

דרוש וקבל שכר:

Halakhic and Metahalakhic Arguments Concerning Judaism and Homosexuality<sup>1</sup>

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Question:

*Can homosexuality, both male and female, be reconciled with Judaism, conceived through a halakhic lens? Specifically, can Jews who are living sexual lives with partners of the same sex be considered to be subject to the same obligations and entitled to the same rights as those whose sexual lives are with members of the opposite sex?<sup>2</sup> (In the sequel, the status that is described in this question will be called, for the sake of simplicity, the “normalization of Jewish gays and lesbians”, or, where the context is clear, just “normalization”)*

I. Introduction

This paper argues for an answer to the question posed above, and in that sense it is a responsum. But it goes beyond the treatment of the question at hand. It is a more general essay on approaches to law, and in particular on the methods that have been used to analyze and develop *halakhah*. The paper argues that those methods that have been used in the Conservative Movement have been conceived in an overly narrow way, and that this constriction of method has put Conservative *halakhic* practice at odds with the historical consciousness that has been the root of the fabulously fruitful intellectual and theological achievements of Conservative Judaism and its scholars. Approaches to understanding the authority of religious law are no more determined in our sacred texts than are approaches to understanding the authority of the texts themselves. As long-standing as those approaches may be, they are ultimately chosen by us, based on our philosophical and theological commitments. We have not shunned or feared the notion that the texts of the Torah itself, and of the Talmud, were the products of historically unfolding processes involving human hands, and not infallible, self-authenticating formulations of the transcendent divine will in human language. In fact, such notions have been consciously taught in our educational institutions, as characterizing our

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<sup>1</sup> Among the many people to whom I am grateful for insights over the years that have helped shape this paper are: my colleagues on the Committee on Jewish Law and Standards, and especially Rabbis Elliot Dorff and Elie Spitz, with whom I have had many fruitful talks on the philosophy of law and halakhah, Rabbi Lester Bronstein, Rabbi Jane Kanarek, Rabbi David Lazar, my students in courses I have taught at JTS on jurisprudential theory and halakhah, members of my Shabbat morning theology study group at Temple Israel Center of White Plains, my son Ethan Tucker, and Brent Spodek, who was both a sounding board and a researcher in the course of an independent study semester at JTS. Responsibility for the conclusions herein is, of course, mine.

<sup>2</sup> The obligations and rights here alluded to include, but are not limited to, these: sexual responsibility and fidelity, a preference for marriage, an obligation to produce and/or raise children, regulations relating to marriage and divorce, the right to full participation *as families* in Jewish ceremonies and rites, and the right to earn religious leadership status in the Jewish community.

understanding of such foundational concepts as God, covenant, revelation, and *mitzvah*. They have powered a compelling synthesis between modern thought and traditional piety, and have been rightly lauded among all sectors of our broad Movement as having brought theology and truth closer together. We take pride in these far-reaching intellectual accomplishments. Yet none of this has successfully motivated a change in the *halakhic* methods to which our responsa have appealed. And what has the result of this been? On the one hand, there has been ongoing historical and theological thinking in our quarters, which has taken for granted a richly textured interrelationship among Jewish laws, Jewish narratives, and the real Jewish communities that have lived, and put their stamps on those laws and narratives. On the other hand, there has been a facile assumption, in *halakhic* reasoning, that *halakhah* can be managed – and changed, when that seems warranted – only by appeal to rules set forth within the proverbial four cubits of *halakhah* itself, and to the transformations that they explicitly authorize. The delicate and fruitful interplay between religious law (*halakhah*) and sacred narrative (*aggadah*) is summarily set aside as being irrelevant when it comes to deciding matters of legal practice, even though it is a real community and real people that are expected to integrate those rules of practice into their religious lives.

This paper will argue that the constriction of *halakhic* method deprives us of an articulation of a Conservative approach to Jewish law that would not only be both compassionate and intellectually consistent, but would give distinctive meaning to what Conservative Judaism is as a religious movement. Readers of this paper needn't be reminded how much we have lamented our failure as a Movement to define ourselves in ways more compelling than simply being “centrist”, and how lacking in energy such a definition-by-default has been. But going beyond some of the artificial bounds that we have placed on ourselves in terms of *halakhic* method, bounds that have been at odds with our intellectual and theological commitments, would do much to overcome those failures at compelling self-definition.

I am, in other words, attempting to point the way to a more expansive model of *halakhic* argument (one that I will suggest be spelled in English with a capital “H”). In this attempt, the case at hand – the question of reconciling Judaism and homosexuality – serves as a tool for exposing the inadequacies of our practices heretofore, and thus as a means for urging the opening up of practice that will surely have ramifications – important ones – beyond this particular case. All of this will be set forth and developed in the body of the paper.

One more thing, by way of introduction. Although this paper in its entirety has not previously been formally submitted to the Committee on Jewish Law and Standards, some of the major sections of it were integrated into a jointly-authored paper that was submitted and discussed at the March, 2006 meeting. At that meeting, a majority of the CJLS voted to declare that paper to constitute a proposed *Takkanah*, and thus to require (by subsequently amended rules) 13 votes in order to enjoy the endorsement of the Committee (6 votes are normally required). I believe this action of the Committee was based on both a misapprehension of what this paper argues, and a misapplication of the classical category of *takkanah*. I will take the second point first.

*Takkanot* were, historically, devices for instituting innovations into Jewish law by relying not on the usual tools of legal interpretation, but rather on the authority of the Rabbi – or of the Bet Din – who issued the *Takkanah*. That authority was a sociological phenomenon, based, of course, in large part, on the perceived proficiency and piety of the religious leader. Provided that this authority was real and not simply imagined, the declaration of a *Takkanah* had an effect that no mere legal ruling would have; that is, it altered legal practice in a decisive way, which was as solid as the authority of *Takkanah*'s author. In other words, although *Takkanot* were generally innovative rulings, they became *Takkanot* not because of what or how they argued, but rather because the authors of the *Takkanot* antecedently enjoyed the authority to declare them to be so and thus to make their innovations unchallengeable. Many Rabbis historically wrote *teshuvot* that proposed innovations, but did not enjoy the authority of a Rabbenu Tam so as to make it possible to offer them as *Takkanot*. Their responsa remained responsa, perhaps overlooked or overruled in their days, but perhaps also referred and appealed to at a later period.

The category of *Takkanah* could indeed be translated into the context of the CJLS. If an author of a paper were to wish to invite the authority of the Committee as a whole as backing for his or her proposal, then it would make sense for that desire to be stated, and for the sought for authority to be granted only when a majority (or even supermajority) of the Committee so voted. But when that kind of special authority is not sought, when responsa are submitted not as proposed enactments of the Committee as Committee, but rather as papers validated by Committee processes in the usual way (by 6 voting members), then the category of *Takkanah* becomes inappropriate. Indeed, the effort to declare a paper to be a *Takkanah*, when the author intends no such thing, threatens to undermine the very structure under which the Committee has operated since 1927.

And thus to the first point: this paper does not share in the classic character of a *Takkanah*. That is, it does not put forward a ruling that constitutes a departure from usual *halakhic* practice on the basis of the authority of its author or of the CJLS. It does, as noted, argue for a different overall *halakhic* methodology. But it does not seek any extraordinary authority from the CJLS. It does not seek to create an unchallengeable innovation. It seeks only the normal consideration that responsa are given, and the possibility of achieving the normally available validation of its conclusions as a cogent and legitimate way in which *halakhah* – and this area of *halakhah* in particular – can be understood and followed by Conservative Jews and Conservative communities.

I trust that the CJLS will not insist on ascribing to this paper a non-existent desire for *Takkanah* status, which it will then seek to deny it, as it did in March 2006.

## II. Definition of the Task

The immediate question at hand has, as is well known, been taken up previously by the CJLS, as it has by various other religious authorities and organizations. It has also been

given a fairly full airing in the many organs of the Jewish press. Since there is this history of discussion, I can begin with an observation:

*Virtually every position in recent years that has argued against the normalization of Jewish gays and lesbians has done so not out of any stated animus toward, or fear of, gays or lesbians (what is sometimes called, with some hyperbole, “homophobia”), but rather out of theological/halakhic or more general halakhic concerns.*

This has been especially true in Conservative Jewish circles. Joel Roth’s *teshuvah* from 1991 – the leading vote-getter in the CJLS at that time – is perhaps paradigmatic in this respect. Roth described his conclusions in that *teshuvah* as having been arrived at “with great anguish”, and “with a heavy heart for those who must bear the burden of its message”<sup>3</sup> Indeed, in making an analogy to the *kohen* with a genealogical imperfection (who, in Temple times, had to forego exercising the usual priestly functions), Roth essentially acknowledged that the demand that homosexuals not have sexual relations with members of their own sex “is difficult and may even fill one with both anguish and anger”, even though he concluded that the demand was not immoral *per se*.<sup>4</sup> In a written version of a talk that he gave at the biennial convention of the United Synagogue of Conservative Judaism in 2003, he even asserted this about that 1991 *teshuvah*: “I undertook my research and analysis.....with a predisposition to say yes.”<sup>5</sup> In other words, Roth’s insistent conclusion that gays and lesbians could not be normalized halakhically was, like virtually every other similar conclusion published at that time and since, not predicated on the idea that homosexuality was *inherently* destructive of Jewish society, but rather on the idea that *legitimizing it* would be destructive of the *halakhic* system.

It is possible, of course, that some or all of those who have argued against normalization have simply succumbed to “political correctness” and have chosen to conceal animus and fear with respect to gays and lesbians under a layer of “pure” halakhic argument. But I believe in taking halakhic writers at their word. And so, because arguments to the contrary are absent in the *teshuvot* and other writings on the subject, I must assume that there is no significant disagreement in our circles today that gays and lesbians can be responsible members of society, that there are many Jewish gays and lesbians who are responsible -- **and religiously observant** – members of Jewish society, that they are entitled to *civil* marriage because both they and society have a stake in the institution of marriage, that some are raising Jewish families and many more wish to do so, and that (apart from the issue under discussion, namely the halakhic legitimacy of their sexual lives) they are *intrinsically* capable of exercising Jewish religious leadership on the highest level. Moreover, nearly all who argue against normalization agree today that attraction to, and sexual desire towards, people of one’s own sex is not consciously chosen, and that the evidence (both from scientific studies and from the testimony of gays and lesbians) for any successful and enduring change in sexual orientation is scant

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<sup>3</sup> Roth, Joel, “Homosexuality”, in Responsa 1991-2000: The Committee on Jewish Law and Standards of the Conservative Movement, New York: Rabbinical Assembly, 2000, pg. 643.

<sup>4</sup> Ibid, pg. 644

<sup>5</sup> Roth, Joel, “We Can’t Legitimate Homosexuality Halakhically”, in USCJ Review, Spring 2004

indeed.<sup>6</sup> These observations, conjoined to the one given in bold italics on page 1, are quite important. Together, they account for the fact that arguments against normalization in our circles can be characterized in one of two ways: (1) arguments from the theological sanctity of the text of the Torah, which is taken to be unambiguously clear at least on the subject of gay males having sexual relations, and (2) arguments from the deeply entrenched character of the precedents in the halakhic system against normalization, and the unavailability of systemic devices (as opposed to social and moral considerations that lie outside the system) that could override those precedents. Both of these kinds of arguments can logically be, and are, presented as being compatible with the highest level of respect for gays and lesbians, and of empathy with their halakhic plight.

All of the above means that an argument within our Conservative circles for normalization<sup>7</sup> need not concern itself with scientific theories of the etiology of homosexuality<sup>8</sup>, with the possibilities of change through therapy<sup>9</sup>, or with demonstrating that gays and lesbians can be integrated, functioning members of the Jewish community at all levels<sup>10</sup>. It need only focus on the two kinds of arguments that are described in the previous paragraph, which I shall call the “theological” argument and the “halakhic/systemic” argument. And it is to these two that I now turn.

### III. The Theological Argument

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<sup>6</sup> See, for example, Roth, *op. cit.*, who says that “homosexuals do not make a conscious and knowing choice to be homosexuals”. In the same piece, he also allows that it may indeed be true that homosexuality cannot be treated “successfully or even moderately successfully.” See also Greenberg, Steven, “Gayness and God”, in *Tikkun*, Sept./Oct. 1993 (originally published under the pseudonym “Yaakov Levado”), who says that “gay feelings are hardwired into our bodies, minds, and hearts.” Indeed, at a CJLS retreat in February 2004, compelling testimony was given by an Orthodox therapist concerning the experiences that dashed his hopes for “curative therapy”, as well as his conviction that he was in the process of discovering and perfecting such a procedure. The experiences were particularly devastating, he said, because of the toll that the failed therapy took not only on the gay subject, but on the spouses who were unwitting “accessories” to the failed treatment, and in some cases on children begotten.

<sup>7</sup> This paper will make arguments and come to conclusions that are accessible to any reader, but coming as it does from a Conservative context, it is addressed primarily to that community.

<sup>8</sup> Since the fact that, in nearly all cases, gays and lesbians do not choose the orientation of their sexual desires is now roundly conceded, the question of etiology is of great interest for scientific discussion, but of little or no interest for halakhic argument.

<sup>9</sup> The fact that gays and lesbians, particularly in Jewish circles, and more particularly in observant Jewish circles, have such strong external incentives to try to graft a heterosexual orientation onto themselves is *prima facie* evidence of the tenacity and stability of their internal, natural orientation. The evidence of therapists such as the one mentioned in footnote 6 above combines with this *prima facie* evidence to put the burden of proof squarely on those who would argue for the possibility of change through therapy. It is clear that such proof has not been forthcoming, and that the major mental health professional organizations in the United States do not consider such therapy to be promising, nor even attempts at it to be desirable.

<sup>10</sup> This, for what should be the obvious reason that they already are all of these things, including being members of the clergy. But in any event, the only contrary claim in this connection made by opponents of normalization is that one who repeatedly and publicly flouts a halakhic prohibition of the gravity of this one cannot be a religious role model. But that claim can only *follow from* a conclusion that it is, in fact, a halakhic prohibition. It cannot be used to *argue for* maintaining that very halakhic prohibition without engendering a vicious circularity.

