

HOMOSEXUALITY, HUMAN DIGNITY & HALAKHAH

a combined responsum for

The Committee on Jewish Law and Standards

by

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This responsum was approved by the CJLS on 15 Kislev 5767 / December 6, 2006 by a vote of thirteen in favor and twelve opposed.

Voting in favor: Rabbis Susan Grossman, Avram Reisner, Gordon Tucker, Kassel Abelson, Pamela Barmash, Myron Geller, Allan Lucas, Daniel Nevins, Elliot Dorff, Myron Fenster, Robert Fine, Adam Kliegfeld, Aaron Mackler.

Voting against: Rabbis Jerome Epstein, Vernon Kurtz, Paul Plotkin, Joel Roth, Leonard Levy, Mayer Rabinowitz, Philip Scheim, Baruch Frydman-Kohl, Lowell Weiss, David Wise, Robert Harris, Joseph Prouser.

She'elot:

What guidance does halakhah offer to Jews who are homosexual? Which intimate activities are permitted to them, and which are forbidden? How shall Conservative Judaism relate to gay and lesbian couples?

Teshuvah:

אורו של משיח, כשזורח בלב, הוא מלמד לכבד את הבריות כולם "וְהָיָה בַיּוֹם
הַהוּא שֶׁרֶשׁ יִשְׂרָאֵל עֹמֵד לְגַם עַמִּים אֲלֵיוּ גוֹיִם יְדַרְשׁוּ וְהָיְתָה מִנְחָתוֹ כְּבוֹד.
יִשְׁעִיהָ יֵאָ, י

The light of the Messiah, when it blazes in the heart, teaches one to dignify all people: "It shall be on that day that the root of Jesse will stand as a sign to the nations, and peoples will seek him, and his consolation shall be *dignity* (Isaiah 11:10)."¹

I. Introduction

No subject elicits as much heated controversy in contemporary religious discourse—Jewish and non-Jewish—as the status of gay and lesbian people, their sexual lives and their relationships. For some, this is a basic matter of civil rights and justice. The traditional prohibition of homosexual sex is, in this view, bigoted and intolerable. The opposite perspective is equally unequivocal: biblically-based mores are immutable,

and the burden is therefore upon gay and lesbian people somehow to change their sexual orientation or else to practice life-long celibacy.

This responsum is a collective effort by three rabbis who initially wrote separate papers on the subject of halakhah and homosexuality.² Together we are able to present a more comprehensive study of the dilemma faced by observant Jews who are gay or lesbian, the implications of earlier halakhic treatises,³ and the options available within traditional *p'sak halakhah* to guide their intimate lives. We have abridged our earlier collective responsum while retaining many of the detailed arguments in the end notes. In this way we intend to make our paper accessible to a broader range of readers.

This responsum works within the limits of traditional halakhic discourse. To do otherwise would compromise the integrity of the halakhah and would accomplish nothing for those gay and lesbian people who strive to live as observant Jews. People who are not Torah observant have no particular need for a traditional halakhic responsum. But people who are observant and are also gay or lesbian are caught in a terrible dilemma, with no halakhic guidance about the integration of their Jewish identity and their sexual orientation. Our core conviction is that dignity for gay and lesbian Jews – as for heterosexual Jews – results neither from blanket permission nor from blanket prohibition of all sexual activity, but rather from situating it within the matrix of *איסור והיתר*, permission and prohibition, which permeates all of Jewish life.

Contemporary Jewish law is based upon the legal and moral texts found in the Written and Oral Torah. The Written Torah famously pronounces that “God created humanity in His image” (*Genesis* 1:27; 9:6), that “It is not good for man to live alone” (*Genesis* 2:18), that you must “Love your neighbor as yourself” (*Leviticus* 19:18) and that “God is good to all; His mercies apply to all creatures” (*Psalms* 145:9). The Oral Torah (Talmud, Midrash and Codes) draws upon these and many other biblical passages to create a system of law that sanctifies the daily lives of those who serve God in truth.

The Committee on Jewish Law and Standards (CJLS) has a long and proud history of addressing weighty issues of ritual and social practice as our community wrestles with the challenges of observing Jewish law in a modern context. We are motivated always by our tradition’s mandate that rabbis in every generation apply Jewish law sensitively and effectively to the new circumstances of their time, drawing upon not only the precedents of our tradition but also its fundamental concepts and values. The issue of homosexuality and halakhah is particularly contentious in our historical moment, but it is hardly unique when compared to the complex topics addressed by our predecessors. Fifty years ago our committee was similarly occupied by the subject of *agunot*, women who had been abandoned by their husbands but who were considered “chained” to them by the law. Then too, critics warned that the creative halakhic solutions fashioned by the CJLS would be the undoing of halakhah but, in fact, this has emerged as one of the finest hours of modern rabbinic leadership.

Our predecessors applied classical halakhic principles in new ways in order to free women from this legal quandary.

Dor dor v'doroshav—each generation demands its own interpretations of Jewish law. As the Torah says, “When a matter shall arise that confounds you...you shall go and inquire of the judge who shall be in that day, and they will tell you the law.” (Deut. 17:9) For the CJLS to avoid this issue or to declare that nothing can be done for homosexuals who wish to observe the halakhah would be to abandon the Torah’s mandate. Indeed, were we unable to find compelling guidance in the halakhah for the sexual lives of our contemporary Jews, including those who are gay and lesbian, that would be a terrible defeat for our religious mission.

Some may object to our proposal by predicting that gay men will find our limited permission unacceptable.⁴ We, however, believe that those motivated to live within the framework of halakhah are necessarily willing to accept limits on personal autonomy—as long as they are feasible—for the sake of pursuing a life of holiness.⁵ Others may object that human dignity is a peripheral concern of the halakhah incapable of modifying our ancient sexual ethic. We, however, believe that dignity is a central concern of the Written and Oral Torah and is a well established halakhic principle.⁶ We approach this challenging subject with reverence for God, humility, and with respect for the dignity of humans, all of whom are created in the divine image.

II. Contemporary Theories of Sexual Orientation

The idea of sexual orientation is a relatively recent construct first developed in the late nineteenth century. Prior to this time, homosexual behavior was generally understood as a deviation from the normative conduct of otherwise heterosexual individuals. In recent decades, researchers have formulated a more definitive idea of sexual orientation as an integral component of individual identity. Yet even modern psychological studies acknowledge that people do not divide neatly into the binary categories of heterosexual and homosexual. Although some individuals’ sexual orientation is clear and consistent throughout life, others experience ambiguous or evolving sexual attractions to people of the same or opposite gender.⁷

There remains much to be learned regarding the psycho-social construction of sexual orientation, *yet this much is absolutely clear to the leading scientific authorities of our day: homosexual orientation is not a form of mental illness;⁸ it is not inherently harmful to individuals⁹ or to their children¹⁰ or families;¹¹ and it is not subject to reversal by means of any available therapy* (see below). Furthermore, social acceptance of gay relationships will not “convince” children to become homosexual who would otherwise be heterosexual; current research indicates that sexual orientation is set in a person at an early age, long before sexual experimentation takes place. What social acceptance will do, however, is reduce the amount of discrimination against gays and lesbians and their need to remain

in the closet, with all the suffering, indignity, and the increased risk of suicide that this entails. These conclusions are documented in the appended review of the psychological literature provided to us by Dr. Judith Glassgold.

People who identify as gay or lesbian are not able to become heterosexual. While some people of ambivalent sexual orientation are capable of functioning as heterosexuals, those for whom homosexual orientation has become an integral feature of their personal identity are not able to transform into heterosexuals.¹² The following 2005 statement by the American Psychological Association summarizes the current scientific consensus about sexual orientation and individual volition:

Human beings cannot choose their sexual orientation. Sexual orientation emerges for most people in early adolescence or late childhood without any prior sexual experience. The experience of sexual attraction and falling in love is one that individuals experience as outside their conscious control. Although we can choose whether to act on our feelings, psychologists do not consider sexual orientation to be a conscious choice.¹³

The near total failure of advocates of “cure” to convert homosexuals into heterosexuals obviates the halakhic significance of tracing the source of homosexuality. Gay and lesbian people are homosexual and will remain so. Even those who have attempted a “cure” have been unable – in the vast majority of cases – to change their orientation. For the halakhist, therefore, the issue of significance is not the *origin* of homosexual orientation, but rather the *permanence* of such an orientation by the time sexuality reaches consciousness.¹⁴ Whether sexual orientation is determined by nature or nurture or some combination of both does not alter the resultant orientation, whether that orientation is heterosexual, homosexual, or something in between.¹⁵

Moreover, this pursuit of futile therapy has caused great personal anguish to gay and lesbian individuals.¹⁶ It has undermined their dignity and endangered their spiritual and even physical health. The medical literature has documented elevated rates of suicidal thinking and attempts among gay and lesbian teens and adults.¹⁷

There is also an emergent literature on the damage caused to married couples and their children when one spouse “comes out” as gay.¹⁸ Such revelations often result in divorce, leaving the heterosexual spouse devastated. There are physical and mental health risks to all parties, including the children. This tragic situation demands the thoughtful and thorough attention of the Jewish community, including its rabbinic leadership and halakhic authorities.

In this responsum, we will argue that the permanent social and sexual loneliness mandated by halakhic precedent for homosexuals undermines their human dignity. However, we reject attempts to distort this argument by claiming that, if so, every

human desire deserves to be satisfied. In fact, Judaism teaches us constantly to bend individual desire to fulfill the will of God.¹⁹ Some sexual desires must be delayed, and some must be permanently suppressed.²⁰ What distinguishes the situation of gay and lesbian Jews from others who experience forbidden sexual desires is that heretofore, gay and lesbian Jews have had absolutely no permitted avenue for sexual expression or for the creation of a committed romantic relationship. *It is this situation of absolute and permanent isolation that undermines their human dignity.*

Regarding bisexuals, we understand that some people experience sexual attraction to both men and women.²¹ Because the heterosexual ideal is enshrined in over three millennia of Jewish texts, because heterosexual marriages alone are recognized by established Jewish law, and because bisexuals do have a permissible avenue for sexual and romantic intimacy, we instruct any Jew who has sexual longings for someone of the opposite sex to marry a Jew of the opposite sex and to maintain complete fidelity to his or her spouse. While this may involve the sacrifice of some sexual satisfaction, this is a common consequence of marital fidelity, which gives greater priority to stable relationships than to the erotic desires of each individual.²²

We are aware of a recently documented trend among teens and young adults to experiment sexually with multiple partners of different genders.²³ Some youths, referred to as “ambisexual,” or “heteroflexible,” eschew the establishment of a clear sexual identity. Such promiscuous behavior is risky and can prevent the development of a healthy and stable sexual identity. Moreover, sexual promiscuity, whether heterosexual, homosexual, or both, undermines the traditional Jewish values of modesty, fidelity, and the belief that our bodies are containers of precious souls that bear the image of God.²⁴ The same concern for human dignity that has stimulated us to reconsider the rabbinic prohibitions on homosexual intimacy also requires us to instruct young adults to refrain from sexual promiscuity and to do everything possible to prepare themselves for a traditional marriage.

Nevertheless, it is evident that by early adulthood, some Jewish men and women have discerned that they are homosexual and will not be able to enter a traditional heterosexual marriage. Given this reality, and given the ineffectiveness of any therapies to allow them to function within the ancient heterosexual norms of Judaism, we are presented with a significant dilemma: what guidance does Jewish law offer to people who are not able to live within its heterosexual norms?

III. Halakhic Sources Regarding Homosexual Intimacy

A. The Biblical Prohibition.

The standard codes of Jewish law establish all-encompassing prohibitions on homosexual contact. However, only one act is explicitly prohibited in the Torah: anal

sex between men. This is established in the holiness code section of *Leviticus*. Chapter 18:22 states:

וְאֵת זָכָר לֹא תִשְׁכַּב מִשְׁכַּבֵּי אִשָּׁה תוֹעֵבָה הוּא :

Do not lie with a man the lyings of a woman; it is abhorrent.

Leviticus 20:13 restates the law, adding a severe punishment for both partners:

וְאִישׁ אֲשֶׁר יִשְׁכַּב אֶת זָכָר מִשְׁכַּבֵּי אִשָּׁה תוֹעֵבָה עָשׂוּ שְׁנֵיהֶם מוֹת יוּמָתוּ דְּמֵיהֶם בָּם :

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

What does it mean for a man to lie with a man with the “lyings of a woman”? The Talmud derives from this plural construct that there are two forms of sexual intercourse between a man and a woman, vaginal and anal (*Sanhedrin* 54a). The Sages understand these verses to prohibit anal sex between men without any exception, even as the other sexual behaviors on this list are forbidden without exception.

Ancient authors employed euphemism when describing sex, making it difficult to prove exactly what activities they understood to be included within these verses. Is it possible that the biblical prohibition called *mishk'vei islah* and later, by the Rabbis, *mishkav zakhur*, includes actions other than anal intercourse?²⁵ These verses have been variously translated, but almost all readers conclude that they prohibit anal sex between men, with the first verse addressing only the insertive partner, and the second verse including the receptive partner.²⁶ Judaism is based on how the Rabbis interpreted the Bible, and so the crucial point for legal purposes is that the Rabbis read these verses to refer to anal sex. Their only debate regarded whether 18:22 penalizes the receptive as well as the insertive partner.²⁷ In 20:13 the penalty for both partners is made explicit.²⁸

Our colleague, Rabbi Joel Roth, has argued that the rabbinic expression for *heterosexual* anal sex, *biah shelo kedarkah*, may possibly include not only homosexual anal sex, but even oral sex between men.²⁹ Rabbi Roth is *sui generis* in this reading, which is rejected by other contemporary halakhic interpreters, including Orthodox rabbis Dr. Abraham Steinberg and Chaim Rapoport.³⁰

Moreover, the definition of *mishkav zakhur* is made abundantly clear at *Yevamot* 83b, which discusses the prohibition of homosexual relations with an *androginus*. An *androginus* is defined as a person with both male and female external genitalia, but is considered legally male.³¹ The Talmud states that such an *androginus* has the potential to transgress *mishkav zakhur* in two places. If, as Rabbi Roth argues, oral sex is to be included in the transgression of *mishkav zakhur*, then any male has two potential orifices about which one may be liable. Why does the Talmud specify an *androginus*? Clearly only of the *androginus* is this true, for oral sex is *not* considered *mishkav zakhur*.

Indeed, Rava reports the explanation in the name of the son of Hamduri:

”ואת זכר לא תשכב משכבי אשה” -- אי זהו זכר שיש בו שני משכבות? הוי אומר זה אנדרוגינוס.

“Do not lie with a male as one lies with a woman [lit. the lyings of a woman]” -- Who is a male who has two “lyings?” Conclude: this is an *androginus*.

Only with an *androginus* are there two biblically prohibited acts between male lovers. Otherwise, the only act forbidden by these verses is anal intercourse. There is no other way for men to have intercourse that would be considered *משכב זכור*. This source clearly excludes oral sex between men from the category of *ervah* with its severe penalties.³²

In contrast, our colleagues Rabbis David Fine, Robert Fine and Myron Geller have argued that the verses in *Leviticus* should be understood to prohibit only those sexual relationships that offer no possibility of marriage.³³ In an age when gay marriage is permitted by some jurisdictions, they argue, the Torah’s ban is no longer universal. Although they present their reading as “the *p’shat*,” there is nothing simple or contextual about this interpretation. Nowhere does the passage mention marriage. The list of forbidden sexual relations includes menstrual sex, which can occur within a marital context. It is hard to accept that the Torah forbids bestiality only because it offers no opportunity for marriage. This reading, too, is *sui generis*—unsupported by either ancient or modern commentaries.

Rabbis Fine and Geller’s responsum offers one of many alternative readings of these verses offered in recent years. Various writers³⁴ have proposed, respectively, that these verses forbid anal sex *only* when in a context that is: cultic, or coercive, or non-loving, or non-procreative, or bisexual.³⁵ Yet none of these interpretations is *p’shat*, the exclusive contextual reading of these verses. Although we sympathize with the motivation that inspires such readings, as a general rule the established rabbinic understanding of the Torah governs halakhah, even when modern scholarship is at one in proclaiming a different *p’shat* (which is hardly the case here). Simply stated, these verses have been understood and codified as creating an *unqualified* prohibition on anal intercourse between men, rather than a *conditional* and limited restriction.

Moreover, the particular negative commandment associated with male homosexual sex is listed in the Torah among the *גלויי עריות* (literally, “exposures of nakedness”), and of these prohibitions it is said *יהרג ואל יעבור*, “one should die rather than transgress.”³⁶ To strike this law from the Torah is a radical step. On the other hand, to expand the biblical prohibition beyond what is actually written is unnecessarily harsh. The Torah forbids anal sex between men, nothing more, and nothing less.

B. Rabbinic Prohibitions on Homosexual “Approach”

The Torah prohibits anal sex between men, while remaining silent regarding other forms of sexual intimacy between men and between women. Nevertheless rabbinic codes describe a much broader prohibition of all male and female homosexual intimacy. R. Joseph Karo writes in *Shulhan Arukh, Even haEzer* 20:1:

הבא על אחת מן העריות דרך איברים, או שחבק ונשק ונהנה בקירוב בשר, הרי זה לוקה וחשוד על העריות.

Whoever copulates with one of the forbidden relations non-genitally, or hugged and kissed [them] or enjoyed skin-to-skin contact -- such a person is lashed, and is suspected of *arayot* [forbidden intercourse].

His words echo those of Maimonides, who explains that, although these intimate acts are not to be categorized as actual sexual intercourse, they are prohibited separately by the Torah as “things that lead to prohibited sexual relations.” He writes, in *Hilkhot Issurei Biah* 21:1:

הרי זה לוקה מן התורה. שנאמר: “לבלתי עשות מחוקות התועבות וגו’” ונאמר “לא תקרבו לגלות ערוה”, כלומר: לא תקרבו לדברים המביאים לידי גילוי עריות.

Such a person is lashed according to the Torah, for it says (Lev. 18:30): “not to engage in any of the abhorrent practices...” and it says (Lev. 18:6): “None of you shall come near... to uncover nakedness,” that is to say: Do not approach those things that lead to prohibited sexual relations.

Indeed, Maimonides lists this as a separate prohibition, negative mitzvah number 353 in his *Sefer haMitzvot*, basing himself on a text in the *Sifra* that interprets the verse in that way.³⁷

Other authorities reject this assessment. Ramban (Nahmanides) argues at length in his comments to *Sefer haMitzvot* that “do not approach” is *not* a biblical prohibition, noting that the *Sifra* text is not cited by the Talmud. On the contrary, two amoraim, R. Pedat (*Shabbat* 13a) and R. Yose b R. Bun (*Y. Sanhedrin* 7:7), explicitly assert that when the Bible speaks of “approach” it is referring euphemistically to sexual intercourse,³⁸ and their view is unrefuted by any other amoraic comment.³⁹

דאמר ר' פדת: לא אסרה תורה אלא קריבה של גילוי ערבה בלבד שנאמר לא תקרבו לגלות ערוה.

For R. Pedat says that the Torah only prohibits an approach which is characterized by sexual relations, as it says “None of you shall come near... to uncover nakedness.”

אמר ר' יוסי בר' בון: היא בל תקרב היא בל תגלה.

Said R. Yosi b'R. Bun: “Do not approach” means do not uncover.

This reading better suits the biblical context, where the verse appears as a preamble to extensive details of the cases of explicit forbidden intercourse, and not as a separate prohibition.⁴⁰

Rabbi Roth has argued that Ramban does not in fact view “approach” as a rabbinic prohibition; rather, his disagreement with Rambam is limited to the question of whether “approach” is a separate biblical prohibition.⁴¹ This assertion is problematic. The gemara cited by Ramban above clearly states, לא אסרה תורה “the Torah did not forbid...” and Ramban himself writes, נבין מהם כי אצלם זה האיסור מדרבנן “we understand from them that this prohibition is rabbinic.” In his conclusion, Ramban writes, ומה שאמר ר' פדת לא אסרה תורה, ירצה בו שאינו אסור כלל. “When R. Padat said that the Torah did not forbid [approach] he means to say that it is not forbidden at all.” The Vilna Gaon reviews this debate, saying, והרמב"ן השיג עליו וכתב דכל הנ"ל אסמכתא היא (rabbinic interpolation).” He concludes that according to Ramban, אלמא בנשיקה אפילו לאו אין בו “there is not even a [biblical] prohibition of non-penetrative intimacy.”⁴² We do not see any evidence in the Ramban or his commentators that he considers “approach” to be a biblical prohibition.

