in both cultures as an act of domination injurious to true men and appropriate to others. Sexual penetration of one man by another is by definition a humiliation and feminization of the penetrated partner... Regardless of one's will or desire, being sexually penetrated demotes one to the status of a woman ...[I]n Judea it is God who prohibits such humiliation and who prescribes punishment for both the aggressor and the one who willingly submits himself to humiliation.

It is to Greenberg's credit that he recognizes this type of reading of Leviticus as a "creative rereading,"<sup>18</sup> and one to which "most Orthodox rabbis" will not be too receptive. There are, of course, many who are not Orthodox who are also not too receptive. Even those usually more receptive to the use of rationales in halakhic discourse than most of the Orthodox rabbis to whom he refers, would probably agree with them in this case. Why? Because Rabbi Greenberg's creative reading does not really fit the text well.

His reading requires us to accept the claim that any act of intercourse between men made the penetrated into a woman. Remembering Boswell's evidence, that would not be a necessary reading on the part of the Rabbis. And, given that the simple meaning of the words of the text do not actually say what Greenberg interprets them to mean, one should apply the principle *המוציא מחבירו עליו הראיה*. It would be Greenberg's task to prove that the rationale behind the verses is as he says *even when loving and monogamous homosexual unions were known to the Rabbis*. That proof is entirely missing, and makes the thesis untenably weak, even for one who might otherwise take rationales into account.

Furthermore, the "incidental" nature of the guilt and liability of the passive partner is a negative for Greenberg's interpretation. The liability of one who allows himself to be humiliated should not be "incidental." If the goal of the Torah is to make clear that for Jewish men it is impermissible to humiliate another man by making him into a woman, as opposed to the other nations for whom this was not problematic, it should do so without mentioning the penetrated party. And, if the Torah could not ignore the penetrated party, since being that party and agreeing to the humiliation is agreed by everyone to be an

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<sup>18</sup> Page 214.

offense, it should have equal prominence with the penetrating party, since we might otherwise think that the Torah is turning the view of the nations on its head, making only the penetrator liable, and not the penetrated, especially since there is no other place in the Torah where the issue is dealt with.

We could spend several pages discussing the various nuances suggested by some regarding the *baraita* quoted by the Bavli from the Sifra<sup>19</sup> as the source for the אזהרה for both the שוכב and the נשכב. Some have made interesting observations about rabbinic rhetoric regarding the dispute between Rabbi Yishmael and Rabbi Akiva in that *baraita*. But, whether those observations are correct or not, whether such a reading of the talmudic text is the strongest reading of that text or not, one thing is absolutely clear: there is not one scintilla of ambiguity that the Rabbis *knew* that the Torah forbids, with both warning (אזהרה) and punishment (עונש), being either the active or the passive partner in a forbidden homosexual act.

For us as halakhists and halakhic Jews that is, as it must be, what counts most. The universally acknowledged prohibition against being either the active or the passive partner in a forbidden homosexual relationship is uncontested, and it is דאורייתא. The rabbinic quest to find the אזהרה for both of the offenses which the verse in Leviticus 20:13 clearly punishes is not an aberration in rabbinic literature, it is a commonplace. The phrase עונש שמענו אזהרה מנין is frequent enough in the literature, and to those who are familiar with it, to understand its implication: The offense is clear, but the biblical source of the warning is not. The Rabbis must find that source by some exegesis, but the question can be only *from where* do we know the warning, not *whether* there is a warning.

### What Exactly Is Forbidden

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<sup>19</sup> See page 618 of my earlier paper for the *baraita* from Sanhedrin 54a = Sifra Kedoshim 9:14, Weiss edition page 92b)

It seems to be becoming commonplace to suggest that what is forbidden is anal intercourse, or anal penetration, and that alone. That suggestion leads some to far-reaching conclusions. We forbid what is forbidden, but anything other than what is biblically forbidden is permissible. A relationship between two males that avoids actual anal intercourse or penetration is perfectly valid and halakhic. The other sexual behaviors in which they may engage are not forbidden. Also, since we have made our position regarding anal intercourse/penetration clear, we can perform marriages/commitment ceremonies for homosexual couples and work on the premise that they obey our dictates, in exactly the way we make our dictates clear to heterosexual couples that they must not engage in intercourse when the woman is a menstruant, and we perform marriages for them on the premise that they do not violate what we demand. And, we are entitled to “check up” on the behavior of homosexual couples to exactly the same extent that we do so for heterosexual couples. It is to these suggestions that we must now address ourselves.

It is absolutely correct that an act which makes those who engage in it liable for execution under the law is anal penetration by one male of another, in which case both are equally liable. We shall discuss below whether that is the **only** act which brings with it such liability. First, however, it must be made clear that the use of the terms “intercourse” and “penetration,” is often misleading in this context, even if and when the authors who use these terms know full well what I am about to make clear. The “intercourse” or “penetration” that is sufficient to bring with it full liability under the law is really העראה, the initial stage of intercourse, and that does not entail significant penetration in any way, and would hardly be referred to as anal intercourse by most.

To the best of my knowledge, there is no clear tannaitic definition of what constitutes העראה. There is, however, a clear amoraic dispute about the subject, and any responsible halakhist is duty bound to make clear just what it is that is forbidden. The source of the dispute is in Yevamot 54b, where Samuel defines it as נשיקה, i.e., genital contact, and says about it הבשר לא ידחוק, “It is comparable to a person

who puts his finger on his mouth. It is impossible that it not impress upon the flesh.” That is, according to Samuel there is no actual penetration required, simply the contact with the genital, for any contact which is similar to pressing one’s finger on the lips must impress upon the flesh somewhat, and that is sufficient to be considered “intercourse” for purposes of legal liability. Unlike Samuel, however, two tradents offer in the name of Rabbi Yohanan that העראה is הכנסת עטרה, i.e., insertion of the corona of the penis, that is, the part of the penis that sits atop the shaft. That amount of penetration is, one suspects, hardly what people who hear or use the term “anal intercourse” or “anal penetration” understand or mean. In any event, the accepted *pesak* follows the second view,<sup>20</sup> hence the assertion above that while it is correct to say that an act which brings with it full legal liability is anal intercourse or penetration, we had best make clear exactly what amount of penetration we are talking about.

And from where do we know that העראה is sufficient to incur liability in homosexual relations? The Gemara in Yevamot 54b records a question asked by Ravina of Rava: במערה בזכור מהו? בזכור משכבי אשה כתיבא. “What is the law concerning העראה in homosexual relations? It is precisely with regard to homosexual relations that the Torah has written “משכבי אשה!” Earlier on that page of the Talmud the sufficiency of העראה for the *arayot* had been deduced from the fact that Leviticus 18:29 lumps all of the mentioned offenses together (כי כל אשר יעשה מכל התועבות האלה ונכרתו הנפשות העושות מקרב), and one of those offenses (v. 19) is having intercourse with a menstruant woman. And, in Leviticus 20:18 the verb form from which the noun העראה is derived is used with reference to intercourse with a menstruant. Hence, since העראה is forbidden with a menstruant, and all of the *arayot* are compared to a menstruant, העראה is forbidden with all *arayot*. Now, the Gemara’s answer to the question posed by Ravina to Rava should be understood thus: Since the term משכבי אשה, from which is deduced that there is more than one way to “lie with a woman,” appears in the Torah in the verse about homosexual relations, and since in all of those ways of “lying with a woman” העראה is sufficient to

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<sup>20</sup> See Maimonides, *Issurei Bi’ah* 1:10, and Shulhan Arukh, Even HaEzer 20:1, in Rema.

constitute intercourse, surely the presence of משכבי אשה in the context of homosexuality is sufficient to demonstrate that העראה is sufficient for it, too.<sup>21</sup>

There is also a brief *sugya* in the Yerushalmi which provides a definitive answer to the question:<sup>22</sup>

ר' יוסי בעא: הערייה בזכור מהו? הערייה בבהמה מה היא? וכל העריות לא מן הנידה למדו?  
זכור מינה, בהמה מינה.

Rabbi Yose asked: What is the law concerning *ha'arah* in a homosexual relation? What is the law concerning *ha'arah* with an animal? Were not all of the *arayot* deduced from the menstruant woman? The case of homosexuality is also deduced from it, as is the case of an animal.

There is no likelihood that Rabbi Yose questioned whether homosexual relations and relations with an animal are in the category of *arayot*. After all, in Leviticus 20 these two categories appear right between categories which are clearly *arayot*. So, even if there could be doubt from Leviticus 18, where זכור and בהמה are mentioned last, there could be none when the Torah is considered as a whole. And surely Rabbi Yose considered it to be a whole. It is far more likely that his question is as indicated in note number 21, namely, questioning whether העראה is applicable to relations other than those between a man and a woman. The answer is a resounding “yes.”

To summarize: it is technically accurate to say that an act which entails anal penetration, which has the legal status of intercourse, incurs the full liability of the law regarding homosexual relations. Legally, however, it refers to העראה and not to complete insertion or to ejaculation.

All acts of intercourse between males are, by definition, considered to be ביאה שלא כדרכה, since, by definition, ביאה כדרכה can take place only between a male and a female. To the best of my knowledge, however, there is no clear definition in talmudic literature of

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<sup>21</sup> There seems to be no good reason to posit that perhaps Ravina did not consider homosexual relations in the category of *arayot*. His question is simply whether the category of העראה applies to acts of sexual behavior that are not between a man and a woman. After the answer given in the Gemara which I have explained, the Gemara then applies the question to intercourse with animals.

<sup>22</sup> Yerushalmi Kiddushin 1:1, 58c.

exactly what act or acts are halakhically to be categorized as *ביאה שלא כדרכה*, or what it is about those acts that makes them so categorized. It is clear, however, that an act of *ביאה שלא כדרכה* has the same halakhic status as one *כדרכה* for all requirements and liabilities of the law;<sup>23</sup> and that, both for *כדרכה* and *העראה*, *שלא כדרכה* suffices.<sup>24</sup>

The fact that even the medievals used euphemisms for the types of matters we are now discussing, makes it difficult to learn clearly even from them. Indeed, it seems to me that the closest to a definition of *שלא כדרכה* among *rishonim* comes from Rashi, who defines it as *שלא במקום זרע*.<sup>25</sup> Indeed, it seems reasonable to wonder why it appears so clear to most who have written recently on the subject that the reference is exclusively to anal intercourse. What about oral intercourse, fellatio? Surely it qualifies as penetrative, and as *שלא במקום זרע*.

Of those who have written lately, only our colleague Rabbi Simchah Roth has even entertained the possibility that oral sex is intended.<sup>26</sup> But, in my opinion, Rabbi Roth's analysis in Appendix 1 of his paper is flawed. First of all, he assumes that *ביאה שלא כדרכה* must be one or the other, either anal or oral, but not both. There is no immediately apparent reason that such an assumption is warranted. Thus, none of his proofs is sufficient to demonstrate that only anal intercourse is intended by the term, and that even assumes that the proofs which he offers are convincing in the first place. And while I suspect that Rabbi Roth may think that the term *ביאה שלא כדרכה* can tolerate but one

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<sup>23</sup> Sifra, Parashat Kedoshim 9:14 (92b), Sanhedrin 54a, Yevamot 56b: *משכבי אשה מלמד ששתי משכבות באשה*.

<sup>24</sup> See Horayot 4a.

<sup>25</sup> See Rashi to Yevamot 34b, *ד"ה שלא כדרכה*.

<sup>26</sup> Simchah Roth, "Dear David, Homosexual Relationships, A Halakhic Investigation." I refer to page numbers in the copy distributed to the members of the CJLS. Rabbi Simchah Roth mentions the question first on page 4, but deals with it in Appendix 1, pages 33-34.

meaning, since the term ביאה is in the singular, that is not so. Here is a passage that makes the point:<sup>27</sup> מכאן יש ללמוד דכל תשמיש שאינה כדרך כל הארץ נכלל בשם שלא כדרכה.<sup>28</sup>

It is not only our own colleagues who have made this claim, however. Rabbi Abraham Steinberg, in his entry מיניות, column 77 wrote: איסור משכב זכור – “The prohibition against homosexual acts which incurs the penalty of death and *karet* is specifically through anal intercourse.”<sup>29</sup> Rabbi Steinberg answered a couple of emails that I sent to him on the subject, in which I asked him how he knew that oral sex was not included. I quote verbatim what he wrote to me that is most germane to our discussion:

כתוב בתורה בעניין חיוב סקילה של משכב זכור "משכבי אשה" ובגמ' סנהדרין נד א – מגיד לך הכתוב ששני משכבות באשה, היינו רק שני משכבות יש ולא יותר, והכוונה לדרכה ושלא כדרכה. וברור ששלא כדרכה הוא בפי הטבעת – ראה ש"ת פנים מאירות ח"ב סי' קנח, ברכ"י או"ח סי' רמ אות ה, ישועות יעקב שם ס"ה. כל יחסים אחרים נקראים] דרך איברים. וראה רש"י נידה יג ב ד"ה דרך.