The Torah, as is well known, addresses forbidden sexual relationships in a comprehensive way<sup>11</sup> only in two chapters (Leviticus 18 and 20), and it is only in those two chapters that same-sex relations are treated. Leviticus 18:22 reads simply “Do not lie with a male as one lies with a woman (משכב י אשה); it is an abhorrence (תרעבה).” And Leviticus 20:13 adds to this very language only the severe punishment of execution by a human court.

Now the theological argument against normalization generally begins with the observation that the Torah is rarely as simple and as direct as it is in these two verses. Unlike the well-known ambiguity of even such a central halakhic pillar as Shabbat, in which the term מלאכה is notoriously unspecific, and thus susceptible to many interpretations that can depend on ambient social and economic conditions, the direct description of the physical intimacy in Leviticus 18:22, and the unambiguously negative force of the word תרעבה leave little doubt as to the Torah’s meaning. It is one thing for a human interpretive community to claim the right to explicate, restrict, and relativize a biblical text that has seemingly left us room for just such activity (מקום להתגדר בר). But it is quite another thing to make such a claim with respect to a text which seems fairly to shout out the clear intent of the Lawgiver. The unusual terseness and transparency of Leviticus 18:22 are so striking that one almost senses a divine intent to preclude and close off human interpretation. The theological argument then asserts that if one proposes either (a) ignoring the prohibition in Leviticus 18:22 or (b) modifying and restricting it despite its sweeping clarity, then one has begun a process of undermining the divine authority of the Torah that will ultimately know no limits. After all, if something as clear as Leviticus 18:22 can fall, then anything can fall. The very integrity of the Torah as divine revelation is at stake, and it is this urgency that requires us to override all of the empathy and anguish that is associated with instructing gays that because of the verse in Leviticus they may not legitimately express their unchosen sexuality.

Notice that this theological argument does not appeal to the halakhic texts and traditions that grew out of the Torah’s words. Those texts have central importance in any halakhic argument, but they are, strictly speaking, the subject of the second of the arguments mentioned above (the halakhic/systemic one), which I shall discuss presently (and at greater length). The theological is an unusual argument in that it appeals to the *peshat* – the surface, contextual meaning of the verse – and that is not the usual procedure when making arguments in Jewish law. Indeed, the rarity of this appeal is what makes the theological argument against normalization so noteworthy. Although it is sometimes combined with halakhic arguments, the theological argument, in its essence, boils down to the contention that the clarity of Leviticus 18:22 is, and should be, self-validating. It cannot be overridden. Or, as it is sometimes stated in a more informal mode: “What can we do? The Torah is clear on the subject!”

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<sup>11</sup> There are, of course, other places in the Torah where specific sexual rules and prohibitions are articulated in a less comprehensive, more fragmentary way.

There are three refutations of the theological argument against normalization that I shall present. The first two are here because they are surely worth some consideration, but it is the third that is by far the most important, and that I aim to highlight:

(1) The theological argument attaches great importance to the unambiguous clarity of Leviticus 18:22, and the consequent impermissibility of modifying the scope of its meaning (to encompass, for example, only exploitative or promiscuous sexual relations). Granting for the moment the claimed clarity of the verse, this first reaction to the theological argument notes that the same argument has never been made for Exodus 21:12 (“He who fatally strikes a man shall be put to death”), which is, if anything, even more concise and clear than Leviticus 18:22. The scope of Exodus 21:12 (whose lucidity is reprised in Leviticus 24:17) has been readily subjected to modification and contextualization, so as to legitimate, for example, self-defense killing.<sup>12</sup> And these restrictions on the scope of the prohibition did not, in and of themselves, undermine the divine authority of the text. Why is Leviticus 18:22 different in this respect?

(2) The second reaction to the theological argument does not take as given the claim that Leviticus 18:22 unambiguously prohibits all sexual relations between two males. The claim certainly is plausible on the surface. But the most prominent explicator of Leviticus in our time, Professor Jacob Milgrom, does not agree. Starting from an analysis of the rare form **משכב י אשה** as applying only to illicit relations, and apparently from the observation that the prohibition in Leviticus 18:22 comes at the end, not in the middle, of the list of human sexual relations forbidden by consanguinity, Milgrom offers the following reading of the verse:

....since illicit carnal relations are implied by the term **משכב י אשה**, it may be plausibly suggested that homosexuality is herewith forbidden for only the equivalent degree of forbidden heterosexual relations, namely, those enumerated in the preceding verses. However, sexual liaisons occurring with males outside these relations would not be forbidden.<sup>13</sup>

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<sup>12</sup> The complete permissibility – indeed, the obligatory nature – of self-defense killing that eventually became the halakhic norm (**בא להרגך – השכם להרגך**) is hardly indicated in the biblical texts themselves. Exodus 22:1, for example, merely absolves a frightened homeowner of bloodguilt for killing an intruder. That provision is a far cry from the later settled law that imposes both a duty to preserve one’s life with deadly force, as well as a third party duty to rescue another’s life with deadly force (see, for example, **רמב"ם, הלכות רוצח ושמירת נפש א' ר'** and **ברכות ס"ב :**). Indeed, even the biblical laws of war suggest that there is some bloodguilt that adheres to a soldier who has killed in war (see, for example, Arnold Ehrlich’s (**מקרא כפשוטו**) highly suggestive commentary on Numbers 31:49-50, and also the biblical text at I Chronicles 22:8). This is completely absent in later settled law on the subject.

<sup>13</sup> Milgrom, Jacob, Commentary on Leviticus 18:22, in *Leviticus 17-22* (trans. Jacob Milgrom), The Anchor Bible, New York: Doubleday, 2000, pg. 1569. Leviticus 20:13 uses the same term – **משכב י אשה**. In that chapter, the prohibition is not at the end of the list, but the list of cultic and sexual prohibitions in that chapter has clearly been preserved in a less than perfectly ordered form (Leviticus 20:27 being the most prominent example of this). The point is raised here not as an unqualified acceptance of Milgrom’s exegesis, but simply to call attention to the fact that the plain meaning of the biblical verse is far from being uncontroversial, in the way that this theological argument wishes to claim. In any event, the main objection to the theological argument comes in the next paragraph.

In the opinion of this renowned biblical expert, then, one can at least call into question the unequivocal and exceptionless nature of the ban on gay sex in the plain meaning of Leviticus 18:22.<sup>14</sup>

(3) The third, and most far-reaching, reaction to the theological argument against normalization calls into question the very theological premise on which the argument rests. When someone says, “What can we do? The Torah is clear on the subject!”, what is being said amounts to a claim of infallibility and irrefutability for the text of the Torah. And that claim ultimately rests on the assumption that Leviticus (and, of course, the other four books of the Pentateuch) is of divine authorship. But that assumption is one that, for all its currency in parts of the Jewish world, is not accepted in our Conservative Jewish world. And it is not accepted for good scholarly and theological reasons. That is, the non-acceptance of biblical infallibility is not merely a negative verdict on the divine authorship of the Torah born of academic skepticism; it is a profound and inspiring positive message about the ways in which God and humans find each other on the stage of history onto which we have been placed. A large part of our understanding of the role of human beings in the generation and perfection of religious truth hinges on the idea that God’s will is not infallibly represented in the Torah, but only imperfectly, in a form that awaits the engagement and honest searching of religious communities that connect to one another, and to Sinai, throughout the ages, but do not simply duplicate one another. Was it for nothing that we have celebrated the groundbreaking scholarship of Yehezkel Kaufmann on the religion of Israel? Is it merely an intellectual game that we have played for a century now by calling such people as Mordecai Kaplan, Robert Gordis, Gerson Cohen, Abraham Joshua Heschel, Nahum Sarna, H.L. Ginsburg, Jacob Milgrom, and Yochanan Muffs our masters and teachers? Why do we study and get inspired in one way and teach our congregations in another way? And why would we even consider doing halakhah by appealing to an axiom of biblical inerrancy that undermines the very theology with which these teachers, and others, have gifted us?

I remember vividly discussions about this very theological issue that took place among the members of the commission that produced Emet Ve-Emunah. At one such session, it was suggested, to a fair amount of approval, that one of the ways in which we might approach the biblical text is to treat it “as if” it were divine. It was not my point of view, but I thought at the time that it was not an *unreasonable* position to be offered to congregations that still had no real alternative to the Hertz Humash commentary in their pews. With the right mental reservations, it would do little or no harm to speak and to preach as if God had actually spoken the Hebrew words of the fifth commandment, which calls upon us to honor our parents. But this “as if” approach is not always harmless, as we can now see. For what justification is there for using an “as if”, or “virtual”, theology to undergird the inerrancy of a prohibition (i.e. the one in Leviticus 18:22) that has a deep, irrevocable, and devastating effect on the lives of people who one day in their teens discover something about their sexual constitutions? It would be one

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<sup>14</sup> Some may object that *peshat*, at which Milgrom is directing his learned speculation, is in any case irrelevant to halakhah. That is generally true, but remember that it is precisely the peculiarity of this theological argument that it appeals to *peshat*, and it is *that* argument that is being addressed here.

thing to impose such a prohibition on the basis of a theology that we truly believed. But to negate a person's drive for love, companionship, and family life on the basis of "as if"? Who would want to answer to such a charge in some future, post-mortem tribunal?

No, the time has come for a movement that has finally published a Humash commentary that reflects the theology our masters have taught us to "come out of the closet". It is past time for us to be, in the prophet Elijah's words, "hopping between two opinions". If the axiom behind this theological argument is to be accepted, then let us forthrightly admit that we have been misled by the teachers at whose feet we have sat. But if we confess that we do not accept the axiom of biblical infallibility, then let us honor our teachers by abandoning this theological argument, and by no longer permitting ourselves to say, when the matter of gays and lesbians comes up, "What can we do? The Torah is clear on the subject!" Could it perhaps be that critical study itself was given to us precisely so that we would not let the text of the Torah stand as an impediment to the acceptance, fulfillment, and normalization of God's creatures?

When the Talmud was convinced that every parent would immediately see the injustice, indeed, the impossibility, of turning over a child to be stoned to death for an unhealthy and antisocial lust for food and wine, it opined that no one had ever been made subject to the Deuteronomic law of the "stubborn and rebellious son", and, what's more important, that no one ever would be. Why was it in the Torah, then? "דרוש וקבל שכר". Because the enterprise of expounding it would itself be rewarding. It is a safe suspicion that the Talmudic authors did not share the contemporary Conservative Movement's theology of revelation. But still, those words speak to us. However it was that Leviticus 18:22 and 20:13 got into the Torah, expounding those verses, and holding them up to the realities and moral conundra that history and experience have taught us about, can be rewarding. Even if they are, in the end, not destined to embody enduring and enforceable law. The theological argument is not tenable for a Conservative community. But apprehending why that is so can bring with it the reward of a deeper understanding and appreciation of the theologies in which we do in fact believe.

In any event, we must now consider the more challenging argument against normalization, namely the halakhic/systemic one.

#### IV. The Halakhic/Systemic Argument

The systemic view of halakhah paints for us the following picture: Halakhah starts with both the legal texts in the Torah and with those teachings brought down by tradition that are considered to be Torah (דאורייתא) by the Sages of the Rabbinic Period.<sup>15</sup> Authorized interpreters of the דאורייתא material now interpret, expand, and qualify

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<sup>15</sup> That "biblical", or "דאורייתא", means not just that which is written in the Pentateuch, but also that which is denominated "oral teaching" ("תורה שבעל פה"), is axiomatic to Rabbinic Judaism, and that has the following paradoxical, but important, consequence: Although we often speak freely of things that are דאורייתא (biblical) and those that are דרבנן (rabbinic), the fact is that the very category of דאורייתא as we know it, and particularly that which is encompassed by it, *is itself* דרבנן!

it<sup>16</sup>, and this in time creates new law. The process iterates, and in this way, many inferences upon inferences are created within Halakhah, which enable us to trace back to uncontroversial origins even the most complex of later rulings. Throughout what follows, I shall refer to the many lines that these halakhic inferences create as “derivational pathways”. Every ruling – permissive or prohibitive – that seeks recognition as a norm of the system must establish its “pedigree” through one of these derivational pathways. And so Halakhah emerges as a system. It is not a random set of norms, nor is it subject to the vagaries of human whim or the ephemera of styles; it is structured and stable. It is predictable. It can be counted upon to ground Jewish societies and bind them to one another and to their past. For Halakhah, as a system, sports an impressive array of precedents which, by the logic of the system, command deference and conformity.

How is this view used to construct the Halakhic/Systemic argument against the normalization of gays and lesbians? Essentially as follows: The Rabbis, throughout the Talmudic period, read and used Leviticus 18:22 and 20:13 unequivocally. This **יִתְּנָה דְאֵרְרֵי יִתְּנָה** material was not modified or qualified by them in any way. They offered reasons for why the prohibition contained in it was a categorical one. And in general, they and their successors made it into about as solid a precedent as one could imagine. And, many will add, the Rabbis did this despite the fact that they knew that there were people inclined to homosexual relations, and despite the probable fact that they also knew of people who were willing to consider lives of covenanted relationship to members of the same sex. The result of this is a relative paucity of ramified derivational pathways with regard to Leviticus 18:22. As Elliot Dorff has written, the desire to find a way to normalization is difficult to fulfill because “we do not, in this case, have a long history of development regarding this law. Consequently, those of us who are interested in understanding the law differently are in the first generation of Jews who are testing this law, testing what its scope is and ought to be. Because of the very short legal history on this law, this is very close to what lawyers call ‘a matter of first impression’.”<sup>17</sup> And, needless to say, no one relishes being the first to create a new pathway, particularly an adherent of the systemic view of Halakhah who is confronting 2000 years of extremely narrow and unequivocal precedent.

Notice that this argument against normalization is independent of theology, and it does not depend on any assertion about the *peshat* of Leviticus. It instead assumes, as any systemic analysis does, the canonicity of early legal material (in this case, the halakhic texts that originate with the earliest authorized rabbinic interpreters of Torah), and it can thus coexist comfortably both with traditional and critical views about the origin of the text of the Torah.

This argument is a version of what is called, in more general settings, “legal positivism” (“positivism”, because it begins by positing the canonicity of basic norms, from which all derivational pathways must begin). It is a very attractive point of view about law,

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<sup>16</sup> Just who is authorized to do so, is a perennial and controversial question. The canonical rabbinic text that seeks to establish a “normative” line of authority is, of course, Mishnah Avot.