In summary, Ramban holds that only anal sex is *assur d'oraita* (biblically prohibited); the broader restrictions are forbidden by the Rabbis.⁴³ The *p'shat* of the Bible favors Ramban, as do the clear amoraic statements, and we are convinced by those arguments. But there is another major reason why we cannot accept Maimonides' more stringent view, or to put it plainly, why we must realize that we have long since rejected it. For if “approach” is truly to be considered a biblical prohibition, then not only sexual play but even *negiah* (casual touching) and *yihud* (momentary seclusion) would be biblically prohibited to all but a married couple where the woman is not in *niddah*. Maimonides, who is very prohibitive in areas of sexual mores, writes in *Hilkhot Issurei Biah* 11:18,

ואסור לאדם שידבק באשתו בשבעת ימים נקיים אלו ואע"פ שהיא בכסותה והוא בכסותו
ולא יקרב לה ולא יגע בה אפילו באצבע קטנה, ולא יאכל עמה בקערה אחת...

It is forbidden for a man to get close to his wife in these seven ‘clean’ days, even though they both are fully clothed; he may not approach her or touch her even with a little finger, nor may he eat with her from a single bowl.⁴⁴

The corollary provisions in *Shulhan Arukh, Yoreh Deah* 195 and *Even haEzer* 21 are even more severe (“he should not kid or laugh with her... eat with her on the same table... She should set aside special clothes... so that they are always cognizant...).

However, our community does not enforce, and indeed does not accept, these severe prohibitions. We do not hold, as a matter of fact, that the laws of “approach” are

biblically mandated, but rather that they are in the category of rabbinic fences and borders that are all ultimately intended to protect against transgression of the fundamental biblical rules about sexual conduct. Just as the Sages of old exempted themselves from some of the severity of the laws against contact between the sexes between relatives,⁴⁵ so have we concluded that average people can be trusted to maintain appropriate relations despite social kissing and hugging and moments alone together, even behind locked doors.⁴⁶

Ramban discusses the logic of legal fences. We prohibit a man from sleeping in one bed, even clothed, with his neighbor's wife out of obvious concern for the urgings of desire in such a situation; but we permit sleeping together clothed to a married couple when she is a menstruant, or to relatives, for there is less reason to fear transgression. Even they, however, may not sleep together naked nor engage in sexual play. This is not a matter of biblical decree then, but a matter of common sense—where there is danger of the core prohibition being flouted, there is need for a legal fence. That is the reason that that very same fence might be waived for those who are not under suspicion of transgression in this regard. Normative Jewish law and custom recognize no bar to males establishing a homestead. But sexual play remains rabbinically prohibited.⁴⁷

C. Lesbian Intimacy

To this point we have not considered what the tradition has to say specifically about female lesbian sexual activity. The Bible is silent on the subject, but some sages have discovered indirect hints of a biblical prohibition. In *Issurei Biah* 21:8, Maimonides codifies the Midrash found in *Sifra*:

נשים המסוללות זו בזו אסור, וממעשה מצרים הוא שהזהרנו עליו, שנאמר: כמעשה ארץ מצרים לא תעשו. אמרו חכמים: מה היו עושים? איש נושא איש ואשה נושא[ת] אשה ואשה נשאת לשני אנשים. אף על פי שמעשה זה אסור, אין מלקין עליו, שאין לו לאו מיוחד והרי אין שם ביאה כלל. לפיכך אין נאסרות לכהונה משום זנות, ולא תיאסר אשה על בעלה בזה... וראוי להכותן מכת מרדות הואיל ועשו איסור.

Women who rub one against the other—this is forbidden. It is among the acts of Egypt against which we were warned, for it says [*Leviticus* 18:3]: “You shall not copy the practices of the land of Egypt.” The Sages said [*Sifra, Aharei Mot, parsheta* 9:8]: “What is it that they would do? A man would marry a man, a woman marry a woman, or a woman marry two men.” Even though this practice is prohibited, one does not receive lashes, for there is no specific biblical prohibition and it is not called ‘intercourse’ at all. Therefore, they are not prohibited [from marrying] into the priesthood on account of prostitution and a woman is not prohibited to her husband on account of this... But it is appropriate to give them

[rabbinic] lashes for rebelliousness, since they have done a prohibited thing.

In his responsum of 1992, Rabbi Joel Roth argued that despite the penalty for lesbian sexual activity being rabbinic, and despite the Talmud's characterization of it on *Yevamot* 76a as פריצותא בעלמא "simply licentiousness," the ban followed from the biblical prohibition of gentile acts that lies at the heart of the chapter of *arayot* (prohibited sexual relations) and should therefore be viewed as a biblical prohibition.

Once again, Ramban questions whether this midrash is a formal derivation, representing biblical law. It is part of the very same series of *midrashim* in *Sifra* which, as we noted above, are *not* cited by the Talmud. Although *Leviticus* clearly intended by "their laws" the specifics of sexual impropriety given within the biblical text of that chapter, the Talmud uses this verse to refer to a list of practices prohibited because of magic, superstition and hints of faith in idolatry. That is the context of all of the references to "their laws" or the similar concept that is associated with this, "*darkhei haEmori*"--"the ways of the Amorites." Thus there is reason to doubt that the prohibition against female lesbian activity derived by Midrash *Sifra* from *Leviticus* 18:3 was regarded as biblical in the eyes of the Sages.⁴⁸ Since female homosexual activity cannot lead to a biblically prohibited act, as even Maimonides noted, the general rabbinic prohibition can have been predicated only, as the Talmud says, on a general aversion to licentiousness and a concern for the preservation of the heterosexual family.

D. *Ervah* and *S'yag*: Distinguishing the Biblical and Rabbinic Prohibitions

We conclude that there is only one prohibited sexual relation of *arayot* among homosexual behaviors, which is anal sex between men, and that other restrictions have no basis in biblical legislation. The operative reasoning for the broader prohibitions—from proximity to petting and even to oral sex—is that of the ג'ט, the legal fence, establishing the distance rabbinic authorities felt necessary to assure that the biblical prohibition would not be transgressed, and the more general concerns about propriety and the preservation of the family.

While some readers might conclude from the texts reviewed above that Jewish law imposes a universal and undifferentiated ban on all homosexual intimacy, we must emphasize the nuances found in this literature. The dominant voice of rabbinic interpretation follows Maimonides and the Tur/Shulhan Arukh in regarding lesbian intimacy and male homosexual acts other than anal sex as all *assur d'oraita*, banned by the Bible, albeit indirectly. Yet Nachmanides is convincing in his assertion that this ruling is an *asmakhta*, a later rabbinic interpolation, for the Bible itself never mentions or prohibits any of these acts.

The Torah's most severe sexual prohibitions are identified as *ervah* (plural: *arayot*). In antiquity, these were punishable by death as well as by the severe divine

penalty known as *karet*. Of these sexual prohibitions alone did the rabbis teach, *yeihareig v'al ya'avov*, that one should die rather than transgress. We have demonstrated that only one form of homosexual intimacy, anal intercourse between men, is prohibited at this level as an *ervah*. We must conclude that any Jew who seeks to fulfill the Torah's commandments must avoid this forbidden act.

We have learned that *ervah* is legally defined as penetrative intercourse, whereas lesbian intimacy is deemed by the Talmud as *peritzut*. Other forms of sexual petting between same-sex partners are banned under the general banner of "approaching," with Maimonides viewing this as a biblical level prohibition, and Nachmanides as a rabbinic interpolation. Neither rabbi would deem "approaching" to be an act of *ervah*, but neither would permit it either. Those opposed to any halakhic accommodation of homosexuals have the advantage of the great codes of Maimonides and Rabbi Karo on their side. Readers seeking to disentangle the biblical ban from the accretion of rabbinic prohibitions, and thereby to diminish the severity of the ban, may rely on the trenchant arguments of Nachmanides.⁴⁹

Yet at the conclusion of this section we must acknowledge that the established halakhah presents a comprehensive ban upon homosexual intimacy. Even if most of the possible activities are banned "only" by rabbinic authority, we are rabbis who accept and promote the authority of our predecessors. Our liturgy, diet, festival cycle, ethical and civil codes and all other aspects of religious life are directed by rabbinic precedent. As individuals and as rabbinic leaders of our communities and movement, we are dedicated to spreading these teachings and inculcating their practice. We understand that there is a need for fences to prevent Jews from transgressing the Torah's sexual prohibitions. If anal sex between men is a cardinal prohibition, then it is clear why our predecessors thought that non-anal sex should generally be prohibited as a fence around the Torah. Whether we follow Rambam or Ramban, the established halakhah presents a complete ban on all acts of homosexual intimacy.

However, our predecessors assumed that this ban would lead those with homosexual inclinations back into heterosexual marriages; nowhere do the Sages suggest that celibacy is a desired Jewish outcome. Given what we have learned about sexual orientation in recent decades, this assumption is no longer valid. To uphold the halakhah's comprehensive ban is to consign a significant class of Jewish women and men to life-long celibacy or communal condemnation. This result is problematic not only for the affected individuals, but also from the vantage of the halakhah's own mandate to safeguard human dignity.

IV. Dignity, Disgrace and D'rabbanan

A. The Realm of Feasibility

Unlike other subjects that pit individual liberty against traditional halakhic norms, this topic affects the very ability of many Jews to participate within our religious community. Observant Jews who are gay or lesbian are caught in an impossible dilemma, unable to fulfill the traditional Jewish norm of heterosexual marriage, usually incapable of practicing life-long celibacy,⁵⁰ and yet unwilling to abandon a life of Torah and mitzvot. In those rare occasions in which we consider modifying or even reversing a rabbinic precedent, we look for guidance and support from within the rabbinic tradition itself. This is precisely the situation in the present case as we seek to balance the ancient code of Jewish sexual ethics with our obligation to provide a place of dignity for gay and lesbian Jews.

Rabbi Eliezer Berkowitz studies the halakhic role of *feasibility* in his book, *Not in Heaven: The Nature and Function of Halakha*. Citing the rabbinic principle, - היכא דאפשר - לא אפשר (what is possible is possible; what is impossible is impossible),⁵¹ Berkowitz shows that the halakhah demands compliance with that which is not only physically possible, but reasonably feasible:

In the application of the principle of the possible, the impossible is not the objectively impossible, but that which is not reasonably feasible. The category of the *efshar*, the possible, represents what in view of human nature and with proper attention to human needs is practically or morally feasible.⁵²

The question that has been placed before *poskei halakhah* in our day is whether the demand of celibacy that has been made of observant homosexuals is practically or morally feasible. Of course, the exercise of bending individual desire to the demands of tradition is a core component of the Torah's central commandment: קדשים תהיו כי קדוש : "Become holy, for I the Lord your God am holy." Yet the premise of this demand is that it is *essentially possible*. Moses makes this point forcefully in his final speech in *Deuteronomy* (30:11-14):

כי המצוה הזאת אשר אנכי מצוה היום לא נפלאה היא ממך ולא רחוקה היא : לא בשמים היא לאמר מי יעלה לנו השמימה ויקחה לנו וישמענו אתה ונעשה : ולא מעבר לים היא לאמר מי יעבר לנו אל עבר הים ויקחה לנו וישמענו אתה ונעשה : כי קרוב אליך הדבר מאד בפיך ובלבבך לעשתו :

For this mitzvah which I command you today is not too grand for you, nor is it far away. It is not in heaven, that it be said, 'who will ascend to heaven to get it for us, and teach us how to do it?' It is not across the sea, that it be said, 'who will cross over the sea for us to get it for us, and teach

us how to do it?' For the word is very close to you; it is in your mouth and in your heart to do it.

The Torah is possible—it is the gift of life, not a path to suffering and destruction of the physical self.⁵³ The Torah and its commandments are love, though like any true love, they demand heroic commitment from those who would embrace them. In demanding that observant homosexuals avoid all sexual contact for life, the halakhah is not asking for heroism but inviting failure.

The experience of other faiths that mandate celibacy for their clergy is instructive here. Many clergy who have taken a vow of celibacy have found it impossible to fulfill. Celibacy is even less feasible for those who never voluntarily decided to take such a vow as a matter of religious devotion and vocation, but rather simply discovered themselves to be gay or lesbian. God, after all, created us as sexual beings. That does not justify all sexual acts, but it does indicate that God intended that we be able to express ourselves sexually. Jewish law should therefore show gays and lesbians, as it shows heterosexuals, the circumstances in which sexual relations are permitted.

B. The Realm of Humiliation

Feasibility, however, is not the only halakhic objection to our status quo. If celibacy for homosexuals were merely considered unfeasible, then our topic would be amenable to individual dispensations rather than challenging the entire structure of the law. However, there is a second halakhic principle that is undermined by our current policy: *human dignity*. The halakhic *status quo* is deeply degrading to gay and lesbian Jews. Quite apart from social and literary trends that have taught contempt for homosexuals, legal norms that either ignore them or cruelly demand the absolute suppression of their libido create an environment of humiliation. At this point it is impossible for responsible *poskim* to ignore this dynamic.

In *Hilkhot Teshuvah* (4:4), Maimonides lists five sins from which it is difficult to desist since they are treated casually by most people. Among them is dignifying oneself through the humiliation (even passive) of another. Because most people are indifferent to the humiliation of others, there is little social motivation for the offender to repent and restore respect to his neighbor. This description helps explain the great reluctance of many religious authorities to reconsider the dilemma of homosexuals. True, liability for humiliation is generally limited in halakhah to cases where it is intentional,⁵⁴ yet given the social ferment surrounding gay rights in recent years, it is difficult to dismiss accusations of intentional indifference to the plight of homosexuals by many religious leaders.

This dilemma is a matter of human dignity, כבוד הבריות, and as such it evokes the principle⁵⁵ stated dramatically and repeatedly in the Talmud: גדול כבוד הבריות שדוחה [את] לא תעשה שבתורה, “So great is human dignity that it supersedes a negative commandment

of the Torah.”⁵⁶ Yet no sooner is this potentially radical principle enunciated than it is limited specifically to the commandment that establishes rabbinic authority, לא תסור, “do not stray from the law they [i.e., the rabbis] teach you right or left.”⁵⁷ This concern for human dignity is cited in both Talmuds to override certain injunctions, but it is not considered capable of overturning an explicit biblical rule.⁵⁸

C. Human Dignity in the Talmud

רבי אליעזר אומר, יהי כבוד חבֵרְךָ חָבִיב עֲלֶיךָ כְּשֵׁלְךָ.

Rabbi Eliezer says, “Let your neighbor’s dignity be precious to you as your own. (*Avot* 2:10)

If heterosexual marriage and celibacy are not realistic options for gay and lesbian Jews, then we must ask what kind of lifestyle is best for them as individuals and for the Jewish community as a whole. For the sake of human dignity, gay and lesbian Jews need a realistic guideline for their observance of the Torah and mitzvot. How is this possible given what we have learned?

The value concept כבוד הבריות, human dignity, has a long legal history within Judaism. Rabbi Eliezer’s statement above is not an abstract platitude devoid of legal consequences. Nor is Rabbi Akiva’s statement, חָבִיב אָדָם שֶׁנִּבְרָא בְצִלְמֵי, “beloved is humanity, created in the divine image.” (*Avot* 3:14) While human dignity may not be the ultimate value in the halakhic system (divine dignity has priority), it is cited frequently in the Talmud as a principle with normative consequences.⁵⁹

The primary text for this topic is Tractate *Berakhot* 19b, where we learn that a sage must strip off a garment in public should it be found to contain כלאים, a mixture of threads forbidden by the Torah (*Leviticus* 19:19). Since appearing unclothed in public (even not fully naked) is considered a great בויון, disgrace, this ruling teaches us that human dignity is secondary to divine dignity. Were the sage publicly to ignore the biblical prohibition of כלאים, his brazen act would give priority to human dignity over divine dignity.⁶⁰ For this reason, he must strip off the garment, even in public.

Yet the Talmud continues to describe cases where human dignity does in fact override rabbinic and even biblical imperatives. In each case the Talmud seeks to contextualize and limit the supersession of individual dignity over established halakhah, but the cumulative effect remains significant. In order to comfort a mourner, a kohen may accompany him even through a field that may have human remains buried within it. The Talmud limits this leniency to בית הפרס, a field of doubtful status. In other words, the kohen may not ignore the Torah’s command that he avoid the ritual impurity caused by proximity to the dead (*Leviticus* 21:1) in order to accompany and thus give dignity to a mourner, but he may ignore the Rabbis’ expansion of that ruling to even בית הפרס.

The next case seems even bolder. Rabbi Elazar bar Zadok, who was a kohen, recalls, מדלגין היינו על גבי ארונות של מתים לקראת מלכי ישראל, “we used to go skipping across graves to greet the kings of Israel.” This would appear to place the dignity of the human king higher than God’s dignity, represented by the biblical verse. Once again, the Talmud limits the impact of this anecdote, stating that most graves are designed in a way that minimizes the transmission of impurity.⁶¹ Moreover, the Rabbis gave great deference to the king, who represented the dignity of the entire nation.

Grammatically, Rabbi Elazar bar Zadok’s use of the past continuous היינו מדלגין indicates that this supersession of the law based upon the demands of human dignity was “a continuous or repeated action.”⁶² This Talmudic example, together with more recent halakhic applications of the principle of human dignity, refutes the claims of some that it functions only as an emergency measure, and never as a permanent policy.

Returning to Brakhot, our general principle is now stated dramatically:

תא שמע: גדול כבוד הבריות שדוחה [את] לא תעשה שבתורה. ואמאי? לימא: אין חכמה ואין תבונה ואין עצה לנגד ה'! - תרגמה רב בר שבא קמיה דרב כהנא בלאו (דברים י"ז) דלא תסור. אחיכו עליה: לאו דלא תסור דאורייתא היא! אמר רב כהנא: גברא רבה אמר מילתא לא תחיכו עליה, כל מיילי דרבנן אסמכינהו על לאו דלא תסור, ומשום כבודו שרו רבנן.

Come and learn: So great is human dignity that it supersedes a negative commandment of the Torah. And why? Don’t we say, “there is no wisdom, nor comprehension nor counsel against the Lord”? (*Proverbs* 21:30) Rav bar Sheba interpreted it thus before Rav Kahana: “[this principle applies only] to the negative commandment of ‘do not stray’” (*Deut.* 17:11). They [i.e., his colleagues] laughed at him, saying, “‘Do not stray’ is itself from the Torah!” But Rav Kahana said to them, “When a great man states a matter, do not laugh at it. For all of the words of the Sages are supported by the negative commandment of ‘do not stray,’ but for his dignity, the Rabbis permitted him [to ignore their ruling].”

This passage establishes that the Sages waived their own dignity (i.e., the power of their precedents), but not the dignity of the Torah, in deference to the dignity of other people. While the Sages traced their own authority to the verse from *Deut.* 17:11, they still distinguished between the stature of their rulings and those of the Torah itself.

In the hierarchy of halakhic values, God’s dignity is highest, but human dignity is not far below, as *Psalm* 8:6 famously declares: ותחסרהו מעט מאלהים וכבוד והדר תעטרהו “That You have made him little less than divine, and adorned him with glory (כבוד) and majesty.”⁶³ Indeed, the final passage of this *sugya* in *Brakhot* 19b gives an example in which the clear biblical command (*Deut.* 21:1) to return a lost object (in this case, a stray animal) is waived for an elder when the dignity of the finder would be compromised by the obligation to lead the animal back to its owner. Here the maxim גדול כבוד הבריות

הוא שדוחה [את] לא תעשה שבתורה supersedes not only a rabbinic injunction, but even a biblical command, albeit via the passive mechanism of *שב ואל תעשה*, “sit and do not act.”