Regarding the liability for stoning for homosexual relations the Torah says “manners of lying with a woman,” and the Gemara at Sanhedrin 54a [reads:] “Scripture teaches that there are two manners of lying with a woman.” That is, there are **only** two and no more. And the intent is to כדרכה and שלא כדרכה. And it is clear that שלא כדרכה means anal - See Responsa *Panim Me'irof*, II: 158; *Birkei Yosef*, Orah Hayyim 240, letter *heh*; and *Yeshu'ot Ya'akov*, *ibid.*, #5. All other sexual relations are called דרך איברים. And see Rashi, Niddah 13a, s.v., דרך.

I have a great deal of respect for Abraham Steinberg, and I pursued the references he sent me to, even though I reject the claim of “only two and no more,” on the grounds

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<sup>27</sup> *Derisha* (Rabbi Joshua Volk Katz) to Tur, Even haEzer 25, end of subparagraph 3.

<sup>28</sup> Rabbi Daniel Nevins, in his paper “Homosexuality, Human Dignity & Halakha,” currently before the CJLS, mistakenly writes (page 12 in the 03.14.05 version) that I deduce from the Drisha that oral sex is in the category of ביאה שלא כדרכה. That is not accurate. I use the Drisha for no other purpose than to argue against my understanding of the view of Rabbi Simcha Roth that the term ביאה שלא כדרכה can have but one meaning. I make no deductions from the Drisha beyond the fact that from his words one can readily see that the term can have more than one referent. Rabbi Nevins also ignores the reading of the Venice 1594 edition of the Shulhan Arukh, quoted by the *Panim Me'irof*, from which it is clear that שלא כדרכה cannot be restricted to anal intercourse (see below, page 17).

<sup>29</sup> Rabbi Simchah Roth, in footnote 24, references a responsum by Rabbi Dr. Mordecai Halperin, which seems to be saying the same thing. I was not able to locate the responsum, however, and do not know what the Hebrew was for the what Roth translated as “refers to penetrative anal sex only.” In the quotation from Rambam (*Issurei Bi'ah* 1:14) which precedes this reference in his paper, Rabbi Roth adds the word “[anal]” in his translation of Maimonides’ “כיון שהערה.” Of course, that addition is precisely what I am questioning.

that I believe it means “two types,” but that there is no implication that only one manner of “unnatural intercourse” is possible. That is, the second type of משכב is כדרכה, ביאה שלא כדרכה, but that can be accomplished in more than one way.

The *Panim Me'irov*, Rabbi Meir Eisenstadt, teacher of Rabbi Jonathan Eibescheutz, quotes from Tosafot<sup>30</sup> that ביאה שלא כדרכה is not למטה והוא למעלה היא (“she on the top and he on the bottom”), but rather שמצערתה, that causes her pain, i.e., anal. And that, according to Tosafot, but not referred to by the *Panim Me'irov*, is based on the Gemara in Yoma 77b which quotes the verse from Genesis 31:50 (אם תענה את בנותי ואם תקח נשים על) and reads, according to Tosafot: כדרכך – שלא כדרכך. From this the Tosafot deduce that ביאה שלא כדרכה causes pain, and the *Panim Me'irov* deduces that the reference is to anal intercourse. The Tosafot also quote the verse from Genesis 34:2 (וישכב אותה) with the following appended explanation: ויענה, כדרכה, – שלא כדרכה. These verses and the interpretations which they quote concerning them may well have appeared thus in the Gemara of Tosafot, but do not in ours. What’s more, Rashi<sup>31</sup> both interprets differently and refers to the explanation that ביאה שלא כדרכה is referred to and rejects it. And the further proofs that the *Panim Me'irov* quotes demonstrate what he wants to prove only by **assuming** that male homosexual intercourse is necessarily anal. But, that is precisely what is here being questioned!

In passing, the *Panim Me'irov* also quotes the reading of the Venice 1594 edition of the Shulhan Arukh, which reads in the gloss of the Rema to Even HaEzer 25:2 as follows: (“And has intercourse with her either כדרכה or שלא כדרכה, but not anally, God forbid.”) This reading, which Eisenstadt rejects and which is not, admittedly, the version of the Shulhan Arukh before us, clearly understands that ביאה שלא כדרכה need not be anal. In point of fact, the main concern of the *Panim Me'irov* is to prove that ביאה שלא כדרכה is not למטה והוא למעלה היא or מאהורים באותו מקום, and he has no interest whatsoever to answer whether it might be oral.

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<sup>30</sup> ד"ה מי איכא, Sanhedrin 58b.

<sup>31</sup> ד"ה אם וד"ה מביאות אחרות, Yoma 77b.

Prof. Steinberg's reference to *Birkei Yosef* (Hayyim Yosef David Azulai, 1724-1806) adds little to our discussion above. Azulai refers to the *Panim Me'ivot* as proof that the view of *Sefer Haredim*, which forbids anal intercourse entirely and contends that במקום הראוי רק שאינו פנים בפנים (=מאחורים באותו מקום) is what is meant by the term ביאה שלא כדרכה, is false. So, Azulai's reference to *Panim Me'ivot* is not necessarily intended to demonstrate that only anal intercourse qualifies as ביאה שלא כדרכה, but to demonstrate that that term does not mean במקום הראוי רק שאינו פנים בפנים.

With regard to his reference to *Yeshu'ot Ya'akov* (Rabbi Jacob Meshullam ben Mordecai Ze'ev Ornstein, 1775-1839) I am unable to find any comment which deals directly with what we are discussing. I suspect that the reference is to the quotation by the *Yeshu'ot Ya'akov* of the midrash ויענה שלא כדרכה, and I have commented on that above.

Finally, Steinberg refers to Niddah 13a (should be "b") where the Gemara says that המשחקין בתינוקות מעכבין את המשיח. The Gemara there rejects the possibility that the reference is to acts of homosexuality, and proposes that the reference is to acts of דרך איברים. (The Gemara actually rejects this possibility as well, but that is irrelevant to our discussion.) On this phrase Rashi comments: זכור דבמשכב זכור ואינו משכב זכור דבמשכב זכור - "Doing acts דרך איברים falls under the category of wasting one's seed, but is not homosexuality [which incurs the liability for the death penalty], concerning which it is written 'the lyings of a woman.'" Dr. Steinberg contends that דרך איברים is the term used to refer to sex in any place other than the vagina (which is ביאה כדרכה) or the anus (which is ביאה שלא כדרכה). That may not be so. Indeed, it is likely that ביאה שלא כדרכה refers to any non-vaginal penetrative act, anal or oral, while דרך איברים refers to sex acts that are not penetrative, as, for example, intercrural intercourse, or even digital stimulation by one partner of the other.

What would follow from what we have been discussing is that fellatio is as biblically forbidden as anal intercourse, making those males who engage in it with other males liable for the full penalty of the biblical law. And, bearing in mind that העראה is sufficient to make a person liable, one might wonder how "realistic" it is to assume that

homosexual males will refrain from both oral and anal הֶעֱרִיאוּ, not to mention actual penetration, for their entire lives. It is one thing to assume that a heterosexual couple heeds our admonition not to engage in intercourse when the woman is a נדה and quite another to make a similar assumption about a homosexual couple. The heterosexual couple is called upon to refrain from penetrative intercourse for a restricted period each month, but there is a period of permissibility. If both oral and anal intercourse are forbidden to homosexuals, there is never a period of permissible penetrative intercourse. It is not at all clear that one might reasonably “assume” obedience to our mandate if it were that.

It has recently come to my attention that Rabbis Dorff/Reisner/Nevins/Fine have offered three talmudic sources as proof positive that it is only penetrative anal intercourse that entails the full punishment of the law. A look at the three, however, seems to prove that they are not nearly as conclusive as they believe.

I start with the last one offered, from Yerushalmi Megillah 4:1, regarding Ezra’s *takkanah* that women wear a *sinar* which covers the genitals both in front and behind. This edict is explained by Rabbi Tanhum bar Hiyya as stemming from an incident: מפני מעשה שאירע, מעשה באשה שבעלה קוף מכדרכה ושלא כדרכה – “Because of an incident in which an ape had intercourse with a woman both vaginally and שלא כדרכה.”<sup>32</sup>

Clearly, of course, שלא כדרכה in this passage refers to anal intercourse, since otherwise the solution of the *sinar* is ineffective. However, it is worth raising here what was raised above with regard to the paper of R. Simha Roth, namely, that there is an implicit assumption by our authors that שלא כדרכה means one type of sexual contact, and not multiple types. Nothing that compels such a view. Surely, nobody denies that anal intercourse is ביאה שלא כדרכה. What is at question is whether that *alone* is ביאה שלא כדרכה, and this Yerushalmi passage in no way proves such a claim.

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<sup>32</sup> <sup>32</sup> <sup>32</sup> I am not at all certain why our colleagues have understood the passage to refer to the woman’s husband, rather than to an ape, requiring a reading of *ba’alah* instead of *be’alah*, and understanding the word קוף as some type of verb form. In any event, both the *Korban ha-Edah* and Kasovsky in his Concordance to the Yerushalmi have understood it to refer to an ape and, for the purposes of this deliberation, whether it was the husband or an ape is not particularly germane.

We turn, then, to the two Bavli passages, Yevamot 83b and Sanhedrin 55a. In the former, Rav affirms that *אנדרוגינוס הייבין עליו משתי מקומות* – that one can incur liability for a forbidden homosexual relationship with an *androginus* from two places.<sup>33</sup> Our colleagues argue that if oral sex were included in *ביאה שלא כדרכה*, then any male has two places from which he can become liable for *משכב זכור*, and Rav’s statement has no *hiddush*. I think that they are mistaken, even *לשיטתם*, and *kal va-homer לשיטתי*, which I will get to below. Even *לשיטתם*, the *hiddush* of Rav is that *qua androginus*, i.e., *qua* one who has dual genitalia, he can be made liable from each. In other words, the *hiddush* is not his liability as a male, but as a female. So, *משני מקומות* means “both as a male and as a female with regard to their genitalia,” and has nothing to do with whether there are other manners of incurring liability.

Further, there is something quite strange about the whole *sugya*. In the view contrary to Rav’s, according to which one does not become liable through penetration of the *androginus*’ vagina, i.e., *בזכרות שלו ולא בנקבות שלו*, the term *בנקבות* is a reasonable term for what is being spoken of. But, the term *בזכרות* is hardly accurate, since it must be understood according to Rabbis Dorff/Reisner/Nevins/Fine to refer to the anus. Why an anus would be *זכרות*, when women also have one and theirs, too, can be penetrated, is problematic linguistically. What’s more, the term *זכרות* is used a couple of times with regard to an *androginus* and it means “penis.” Thus, when explaining why an *androginus* must be specifically excluded from the *mitzvah* of *ראיה*, the Gemara<sup>34</sup> explains: *אצטרך, – סלקא דעתך אמינא: הואיל ואית ליה צד זכרות - ליחייב, קמשמע לן דבריה בפני עצמו הוא* “It is needed since it might otherwise occur to one to think that since an *androginus* has a element of masculinity, he should be obligated for *ראיה*. Thus, the verse teaches us that he is considered in a class by himself.” Clearly the *זכרות* of this passage has nothing to do with his anus. Also, in Bekhorot<sup>35</sup> the Gemara says: *מטיל מים במקום זכרות, כולי עלמא לא פליגי דזכר*

<sup>33</sup> To translate *מקומות* as “orifices” is to load the dice. It is possible that the *מקומות* may be orifices, but there is nothing in the word itself that makes that mandatory.

<sup>34</sup> Hagigah 4a.

<sup>35</sup> 42b.

הוא – “If he urinates from the place of his זכרות, everyone concedes that he is considered male.”

I would offer a radically different understanding of the passage in אילולי דמסתפינא question, one, I admit, not offered, to the best of my knowledge, by anyone. In the view means “vaginal penetration,” from which no בנקבות שלו, of those who disagree with Rav however, means “oral sex,” for which liability is בזכרות שלו, liability is incurred. That is, if זכרות incurred. This reading results in an accurate understanding of the term penetrated the vaginal opening of the זכור משכב the person potentially liable for androgynus, he is not liable, as an androgynus is legally considered male. If, however, he engaged in oral sex with the androgynus, he is liable. That does not mean that if he penetrated his anus he would be not liable, but that is not the subject here, as that is not unique to the status of an androgynus. And, from the view of those who disagree with means that זכרות עליו משני מקומות Rav, we can easily see what it was that Rav intended and from נקבות ’liability is incurred both from vaginal intercourse with the androgynus oral sex with his זכרות.

Finally, the passage in Sanhedrin 55a is not a likely candidate for a clear and simple derivation. It is quite conceivable that Rav Ashi didn’t consider the possibility of sufficient flexibility on the part of the man to insert his own erect penis into his own mouth real enough to think it was the question addressed to Rav Sheshet, so he explained what the question was with reference to the other location that would be considered ביאה כדרכה. But, it is quite conceivable that what Rav Ashi considered unlikely was precisely the intent of the question asked by Rav Ahdeboy bar Ami of Rav Sheshet! If so, that very intent demonstrates that oral sex is also in the category of ביאה שלא כדרכה. Rav Sheshet rejects the question out of hand, considering any such act, as normally construed (i.e., with an erect penis), impossible either orally or anally; while Rav Ashi “saves” the legitimacy of the question by positing it as referring to what, in his opinion, was the more likely scenario, but necessitating understanding the act not as normally construed. In any event, a תירוץ דחיקא is not solid grounds upon which to build such a large edifice.

