



Homosexuality and Halakhah: A Second Look at the Sources

Parshat Aharei Mot-Kedoshim, Leviticus 16:1-20:27 | By Mark Greenspan

“Same-Sex Relationships” by Rabbi Elliot Dorff, (pp. 657- 672) in *The Observant Life*

Introduction

Most of the sources quoted in this week's *Torah* Table Talk are the same ones that appeared a year ago for this *Torah* portion. Since that time I have officiated at a same-sex marriage ceremony based on the guidelines suggested by the Committee on Jewish Law and Standards. As a halakhically committed Jew I continue to wrestle with this issue but the matter became clearer to me when I viewed it from the perspective of the couple who approached me and asked to marry them. This is not a theoretical or philosophical issue; it's about real people and real lives. In this case one of the brides was a student at whose bat mitzvah I officiated and whose family visited Israel with me years ago. The couple grappled seriously with the role that Judaism would play in their lives and they wanted to be married in a synagogue.

I would like to tell you that my decision was based solely on the merits of the three responsa quoted below but that was not the case. It was a personal decision on my part. Of course I would not have made that decision without the backing of the Conservative Movement and the Committee of Jewish Laws and Standards of the Rabbinical Assembly. But the truth is there are problems with each of the decisions as I understand them. Yet all three responsa are offered out of a deep commitment to *halakhab* and the values of Judaism. With that in mind I'd like to revisit the sources which we studied last year (plus one additional source) with the hope that you will join me in exploring this issue. They challenge us to think about the connection between a biblical prohibition and our contemporary reading of that verse.

The Torah Connection

Do not lie with a male as one lies with a woman (mishkevei ishab); it is an abhorrence.

-Leviticus 18:22

If a man lies with a man as one lies with a woman, the two of them have done an abhorrent thing; they shall be put to death - their bloodguilt is upon them.

-Leviticus 20:13

Do not lie with a male as one lies with a woman. Hebrew *mishkevei ishab* means literally “after the manner of lying with a woman” by the introduction of the male member. Male homosexuality is associated with the ancient Canaanites, if we are to judge from biblical literature. Two biblical narratives highlight this theme, one about the men of Sodom in Genesis 19, and the other concerning the fate of the concubine at Gibeah in Judges 19. Although Gibeah was an Israelite town, the story clearly implies that Gibeah’s Israelite residents had descended to the abominable ways of the surrounding Canaanites...Both of these accounts place the phenomenon of male homosexuality in a particular context: xenophobia. The extreme fear of strangers induces a community to attack visitors. In both of the stories cited here, the form of attack was homosexual acts. ...There has been considerable speculation as to why lesbianism is not explicitly forbidden in the Torah. In due course rabbinic interpretation added this prohibition as well.

--Baruch Levine, The Jewish Publication Society Torah Commentary, Leviticus

With a male you shall not lie as one lies with a woman. *The explicitness of this law - the Hebrew for "as one lies" is the plural construct noun mishkevei, "bedding," used exclusively for intercourse - suggests that it is a ban on anal intercourse... Other forms of homosexual activity do not seem of urgent concern. The evident rationale for the prohibition is the wasting of seed in what the law appears to envisage as a kind of grotesque parody of heterosexual intercourse. (Lesbianism, which surely must have been known in the ancient Near East, is nowhere mentioned, perhaps because no wasting of seed is involved, though the reason for the omission remains unclear.*

- Robert Alter, *The Five Books of Moses: A Translation with Commentary* (New York: W. W. Norton & Company, 2004)

You shall not lie with a male like lying with a woman. Why is a male homosexuality explicitly forbidden in the Torah but not female? Some would surmise that it is because women are controlled in a patriarchal Israelite society; and so a woman would simply have no choice but to marry a man. But this is not an adequate explanation, because there would still be opportunities for female homosexual liaisons. Some would say that the concern is the seed, which is understood to come from the male, and therefore is "wasted" in another male. But the text calls homosexuality "an offensive thing" (in older translations, "an abomination"), which certainly sounds like an abhorrence of the act, and not just a practical matter of reproduction.

- Richard Elliott Friedman, *Commentary on the Torah* (San Francisco: Harper San Francisco, 2001).

Any t'shuvah which predicated its conclusion on a thesis which undermines the sacrosanct nature of the Torah cannot be entertained as the legitimate writing of the next chapter in the book of Halakhah, but must, rather, be considered a new book - which is precisely what our movement affirms that it is not writing. Reading the context of the verses in Leviticus in a unique way, unsupported by objective and dispassionate evidence that such a reading is correct, makes for bad law. Even when the reading is ostensibly supported by the view of one Bible scholar, whose theory has not yet stood the test of time, and is not even widely accepted by other Bible scholars, it is unwise in the extreme to base so far-reaching a change in normative Jewish law upon it.