Yet in other Talmudic contexts, this principle is restricted to superseding rabbinic injunctions. For example, in *Shabbat* 81a-b, permission is granted to carry smooth stones up to a roof on Shabbat to be used for hygienic purposes.⁶⁴ Here a form of carrying prohibited by the rabbis, but not the Torah, is permitted in deference to human dignity. A similar case is brought at *Eiruvin* 41b. Likewise in *Shabbat* 94b, Rav Nachman allowed the removal of a dead body from a house to a *קרמליית* on Shabbat, out of deference to human dignity.⁶⁵

Another application of our principle comes from *Megilah* 3b. Which mitzvah takes precedence, reading *Megilat Esther* at its prescribed time, or attending to the burial of an abandoned body? The abandoned body has priority, for “so great is human dignity that it supersedes a negative commandment of the Torah.”^{66, 67}

In Talmud *Hagigah* 16b, a story is related in the name of Abba Eliezer of a departure from the policy preventing women from laying hands on the sacrifice in order “to make them feel pleased.” This passage does not cite human dignity, but it is an example of rabbinic consideration for the feelings of an excluded population to participate more fully in the public rituals of Judaism.⁶⁸

A further Talmudic example of human dignity superseding a halakhic prohibition comes from Yerushalmi *Nazir* 56a.⁶⁹ Here a *nazir*⁷⁰ is given permission to follow a crowd that is taking an impure road rather than going out of his way to walk a pure road alone. Unlike the case in Bavli *Brakhot* 19b, the Yerushalmi allows him to take even a biblically prohibited path. In support of this permission, the Yerushalmi cites our principle with a variation: *דאמר רבי זעירא גדול כבוד הבריות שדוחה למצוה בלא תעשה שעה אחת*, “for Rabbi Zeira says, ‘so great is human dignity that it supersedes a negative commandment temporarily.’” That is, the prohibition remains in force, but in this situation the *nazir* is given a temporary waiver from the biblical prohibition.

From this brief survey of the citation of human dignity in Talmudic texts,⁷¹ we learn that this principle is not merely a *soft* value, but is also used in *hard* legal applications to override even the biblical requirements that a *nazir* not defile himself and that all Israelites must return lost objects. In addition, forms of carrying prohibited by the Rabbis on Shabbat can be waived for the sake of human dignity.

There are significant restraints upon the application of this principle. It is claimed in the Talmud and codes to apply only to rabbinic prohibitions, though the Bavli releases individuals from biblically-based monetary obligations (such as returning lost property) based on human dignity.⁷² The Yerushalmi does not make this distinction, but at least in the case of Rabbi Zeira cites dignity only for a temporary suspension of a *biblical* commandment rather than a permanent deletion of a mitzvah.

Nevertheless, these texts indicate that when our Sages of blessed memory claimed to value human dignity, they truly meant it, and translated this value into

normative practice.⁷³ For example, The *Shulhan Arukh* (OH 312) cites human dignity in allowing one to carry stones for sanitary purpose on Shabbat within the type of area the Rabbis generally prohibited carrying:

משום כבוד הבריות התירו לטלטל אבנים לקנח, ואפ"י להעלותם לגג עמו דהוי טרחא יתירה,
מותר.

For the sake of human dignity, they permitted carrying smooth stones to wipe with. And even to carry them up to the rooftop, which is a great effort, is permitted.

Tosafot comments on the Talmudic permission to sell a Torah scroll in order to marry a wife that this may be justified based on human dignity.⁷⁴

Of course, there is no objective measure of human dignity. The Talmudic sources are sensitive to the different circumstances of people based on age, class, scholarship and other factors. It is interesting that several of the waivers granted to the *kohen* and the *nazir* address the indignity of walking alone, therefore investing more importance in this social indignity than in the requirement to remain ritually pure.

The opposite of dignity, בושת, or disgrace, is a major offense in Jewish law.⁷⁵ Fear of shaming illiterate individuals led to exempting them from reciting the biblically-required first fruits declaration, and allowing the *kohen* to read on their behalf. The same concern led to the modification of many funeral customs,⁷⁶ and also to the separation of the role of *aliyah laTorah* from the obligation to chant the actual text. Shame too is a relative phenomenon. If all people have a benefit and one person is excluded, he or she is shamed. The families established by heterosexual Jews are recognized and celebrated by the Jewish community, whereas homosexual Jews have been ignored or scorned. This shame demands the attention of the larger community.⁷⁷

D. Human Dignity in Medieval and Modern Halakhic Sources

Based on the Talmudic texts above, we see that concern for human dignity trumps both positive and negative commandments, generates both exemptions and obligations, and is activated by challenges to the physical and the social needs of an individual. Perhaps this principle had a glorious but short-lived run, disappearing from the stage of halakhic discourse? In fact, גדול כבוד הבריות has retained its power, though it is seldom cited as sweepingly in later sources as in the Talmud.⁷⁸

The *Shulhan Arukh*, as already noted, ratifies the Talmudic permission to carry stones to the roof on Shabbat, citing human dignity.⁷⁹ The *Levush* comments, "And not merely for a major aspect of *kevod haberiot*, but even for a much lesser one [such as being able to use a wood splinter to pick one's teeth]."⁸⁰

Rabbi Moses Isserles permitted a couple whose dowry arrangements were delayed to marry on Friday night, despite the prohibition of marrying on Shabbat,

because “it would shame the bride and groom if they were not married.” (O.H. 339:4)⁸¹ These examples generally describe extraordinary circumstances (בדיעבד) that should be avoided when possible (לכתחלה). Still, they demonstrate the enduring power of human dignity as a legal construct in permitting the otherwise forbidden in order to avoid humiliation. Indeed, human dignity is cited 81 times in the Shulhan Arukh and its primary commentaries to permit otherwise forbidden actions.

In his essay “Congregational Dignity and Human Dignity: Women and Public Torah Reading,” Bar Ilan Professor Daniel Sperber assembles a diverse assortment of ways in which human dignity has been cited in recent centuries.⁸² Professor Sperber says that גדול כבוד הבריות “has been given wide application” in various halakhic contexts. In the responsa literature, Sperber finds numerous references to human dignity superseding a rabbinic law. A sixteenth century responsum of Rabbi Joseph bar Lev prevented a man who married a second wife when his first was barren from divorcing the second woman and keeping the children, citing the principle of human dignity.⁸³ Rabbi Abraham Yitzhak HaKohen Kook waived the disqualification of women from participating in producing a Torah scroll, allowing them to sew together its panels, by reference to human dignity.⁸⁴

Rabbi Eliezer Waldenberg cites human dignity to allow a hearing impaired person to wear (and carry) a hearing aid on Shabbat.⁸⁵ First he considers whether the use of a hearing aid can be justified under the rubric of פקוח נפש, protecting health or avoiding danger. Having rejected this rationale, he turns to the dignity of a hearing impaired individual, and uses the Talmud’s reasoning with great force and sensitivity:

למדנו מהאמור דהותרה איסור טלטול מוקצה משום כבוד הבריות שלא יתבזה האדם מגרמת אי הטלטול בעיני עצמו ובעיני הבריות באיזה דרך שהוא. וא”כ לפי”ז הרי נדמה דאין לך כבוד הבריות גדול מזה כמניעת בושה ובזיון מהחרש מאי שמעו לקול המדברים אליו, דאין לתאר גודל החרפה ובושת הפנים ואי הנעימות הנגרמת לו מדי בואו בין אנשים ובהכ”נ = ובבית הכנסת = והוא בודד לו, אינו מקשיב להנעשה, ולא יכול להשיב למה ששואלים אותו, באופן שאיכא בזה משום כבוד הבריות יותר מהנידונים האמורים, ועוד זאת, בבשתו זאת מעורב גם צער רב על ביטול תפלה בצבור ושמיעת קה”ת ואיש”ר = קריאת התורה ואמן יהא שמיה רבה = וקדושה ובכדומה בביטול קיום חביל מצות קלות וחמורות, ולכן שפיר יש להתיר טלטול מוקצה משום כבוד הבריות גדול כזה ולהתיר לחרש לשאת בשבת מכונת - החרשים.

We have learned from that said [in the Talmud and codes] that the prohibited act of carrying *muktzeh*⁸⁶ [on Shabbat] was permitted in deference to human dignity, lest the person be humiliated, whether in his own eyes or in the eyes of others, due to being unable to carry [e.g. smooth rocks for wiping] in any way. And if so, it seems that there is no greater matter of human dignity than preventing embarrassment and humiliation of the hearing-impaired person due to inability to hear those who speak to him. One cannot describe the great humiliation, shame and discomfort caused to him when he walks among people and in synagogue and is isolated, unable to hear what is happening, unable to reply to that

said to him, for this is more a matter of dignity than the subjects mentioned [in the Talmud]. Moreover, together with humiliation is mixed great anguish at his inability to participate in public prayer, and to hear the Torah chanted, and to respond “*Amen, yehei shemei rabbah*” and *kedushah*, and similarly, his inability to fulfill the package of commandments, small and great. Thus, it is certainly proper to permit him to carry *muktzeh* because of such a great instance of human dignity, and to allow the hearing-impaired person to carry a hearing aid on Shabbat.

Rabbi Waldenberg writes compassionately about two levels of human dignity at risk: the humiliation of being socially excluded from the life of his community, and the anguish at being unable to fulfill the mitzvot. In the beginning of his responsum, Rabbi Waldenberg stipulates that his permission applies only to cases in which the hearing-impaired person agrees not to turn the device on and off on Shabbat. From his perspective this act, which is done quite casually at other times, would violate a primary category of Shabbat labor.⁸⁷ Moreover, there is a concern for מראית עין (misleading appearance): other Jews might see him using the hearing aid and assume that they may operate electrical appliances on Shabbat. *Even though these are reasonable concerns that could lead to capital offenses, Rabbi Waldenberg sets them aside in favor of the need for the hearing-impaired person to have a dignified part in Jewish society.*

This example demonstrates that human dignity as a legal consideration is not limited to *temporary* dispensations but can also be summoned for a *permanent* accommodation.⁸⁸ It also shows that even when there is a danger that the limited permission of a rabbinically prohibited act could arguably lead to the violation of a biblically prohibited act, we are allowed to be lenient for the sake of human dignity. Rabbi Waldenberg notes both the social and the religious elements of exclusion; human dignity is a legitimate and powerful consideration of the law.

In light of this long, well established, and broad application of the value of human dignity, Professor Sperber cites the human dignity of women to justify their permission to read Torah in public, even if some people still consider this to violate כבוד הציבור, the dignity of the congregation. Human dignity is a central value of Jewish theology and law. In making her case for the expansion of women’s ritual participation within Orthodoxy, Professor Tamar Ross describes the role of values (meta-halakhah) such as human dignity within halakhic discourse in clarifying the *telos* or ideal vision of the halakhah.⁸⁹

Rabbi Aaron Lichtenstein, Rosh Yeshivah of *Yeshivat Har Etzion*, published an article on the role of human dignity in halakhah in the Israel Defense Force journal, *Mahanayim*.⁹⁰ He observes that many *poskim* have been reluctant to cite כבוד הבריות explicitly in their *piskei din*, but that this value is frequently the background motivation

for a *poseik's* decision. Rabbi Lichtenstein understands this reluctance, and indeed fears that the liberal citation of human dignity could undermine the authority of rabbinic norms in general. Nevertheless, he argues that this hesitation to cite *כבוד הבריית* explicitly results in the weakening of a significant halakhic and theological principle. If the halakhah is reduced to the mechanical application of precedent without concern for its moral motivations, its religious significance is greatly diminished.

The State of Israel, lacking a constitution, has turned for precedent to both Jewish law (*mishpat ivri*) and what is called Jewish heritage (*moreshet Yisrael*). The former category includes the formal legal texts of our tradition, while the latter category includes the broader moral and religious teachings of Judaism. In the 1985 case, *Naiman v. Chairman, Central Elections Committee*, the scope and impact of Jewish heritage as a source of modern Israeli law was examined. Justice Menachem Elon summarized the role of meta-principles in halakhah: "The principles of freedom, justice, equity and peace pervade the world of *Halakhah* and Judaism; nowhere in that world are they absent."⁹¹

Since 1950, the State of Israel has passed eight "Basic Laws" (*חוקי יסוד*), largely related to the functioning of the government and army. In 1992, the Knesset passed "Basic Law: Human Dignity and Freedom" (*חוק יסוד : כבוד האדם וחירותו*). In four of its twelve clauses⁹² it establishes a broad entitlement to dignity in Israel.⁹³

	זכויות היסוד של האדם בישראל מושתתות על ההכרה בערך האדם, בקדושת חייו ובהיותו בן חורין, והן יכובדו ברוח העקרונות שבהכרזה על הקמת מדינת ישראל.	
א1	חוק-יסוד זה, מטרתו להגן על כבוד האדם וחירותו, כדי לעגן בחוק-יסוד את ערכיה של מדינת ישראל כמדינה יהודית ודמוקרטית.	
2.	אין פוגעין בחייו, בגופו, או בכבוד של אדם באשר הוא אדם.	
4.	כל אדם זכאי להגנה על חייו, על גופו ועל כבודו.	

1. Basic human rights in Israel are grounded in the recognition of human worth, in the sanctity of human life and freedom, and these are honored in the spirit of the principles included in the declaration establishing the state of Israel.

1a. This basic law is intended to protect human dignity and freedom in order to secure in basic law the values of the State of Israel as a Jewish and democratic state.

2. It is forbidden to harm the life, body, or dignity of a person in that he is human.

4. Every person is entitled to protection of his life, body and dignity.

This basic law has been cited in a broad array of appeals to the Israeli Supreme Court in cases considering the rights of Arab citizens, those of Jewish settlers expelled from Gaza, and the complaint of Alice Miller, a female Israel Air Force pilot.⁹⁴ The

status of gay relationships has been granted State recognition as *ידוע בצבור*, publicly recognized, in cases awarding social security and inheritance benefits to a male partner of a military officer and in the registration of two women as the mothers of an adopted child.⁹⁵

Our purpose in citing this Basic Law and its application in protecting the rights of gay and lesbian Israelis is to demonstrate the centrality of human dignity not only within the discourse of traditional halakhic sources but also in the State of Israel.⁹⁶ As the CJLS reviews the status and halakhic guidelines applicable to gay and lesbian Jews, what consideration shall be given to their claims to human dignity?

E. The Human Dignity of Homosexuals

Tel Aviv University professor Delphine Haiun writes perceptively about the relationship between dignity as an internal state and dignity within a social context:⁹⁷

Kavod is the inner value that makes man a human being, that gives him/her identity as such; it constitutes a condition of human existence for him/her. This signification can slide into more institutional connotation, also present in the Bible. The *kavod* is, then, the social nature of a human being, his/her status, his/her importance, his/her value in society.... Since the Middle Ages, the word *kavod* has represented the name of God. What makes us human beings is the divine part of us, the presence of God in us.

This description resonates with our experience. For gay and lesbian Jews, it is impossible to ensure an internal state of dignity as long as their social status is one of utter humiliation. The Rabbis recognized the social component of shame in calling attention to the fact that people are shamed (and are owed compensation for that) not only when they themselves feel humiliated, but also when that person's family or community recognizes something that has happened to that person as embarrassing.⁹⁸

Rabbi Joel Roth has argued in his responsum, "Homosexuality Revisited" that human dignity is cited in the Talmud to permit person X to violate the law only in order to protect the dignity of person Y.⁹⁹ This would mean that a gay or lesbian Jew may not claim an exemption from the rabbinic prohibitions for the sake of his or her *own* dignity. Rabbi Roth believes that human dignity may not be used as a rationale by a person to violate the law for his own sake—this, he argues, would be a theological absurdity in that an observant Jew would be invited to place his own dignity higher than God's. Of course, this is precisely the argument used in the Talmud for why human dignity does not supersede *biblical* law. Yet the Talmud does not discern a theological objection when human dignity supersedes *rabbinic* law. It even provides a *drashah* to explain that "sometimes you can ignore the injunction" because of human dignity.¹⁰⁰

Some of our examples do indeed conform to Rabbi Roth's view of human dignity as an altruistic principle. A Jew may detour from the task of reading *Megilah* or performing a *brit milah* in order to assure the burial of an unattended corpse (מת מצווה). Yet, other examples clearly refer to the dignity of the actor himself: An elder need not return a lost object, since this act would undermine his dignity. A person may carry stones in a כרמלית in order to wipe off excrement for his own dignity's sake. A superior court judge need not testify in a lower court. A man caught [or carried off by gentiles] outside of the Shabbat boundary, תחום שבת, and therefore prohibited from moving more than four cubits, may nevertheless move away from a place where he has defecated, or move to a private location for his own dignity's sake.

Rabbi Roth argues that even the latter cases concern not the dignity of the actor, but the dignity of his neighbors. He claims, for example, that a man is allowed to carry stones and clean himself so that *others* will not be offended by his smell; he is allowed to walk more than four cubits into a secluded location so that *others* will not be offended by seeing him defecate; as an elder, he is exempted from returning a lost object so that *others* will not be humiliated by his need to fulfill this mitzvah. We find Rabbi Roth's claim unconvincing since the Talmudic cases do not make this distinction,¹⁰¹ and it is hard to believe that the primary concern in these cases is the dignity of bystanders¹⁰² rather than that of the person most directly affected.

Rabbi Louis Ginzberg discusses the concept of כבוד הבריות in his great commentary on Yerushalmi *Brakhot*.¹⁰³ Contrasting this concept with the similar idea of כבוד הרבים, Rabbi Ginzberg writes, שכבוד הבריות משמעו דבר שאדם מונע עצמו ממנו כדי שלא יתבזה בין בני אדם, וכבוד הרבים דבר שאדם שיש בו נימוס עושה אותו לכבוד הצבור, "For the meaning of *kvod habriot* is that a man withholds himself from something so that he not be humiliated among people, whereas *kvod harabim* is a thing done by a polite man for the dignity of the public." A few lines earlier Rabbi Ginzberg explicitly states regarding the man required to strip off forbidden garments כבוד הבריות ערום בין הבריות, "for it is a great humiliation to him to appear naked before other people." Rabbi Ginzberg states that the law is more sensitive to the humiliation of the individual than to the disrespect to the public. This commentary supports our understanding that *kvod habriot* describes the dignity of an individual within his or her social context.¹⁰⁴

Dignity is a social phenomenon.¹⁰⁵ In all of these cases, there is interplay between the dignity of the actor and the dignity of his neighbors. For a person to smell filthy in isolation may be uncomfortable, but it becomes humiliating only when others smell him. His humiliation humiliates them and vice versa. For a mourner to walk home alone from the funeral may be depressing, but his *dignity* is impugned only when it appears that a neighbor has refused to walk with him. For a sage to strip off forbidden clothes in public may be an affront to the dignity of his neighbors, but this is certainly because they feel horrified to have witnessed his humiliation. For a sage to be forced to stand in testimony in a lower court humiliates him and also his students, who feel that

they have participated in his humiliation. It is therefore not accurate to discuss the dignity of X as if it were separate from the dignity of Y. As Rabbi Waldenberg writes in the passage cited above, the halakhah considers the person's dignity, "whether in his own eyes, or in the eyes of others." Some cases are primarily about the actor's dignity, and some are primarily about the dignity of his neighbor, but all are ultimately about the social fabric of Israel.

This, of course, is precisely our point. We are concerned for the dignity of gay and lesbian Jews not only because we are sympathetic to their dilemma, but also because their humiliation is our humiliation. We wish to welcome them, but we do so in such a forbidding fashion that they are repeatedly humiliated. Looking at our own congregations, we too are embarrassed by our cold welcome. For example, a gay man told us of going to minyan to say kaddish during *shloshim* for his father. The rabbi prevented him from leading services because he was gay, and then showed him an entire list of "leadership activities" from which he was banned based on that rabbi's interpretation of the CJLS's 1992 consensus statement. This humiliation was experienced not only by an individual, but by an entire congregation.¹⁰⁶ When gay and lesbian Jews are finally welcomed to take their rightful places in our community, then we will have safeguarded their dignity as individuals, and our dignity as a community.

It is difficult to imagine a group of Jews whose dignity is more undermined than that of homosexuals, who have to date been told to hide and suppress their sexual orientation, and whose desire to establish a long-term relationship with a beloved friend have been lightly dismissed by Jewish and general society. They have, in effect, been told to walk alone, while the great majority of Jews are expected to walk in pairs and as families. In such a context, where is the dignity of homosexual Jews? How can we hide from their humiliation? What halakhic recourse is available to integrate gay and lesbian Jews into the observant community with full dignity?