A final comment about this. It is far more important to Rabbis Dorff/Reisner/Nevins/ Fine that I be mistaken, than it is to me that I be correct. For their entire argument to stand, it must be absolutely clear that oral sex cannot be in the category of the biblically forbidden. I, on the other hand, have argued all of the above as what seems to me a logical possibility, with far reaching implications, but upon which my argument does not actually depend. **BECAUSE**, all of the above notwithstanding, I seriously entertain the possibility that I am, in fact, mistaken, and that the only behavior which incurs the full liability of the Bible's verses about homosexuality is anal intercourse. Methodologically, one had better be very certain before relying on one's own interpretation of the law that seems to be at variance with the interpretation of so many others. After all, maybe the others are really correct! So, I now turn our attention to the following question: Is the assumption correct that if only anal intercourse makes one fully liable for the violation of the biblical verses about homosexuality, that all other acts of sex or intimacy between males are either permissible, or, at most, forbidden only דרבנן?<sup>36</sup>

Let us begin with a quotation from Maimonides' *Mishneh Torah*,<sup>37</sup> which I quoted in part in my earlier paper, in a different context.

כל הבא על ערוה מן העריות דרך איברים או שחבק ונשק דרך תאוה ונהנה בקרוב בשר  
הרי זה לוקה מן התורה, שנאמר לבלתי עשות מהקות התועבות וגו' ונאמר לא תקרבו לגלות  
ערוה, כלומר לא תקרבו לדברים המביאין לידי גילוי  
. ערוה

Anyone who engages in intercourse דרך איברים with any of the forbidden relations, or hugs or kisses them with lust, or enjoys physical closeness with them, is biblically punishable by lashes, as it says (Leviticus 18:30): "Not to engage in the abhorrent practices ...," and it says (Leviticus 18:6): "You shall not come near to uncover nakedness," that is, you should stay away from things that lead to a forbidden relationship.

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<sup>36</sup> Please note that I am not going to engage, for reasons that will become quite clear below, in a discussion of the question of the circumstances that would legitimately warrant simply ignoring matters which are אסורים דרבנן. That question, however, is a very important one. One sometimes gets the impression around our table that matters which are אסורים דרבנן can be legitimately ignored at will. I reject that thesis completely, but this is not the place for me to discuss it beyond this comment.

<sup>37</sup> Hilkhoh Issurei Bi'ah 21:1.

Several matters deserve attention regarding this quotation from the Rambam. First, it is difficult to understand how some have simply ignored it, and its appearance also in Tur, Even haEzer 20, and Shulhan Arukh, Even haEzer 20:1. Second, and far more important methodologically, it is exceptionally difficult to understand how a responsible decisor could imagine that this is Rambam's own view, based on some supposed intent of his to react to the behavior of others, or whatever other justification or explanation might be offered to explain its presence in the Rambam. It is not that there are no such things in the Rambam. There are. But, while I admit that I have not checked the entire Rambam to confirm what I am about to say, I feel very confident in claiming that he would not say לוקה מן התורה about any interpretation that was exclusively his own invention. He is contending here that these behaviors are **biblically forbidden**, as that is precisely what לוקה מן התורה means. These activities do not constitute a homosexual act which is such that one who engages in it is liable by law for execution, but they are biblical prohibitions for which the established punishment is lashes. These behaviors are not forbidden דרבנן, they are forbidden דאורייתא. This is not מכת מרדות, it is מכות דאורייתא!

And if some decisor somehow overlooked it in the *Mishneh Torah*, perhaps the decisor might have found it in Rambam's Commentary on the Mishnah:<sup>38</sup>

והבא על ערוה מן העריות דרך איברין או שנשק אחת העריות או שחבק או שנגע באבר מאבריה כדי ליהנות, באיזה אבר שיגע מאברי גופה כגון אותם המתחככים ביד וברגל, וצורה זו מן התיעוב קוראים אותו חכמים עליהם השלום מנאפין ביד וברגל. וכן המצחק עם אחת העריות, והשחוק עמה והקריצה בעין לשם תענוג כל זה אסור והעושה אותם חייב עליהם מלקות, והם כולם כלולים בתוך שני לאוין האמורים בתורה האחד הוא אמרו יתעלה לא תקרבו לגלות ערוה, כאלו אמר התרחקו מדברים המקרבים והמרגילים לגלוי ערוה וכך פירשוהו עליהם השלום לא תקרבו ולא לגלות ערוה. והשני אמרו לבלתי עשות מחקות התועבות, ואלו שאמרנו ודומיהן נקראין חקות התועבות. אבל לא יתחייב כרת אלא על ביאה

If one had intercourse with any forbidden relation דרך איברין, or kissed any of the *arayot*, or embraced, or touched any of that person's limbs for the sake of pleasure, whatever limb of the body one might touch – as those

<sup>38</sup> Sanhedrin 7:4.

who rub with a hand or a foot, which type of abominable activity is called by the sages “committing adultery with one’s hand;” and also one who flirts with one of the *arayot*, when such “playful” behavior or eye winking with her is for the purpose of pleasure – all of this is forbidden, and whoever does them is liable for lashes. They are all included in two prohibitions stipulated in the Torah. The one, His having said “You should not come near to uncover nakedness,” as though He had said: “Keep far away from the things that lead to or make forbidden relationships common.” And thus did they (the Sages), of blessed memory, understand it: “Don’t get near to it, and don’t uncover nakedness.” And the second, His having said: “Not to engage in the abhorrent practices,” and these and similar practices are called “the abhorrent practices.” But, one does not become liable for *karet* except through intercourse.

Nothing could be clearer than this statement of Maimonides. The liability for execution or *karet* accrues to one only after having engaged in forbidden intercourse. But, it is not only intercourse which is biblically forbidden – all sexual behavior is also forbidden with those with whom intercourse is forbidden, and the prohibition is biblical, not rabbinic.

There is no need to quote it here, but Rambam says it again, a third time, in the *Sefer haMitzvot*, negative commandment #353. There he also gives the rabbinic source, which comes from the Sifra:<sup>39</sup>

ואל אשה בנידת טומאתה לא תקרב לגלות ערותה, אין לי אלא שלא יגלה מנין שלא תקרב  
תלמוד לומר לא תקרב אין לי אלא נידה בל תקרב בל תגלה, מנין לכל העריות בל תקרבו  
ובל תגלו, תלמוד לומר לא תקרבו לגלות, אני ה' אני נאמן לשלם שכר

“Do not come near a woman during her period of uncleanness to uncover her nakedness (Leviticus 18:9).” I might think that only intercourse is forbidden. From where do we know that “coming near” is forbidden? The Torah says: לא תקרב. From where do we know that both the prohibitions of intercourse and “coming near” apply to all other *arayot*? The Torah says (Leviticus 18:6, in the context of בשרו): “Do not come near to uncover nakedness.”

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<sup>39</sup> Aharei Mot, Perek 13:2 (85d).

Nahmanides, in his *Hassagot* to the *Sefer Ha-mitzvot* seems to disagree with Maimonides' assertion that the prohibition is דאורייתא. He seems to be understanding Maimonides to be claiming that these activities are forbidden under even innocent circumstances,<sup>40</sup> as evidenced by his quotation from Shabbat 13a, in which the subject is whether one may lie completely clothed in the same bed with his wife who is a *niddah*.<sup>41</sup> From the other sources we have quoted from Maimonides, however, it seems that he considers the activities biblically forbidden only when they are “sexual,” or “lustful.”

Indeed, though, a careful reading of Nahmanides' words indicates that he is not as concerned with whether the prohibition (and he means, even when the acts are innocent) is דאורייתא or דרבנן, but with whether this prohibition is to be counted as one of the 365 negative commandments. He wrote:

...נבין... כי אצלם זה האסור מדרבנן או יהיה מן התורה, דכל המתהני מאיסורא איסורא הוא כענין בחצי שיעור, אבל אין זה עיקר מדרש בלאו הזה אלא קרא אסמכתא בעלמא

...We can deduce ... that according to them (i.e., the Sages), this prohibition is *de-rabbanan*; or perhaps it is *de-oraita*, since anyone who benefits (or, derives pleasure) from a prohibition himself violates a prohibition, as is the case with “half a minimum size.” But that is not the fundamental derivation from this verse. Rather, the verse is merely an *asmakhta*.

The Ramban is not taking a stand on whether the prohibition against sexual activity without intercourse is forbidden דאורייתא or דרבנן. It may be the former, since the verse is an אסמכתא. On the other hand, it may also be the latter in the same way as one who eats half a שיעור of what would make him liable for כרת for the desecration of Yom

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<sup>40</sup> Indeed, there are grounds to so understand. While in the *Mishneh Torah* and the Commentary to the Mishnah Maimonides clearly indicates that the activities in question must be done “lustfully” or “for the sake of pleasure,” his wording in the *Sefer Hamitzvot* is not so clear in that regard. He says only: הזהיר מהקרב אל אחד מהעריות האלו ואפילו בלא ביאה כגון חבוק ונשיקה והדומה להם מן הפעולות הזרות. Remember, though, that the *Sefer Hamitzvot* was written after the other two works, and he specifically refers to his comments in those earlier works in his comments to Negative Mitzvah 353. Remember, also, that Maimonides' purpose in this later work is to enumerate the commandments, and not to decide the law. We should be guided as to his intent by those works whose essential purpose is the recording of the law. (I am aware that that is not the only goal of the Commentary to the Mishnah. But, the passage quoted above from it comes from a section which Maimonides prefaces with a comment which says, in essence, “I am now going to summarize the laws involved in the issues I have been explaining.”)

<sup>41</sup> In the course of his discussion, Nahmanides must claim that the statement in the Gemara דרב פדת does not imply that the other sages disagree with Rav Pedat. While Nahmanides may be right, it is not absolutely certain that he must be right. In any case, this point is secondary to the primary thesis which I am presenting.

Kippur is nonetheless in violation of a biblical prohibition. And how does the Ramban know that? From Yoma 73b, where there is a dispute between Rabbi Yohanan and Resh Lakish about whether a person who does just what we have described has done nothing wrong (i.e., it is מותר), or has violated a biblical prohibition (i.e., אסור מן התורה). In this dispute, the law follows the latter view.<sup>42</sup> The Ramban disputes Rambam only about whether the verse is to be counted as one of the 365 negative *mitzvot*, not whether the prohibition is *de-oraita*. On that issue, he simply does not make a claim at all, recognizing that there may be two possibilities.

Since there is every reason to believe that a passage from Sotah 26b will be quoted as evidence against the Rambam's contention that the prohibition we are talking about is biblical in authority, a comment or two about it now are in order. There the Gemara is engaged in an extended discussion of the types of men about whom the husband may issue a warning (קינוי) to his wife not to be alone with them, which would result in her being prohibited to her husband if she, in fact, were alone with them after having been warned. For each of the potential categories under discussion, like *arayot*, for example, the Gemara offers some thesis according to which one might have thought that the wife would not have been forbidden to her husband, because the קינוי does not really constitute a קינוי. It then affirms that the Mishnah, which includes that category among those on whose account she does become forbidden to her husband (and a couple of other things, too), was intended specifically to prevent our offering the thesis which we had thought might exclude that category. At one point in the discussion the Gemara concludes that קינוי even concerning a man whose testicles are crushed (שחוף) is a valid קינוי, which would result in the prohibition against intercourse between the man and his wife if she were alone with that שחוף. At that point the Gemara asks what the purpose of the words זרע שכבת in Numbers 5:13, in *parashat* Sotah, is, if even a שחוף is acceptable as the focus of קינוי. The Gemara answers: ...אמר רבא פרט לשקינא לה דרך אברים אמר ליה אביי... – “...Rava said (that the term זרע שכבת) comes to

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<sup>42</sup> See Maimonides, *Shvitat Asor* 2:3.

exclude a קינוי based on intercourse דרך איברים (i.e., neither vaginal nor anal). Abayee said to him: “Such behavior is mere *peritzut* (licentiousness). And does the Merciful One forbid licentiousness?”

Surely Maimonides, who considers hugging and kissing lustfully to be forbidden דאורייתא would also so consider intercourse דרך איברים. Indeed, he does so explicitly in both *Mishneh Torah*<sup>43</sup> and his Commentary to the Mishnah.<sup>44</sup> Does not Abayee’s statement, therefore, demonstrate that Maimonides must be incorrect, and that, at most, the prohibition is דרבנן? That is, in essence, what has been and will be argued.

The answer to that question is no. While it is true that one *might* understand Abayee’s statement that way, it is not likely. Not only Maimonides, but also Jacob ben Asher and Joseph Karo seem to agree that the prohibitions we are talking about are דאורייתא,<sup>45</sup> and it is highly unlikely that they were unaware of the Gemara in Sotah; and Nahmanides in his *Hassagot* does not refer to this passage as providing proof that Maimonides must be mistaken in considering these activities as a specific negative *mitzvah*, and he, too, was surely aware of the Gemara in Sotah.