- Joel Roth, Summary, Homosexuality, Revisited. The Committee on Jewish Law and Standards

A review of the biblical and rabbinic sources reveals that only one form of homosexual intimacy, anal intercourse between men, is explicitly forbidden by the Torah. Other forms of homosexual intimacy between men and between women have been prohibited by the authority of the Rabbis. Although some prominent rabbis such as Maimonides have maintained that the general prohibitions of homosexual intimacy have biblical authority, the arguments of Nahmanides are more convincing. The established halakhah has classified mishkan zachur (anal intercourse) as assur d'oraita (forbidden by the Torah), while other sexual acts between men and between women are issurim d'rabbanan (forbidden by the rabbis).

- Elliot Dorff, Daniel Nevins, and Avram Reisner, Summary of "Homosexuality, Human Dignity, and Halakhah". The Committee on Jewish Law and Standards

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 the words of Leviticus ... express directly and completely the will of God... But that assumption (that the Torah is the direct and complete expression of God's will) is one that, for all its currency in parts of the Jewish world, is not accepted in our Conservative Jewish world. ... Heschel famously wrote that "as a report about revelation, the bible itself is a midrash." We quote this phrase often enough, but perhaps don't sufficiently appreciate that its far-reaching implications both free-up our religious thinking and tie us to traditional theological categories at the same time. It is, in other words, possible to (a) believe in God; (b) believe in revelation; (c) believe that it is meaningful to speak of a divine will for the world; and (d) to have faith in the idea that the Torah is our first (and thus, in an important sense, most sacred) expression of God's will in human language, and still insist that the sacred text of the Torah does not perfectly and infallibly express that will. ... 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 by such teachings, and yet fear to teach them in turn to our congregations, preferring to present to them the simple – but misleading – formulation that the Torah is the word of God? And why would we even consider doing halakhah by appealing to an axiom of biblical inerrancy that undermines the very theology with which these revered teachers, and others, have gifted us?

- Gordon Tucker, “Halakhic and Metahalakhic Arguments Concerning Judaism and Homosexuality.” The Committee on Jewish Law and Standards

The answer to the question involves...the issue of free choice: are homosexuals able to choose and to change? If they are, they should be considered in violation of the Torah's prohibition, which is still binding; if they are not, but except for the sexual identity of their mate do live faithfully by traditional Jewish standards, they should be accepted fully and respected...Those of us...who insist that it is God's "right" to prescribe standards of human behavior in general and for Jewish behavior in particular, and who teach that heterosexual behavior is God's intended norm, must not be so presumptuous to deny God's "right" to create or permit the "homosexual exceptions." Indeed, with regard to such "exceptions" we must strive to echo...God's full acceptance and approval.

-Rabbi Herschel Matt, A Call for Compassion" Judaism 32, Fall 1983

Reflections

We begin our discussion with a biblical verse. What is *mishkevei ishah*? What does the Bible have in mind when it uses this expression? How limited or broad should our interpretation of *mishkevei ishah* be? And if we can ascertain the original meaning of this expression (*the P'shat*), to what extent should *P'shat* influence how we read these verses today?

Levine, Alter, and Friedman each offer interpretations of the verse that subtly vary. Levine suggests that the prohibition might have something to do with violence and xenophobia. Alter suggests that the text emphasizes a specific sexual act and not homosexuality as a lifestyle (much like Dorff, Nevins and Reisner). Friedman entertains the idea that the prohibition might have something to do with the spilling of male seed; that is why there is no prohibition for lesbians. There can be little question that from the standpoint of the sages the prohibition was a more general one and not limited to one specific sexual act. The sages were not concerned with the origins of this prohibition or its cultural context; the *Torah* as a sacred, divinely given/inspired text simply is. Should the original rationale for a commandment necessarily influence whether or not we observe it? For instance the *Torah* commands us, “You shall not cook a baby goat in its mother's milk.” We don't know what the original reason for the prohibition might be though modern Bible scholars offer theories. What we know is that it has come to mean don't mix milk and meat. And so that is how we practice the biblical prohibition whatever its original meaning might have been.

As we explore this issue we must delve into the murky waters of theological speculation. If the *Torah* is the infallible and irrefutable word of God then how can I possibly question the biblical injunction? Yet while we know what the word of God says we don't necessarily know what God's original intention might have been. Jewish practice is not determined by *P'shat* but by the Talmudic and rabbinic interpretation of the verse. And while there might be times when new interpretations of scripture become the new official canon Joel Roth

suggests that we must not be too quick to introduce new interpretations. Biblical speculation often changes not only from generation to generation but from decade to decade as we find new insights into the world of the Bible. Our conversation according to Joel Roth is with the rabbis and while this allows for the evolution of Jewish practice in some cases it must be approached with caution and deep respect. At the heart of our approach to scripture must be a deep reverence for the sacrosanct nature of the Bible.