<sup>17</sup> Dorff, Elliot, “Medical and Moral Reasons to Change the Law”, in USCJ Review, Spring 2004.

because it provides for the objectivity, predictability, and independence of law that law seems to require, and that societies indubitably need for stability. And yet, as seductive as it is, legal positivism has been the subject of many and varied critiques. And some of those critiques will be very instructive for us in our current quest.

An amusing, though still quite cogent, description of what can be wrong with insisting on continuing only existing legal pathways – and with having the substance of issues take a back seat to the question of whether there is a precedent – was given by Francis Cornford, a classicist who taught at Cambridge in the early 20<sup>th</sup> century:

The Principle of the Dangerous Precedent is that you should not now do an admittedly right action for fear you, or your equally timid successors, should not have the courage to do right in some future case, which, ex hypothesi, is essentially different, but superficially resembles the present one. Every public action which is not customary, either is wrong, or, if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time.<sup>18</sup>

At roughly the same time, a more expanded and thought out critique of the positivist model was given by Oliver Wendell Holmes, in his classic lecture/essay “The Path of the Law”:

The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. But why do you [conclude] it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. ....No concrete proposition is self evident, no matter how ready we may be to accept it.<sup>19</sup>

Holmes’s description of the “longing for certainty and repose” is an excellent depiction of the inner motivations of the halakhic positivist as well. They are motivations that we all share, and for good reason, as will be argued below. But the truth of Holmes’s warning should also be quite apparent. Repose is not, in fact, our destiny, and classical Jewish theology would be the first to recognize that. Indeed, the idea that certainty – as natural an aspiration as it is – is not a worthy, or even possible, ultimate goal for human

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<sup>18</sup> Kay, John, “Inside Track: An Object Lesson in Prevarication: Oxford University” in Financial Times of London, November 22, 2000. Thomas Fuller, a 17<sup>th</sup> century preacher, stated the danger of venerating precedent even more simply: “A conservative believes nothing should be done for the first time.”

<sup>19</sup> Holmes, Oliver Wendell, “The Path of the Law”, 10 Harvard Law Review 457 (1897)

beings would seem to be axiomatic for Jewish theology. A vision of a legal system in which a sufficiently long period of inertia (as has admittedly been the case in the matter of homosexuality) engenders stasis into the indefinite future is not a vision of striving and building; but these are the very endeavors that are, in fact, the human destiny.

Holmes felt the urgency of this critique sufficiently to sum it up in these memorable words:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>20</sup>

An even more interesting and relevant evaluation of positivism for our purposes is the critique leveled against halakhic positivism by the modern Orthodox scholar Moshe Halbertal. In describing why the Hartman Institute in Jerusalem developed a style of halakhic jurisprudence that rejected the formalistic basis of positivism, Halbertal wrote:

קריאת התיגר על הגישה האנליטית פורמליסטית בהלכה שהתרחשה בבית המדרש של המכון, מקבילה במרבנים רבים לשנוי העמק בתפיסת המשפט ובלימוד המתחולל בעשורים האחרונים. טיבו של שינוי זה הוא מיקומו של החוק, הוראתו והבנתו, בהקשרים תרבותיים, חברתיים וכלכליים, והבנת המשפט כשיקוף של הקשרים אלה. אין בביקורת זו משום התעלמות מכך שיש להלכה כמו למשפט אינרציה פנימית משלה, אולם גם כאן מן הראוי להעלות את השאלה באיזו שלב מאבד הדיון המשפטי את נקודת המוצא המהותית שלו והוא הופך לפעולה אינרטיית של הגדרה, מיון, והבחנה. מעבר לכך שכוחו ההסברי של המודל הפורמלי-אנליטי הוא מוגבל, הוא מאיים לעקר את משמעותו הדתית של לימוד תורה. אם לימוד תורה הוא בירור אנליטי של קטגוריות משפטיות פורמליות, מסעיר ומבריק ככל שיהיה, סופו שיעמיד את כמיהתם של הלומדים להשראה והבנה בפני שוקת שבורה. לא ייפלא אפוא שתפיסה פורמליסטית מסוגלת להחזיק מעמד כתופעה חיה ומתוחכמת רק באותם מוסדות – כמו הישיבות הליטאיות – שהצליחו ליצור מרחב לימוד שהוא עצמו מעין עולם בתוך עולם. יושב בית המדרש שרוי בהוריה קסומה, חובקת כל, המשכפלת את תפיסת ההלכה עצמה כמערכת סגורה בעלת דינמיקה פנימית בלבד. בכך נוצרת מערכת של תמיכה הדדית בין מבנה מוסדי לבין תפיסה מתודולוגית.

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<sup>20</sup> Ibid. That “the grounds upon which it was laid down” may have vanished in the case of Leviticus 18:22 is certainly plausible. It seems to have been based on a theology that assumed that certain sexual acts would have a direct causal connection with expulsion and exile from the Land of Israel. Such a belief could certainly warrant the elimination of certain practices, much as we would still consider today the isolation and quarantining of people with contagious diseases. But how many of us today honestly hold to such beliefs about the causal nexus between sexual practices, pollution of the land, and exile?

The dissent in the Hartman Institute from the analytic-formalist approach to Halakhah runs parallel in many respects to the profound changes in the approach to – and to the study of – law that have taken hold in recent decades. The essence of these changes is the location of the law and its individual norms in cultural, social, and economic contexts, and the understanding of the law as reflecting those contexts. This critique does not ignore the fact that Halakhah, like law generally, has its own internal inertia; but it is also important to ask the question: “at what point does legal reasoning abandon its essential point of origin and become instead an inert activity of definition, categorization, and distinction?”. Besides the fact that the explanatory power of the formal-analytic model is limited, *it also threatens to uproot the religious meaning of study of Torah*. If the study of Torah is an analytic explication of formal legal categories, however stimulating and brilliant it may be, in the end it will lead those students who are thirsting for inspiration to an empty trough. It is not surprising, therefore, that the formalistic approach can sustain itself as a vibrant phenomenon only in those institutions – such as the Lithuanian Yeshivot – that have succeeded in creating a landscape of learning that is itself a kind of world within a world. The inhabitant of such a house of study has there an enchanted existence, which is all-encompassing, and which reproduces the approach to Halakhah itself as a closed system having only an inner dynamic. Thus is created a mutually sustaining relationship between an institutional structure and a methodology.<sup>21</sup>

Striking in Halbertal’s exposition here is not only that he sees positivism (what he calls the “analytic-formalist approach”) as a betrayal, *in religious terms*, of the originating essence of halakhah as a way of expressing the living will of God, but also that he points out the symbiotic connections between methodologies and the institutions in which they grow and are sustained. It was perhaps inevitable that the lengthy experience of homelessness would cause the enterprise of Halakhah to adopt, almost exclusively, the positivist mode, since it excels in providing stability and continuity. But it was also true that the temperament of the Lithuanian Yeshivot produced an even greater attraction for a style of legal reasoning that created a “world within a world”. And that, in turn, goes a long way toward explaining to ourselves why we Conservative rabbis, who are largely products of the Jewish Theological Seminary with its heritage of Kovno and Slobodca, have been in thrall to this positivist approach. Indeed, we have usually treated it not as the *best* approach to Jewish law, but as the *only* authentic approach to Jewish law. Here is how Halbertal pushes this point home:

עולם הישיבות דחה את הגישה המחקרית משום שזו העמידה את הטקסט המקודש למבחן ביקורתי וראתה בו מוצר תרבותי, אנרשי והיסטורי, שכללי החקירה החלים עליו זהים לאלה שהמסורת הפילולוגית הקדומה יותר החילה על מקורות קלאסיים ונרצרים. לעומת זאת, בעולם המחקר נדחתה השיטה הישיבתית ככזו הבנויה פעמים רבות על אבחנות פורחות באוויר, שאין להם דבר וחצי דבר עם הטקסט כפי שהוא לאשורר. אולם בין

<sup>21</sup> Halbertal, Moshe, "הרטמן והפילוסופיה של ההלכה", in מחריבת יהודית מתחדשת, Jerusalem: Hartman Institute, 2001, pp. 16-17 (translation and italics mine).

שתי האסכולות קיימת ברית סמויה בגישתן לפרמליזם. שתייה נמנעות מלהעלות שאלות של מהות הקשרות את המשא ומתן התלמודי לעמדות, אינטרסים וערכים שבזיקה אליהם יש להבין את החומר שלפנינו. הגישה המשפטית אנליטית – משום רצונה לשמר את ההלכה כמערכת סגורה, ואילו הגישה הפילולוגית – בגלל חששה ממה שנראה בעיניה דרשני וספקולטיבי ובגלל היצמדותה למודל הפרזיטיביסטי.

The Yeshivah world rejected the world of Talmudic research because the latter held up the sacred text to a critical examination, and saw it as a cultural artifact, human and historically conditioned, which was subject to the same principles of inquiry that the older philological tradition had applied to classical and Christian texts. At the same time, in the world of research, the Yeshivah approach was rejected as one that was often built on baseless distinctions having nothing whatsoever to do with the text as it is in itself. And yet, between these two opposing schools *there is a tacit alliance with respect to formalism*. Both schools avoid asking the essential questions that would connect the Talmudic dialectic to the attitudes, interests, and values by reference to which one could understand the material under study. The legal-analytic school [that of the Lithuanian-style Yeshivot] does so because it wishes to safeguard the Halakhah as a closed system, and the philological school does so because of its suspicion of all that appears to be homiletic and speculative, and because it is ultimately allied to the positivist model.<sup>22</sup>

This analysis is as relevant to us, given our institutional history, as was the appeal in the previous section to the ways in which Bible has been taught in Conservative circles. And it explains why the Committee on Jewish Law and Standards has, from its inception, worked under this positivist paradigm. Virtually every *teshuvah* has been written in that style, be it the “permissive” *teshuvot* on driving on Shabbat (1950) or aliyot for women (1955) or “prohibitive” *teshuvot* such as those reaffirming the ban on homosexuality (1991) or the denial of conversion to a Gentile man prohibited medically from undergoing circumcision (1993).<sup>23</sup> Indeed, this is how almost all *teshuvot* have been written throughout the history of Halakhah, for reasons sketched above. But even had that not been so, the biases of the *Wissenschaftliche* school that is our intellectual foundation would have pushed this Committee in that direction.

Still, positivism is only one legal philosophy among many. And if it is not perfectly suited to understanding the meeting of law and society generally, it is even less well suited to be a model for the development of a legal order that is meant to embody religious meaning. But lest it be thought that what is being advocated here is anarchy, it

<sup>22</sup> Ibid., pg. 19

<sup>23</sup> Joel Roth’s *teshuvah* on the ordination of women was not a submission to the CJLS, but it is another prominent example of a permissive *teshuvah* written entirely in a positivist mode. A notable exception, to be returned to below, was David Aronson’s paper on *agunot*, “Kedat Moshe Ve-Yisrael”, published in 1951 (see note 59 below).

is crucial to clarify several things about the proper role – which there surely is – of both positivism and the authority of precedent in societies ruled by law.

#### V. Positivism Reconsidered

Let us be clear about one thing: we are all, in some important and basic sense, positivists. Stability is, after all, important to the rule of law. Precedent is important, for reasons that we shall see. And certainly no one would sanely call for randomness or caprice in the law. A positivist argument, which either locates a norm on an established pathway and thereby grants it authority, or that demonstrates the incompatibility of a proposal with the established pathways and thereby denies it authority, is the clearest and most objective way to reach intersubjective consensus and closure. It also brings with it the satisfaction of having kept faith with the foundations of the past. So for the broadest range of questions that may arise – be they queries about the *kashrut* of microbial enzymes, or the use of a *shaliah le-kabbalah* in giving a *get*, or the permissibility of driving on Shabbat to be a *shomer* for a corpse – the *teshuvot* are bound to be written in the positivist style. In addition to there being many good reasons to reason this way, there are, in the large majority of cases, no good grounds not to. We are all positivists in the same way that we all use Euclidean geometry and Newtonian mechanics to solve the broadest range of problems in the configuration of space and in the dynamics of motion. Euclid and Newton are not only perfectly suited to the small scale of the billiards table; their relative simplicity and linear quality serve us well in most of the tasks we face. But despite the fact that Euclid and Newton are splendid and irreplaceable tools in most ordinary matters, we need to know that their “local success” does not necessarily translate into “global success”. When Einstein measured, during a solar eclipse, the light of a distant star that passed very near the large mass of the darkened sun, he demonstrated that we either had to concede that space was not Euclidean, or that light did not travel in straight lines near large gravitational fields. We know, in other words, that there are those phenomena that lie outside the domain of normal observation, that lay bare to us the need for more sophisticated, less simple tools of analysis that can be extremely disorienting at first. But that is the only way that progress is made.

This is the sense in which we are all positivists in law. It is a splendid and irreplaceable tool for the ordinary questions that law is called upon to answer. But then there are the analogues of Einstein’s landmark experiment, the hard cases of law, hard cases like the one before us in this paper. For we are dealing with a case in which the logic of the system and its precedents do not fit well with the personal experiences and narratives of gay and lesbian Jews, and with the growing moral senses of the community.<sup>24</sup> This ill-fit will be explicated further below. For now, I want simply to note that the virtually universal tendency to use positivist analyses when doing law does not imply that positivism is the best tool for answering *every* question at law. Sufficiently hard cases

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<sup>24</sup> The moral senses referred to here are, as noted above, shared by those who argue against normalization; but the latter believe that those moral senses may not legitimately be given a role in determining law and practice in the presence of clear precedent. That ruling out of the juridical use of moral sense is, in fact, one of the essential features of positivism taken as a global tool.

may stretch the local successes of positivism beyond the limits within which they reside. Despite the esteem that positivism has earned, it may not be the appropriate method for deciding *this* hard case, the case of gay and lesbian Jews. Before elaborating on that, however, I move on to some further reflections on precedent and its role.

## VI. Precedent Reconsidered

It was noted above that precedent is a very important element in any society under the rule of law. Since that is so, and since the strong precedent against normalization that exists in our case might convince the reader that this is not, after all, a very hard case at all, a deeper look at the role of precedent is now called for.