Here we acknowledge the lessons of modern science and psychology in teaching that homosexual orientation is not an individual decision but rather a core component of human identity often established by childhood. For the contemporary *poseik* to possess this information, to hear the distress of gay and lesbian Jews eager to observe the Torah, and simply to state that nothing can be done is to ignore the halakhic principle of human dignity.

Until this point, halakhic authorities have maintained a complete ban on all intimate acts by homosexuals. The most generous opinions have viewed homosexuals as devoid of individual agency, and thus exempt from the most violent penalties of the law. Yet even such opinions establish the spurious ideals of: celibacy, which is impossible for many people; conversion therapy, which has been discredited by the psychological profession; or surreptitious sexual behavior, which is dangerous on many levels. None of these options allows for a gay or lesbian Jew to live openly and honestly within the Jewish community. None of these solutions provides for his or her dignity.

It is not possible to set aside the explicit biblical prohibition on anal sex that is stated twice in *Leviticus* and frequently reaffirmed by the Rabbis. As we have shown, the *kvod habriot* principle supersedes rabbinic, not biblical law. Of course, there is a theoretical way to overturn biblical law via the legislative mechanism of *takkanah* (decree). We do not find this mechanism to be appropriate in our case, because *takkanah* requires the consent of the majority of the population, and this subject remains quite controversial in the observant Jewish community.¹⁰⁷

However, the rabbinic restrictions upon gay men and lesbian women that result in a total ban on all sexual expression throughout life are in direct conflict with the ability of these Jews to live in dignity as members of the people of Israel. For this reason, the halakhic principle of *gadol k'vod habriot* must be invoked by the CJLS to relieve their intolerable humiliation.¹⁰⁸ We must make open and rigorous efforts to include gay and lesbian Jews in our communities, to provide a proper welcome and a legal framework for the normalization of their status in our congregations.

We are aware that the continued biblical ban on anal sex may be extremely difficult for some gay men to observe, and that this ban is in some ways more challenging than the ban on menstrual intimacy for heterosexual couples for 7-14 days per month.¹⁰⁹ However, this responsum provides gay men with other options for sexual intimacy, with full social acceptance in the observant Jewish community, and with a feasible path to a life of Torah observance. Many observant Jews who are gay already have adopted this practice.¹¹⁰

F. Gay and Lesbian Relationships

If the halakhah is able to address the sexual and social needs of gay and lesbian Jews, what is the status of their relationships? Surely the halakhah is not indifferent to decisions made by gay and lesbian Jews about their intimate relationships. Surely it is better for gay and lesbian Jews to establish monogamous relationships with other Jews and thereby to establish stable Jewish households. Surely promiscuity ought to be no more acceptable among homosexuals than it is among heterosexuals. Surely the establishment of family units is central to the preservation of human dignity. For all of these reasons, we favor the establishment of committed and loving relationships for gay and lesbian Jews. The celebration of such a union is appropriate with blessings over wine and *shehecheyanu*, with psalms and other readings to be developed by local authorities.

Yet can these relationships be recognized under the rubric of Jewish *kiddushin* (marriage)? Does their dissolution require a ritual of *gerushin* (divorce)? What format and force would such rituals require?¹¹¹ These are complicated and controversial questions that deserve a separate study. We have no objection to informal rituals of celebration for gay couples, including the elements mentioned above, but we are not able in this responsum to address the many halakhic questions surrounding gay

marriage. Our paper does not provide for rituals of *kiddushin* for gay and lesbian couples.

G. Regarding Halakhic Interpretation, Legislation and *their Consequences*

Parallel to the intensive consideration of halakhic sources presented in this responsum (and its companions) has been a debate about the ramifications of this decision for the halakhic process and for the Conservative Movement worldwide. Our colleague, Rabbi Joseph Prouser, has argued that any leniency on this subject should be considered a *takkanah*, an act of rabbinic legislation. To justify this argument, he has produced a novel definition of the *takkanah* as any ritual innovation departing from precedent.¹¹² However, his definition does not accurately describe most *takkanot* of Jewish history, which have dealt largely with economic matters. The official rules of the CJLS state, “*Takkanot* and *gezeirot* are historically amendments to the law that, in the judgment of the author, cannot or need not be substantiated by the usual methods of legal interpretation but which the author nevertheless thinks should be adopted and therefore decreed.”¹¹³

In contrast, this paper affirms biblical law and depends upon established halakhic principles and precedents for its conclusions. We contend that the halakhic status quo violates the Talmudic principle of *gadol kvod habriot*. We therefore propose a solution that will allow our communities to fulfill this halakhic obligation more fully. In other words, our responsum precisely follows the format of rabbinic interpretation rather than legislation.

Perhaps for this reason, Rabbi Prouser does not challenge our responsum based upon its form, but rather on its conclusions, which differ from halakhic precedent. If his is to become the new definition of a *takkanah*—any variation from established precedent—then many if not most CJLS decisions of the past century as well as the decisions of other halakhic bodies and *poskim* through the centuries would also need to be considered *takkanot*. The elimination of the *mechitzah* would be a *takkanah*. So too would be the triennial reading of the Torah, the awarding of joint *aliyot*, the calling of women to the Torah, as well as stringencies such as our recent prohibition of shackling and hoisting animals for ritual slaughter. So too would a host of talmudic precedents, including, for example, changing “eye for an eye” from retribution to compensation; maintaining that the Torah requires eating unleavened bread only on the first day of Passover rather than the seven days mandated in the Torah; or that the Amidah can replace the daily sacrifices.¹¹⁴

Rabbi Prouser’s argument must be rejected because: it is not an accurate description of the historical use of *takkanot*; it fails to note that our responsum is based upon established principles of halakhic interpretation; and, because this radical new view of *takkanot* would undermine the legitimacy of many established practices of Conservative Judaism and, indeed, of talmudic Judaism and all its successors.

Rabbi Prouser advances a separate critique that only in the United States is the exclusion of homosexuals perceived as a problem of human dignity demanding new halakhic consideration. Entire regions such as Latin America, Canada, and Israel are allegedly unconcerned with this issue, and would be alienated from the Conservative Movement were a lenient position to be validated by the CJLS. While there are indeed several prominent opponents of change in these regions, some of the most outspoken advocates of inclusion of gay and lesbian Jews live and work in these same regions. It appears that many younger people across the globe view the halakhic status quo as demeaning to gay and lesbian Jews and as a cause for alienation from the system of Jewish law.

Some have argued that even if gay and lesbian Jews are to be welcomed in our communities, they still should not be ordained as clergy, who are expected to represent our ideal of Torah observance. Although we agree that the clergy should be role models of the mitzvot which apply to all Jews, they are also entitled to the same consideration of their dignity as are other Jews. As our Talmudic examples have demonstrated, considerations of human dignity were extended to the rabbis of antiquity, and we should not discriminate against the clergy of today.

Finally, some have maintained that once we permit homosexual Jews to create unions that are celebrated in some form of Jewish ceremony and to be students and ultimately graduates of our professional schools, all other sexual prohibitions of the Jewish tradition will soon fall as well. This kind of “slippery slope” argument is faulty on several grounds. First, the very essence of moral and legal sophistication is the increasing ability that one learns to distinguish cases. Second, the arguments that we have mustered to permit homosexual unions and ordination simply do not apply to adultery, incest,¹¹⁵ bestiality, rape, or any of the other prohibitions of sexual acts in the Torah.

On the contrary, we insist that the Jewish values and norms that apply to heterosexual sex be observed by homosexuals as well, including fidelity, safety, respect for one’s sexual partner, modesty, and love. Far from undermining Judaism’s sexual norms, this responsum seeks to extend them to homosexual sex. The CJLS recently¹¹⁶ reaffirmed the practice of *hilkhot niddah*, which regulate heterosexual relationships in light of the Torah. This responsum brings the light of Torah to the regulation of homosexual relations as well.

It is impossible to know whether this decision would, on balance, strengthen or weaken the Conservative Movement. We are not prophets, but are rather students of Torah. This responsum represents many years of study of this complicated subject and our best attempt to be instructed by what we have learned from the Written and Oral Torah. We pray that our interpretation will be considered authentic and convincing not only by our rabbinic colleagues on the CJLS, but also by the broader community of God-fearing and observant Jews.

Having studied this important topic for many years, and having considered the approaches of other rabbis, we are humbled by its complexity and significance. We are motivated by our obligations to be loyal custodians of Torah and defenders of the dignity of our fellow person. We conclude this complicated conversation with an ancient rabbinic prayer: יהא רעוא דלא תבייש ולא תתבייש "May it be God's will that we not humiliate another, nor be humiliated ourselves." (*Moed Katan* 9b).

V. CONCLUSIONS

A. *Piskei Din*: Legal Findings

Based upon our study of halakhic precedents regarding both sexual norms and human dignity, we reach the following conclusions:

1. The explicit biblical ban on anal sex between men remains in effect. Gay men are instructed to refrain from anal sex.
2. Heterosexual marriage between two Jews remains the halakhic ideal. For homosexuals who are incapable of maintaining a heterosexual relationship, the rabbinic prohibitions that have been associated with other gay and lesbian intimate acts are superseded based upon the Talmudic principle of *kvod habriot*, our obligation to preserve the human dignity of all people.
3. This ruling effectively normalizes the status of gay and lesbian Jews in the Jewish community. Extending the 1992 CJLS consensus statement, gay and lesbian Jews are to be welcomed into our synagogues and other institutions as full members with no restrictions. Furthermore, gay or lesbian Jews who demonstrate the depth of Jewish commitment, knowledge, faith and desire to serve as rabbis, cantors and educators shall be welcomed to apply to our professional schools and associations.¹¹⁷
4. We are not prepared at this juncture to rule upon the halakhic status of gay and lesbian relationships. To do so would require establishing an entirely new institution in Jewish law that treats not only the ceremonies and legal instruments appropriate for creating homosexual unions but also the norms for the dissolution of such unions. This responsum does not provide *kiddushin* for same-sex couples. Nonetheless, we consider stable, committed, Jewish relationships to be as necessary and beneficial for homosexuals and their families as they are for heterosexuals. Promiscuity is not acceptable for either homosexual or heterosexual relationships. Such relationships should be conducted in consonance with the values set out in the RA pastoral letter on intimate relationships, "*This Is My Beloved, This Is My Friend*": *A Rabbinic Letter on Human Intimacy*.¹¹⁸ The celebration of such a union is appropriate.

B. Afterword

This subject has riveted the attention and commanded the energies of us as individuals and of our movement to a greater extent than any other topic in recent memory. Given the fact that observant Jews who are gay or lesbian constitute a small minority of the Jewish people, this might seem surprising. The great importance of this topic signifies a broader attempt to understand the nature of human dignity in our time.

We realize that it will take time for our congregations and other arms of the Conservative movement to develop a consensus on this challenging subject. The concepts and policies we have advocated represent a sea change in attitude within traditional Judaism. There is a genuine conflict between our ancient heterosexual ideal and our imperative to safeguard the dignity of gay and lesbian Jews. We must dedicate significant efforts to education at all levels of our movement. Respectful disagreement on this subject is a sign of strength, not weakness, within Conservative Judaism.

However, we must emphasize that even those opposed to our halakhic reasoning and *piskei din* remain obligated to show compassion to their fellow Jews who are homosexual. What once seemed like a willful rejection of the Torah's ideal of heterosexual marriage is now understood to be a profound desire by gay and lesbian Jews to sanctify their lives and to establish faithful families guided by the light of Torah. In addressing this challenge, we have been determined to safeguard the integrity of both the halakhic system, which is our mechanism for following God's teaching, and also the dignity of our fellow men and women, who are created in the very image of God. We pray that our work will strengthen the Jewish people in its sacred task of establishing holy communities, raising Jewish children, and sharing the light of Torah with the entire world. May God prosper the work of our hands.

כי-רוצה ה' בעמו לפאר עניים בישועה :

יעלו חסידים בכבוד ירננו על משכבותם : (תהלים קמט)

For the Lord favors His people; glorifying the humble with salvation.

The pious will rejoice in dignity; singing upon their couches. (Psalm 149)

Appendix

Summary of research on select issues in Lesbian, Gay, and Bisexual Psychology

Judith Glassgold, Psy.D.

Definition of Sexual Orientation

"Sexual Orientation is an enduring emotional, romantic, sexual, or affectional attraction to another person. It is distinguished from other components of sexuality including biological sex, gender identity (the psychological sense of being male or female) and the social gender role (adherence to cultural norms for feminine and masculine behavior)". (APA, 2005).

"Sexual orientation exists along a continuum that ranges from exclusive homosexuality to exclusive heterosexuality and includes various forms of bisexuality. Bisexual persons can experience sexual, emotional, and affectional attraction to both their own sex and the opposite sex" (APA, 2005). However, the degree, type, and amount of attraction can vary. "Sexual orientation is different from sexual behavior because it refers to feelings and self-concept. Persons may or may not express their sexual orientation in their behaviors". (APA, 2005). Thus, though someone may feel either opposite-sex or same-sex attraction, they might not act on those feelings.

Estimates of the number of people who experience same-sex and opposite-sex attractions have been studied in the United States (Laumann et. al, 1994; Kinsey, 1948, 1953). However, each study has significant limitations and exact numbers are difficult to assess due to the fact each study focuses on different areas, such as fantasies, feelings, behaviors, and/or identities. Further, these topics are difficult to study due to social stigma, many individuals do not wish to discuss such issues. Initial results show that the vast majority of individuals identify as heterosexual; the incidence of exclusive homosexuality in men is about 3% (Laumann et. al., 1999) to 4% (Kinsey, 1948), with the incidence in women approximately half that of men 1-2% in women (Laumann, 1994; Kinsey, 1953). Some individuals indicate having same-sex fantasies, feelings, attractions or behaviors. There is no evidence that changes in social attitudes and law have changed the incidence of homosexual sexual orientation.

(Adapted from "Answers to Your Questions about Homosexuality and Sexual Orientation" American Psychological Association).

Causes of Sexual Orientation

"Sexual orientation is most likely the result of a complex interaction of environmental, cognitive, and biological factors" (including genes, brain differences, and hormones). In most people, sexual orientation is shaped at an early age and children become aware of these feelings during in adolescence. It is important to recognize that there are probably many reasons for a person's sexual orientation and the reasons may be different for different people" (APA, 2005). There is considerable recent evidence to suggest that biology, including genetic or inborn hormonal factors, play a significant role in a person's sexual orientation. Recent genetic studies in men find higher proportions of gay men in families with other gay male relatives. There have been studies that illustrate brain differences between heterosexual men and homosexual men. There has been limited study of lesbians and genetic variables, however other studies indicate early exposure to sex hormones may shape sexual orientation in women. (Mustanski, B. S., Chivers, M., L., & Bailey, J. M., 2002; Rahman, Q., & Wilson, G. D., 2003).

Same-sex sexual orientation is not caused by knowing someone gay or lesbian. Sexual orientation does not evolve out of knowing someone else's sexual orientation or having an orientation modeled. This thesis is untenable, as since there are far more heterosexual individuals, it would follow that everyone should be heterosexual. Further, the vast majority of lesbian, bisexual, and gay individuals are raised by heterosexual parents and thus, too, given such logic should be heterosexual.

(Adapted from "Answers to Your Questions about Homosexuality and Sexual Orientation" American Psychological Association).

Is Sexual Orientation a Choice?

Human beings cannot choose their sexual orientation. Sexual orientation emerges for most people in early adolescence or late childhood without any prior sexual experience. The experience of sexual attraction and falling in love is one that individuals experience as outside their conscious control. Although we can choose whether to act on our feelings, psychologists do not consider sexual orientation to be a conscious choice.

(Adapted from "Answers to Your Questions about Homosexuality and Sexual Orientation" American Psychological Association).

Can sexual orientation be changed?

Psychologists do not consider that sexual orientation can be changed, either heterosexual, bisexual, or homosexual. The developmental process where someone comes to understand the meaning and importance of sexual orientation and love is a different process, which can take many years. Investigations of claims in some studies to change sexual orientation have found major problems (Carlson, 2003; Drescher, 2001; Forstein, 2001; Haldeman, 1994). Most

studies that report change are plagued by bias, individuals who have a pre-existing assumption about outcomes when engaging in research, lack of objective measures and are of skewed samples. "Most studies do not include long-term measures of outcome that are necessary to test the validity of such a mental health intervention" (APA, 2005). Most recent studies suggest that only very few individuals may experience an alteration in attraction and that these individuals were members of religious groups advocating programs of sexual orientation change, limiting their reliability (Schroeder & Shidlo, 2001). Therapies that claim to change orientation have weak theoretical basis and are often plagued by stereotypes and inaccuracies about the causes of same-sex orientation (Drescher, 2001; Haldeman, 1994). Therapies that focus on the pathology of homosexuality are inconsistent with existing data that illustrate that homosexuality is not a mental illness or pathology (Gonsiorek, 1991). Further, many therapies seeking to alter orientation engage in unethical practices (Schroeder & Shidlo, 2001).

Homosexuality is not a mental illness or emotional problem

"Psychologists, psychiatrists and other mental health professionals agree that homosexuality is not an illness (Conger, 1975), mental disorder, or an emotional problem. Over 35 years of objective, well-designed scientific research has shown that homosexuality, in and itself, is not associated with mental disorders or emotional or social problems" (Gonsiorek, 1991). "Lesbians, Gay men, and bisexual individuals are capable of leading healthy and productive lives" (APA, 2005).

(Adapted from "Answers to Your Questions about Homosexuality and Sexual Orientation" American Psychological Association).

Sexual orientation and perpetrators of sexual abuse

"There is no evidence that homosexual men are more likely to abuse children than heterosexual men" are. (APA, 2005). Individuals having an erotic interest in children are distinct from those with an erotic interest in adults. The vast majority of these individuals are male (over 90%), and the vast number of victims are female. Adults with homosexual and heterosexual orientation and an interest in adults are distinct from those with an erotic interest in children; this distinction is true of those of all sexual orientations. The evidence suggests, however, that homosexual pedophilia is most closely linked with heterosexual pedophilia; pedophiles differentiate less between males and females than do adults with erotic interest in adults when they receive a psychophysiological test of erotic preference (Freund & Langevin, 1976; Freund et al., 1991)" (Cantor, 2002).

"Although having a genuine erotic interest in children is the strongest predictor of sex offender recidivism (Hanson & Bussiere, 1998), some offenders engage in their behaviors for other reasons (Barbaree & Seto, 1997). Little is known about these other offenders. It is possible that at least some are pedophilic, but lie beyond the ability of psychophysiological tests to identify them. Other factors have been suggested as causing their sexual assaults on children, including alcoholism and anti-social personality (e.g., Marshall, 1997). It is well established, however, that sex offenses committed by non-pedophiles are largely associated with incest, while the extra-familial offenders are more likely to be genuinely pedophilic (e.g., Blanchard et al., 2001). Furthermore, very few incest victims are male. Estimates are typically 6–8% (e.g., Carlstedt, Forsman, & Soderstrom, 2001; Langevin, Wortzman, Dickey, Wright, & Handy, 1988), substantially lower than the overall proportion of males among all victims (i.e., 20–30%). Sex offenses may comprise two phenomena: genuine pedophilia producing offenses against either male or female, extra-familial children, and an incest pattern producing offenses against primarily female children. This latter population, girls assaulted by family and close friends constitutes the largest number of victims" (Cantor, 2002).

(Adapted from James Cantor (2002) Male Homosexuality, Science, and Pedophilia. Newsletter of the Society for the Psychological Study of Lesbian, Gay, & Bisexual Issues, 18 (3).)

Same-Sex Couples

"The human impulse for sexual intimacy, as well as the importance of this impulse to the self and to the development of close relationships with others, have been observed and chronicled for centuries. The mental health professions have also long recognized the importance of the desire for sexual intimacy in the development of the self, in the establishment of close relationships, and in the maintenance of family units. And the most recent study of the sexual behavior of the American population has found that sexual satisfaction in intimate relationships is linked to satisfaction with those relationships and with general satisfaction with life (Lauman, 1999)" (APA, 2002). Prohibiting sexual intimacy between same-sex individuals who experience an erotic attraction of each other would be denying them one of the most special experiences of being a human being, that of a loving, committed relationship with another (APA, 2002).