This is not claim that the passage in Sotah proves Maimonides’ position. It is, however, to contend that it is completely consistent with it. Sotah probably means this: Regarding the prohibition of a woman to her husband for violation of a קינוי, intercourse דרך איברים would be פריצותא, and would not result in her being forbidden. Hence, any קינוי that is couched by the husband in terms of intercourse דרך איברים is not a קינוי, and that cannot be what the Torah intended to teach by using the words שכבה זרע.<sup>46</sup> The woman may well have violated a biblical commandment, she may even be eligible for lashes, but she does not become forbidden to her husband pending her drinking the sotah-water on that basis.

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<sup>43</sup> See above, note 37.

<sup>44</sup> See above, note 38.

<sup>45</sup> See Tur, Even haEzer 20, and Shulhan Arukh, Even haEzer 20:1.

<sup>46</sup> Below, in the section on Lesbianism, I shall address a similar use of the word פריצותא.

**But**, what if Ramban really means that the prohibition is דרבנן, and not דאורייתא? And what if he is really more correct than the Rambam, the Tur and the Shulhan Arukh? Would that make a difference? Would that suggest that the CJLS should reconsider its Consensus Statement of 1992? We must address a few remarks now to these questions.

1. Methodologically: The position of the Rambam, the Tur and the Shulhan Arukh surely has the weight of precedent behind it. It would take a daring (probably foolhardy) decisor, indeed, to affirm with certainty that they are incorrect, absolutely and without question. A responsible *poseik* would at least have to admit that we have here a case of doubt – it being unclear whether the prohibition is דאורייתא or דרבנן. A responsible *poseik* also recognizes that the decision which he renders becomes, at least *de jure*, the will of God. Could there be any clearer reason to apply the principle לחומרא דאורייתא? At a minimum, even one who strongly believes that he understands Ramban correctly – ignoring the fact that Ramban himself seems only interested in determining whether this prohibition is to be counted as a separate *mitzvah* – ought to admit that the matter is hardly resolved, and that his conviction concerning the position of the Ramban is sufficiently tenuous as to warrant considering the possibility that he may be wrong. And, if that be the case, halakhic methodology demands of the *poseik* to apply the principle לחומרא דאורייתא.
2. If the *poseik*, despite the above, feels so strongly that his analysis and understanding of Ramban is so correct as to allow him to decide that there is no ספק here, and that he is willing to act according to the Ramban, that *poseik* is duty-bound to think about the logical implications of his decision. If one allows sexual behavior between two people who are ערויות to each other, so long as they do not violate what is אסור דאורייתא, there does not seem to be any defensible reason to distinguish, legally, between any ערויות. What would be permissible for two men or for two women would be permissible for a man and his daughter, in a non-coercive relationship; or for a man and a woman, each still married to someone else, in a non-coercive relationship; even between a man and two

different married women in a non-coercive relationship.<sup>47</sup> And more: does the assertion that X is forbidden *דרבנן* make it so easily ignored or overturned? Has the category *דרבנן* no authority in the Conservative Movement? Does the uncontested weight of precedent count for nothing among us?

3. Some will argue that we often “turn a blind eye” to other instances of the same type of behavior (i.e., sexual behavior short of actual intercourse, either *כדרכה* or *שלא כדרכה*) which are equally forbidden by the standards of the law. They will, in particular, refer to an unmarried man and an unmarried woman who are not *ערויות* to each other, but where the woman is unlikely to have been to the *mikveh* since the end of her last menstrual cycle, so that any physical contact between them is forbidden by Maimonides’ standard since she is legally a *niddah*; or, to a married couple whose behavior during the woman’s period does not meet the standards of the law, even though they do not engage in intercourse. If we can “turn a blind eye” to these infractions, then we can “turn a blind eye” to the infractions that might be present in the relationship between two men, too, so long as they do not engage in anal *העראה*. These arguments are deserving of more lengthy treatment than they will receive here, but a couple of comments are required:

- a. The Law Committee has not been asked to rule on those issues, and there is a very big difference between “turning a blind eye” and issuing a ruling. The closest we may have come to ruling on those issues was in the Pastoral Letter on the subject of sexuality which was not a paper prepared for the Law Committee and was not subject to the same deliberation as are its papers. It should never have been brought before the Law Committee in the first place. And once it was, the Law Committee should have been wise enough to refuse to consider it. Regrettably, it was brought to the

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<sup>47</sup> I suspect, of course, that some will contend that these latter examples must continue to be forbidden because to permit them would be destructive to families. I think, however, that there is no evidence whatsoever to suggest that the Torah’s *ערויות* prohibitions are based on that premise, nor do I think that there is any evidence that families would be destroyed if there were consensual relations between people who are *ערויות* to one another, with the knowledge of the other party. The *ערויות* are forbidden because they are *ערויות*, independent of whether there would be any negative effects upon any one if they were to engage in relations with each other.

Law Committee, and the CJLS was not wise enough to refuse to consider it. To consider its claims and implications as positions of the Law Committee seems, however, to be unwarranted.

- b. There is a very big difference between things that a *poseik* may say in the privacy of his office to one who seeks his halakhic advice (as, for example, privately telling an unmarried, single, couple who will clearly not listen to a *pesak* that they not engage in any sexual behavior, that the woman should, therefore, go to the *mikveh*), and making public statements about the same subjects. It is not the Law Committee's business to know whether a *poseik* has ever offered private advice to people who have sought his decision on certain matters, or what he might have said to them. But, it is very much the Law Committee's business to know what he, as a member of the Law Committee, is prepared to state publicly and to advocate as a publishable *pesak*. If a decisor decides to go public with what might be or has been his private advice, it is no longer possible to claim that it is private and that any of the logical inferences that can be drawn from it ought not to be. It might be possible to offer a private decision that one intends to be applicable to one party in one set of circumstances, when the decision is offered to that party. It is not possible to prevent correct and accurate extrapolations from such a decision once it is offered publicly.
- c. Even if one were willing to offer public *pesak* on cases like the two listed in 3 above, there is a very big difference between decisions that one might reasonably offer regarding a relationship which either already is, or, at least, has the potential to be a valid, legal, halakhic relationship, and offering similar decisions regarding relationships which can never have halakhic sanction.

Now, where does all of this leave us? It seems clear beyond question that the claim that all that is forbidden is penetrative anal intercourse is halakhically false. What is forbidden is sexual behavior with a partner with whom one could not legally have intercourse.<sup>48</sup> We can leave without a definite answer whether the prohibition is דאורייתא (though I believe that it is) or דרבנן. But we can leave that ultimately unresolved because even if it were דרבנן, no reasonable *poseik* would legitimately conclude that the prohibited behaviors became permissible thereby. Such a conclusion ignores the strength of laws which are דרבנן, it results in logical derivations that are quite unacceptable, and it fails to distinguish between relationships which are, or can be, legal, and those which are not and cannot be.

We have now answered what exactly is forbidden.

### Lesbianism

Though I have been trying to limit my repetition of items that were already spelled out quite clearly in my earlier paper, I think it important to review what was said there about lesbianism. I copy it below.

The sages have forbidden female homosexuality. At bottom line, then, the primary difference between male and female homosexuality is that one is אסור דאורייתא and the other is אסור דרבנן. Female homosexuality is no less forbidden by the law than male homosexuality. It is the classification of the prohibitions that distinguishes them from one another.

I think it is important, furthermore, to make clear why lesbianism is forbidden דרבנן rather than דאורייתא from a legal point of view. Let us, therefore, look first to a *baraita* in the Sifra:<sup>49</sup>

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<sup>48</sup> I allow myself to ignore the question of whether what we have been discussing is equally applicable to לאו איסורי לאו as to איסורי מיתה or איסורי כרת, though that is a subject worthy of discussion. The reason is obvious: we are here dealing with the latter categories, not the former.

<sup>49</sup> Aharei Mot, Parashah 9:8 (Weiss edition, 85d).

או כמעשה ארץ מצרים וכמעשה ארץ כנען לא תעשו, יכול לא יבנו בניינות ולא יטעו נטיעות כמותם תלמוד לומר ובחקותיהם לא תלכו, לא אמרתי אלא בחוקים החקוקים להם ולאבותיהם ולאבות אבותיהם ומה היו עושים האיש נושא לאיש והאשה לאשה, האיש נושא אשה ובתה והאשה ניסת לשנים לכך נאמר ובחקותיהם לא תלכו

“You should not follow the acts of the land of Egypt or the acts of the land of Canaan (Lev. 18:3) – Is it conceivable that [the Israelites] should not build buildings or plant plantings as they (i.e., the Egyptians and Canaanites) do? The Torah states: ‘You should not follow their practices (ibid.)’ – [implying] ‘I (God) have declared prohibited only the practices which they and their ancestors established.’ And what did they do? A man would marry a man and a woman [marry] a woman, a man would marry a woman and her daughter, and a woman would be married to two men. Regarding these it is said: ‘You shall not follow their practices.’”

Among the practices mentioned in the Sifra as intended by Leviticus 18:3 is lesbianism.

The prohibition is grounded in כמעשה ארץ כנען לא תעשו. According to this *baraita* lesbianism is forbidden by implication of the Torah itself. If so, why is the claim always made the female homosexuality is forbidden only מדרבנן? Maimonides’ wording of the law provides an accurate answer.<sup>50</sup>

נשים המסוללות זו בזו אסור וממעשה מצרים הוא שהוזהרנו ... אע"פ שמעשה זה אסור אין מלקין עליו, שאין לו לאו מיוחד והרי אין שם ביאה כלל... וראוי להכותן מכת מרדות הואיל ועשו איסור

“Lesbianism is forbidden, being ‘a practice of Egypt’ about which the Torah has warned... And even though the act is forbidden, lashes (i.e., the normal punishment for violating a negative commandment) are not given because (the offense) has no unique prohibiting verse and there is no actual intercourse involved ... But it is appropriate that [lesbians] be whipped under the category of מכת מרדות since they have acted in a forbidden manner.”

According to Maimonides, therefore, the *baraita* in Sifra posits lesbianism as forbidden דאורייתא though not punishable as a violation of דאורייתא norms. Since there is no *specific* mention of lesbianism in the Torah’s prohibition, מכות דאורייתא cannot be invoked.

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<sup>50</sup> Issurei Bi’ah 21:8.

Nonetheless, lesbianism is itself **אסור דאורייתא** and we refer to it as **דרבנן** only in terms of the applicable punishment – **מכת מרדות**.

Given what we have just said it should be clear that the passage in Yevamot 76a, which refers to lesbianism as **פריצותא בעלמא** – “simple lewdness” – has been popularly misunderstood. Understanding that passage to imply that lesbianism is merely some petty offense ignores its context there in the Gemara. The question being addressed is whether having engaged in an act of lesbianism renders a woman unfit to marry a priest, because of **זנות**. If that question is answered in the affirmative, it would imply that an act of lesbianism is intercourse. That was the opinion of Rav Huna. Rava, however, claims that such a woman could not be in the legal category of a **זונה** because intercourse is not involved. From the perspective of the woman’s eligibility to marry a priest, or to remain married to her husband, the act was **פריצותא בעלמא**, i.e., not intercourse. This passage in Yevamot does not contradict the clear statement of the *baraita*. Both male and female homosexuality are forbidden. Male homosexuality is forbidden by specific prohibition of the Torah, female homosexuality by implication of the Torah. Both are equally forbidden, though not equally punishable.

This concludes what I wrote about the subject in my previous paper. Now I shall react and respond to the claims that have been raised against that thesis.

It is, in fact, correct that I have based myself on Maimonides’ understanding of the law, as based on the *baraita*, and not contradicted by the Gemara in Yevamot. Not only is Maimonides an **אילן גדול**, that he is no doubt correct. There is no more sound **halakhic** methodology than to interpret texts of the halakhic tradition, when possible, in a way that leaves them intact and that does not compel one to reject one of them as non-authoritative. Of course, it is not always possible to do so. And, when must one accept that one of the sources is not authoritative? When one can prove that the other one contradicts it. Thus, if one could prove that the Bavli contradicts the claim of the Sifra, the view of the Bavli would have systemic primacy over the Sifra. If, however, the two sources can reasonably be judged not to contradict each other, reasonable decisors of law would always opt for that choice above creating a dispute where one is not necessary.

The process of halakhic decision-making and the process of rabbinic scholarship are not at all identical undertakings, even if they share many of the same primary texts as their focus. Thus, it is conceivable that a scholar of rabbinics may have a reasonable case that the Bavli was often unaware of *baraitot* in the Sifra – and the scholar may even be correct – but that fact would be halakhically irrelevant unless the scholar could prove that **in this case** there is strong evidence that the Bavli contradicts the claim of the *baraita*. If the Bavli does not necessarily contradict the claim of the *baraita*, and the two texts can be understood to be in harmony with each other, no responsible **halakhist** would draw halakhic conclusions from the claim of the scholar. And, that contention is as true of decisors of the Conservative Movement as it is of decisors of movements to our right. It reflects, I believe, a gross misunderstanding of the nature of decision-making in the Conservative Movement to affirm that our *poskim* can adopt a scholarly claim as halakhically decisive against the accepted methodology of the halakhic system itself. That some of us fall into this trap with all too great frequency – usually when scholars who have little experience with halakhic decision-making mistakenly perceive themselves to be not only scholars but *poskim* – does not make it valid.