I know of no better statement about the central function that precedent plays in human societies than that given by Anthony Kronman:

The longevity of the artifacts that at any given moment constitute the world of culture make it possible for one generation to build upon the work of its predecessors, to refine their accomplishments and to extend them, thereby passing on to its successors a world richer and more finished than the one it inherited. The possibility of accumulating achievements in this way enables human beings to do something that no other living creatures can: to undertake and execute projects that by their nature cannot be completed within the span of a single human lifetime, like the construction of the great cathedrals of medieval Europe. The cumulative character of culture thus liberates human beings from the narrow temporal constraints within which their ambitions would otherwise be confined, and permits them to dream and work on a scale larger than the limits of a single lifetime will permit.....

The first characteristic of the world of culture is thus its potential for accumulation. The second is its destructibility.....It is destructible because the things that it contains, if left to themselves and not purposefully kept up, will all eventually deteriorate.....A building may be kept up with bricks and mortar, but to keep up a system of laws requires an educational program of some sort through which each generation of newcomers can be introduced to the laws and learn the methods for interpreting them.....a ceaseless effort at preservation is required if the artifact in question is to retain its meaning within the system of signs that constitutes the world of culture.....this is an iron law, and the responsibility it creates is the chief one that the world of culture imposes on all those who inhabit it, a responsibility that goes with culture's liberating freedom and which indeed is its condition.<sup>25</sup>

Kronman's stirring argument connects our esteem for precedent and our general willingness to be bound by it with the essential core of human culture. Among the

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<sup>25</sup> Kronberg, Anthony T., "Precedent and Tradition", in 99 Yale Law Journal 1029 (March, 1990). I thank Robert Schoenberger for bringing this article to my attention.

characteristics that make human life distinct from all other life is that a given generation of human beings is not doomed to begin life at essentially the same place from which previous generations began. Culture is additive, and that is possible precisely because we are able to study the past, learn from it, and build on it. Precedent in law, like all other precedents, has a *prima facie* hold on us because without it, our building has no foundation. The very definition of a culture requires that our achievements not be disconnected to those of generations past. To use rabbinic terminology, they must not be פּוֹרְחִין בְּאֵיר, just free-floating. Just as one generation can start building a cathedral, or launch a scientific program, knowing that it will take future generations to complete it, if it is completed at all, so are legal orders built with a long, intergenerational view in mind<sup>26</sup>, and that can only come to fruition if precedent enjoys authority *per se*. This is, of course, yet another reason why we are all positivists most of the time.

But notice that there are two sides to Kronman's argument. It is true that we need to grant authority to precedent, else we will fail to create a continuous culture at all. But it is equally true that if precedent, and linear extensions of it, is *all* that has authority, then we will *equally* fail to create a culture, because we will be doing little more than duplicating past achievements. For law to “retain its meaning within the system of signs that constitutes the world of culture”, its preservation must not simply be a reprise of past decisions and interpretations, but rather an enterprise, at least on occasions that call for it, in improvising on established themes. Precedent can never be dismissed. It will most often be not only a guide but also a template. But sometimes it will be a reference point from which innovation will proceed because careful and respectful innovation is what is demanded. And with that said, it is now time to lay out why it is that our question constitutes a “hard case”, and why careful and respectful innovation is called for when considering the status of Jewish gays and lesbians.

## VII. Jewish Gay and Lesbian Reality

There is little point in trying to create large, inevitably artificial categories out of human beings, particularly when it comes to their sexual make-ups. A more authentic way to proceed, if we want to measure halakhic precedent against Jewish gay and lesbian reality, is simply to listen to voices and stories. Inevitably, one will have to trust one's instincts and believe that what is being heard is sincere, that it is more typical than atypical, and that it requires some decision.

In 1999, a collection of letters to and from Yeshayahu Leibowitz was published. In that collection, two letters appeared, of which the following are excerpts:

אני סטודנט בן 29. אני אדם שומר מצוות, משתדל להיות דתי ורוצה לעבוד את האלהים בכל מה שרק ארכל. אלא מה, יש לי בעיה שירוצת לי ניגוד עם התשוקה אל האלהים. הבעיה היא שיש לי תשוקה לבני מיני שכמרבן אסורה על-פי דתנו. כל

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<sup>26</sup> This may be the best understanding of the traditional view that the souls of all future generations were already present at Sinai.

ניסיונותי להיפטר מתשוקה זו עלו בתוהו. האמן לי שאת כל ימי מאז שעמדתי על דעתי, אני מוציא בשאלה מה לעשות עם עצמי, שאוי לי מיצרי ואוי לי מירצרי.... כבר חשבתי לעצמי ללכת עם, להרגיש בלי. כלומר, לא משנה מה התשוקות שלי אבל להינשא ולהקים משפחה כדת וכדין. אלא מאי? – מתחבט אני עם מצפוני האם לספר לאשה שתרצני. כלומר האם היא עדיין תרצה אותי אם תדע שכך הדבר. שאלה זו גורמת לי מתח רב בניסיון ליצור קשר עם נשים שכך אני חש רמאי ולא אמין. רביותר חושש אני שמה שאסתיר היום יתגלה מחר. שאף אמנם אם כוונותי טובות, לנסות לרסן את האש הזרה הזאת בזרועות אשה ובמסגרת משפחה, אינני בטוח כלל בסיכויי להצליח.... האם נכון לדעתך.... להסתיר אמת כזו מאדם שאתה הולך לחלוק עמו את אותו נושא עצמך?

I am a 29 year old student. I am an observant person, who tries to live a religious life and to serve God to the best of my ability. Yet I have a problem that interferes with my yearnings for God. The problem is that I have desires for other men, which is, of course, forbidden by our religion. All of my attempts to free myself from this desire have come up empty. Please believe me, that every day since I have become aware of this, I struggle with what to do with myself, for I am caught between my Creator and my constitution. I have already considered the possibility of separating my behavior from my feelings, that is, of getting married and conventionally raising a family, irrespective of my inner desires. But I find myself struggling with my conscience over whether I should reveal this to any woman who would want me. That is, would the woman still want me were she to know the truth? The question causes me endless tension in my efforts to create relationships with women, since I feel like an untrustworthy fraud. Moreover, I fear that what I conceal today may be revealed tomorrow. For pure as my motives may be in attempting to stifle this strange fire in the arms of a woman and in the framework of a family, I am not certain that I can succeed.... Is it right in your opinion....to conceal a sexual truth from a person with whom one intends to share a sexual life?<sup>27</sup>

And this:

הנני בן למשפחה חסידיית...ניצולת השואה. מיום שעמדתי על דעתי, ובתחילה טרם הגדרתי את הדבר לעצמי, נמשכתי לגברים, ערבדה שגרמה לי יסורי נפש וגוף רבים במהלך לימודי בישיבה ומגורי בפנימיה.

הדילמה היא כיצד ניתן לשלב את דת ישראל עם משכב זכר?

<sup>27</sup> רציתי לשאול אותך, פרופ' ליבוביץ: מכתבים אל ישעיהו, Leibowitz, Yeshayahu, ליבוביץ וממנו, Jerusalem: Keter, 1999, pp. 177-179 (translation mine). I am grateful to Marc Schiller for bringing these letters to my attention.

ע"פ השגתי המעטה את שיטתך תטען כי היצר המיני ההרמוסקסואלי הינו צורך שיש לוותר עליו למען עבודת השם שהיא הערך. דא עקא, לדבי דידי זוהי מהות המטביעה את חותמה על החיים בכלל ועל חיי האישות או המצוות בכרוכות בכך בפרט.

...לעניות דעתי טרם ניתנה הדעת לבעייה זו ומהותה וזאת עקב הפחד הנפשי מהעיסוק בה וכן מהבוררת בחינת "זר לא יבין".

I am from a Hasidic family, Shoah survivors. From my earliest sentient days – and even before I could define it for myself – I have been attracted to men, a fact that has caused me much physical and spiritual agony throughout my studies at Yeshivah and my residence in its dormitory.

My dilemma is: how can the Jewish faith be reconciled with homosexuality?

From what I know of your approach, I expect that you will tell me that the homosexual urge must be trumped by the overriding value of the service of God. There's the rub: for me, this is an essential imprint on my life in general, and on family life and its associated obligations in particular.

...in my humble opinion, we have not yet understood the essence of this problem, and that is due to the fear that dealing with the issue inspires, and because of the ignorance that necessarily affects those who have not experienced this.<sup>28</sup>

The two young men whose lives are revealed in these brief letters cannot but impress us with their struggles. In each case, we encounter a sexual constitution that is discovered, not chosen. In one at least, there is a family religious background that is not rejected, but which was still unable to prevent what that very religious tradition defines as a sexual deviancy. These are not people who are seeking to flout the law. On the contrary, they wrote to Yeshayahu Leibowitz because they were struggling, and presumably still are, to follow the law, to be respectful and obedient to it. But as each attests, the law as defined and interpreted by the community they identify with has been unable to embrace the lives that they are inexorably led to live by their constitutions. They carry a burden of sin for being who they are. And it is hard to bear such a burden, when what is in question is not a compulsion to do harm (such as compulsive thieves do), but a natural way of bestowing and sharing love with another human being, who may well have the same positive commitments to Judaism and Jewish law as Leibowitz's correspondents did.<sup>29</sup>

<sup>28</sup> Ibid, pp. 180-181 (translation mine).

<sup>29</sup> Just to repeat, such committed and loyal relationships in the context of Jewish commitment *are the only ones that we are dealing with in this paper*. Some are inclined to accept this characterization, but nevertheless to say: "I do not call you a sinner [a subjective judgment], but I am constrained to call your actions sinful [an objective judgment]. I do not condemn you, but neither will I legitimate your way of living and loving." I understand this reaction to be quite genuine. But it can be countered as follows: Calling gay and lesbian love "sinful", and refusing to legitimate it, must be based on something. It may be based, as noted earlier, on a theology of infallibility for the biblical text, or else on a positivist, precedent-

In any event, it is worth seeing how Leibowitz, a classic (if somewhat extreme) positivist was unable to provide hope or help for the two men, though he clearly believed in the sincerity and purity of their motives, as well as their testimony that their sexual urges and attractions were not a matter of will, but of constitution. Here's his response to the first writer:

אין לאדם שליטה על יצריו ועל הרהורי לבו, ואין בכוח רצונו לבטלם או לחסלם.... ממכתבך ומדבריך הנרגשים ניכר עד כמה אתה מודע לניסיון הקשה שנגזר עליך לעמוד בו.... אם נמנע אדם מן העבירה, כשהיצר מוסיף להדריך את מנוחתו ומונע ממנו סיפוק נפשי ואף מעורר בו חשש שמא אין הוא נאמן ברוחו עם ה' – יסמוך על מאמר חז"ל: "מי שבאה עבירה לידו ולא עשאה – מצוה גדולה עשה." ועוד יש לומר שהעושה את המצוה ללא סיפוק נפשי בעשייתה – עשה מצוה לשמה, ז.א. מצוה שאין מתן-שכר בצדה, ואפילו לא סיפוק נפשי.

אני נוטה לחשוב שאם אתה מקבל עליך ללחום את המלחמה הקשה בנפשך "לשם שמים", תיטיב לעשות אם תבקש למצוא את הנערה אשר – **לאחר שתגלה לה את אשר בלבך** – תבין אותך ואת כוונתך הטהורה ותאבה להיות עזר כנגדך. אותה תקח לאשה כדת וכדין, ויהיו לכם חיי אישות וחיי משפחה מלאים וכשרים, גם אם לא תצליח לעקור מלבך את המחשבת הזרות ולא תיפסק ממך המרעקה הנפשית – **אשר לא תעלים אותה מאשתך**. אם תחזיקו מעמד – יהיה בכך משום מעשה של קידוש השם.

A person does not control his constitution and his inner thoughts, and his will has no power to void or cancel them....From your letter and your heartfelt words it is clear just how aware you are of the difficult test that has been decreed for you....If a person restrains himself from sinning, even while his impulses give him no rest, prevent him from feeling satisfaction, and even make him doubt his spiritual faithfulness to God, let him get support from the words of the Sages: "Whoever has the opportunity to sin and does not do so, has done a great *mitzvah*." One may even go further, and say that when one does a *mitzvah* without any satisfaction in doing it – one has done a *mitzvah* for its own sake, that is, without expectation of reward, even the reward of fulfillment.

I tend to believe that if you take it upon yourself to fight the difficult battle with your soul for the sake of heaven, you will ultimately do well by searching for the young woman who – ***after you reveal to her your inner longings*** – will understand you and your pure motives and will want to be your helpmate. You

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centered legal argument. But I have shown how the theological argument does not jibe with our other beliefs and commitments as Conservative Jews, and that the notion that positivism and precedent are the only legitimate and serious ways to look at law is simply a mistake. What philosophy of law I do propose in its place remains, however, to be sketched out below.

should marry such a woman according to the law, and live with her a full life of marriage and family, even if you do not succeed to uproot from your heart the foreign thoughts, and even if there is no end to your agony of soul (**which you must not hide from your wife**). If you both are steadfast, you will accomplish in this way an act of sanctification of God's name.<sup>30</sup>

And to the second young man:

אתה מן האנשים שנגזרה עליהם הגזרה הקשה להיות המועמדים  
בנסיון . . . . בנסיונות של התגברות על דחפים ואינטרסים  
אישיים החזקים ביותר הועמדו אברהם אבינו ואיוב, והעמידה  
בנסיונות כאלה – גבורה גדולה היא. אני, שלא הועמדתי  
בנסיון מעין אלה ולא הוכחתי את יכולתי לעמוד בו, אנני  
רשאי לתבוע מאנשים אחרים גבורה שלא נתבעה ממני.

אם "דת ישראל" בלבך ונגד עיניך, ואתה שואל "כיצד ניתן  
לשלב אותה עם משכב זכר" – התשובה ברורה וחד-משמעית ואינה  
משאירה מקום להתחמקות: השילוב אינו אפשרי – האיסור של  
משכב זכר מן התורה הוא מוחלט ואינו משאיר פתח היתר. הוא  
נכלל בשלושת הדברים (רק שלושה דברים!) שהם בגדר ייהרג  
ועל יעבור. . . . . אף אם יצר זה הוא "מהות המטביעה את חותמו  
על חייו".

[נ.ב.] אני מזכיר לך את דברי חז"ל: "אם רואה אדם שיצר  
מתגבר עליו – ילך למקום שאין מכירין אותו, וילבש שחורין  
ויתעטף שחורין ויעשה מה שלבו חפץ, ועל יחלל שם שמים  
בפרהסיא" (חגיגה ט"ז.).