"Research indicates that many gay men and lesbians want and have committed relationships. For example, survey data indicate that between 40% and 60% of gay men and between 45% and 80% of lesbians are currently involved in a romantic relationship (e.g., Bradford, Ryan, & Rothblum, 1994; Falkner & Garber, 2002; Morris, Balsam, & Rothblum, 2002). Further, data from the 2000 United States Census (United States Census Bureau, 2000) indicate that of the 5.5 million couples who were living together but not married, about 1 in 9 (594,391) had partners of the same sex. Although the Census data are almost certainly an underestimate of the actual number of cohabiting same-

sex couples, they indicated that a male householder and a male partner headed 301,026 households and that a female householder and a female partner headed 293,365 households". (APA, 2004b)

"Despite persuasive evidence that gay men and lesbians have committed relationships, three concerns about same-sex couples are often raised. A first concern is that the relationships of gay men and lesbians are dysfunctional and unhappy. To the contrary, studies that have compared partners from same-sex couples to partners from heterosexual couples on standardized measures of relationship quality (such as satisfaction and commitment) have found partners from same-sex and heterosexual couples to be equivalent to each other (see reviews by Peplau & Beals, 2004; Peplau & Spalding, 2000)" (APA, 2004b).

"A second concern is that the relationships of gay men and lesbians are unstable. However, research indicates that, despite the somewhat hostile social climate within which same-sex relationships develop, many lesbians and gay men have formed durable relationships. For example, survey data indicate that between 18% and 28% of gay couples and between 8% and 21 % of lesbian couples have lived together 10 or more years (e.g., Blumstein & Schwartz, 1983; Bryant & Demian, 1994; Falkner & Garber, 2002; Kurdek, 2003). Researchers (e.g., Kurdek, in press) have also speculated that the stability of same-sex couples would be enhanced if partners from same-sex couples enjoyed the same levels of social support and public recognition of their relationships as partners from heterosexual couples do" (APA, 2004b).

"A third concern is that the processes that affect the well-being and permanence of the relationships of lesbian and gay persons are different from those that affect the relationships of heterosexual persons. In fact, research has found that the factors that predict relationship satisfaction, relationship commitment, and relationship stability are remarkably similar for both same-sex cohabiting couples and heterosexual married couples (Kurdek, 2001, Kurdek, in press)" (APA, 2004b).
(Excerpt from American Psychological Association (2004) Resolution on Sexual Orientation and Marriage)

Lesbian and Gay Parents

"Many lesbians and gay men are parents. In the 2000 U. S. Census, 33% of female same-sex couple households and 22% of male same-sex couple households reported at least one child under the age of 18 living in the home. Beliefs that lesbian and gay adults are not fit parents have no empirical foundation (Patterson, 2000, 2004a; Perrin, 2002). Lesbian and heterosexual women have not been found to differ markedly in their approaches to child rearing (Patterson, 2000; Tasker, 1999). Members of gay and lesbian couples with children have been found to divide the work involved in childcare evenly, and to be satisfied with their relationships with their partners (Patterson, 2000, 2004a). The results of some studies suggest that lesbian mothers' and gay fathers' parenting skills may be superior to those of matched heterosexual parents. There is no scientific basis for concluding that lesbian mothers or gay fathers are unfit parents on the basis of their sexual orientation (Armesto, 2002; Patterson, 2000; Tasker & Golombok, 1997). On the contrary, results of research suggest that lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children" (APA, 2004c).

(Excerpt from American Psychological Association (2004) Resolution on Sexual Orientation, Parents, and Children)

Children in Same-sex Families

"As the social visibility and legal status of lesbian and gay parents has increased, three major concerns about the influence of lesbian and gay parents on children have been often voiced (Falk, 1994; Patterson, Fulcher & Wainright, 2002). One is that the children of lesbian and gay parents will experience more difficulties in the area of sexual identity than children of heterosexual parents. For instance, one such concern is that children brought up by lesbian mothers or gay fathers will show disturbances in gender identity and/or in gender role behavior. A second category of concerns involves aspects of children's personal development other than sexual identity. For example, some observers have expressed fears that children in the custody of gay or lesbian parents would be more vulnerable to mental breakdown, would exhibit more adjustment difficulties and behavior problems, or would be less psychologically healthy than other children. A third category of concerns is that children of lesbian and gay parents will experience difficulty in social relationships. For example, some observers have expressed concern that children living with lesbian mothers or gay fathers will be stigmatized, teased, or otherwise victimized by peers. Another common fear is that children living with gay or lesbian parents will be more likely to be sexually abused by the parent or by the parent's friends or acquaintances" (APA, 2004c).

"Results of social science research have failed to confirm any of these concerns about children of lesbian and gay parents (Patterson, 2000, 2004a; Perrin, 2002; Tasker, 1999). Research suggests that sexual identities (including gender identity, gender-role behavior, and sexual orientation) develop in much the same ways among children of lesbian mothers as they do among children of heterosexual parents (Patterson, 2004a)" (APA, 2005). Studies of children raised by same-sex couples indicate that the vast majority identify as heterosexual in similar proportions as

those raised by different-sex couples, however, the data sets are extremely small (Bailey, et. al. 1995; Golombek & Tasker, 1996; Patterson, 2004a). "Studies of other aspects of personal development (including personality, self-concept, and conduct) similarly reveal few differences between children of lesbian mothers and children of heterosexual parents (Perrin, 2002; Stacey & Biblarz, 2001; Tasker, 1999). Evidence also suggests that children of lesbian and gay parents have normal social relationships with peers and adults (Patterson, 2000, 2004a; Perrin, 2002; Stacey & Biblarz, 2001; Tasker, 1999; Tasker & Golombok, 1997). The picture that emerges from research is one of general engagement in social life with peers, parents, family members, and friends. Fears about children of lesbian or gay parents being sexually abused by adults, ostracized by peers, or isolated in single-sex lesbian or gay communities have received no scientific support. Overall, results of research suggest that the development, adjustment, and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents" (APA, 2004c).

(Excerpt from American Psychological Association (2004) Resolution on Sexual Orientation, Parents, and Children)

Advantage of recognizing same-sex relationships

Marriage has important psychological and social benefits to its participants. There is evidence that marriage has positive effects on self-esteem and mastery (Gove, 1990). Married women and men experience greater physical health and well-being than their counterparts. This comparison holds when individuals are compared to cohabitating couples (Kessler & Essex, 1992). Recognition by community and peers increases the success and stability of such relationships (Adams & Jones, 1997).; this is especially important if the couple has children. There have been studies that the marital status of a couple affects the grieving process, where unmarried partners experienced a more complicated grief process (Weiss & Richards, 1997). Denying marriage to couples contributes to the stigma individuals feel; stigma has a negative impact on mental health (Meyer, 2003) by increasing stress and symptoms of distress

Adapted and excerpted from APA, (2004). Brief of Amicus Curea to the Appellate Court of the State of New Jersey in the matter of Lewis v. Harris

Religious ceremonies and inclusion in the life of a religious community would provide many of the same benefits and social recognition given to heterosexual couples, particularly strengthening social support, support in raising children, and support in the grieving process that occurs during relationship loss (religious laws regarding who can mourn and participation in burial). For instance, individuals denied participation in the rituals of mourning have more difficulty in recovering from the loss (Weiss & Richards, 1997).

Psychological rationale for having Lesbian, Gay, and Bisexual Clergy

Prejudice against lesbians and gay men, and those perceived to be lesbian, gay, or bisexual is well-documented (Herek, 1998). Lesbians, gay men, and bisexuals often have higher rates of stress due to the stigmatization of their sexual orientation, termed minority stress and observed in other minority groups (Meyer, 2003). This stress can manifest itself in higher levels of depression and anxiety Research shows that when people know someone who is homosexual, they are less likely to be prejudiced against such a person (Herek, & Glunt, 1993). Having an individual with high status self-disclose, is effective in altering assumptions about homosexuals, reducing the stigma of homosexuality and reducing prejudice.

Adolescents who are questioning their sexual orientation, as well as those who are coming to terms with same-sex feelings often face oppression, bullying, and abuse due to their sexual orientation both in school and in larger society (D'Augelli, 1998). Some develop more serious problems such as depression and substance abuse (D'Augelli, 1998; Ritter & Terndrup, 2002). Even in situations where such negative stressors do not exist, having positive role models would aid such teenagers in their struggle as most adolescents who are homosexual do not have such role models. Parents and family members of lesbian, gay, and bisexual individuals are also harmed by negative stereotypes and the stigma that their family members face. Having individuals within the religious community to support them would reduce the isolation and suffering faced by family members.

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NOTES

¹ Rabbi Abraham Yitzhak HaKohen Kook, *Mussar Avikha, Midot Rayah*, “Kevod” 1:9. This text is cited by Hebrew University law professor Nahum Rakover in his book, *Gadol K’vod Habriot: K’vod Ha-Adam K’Erekh-Al* (Jerusalem: Ministry of Justice, *Mishpat Ivri* Library, 1998), p.26 [Hebrew].

² Our separate papers were among nine responsa prepared for the second CJLS retreat on halakhah and homosexuality, in March 2005. Elliot Dorff wrote, “Judaism and Homosexuality: Rekindling a Sense of Holiness in Sexual Life;” Avram Reisner wrote, “What If I Truly Love My Fellow?” and Daniel Nevins wrote, “Homosexuality, Human Dignity and Halakhah.” Although the papers differed significantly in methodology and style, they shared a conclusion that the biblical ban on anal sex could be separated from the rabbinic prohibitions of other forms of homosexual intimacy, and that there was greater possibility to accommodate homosexuals within that realm. We presented a combined 68 page responsum at the March 2006 retreat. The current draft addresses criticisms offered by the CJLS at that reading and also streamlines the argument and style into a more user-friendly format. We thank our colleagues who reviewed and critiqued this responsum, in particular, Rabbis Benjy Siegel, David J.B. Krishef, David Rosenn, Roderick Young, David Fine, Aaron Mackler, Andy Sacks, Gershon Freidlin, Simchah Roth, Len Gordon and David Teutsch, as well as Professor Benjamin Sommer, and Mr. Paul Magy. This responsum, of course, expresses our own opinions.

³ A substantial and varied literature on homosexuality and Judaism has developed in recent years, starting with the responsa addressed by the CJLS in 1991-1992 by Rabbis Bradley Artson, Elliot Dorff, Reuven Kimmelman, Mayer Rabinowitz, Avram Reisner and Joel Roth. Our RA colleague Rabbi Simchah Roth’s responsum, “Dear David: Homosexual Relationships—A Halakhic Investigation” also informed our thinking on this subject (it is available on-line at: <http://www.bmv.org.il/ab/dd.asp>). Two Orthodox rabbis have recently published insightful studies on the subject: Rabbi Steven Greenberg, *Wrestling with God and Men: Homosexuality in the Jewish Tradition* (Madison: Univ. of Wisconsin Press, 2004) and Rabbi Chaim Rapoport, *Judaism and Homosexuality: An Authentic Orthodox View* (London: Vallentine Mitchell, 2004). The film, “Trembling before G-d” and the Israeli collection of narratives edited by Irit Koren, *Closet within a Closet: The Stories of Orthodox Gay and Lesbians*, (Yediot Aharonot Press, 2003) [Hebrew], as well as hundreds of personal communications have added insight and urgency to this investigation.

⁴ We have, in fact, discussed the subject of abstaining from anal sex with both secular and observant gay men. It is evident that while many gay men consider this to be the most fulfilling form of sexual intercourse, others avoid it for a variety of reasons ranging from aesthetics to health and religious concerns. Among Orthodox gay men there is a documented trend to avoid anal intercourse because of the explicit biblical ban while maintaining an otherwise gay lifestyle. See, *Closet within a Closet*, p.90.

⁵ Rabbi Eliezer Berkowitz studies the halakhic role of *feasibility* in his book, *Not in Heaven: The Nature and Function of Halakha* (New York: Ktav Publishing House, Inc., 1983), p. 12. Citing the rabbinic principle, *היכא דאפשר - אפשר, היכא דלא אפשר - לא אפשר* (what is possible is possible; what is impossible is impossible), Berkowitz shows that the halakhah demands compliance with that which is not only physically possible, but reasonably feasible. See discussion in section IV below.

⁶ In the written Torah, the foundational concept is the creation of humanity in the divine image. This concept is emphasized by Rabbi Akiva in *Avot* 3:14. We shall describe the legal application of human dignity in detail below.

⁷ See Edward O. Laumann, editor, and Robert T. Michael, editor, *Sex, Love, and Health in America: Private Choices and Public Policies* (Chicago: Univ. of Chicago Press, 2001), Table 12.2, “Sexual Behavior by Age, Country, and Gender,” p.445. Line C. “% reporting any same-sex partners within the past year” and line D. “% reporting any same-sex partners over the lifetime (Britain) since age 18 (United States)” document

moderate variation of homosexual activity over the course of time for both men and women in Great Britain and the United States.

⁸ APA 2005 Statement: "Psychologists, psychiatrists, and other mental health professionals agree that homosexuality is not an illness, mental disorder, or an emotional problem. Over 35 years of objective, well-designed research has shown that homosexuality, in and of itself, is not associated with mental disorders or emotional or social problems. Lesbians, Gay men, and bisexual individuals are capable of leading healthy and productive lives."

⁹ Eli Coleman, "Toward a New Model of Treatment of Homosexuality: A Review," in Moses and Hawkins, *Counseling Lesbian Women and Gay Men*, (Columbus: Merrill Publishing Company, 1982), p. 225. "Many other studies have been conducted that have not found any psychopathology of male homosexuality as measured by psychological profiles ... the only major difference found between groups of homosexuals and heterosexuals was choice of sexual object."

¹⁰ Jennifer L. Wainright, Stephen T. Russell, and Charlotte J. Patterson, "Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents," *Child Development* 75:6, pp. 1886-1898. Before this study, as critics were quick to point out, research in this area has had various limitations – in particular, small sample groups and a lack of educational or socioeconomic diversity. But this most recent study is based on the National Longitudinal Study of Adolescent Health, a survey of more than 12,000 high school students from across the United States. Forty-four adolescents identifying as homosexual were compared with an equal number of adolescents identifying as heterosexual, matching characteristics of race, socio-economic class, region of residence, etc. as much as possible. Although the sample size of 12,000 is much larger than previous studies, the result is the same: teens with same-sex parents were identical to those with opposite-sex parents in almost every area analyzed, from anxiety levels to autonomy, and even in grade-point average. It was the degree of warmth, caring, understanding, and acceptance in the parent-child relationship, not the gender of the parents or the parents' partners, that strongly influenced the children's development. Gay and lesbian parents are just as likely as heterosexual parents to meet – or to fail to meet – their children's needs for healthy development. Put another way, sexual orientation is irrelevant to promoting and rearing a physically, mentally, emotionally, and socially healthy child. What matters is who the parents are as people and parents, not whom they love. For earlier research on this and the statement of the American Psychological Association, see the Appendix to this responsum written by Dr. Judith Glassgold.

¹¹ This charge – of disrupting family stability – may indeed have been accurate in Talmudic and Medieval times. It happens even in our own time that men and women marry, father or bear children, and only later discover that they are constitutionally homosexual and are unable to alter or suppress their sexual orientation. This problem is heightened by the fact that American culture (and rabbinic culture as well) actively supports one form of sexual orientation and oppresses another, forcing people who begin to discover themselves as homosexuals to deny their sexuality to themselves and to others. We shall document the marked lack of success with which these efforts at self-suppression and denial typically end. A man who is married in his teen years or early twenties, for example, who finds himself unable to find emotional or erotic satisfaction within marriage and who discovers that he can find that nurturance and satisfaction only with another male is indeed likely to become a home-wrecker, and the same is true for a woman who discovers that she can find emotional and sexual satisfaction only with another woman.

In our own day, with homosexual orientation a recognized reality, it is much more likely for homosexuals to resolve their sexual identity before finding themselves in an unfortunate, socially-coerced marriage. Instead, some gay and lesbian couples – in some pockets of America that do not act to prevent stable homosexual couples – are able to form steady relationships of love, support, and responsibility. Recent marriages, civil unions, and domestic partnerships in the tens of thousands in the Netherlands, Belgium, Spain, Canada, Vermont, California, and Massachusetts; attempts to form a legally recognized

marriage by literally thousands of homosexual couples in areas where that level of legal recognition is not available (including the dramatic cases of New Paltz, New York and San Francisco, where the mayors acted against state law in authorizing such marriages); the many attempts by homosexuals and others to change the law to permit the legal marriage of homosexuals in California, New Jersey, New York, and other states; and the many other attempts by homosexuals to adopt children and to establish legal parenthood for children born to their partners all indicate the degree to which homosexuals desperately want to *establish* families rather than threaten them.

Furthermore, adultery and divorce among heterosexuals clearly wrecks homes in far larger numbers than homosexuals leaving heterosexual unions after reconciling themselves to their homosexuality, and the prospect of adultery or divorce does not prevent us from marrying heterosexuals and celebrating their unions. We thus certainly should not desist from permitting homosexual unions on the much less remote chance -- chance though it be-- that this will lead some homosexuals in heterosexual unions to divorce their spouses.

Forcing homosexuals into heterosexual roles is the sure way to subvert the loving and supportive nature of family life. With the decline of early, arranged marriages, there is no longer significant danger of homosexuality destroying the family. And the sure way to remove whatever danger might be left would be to encourage homosexuals to create monogamous homosexual families so they do not have to try to hide, to deny their own adult need to love and be loved by someone of the same sex, and to pose in a relationship that creates only victims and hurt.

¹² A vocal minority in the psychological profession disputes this conclusion and argues that some highly motivated homosexuals may in fact pursue therapy which would allow them to maintain stable heterosexual relationships. As with other therapies, we trust the person who is directly affected to determine the best path for his mental and physical health. As the Talmud says, אדם קרוב אצל עצמו "a man understands himself" (*Yevamot* 25b; *Sanhedrin* 9b-10a).

¹³ The full document is available online at: www.apahelpcenter.org/articles/article.php?id=31

¹⁴ We make no theological claim, as Rabbi Roth asserts, about what the origin of sexual orientation says about the nature of God ("Homosexuality Revisited," p.54). Every human body will at some point in a person's life make it impossible for him or her to fulfill a mitzvah. This does not imply immorality in the Creator; the moral problem arises when human interpreters of the divine will refuse to consider what the best available scientific knowledge teaches them about what is possible to expect of their fellow humans. The demand that gay and lesbian people attempt life-long celibacy or subject themselves to discredited psychological experiments is a moral challenge for rabbis, not for God.

¹⁵ It is impossible to measure whether the percentage of homosexuals in the societies of the past has been greater in those that were more accepting of homosexuality than in those who were not. It is noteworthy in this regard, however, that, as the research cited by Dr. Glassgold and as older findings demonstrate, children raised in gay or lesbian households grow up to be heterosexual at precisely the same ratio as children reared in heterosexual homes. If acceptance and even practice of homosexual sex by those who love and raise you does not make you a homosexual, surely acceptance by those you know less well and to whom you have weaker attachments should not have that effect. We have no evidence that social acceptance in and of itself produces more homosexuals, and the studies of children being raised by homosexual parents seem to indicate that acceptance and even growing up in the context of homosexuals who love and support you does not make you homosexual. Thus the worry expressed by some heterosexual parents that greater social acceptance might convince their own children to be homosexual is unfounded. Rather, as Dr. Glassgold's summary of current research indicates, sexual orientation takes root in individuals at an early age and is unalterable.

The only thing that we *can* control is whether people's experience as homosexuals in the Jewish and general communities will be dignified or degrading. Greater social acceptance should eliminate negative

social evaluations of homosexuals and thus diminish the number of suicides among (especially) teenage homosexuals; it may also reduce the number of homosexuals who desperately try to act like heterosexuals, including dating and even marriage, often resulting in extramarital homosexual liaisons, divorces, and psychological trauma affecting the entire family unit.

¹⁶ This position was cogently presented to the Committee on Jewish Law and Standards (CJLS) at its March 2004 retreat by psychiatrist Dr. Abba E. Borowich, an Orthodox therapist who is the founder of the Mesorah Society for Traditional Judaism and Psychiatry and an advisor to the Rabbinical Council of America and Yeshiva University. Although he practiced "sexual conversion therapy" for Orthodox homosexuals for thirty years, Dr. Borowich has now concluded that such efforts, even by individuals highly motivated by what they construe to be the will of God and their tightly-knit community, usually result in failure to maintain either celibacy or exclusively heterosexual behavior for even one year, leading to the tragic failure of marriages and severe mental health crises. He has called upon Orthodox rabbinical organizations as well as the CJLS to become more accepting of homosexuals rather than expecting them to change their sexual orientation.