Elliot Dorff, Daniel Nevins, and Avram Reisner offer a different approach. Using a tried and true rabbinic strategy they suggest that the biblical text should be understood in its most limited sense. The *Torah* speaks of *mishkevei ishah*; therefore we should understand it as applying solely to male anal sex. All the other prohibitions regarding homosexual relations they argue are only rabbinic and they should be set aside in the interest of human dignity. Because our understanding of homosexuality has radically changed in the contemporary world we can no longer countenance the prohibition of such relations and yet we cannot ignore the biblical verse either. In their approach the biblical prohibition remains intact but is given its most narrow and specific interpretation.

Gordon Tucker offers the most radical and broad interpretation. He suggests that there are times when we must have the intellectual and spiritual courage and integrity to reject ideas in the *Torah* that are simply not appropriate for our age. Gordon Tucker suggests that we are being disingenuous when we make the argument that we cannot abrogate or change a law because it is explicitly written in the *Torah*. We believe in revelation but he argues that *Torah* is both a product of God's will and human expression. As a result *Torah* is not infallible; it records God's will imperfectly. This has been the approach of Biblical and Rabbinic scholarship for the last several generations in places like the Seminary. If we believe what we have been teaching and what we have been taught then we must allow for larger issues to override biblical mandates in some cases. There are meta-halakhic values (such as justice, human dignity, etc.) that ought to inspire us to say that we can no longer live by this biblical prohibition any more than we can follow such commandments as the rebellious son (who can be put to death by his parents). Of course Gordon Tucker opens a door to a slippery slope; where does one draw the line about which laws we follow and which we can abrogate or change?

Let me end by saying that I admire all of these men; Joel Roth, Elliot Dorff, Daniel Nevins, Avram Reisner, and Gordon Tucker are not only brilliant scholars but people who are deeply committed to *Torah*, tradition, and to the integrity of Conservative Judaism. Not only that but they are people whom I admire on a personal level as well; they are all *menschen* and from my perspective that is just as important in measuring the integrity of a rabbinic position. Ultimately the Committee of Jewish Laws and Standards chose to approve the Roth and the Dorff-Nevins-Reisner responsa by a sufficiently large vote to make them official positions of the panel. Gordon Tucker's paper only received six votes which meant that it is not an official position.

The committee argued that Tucker's position was not a halakhic argument and had to be voted on as a *takkanah*, a rabbinic decree, which necessitated a larger percentage of the committee. Still all three papers were entered into the archives of the CJLS and can be read on line. You can find them online: <http://www.rabbinicalassembly.org/jewish-law/committee-jewish-law-and-standards/>

None of these responsa has completely answered all my doubts: I respect Joel Roth's integrity but I cannot ignore the anguish of those who are homosexuals and seek to lead a fulfilling life within the context of Jewish law. Elliot Dorff, Daniel Nevins, and Avram Reisner offer an intriguing compromise; they are willing to live with a biblical prohibition that is troubling at best in its attitude toward homosexuality. I find Gordon Tucker's position compelling but I fear that his approach to be dangerous in terms of its ultimate effect on the integrity of Jewish tradition. Personally I find Herschel Matt's statement most compelling; he suggests that the ultimate issue here is one of common sense. You can't require people to live by a set of standards which

they cannot follow by their very nature. Jewish law should be a matter of free will. Also what does it say about God if God creates people in such a way that they could not live by those laws? For me the question of same sex relations is more of a pastoral question than a legal one.

Elliot Dorff offers a brief history of the discussion on same-sex relations in the Conservative Movement in his chapter in The Observant Life so I am not going to quote sections of this chapter below. But there is one thing that I believe is important to acknowledge in this ongoing conversation. None of the positions offered above suggest a prejudice one way or another toward homosexuality or homosexuals. They reflect a deep respect for the halakhic process as well as a commitment to halakhic pluralism; if this was an easy issue to resolve our rabbis and teachers would have done so. And for over two decades while seeking a halakhic way the Conservative Movement and the Rabbinical Assembly has sought to find ways to welcome those who are homosexuals into our congregations. We are left to wonder in the end whether true inclusivity is possible if one doesn't seek a way to change the law.

Questions to Ponder

1. What do you think *mishkevei ishab* means? What can we learn about this term from its context in chapters 18 and 20 of Leviticus? (Read the chapters and then decide what the text reveals about the expression.)
2. Homosexuality appears not only in legal texts but in narrative texts as well. What do the biblical narratives have to say about homosexuality?
3. Why do you think the Bible seems to be ignorant of or at least ignore female homosexuality?
4. How does the notion that the *Torah* is divinely revealed affect your practice of Judaism? What parts of the *Torah* do you think of as “the will of God?”
5. What are the strengths and weaknesses of the three positions on same-sex relations as presented above? Which one do you feel most comfortable with?
6. If your rabbi announced from the *bimah* that he no longer believed that the *Torah* was divinely revealed and that he believed it was written by human beings how would you feel? Would that undermine your respect for his authority as a leader?

Adapted from Torah Table Talk by Mark Greenspan