You are one of those upon whom has been laid the severe decree to be sorely tested. Such tests, which require one to overcome the most powerful drives and personal interests, were laid on Abraham and Job, for example – and withstanding such trials is great heroism. I, who have not been so tested, and who therefore have not demonstrated my ability to withstand the test – have no right to demand of others what I have not done myself.

But if you are concerned about Judaism, and ask how it can be reconciled with homosexuality, the answer is clear, unambiguous, and unequivocal: the reconciliation is impossible. The prohibition on homosexual sex in the Torah is absolute, and leaves no room for leniency. It is one of the three sins (and there are only three!) for which one must give one's life. And this is so even if it is an "essential imprint on your life".

P.S. I remind you of what the Sages said: "Should a man feel that his urges are irresistible, let him go to a place where he is not recognized, let him go incognito

<sup>30</sup> Leibowitz, Yeshayahu, רציתי לשאול אותך, פרופ' ליברוביץ: מכתבים אל ישעיהו, Jerusalem: Keter, 1999, pp. 177-179 (translation mine).

by wearing black clothes and by wrapping himself in a black shawl, and do what he feels he needs to do. Let him not profane the name of God publicly.” (BT Hagigah 16a)<sup>31</sup>

Notice what it is that positivism is able to offer each of these men, who are struggling to integrate the tradition they love with the reality of who they are. It offers them these two alternatives: (1) *Kiddush Hashem* (a heroic martyrdom of living either no sexual life at all, or of sharing a joyless sexual life with an equally martyred partner of the opposite sex), or (2) Going into the closet to avoid *Hillul Hashem*, with all of the intensified feelings of sin and isolation that go with life in the closet.<sup>32</sup>

The two men are not, or should not be, unfamiliar to us. At this point, we’ve all met, or have become aware of, many sincere Jews just like them. The guardians of Halakhah (and, to be fair, the Jewish community at large) have until now been unable to form a vision of integrating these men and women with a normative Jewish life. But such a vision is not impossible. Indeed, these sincere Jewish gays and lesbians have a clear vision of it, and that vision includes commitments to Jewish life, Jewish community, and Jewish practices, as well as loving relationships and family structures that they can build without being false, self-destructive, or exploitative (by using someone of the opposite sex for the sake of normalization). The vision, in other words, exists, and it is not in any way self-contradictory or incoherent. That is, it is eminently possible to live the lives that gay and lesbian Jews aspire to live. Indeed, they already do so, albeit without wide community approval and embrace. What remains to be accomplished is for the vision that is being lived out in real gay and lesbian communities to be seen by others, so that it is not dismissed as being in *prima facie* contradiction with tradition as it is understood.<sup>33</sup>

Here is a description of another such man, who brings with him his own poignant story. He is an Israeli who called a rabbinic colleague to report that he

.....had become observant of late, and that he was gay. He became worried that he was infected with HIV. He went to get tested, and in the meantime made a *neder* that if the test was negative, he’d find a woman, settle down with her, and start a family. He received a negative result, and now was conscience-stricken about what he needed to do.<sup>34</sup>

Here is a young man whose theology is conventional enough (rather like Job’s friends) to have him believe that he is being punished for his sexual life by having to suffer at least a scare about AIDS. And, he is knowledgeable and respectful enough about *Nedarim* to (a)

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<sup>31</sup> *Ibid.*, pp. 180-181 (translation mine).

<sup>32</sup> It is also worth noticing that for Leibowitz, even the possibility – which he is willing to grant – that homosexuality is inborn, makes no difference to the law.

<sup>33</sup> It is striking just how conformist and conventionally bourgeois are the aspirations of gays and lesbians who seek normalization in society generally. When some years ago, New York City began registering same-sex couples as domestic partners, the offices of the responsible city department were crowded on the first day with couples ranging in age from the twenties to the seventies, wearing corsages, exchanging rings, popping champagne, and doing all the predictable things that people getting married do.

<sup>34</sup> Private communication from a rabbinic colleague

have made a *neder*, and (b) have had serious struggles with whether he now needs to carry it out. This person, it need hardly be said, was not in a good place when he called the rabbi. But he is speaking *our* language, the language of *halakhah*, and he is respectful, not contemptuous, of it.

The element of the *neder* here, of “using” a spouse of the opposite sex, already appeared in the words of one of Leibowitz’s correspondents. It is a deeply problematic idea, morally speaking. It flies in the face of the well-thought-of Kantian imperative never to treat a person as a means, but only as an end in himself/herself. Indeed, Leibowitz, in his response, underscored the need for honesty in this matter. But honesty may well be chimerical in an emotionally and sexually charged issue in which the hope of being transformed – and perhaps also of being the agent of transformation – may be irresistible. Many have suggested to young men such as this one the strategy of overcoming constitutional urges and “settling down” in a heterosexual marriage; many have done so without Leibowitz’s warning to reveal all. But how does one justify that use of a human being (the chosen spouse), and what may be his/her “prime years”?

Steven Greenberg, the Orthodox rabbi who, before revealing his identity, was Yaakov Levado, the author of a moving and much-remarked autobiographical essay in Tikkun magazine, raised this very point:

What disturbs me most in this sometimes heroic attempt at approximating the traditional ideal is the cost to the heterosexual spouse.<sup>35</sup>

But most important for us in Greenberg’s essay is how he points out a prime tendency in the discussions and debates on this subject, one which is perhaps the greatest barrier to a more correct and sympathetic understanding of the reality of gay and lesbian Jews. This is the tendency to think of sexuality as heterosexuality; to take what is the sexual constitution of the vast majority of human beings, and to set aside and marginalize the sexual constitutions of the rest of humanity:

The unfairness...begins with the recasting of homosexuals as heterosexuals with perverse desires. The Torah is employed to support the idea that there is only one sexuality, heterosexuality. God confirms heterosexual desire, giving heterosexuals the opportunity to enjoy love and companionship. With the impossibility of another sexuality comes the implicit assumption that gay people can “become” straight and marry and, indeed, should do so.....<sup>36</sup>

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<sup>35</sup> Greenberg, Steven, “Gayness and God”, in Tikkun, Sept./Oct. 1993

<sup>36</sup> Ibid. This exclusive canonicity of the heterosexual constitution of the large majority of the human population is also the source of the idea that “curative therapy”, even though there is little evidence that it can work (see note 6 above), is still worth a try, as if there is nothing to lose. Joel Roth, in a recent article in USCJ Review (see note 5 above) writes for example: “Since the halakhic prohibition stands irrespective of whether there is treatment possible or not, there is little to be lost in giving a chance to treatment for which claims of marked success are made and attested.” But there is much to be lost when spouses married – and children begotten – in a vain attempt to “go straight” are left devastated when the therapy fails, as it nearly always does.

Notice the idea expressed here, daring for an Orthodox rabbi, that Torah is being *used* to support a halakhic theory, as well as the implicit claim that Torah properly understood, and God’s will properly apprehended, would point us to a very different assessment of human sexuality. This idea will be revisited below when considering a pivotal text in Leviticus Rabbah. Greenberg, and so many others like him, yearn for the vision they have of a normalized life within halakhah to be shared more widely. These are the people who constitute our universe of discourse here, and whose stories spark our investigation into this question anew, after 13 years. Their lives are the “anomalous” observation here<sup>37</sup>; hearing their stories is the analogue to the moment when Einstein got confirmation from his eclipse measurements that the venerated laws of Newton could not adequately explain all of the world. They are the proof that halakhah and its precedents, as they are presently constituted, are inadequate to account for the reality of committed Jews who know deeply in their hearts that they are not sinning when they love those whom they are capable of loving.

You don’t need to know many such people, though there are many of them. Their numbers are not insignificant, but in another sense, the numbers are far less relevant than one’s knowledge – unshakable, intuitive knowledge – about a single person. It was Anna Quindlen who taught us this, in a remarkably insightful essay published just after hundreds of thousands of people participated in a gay rights march in Washington D.C. in April 1993. Many people thought that the numbers who turned out, numbers that could not be ignored, would finally turn public opinion around. Quindlen disagreed, and explained what seemed to her to be closer to the truth about how minds are really changed:

How many gay people are there in the nation? Ten percent? One percent? Four percent? It depends upon whom you ask, what survey you read, how statisticians and sex experts crunch the numbers, which respondents tell the truth and which don’t....But at some level none of it matters at all....It’s the power of one that does it. It’s the power of one man like Sgt. Jose Zuniga, who was the Sixth Army’s 1992 soldier of the year and a medic in the gulf war. Before the march he stood before the television cameras and so before the world and said, with a chestful of medals, that he was proud to be a soldier, and he was proud to be gay. Right that minute, maybe, some fellow vets and fellow Americans wrote him off. But there have to be people who have worked with him, trained with him, fought with him, who are now forced to re-examine their attitudes toward gay men, to compare their prejudices with what they know of this one individual. Stereotypes fall in the face of humanity. You toodle along, thinking that all gay men wear leather after dark and should never, ever be permitted around a Little League field. And then one day your best friend from college, the one your kids

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<sup>37</sup> I trust that the quotation marks around “anomalous” will be adequate to avoid giving offense to gays and lesbians. The point is that what are called “anomalous observations” in science are not false observations; rather, they have the potential of falsifying the theory that cannot account for them, the theory according to which they are “anomalous”. And the same is true of the theory of “one sexuality” that Greenberg speaks about, and which has undergirded halakhic thinking on this matter. It is the theory that must give way to the reality, not vice versa.

adore, comes out to you....The numbers in Washington were not as important as the faces, the sheer humanity of one person after another stepping forward, saying: Look at me. I am a cop, a mother, a Catholic, a Republican, a soldier, an American. So the ice melts. The hate abates. The numbers, finally, all come down to one.<sup>38</sup>

This, then, is the reality of which we speak, and which cannot be accommodated by the positivist, precedent-controlled legal method which has characterized halakhic discourse on this subject. And thus, the next order of business is to set forth an alternative to that positivist approach, and to argue for its cogency and legitimacy.

### VIII. An Alternative (Enhanced)<sup>39</sup> Halakhic Method

We seek a method that could retain the advantages of positivism for most cases, but avoid the relatively infrequent, yet vexing, failures of positivism to produce the legal results that our deepest intuitions and consciences guide us to. In doing so, we do well to keep in mind what was urged above (in section II): that Conservative Judaism has long since made a commitment to a theology that acknowledges that (1) the text of the Torah is not necessarily God's word, and thus not an infallible expression of God's will; (2) that human beings have a critical role in the generation and perfection of religious truth; and (3) that the fulfillment of God's will not only allows, but *requires* the engagement of religious communities. This means, of course, that *halakhah* will change, but that is hardly a complete characterization of what this theology entails. Positivists, after all, have never denied that *halakhah* changes. The deeper consequence of our theology, is that the Torah (and *a fortiori* subsequent expressions of religious law) is not a record of commanding utterances from God, but rather ***a record of the religious quests of a people, and of their understanding of how God's will commands them.*** The long-standing – and understandable – tendency to divide up religious literature into *halakhah* (law) and *aggadah* (narrative) has thus always been a mistake. The law is given cogency and support by the ongoing story of the community that seeks to live by the law. This is true no less for religious than for secular communities, and it is precisely what Robert Cover had in mind when he wrote that “for every constitution there is an epic”.<sup>40</sup> The ongoing, developing religious life of a community includes not only the work of its legalists, but also its experiences, its intuitions, and the ways in which its stories move it. This ongoing religious life must therefore have a role in the development of its norms, else the legal obligations of the community will become dangerously detached from its theological commitments. And when that happens, *halakhah* becomes idiosyncratic, and

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<sup>38</sup> Quindlen, Anna, “The Power of One”, in The New York Times (OpEd Page), April 28, 1993

<sup>39</sup> I use the word “enhanced” here to underscore what was said above, in section IV of this paper: the need for an alternative approach to halakhah does *not* negate the validity of the positivist method for most normal purposes. *Responsa* should, and will, continue to be written in that mode. But for hard cases such as those of the people described in the previous section – and other cases to be described below – we need a way of “unsimplifying”, and thus enriching, the normal mode of operation in order to achieve a result that both reflects a deep fealty to the legal tradition and conforms to certain compelling and undeniable realities. Envisioning and describing that enhanced *halakhic* method is what this section is about.

<sup>40</sup> Cover, Robert, “Nomos and Narrative”, in 97 Harvard Law Review 4 (1983)

less and less possible to defend even to ourselves.<sup>41</sup> So we would do well to speak of *Halakhah*, written with a capital “H”, when we wish to denote not only collections of rules and precedents, but rather a more expansive repertoire of legally relevant materials, which include the accretions over time of theological and moral underpinnings of the community of faith. And a vision of a *Halakhic* methodology would then be one that would include the more conventional *halakhic* methods, but would also appeal to *aggadic* (narrative) texts that have withstood the tests of time to become normative Jewish theology and ethics. The kinds of formative *aggadic* texts which I claim must be given legal standing will be exemplified later in this section.

How can commitment within a community itself generate legal meaning and make legal claims that command attention (even though those claims may not prevail in the end)? Here is Robert Cover’s description of such a process:

Consider the case of the civil rights sit-in movement from 1961 until 1964. The movement’s community affirmed that the Constitution of the United States has a valid moral claim to obedience from the members of the community. Yet the community also affirmed an understanding that the Constitution’s guarantee of equal protection includes a right to be served in places of public accommodation without regard to race. In the face of official interpretations of the Constitution that permitted continued discriminatory practices in public accommodations, the movement had this choice: it could conform its public behavior to the official “law” while protesting that the law was “wrong”, or it could conform its public behavior to its own interpretation of the Constitution. There is both “disobedience” and “obedience” in either case. But only obedience to the movement’s own interpretation of the Constitution was fidelity to the understanding of law by which the movement’s members would live *uncoerced*. Thus, in acting out their own, “free” interpretation of the Constitution, protesters say, “We *do* mean this in the medium of blood” (or in the medium of time in jail); “our lives constitute the bridges between the reality of present official declarations of law and the vision of our law triumphant” (a vision that may, of course, never come to fruition).