In a letter co-signed with another Orthodox therapist, Naomi S. Mark, Dr. Borowich wrote,

As therapists, we see the pain and fall-out of many of these marriages when often, years later, there is a regression to homosexuality despite a sincere attempt at heterosexual adaptation. Situations like these can have disastrous consequences for the spouses, the children and, of course, the individuals themselves. The fact that there are no long term follow-up studies that confirm the "success" of conversion therapy argues against guiding susceptible individuals towards this treatment. Perhaps change is possible, but it remains unclear that there is a technique that works repeatedly in a manner that can be reproduced. What is clear is that there are terrible consequences for people who are misled. (*The Jerusalem Post*, Sept. 6, 2001.)

¹⁷ See "Suicidality and associated risk factors among lesbian, gay, and bisexual compared to heterosexual Austrian adults" by Ploderl M, Fartacek R in *Suicide Life Threat Behav.* 2005 Dec;35(6):661-70; and "Gay adolescents and suicide: understanding the association" by Kitts RL in *Adolescence.* 2005 Fall;40(159):621-8. A search at www.pubmed.gov under the terms "gay, suicide, teen" generates dozens of references.

¹⁸ Amity Pierce Buxton, Ph.D. "The Other Side of the Closet: The Coming-Out Crisis for Straight Spouses and Families, Revised and Expanded Edition (John Wiley & Sons, 1991, 1994). See also Jane Gross, "When the Beard Is Too Painful to Remove" *New York Times*, August 3, 2006. "Data on these marriages is scarce and unreliable because of the various ways of defining "gay" in demographic research. Studies in the 1970's and 80's, using inconsistent methodology, found anywhere from one-fifth to one-third of gay men were or had at one time been married. All the therapists and gay men interviewed for this article assumed that percentage would be far lower in today's more accepting society. But Gary J. Gates, a demographer at the Williams Institute, a research group that studies gay issues at U.C.L.A., blended data for *The New York Times* from the 2000 Census and a 2002 federal survey of family configurations, and found that the percentage of gay men who had ever been married could be as high as 38 percent -- or as low as 9 percent -- depending on whether respondents were asked their sexual orientation, whom they had sex with or whom they found attractive. Of the 27 million American men currently married, Mr. Gates found, 1.6 percent, or 436,000, identify themselves as gay or bisexual. Of the 75 million men who have ever been married, 1.8 percent, or 1.3 million, identify themselves that way. But, in both cases, when the men are asked about behavior if they have ever had sex with men, not what they consider their sexual orientation, the number of men who have ever been married doubles." See also web page: www.marriedgay.org.

¹⁹ *Leviticus* 19:2. See, for example, Rashi's comment to this verse: ,הוּ פְרוּשִׁים תְּהִי - הוּ פְרוּשִׁים מִן הָעֲרִיּוֹת וּמִן הָעֵבִירָה, "You shall be holy. Separate yourself from sexual

transgression and other sin, for wherever you find a fence around sexual transgression, you find holiness.”

²⁰ The former category includes sexual relations between a man and a woman in *niddah*. The latter category includes rape, incest, adultery, pedophilia and bestiality.

²¹ In a March 7, 2006 *New York Times* article by Katy Butler, the complex relationship between romantic and sexual attraction was discussed: “Helen Fisher, a research anthropologist at Rutgers University, said in an interview that human partnerships are shaped by three independent neurochemical brain-body systems, responsible respectively for sexual attraction, romantic yearning and long-term attachment. ‘The three systems are very fickle. They can act together, or they can act separately,’ Dr. Fisher said. This, she said, helps explain why people can be wildly sexually attracted to those they have no romantic interest in, and romantically drawn to -- or permanently attached to -- people who hold no sexual interest. ‘Once the system is triggered, it’s so chemically powerful that you can easily overlook everything about that person that doesn’t work for you’ Dr. Fisher said. ‘Even straight people have fallen in love with people they could never make a life with,’ she said.” Dr. Fisher’s findings were first published under the title, “Lust, Attraction, and Attachment in Mammalian Reproduction” in the journal *Human Nature* (1998).

²² Some have argued that requiring bisexuals to seek marriage partners among the opposite sex may prevent them from finding their *beshert*. While this may be true, it is not different from our instructing single people to limit their dating to fellow Jews.

²³ See Alex Morris, “The Cuddle Puddle of Stuyvesant High School” in *New York Magazine*, February 6, 2006. <http://www.nymag.com/news/features/15589/> According to a National Center for Health Statistics report released in September 2006, 11% of 15-19 year old American girls claim to have had same-sex encounters.

²⁴ For an excursus on Jewish sexual ideals, see Elliot N. Dorff, “*This Is My Beloved, This Is My Friend*”: A Rabbinic Letter on Human Intimacy (New York: Rabbinical Assembly, 1996); republished in Elliot N. Dorff, *Love Your Neighbor and Yourself: A Jewish Approach to Modern Personal Ethics* (Philadelphia: Jewish Publication Society, 2003), Chapter Three.

²⁵ Despite some vagueness and euphemism in the terms used, these verses refer to anal penetration. That has been the unquestioned interpretation of these passages throughout the ages. To begin with the biblical text’s own testimony, virgins are described as women “אִשָּׁר לֹא יָדְעוּ מִשֵּׁכֵב זָכָר” (who have not had carnal relations with a man -- *Numbers* 31:18) and the non-virgin is known as “אִשָּׁה יוֹדַעַת מִשֵּׁכֵב זָכָר” (who has known a man carnally -- *Judges* 21:11). Thus vaginal intercourse is described by the term מִשֵּׁכֵב / *mishkav*. This term is twinned with the verb יָדַע / to know, which in this context also refers to copulation (“וְהָאָדָם יָדַע אֶת חוּהָ אִשְׁתּוֹ וַתְּהַר” / the man [viz. Adam] knew his wife Eve and she conceived -- *Genesis* 4:1).

The obvious corollary to that penetrative vaginal intercourse with regard to a woman, when spoken of with regard to a man, is anal intercourse. The term יָדַע is apparently used similarly with reference to homosexual activity in the Sodom story (*Genesis* 19:5) and in the parallel story of the handmaiden of Givah, used there equally about non-consensual homosexual activity and heterosexual rape (*Judges* 19:22, 25).

The Sages recognized that meaning, and interpreted acutely that the term מִשֵּׁכֵב אִשָּׁה (female sexual relations) is plural because it refers to both types of penetrative copulation that might be performed by a man with a woman, vaginal and anal, or as they are generally termed, כְּדַרְכָּהּ and כְּדַרְכָּהּ or ‘usual’ and ‘unusual.’

They defined penetration, הֶעֱרָא, as the act that calls down the biblical penalties for illicit sexual relations in both vaginal and anal penetrations of a forbidden relative (*Yevamot* 54a), and it is that that invokes the biblical penalties of male copulation and of bestiality (*Sanhedrin* 55a). We agree with Rabbi Roth that הַכְּנֶסֶת הָעֵטֶרָה and not only full penetration is included in this prohibition. This penetration was

classed as the biblical prohibition of משכב זכור, male homosexual relations. The Sages were careful to distinguish this biblically prohibited penetrative activity from other erotic activity leading to ejaculation, which was classed as דרך איברים (by way of the limbs) and prohibited not under the biblical prohibition of male homosexual relations, but under the separate prohibition against wasting seed (*Niddah* 13b). As Rashi explains:

דרך איברים -- היינו שכבת זרע לבטלה ואינו משכב זכור, דבמשכב זכור כתיב משכבי אשה.

By way of the limbs -- this is wasting seed, but not homosexual relations, for about male homosexual relations the Torah says: "the lyings of a woman."

Thus it is that both the Torah and the Rabbis understood that the prohibition of משכב זכור (male homosexual relations) specifically and exclusively refers to male anal penetrative copulation.

²⁶ This terminology is based on Saul M. Olyan's study, "And with a male you shall not lie the lying down of a woman": On the meaning and significance of Leviticus 18:22 and 20:13" in *Journal of the History of Sexuality* (5:2, October 1994), pp.179-206. Olyan argues that the penalty for the receptive partner in 20:13 was a later addition to the holiness source (H), but for our purposes, there is no difference.

²⁷ See Rashi to *Leviticus* 20:13, מכחול בשפופרת, משכבי אשה - מניח כמכחול בשפופרת, "lyings of a woman--he inserts as the painting stick is inserted in the tube" (he refers to the mascara-style applicators used in antiquity to apply *khol*). See *Bava Metzia* 91a, and Jastrow, p.782. In *Midrash Sifra* and in *Bavli Sanhedrin* 54b the prohibition of the receptive act is discovered by Rabbi Yishmael by reference to the *kedeish* or male cultic prostitute in *Deut.* 23:18 and *I Kings* 14:24. Rabbi Akiva finds evidence for the prohibition of the receptive act in *Leviticus* 18:22 itself by revocalizing *tishkav* into the passive form *tishakeiv*, i.e. "you shall not be laid by a man as a woman."

²⁸ *Sifra, Kedoshim, Parsha* 10, Ch. 9:14. An extended analysis of this question is offered by Michael L. Satlow, "They Abused Him Like a Woman" in *Journal of the History of Sexuality* (5:1, July 1994), pp.1-25, esp. 9-12.

²⁹ He writes in "Homosexuality Revisited" (Unofficial CJLS responsum, revised Nov. 2006, p.18), "What would follow from what we have been discussing is that fellatio is as biblically forbidden as anal intercourse, making those males who engage in it with other males liable for the full penalty of the biblical law." We, however, are not aware of any rabbinic text which employs the expression *biah shelo kedarkah* to describe homosexual sex, nor does Rabbi Roth cite any. Moreover, Rabbi Roth does not cite even one proof-text which explicitly includes heterosexual oral sex in the category of *biah shelo kedarkah*. He does produce a variant reading (Venice 1594 edition) of the *Rema* to *Shulhan Arukh* E.H. 25:2 which implies that *biah shelo kedarkah* can describe something other than penetration of the anus. However, this variant reading is unclear, it does not mention oral sex, and of course, it is not referring to gay sex.

³⁰ Rabbi Roth quotes and translates Rabbi Avraham Steinberg's entry in *Encyclopedia of Medical Halakha* [Hebrew] s.v. מיניות. "The prohibition against homosexual acts which incurs the penalty of death and *karet* is specifically through anal intercourse." Rabbi Rapoport writes, "In the case of *mishkav zachar*, this refers specifically to anal penetrative intercourse." *Judaism and Homosexuality: An Authentic Orthodox Approach*, p.2.

³¹ Rabbi Roth again has a distinctive take on this text. He claims that חייבין עליו סקילה משתי אנדרוגיניס - חייבין עליו סקילה משתי אנדרוגיניס means that a man who has sex with an *androgynus* may be held liable for him once as a male and once as a female, rather than once for his vagina and once for his anus. His translation of משתי מקומות to mean "in two ways" instead of "in two places" is improbable. Moreover, his reading is undermined by the gemara's actual words, אי זהו זכר שיש בו שני משכבות? "what kind of male has two lyings—it must be an *androgynus*." The only kind of male who has שני משכבות, two ways to be laid, is an *androgynus*. If oral sex were one of the options, then every male would have שני משכבות.

We agree with Rabbi Roth that the gemara's terms של זכרות and של נקבות are confusing, yet his suggestion that the former refers to oral sex is tendentious and unconvincing. Rabbi Yom Tov b.

Avraham's explanation is more compelling: בזכרותו של פני מאחוריו "his masculine side means his behind" (*Hiddushei HaRitb" a to Yevamot 83b*). The *androgynus* has a female place of intercourse—his vagina—and a masculine place of intercourse—his anus. These are his two משכבות. There is no reason to think that the mouth is involved. We stand by the plain meaning of this text.

³² A second Talmud passage that carries this implication is a passage on *Sanhedrin 55a* where an amora asks, in the context of a discussion of homosexual relations, what prohibition applies to one who achieves sexual penetration on himself. The initial reaction is that that would be impossible, but Rav Ashi opines that while it would be impossible with an erection, it might be possible flaccid. (In that case, since the penetration was only achieved in a non-ejaculatory condition, there are those who exempt him and those who would find him liable both as the penetrator and as the penetrated, which are both capital offences with regard to homosexual penetration). Oral penetration would be more rather than less likely upon erection for one sufficiently flexible. It is clear, then, that that is not what Rav Ashi has in mind. A flaccid penis, on the other hand, but not an erect one, could be bent to achieve anal-self-penetration.

A third source is in Yerushalmi *Megilah 4:1*, discussing Ezra's decree that a woman should wear a *sinar*, a laced garment covering her genitals, both front and back (בין מלפניה בין מלאחריה), R. Tanhūm bar Hiya explains that this was decreed,

מפני מעשה שאירע. מעשה באשה שבעלה קוף מכדרכה ושלא כדרכה

Because of the event that happened. This was a case of a woman whom an ape raped in both the "natural" and "unnatural" ways.

A *sinar* is required to protect her against unnatural intercourse, but a veil was not considered. Thus it is clear that the Rabbis were careful to define anal penetration, and only that, as the second prohibited act of penetration of illicit sexual relations.

Rabbi Roth concedes that in this source, at least, ושלא כדרכה means anal sex; however, he says, correctly, that this does not *prove* that oral sex could not *also* be called כדרכה. We have provided three sources which use this expression the way it is commonly interpreted: anal sex. Rabbi Roth has not provided one source which mentions oral sex in this category. An argument from silence is not sufficient to overturn the standard definition. Finally, we remind Rabbi Roth that ביאה שלא כדרכה is commonly associated with pain, as in the rape of Dina (Genesis 34:2; see Rashi there). Oral sex is not commonly associated with pain.

³³ "Reconciling Judaism with Male and Female Homosexuality" (Unofficial CJLS responsum, revised, October 2006). They claim, "According to *parshat arayot*, real sex requires sanctification, codified later by halakhah as *kiddushin*. Outside of marriage, sexual relations are forbidden." However, even a cursory reading of these chapters undermines this claim, since *there is no mention of marriage in them*, and certainly no prohibition of sexual relations outside of marriage between a man and an unmarried and unrelated woman. The authors state that, surely, "the Torah had a sense of marriage, and the fact that marriage was sacred" yet they do not produce any support for their theory that this section of the Torah is about marriage (actually, the Torah nowhere describes a marriage ritual, just a man "taking" a woman). They describe their reading as a *pshat*, but also as a *mi'ut*, which is of course a midrashic technique.

Another difficulty with this approach is that it makes a halakhic *heiter* for gay sex dependent upon the availability of gay marriage or at least civil unions in public law. Given the unsettled state of public law on this subject both within and without the United States, this strikes us as a poor foundation for the halakhah. Moreover, it is not our practice to alter the halakhah to accord with public law in matters of sexual ethics. Civil law does not penalize adultery, yet Jewish law rightfully insists upon marital fidelity.

³⁴ Rabbis Brad Artson, Steven Greenberg, Jacob Milgrom, as well as Dr. Shai Cherry have each offered variants on such a new "*pshat*."

³⁵ Jacob Milgrom's commentary on Leviticus advances another argument unheard of in other commentaries to these verses. Milgrom argues that Lev. 18:22 is prohibiting male-male sex *only* in cases

where the men are *related to each other* (in a degree similar to the other incest provisions for heterosexuals found in chapter 18). He associates the use of the plural *mishk'vei* ("beddings") in this verse with its use in Genesis 49:4 where Jacob scolds Reuben his son with having sex with his father's concubine. "In effect," he concludes, "this means that the homosexual prohibition applies to Ego with father, son, and brother (subsumed in v.6) and to grandfather-grandson, uncle-nephew, and stepfather-stepson, but not to any other male." Jacob Milgrom, *Leviticus 17-22* in the Anchor Bible series (New York: Doubleday, 2000), p.1569. He credits his student David Stewart with this insight. See p.1786. In "Comment E: Who Says Homosexuality is a Sin?" Milgrom expands upon this reasoning, dismissing the entire prohibition of anal sex between men unless they are related to one another. By so doing, however, Milgrom distorts the clear context of the verse. Although the bulk of the chapter deals with incest, the chapter proceeds after verse 18 to deal in other miscellaneous sexual prohibitions. Verse 18:22, which prohibits male-male intercourse is embedded among verses that prohibit other sexual transgressions: menstrual sex, adultery, bestiality, and Molekh worship, sexual prohibitions that go beyond the purely incestuous. The Rabbis did not understand this verse as prohibiting male-male incest. Rather, they found male-male incest doubly prohibited, forbidden as a matter of male-male intercourse, based on this verse, and as a matter of incest, based on an extrapolation of verse seven (See Sanhedrin 54a).

³⁶ The three cardinal rules of עבודת כוכבים וגלוי עריות "one should die rather than transgress" יהרג ואל יעבור "idolatry, sexual transgression and murder" are stated in BT *Sanhedrin* 74a and codified by Rambam in *Hilkhot Y'sodei HaTorah* 5:2, and the Shulhan Arukh at *Yoreh De'ah* 157:1.

³⁷ *Sifra* (*Aharei Mot* 13:2 and 21):

"לא תקרבו לגלות" -- אין לי אלא שלא יגלה. מנין שלא יקרבו?
 ת"ל: "ואל אשה בנדת טומאתה לא תקרב לגלות ערותה."
 אין לי אלא בנדה בל תקרב ובל תגלה. ומניין לכל העריות שהן בבל תקרבו ובל תגלו?
 ת"ל: "לא תקרבו לגלות."
 ונכרתו הנפשות העושות" -- מה תלמוד לומר?
 לפי שנאמר: "לא תקרבו", יכול יהו חייבין כרת על הקריבה? ת"ל: "העושות" -- ולא הקרבות.

"None of you shall come near... to uncover" -- I only know that one should not uncover. Whence do I learn that one should not approach? It says (*Levit.* 18:19): "Do not come near a woman during her period of impurity to uncover her nakedness." I only know about a menstruant that one may neither have sexual intercourse with her nor approach her. Whence do I learn that one should not have relations nor approach any forbidden relation? It says: "None of you shall come near... to uncover." "Such persons shall be cut off (*Levit.* 18:29)" -- What does this teach? Since it says, "None of you shall come near," might it be that people are liable for [the punishment of] *karet* for an approach? Therefore I learn, "such persons [lit. persons who do so]" -- not those who approach [only].

This version of the *Sifra* is that of Maimonides' citation in *Sefer haMitzvot*. It conforms in content, but not in specific language, to that in published editions of *Sifra*.

³⁸ Ramban's arguments can be found at length in his commentary to Maimonides's *Sefer haMitzvot*, negative commandment #353. He writes, in part:

הנה אין "לא תקרבו לגלות ערוה" נדרש להם לאו בפני עצמו כברייתא השנויה בספרא אבל ידרשוהו בקריבה של גילוי ערוה בלבד... אין זה עיקר מדרש בלאו הזה, אלא קרא אסמכתא בעלמא. והרבה מאד כן בספרא וסיפרי.

Now, 'None of you shall come near... to uncover nakedness' is not interpreted by them to be a negative commandment of its own, as the *Baraita* in the *Sifra* has it. They interpret it to mean sexual relations only... This is not a primary exegesis of a negative commandment, rather the verse is just a [homiletical] support. There are many such exegeses in *Sifra* and *Sifrei*.

There he fully explains the Talmudic discussion that surrounds the dictum of R. P'dat and cites several other proofs that "approach" cannot be biblically prohibited.

³⁹ On *Shabbat* 13a Ulla is cited as saying the “any approach” is prohibited, but he does not claim that that ruling is biblical rather than rabbinic, and he himself is cited as excepting his relatives, which, as Ramban points out, is more consistent with the view that the prohibition is rabbinic in origin. An unattributed text is understood to disagree with R. Pedat, there, but Ramban insists that that is with regard to a subsidiary point, and does not represent an argument that “approach” is biblically prohibited.