Several claims of the scholars deserve comment. First, the contention that the *baraita* in the Sifra forbids only marriages, but not sexual behavior is, I believe, invalid both from a scholarly point of view and from a halakhic one. Since our focus is entirely halakhic, I suffice with the latter. Since sexual activity between a man with a man, or a man with a woman and her daughter, or a woman with two men is clearly forbidden by biblical verses (unlike sexual activity between two women), it would follow halakhically by קל וחמר that marriage between them is forbidden. It is halakhically absurd, therefore, to argue that the verses prohibit sexual activity, but that one needs the *baraita* to forbid marriage. Since it follows by קל וחמר that if sexual activity is forbidden that marriage is certainly forbidden, that cannot be the halakhic point of the *baraita*. Even if one had difficulty explaining what the point of the *baraita* was, it would be untenable to argue that its point was to forbid what already follows by קל וחמר. But if the point of the *baraita* is to add one category of prohibition – sexual activity and marriage between

women – which could not be included in the earlier biblical prohibitions because there is no intercourse involved, and to affirm that it, too, is among the “practices of Egypt,” then it would be clear (even by the placement of the “woman to a woman” clause between two clauses where it is clear that both sexual activity and marriage are forbidden) that the point of the *baraita* is to link this additional forbidden practice to others which already are clearly forbidden – and the prohibition would be identical, namely, both sexual behavior and marriage.

Furthermore, though translated above “a woman [marry] a woman,” the word “marry” is in brackets because it does not appear in the Hebrew, even though it does appear for all of the other categories in the *baraita*. It would have been logical for the *baraita* either to use the verb “marry” (or its passive form, “be married”) for all of the categories or to use it for the first category and presume its applicability to the remaining categories. What is not logical is what we, in fact, have: using the verb for categories one, three and four, but not for category two. The most reasonable explanation of this seems to be as follows: In categories one, three and four, where one of the parties is a male, intercourse (which requires penetration) is actually possible, and the relationship between the two (or three) parties can be called “marriage.” In category two (woman to woman), where penetration is not possible and therefore the act cannot be called intercourse, the verb would be inappropriate. Hence, it is clear that the inclusion of lesbianism in the *baraita* cannot refer to “marriage,” while permitting sexual activity. For the *baraita* there cannot be “marriage” between women, so it must be prohibiting sexual activity.

The passage from Hulin 92a-b has been quoted as demonstrating that the Bavli, in fact, did not know the *baraita*. The Gemara reads:

עולא אמר: אלו שלשים מצות שקבלו עליהם בני נח, ואין מקיימין אלא שלשה: אחת שאין כותבים כתובה לזכרים.

Ulla said (concerning the verse in Zechariah 11:12 – “They weighed out my wages, thirty shekels of silver”): [The thirty shekels] refer to the thirty

commandments which the Noahides accepted upon themselves, though they comply only with three: one, that they do not write a *ketubbah* for a male ...”

How is the case made that this passage proves that the Bavli didn't know the *baraita* in the Sifra? The argument is offered that had the Bavli known the *baraita* it should have offered it in Hulin as evidence that Ulla is incorrect, and that gentile men did marry one another. Those who offer this argument recognize that it has a weakness. That is, there is really a distinction between what the *baraita* says and what Ulla says. At most, what could be sought is the quotation of the *baraita* in the Gemara's discussion of Ulla in order to make clear what the difference between them is. Indeed, there are passages like that in the Bavli. But when there is a difference, and it is clear, the failure of the Bavli to quote the *baraita* in no way proves that the Bavli didn't know the *baraita*. And that is the case here. The *baraita* speaks of a man **marrying** a man. Ulla speaks of a man **writing a *ketubbah*** for a man. Rashi, commenting on Hulin, has it exactly correct: דאע"פ דחשודין – למשכב זכור ומייחדין להם זכר לתשמישן, אין נוהגים קלות ראש במצוה זו כל כך שיכתבו להם כתובה – “Even though they are suspect to engage in homosexual relations and designate a male as their exclusive partner, they do not make so light of the *mitzvah* that they write a *ketubbah* for their partner.” Ulla already presumes that men “marry” men among the gentiles, and that is precisely what Rashi means by מייחדין להם זכר לתשמישן. What Ulla adds is that even though they do this, they don't go as far as to write a *ketubbah*. The passage in Hulin in no way proves that the Bavli didn't know the *baraita* of the Sifra. There is simply no need to quote it there.<sup>51</sup>

Finally, the passage from Shabbat 65 a-b, regarding Shmuel's father and his daughters, is also referred to as evidence that the Bavli does not consider same sex activity between women to be forbidden. The Gemara there rejects the possibility that Shmuel's father, by not allowing his daughters to sleep in the same bed, agrees with Rav

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<sup>51</sup> I reiterate that none of this is meant to deny the possibility that the Bavli may not have known the *baraita*. What I am showing is that there is no compelling reason for a reasonable decisor of law to affirm with certainty that the Bavli did **not** know the *baraita*, and to use this affirmation as even supportive evidence that the Bavli does not follow the Sifra.

Huna that if they were *זו בזו* מסוללות *זו בזו* they would be considered as *זונות*. Instead, the Talmud affirms that he did not allow them to sleep together for fear that their bodily contact would engender sexual desires in them to sleep with a man. Some have argued that if the Bavli thought same sex activity between women was forbidden, it would have had a much simpler answer. Shmuel's father refused to allow his daughters to sleep together for fear that they would engage in sexual activity, which is forbidden. Hence, it seems to follow that the Bavli didn't hold that such sexual activity is forbidden, and therefore had to come up with the reason it offers.

The thesis is weak. The Bavli is unlikely to come up with the suggested solution *precisely because* it presumes that intentional sexual activity between women is forbidden! Just as the prevalent talmudic view is that men are not *השווים* regarding the prohibition against forbidden sexual activity with other men, there is no reason to presume that women are any more suspect regarding the prohibition against forbidden sexual activity with other women. It is simply unreasonable to suppose that the Bavli might explain Shmuel's father refusal to allow his daughters to sleep together because he feared that they would willfully violate the prohibition against sexual activity with each other. From the Bavli's perspective, then, the only logical alternative to claiming that Shmuel's father agreed with Rav Huna was the contention that the inadvertent bodily contact between the daughters would arouse sexual feelings that they might seek to fulfill in the "permissible" manner, i.e., with men.

In the final analysis, the position which I first expressed in my earlier paper stands. Lesbian behavior is itself *אסור דאורייתא* and we refer to it as *דרבנן* only in terms of the applicable punishment – *מכת מרדות*. The counter claims that have been raised are questionable even from a scholarly point of view, but they are surely without merit from a halakhic methodological perspective.

### Kevod Ha-beriyot

Our colleague, Rabbi Daniel Nevins, has argued for his position on the basis of the claim of *kevod ha-beriyot*. As he himself notes, the subject is complex and

deserving of thorough treatment, which neither he, nor I, is giving to it. Nonetheless, a couple of comments are in order.

It is absolutely critical to Rabbi Nevins that only anal penetration be categorized as אסור דאורייתא because it would otherwise be impossible even to consider applying the principal of *kevod ha-beriyyot* to the issue at hand. Why? Because the Bavli is about as clear as one can get that *kevod ha-beriyyot* can be applied only to matters דרבנן.<sup>52</sup> And even the passages in the Yerushalmi which apparently permit violating a biblical norm, restrict the permission to violate to שעה אחת.<sup>53</sup> Indeed, it seems that even in the cases in which איסורים דרבנן are superseded by *kevod ha-beriyyot*, it is only for שעה אחת.

More than a few pages of this paper, in the section entitled “What Exactly is Forbidden,” have been devoted to an analysis of the strength or weakness of the claim which is so central to Rabbi Nevin’s thesis, namely, that only anal penetration is אסור דאורייתא. We have also dealt with the legal considerations that a decisor should take into account even if all other sexual homosexual activity is only אסור דרבנן. At a very minimum, Rabbi Nevins ought to consider that his thesis is at least a ספק, and apply the principle that דאורייתא לחומרא.

Most importantly, however, the entire category of *kevod ha-beriyyot* may well be inapplicable to this issue. The principle means: “X may violate the law out of deference to the honor/dignity of Y.” It does not mean that “X may violate the law out of deference to his own honor/dignity.” Let us look at the cases briefly.

When the *sugya* in Berakhot 19b mandates that one must remove a garment which he discovers contains *kelayim*, HaRah (Rabbi Aharon ben Joseph ha-Levi, c. 1235-1300) explained:<sup>54</sup> – “Therefore (i.e., since אין חכמה – ‘ואין חכמה ואינו חושש לכבודם’ he removes it in the presence of everyone, and does not worry about **their** honor!” Of course there is dishonor to the person him/herself in disrobing in

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<sup>52</sup> Berakhot 19b-20a.

<sup>53</sup> Yerushalmi Kelayim 9:1, 32a, and Yerushalmi Berakhot 3:1, 6a.

<sup>54</sup> ספר פקודת הלוי: פרוש הלכות רב אלפס על מסכת ברכות ותענית, ירושלים תשכ"ב, in his comments to Berakhot 19b.

public, as is made clear in the Gemara:<sup>55</sup> אין לך משוקץ ומתועב לפני המקום יותר ממי שמהלך ערום בשוק. But HaRah is correct because what makes going around that way so despicable is that offends others. If one wants to walk around unclothed, that is one's own business, *except for the fact that it impinges on others*. It is their כבוד which makes the behavior משוקץ ומתועב.

And even if there could be some doubt that the כבוד in the *kilayim* case refers to the honor of others, there can be no doubt whatsoever in most of the cases in which the principle of כבוד הבריות is invoked in the Talmud. In the next case in the Gemara in Berakhot, about returning with a mourner on a road which will render a priest or a *nazir* impure (and, for our purposes at the moment it makes no difference whether the impurity is דאורייתא or דרבנן, since we are only concerned with the question of whose honor is involved), the priest is permitted to make himself impure out of deference to the honor of the mourner. That case is repeated in the Yerushalmi<sup>56</sup> where it is equally clear that the permission is granted out of deference to others. Indeed, there the permission is more restrictive because the Yerushalmi insists that it be כבוד הרבים. And in the next case in the Bavli, skipping over coffins to greet either a Jewish or non-Jewish king (also repeated in the Yerushalmi where it is extended to include a patriarch), it becomes permitted only out of deference to the kings – that is, X can violate the law out of deference to the honor of Y. And the case of one going to offer the Pascal sacrifice or to circumcise his son who must desist from fulfilling those *mitzvot* in order to bury a מת מצוה is again X being obligated to violate the law out of deference to Y.

There are, I admit, several passages from which one might ostensibly deduce that permission is being granted to X to violate the law out of deference to X's own dignity or honor. It is to these that we must turn our attention now. Let us first list the passages, and attempt thereafter to deal with all of them at the same time.

In the very Berakhot passage from which all of the instances above were quoted, there appears the following:

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<sup>55</sup> Yevamot 63b, and see Sifre Devarim 320.

<sup>56</sup> Berakhot 3:1, 6a.

תא שמע: "והתעלמת מהם" a –פעמים שאתה מתעלם מהם ופעמים שאין אתה מתעלם מהם; הא כיצד? אם היה כהן והוא בבית הקברות, או היה זקן ואינה לפי כבודו, או שהיתה מלאכתו מרובה משל חברו, לכך נאמר: והתעלמת. אמאי? לימא: אין חכמה ואין תבונה ואין עצה לנגד ה'! a שאני התם, דכתיב: והתעלמת מהם?

Come and hear: “You should ignore them”<sup>59</sup> – there are times when you can ignore them, and times when you ought not ignore them; How? If he was a priest and it (i.e., the lost animal) was in the cemetery, or he was an elder and it was not consistent with his honor, or if his loss would have been greater than that of the other, for such cases the Torah says: “You should ignore them.” Why? Shouldn’t we say: “There is neither wisdom nor understanding nor counsel against [the word of] God?” That case is different, since the Torah specifically says: “You should ignore them.”

At first look, this passage seems to imply that the determining factor in allowing some to ignore the biblical command to return the lost animal is their own dignity.<sup>60</sup>

The second passage reads thus:<sup>61</sup>

בעא מיניה רבה בר רב שילא מרב חסדא: מהו להעלותם לגג? אמר ליה: גדול כבוד הבריות שדוחה את לא תעשה שבתורה.

Rabbah the son of Rav Sheila asked of Rav Hisda: “What is the law concerning his right to take them (i.e., the stones used to clean oneself after moving one’s bowels) up to the roof (i.e., on Shabbat)?” He said to him: “The dignity of people is great in that it supersedes a negative biblical commandment.”

It is not critical that we go into lengthy discussion of exactly what the prohibition here might be, or even exactly which negative commandment is here referred to. What is

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[60] דברים כב:א

[61] משלי כא:א

<sup>59</sup> Deuteronomy 22:1.