A community that acquiesces in the injustice of official law has created no law of its own. It is not *sui juris*.....The community that disobeys the criminal law upon the authority of its own constitutional interpretation, however, forces the judge to choose between affirming his interpretation of the official law through violence

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<sup>41</sup> Cover put it in these words: “The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior. Any person who lived an entirely idiosyncratic normative life would be quite mad.” (*op. cit.*, pg. 10). Moshe Greenberg also wrote in a similar vein: “Only by making the larger context determine the construction of particular laws can the Torah be kept from dissolving in a welter of incoherent rulings, adding up to no intelligible pattern of goodness.” (Greenberg, Moshe, “Rabbinic Reflections on Defying Illegal Orders”, reprinted in Menachem Kellner, *Contemporary Jewish Ethics*, New York: Hebrew Publishing Company, 1978, pg. 216. See also Moshe Halbertal’s warning, cited above in Section III, that “if the study of Torah is an analytic explication of formal legal categories, however stimulating and brilliant it may be, in the end it will lead those students who are thirsting for inspiration to an empty trough.”

against the protesters and permitting the polynomia of legal meaning to extend to the domain of social practice and control. The judge’s commitment is tested as he is asked what he intends to be the meaning of his law and whether his hand will be part of the bridge that links the official vision of the Constitution with the reality of people in jail.<sup>42</sup>

Cover did not, of course, have our case in mind when he wrote these words, but they could hardly be more pertinent. The parallels are, in fact, striking, and I shall move sequentially through Cover’s description here, and apply it to our own case. First, the gay and lesbian Jews of whom we speak have not sought to separate themselves from the Jewish community. They are a fully committed group who have elaborated, and are elaborating still, norms for sexual lives (e.g. the still embryonic creation of religious commitment ceremonies, and the as-yet almost non-existent rules for severing relationships) that stand against the “state” or, more properly, against the halakhic establishment. They agree that halakhah has a valid moral claim to obedience by the community (which is why they care about what happens, for example, at the CJLS). But they also affirm that the Jewish legal tradition’s positive emphasis on sexual fulfillment, companionship, and family life must include space for romantic love and sexual attraction other than the “canonical” heterosexuality. And, they have always been faced with this (Hobson’s) choice: (a) proclaim the official interpretation of halakhah to be wrong, but conform behavior to it (i.e. celibacy or life in the closet), or (b) conform public behavior to their own interpretation of halakhah, and accept the consequences. Gay and lesbian Jews who live their real lives openly have chosen fidelity and commitment to the understanding of halakhah that allows them to live uncoerced. In so doing, they have, in effect, said: “Our lives constitute the bridges between the reality of present official interpretations of halakhah, and the vision of our interpretation of halakhah triumphant.”<sup>43</sup> And they thereby force all official interpreters of halakhah, such as the CJLS, to choose between reaffirming the official interpretation, and thus criminalizing and isolating this committed community, or “permitting the polynomia of legal meaning” to extend to the delicate but vital area of family structure. This is our test: Shall we see ourselves as defenders of the official precedents against those who are constructing new legal interpretations out of the necessities of their reality? Or shall we “be part of the bridge” that links the official vision of halakhah with the reality of people whom that official vision would condemn to celibacy?

This is by no means the first time that we have been tested in this way. Consider, for example, the movement for normalizing the status and roles of women in Judaism. Before there were any legal arguments for the full equalization of women and men in the synagogue and house of study, there were communities that had formed themselves with a vision of such equalization. They were committed to Judaism in a way that included ritual and liturgical traditionalism, but their own narrative, their own understanding of our texts, led them to the conviction that the tradition was wrong in excluding women from any public roles. The vision of those egalitarian communities was not born of a straight

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<sup>42</sup> Cover, Robert, *op. cit.*, pg. 47 (italics mine).

<sup>43</sup> They are also painfully aware of the fact that, despite the CJLS’s revisiting of the issue, there is no guarantee that this vision will come to fruition.

derivation from halakhic precedents along the derivational pathways. Instead, it was a coming together of a halakhic tradition that those communities felt bound to, along with an aggadah – a narrative – that began with the very beginning of our scripture, with Genesis 1:27 and 5:2 (both of which stated that humans were created male and female, and that “adam” – human – was the name given to both sexes). It was augmented by such classical *aggadic* texts as this one, which strongly suggests that the discriminations we humans make are *not* God’s will:

**ותקרבנה בנות צלפחד:** כיון ששמעו בנות צלפחד שהארץ מתחלקת לשבטים אבל לא לנקבות נתקבצו כולם זר על זר ליטור עצה. אמרו: לא כרחמי בשר ודם רחמי הקב"ה. בשר ודם רחמיו על הזכרים יותר מן הנקבות, אבל הקב"ה אינו כן אלא על הזכרים ועל הנקבות, רחמיו על הכל שנאמר "טוב ה' לכל ורחמיו על כל מעשיו" (תהלים קמ"ה:ט)

“The daughters of Zelofehad came forward” – Once the daughters of Zelofehad heard that the Land was being divided among tribes, but to males, and not to females, they got together to seek each others’ counsel. They said to one another: “God’s mercy is not like the mercy of human beings. For human beings have more compassion for males than for females. But the Holy and Blessed One is not like that; God’s compassion extends to both males and females. God’s compassion extends to everyone, as it is written: ‘The Lord is good to all, and His mercy is upon all His works’.”<sup>44</sup>

These narratives were amplified by the history of women of piety, courage, and ability, and most of all by the undeniable reality that contemporary women were fully capable of assuming equal roles, and the growing conviction that to deny them those roles was to unjustly thwart sincere, pure religious yearnings. The vision that grew out of this blend of halakhah and narrative informed the practices of more and more communities, which in time came to include synagogues, havurot, and college communities. The received halakhic tradition, governed by precedent, was failing to account for a reality that would not go away: here were egalitarian communities that were *preserving*, not dismantling, Jewish tradition. Their commitments were familiar: the texts they venerated were the Jewish sacred texts (though they, of course, had their own interpretations of them), their liturgy was structured traditionally and was recited in Hebrew, they were Zionists, they contributed to Jewish scholarship, they supported the philanthropic institutions of mainstream Jewish society, and so on. Their vision was of a law that was being created by this encounter, this interaction, of halakhah and aggadah, and although it was repudiated by the halakhic tradition (and still is, in ultra-Orthodox circles<sup>45</sup>), it was in fact a law “waiting in the wings” that eventually became mainstream. And it did so to our great blessing, and to that of the Jewish people.

<sup>44</sup> Sifre Pinehas 133

<sup>45</sup> Modern Orthodoxy is today a very different environment from this point of view. It tends to grant substantial respect to egalitarian communities, although its ability to go beyond respect to an incorporation of egalitarian practice is still impeded by a “positivist paralysis” that we managed in the end to avoid, at least with respect to egalitarianism.

Although the story of the normalization of women in Conservative Judaism parallels closely what Cover describes in terms of communities that develop commitments originally at odds with the authorities, the actual achievement of the normalization here was, interestingly enough, largely accomplished along positivist lines. Once the recognition had developed that halakhah had to accommodate to the reality of traditional egalitarian communities, our movement rose to the challenge, and it did so largely by demonstrating, in a positivist mode, that there were ways to locate such equalization of women's roles in the synagogue and religious leadership along some of the derivational pathways already in place in the halakhic system. Two of the most prominent examples of this are Joel Roth's *responsum* on the ordination of women<sup>46</sup>, and Judith Hauptman's article on women and Jewish prayer.<sup>47</sup> Both of these illustrate a perfectly valid methodology: positivist analysis makes good policy when it is available, since it increases the number of existing derivational paths, and since it is the most powerful way to convince the larger community that a change in practice is not, in fact, a drastic, or even substantive, change in deep structure. The argument was that the "innovation" was really there to be seen all along; it just needed to be discovered.

But the limits to positivist analysis are also illustrated by this history of egalitarian *responsa*. Shai Wald, in an unpublished paper on the status of women in public prayer<sup>48</sup> skillfully argues in a positivist mode, using halakhic sources to demonstrate the legitimacy of equalizing the gender roles in the synagogue. But in the end, he is forced to concede that he is unable to do so for one aspect of synagogue activity – the blowing of the Shofar on Rosh Hashanah. Thus, his paper argues for women counting in the *minyan*, being required to pray as men are three times a day, and being qualified to lead prayers for both men and women (including, of course, the prayers on Rosh Hashanah and Yom Kippur), but not being qualified to blow the Shofar for the benefit of men, who are obligated to do so in ways that women are not. The oddity of this result is what, in effect, proves its legitimacy and authority to the positivist. The analysis went as far as it could, and permitted only what was permitted, while ruling out what was not to be found, even in latent form, in the derivational paths.<sup>49</sup> This willingness to tolerate, or even welcome, anomalies such as this (which are surely incomprehensible to the lay community) for the sake of precedential purity, remains one of the signature weaknesses of the positivist program.<sup>50</sup> Still, Conservative Judaism today takes pride, as it should, in having risen to the challenge of seeing itself as a bridge between the received halakhah and both the lived and envisioned reality of the egalitarian communities.

The normalization of the roles of women is an example of the narrative of a committed community pushing the interpretation of halakhic precedents to their limits. But in

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<sup>46</sup> See Greenberg, Simon (ed.), *The Ordination of Women as Rabbis*, New York: JTSA, 1988, pp. 127-187

<sup>47</sup> Hauptman, Judith, "Women and Prayer: An Attempt to Dispel Some Fallacies", in *Judaism*, vol. 42 (1993) pp. 94-103.

<sup>48</sup> Wald, Shai, "מאמר על מעמד האשה בתפלת הציבור" (May, 1996, unpublished)

<sup>49</sup> I have always suspected that although Wald wrote neutrally about his inability to find permission in the sources for women to serve in general as Shofar blowers, he may have been secretly happy to have reached that dead end, owing to the greater authority that this "no" granted to his many "yeses".

<sup>50</sup> Committed positivists, needless to say, do not consider this a weakness at all.

another case, that of solving the perennial problem of the abandoned *agunah* – the woman still technically tied in marriage to a husband who has left and refused to deliver a *get* – we have an example of halakhah and aggadah actually merging and integrating with one another to create a new legal reality. There are similarities between how the *agunah* was long viewed and treated by halakhists, and how Jewish gays and lesbians have come to be treated by halakhists today. For there was sympathy – enormous sympathy – for the *agunah*. It was acknowledged that she had no control over her situation, that her predicament was not her fault, and that nevertheless there seemed to be no way to legitimate any sexual relationship she might desire to have. Yes, there were case-by-case attempts to alleviate the suffering, a good number of them successful. But each such solution depended on idiosyncratic elements of the individual case. As for a general prescription, one that could be addressed to all *agunot*, halakhah could only recommend a life of celibacy, in accordance with the law, unless and until some peculiarity of the case – allowing, e.g., for a retroactive annulment of the original marriage – might come to light. Or, until the husband could be convinced to write and deliver a *get*.<sup>51</sup>

In this case, the “community” of *agunot*<sup>52</sup> was not as well defined as the egalitarian communities, but it certainly included, in a loose way, the women themselves, their families, and many rabbis who wished to be able to officiate at weddings that would bring happiness and fulfillment back to these women. The positivist impulse continued to hold sway, as Louis Epstein (in 1930) devised a scheme of agency appointment, which set out to use existing halakhic rules in already authorized ways in order to alleviate the problem.<sup>53</sup> But, of course, this was still not a general solution – primarily because it was of avail only to women whose marriages had been contracted with Epstein’s innovation. For those who hadn’t married in that way (and that, too, was a matter almost totally outside of the woman’s control – most women would probably not even know of the possibility of such a legal maneuver), the halakhic precedents still would have no general solution but celibacy.

But at the same time that the halakhists pursued their positivist methods, the committed community concerned about *agunot* was making an *aggadic* argument that took up its place side by side with the halakhic track. The essence of human fulfillment is summed up in Jewish narrative in what is, in the Torah, the very first negative observation about the world. After assessment after assessment of the world as being “good”, “good”, and “very good”, Genesis 2:18 reports this divine appraisal of the state of affairs in the Garden of Eden: “It is not good for the human to be alone.” Companionship, and

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<sup>51</sup> In most cases, the probability of the latter happening is roughly of the same order of magnitude as the likelihood of therapy transforming gays or lesbians into heterosexuals.

<sup>52</sup> I do not need to say “committed community” here since *agunot* are, by definition, committed to the Jewish community and to Jewish practice. Were they not so committed, they would not be *agunot* at all, for they would simply marry outside the aegis of the community.

<sup>53</sup> The scheme provided that the husband appoint the wife to be his agent, without time limit, to have a *get* written, and to deliver it to herself. That a woman could be so appointed was already established in *halakhic* precedent, and thus this solution could be found on a derivational pathway in *halakhah*. The plan was roundly rejected in the Orthodox world because of the belief that continued cohabitation after the agency appointment would effectively cancel that appointment.

physical intimacy<sup>54</sup>, were seen from the very beginning as prerequisites for a truly fulfilled life. To deprive someone of the means for that fulfillment for reasons that are beyond her (the *agunah*'s) control would betray the power of this narrative, a narrative that takes center stage in the Jewish wedding ceremony itself.