⁴⁰ Chapter 18 of Leviticus is a dramatic call to the Israelite nation not to follow the corrupt ways of the gentiles whose behavior the Israelites were familiar with most intimately, the ways of the Egyptians and the Canaanites. The midrash (*Sifra d’Rabbi Ishmael, Aharei Mot, parsheta* 9:8) asks acutely what that might mean, since clearly the Torah can’t intend not doing anything like their neighbors, even building houses and engaging in agriculture? The verse in questions serves as an introduction to the detailed list that follows in answer to that implied question. Were this intended as a separate prohibition derived from the primary prohibition of *arayot*, it would have been placed at the end, after verse 20, and not before the prohibitions which are its predicate.

⁴¹ Rabbi Joel Roth, “Homosexuality Revisited” Nov.-Dec. 2006 draft, pp.24-25.

⁴² *Biurei HaGR”A to Shulhan Arukh*, E.H. 20:1.

⁴³ This debate between Rambam and Ramban remains unsettled, with *Helkat M’hokek*, in his commentary to *Shulhan Arukh* (E.H. 20:1) citing Rabbi Shimshon ben Tzemah Duran supporting Ramban’s position, and *Baer Heitev* and the comments of the Gaon of Vilna presenting both equally, side by side, as does the relevant section in the *Entsiklopedia Talmudit* (Volume IX, 111-112). As late as the 19th century Rabbi Jacob Ettlinger is cautious in judging the issue. He writes (*Binyan Tzion* 75):

אם נחליט שיש כאן איסור ערוה, כיון דלדעת הרמב”ם יש בנגיעה בבשר ערוה לאו ד”אל כל שאר בשרו לא תקרבו
“If we were to conclude that this is an *ervah* (a biblically prohibited sexual relation), for it is the opinion of Maimonides that touching a prohibited person is prohibited by the negative commandment of ‘None of you shall come near....’” Rabbi Ettlinger is not prepared to assert that this is a biblical prohibition despite Maimonides’ opinion.

The predominant tendency among Aharonim seems to have been to seek a middle ground. Beginning this line, Rabbi Isaac de Leon, who seeks to defend Maimonides's positions in his commentary *Megillat Esther* to Maimonides's *Sefer haMitzvot*, finds that only with regard to lying naked with a forbidden relative or a menstruant, which is likeliest to lead to actual sexual intercourse, does the prohibition of “approach” have biblical force. Into this category would fit all forms of sexual play. All other extensions of the prohibition of “approach,” such as lying together clothed, eating together, *yihud* (being alone together), and *negiah* (touching) are to be seen as rabbinic rulings, beyond the force of biblical mandate. While de Leon's position is appealing, it is presented as an explanation and defense of Maimonides's thinking, which it clearly does not represent. On the other hand, Ramban himself understands that lying naked with a forbidden relative or a menstruant (thus sexual play) is the highest order of “approach,” but he understands it, too, to be only rabbinically prohibited. According to Ramban and his followers, the *Sifra* text is only an *asmakhta* (a rabbinic interpolation), not a true biblical derivation.

⁴⁴ That Maimonides appears to consider this also a biblical prohibition follows from his broad language at the beginning of the *Mishneh Torah* where he writes in his list of the commandments of negative commandment #353, “One may not approach *arayot* in ways that lead to intercourse, such as hugging and kissing, or flirting or signaling.” See *Beit Shmuel, Even haEzer* 20:1. This is the tack that we associate with the ultra-Orthodox, forbidding mixed bathing because,

לא תקרבו לגלות ערוה -- ובכללם גם לעמוד לפניו ערומה או אף חצי ערומה באופן שמגרנים] יצ[ר] הר[ע].
וזה עיקר כוונת ההולכים לשם, ומחוייבים למסור נפשו ע[ל] ז[ו]ה

(you shall not come near... to uncover nakedness -- included in [these prohibitions] is to stand before him naked, or even half naked, in such a way as to incite lustfulness... that is the prime intent of those who go there, and they are required to give their life over this.)”

R. Mordechai Ya'akov Breisch, 20th c. Switzerland, *Helkat Ya'akov, Yoreh Deah* 138.3]. But see the last note for a less extreme reading of Maimonides.

⁴⁵ *Shabbat* 13a: Ulla... would kiss his sisters upon their bosoms (some say: hands). *Tosafot* s.v. *u'fliga*: He knew of himself that he would not harbor improper thoughts because he was a perfectly righteous man. Ramban cites *Kiddushin* 81b in making his case: "the story of Rav Hanan bar Rava who sat his minor granddaughter in his lap and was informed that she had already been betrothed, which is to say that such behavior would be forbidden with a married woman, but they did not say anything about a prohibition due to forbidden relations with his relative... Then he said: 'I... believe... that this is all for the sake of heaven.' Were 'approach' an absolute negative commandment of the Torah it would not be permitted to the righteous... who are acting for the sake of heaven. All of this is a fence and border, therefore it is permissible for relatives for those who are reliably not suspect."

⁴⁶ Even those who insist that "approach" is a biblical offense with regard to the prohibited classes of heterosexual contact affirm that being secluded or even sleeping together naked is permitted to two males without concern about sexual misconduct. The Mishnah, *Kiddushin* 4:14, reports that whereas Rabbi Judah sought to prohibit single men "sleeping together in one cloak," generally understood to mean sleeping naked under one cover, the Sages permitted this. Their response to Rabbi Judah is recorded on *Kiddushin* 82a: "They said to Rabbi Judah: 'Jews are not suspected of transgressions of *mishkav zakhur* (male anal homosexual intercourse) or of bestiality.'" Maimonides, who is stringent regarding heterosexual "approach," codifies this dictum, writing [*Issurei Biah* 22:2]:

לא נחשדו ישראל על משכב זכור ועל הבהמה, לפיכך אין אסור להתייחד עמהם.

Jews are not suspected of transgressions of *mishkav zakhur* (male anal homosexual intercourse) or of bestiality, therefore it is not prohibited to be alone with them.

Where concern about intercourse was absent, no prohibition of "approach" was considered necessary. In our day, despite the rise in open homosexual behavior, we regularly send our young adults to university dorm rooms shared with same-sex roommates and allow same-sex nakedness in gymnasium showers and dressing rooms without a second thought. We focus on our expectation of personal discipline in all matters. We expect that an individual can attend to himself and will not fall into forbidden sexual activity, heterosexuals and homosexuals alike. In this, the status of homosexuals sharing a bed is like that of a man sharing a bed with his wife who is *niddah*.

⁴⁷ An additional prohibition is that of the prohibition of destruction or wasteful emission of seed (השחתת זרע, הוצאת זרע לבטלה). Again the issue of whether the prohibition is *d'oraita* (biblical) or *d'rabbanan* (rabbinic) greets us. In his *Intziklopedia Hilkhait Refuit* (2:407-9) Dr. Abraham Steinberg begins his discussion with this:

יש הסוברים שאיסור השחתת זרע הוא מן התורה, יש מי שכתב שהאיסור הוא הלכה למשה מסיני, ויש הסוברים שהאיסור הוא מדרבנן... מאחר שאיסור השחתת זרע לא נתפרש באופן ישיר בתורה, נחלקו הפוסקים... ביחס למקורו... הפוסקים הסוברים שאיסור השחתת זרע הוא מדרבנן דחו את המקורות האפשריים מן התורה בדרכים שונות.

There are those who hold that the prohibition of destroying seed is biblical, someone wrote that it is a law stemming from Moses at Sinai, and some hold that the prohibition of destroying seed is rabbinic.... Since the prohibition of destroying seed was not directly made evident in the Torah, the halakhic authorities differ... regarding its source.... Those authorities that hold that the prohibition of destroying seed is rabbinic rejected the potential sources from the Torah in different ways.

Steinberg actually offers a list of the many ways to derive destruction of seed from the Torah that have been offered, naming nine such derivations. When the authorities across generations are unable to find a convincing source (or to at least to narrow the field to only one or two possibilities) it is likely, that the prohibition is not, in fact, from the Torah.

Maimonides himself, who pushed the biblical interpretation of “approach,” is unable to credit the argument that destruction of seed is biblical, or that it may merit the biblical penalty of lashes. He writes (Commentary to Mishnah *Sanhedrin* 7:4):

אין להוצאת שכבת זרע בענין חיוב העונשין סרך בשום פנים, אלא כיון שהכניס האבר יתחייב העונש עליה.... ואם בא אדם על ערוה מן הערויות באבר זולתי הזכרות אינו חייב עונש, ואפילו הוציא שכבת זרע, לפי שהוא דבר שנחלקו עליו ולא פסק בו הש"ס ואין לעונש אלא על דבר מפורש שאין בו ספק -- ומכל מקום הוא דבר ערוה.

Emission of seed has no place whatsoever among punishable acts. Only when one inserts the penis is one liable.... Where a person has penetrative sexual contact with one of the forbidden sexual relations with an extremity other than the penis, he is not liable for a punishment, even if he emitted seed, since this is a matter that people differed about, and the Talmud did not rule, and one is not to punish except when matters are clear, without a doubt -- but it is still an act of prohibited sexual relations.

Now recall that Maimonides considers approach to the illicit relatives its own biblical prohibition, so that, as he continues to say, this case would be liable to lashes for the approach, just not for sexual relations per se, nor for the destruction of seed.

Despite the huge homiletical push to control masturbation, which explains the many verse derivations which we take to be purely homiletic, there is an interesting history of forgiving emission of seed wherever it appears appropriate. Spilling of seed was to be avoided within a married relationship as well, whenever possible, according to Maimonides, [*Hilkhot Issurei Biah* 21:9], yet that matter is left, in practice, to the discretion of the couple. The Talmud permits all sexual behavior within marriage without mention of such a proviso (*Niddah* 20b). It is to be noted that Maimonides, himself, included the prohibition of spilling seed only among the less substantive restrictions and preferred practices collected in chapter 21 of *Hilkhot Issurei Biah*, which practices and restrictions command no rabbinic monitoring nor punishment upon infraction. Maimonides, there, objects, as well, to marriage to a female minor, apparently due to consideration of wasting seed [21:18], even though the Talmud is replete with provisions for just such a practice. The majority of authorities permit marriage to a minor, post-menopausal or infertile woman, despite the wasting of seed, since it is *כדרך כל הארץ* (the way of the world) (See *Bayit Hadash* to *Tur*, *Even haEzer* 23) It is further a matter of fairly broad consensus that emitting seed for the purposes of fertility treatments should be permitted (Steinberg, 2:415). Some have even suggested that spilling of seed may be permitted as a lesser transgression where it prevents a greater sin (*Beit Shmuel* and *Hokhmat Shlomo* to *Shulhan Arukh*, *Even haEzer* 23:1 as well as other sources cited by R. Simcha Roth in his responsum *Dear David*. R. Roth proposes that the matter of homosexual non-anal sex be treated as just such a displacement activity which sublimates the desire for anal sex to other activities and permitted on that basis). See <http://www.bmv.org.il/ab/dd.asp>.

Many other ways have been suggested by which to neutralize the prohibition of spilling seed which would be applicable to a male same-gender relationship. Rabbenu Tam associated its prohibition with the antithesis of procreation, therefore concluding that women, who are not commanded with regard to procreation, were also not prohibited from destroying seed [*Tosafot Yevamot* 12b, s.v. *shalosh*]. Others limit it to the specific act of Er and Onan, *coitus interruptus*. In this regard see the speculations of Rabbi Solomon Zalman Auerbach who is cited in Dr. Abraham Abraham's *Nishmat Avraham* to *Even haEzer* 23, #1 [III, p. 107] as speculating that “perhaps one... who is unable to marry a wife should be permitted to wastefully spill seed. Or concerning that which *Arukh laNer* wrote, that it is [prohibited] on account of [general] destruction..., perhaps if he does it for enjoyment then it is not destruction [for its own sake]. But if the prohibition is a Mosaic Law given at Sinai, then it follows that one may not be lenient at all...”

Rabbi Chaim Rapoport cautiously writes along these lines: “The ruling of the *Chelkat Mechokek* and the *Bet Shmuel*—whatever its rationale may be—may provide rabbis and counselors with useful

guidelines when instructing homosexuals. In what almost inevitably amounts to commitment to lifelong celibacy, there are bound to be situations in which some homosexuals will find themselves on the verge of violating the biblical prohibition of male-to-male intercourse or the rabbinic extensions of that prohibition.... In all such situations, it is possible that the mentor may be justified in taking recourse to the views expounded by the above mentioned authorities when forming their advice to their charges." *Judaism and Homosexuality: An Authentic Orthodox View*, note 11, p.142.

Our position on that last question is clear – As R. Dorff has written (*Matters of Life and Death*, p. 119): "To date, none of the three movements has taken an official position validating masturbation, but in practice the tradition's abhorrence of masturbation is largely ignored." Rabbi Walter Jacob of the CCAR published a 1979 responsum entitled "Masturbation" which concludes, "Although the statements of tradition are very clear [in forbidding], we would take a different view of masturbation, in the light of current psychological thought. Masturbation should be discouraged, but we would not consider it harmful or sinful." The text can be read at: <http://data.ccarnet.org/cgi-bin/respdisp.pl?file=153&year=arr>.⁴⁸ *Darkhei haEmori* (דרכי האמורי) is the preferred rabbinic term. It appears in Mishnah *Shabbat* 6:10, and is associated there with the verse in *Leviticus* by the commentator Bartenura, as well as by Rashi on *Shabbat* 67a and the Talmud itself on *Avodah Zarah* 11a. *Mekhilta d'Arayot* [*Sifra, Aharei Mot* 13:9] utilizes this identity as well:

-- "ובחוקותיהם לא תלכו" -- וכי מה הניח הכתוב שלא אמרו... ת"ל "ובחוקותיהם לא תלכו" --
שלא תלכו בנימוסות שלהן, בדברים החקוקין להם כגון תיטריות וקרקסאות והאסטריות.
ר' מאיר אומר: אלו דרכי האמורי שמנו חכמים.

"Nor shall you follow their laws" -- What did the Torah leave over that it did not specify?
... Therefore it teaches, "nor shall you follow their laws" -- that you should not follow
their customs, the things that are instituted for them like theaters, circuses and
gladiatorial combats. Rabbi Meir says: These are the ways of the Amorites which the
Sages listed.

And where, in the view of Rabbi Meir, did the Sages list them? The *Tosefta* of *Shabbat*, chapters 6 and 7, appears to be that list, which is referred to by the Talmud on *Shabbat* 67a as בפרק אמורי "in the Amorite chapter".

[N.B.: The *Mekhilta d'Arayot* appears in printed versions of the *Sifra, Aharei Mot* 13:3-15 and *Kedoshim* the whole of chapter 9. These two sections deal expressly with the *Arayot* section of *Leviticus*, chapters 18 and 20, and are an interpolation into the *Sifra*, as is evident, for the verses discussed have a running midrash in the *Sifra* which the sections of the *Mekhilta d'Arayot* interrupt and repeat. Whereas the *Sifra* is a descendant of Akiban *midrash*, in *Mevo'ot leSifrut haTannaim*, p. 640, J.N. Epstein establishes that *Mekhilta d'Arayot* is Ishmaelian.]

One more datum in this regard. In Rabbi Eliezer of Metz's *Sefer Yereim* #313 (cited by *Bet Yosef* to *Shulhan Arukh, Yoreh Deah* 178 and in Lieberman's *Tosefta Kifshutah, Shabbat* p. 80) he writes:

וחכמים פירשו מה המעשים וחוקים שהורגלו לעשות לשם תורה שלהם... ובתוספתא דשבת
מונה כל מה שהיתה קבלה ביד חכמים שהיו מחוקותיהם. ואין להוסיף עליהם.
ואינם מסברא כי אם מקבלה.

The Sages set forth which practices and norms they had grown accustomed to according to their canon... In the *Tosefta* of *Shabbat* there is listed everything about which the Sages had a tradition that it was [prohibited as] part of "their laws." One may not add to them. They are not garnered by reason but by tradition.

If Rabbi Eliezer is correct, then it is certainly not correct to attribute any prohibition with regard to female lesbian sexual activity to biblical categories of prohibition.

For more on the status of the prohibition of female lesbian activity, see Chaim Rapoport, *Judaism and Homosexuality: An Authentic Orthodox View* (London: Valentine Mitchell, 2004), pp.3-4 and his extensive notes, #17-22, pp.143-147.

⁴⁹ When in doubt regarding a biblical prohibition, the general practice is to adopt the stricter view, ספק דאורייתא לחומרא. We do not argue that Ramban's interpretation results in a permission of homosexual intimacy, only that it proves the rabbinic status of that prohibition.

⁵⁰ A homosexual may be מוחל בכבודו (waive his own dignity) and attempt to walk the lonely path of celibacy in his service of God as a form of יסורין של אהבה, "afflictions of love." (*Brakhot* 5a-b). Halakhic authorities, however, cannot arrogate to themselves the place of God and *insist* that homosexuals waive their own dignity and accept their fate as forever alone. Rather, we should follow the example of Rabbi Yochanan, who, visiting Rabbi Chiya bar Abba, asked him, חביבין עליך יסוריך?, "are your sufferings welcome?" When Rabbi Chiya replied, לא הן ולא שכרן, "neither them nor their reward," Rabbi Yochanan lifted him up, relieving him from his suffering and isolation. This is an apt metaphor for our current project.

⁵¹ *Bava Kama* 84a; *Hulin* 11b-12a; *Niddah* 67b.

⁵² Eliezer Berkowitz, *Not in Heaven: The Nature and Function of Halakha* (New York: Ktav Publishing House, Inc., 1983), p. 12.

⁵³ Rambam, *Hilkhot Shabbat* 2:3, "This teaches that the laws of Torah are not vengeance for the world, but rather mercy and compassion and peace for the world."

⁵⁴ Rambam, *Hilkhot Hoveil umazik*, 1:10.

⁵⁵ Professor Nachum Rakover studies the concept of human dignity in his book, *Gadol Kvod Habriot--kvod ha-adam k'erekh-al* (Jerusalem: Ministry of Justice, Mishpat Ivri Library, 1998). He observes that while "kvod habriot" is a significant concern of the Tannaim, extending God's dignity to His creatures, it is in Amoraic sources that it develops into a legal principle with jurisgenerative power. See p.41.

⁵⁶ BT *Berakhot* 19b, *Shabbat* 81b, 94b, *Eruvin* 41b, *Megilah* 3b, *Bava Kama* 79b, *Menahot* 37b, 38a and PT *Nazir* 56a.

⁵⁷ *Deuteronomy* 17:11 as applied in the primary text on this concept, *Berakhot* 19b.

⁵⁸ Professor Rakover notes that גדול כבוד הבריות is in fact used to override an איסור דאורייתא in a case where the biblical obligation to return a lost object is waived out of concern for the dignity of the elderly person who found it. See *Berakhot* 19b, *Bava Metzia* 30a, *Sanhedrin* 18b, and in Rakover, pp.54-5. Still, the principle of כבוד is not generally applied to overturn biblical verses, which are considered the source of life, and therefore of human dignity.

⁵⁹ Rabbi Akiva's statement reminds us that Jewish texts discuss the dignity not merely of humans, but of *creations*. The Hebrew term בריות, creations, indicates that human dignity is a derivative of divine dignity, כבוד ה'. As a consequence, כבוד הבריות applies broadly to all humans, and not only to Jews. A second consequence is that human dignity is secondary to divine dignity. This prioritization is expressed in the Talmud by citing Proverbs 21:30: אין חכמה ואין תבונה ואין עצה לנגד ה', "there is no wisdom, nor comprehension nor counsel against the Lord." That is, even those qualities of wisdom that most highly exalt humanity in rabbinic eyes pale in comparison to God's glory. Moreover, if the wise oppose God, they forfeit their own claims to dignity. On the other hand, the degradation of another human is seen as a degradation of the divine image, and the Sages therefore took extraordinary measures to protect human dignity.

⁶⁰ Other sources add nuance to this ruling, discussing whether the stature of the sage is to be considered, whether it matters if the violation is intentional or not, whether stripping would be necessary if he had no undergarments, and whether another person who noticed כלאים on his neighbor should wait until they reach a private place before informing him. It is possible that *only* a sage is required to humiliate himself in this fashion.

⁶¹ This may refer to ossuaries, which typically left enough space between the bones and the lid to intercept טומאה.

⁶² Miguel Perez Fernandez, *An Introductory Grammar of Rabbinic Hebrew*, tr. John Elwolde (Leiden: Brill, 1997), section 16.13a (pp.108-109). See also Moshe Z. Segal, *Dikduk Leshon HaMishnah* (Tel Aviv: Devir, 5696) section 230 (and also 232), p. 130. He describes the combination of הִיהַ and a *beinoni* verb as yielding “an activity which is constant and continuous.”