<sup>60</sup> Two comments: 1) Dignity is not the issue either with the priest or the person whose financial loss would be greater than the loss of the person whose animal was lost. It is only the case with the elder. And note that כבוד הבריות is our interpretation of the issue (heavily supported by the context), even though it is not stated. 2) Refraining from returning the animal would be in the category of שב ואל תעשה, while the issue under discussion by the CJLS now is an act of קום ועשה. And, the talmudic passage requires an extra/superfluous word to use as its midrashic basis, because the idea that one might ignore the Torah’s command without specific permission by the Torah itself was virtually unthinkable.

<sup>61</sup> Shabbat 81a, end.



need not be understood to reflect such a pattern, the responsible decisor of law should be very hesitant to grant permission on their basis to violate biblical prohibitions which are clearly in the category of איסורא, and to do it בקום ועשה, and לדורות.

It is to the analysis of just how these passages should be understood that we must now turn. And, I concede in advance that there are some who understand them precisely to reflect the pattern of כבוד הבריות applying even to cases where it is one's own כבוד that is being guarded.

As a first point, note that the language seems quite strange for that meaning, and that one would expect the idiom to be something like גדול כבוד עצמו שדוחה את לא תעשה, or שבתורה, or גדול כבודו שדוחה.... That is not determinative, however, since one could reasonably argue that since the phrase applies also to cases in which X violates the law out of concern for the honor of Y, the phrase becomes its own idiom, to be used in any instance when violating the law out of concern either for one's own honor or the honor of others, irrespective of the appropriateness of the language.

Second, the idea that one's own honor takes precedence over the honor of God (i.e., that because of one's own honor one would knowingly violate what God, as understood and interpreted by the Rabbis, which is exactly what we mean by the term דרבנן, demands) is theologically counter-intuitive. It would be far more logical to presume that one should, indeed, must, forego one's own honor in order to comply with God's command, and honor Him. Indeed, according to the Bavli, that is exactly what is required in cases of actual איסורים דאורייתא. If this is correct, it would be far more logical to understand that the passages above also refer to instances in which X is allowed to violate the law out of deference to the honor of Y.

The Shabbat case<sup>67</sup> seems most plausibly understood to refer to the fact that if a person were not permitted to violate the rabbinic law by taking the stones up to the privy, that person would spend the rest of the day "violating the honor of others" by the odor which would likely be emanating from him. This is all the more compelling from the comments of the Rosh on the Gemara in Eruvin 41b, from which it is clear that one who has

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<sup>67</sup> See above, p. 39.

inadvertently gone outside the תחום, who is entitled legally only to ד' אמות, but needs to relieve himself, may ignore the תחום (which is דרבנן) because of כבוד הבריות. On this passage, the Rosh quotes Hai Gaon as saying:<sup>68</sup> “That this *kevod ha-beriyot* is because of others who will see him, and not because of his own honor.”

The Rosh himself adds the following comment: ואחר שיעשה צרכיו יש לו רשות – “And after one has relieved himself he has permission to move away from there to the point where the odor ceases, for it is not *kevod ha-beriyot* to sit all day in a dirty place.” While some will read this and assume it supports the view opposite to the one here espoused, it need not, and probably should not, be so understood. First of all, the Rosh makes clear that the odor commonly associated with relieving oneself is the primary factor here. And secondly, the Rosh’s point is that once one has relieved himself he then becomes “other” vis-à-vis the discomfort caused by the odor. So, in the final analysis, the Shabbat passage also is a case of X violating the law out of deference for the honor of Y.

Let us look now at the two passages remaining, the passage from the extensive *sugya* in Berakhot allowing a sage to refrain from returning a lost article,<sup>69</sup> and the passage from Shevuot allowing a sage to refrain from testifying in an inferior court.<sup>70</sup> Two responsa have hit the nail on the head regarding these two passages. The first, by Rabbi Isaac Blaser (1837 – 1907), a student of Rabbi Israel Salanter and one of the founders of Slobodka, and the second by Rabbi Naftali Amsterdam, another of Salanter’s students, whose responsum is printed in the collection of Blaser’s responsa.

Regarding both of the passages we are now discussing, Rabbi Blaser wrote:<sup>71</sup>

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<sup>68</sup> Rosh, Eruvin, 4:1.

<sup>69</sup> Above, p. 38.

<sup>70</sup> Above, p. 39.

<sup>71</sup> *Peri Hadash*, Part I, #52, p. 90b and 91a.

מכיון דאין כבודו של ת"ח להעיד בעמידה דנחשב זלזול לגביה הרי נדחה עשה ד"ועמדו"<sup>72</sup> משום כבוד הבריות, דכל שאינו לפי כבודו הרי הוא בכלל כבוד הבריות ... עיקר כוונתם (ז.א., בפטור חכם וזקן מהשבת אבידה) הוא גם כן רק משום כבוד הבריות, והיינו דמשום כבוד תורה אין כבודו לישא שק או קופה וזהו כבוד הבריות דפטרינהו רחמנא

73

Since it does not befit the dignity of a sage to testify standing up, it being considered denigrating to him, the positive commandment “they should stand”<sup>74</sup> is superseded on account of *kevod ha-beriyot*, for whatever is not consonant with his dignity falls in the category of *kevod ha-beriyot* ... Their basic intent (i.e., in exempting a sage or an elder from the return of lost articles) is also entirely because of *kevod ha-beriyot*, that is, that since it is beneath his dignity to carry a sack or a basket because of the honor owed to Torah, it is the *kevod ha-beriyot* that the Merciful One exempted them from “you should ignore.”<sup>75</sup>

While the language may seem slightly ambiguous, the thrust of Rabbi Blaser’s words seems to be that sages are exempted from testifying standing up and from returning lost articles out of deference to their Torah. That is, were they compelled to do those things it would violate the *kevod ha-beriyot of others* who would be witness to their denigration. Their exemption, therefore, is premised on the desire to retain the *kavod* of those who might otherwise see them denigrated. This, then, is consistent with our claim that even these passages are, in reality, instances in which X is exempted from something out of concern with the *kavod* of Y.

And, whatever ambiguity may exist in the words of Rabbi Blaser surely does not in the words of Rabbi Amsterdam, who wrote:<sup>76</sup>

בדחיה של כבוד התורה שהבזיון מתייחס רק לאדם פרטי ובתכונה פרטית כמו לילך חכם להעיד לפני קטן a ממנו וכדומה לזה, הנה מצד עצמו של החכם לא שייך לומר שידחה שו"ע דבר מצוה כי כל דרך מדת הענוה הוא שימחול על כבודו ולהתבזות מפני כבוד המקום כמו

<sup>72</sup> understood by the Rabbis to refer to witnesses. See Shevuot 30a and b, דברים יט:ז.

<sup>73</sup> דברים כב:א.

<sup>74</sup> Deuteronomy 19:17, and above note 72.

<sup>75</sup> Deuteronomy 22:1.

<sup>76</sup> *Peri Hadash*, Part I, #53, p. 92d.

<sup>77</sup> The printed text reads גדול, but that is clearly impossible, and I have corrected it as the context demands.

שמצינו בדוד המלך עליו השלום ונקלתי עוד מזאת וכו' a ... אך כל עיקר הדחיה הוא ר"ק מצד אחרים ... ולכן אם יזלזל בכבוד תורתו נמצא הוא גורם בזה לאחרים לעבור על עשה 79

Regarding the superseding of *kevod ha-torah*, where the denigration applies only to a specific individual and a specific behavior, as, for example, for a sage to go and testify before someone inferior to him, and similar matters: From the perspective of the sage himself it would seem inappropriate to claim that any *devar mitzvah* should be superseded, for it is the nature of the attribute of humility that one should forego his honor and allow himself to be denigrated out of deference to the honor of God, as we find with King David, of blessed memory, “I would dishonor myself even more. . . .”<sup>80</sup> ... Rather the basis of all superseding is always from the perspective of others ... Therefore if a sage were to treat his *kevod torah* lightly, he would cause others to violate the positive commandment, “You should fear the Lord, your God.”<sup>81</sup>

Rabbi Amsterdam’s point is quite clear. The reason for the exemption of sages from certain requirements, like returning lost articles or appearing before an inferior court, is *kevod torah*. That is, these behaviors are not befitting the honor due to the sages because of the status of their Torah. The sage himself would surely be willing to engage in those behaviors since they are the tradition’s understanding of God’s will, and it is inconceivable that the sage would hold his own honor above that of God’s honor. But, claims Rabbi Amsterdam, if a sage were to act in those ways, ways which the people perceive as cheapening the status of his Torah, his behavior would cause the people to violate the requirement to hold the sages in awe. Thus, why can a sage refrain from testifying in an inferior court, or returning a lost article? Not out of deference to his own honor, but for fear that not refraining would have a negative consequence to others. That is, X may violate the law out of deference to the honor of Y.

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<sup>79</sup> [שמואל ב' ו: כ"ט]

<sup>79</sup>See Pes. 22b and Kid. 57a for the interpretation of this verse “to include sages [דברים ו: יג.]”

<sup>80</sup> II Sam. 6:22.

<sup>81</sup> Deuteronomy 6:13. And see above, note 79.

The understanding of Rabbi Blaser and Amsterdam seems to me to be compelling, for it is consistent with the theological assumption which logic dictates, namely, that an individual could never himself consider his own honor to supersede that of God. On the other hand, one can imagine the law saying that in certain circumstances one could behave in a certain manner out of deference to the honor of others.

But, for the sake of discussion, let us even grant that there are a couple of cases in which *kevod ha-beriyot* could be understood to imply that X may violate the law out of deference to his own honor. Nonetheless, the applicability to the case on our table is highly doubtful. Why? Because even in those cases, “his own honor” is always part of a social context that involves others: taking stones to the privy, the sage not returning a lost article, a sage not testifying before an inferior court. In those social contexts **his** honor would supersede the ostensible requirement of the law. There is no case in which one’s own honor, in isolation from all other people, supersedes the requirements of the law. That is theologically unthinkable, even if one allows for one’s own honor to supersede the requirements of the law in contexts where others are involved. But, there is no social context involved in the issue on our table. There are no others involved in any public way with any refusal to grant halakhic status to homosexual behavior. What is being sought is permission for two people to violate the law in private, each out of deference to his own honor. For such a case there is no precedent, and none from which such permission might be extrapolated.

In summary: We have been spending the last few pages investigating briefly whether the concept of כבוד הבריות can be legitimately applied to the question under discussion. We find the following: 1) The concept of כבוד הבריות is applicable, according to the Bavli, only to איסורים דרבנן, and it is not at all clear that we are speaking of איסורים דרבנן and not דאורייתא. Responsible decision-making demands that we at least recognize that there is significant support for the claim that the prohibitions we are talking about are דאורייתא, and that we treat the matters in question as, at least, 2) (ספק דאורייתא). Even if we ignore the systemic primacy of the Bavli over the Yerushalmi and decide according to the

Yerushalmi position, which seems to allow כבוד הבריות to supersede even איסורים דאורייתא, that permission is only for שעה אהת, and the issues on our table cannot be so categorized in any way. 3) It is clear that in the vast majority of cases in which כבוד הבריות is utilized as the grounds to allow a *mitzvah* to be superseded, the case is one in which X is allowed to violate the law out of deference to the honor of Y. And, even those few cases which may look, at first blush, to be instances in which X is allowed to violate the law out of deference to his own honor, are more logically and compellingly explained as instances in which X violates the law out of deference to the honor of Y. And surely, the issues before us do not fall into that category. 4) Even if we grant the possibility of applying *kevod ha-beriyot* to matters of one's own honor, there is always a social context which is entirely missing in the issues before us.

Therefore, no matter how pure the motivation and how sincere the attempt, it seems unwarranted for the concept of כבוד הבריות to be considered here as having halakhic significance in our current deliberation.<sup>82</sup>

### Morality

A few weeks ago Rabbi Gordon Tucker and I spoke together in New Rochelle about the subject of homosexuality. During the question period I said, in what was

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<sup>82</sup> I relegate to a footnote my conviction that neither the thesis of Rabbi Daniel Sperber regarding *aliyyot* for women, which utilizes *kevod ha-beriyot*, nor the *shiur* by Rabbi Aharon Lichtenstein on the concept of *kevod ha-beriyot*, could really be utilized as support for the thesis which Rabbi Nevins has offered. For Rabbi Sperber, *kevod ha-tzibbur* is a sociological variable which can be trumped by the need for *kevod ha-beriyot* regarding women. While I admit that I have not asked Rabbi Sperber, I doubt that he would call the verses in Leviticus a sociological variable susceptible to trumping! In addition, I note that for Rabbi Sperber, the case is also one of X (i.e., the community) violating the law (i.e., against calling women to the Torah) out of deference to the dignity of Y (i.e., the women).