Moreover, Judaism had also developed over time yet another narrative – in part, enshrined in law – that rejected the practice of punishing people, and causing them undue suffering, for things they are not responsible for. Deuteronomy 24:16 said this in one way: "...a person shall be put to death only for his own crime." Later on, the prophet Ezekiel would make this narrative into a theological focal point. In Ezekiel 18:20 (in the context of an entire chapter devoted to aspects of the issue of "vicarious punishment"), he proclaimed the following: "the righteousness of the righteous shall be accounted to him alone, and the wickedness of the wicked shall be accounted to him alone." The challenge this narrative poses to a set of laws that would deprive a woman of a fulfilling life because of the irresponsible complacency or vindictiveness of a former husband is obvious. And about a millennium later, this narrative was continuing to grow. A bold text in Leviticus Rabbah, dealing with the case of *mamzerim* – the "misbegotten" children of adultery or incest, who were also denied the fulfillment of marriage and family in the name of the law – set forth the essence of this narrative of individual responsibility as a full-blown challenge to halakhists:

**רשבתי אני ואראה את כל העשוקים אשר נעשים תחת השמש: והנה  
דמעת העשוקים ואין להם מנחם ומיד עשקיהם כח ואין להם  
מנחם (קהלת ד:א): חנינא חייטא פתר קרא בממזרים. רשבתי  
אני ואראה את כל העשוקים – אילור הממזרים. והנה דמעת  
העשוקים – אימותיהן שלאילור עברו עבירה ואילין עליביא  
מרחקין להורן?! אביר שלזה בא על ערוה – זה מה עשה וזה מה  
איכפת לו?! ואין להם מנחם – אלא – ומיד עשקיהם כח – זה  
סנהדרין גדולה של ישראל שהיא באה עליהן בכוח התורה  
ומרחקתן, על שם "לא יבא ממזר בקהל ה'" (דברים כ"ג:ג).  
ואין להם מנחם – אמר הקב"ה: עלי לנחמן. לפי שבעולם הזה  
יש בהן פסולת אבל לעתיד לבוא אמר זכריה: אנא חמיתיה  
אולוכרוסון דדהב נקי.**

***I further observed all those who were being oppressed under the sun: the tears of the oppressed, with none to comfort them; and the power of their oppressors***

<sup>54</sup> That physical intimacy, i.e. a sexual life, is also a basic desideratum in this narrative, is easily demonstrated. Immediately after the negative judgment on the human's being alone, the beasts are created to provide companionship. This they presumably did, but they could not provide the kind of total intimacy that would make two human beings into "one flesh". This, the woman created next did provide. It may be added here in a parenthetical mode that this story in Genesis 2 clearly diverges from the "equality" narrative of Genesis 1 and 5. But if the story's purpose was to demonstrate the unfulfilling nature of life lived without sexual intimacy, it had no choice but to have the first two human beings created separately, with a time lag that would heighten the tension of being alone. The story is worth dwelling on in this way because it potentially plays such an important role in understanding the narrative pushes behind the efforts to normalize gays and lesbians within Judaism.

– **with none to comfort them (Ecclesiastes 4:1):** Hanina the Tailor<sup>55</sup> interpreted this verse as applying to *mamzerim*. **I further observed all those who were being oppressed** – these are the *mamzerim*. **The tears of the oppressed** – The mothers of these people committed sins, and we isolate them?! Here’s a man whose father committed adultery – but what did he himself do, and what business is it of his?! **With none to comfort them** – but rather -- **the power of their oppressors** – this refers to Israel’s Great Sanhedrin, which imposes on them the full power of the Torah and isolates them, on the basis of the verse, ‘No one misbegotten shall be admitted into the congregation of the Lord’ (Deuteronomy 23:3). **With none to comfort them** – God, therefore, says: It must be My task to bring them comfort. For it is only in this world that they are deemed to be expendable. But in a future world, it will be as Zekhariah the prophet envisioned: ‘I see a lampstand all of gold’ (Zekhariah 4:2)<sup>56</sup>

Among the many striking things in this very subversive text are: (1) the clear depiction of the injustice inherent in people being made to suffer<sup>57</sup> for things they cannot control; (2) the identification of the Great Sanhedrin, the very embodiment of halakhic authority<sup>58</sup>, as the *oppressor* of the *mamzerim*, for having been unable to alloy its halakhic traditions with a narrative that entitled these victims of the rules to happiness and that promised them the fulfillment that human beings were created to pursue; and (3) that God is not on the side of the narrow halakhah of the Sanhedrin, but rather envisions a broader sense of commandment and community that will include the *mamzerim*.<sup>59</sup>

<sup>55</sup> In other versions, it is Daniel the Tailor.

<sup>56</sup> Leviticus Rabbah (Margoliot) 32

<sup>57</sup> “Being made to suffer” is the essence of the issue here. For the fact that people suffer for things outside their control is one of the enduring and vexing mysteries of life, but one that we all must bear with a certain amount of helplessness. On the other hand, when suffering is actively *imposed* on someone (for example, judicially) for something outside of his/her control, there is no claim of helplessness available. Except, of course, for the alleged helplessness in the face of the law; but the use of that excuse is *exactly* what is being critiqued in this text.

<sup>58</sup> Maimonides would later call the Great Sanhedrin the “root source of Oral Torah.”

(משנה תורה, "הלכות ממרים" א:א)

<sup>59</sup> One has the sense in reading this text that God is playing the role of an exasperated parent saying something like “OK, you’ve failed to clean up the mess; I suppose I’ll have to do it myself.” The analogy is potentially important for this reason: I have translated “לעתיד לבא” here rather indefinitely as “in a future world”. Some will be tempted to translate the same phrase more definitely as “in the Future World”. The upshot of this latter translation would be that God promises some new, non-excluding social order for *mamzerim* in messianic days, beyond normal human history, but that in the here and now, there is nothing more that the halakhic authorities can do, since the great legalists of the past left them no precedent to rely on. This, however, seems to miss the point of the critique by locating it entirely in the distant past, in the early days of Jewish jurisprudence, and no longer speaking to us, since we still live in pre-messianic times. In my reading, it is not that God is promising some rectification beyond human history, but is exhorting us to envision (and create) a world that can be in some future time, in which the innocent *mamzerim* will be embraced. This is surely what the parent means in saying “I suppose I’ll have to do it myself”. The parent’s intent is not to absolve the child of responsibility and really do it for the child. It is precisely to get the child to realize that the responsibility is ultimately hers, and in effect to shame her into doing what she should have done in the first place. This, I firmly believe, is the reading that the words of Leviticus Rabbah themselves lead us to.

In 1951, David Aronson articulated a response to the challenge of the various elements of this long-developing narrative, as it applied to *agunot*. He concluded that the narratives of the *agunot*, and the call for justice embodied in them, could not be ignored by a self-respecting legal order. Here is how Aronson put it:

There were strict judges in Talmudic days who argued *יקרב הדין את ההר*, “Let the law pierce the mountain.” Let the law take its course no matter how rigid and harsh it may be in any particular case. But none of the master-builders of the Halachah ever maintained *את הצדק יקרב הדין*, “Let the law destroy justice.” If alive today, none of them, -- if we may take their reaction to the problems of their days as criteria – would smugly accept a situation where it is not the mountains but the very heart of the authority of the Halachah that is being pierced.<sup>60</sup>

Aronson did not counsel rejecting halakhah. He, too, was no doubt a “local” and “regular” positivist. He accepted the principle of *יקרב הדין את ההר*, which means that law does make demands upon us, inconveniences us, restrains our autonomy, as it must do for the sake of a continuity of culture. And he appealed to a halakhic concept, namely *קדושיך הפקעת*, the rabbinic power to terminate a marital relationship, for his solution. But his was not a use of *קדושיך הפקעת* that could be justified by any precedent. It was a new use, and it was the result of the power of narratives emanating from an undeniably real “community of the oppressed” creating a new legal reality in the style of the received tradition, and indubitably in its spirit.

Think of Conservative Judaism’s great accomplishment in authorizing marital and sexual fulfillment for *agunot* in terms of Kronman’s metaphor about cultures.<sup>61</sup> He taught us that human culture is evident in, among other ways, the readiness of one generation to begin a work of art or architecture that will not be finished for generations into the future.<sup>62</sup> But artistic masterpieces often need not only the work of various generations, but also the fusion of two styles, in order to meet the expressive needs of the age. It has been pointed out<sup>63</sup> that it was only in the Italian Renaissance that a fusion of Greek realistic idealism with Christian transcendence became possible. Portrayals of the beatified Francis of Assisi could now not just be spiritual abstractions (which would miss the crucial point that saints are human); he could be painted and sculpted in ways that remained human even while they achieved transcendence. The “divine moral spirit could enter into a Greek human body and make him a saint – a man who, although mortal, could transcend mortal ways of living.” So it is that great art that expresses the fullness of our understanding of life may at times demand a previously unthought-of fusion.

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<sup>60</sup> Aronson, David, “Kedat Moshe VeYisrael”, in Proceedings of the Rabbinical Assembly, 1951, pg. 122

<sup>61</sup> See Section V above.

<sup>62</sup> This, as he pointed out, was true of the greatest of the medieval cathedrals.

<sup>63</sup> By, among others, Silvano Arieti (in Creativity: The Magic Synthesis, New York: Basic Books 1976, from page 220 of which comes the quotation several lines hence). I am grateful to Sarah Plymate for bringing this treatment of artistic fusion – and this reference – to my attention when I was looking for an analogue to the *halakhic/aggadic* fusion for which I am here arguing.

Now perhaps that other critical element of human culture – law – follows a similar pattern. That is, certain legal methods may perfectly suffice to produce and reflect in law the values of a culture, but eventually prove inadequate by themselves to express in law what needs to be expressed. Traditions other than the familiar legal precedents may then have to be appealed to, borrowed from, and integrated with the received law, in order to create a new law (that will itself become a precedent!) that stands and functions only because the integration was accomplished for the first time. This thought experiment will give you a sense of what happened in the Aronson *responsum*. The received halakhic pathways all by themselves simply could not relieve the suffering of *agunot*. Similarly, the justice narratives of Deuteronomy, Ezekiel, and Leviticus Rabbah could not by themselves create the constancy of a legal order, and the stability of a sanctified view of marriage and family. Only together could they achieve both noble goals. That was exactly Cover's concept of law when he wrote about law constituting a bridge from a present reality to an envisioned, better reality.

This is not an invitation to anarchy, nor is it a rejection of normal halakhic practice. It is, however, an essential supplement to, an enhancement of, that normal practice, when the irrefutable claims of a committed community, which has proven its devotion, and whose exclusion and isolation have not been chosen by them, cannot be met through “business as usual.” If halakhic precedent only has the answer of “celibacy” to committed gays and lesbians, then the time has come to merge narrative and precedent once again, as we've done before. For when this was done in the case of *agunot* and *mamzerim*, we identified two powerful motifs in our *aggadic* tradition: (a) “it is not good for the human to be alone”, and (b) the critique in Leviticus Rabbah of the cruel and short-sighted treatment of the innocent victims of the rules. But both of these apply no less to the treatment of gays and lesbians than they do to *agunot* and *mamzerim*. We take pride in having answered the calls of the latter two. It will ultimately be to our shame and our detriment if we cannot hear רדלרת דלים זעקת, the cries of our oppressed brothers and sisters, on whom it has been decreed that they cannot fulfill both their human and Jewish needs simultaneously. It is a moment of opportunity for Conservative Judaism, in which we can demonstrate the power of our commitment and our compassion, and in which our concept of law can be expanded and not contracted.<sup>64</sup>

Just how this merging of halakhah and aggadah can and should be accomplished in our case, so as to normalize Jewish gays and lesbians once and for all, is now the subject of the next, penultimate section of this paper.

### IX. A Halakhic/Narrative Argument for Normalization

By now, it is obvious that this is not a *teshuvah* of the usual mold. I was already convinced 13 years ago that the usual mold could not produce a *teshuvah* that would address this hard case adequately. The Torah's prohibition on sexual activity between two men<sup>65</sup> appears, after all, to be quite clear. Some have attempted to work only with

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<sup>64</sup> Which I take to be the real meaning of “להגדיל תורה ולהאדירה”.

<sup>65</sup> Expanded by the Sages to a prohibition on all same-sex intimacy.

our precedential texts, and to infer qualifications on the prohibition, so as to make it consistent with the lives and needs and Jewish gays and lesbians. One such attempt was to suggest that the Torah's prohibition applied to exploitative and/or violent and/or promiscuous and/or casual homosexual relations, but that it was not meant to apply to long term, loyal, monogamous relations such as those aspired to by the gays and lesbians whom we need to be addressing.<sup>66</sup> The problem with this approach is this: if we are attempting to use the *peshat* (which is best translated as “contextual meaning”<sup>67</sup>) of Leviticus 18 to infer (not impose) qualifications on the prohibition, then those qualifications must fit the context. Are the prohibitions in Leviticus 18 plausibly dependent on there being exploitation, violence, promiscuity, or lewdness involved? Is it likely, for example, that the Torah did not mean to prohibit a long-term loving marriage between a man and his brother's widow or divorcee? Or between a man and his aunt? There is, of course, no ironclad proof of what context provides, but it certainly seems much more likely that the Leviticus 18 was prohibiting sexual acts that it considered (for reasons we may never know<sup>68</sup>) to be abominable, independent of the marital or other frameworks in which they were occurring.

Another attempt to work only with the precedential texts has avoided the error of over-contextualizing the prohibitions to exploitative, violent, or promiscuous acts. But it has argued that what is forbidden in Leviticus 18 is exactly what the Torah literally says, no more and no less. And since the Torah prohibits a man from being intimate with another man as he would be intimate with a woman, this is taken to mean anal penetration (the closest analogue to the normal intimacy with a woman) and nothing else.<sup>69</sup> This act would be forbidden to two men, even if they are committed to one another in a long-term loving relationship, but other acts of physical intimacy would not be prohibited. This I also cannot accept methodologically. For what are the options here, in terms both of the assessment of those other intimate acts, and of the larger context of the Leviticus text? There are, essentially, two options: The first option is to say that Leviticus 18 *approves* of those other acts of physical intimacy, and thus give gay men the instruction that if they only renounce and avoid this one form of intimacy, all else about their relationship is accepted and can be celebrated through religious ritual. But this particular renunciation

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<sup>66</sup> Bradley Artson's particular claim in this connection (in his 1991 responsum that originated as an essay entitled “Judaism and Homosexuality” in *Tikkun*, vol. 3 No. 2 (March 1988)) was that the Torah could not have meant to prohibit such otherwise wholesome relationships among members of the same sex, since they were unknown in the ancient societies that the Torah was addressing. But that claim has been thrown into grave doubt both by rabbinic texts cited by Joel Roth (in his *responsum* from 1991), and by social historians of the ancient world.

<sup>67</sup> *Peshat* quite literally means something close to “surface meaning”, or “stripped down meaning”, i.e. that which is left when the accretions of later interpretations have been shed. Surface meaning is not, however, literal meaning. *Peshat* is always determined by context, and thus the translation as “contextual meaning”. I am grateful to Rabbi Robert Harris for insisting on this rendering of the term into English, which is far superior to the more usual rendition “plain meaning”, and clearer even than “surface meaning”.

<sup>68</sup> The rabbinic tradition had already made note of the apparent paradox of sexual relations with a brother's widow being an abomination, but at the same time being a *mitzvah* in case the deceased brother had no children.