⁶³ The fuller reference: *Psalms* 8:5-6: וְתִחַסְרֶהוּ מֵעַט מֵאַלְהִים וְכָבוֹד וְהָדָר תִּעֲטָרֶהוּ: “What is man that You have been mindful of him, mortal man that You have taken note of him. That You have made him little less than divine, and adorned him with glory (כְּבוֹד) and majesty.” NJPS trans. We thank Professor Benjamin Sommer for this association as well as the grammatical sources in the prior note.

⁶⁴ בעא מיניה רבה בר רב שילא מרב חסדא: מהו להעלותם אחריו לגג? - אמר ליה: גדול כבוד הבריות שדוחה את לא תעשה שבתורה.

⁶⁵ ההוא שכבא דהוה בדרוקרא, שרא רב נחמן בר יצחק לאפוקיה לכרמלית. אמר ליה רבי יוחנן אחוה דמר בריה דרבנא לרב נחמן בר יצחק: כמאן - כרבי שמעון, אימר דפטר רבי שמעון מחיוב חטאת - איסורא דרבנן מיהא איכא! - אמר ליה: האלהים! דעיילת ביה את, ואפילו לרבי יהודה (שרי). דמי קאמינא לרשות הרבים! לכרמלית קאמינא! גדול כבוד הבריות שדוחה את לא תעשה שבתורה.

⁶⁶ בעי רבא: מקרא מגילה ומת מצוה הי מינייהו עדיף? מקרא מגילה עדיף משום פרסומי ניסא, או דלמא מת מצוה עדיף - משום כבוד הבריות? בתר דבעיא הדר פשטה: מת מצוה עדיף. דאמר מר: גדול כבוד הבריות שדוחה את לא תעשה שבתורה.

⁶⁷ The negative commandment would be straying from the rabbinic instruction that the *megilah* must be read at its prescribed time.

⁶⁸ See *Tosfot* s.v. לנשים ונחת רוח לנשים and the parallel sources in *Rosh HaShanah* 33a etc.

⁶⁹ תלמוד ירושלמי מסכת נזיר פרק ז דף נו טור א/ה"א. תני היו שני דרכים מתאימות אחת רחוקה וטהורה ואחת קרובה וטמאה אם היו הרבים הולכין ברחוקה הולך עמהן ואם לאו הולך בקרובה מפני כבוד הרבים עד כדון בטומאה שהוא מדבריהן ואפילו בטומאה שהוא מדבר תורה מן מה דאמר רבי זעירא גדול כבוד הבריות שדוחה למצוה בלא תעשה שעה אחת.

⁷⁰ *Nazir*: a person who has taken a vow to avoid ritual impurity, haircuts and grape products.

⁷¹ This survey has in fact been limited to those passages that cite our entire phrase, גדול כבוד הבריות שדוחה, *Kvod habriot* appears explicitly or implicitly in many other contexts, such as *Hagigah* 16b, which is described by Professor Sperber (see below).

⁷² See discussion by Eliezer Berkowitz, *Not in Heaven*, p. 23.

⁷³ See Rashi to *Sukkah* 36b s.v. *mutar l'hakhnis*; *Beitzah* 32b s.v. *v'haha*; *Menahot* 38a s.v. *b'lav d'lo*.

⁷⁴ *Tosfot* to *Bekhorot* 29a s.v. “*heikhi azil*”, referring to *Megilah* 27a, which cites Isaiah 45:18, “God created the earth “not for chaos...”

⁷⁵ Some primary sources on בושת include M. *Bava Kama* 83b, Rambam *Hovel umazik* 1:1, Tur/S.A. H.M. 120:3. See also the article in *Intzayklopedia Talmudit*.

⁷⁶ *Moed Katan* 27b.

⁷⁷ It is of course true that other people, such as interfaith couples, may experience the shame of exclusion by the Jewish community. However, significant efforts are being made to draw them near, and such couples always have the option of upgrading their social status in the Jewish community via conversion of the non-Jew to Judaism.

⁷⁸ A search on the Bar Ilan Responsa Project (version 12+) yields 440 citations, 248 of them from responsa.

⁷⁹ *Orah Hayim*, 312:1. משום כבוד הבריות התירו לטלטל (א) אבנים לקנח.

⁸⁰ *Levush* to *Orah Hayim* 312:1, par. 1.

⁸¹ See discussion in Rabbi Joseph Telushkin, *A Code of Jewish Ethics, Vol. 1* (NY: Bell Tower, 2006). p.279.

⁸² *The Edah Journal*, 3:2, 2002 (Elul 5763). Available on-line at www.edah.org.

⁸³ Responsa of Maharibal, part 1, sec.40.

⁸⁴ Responsa *Da'at Kohen*, sec. 169.

⁸⁵ Responsa of *Tzitz Eliezer*, Volume 6, sec.6, par. 3.

⁸⁶ *Muktzeh* means touching an object, such as a match, which is used primarily for a prohibited purpose. Striking the match would violate the biblical prohibition of *mavir* (burning), but even touching the match violates the rabbinic *s'yag* (fence) of *muktzeh*.

⁸⁷ Rabbi Waldenberg considers turning on a battery-powered device on Shabbat to be prohibited as *mavir* (lit. burning; also, consumption) and turning it off to be prohibited as *mikhabe'eh* (lit. extinguishing; also, conservation).

⁸⁸ In a letter addressed to the CJLS in March, 2006, Rabbi David Golinkin argued that *kvod habriot* is utilized exclusively on a temporary basis (*sha'ah achat* in the Yerushalmi's phrase) and is therefore inapplicable to our subject. However, this restriction is used only in the Yerushalmi, and there it is referring to an exemption from a biblical prohibition. While most dignity issues are time-limited, several of these modern applications are recurrent. Indeed it is not evident that the Talmudic cases are all time-limited. As Rabbi Elazar b. Zadok recalls in *Brakhot* 19b, *medalgim hayinu al gabei aronot shel meitim likrat malkei Yisrael*, "we used to skip over graves to greet the kings of Israel." See note 57.

⁸⁹ Tamar Ross, *Expanding the Palace of Torah: Orthodoxy and Feminism* (Waltham, MA: Brandeis UP, 2004), esp. chapter 4, "The Meta-Halakhic Solutions of Modern Orthodoxy," p.65.

⁹⁰ *Mahanayim*, No. 5 (new series) Iyyar 5753. We thank Rabbi David Rosenn for providing us with his translation of this article. A somewhat longer version, delivered as a lecture by Rabbi Lichtenstein under the title "*Kevod Ha-beriyot: Human Dignity in Halakha*," is available in a transcript and translation prepared by Aviad Hacoen and David Silverberg at the Yeshivat Har Etzion Israel Koschitzky Virtual Beit Midrash.

⁹¹ Menachem Elon, *Jewish Law: History, Sources, Principles* (Philadelphia: Jewish Publication society, 1994) Volume IV, p.1840. Elon discusses the metaprinciple of human dignity and equality on pp. 1850-1854:

The principles of freedom, justice, equity and peace pervade the world of *Halakhah* and Judaism; nowhere in that world are they absent. These principles serve a dual role: (1) as legal principles in many areas of the law, and (2) as metaprinciples for establishing legal and adjudicatory policy. Such metaprinciples as "They are my servants and not servants of servants," "do what is right and good," "judge your neighbor fairly," "justice, justice shall you pursue," "her ways are pleasant ways, and all her paths, peaceful," are prime examples of legal norms that establish policy in various areas of the law. In light of the policy so established, specific rules are derived on the basis of the principles of freedom, justice, equity, and peace. The same is true of a number of other similar metaprinciples. A vast amount of material may be found in the sources of the Jewish heritage concerning these metaprinciples and their application to various areas of the law, and these principles have been discussed in philosophical and scholarly literature.

⁹² The full text of "Basic Law: Human Dignity and Liberty" is available at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm. Here is the official translation:

1. *Purpose*. The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.

2. *Preservation of life, body and dignity*. There shall be no violation of the life, body or dignity of any person as such.

3. *Protection of property*. There shall be no violation of the property of a person.

4. *Protection of life, body and dignity*. All persons are entitled to protection of their life, body and dignity.

5. *Personal liberty*. There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise.

6. *Leaving and entering Israel*. (a) All persons are free to leave Israel. (b) Every Israel national has the right of entry into Israel from abroad.

7. (a) All persons have the right to privacy and to intimacy. (b) There shall be no entry into the private premises of a person who has not consented thereto. (c) No search shall be conducted on the private premises of a person, nor in the body or personal effects. (d) There shall be no violation of the confidentiality of conversation, or of the writings or records of a person.

8. *Violation of rights.* There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.

9. *Reservation regarding security forces.* There shall be no restriction of rights under this Basic Law held by persons serving in the Israel Defence Forces, the Israel Police, the Prisons Service and other security organizations of the State, nor shall such rights be subject to conditions, except by virtue of a law, or by regulation enacted by virtue of a law, and to an extent no greater than is required by the nature and character of the service.

10. *Validity of laws.* This Basic Law shall not affect the validity of any law (*din*) in force prior to the commencement of the Basic Law.

11. *Application.* All governmental authorities are bound to respect the rights under this Basic Law.

12. *Stability.* This Basic Law cannot be varied, suspended or made subject to conditions by emergency regulations; notwithstanding, when a state of emergency exists, by virtue of a declaration under section 9 of the Law and Administration Ordinance, 5708-1948, emergency regulations may be enacted by virtue of said section to deny or restrict rights under this Basic Law, provided the denial or restriction shall be for a proper purpose and for a period and extent no greater than is required.

⁹³ See discussion of this basic law in Rakover, pp.14-17 and the full Hebrew text on p.193, Appendix IV.

⁹⁴ Israeli Supreme Court decisions may be searched on the web site: www.court.gov.il/heb/index.htm and at nevo.co.il.

⁹⁵ Although the primary consideration in the latter case, which was decided in favor of the two mothers on January 10, 2005, was for the good of the child, the court also found that to exclude the plaintiffs from consideration as a family based on their being the same gender would violate their dignity as established in the 1992 basic law.

⁹⁶ We thank Ronen Hausirer for his assistance in accessing these cases. See also Orit Kamir, : שאלה של כבוד : "Israeli Honor and Dignity: Social Norms, Gender Politics and the Law" [Hebrew] (Jerusalem: Carmel, 2005).

⁹⁷ Delphine Haiun, "The Israeli Patients' Rights Law: A Discourse Analysis of Some Main Values" in *Korot: The Israeli Journal of the History of Medicine and Science, Healing Individuals, Healing Society*, Volume 17 (2003-2004), pp.97-124.

⁹⁸ *Bava Kamma* 86b.

⁹⁹ Expanded and revised, January 2006, pp.33-41.

¹⁰⁰ *Brakhot* 19b; *Bava Metzia* 30a; *Sanhedrin* 18b.

¹⁰¹ To support his interpretation, Rabbi Roth quotes the Rosh to *Eiruvin* 41b, who in turn quotes a responsum of Rav Hai Gaon:

וחזי לן תשובה לרב האי גאון ז"ל בהאי עניינא ומתחזי לן מינה דהאי כבוד הבריות מפני בני אדם שרואין אותו ולא משום כבוד עצמו הוא, כי כתוב בתשובתו : מיהו אם הוצרך לנקביו ויש שם בני אדם שהוא מתבייש לפניהם יש לו לצאת מאותן ד' אמות עד מקום שהוא יושב בסתר או יחידי ועושה צרכיו כי כבוד הבריות דוחה את הדבר הזה.

We have seen a responsum of Rav Hai Gaon z"l on this subject and it appears to us from this that this case of *k'vod habriot* [human dignity] relates to the people who are watching him, and is not for his dignity himself, for it is written in his responsum, "Yet if he needs to move his bowels, and there are people present before whom he is embarrassed, he may exit those four cubits to a place where he may sit secluded or alone and do what he

needs to do, for human dignity supersedes this matter [of not walking four cubits outside the Shabbat boundary].

The Rosh continues to permit the man to leave his secluded location afterwards since it would not be dignified to sit next to his feces all day. Rabbi Roth has a complicated interpretation of this text, which we cite:

While I suspect that some will read this and assume it supports the view opposite to the one I am espousing, I think not. First of all, the Rosh makes clear that the odor commonly associated with relieving oneself is the primary factor here. And secondly, I believe that the Rosh's point is that once one has relieved himself he then becomes "other" vis-a-vis the discomfort caused by the odor. So, in the final analysis, the Shabbat passage also is a case of X violating the law out of deference for the honor of Y.

We have read and reread both the primary source and Rabbi Roth's interpretation of it, and simply do not understand this interpretation. The only person present is the man who moved his bowels and who is now stuck beside his excrement. He was embarrassed to relieve himself where other people were watching, and now he is embarrassed to sit in private in a filthy location. It is apparent to us that the Sages were concerned with the dignity of the actor, and that the significance of the other people is that their presence exacerbates his humiliation.

This last point is supported by the particular language used by Rosh, ולא משום כבוד עצמו הוא, "it is not because of his own [in]dignity." The source for this phrase is *Ta'anit* 15b-16a, regarding the procedure for public fasting. The custom was for people to embarrass themselves by placing ashes on their own heads, but the Nasi and the head of the court had *others* place the ash upon them. Why?

מאי שנה דשקיל איניש אחרינא ומנח להו? - אמר רבי אבא דמן קסרי: אינו דומה מתבייש מעצמו [טו עמוד א] למתבייש מאחרים.

Why differentiate and have other people place [the ash] upon them? Rabbi Abba of Caesarea says, 'one who embarrasses himself is not like [16a] one embarrassed by others.'

Rashi explains that because of their importance, the leaders accepted additional humiliation (דאיכא עגמת) by having the ash placed on them by others. This passage apparently provides the language employed by the Rosh for a similar purpose--it is far more embarrassing when others participate in the humiliation of an individual. In *Ta'anit*, they do so by placing ash on his head; in *Eiruvin*, they do so by watching him defecate. What is clear is that the concern is not the embarrassment of others, but the embarrassment of the actor which is exacerbated by the presence of other people. The phrase is also used in *Sanhedrin* 42a regarding the embarrassment of a judge. In all of these cases, dignity is undermined and embarrassment augmented when others participate in or even witness one's own discomfort.

¹⁰² In the *Eiruvin* case, the bystanders are most likely the very gentiles who carried him out of town in spite. What other Jews would be outside the Shabbat boundary? These gentiles would probably enjoy watching him sit stranded in his four cubits and even being forced to defecate and stay put. It is exceptionally hard to believe that in this case the Rosh is more concerned with the dignity of these cruel strangers than of the Jew they have tormented. The gemara concludes by encouraging such a person to use his permission to walk to a privy to also re-enter the Shabbat boundary and thus escape his predicament.

¹⁰³ פירושים וחדושים בירושלמי (ניו יורק: ב"מ הרבנים, תש"א), חלק ג', ע' 103.

¹⁰⁴ We thank Rabbi Alvan Kaunfer for drawing our attention to this reference.

¹⁰⁵ A number of modern thinkers, most especially Charles Taylor and Emanuel Levinas, have expanded our understanding of what it means to be a community. See Charles Taylor: *Sources of the Self: The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1989); *Ethics of Authenticity* (Cambridge, MA: Harvard University Press, 1991); and *Modern Social Imaginaries* (Durham: Duke University Press,

2004). See also Emanuel Levinas: *Existence and Existents*, Alphonso Lingis, trans. (The Hague: M. Nijhoff, 1978); *Totality and Infinity: An Essay on Exteriority*, Alphonso Lingis, trans. (The Hague: M. Nijhoff, 1979); *Ethics and Infinity*, Richard A. Cohen, trans. (Pittsburgh: Duquesne University Press, 1986).

¹⁰⁶ Statement made to Rabbi Nevins at a public lecture in Springfield, NJ on Sept. 12, 2006.

¹⁰⁷ תלמוד בבלי מסכת בבא קמא דף עט עמוד ב. לפי שאין גוזרין גזרה על הצבור - אלא אם כן רוב צבור יכולין לעמוד בה.

¹⁰⁸ It has been argued against the proposal made in this paper that if one permits sexual play to homosexuals whose intercourse is forbidden as *ervah*, there is no reason to forbid sexual play short of intercourse to an adulterous or incestuous couple. But that is clearly untrue. *Kevod haberiot* applies in this situation and does not in those, in which case all the rabbinic prohibitions remain in place. We do argue that the fences against intercourse have historically included sexual play and also more distant contact such as innocent touching (*negiah*). And we agree with Rabbi Roth that it is only the prohibitions on innocent contact which have fallen away, whereas prohibitions on lustful sexual play remain in force. The burden of this paper has been that for homosexuals *alone* should *kevod haberiot* be understood to push aside these rabbinic restrictions, while they remain in place without question with regard to all other *arayot*.

¹⁰⁹ Depending on which of the three validated CJLS responsa is followed, and upon the length of a woman's menstrual flow. Rabbi Susan Grossman's responsum on the laws of menstruation mandates sexual abstinence for partners, including lesbian couples, during either woman's period.

¹¹⁰ In any event, compliance with this ruling will now be in the private domain, even as compliance with *hilkhot niddah* by heterosexual couples is in the private domain. Thus the dignity of gay couples will be assured though they have a challenging biblical prohibition to govern their sexual conduct.

¹¹¹ Rabbi Simcha Roth has proposed a same-sex contract based upon the model of partnership rather than the traditional marital model of *kiddushin* and the imposition of unilateral fiscal obligations upon the husband.

¹¹² Rabbi Joseph H. Prouser, "Settled Law in Unsettling Times" in *The United Synagogue Review* (Fall-Winter 2006, vol. 59:1) p.14, 16-17. Rabbi Prouser ascribes this definition of *takkanot* to Rabbi Elliot Dorff, co-author of this paper. However, Rabbi Dorff has written extensively on this subject and understands *takkanot* to be acts of rabbinic legislation that are not based upon textual and legal precedents, but are rather the pure assertion of rabbinic authority to change the law. That is not the case in the present responsum. Rabbi Dorff includes a fuller description of the nature of *takkanot* in "The Internal Rules of the CJLS." Rabbi Prouser's article is currently available at: <http://www.uscj.org/images/prouser.pdf>.

¹¹³ The Committee on Jewish Law and Standards, "Committee Procedures and Policies" (March 2006), p.9.

¹¹⁴ Retribution (*Exodus* 21:22-25; *Leviticus* 24:17-22; *Deuteronomy* 19:15-21) replaced by compensation: M. *Bava Kamma* 8:1 and the Talmud thereon. The Torah requires eating unleavened bread for seven days on Passover: *Exodus* 23:15; *Leviticus* 23:6; *Numbers* 28:17; *Deuteronomy* 16:3. The Talmud and later Jewish law, however, limit the requirement to eat unleavened bread only to the first day: B. *Pesahim* 120a; M.T. *Laws of Hametz and Matzah* 6:1. The Amidah replaces the daily communal sacrifices: B. *Berakhot* 26b.

¹¹⁵ Incest is often cited as the next step on the slippery slope. We reiterate that our application of the halakhic precept of human dignity applies to homosexuals only because under the status quo, they have no permitted romantic or sexual partners for life. This simply does not apply to individuals who are sexually attracted to members of their family. Moreover, the continued comprehensive halakhic ban on incest is supported by nearly universal civil law, and by other Jewish imperatives such as our obligation to guard against child molestation.

¹¹⁶ On September 13, 2006, the CJLS validated three papers: "Mikveh and the sanctity of Being Created Human," by Rabbi Susan Grossman; "Reshaping the Laws of Family Purity for the Modern World," by Rabbi Miriam Berkowitz; and "Observing *Niddah* in Our Day," by Rabbi Avram I. Reisner. The responsa

differed in methodology, style and substance, yet all three affirmed the continued authority and relevance of the Torah's teachings regarding the rules of *niddah*.

¹¹⁷ We expect homosexual students to observe the rulings of this responsum in the same way that we expect heterosexual students to observe the CJLS rulings on *niddah*. We also expect that interview committees, administrators, faculty and fellow students will respect the privacy and dignity of gay and lesbian students in the same way that they respect the privacy and dignity of heterosexual students.

¹¹⁸ See note 24.