Rabbi Lichtenstein avers that utilization of the concept of *kevod ha-beriyot*, which is, as he calls it, "a very broad 'mattir,'" was sparse because "it carries the danger that those searching for 'wholesale' halakhic loopholes will utilize this principle to allow whatever they so desire." And, he claims, that "If, over the course of the generations, authorities virtually refrained from explicitly invoking *kevod ha-beriyot* as grounds for a leniency out of concern that it would be abused by those lacking the appropriate loyalty to Halakha, then today, with the development of means of mass communication ... this concern carries double the weight." I doubt that anyone at our table harbors a moment's doubt about whether Rabbi Lichtenstein would favor the view that the Torah's prohibition against homosexual behavior be overridden because of *kevod ha-beriyot*. I haven't asked him personally, either, but am convinced that he would hold up such a use as a prime example of the concern which moved *poskim* to refrain from using it in the first place.

probably quite an impassioned voice, something like: “Do you think that I would not love to be a hero to the gay community by saying ‘yes?’ Of course I would.” That statement was made after my presentation, and in answer to a question. But, an astute observer said to me afterwards, that while it might have been clear in the context of the entire evening, the statement on its own could be understood to imply that, in my opinion, the law is immoral, but that since there is nothing I can do about it, I live with it and wish that I did not have to do so. I accept the critique, and take advantage of this opportunity to make very clear that I do not believe that the law is immoral.

Every decisor of Jewish law seeks to find a way to render a decision which does not cause pain, hurt, or anguish to those for whom it is rendered. That is what I meant when I wished that I could become a hero to the gay community. I know very well that the view I have expressed in my previous paper, and which I affirm in this one, causes pain, hurt, and anguish to very many people. The fact that a decision causes pain does not mean that the decision is immoral. A moral law can have a negative consequence on the lives of people, but we make the judgment that the reasonableness and morality of the law outweigh the hurt done to the individual in such cases. That is the case here.

A significant amount of my previous paper was devoted to a (hopefully) thorough explanation and analysis of the regnant theories concerning the etiology of homosexuality. Regarding each theory I then asked whether, if it were absolutely proved to be either correct or incorrect, a moral God could demand of homosexuals what I had affirmed He does. My answer, in each case, was “yes.” I reaffirm that answer.<sup>83</sup>

It is my perception that many of our circle have decided the question of the law’s morality solely on the basis of its consequences. But that is not the best way to make this judgment, neither in this issue nor in any other. Those consequences must be considered in light of other factors, and it is precisely that which I tried to do in my previous paper. Since I have no new thoughts on the question of the morality of the law than what I have already expressed in the last paper, I simply wish to remind the members of this

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<sup>83</sup> I leave undiscussed the question of what one does, halakhically, if the law is clearly דאורייתא and one cannot find a moral justification for it. I leave it undiscussed because it is not applicable to this case. I remind the members of the CJLS, however, that I devoted some time at our retreat in 2004 to a discussion of גופי תורה and the halakhic implications of the concept.

committee that that paper is presumed by this one. Nobody should mistakenly think that I have nothing to say on this issue. I have simply already said it.

Allow me also to remind the members of the Committee that I devoted a section of my last paper to pleas for understanding and to a discussion of the implications of my position, for both the homosexual community vis-à-vis the heterosexual community, and vice versa.

### Therapy and Treatment

My desk and shelves are piled high with studies, analyses, reactions, testimonies before Congressional committees or local government committees, books, articles, reports and retorts about the possibility of therapy or treatment for homosexuals. The Law Committee itself, at its retreat in 2004, devoted considerable time and several sessions to the testimony of experts, on both sides of this issue.

Yet, I have decided not to devote much discussion to the question in this paper. I have decided that for two reasons. First, I think that our colleague, Rabbi Leonard Levy, intends to summarize, comment upon, and analyze much of the evidence on both sides of this issue – so it will be before the Committee at any rate.

Second, and the more important now, I restrict my comments greatly because I wish to avoid the type of misunderstanding that I think resulted from my comments on the subject in my previous paper. Therefore, I state with all of the clarity I can: **The prohibitions against sexual behavior between members of the same sex stand and apply irrespective of the ability to “change” the people who are homosexuals or to modify their attractions or behaviors.** This in no way denies that scientific advances and evidence are often important data in halakhic decision-making. But they can be relevant only when the halakhic conclusions are directly linked to the purported scientific facts.

In our case, though, the prohibitions are not prohibited *because* the people who engage in those prohibited actions could be “cured” of their same sex attractions or their sexual desires or fantasies. They are prohibited *even if* all or any change is impossible.

Thus, any scientific evidence as to their unchangeability is irrelevant to the halakhic deliberation of this issue, though scientific evidence may well be admissible in other deliberations of halakhic issues.

Part of what I argued last time around was misunderstood to imply that the prohibition is contingent upon the fact that those who are homosexual can change if they wish to. I did not make that claim then, and I do not make it now! To the extent that same sex attractions may be modifiable, some homosexuals may be more inclined to accept the prohibitions and seek modification of their same sex attractions. To the extent that members of this Committee believe the research that leads one to conclude that modification is possible, the greater the likelihood that it will not seek to abrogate biblical commandments in indefensible ways, out of concern for and sensitivity to the pain which those laws cause to people. That is what I was arguing (or, at least, trying to argue) in my previous paper. And, I continue to believe both.

But, I am not competent to judge (and neither, I believe, are the other members of this Committee, or, to a very large extent, homosexual men and women throughout the world) which side of this debate is correct, and whether whatever side seems to be correct today will remain correct tomorrow, or in five years, or in fifty years. I read the material with interest and I attempt to do so with whatever amount of dispassion I can muster for the task, rather than to be swept up by the atmosphere of political correctness so pervasive now in our society on this subject.

In the final analysis, though, the ability to modify or change has no effect on the law. It is not because the forbidden behaviors are correctable that they are forbidden, and, thus, no claim of their uncorrectability suffices or persuades that the law is null and void, no longer the law, or immoral.

### What is at Stake

Over the years, I have been among the strongest defenders of and advocates for the Law Committee. Both as Chair of the Committee and not as Chair I have defended in very public forums the validity of the multiple opinions which we have rendered – even

those opinions which those on this Committee know very well that I have both voted against and strenuously disagreed with. I have done so because I believe in halakhic pluralism with every fiber of my being.

Since being appointed to the Law Committee almost thirty years, I have almost been pushed over the brink on several occasions. By that I mean that there have been several positions voted by us that I have thought were outside the parameters of halakhic legitimacy. For each of them (and, thank God, there were really very few) I “convinced” myself, probably after the fact, that it did not stretch the rubberband beyond the point at which it could snap back.

What is at stake here, for me, and I believe for the Committee on Jewish Law and Standards as a body, is whether the Law Committee can continue to be seen as an halakhic decision-making body. For all of the breadth I believe that there is for pluralism **within** *halakhah*, some decisions are outside those boundaries. If we make such a decision, we are no longer legitimate halakhists, we undermine our authority as the interpreters of God’s will, and we render the Law Committee halakhically irrelevant.

I hope that I am not a fool. I believe that every member of the Law Committee could pen the final two sentences of the preceding paragraph! What is at stake in our debate on this subject is precisely this: Where are the boundaries of legitimate halakhic decision-making? For me, the wrong decision on this subject will demonstrate that we have drawn the line of legitimacy unacceptably, and have forfeited our legitimate halakhic authority.

We often affirm that our mission is to write the next chapter in the book of Jewish law, to be the next link in the unbroken chain. But, if we are to write that chapter, it must be recognizable as the continuation of the book, and not the beginning of a new one. It can be the continuation of the same book even if its decisions are sometimes radically different from those of the writers of the previous chapters, but it cannot be the next link in the unbroken chain if the method utilized to get to the conclusion would be unrecognizable to the writers of the preceding chapters, and especially if the method we use rejects the foundational premise of the authors of every preceding chapter.

In our current deliberation, the papers before the Committee which argue a position contrary to mine fall into three categories. The first category includes those papers which attempt to argue that we will continue to obey what the authors contend is biblical law, and will limit our permissive rulings to matters which are rabbinic in authority. Much of this paper has been devoted to an attempt to disprove the tenability of those arguments. I have long believed, and regularly articulated my conviction that there is nothing wrong with a *poseik* undertaking his study and research of a question before him with a predisposition to wanting to reach a specific conclusion. I have always affirmed, however, that *poskim* must be very cautious to make sure that their predisposition does not blind them to the improbability of their understandings of the relevant texts, or to the fact that they have ignored texts which cannot be responsibly ignored. I believe that several of the authors of the papers before us, whose motivation is absolutely pure, have fallen into this trap, i.e., so immediately recognizable as halakhically indefensible as to make acceptance of them laughable, at best.

The second category recognizes the weakness of the argument of the papers in the first category. The paper in this category, therefore, argues that the law is clear and דאורייתא. What we must do, in order to be loyal to recognized halakhic method, is to invoke the ultimate systemic right of *poskim* to be עוקר דבר מן התורה בקום ועשה. I would urge the authors of this paper to ponder carefully whether the Law Committee is sufficiently self-validating to warrant its taking such an action, the results of which will be irrevocable. I have made this argument on other occasions around the table of the CJLS, and I believe that it remains valid to insist that such a far-reaching action be taken only by such a body, and that the body's self-validating nature be based on more than its formal position of authority. But, in this instance, it is even more important that the authors remember that the law in question is in the category of גופי תורה, and that the right to be עוקר דבר מן התורה בקום ועשה regarding it does not really exist.<sup>84</sup> To do so, therefore, would be outside the parameters of halakhic legitimacy – even though the authors were arguing as they did

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<sup>84</sup> I would raise the same objection to the *teshuvah* which permitted a priest to marry a divorcee on the same systemic grounds. There, too, the author was attempting to reach the desired conclusion within the parameters of the system, but, I believe, ignored the fact that the right to be עוקר does not apply to גופי תורה.

precisely in order to remain within those parameters, and without doing violence to the texts which are core to this discussion.<sup>85</sup>

The approach of the third category was very straightforward, and for that I give the authors much credit. The authors did not try to “permit the impermissible” through the classical methods of the halakhic system. For these papers, whether stated openly or not, there is one crucial underlying premise, which alone allows for the argument to be made at all. That premise is that the Torah is “somehow” not entirely Divine, and, as such, not legally infallible. Thus, the verses in Leviticus have no absolute legal claim or hold on us, since it is clear to us that they cannot be expressing God’s will, since the view they express is immoral.

Again, to the credit of the authors of the papers in this category, they recognize that this claim has no source in the classical halakhic literature, and that it would be impossible to quote even one *poseik* until our day who has offered such an argument and called it halakhic. Indeed, if we think back over our most radical decisions of the past, all were written utilizing the accepted methodology of classical decisors. It was precisely that methodology that was supposed to make even the most radical departures from precedent acceptable. Some of them were well done and others poorly done, in my opinion, but they did not go outside the boundaries of the halakhic decision-making process. To the best of my recollection, none of them was based on the claim that the Torah was not Divine or not legally infallible.<sup>86</sup>

That, then, brings us to the following issue: Assuming that the type of biblical scholarship we have all been taught is correct, does that mean that the Torah is, in fact, not Divine and legally infallible? I believe that it does not mean that. The argument here

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<sup>85</sup> As I write this footnote in January 2006, I am uncertain whether this will remain a separate paper before the Committee. The authors of this position are working together with the authors of the first category described above to formulate a combined paper. I have no idea whether that will succeed, and, if it does, whether the nature of the argument of this paper will be retained. I doubt it.

<sup>86</sup> As I write this note in November 2006, the rumor mill has it that that paper will no longer be on our table in December 2006. Were I convinced that it had been removed because its authors recognized that it was outside the boundaries of acceptable halakhic decision-making, I would be happy. I doubt, however, that that is the case. Thus, I leave the paragraphs in the text which discuss that paper because, whether currently on our table or not, the argument will surely be heard again within our circles.

is over the following issue: Is theology the dog which wags the tail called *halakhah*, or is *halakhah* the dog which wags the tail called theology? It cannot be both ways.

There can be no real doubt that normatively speaking the halakhic tradition is the given, and theology is required to fall into place behind it. Theology can, indeed, should, provide the narrative which makes the halakhic tradition intellectually persuasive and emotionally acceptable and satisfying, and that narrative can change as needed, and it need not be the same narrative for everyone. Narratives, after all, are aggadic, and thus, neither normative nor binding. That claim, incidentally, in no way diminishes their importance. Whatever narrative works is fine, so long as the narrative does not reverse which is the dog and which is the tail. In this enterprise we are again in a long chain: Sa'adia Ga'on did it, Yehuda ha-Levi did it, Maimonides did it, Samson Rafael Hirsch did it, David Zevi Hoffman did it, and Joseph Hertz did it. Our movement's thinkers and theologians are as competent to provide a modern and persuasive theology of *halakhah* as were the thinkers of the past. But, we, like they, cannot undo the foundational premise of the entire halakhic system – that the Torah is Divine and legally infallible. That requires finding the persuasive and convincing way to affirm the validity of critical scholarship without allowing that affirmation to undermine the foundational premise of the halakhic system. It may well necessitate evolving a theology in which the divinity of the text is not dependent upon direct verbal revelation, but also not undermined by a claim that the text is merely inspired by the Divine; a theology which will allow us to affirm all of the things that we have learned and been convinced by concerning the composition of the text of the Torah without denying that the final result is Divine and legally infallible.<sup>87</sup> What we cannot do if we are to be the writers of the next chapter in the book of *halakhah*, however, is to make theology become the dog which wags the tail called *halakhah*, for that cannot be the next chapter of the same book. That would be the first chapter of a new book!