<sup>69</sup> This argument, made most elaborately and passionately by Simchah Roth, does not consider lesbian relations to be a serious issue, since it is most definitely not in the Torah. For this reason, the immediately ensuing discussion of this point of view will refer only to sexual relations between males.

and avoidance in sexual life is hardly a minor matter for most gay men, and it leaves gaping open the theological question of how and why we would, in the name of God's will, actually encourage gay men to engage in many forms of intimacy but prohibit them in the most urgent terms from consummating their relationship in the most common (and presumably, most desired) way. This solution is akin to encouraging *agunot* to marry (perhaps civilly), but telling them that they must forswear normal sexual intercourse. It is simply not tenable. And, what's more, in our case of homosexuality, this untenability is forced by an adherence to the notion that it is theologically impossible to deviate from what seems to be a plain biblical text. But the "theological argument" has already been sufficiently critiqued above.

This leaves the second option, which is to conclude that the serious (and *mortal*, in the Torah's terms) violation only happens with anal penetration, but that other forms of intimacy may be *excusable* (on the technical grounds of not being in the text) in the case of gay men because their sexual orientation is not a matter of will or choice. But such a reading betrays grossly the actual narrative of gays and lesbians to which we ought to be responding. Theirs is not a story of how sinfulness is unavoidable and thus excusable, but rather a story of how there is more than one human sexuality<sup>70</sup>, and that loving attachment to a partner of the same sex can, for those constituted this way, be as fulfilling and as redemptive to the human soul as heterosexual marriage can be. The problem is that there is simply no way to read this into the sources available to us on what we have called the derivational pathways stemming from the Torah and from the Sages.

So the narrative, the aggadah, must be looked to carefully, and it must be connected to genuine Jewish narrative. I have detailed above the personal and compelling stories of Jewish gays and lesbians<sup>71</sup>, and they are in and of themselves an "aggadic" source that can claim status within a *Halakhic* method. But there is still much value in being able to root those stories in the soil of classical *aggadah*. I therefore offer – as a traditional narrative that begs for standing alongside its *halakhic* cousins – a fuller variant of the *Midrash* from Sifre Numbers about the daughters of Zelophehad that was cited in Section VII. The variant text is as follows (with the additions in bold):

**ותקרבנה בנות צלפחד :** כיון ששמעו בנות צלפחד שהארץ מתחלקת לשבטים אבל לא לנקבות נתקבצו כולן זר על זר ליטול עצה. אמרו: לא כרחמי בשר ודם רחמי הקב"ה. בשר ודם רחמיו על הזכרים יותר מן הנקבות, אבל הקב"ה אינו כן אלא על הזכרים ועל הנקבות, רחמיו על הכל, שנאמר: "נרתן לחם לכל בשר" (תהלים קל"ו: כ"ה), "נרתן לבהמה לחמה" (שם קמ"ז: ט), ואומר: "טוב יי לכל ורחמיו על מעשיו" (שם קמ"ה: ט)

<sup>70</sup> Recall Steven Greenberg's explication of this, cited above in Section VI of this paper

<sup>71</sup> As noted above, no claim of exhaustiveness in these stories is intended here, but simply the claim that there are enough of them to justify the faith (which I cannot, by definition, conclusively demonstrate to the reader who resists such faith) that they are more typical than atypical.

“The daughters of Zelofehad came forward” – Once the daughters of Zelofehad heard that the Land was being divided among tribes, but to males, and not to females, they got together to seek each others’ counsel. They said to one another: “God’s mercy is not like the mercy of human beings. For human beings have more compassion for males than for females. But the Holy and Blessed One is not like that; God’s compassion extends to both males and females. God’s compassion extends to everyone, as it is written: **‘who gives food (לחם) to all flesh’ (Psalms 136:25), and ‘who gives the beast its food (לחמה)’ (Psalms 147:9). And, it is also written, ‘The Lord is good to all, and His mercy is upon all His works’ (Psalms 145:9).”<sup>72</sup>**

When this text was cited earlier in connection with the problem of human discrimination against women, it was cited only up to the words על החמיר – “God’s compassion extends to everyone”, followed by the proof text about universal compassion from Psalm 145. In that form, it was perfectly understandable and seemingly complete. But what is the point of the verses from Psalms 136 and 147 concerning the provision of food to all? It may, of course, simply be a reference to the fact that the daughters of Zelophehad would have had no way to provide food for themselves were they not to have land. Yet they would have been provided for, had they been able to marry, as they eventually did, after the grant of land was made to them (Numbers 36). Until that land grant was made, however, these young women were in a predicament: being orphans with no assets at all, their prospects for marriage may have in fact been very dim. Indeed, Rabbi Eliezer ben Jacob is quoted in a Talmudic passage as saying that none of Zelophehad’s five daughters married before the age of 40.<sup>73</sup> The normal family life they eventually enjoyed may have come at a relatively advanced age, but what made it possible at all was the decision to treat them as the equals of male orphans in the nascent society that was about to divide up the Promised Land.

One of the central points of this *aggadah* is to teach us that we are not necessarily entitled to claim that the discriminations we make are also God’s will. It is to teach us that God is more accepting, more empathetic, more compassionate than we are, and that God provides freely for the needs of all creatures. In this context, we may suggest that *lehem* represents human needs even broader than food, perhaps even broader than physical needs. After all, when in Genesis 39:6, we are told that Potiphar had such confidence in Joseph that he entrusted everything to him הוא ארכל אשר – “save the *lehem* that he ate”, Genesis Rabbah glosses *lehem* as follows: לשרך נקיה – “refined language”, i.e. a euphemism for sexual relations. That is, *lehem* is there understood as being a way of referring not to gastronomical satisfaction but to sexual satisfaction, and even more broadly, the fulfillment of family life. This reading is in part corroborated by Joseph’s explicit statement to Potiphar’s wife (in Genesis 39:9) that it is only his relationship with his wife to which Potiphar has not given Joseph access.

<sup>72</sup> Yalkut Shim’oni, Pinehas 773; full or partial parallels are to be found in Sifre Pinehas 133, as well as in Lekah Tov, Pseudo-Jonathan, and Tanhuma (Buber) Nitzavim 5

<sup>73</sup> BT Bava Batra 119b

Armed with this classical understanding of *lehem*, let us then return to our *Midrash*. Having made the point, through the daughters of Zelophehad, that God’s compassion and merciful provision of needs transcends human solicitude for God’s often ostracized creatures, the *Midrash* drives the point home by reminding us that the compassionate God seeks to provide *lehem*, that is, all needs, including sustenance and sexual fulfillment, to all creatures, even the beasts of the field, and *a fortiori* to the *agunot*, to the *mamzerim*, and now – we may add – to gays and lesbians as well. For God, as the text concludes, is good to all, and being good minimally means not imposing undeserved agonies and unfulfillable yearnings (yearnings, that is, that do not harm others) on any creature.

It is apparently true that our legal precedents, limited as they are to the actualities of legal history, cannot accommodate, in this area, the basic theological axiom that we are called upon to follow God’s lead as depicted in this *midrash aggadah*. But if so, then we need not to discard it as a quaint, but legally irrelevant, meditation. It needs to be conjoined to all of the narrative texts (and there are many) that tell us that humans were meant to live in loving partnership, to all of the narrative texts (and there are many) that have progressively forbidden us to exclude and stigmatize people for conditions that they did not choose or control, and to the text in Leviticus Rabbah that depicts God as a greater source of compassion for the unjustly excluded than the Sanhedrin itself. These *aggadot*, and others, as well as the more recent compelling personal narratives of Jewish gays and lesbians, must be called together to provide an authentic reading of the Torah and our tradition that will enable us to approximate even more closely the will and the image of our compassionate God.

## X. Conclusion

The Jewish gays and lesbians we address in this *teshuvah* call to us from a place we should all recognize: a love of tradition, a commitment to Jewish life and Jewish community, and a desire to be integrated into that community. In that sense, we are dealing with a conservative (small “c”) community that does not wish to tear anything down. This is precisely why even the opponents of normalization evince nowadays such strong sympathy concerning their *halakhic* predicament. But their aspirations can be denied on only two bases: (1) a theological stance that is simply not consistent with our general theological commitments as Conservative Jews; or (2) a restrictive view of *halakhah* based on the idea that only texts that formulate rules are genuine legal texts, and that both classical and emerging narrative (*aggadah*) are mere adornments to Jewish thought with no normative force. This represents a *halakhic* method that is impoverished in scope, that produces the anomalous results of having to slam the door in the face of those whom our deepest sympathies tell us should be entering the door, and that ultimately divorces what is treated as an autonomous *halakhah* from the religious convictions that it was created to serve.

The idea that *halakhic* method needs to be opened up to a receptivity to the potential normative force of *aggadah* is, to be sure, unsettling. It is unsettling because, as Cover put it, there is no “official, privileged canon of narratives”, and thus the presumed and

cherished “objectivity” of *halakhic* method is put in jeopardy. But Cover also noted that although narrative in the modern world has a “diffuse and unprivileged character”, we mustn’t fail to take into account “the indispensability of narrative to the quest for meaning.”<sup>74</sup> And if we fail to make meaningful *halakhah*, we will all be called to account for how we will have failed generations of Jews to come, generations that we are charged with leading to greater loyalty to religious law.

This is, therefore, not just a *teshuvah* about Jewish gays and lesbians. It is also not a plan for dismantling the normal and normative methods of doing *halakhah*. It is, rather, a plea that our “toolbox” not be so circumscribed that we are unable to see that hard cases can call out to us to listen courageously to our hitherto orphaned *aggadic* texts. Although we continue to believe that God speaks to us through *halakhah*, the compassion of God that we are commanded to imitate is still greater than any particular *halakhic* method. And if courageous innovation in law in order to pursue *imitatio dei* unsettles, or even frightens us, we do well to remember that religion is, in the end, still about faith. Communities of faith provide stability and fealty to the past in the midst of change.

Here is how Abraham Joshua Heschel put the issue:

רוב החכמים עשו את ההלכה עיקר ואת החיים טפל לה. והאומר  
אי אפשר בגזירה זו או אחרת, כופים אותו עד שיאמר: "רצה  
אני". "ההלכה לא ניתנה לסימון ולהערכה. ההלכה בודדת  
במיעדה. הכל בה, יסוד וגם גבול. היא למעל לכל בקורת,  
ובמפלא ממך אל תשאל."

אני קובל על קרתנות המחשבה, על צמצום המוחין. מתעלמים  
מן הבעיות המבצבצות וצפות בכל יום, מסכסוכי הנפש ויסורי  
המחשבה של נבוכי הדור. דיני אישות חשובים הם. ברם דיני  
אישיות כלום נטולי ערך הם?

כמה גדולים וטובים בישראל לא נמנעו לדבר משפטים את יחידו  
של עולם. ברם בדורנו בקורת באנשי הלכה אסורה במשהו.

כל הדרכים בחזקת סכנה. אין לך דרך שאין בה כמנות או  
עקמימיות. יש אומר: "מה לי ולצרה הזאת? אשמור רגלי ולא  
אחטא, ואת נפשי הצלתי." ברם חכמינו דרשו: 'ושם דרך  
אראנו בישע אלהים' (תהלים נ': כ"ג) – "אילו שמדליקין נרות  
לרבים."

Most Sages have made the Halakhah primary and life secondary to it. As for one who says that a certain decree or another cannot be lived with, they coerce him until he says “I am willing”. [They say:] “The Halakhah was not given to be marked up and evaluated. It is absolutely unique. All is contained in it,

<sup>74</sup> Cover, Robert, *op. cit.*, pg. 4, note 3

including its own foundations and boundaries. It is above all critique. And of what is beyond you, you may not ask.”

I object to the provinciality of thought, and to the constriction of mind in all of this. There is disregard of the problems that bubble up to the surface each day, of the spiritual struggles and mental anguish of those of our generation who are stumbling. The laws of marriage [אישות] are surely important. But are the laws governing human personality [אישיות] devoid of value?

Several great Sages in Israel did not hesitate to demand justice of the Unique One of the Universe. And yet, in our generation, criticism of the halakhists is prohibited even in the minutest measure!

All paths should be presumed to carry danger. There is no path forward that is without crookedness or ambushes. Some say: “What do I need this trouble for? I will watch my step and not sin, and I will have saved my soul.” But the Sages have expounded: ‘and to him who blazes a path I will show the salvation of God’ (Psalm 50:23) – “This refers to those who light lamps for the multitude.”<sup>75</sup>

So I repeat: This is a moment of opportunity for Conservative Judaism, in which we can demonstrate the power of our commitment and our compassion, in which our concept of law can be expanded and not contracted, and in which we can light lamps for the multitude. For it is not just gays and lesbians whom we address here, but our wider community as well. We have the capacity to create a truly exciting and engaging moment in the history of *halakhic* practice.

And if we think we hear the verses in Leviticus 18:22 and 20:13 questioning us as to why we do not faithfully implement their clear version of what God desires of us? Let us remind them – and ourselves – that the journey of soul-searching, and the understanding of religious mandates, that those two little verses have produced for us will have more than justified their existence, and perhaps even some of the pain that they once caused. דרוש רקבל שכר – it is sometimes the demanding struggle, and not mere obedience, that generates the most enduring reward.

**P’sak:**

***Male and female homosexuality can be reconciled with Judaism, conceived through a Halakhic<sup>76</sup> lens. Specifically, Jews who are living sexual lives with partners of the same sex should be considered to be subject to the same obligations and entitled to the same rights as those whose sexual lives are with members of the opposite sex. Congregations are encouraged to grant family memberships to households created by same-sex couples, and to provide equal support to the celebration of life cycle events in***

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<sup>75</sup> Heschel, Abraham Joshua, תורה מן השמים באספקלריא של הדרור, vol. III, Jerusalem: Jewish Theological Seminary, 1990; English in Heavenly Torah (trans. Gordon Tucker), New York: Continuum, 2005, pp. 717-719.

<sup>76</sup> Note the capital “H”.

*those families, including the joining of partners of the same sex into exclusive spousal relationships. The Rabbinical Assembly should turn its attention to the creation of liturgy, and of legal structures, for the celebration of such spousal unions and for their dissolution. And the theological schools of the Conservative Movement (both rabbinic and cantorial) should assess the candidacies and student status of gays and lesbians aspiring to religious leadership by the same criteria that they apply to all other applicants and students.*