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<sup>87</sup> If I am not mistaken, I recall hearing Yohanan Muffs speak of the need of Bible scholars, whose scholarship has succeeded in demythologizing the ancient myths concerning the Torah and its composition, to devote their attention now to remythologizing. Regrettably, I do not believe that either they or others have done so.

I have long admitted that I am not an expert in legal philosophy, but since the idea of a chain novel, I believe, originates with Ronald Dworkin who, together with Robert Cover, are the two favorites of the Conservative naturalists, I wish to quote two paragraphs from an article of his entitled "Natural Law Revisited," published in 1982 in the University of Florida Law Review.<sup>88</sup> Dworkin wrote:

A naturalist judge must show the facts of history in the best light he can, and this means that he must not show that history as unprincipled chaos. Of course, this responsibility, for judges as well as novelists, may best be fulfilled by a dramatic re-interpretation that both unifies what has gone before and gives it new meaning or point. This explains why a naturalist decision, though it is in this way tied to the past, may yet seem radical. A naturalist judge might find some principle that has not yet been recognized in judicial argument, a brilliantly unifying account of past decisions that shows them in a better light than ever before.

Many on the Law Committee, including some who are usually called positivists, have done this with some regularity, and almost always without going outside of the parameters of acceptability so universally acknowledged in halakhic discourse.

But, it is critical to quote not only the paragraph above from Dworkin, but the following one as well:

Nevertheless, the constraint, that a judge must continue that past and not invent a better past, will often have the consequence that a naturalist judge cannot reach decisions that he would otherwise, given his own political theory, want to reach ... It is in one way misleading to say, however, that he will then be forced to make decisions at variance with his political convictions. The principal that judges should decide consistently with principle, and that law should be coherent, is part of his convictions, and it is this principle that makes the decision he otherwise opposes necessary.

Judges must refrain from making decisions which render the law incoherent, no matter how much their personal predisposition might incline them to those decisions.

Sometimes it is simply impossible for a judge to decide as his heart and head may wish him to. Under those circumstances "a naturalist judge cannot reach decisions that he would otherwise ... want to reach."

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<sup>88</sup> I have quoted these paragraphs before at a convention of the Rabbinical Assembly, though I now do not remember in what year.

So, I repeat: What is at stake here, for me, and I believe for the Committee on Jewish Law and Standards as a body, is whether the Law Committee can continue to be seen as an halakhic decision-making body.

**Addendum, August-November 2006**

Our colleagues Rabbis Dorff, Reisner and Nevins made revisions to their paper and offered it on Ravnet, labeled “Unofficial draft, not for public release – Revised, July 2, 2006,” and since someone sent that revised paper to me, I have decided to make a few comments on that version. Of course, I understand that it is unlikely that that precise paper will be before us, as I expect that our colleagues will make yet further revisions based on the comments which they will have received from those who asked for a copy of their paper. I do this now, rather than wait to see the final version, because I suspect that we will not postpone our decision any longer, though I could, of course, be wrong about that. This addendum, then, will be in the form of individual comments on specific points raised by our colleagues.

Our colleagues wrote:<sup>89</sup>

The near total failure of advocates of “cure” to convert homosexuals into heterosexuals obviates the halakhic significance of tracing the source of homosexuality. Gay and lesbian people are homosexual and will remain so...For the halakhist, therefore, the issue of significance is not the *etiology* of homosexual orientation, but rather the *permanence* of such an orientation by the time sexuality reaches consciousness.

I believe that our colleagues are absolutely mistaken in this claim, even assuming that they are correct about the “near total failure” element of their comment. It is critically important for the halakhist to study the prevalent theories of the etiology of homosexual orientation precisely because only that investigation can help them determine whether a moral God could demand celibacy of homosexuals. It is simply insufficient to point out the permanence of the orientation without asking whether there might well be a Divine

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<sup>89</sup> Page 3 of the July 2, 2006 version.

purpose to such an orientation which would be undermined if the halakhic permissions suggested by our colleagues were to be granted.

It was precisely to the investigation of the prevalent theories of the etiology of homosexual orientation, and asking about each of them whether a moral God could make the demands the tradition makes of homosexuals, that I devoted many pages in my paper of 1992. It was not for naught that I did that, but precisely because one cannot may a halakhically defensible conclusion without doing so. Our colleagues err in assuming that permanence is itself a sufficient reason to seek redress from the traditionally understood demands of the halakhic tradition. And they err in positing, at least by implication, that no moral God could make the demands that our tradition does. That claim requires proof and analysis, not mere affirmation. Such proof and such analysis are entirely missing from their paper.

In the text of their paper<sup>90</sup> our colleagues make it clear that their *teshuvah* is not intended to give permission to bisexuals to act on their attractions to members of the same gender. As they put it: "...any Jew capable of a heterosexual relationship is instructed to marry a Jew of the opposite sex and to maintain complete fidelity to his or her spouse." Footnote 19, however, undoes the significance of the entire paragraph which was intended to give preference to the heterosexual ideal. It reads:

If it happens that an individual falls in love with a member of the same sex, even though s/he may experience some physical attraction to members of the opposite sex, they are now romantically irrelevant. Therefore this person with bisexual tendencies may be considered *b'diavad* to be functionally homosexual and included in this ruling.

This footnote takes back the intent of the paragraph in the text since "falling in love" is always *b'diavad*! This retraction in the footnote is greatly puzzling. Would our colleagues say that a Jew who "happened to fall in love with a Gentile" is a case of *b'diavad*? I doubt it, of course, but cannot easily understand the distinction between the

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<sup>90</sup> Page 4.

two. Surely they would not say that in the latter case the *b'diavad* claim does not apply because the Jew had a “choice” whether to fall in love with a Gentile, because in the former case the bisexual had exactly the same “choice” whether to fall in love with a member of the same or the opposite sex. Surely they would not say that in the latter case the *b'diavad* claim does not apply because a Jew may never marry a Gentile, because the paragraph in the text of their paper implies the same claim about a bisexual having a romantic relationship with a member of the same sex. If, as the authors claim, “it is not different from our instructing single people to limit their dating to fellow Jews,” then there should be no *b'diavad* leniency for a bisexual who ignores our admonition only to date members of the same sex any more than there is a leniency for a Jew who ignores our admonition to date only Jews, and “happens to fall in love” with a non-Jew.

On page 5, and in footnote 26, the authors refer to my disagreement with them on the possible meaning of *ביאה שלא כדרכה*. First I wish to correct what I assume was a simple and unintentional error on their part. I never argued even for the theoretical possibility that masturbation between men might be in the category of *ביאה שלא כדרכה*, since I, as they, affirm that to be called *ביאה*, the act must be penetrative. Indeed, when they quote my paper in footnote 26, there is no mention of masturbation.

More importantly, however, our colleagues repeat their claim that Yevamot 83b proves that the reference must be exclusively to anal intercourse. I merely wish to remind them that I dealt with that claim of theirs, and their “proofs” from other *sugyot* as well, on pages 18ff. above. I understand, of course, that our colleagues do not agree with my analysis of the passages in question, but their assertion that the Yevamot passage makes their contention “abundantly clear” is simply false, in my opinion. I remind them, too, that I offered explanations which do seem to imply oral sex as included in *ביאה שלא כדרכה* (which, by the way, must be what all intercourse between men must be, by definition, whether explicitly stated or not since *כדרכה* means “vaginal,” clearly an impossibility between males). These, too, they obviously reject, but their rejection does

not prove them incorrect. And finally, I refer them again to the Venice 1594 edition of the Shulhan Arukh and its clear implication that *ביאה שלא כדרכה* cannot be restricted to anal intercourse.

On pages 6-11 of their paper, our colleagues treat the matter of homosexual behavior other than intercourse, and dwell extensively on their understanding of the dispute between Maimonides and Nahmanides,<sup>91</sup> reflected in the *Sefer ha-Mitzvot* and Nahmanides' *Hassagot* thereto. I, too, deal with that quite extensively in my paper now on the table of the Committee. I will, therefore, restrict my comments somewhat.

It is well known that Maimonides' *Sefer ha-Mitzvot* was written after his Commentary to the Mishnah. What's more, his intent in the *Sefer ha-Mitzvot* is not to offer clearly explained and detailed legal rulings, but to enumerate the 613 *mitzvot*. If, in the course of laying out Negative Commandment 353 Maimonides refers his readers to what he has stated in his Commentary to the Mishnah (Sanhedrin 7:4), and if there Maimonides makes clear that the biblically prohibited acts to which he refers are those done with "sexual intent;" and if, further, in his *Mishneh Torah* (Issurei Bi'ah 21:1), written after the *Sefer ha-Mitzvot* and intended to be a clear and thorough legal treatment of the matters under discussion, Maimonides is as clear as one could possibly be that the prohibition of which he speaks refers to acts done "lustfully" or for "physical closeness;" and if a host of commentators (some of whom our colleagues have dutifully listed in their notes) have already compellingly and convincingly "reconciled" Nahmanides' comments to the *Sefer ha-Mitzvot* with the other legal statements of Maimonides by saying that Nahmanides was understanding Maimonides in the *Sefer ha-Mitzvot* to be referring even to "innocent" (i.e., not sexual or lustful) acts, but that, in fact, Maimonides, too, does not consider "innocent" acts to be biblically forbidden; and if, further, it is clear from Nahmanides' comments that his major concern is whether the prohibition is to be counted among the 613 and not whether the acts are truly forbidden biblically; if all of the above are true, why would a decisor insist on understanding the *Sefer ha-Mitzvot* in a way that

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<sup>91</sup> For the benefit of those who might wish actually to check some of our colleagues references, note that the reference in the *Entsiklopedia Talmudit* should be to volume VI, not IX.

creates a contradiction between the works of Maimonides when there is no need to do so? Why would a decisor adopt his own interpretation of the Maimonides/Nahmanides conflict against the overwhelming weight of halakhic precedent? Why would a decisor justify his claim by arguing that a verse is merely an *asmakhta* “since the Bible itself never mentions or prohibits any of these acts” when that argument undermines entirely the authority of all halakhic midrash and would result in calling the mixing of milk and meat or the wearing of *tefillin* also merely an *asmakhta*, and entirely rabbinic? For the time being, let us leave these quandries with a תיקו.

More: our colleagues have proffered the argument that following Maimonides’ views (and those of the Shulhan Arukh) leads us to the prohibitions against *negiah* and *yihud* which we have long ignored. Our colleagues are quite correct that most of us, in fact, do not advocate the severe restrictions that Maimonides and the Shulhan Arukh advocate in that regard. But, our colleagues are incorrect in drawing any equation whatsoever between this and the permission they are granting in their responsum. The *negiah* and *yihud* prohibitions which we ignore are only those of “innocence,” and we justify it exactly as our colleagues say: “[we have] concluded that sexual seduction is not as near at hand as they imagined, and that average people, not just sages, can be trusted to maintain appropriate relations despite social kissing and hugging and moments alone together, even behind locked doors.” Let it be clear, however, that we have not, to the best of my knowledge, ever permitted overtly sexual behavior with clear sexual/lustful intent with people with whom intercourse would be forbidden. In my public lectures at JTS on the observance of *tohorat ha-mishpahah* over the years I have made clear that sexual behavior between the husband and the wife *is* forbidden, in my opinion, during the *niddah* period. I do not forbid “innocent” behavior, but I do not permit sexual/lustful behavior, even short of actual intercourse.

Now it is possible to answer the תיקו from above. Our colleagues must reject the widely held differentiation between “innocent” and “sexual/lustful” behavior because they could not possibly reach their conclusion if they had not done so. The behavior they permit to homosexual men and women *is precisely* sexual/lustful behavior. The behavior they

permit is not “innocent,” i.e., non-sexual behavior. It may, in their opinion, be non-intercourse, but it surely is not, and is not intended to be, non-sexual. Thus, they must reject the position that would have put them in the line of classical halakhists, and that would have allowed the Maimonidean positions to be a consistent whole. Regrettably, they have paid a very high price in terms of halakhic integrity and method to accomplish what they think they have accomplished.

#### פסק דין

A) In accordance with resolutions of the Rabbinical Assembly and the United Synagogue, we affirm that gays and lesbians are welcome in our congregations, youth groups, camps and schools.

B) Homosexuals will not be denied any honors within worship and regarding lay leadership positions.

C) Members of the Rabbinical Assembly and the Cantors Assembly will not perform commitment ceremonies for gays and lesbians.

D) The Rabbinical and Cantorial schools will not knowingly admit sexually active homosexual students, nor will they be admitted to either the Rabbinical Assembly or the Cantors Assembly. No witch hunts will be instigated against those who are already students or members.

E) Whether sexually active homosexuals may function as teachers and youth leaders in our congregations and schools will be left to the rabbi authorized to make halakhic decisions for a given institution within the Conservative Movement.