

Sexual Orientation in Jewish Ethics: Towards an Inclusive and Empathetic *Halakhic* Approach

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The challenges posed by classical Jewish law to feminists, gays, lesbians, bisexuals, and intersexuals wishing to live in accordance with halakhah (Jewish law) are profound. The legal system of halakhah has unfortunately branded queer Jews with, in Rachel Adler's phrase, the mark of "peripheral Jews." Moreover, by defining queer Jews solely through the criteria of Leviticus 18:22 and the second-class halakhic (legal) category of *nashim-avadim-k'tanim*, it is nearly impossible for their attitude toward Judaism to be anything but "negative rather than positive."¹

These challenges are cast in sharp relief by Mara Benjamin and Rabbi Steve Greenberg, each of whom are halakhically observant gay Jews desiring both participation in halakhic life and committed, monogamous love. The challenge is compounded by the fact that the observant lifestyle which they treasure—the one which fosters organic communal camaraderie² and lends

¹ Judith Plaskow, "Torah as Law in a Feminist Judaism," *Standing Again at Sinai: Judaism From a Feminist Perspective* (New York: Harper Collins, 1991), p. 60, quoting Adler, and noting that "[t]he net effect of these laws (that exempt women from positive time-bound commandments) is to render women peripheral Jews," p. 62.

² Rabbi Steven Greenberg writes that halakhically observant Jews living in Shabbat-observant communities tend to develop close relationships with each other because the prohibition of driving on Shabbat forces them to live in closer proximity with each other and thereby creates opportunities for interpersonal bonding without the distractions of technology or consumerism. Rabbi Steven Greenberg, "Admitting Difference," *Wrestling with God and Men*, *infra* n. 11, pp. 234-35. This keen sociological observation would be instantly affirmed by nearly anyone who has lived a Shabbat-observant lifestyle, and it presciently evokes Judith Shulevitz's arguments for the

transcendent meaning to their lives—is rooted in a halakhic system that is heteronormative,³ androcentric,⁴ and heterosexist.⁵

How can this historical and halakhic injustice be ameliorated? Can feminists and LGBTs be fully integrated into the halakhic system? This paper will apply two innovative, inclusive, and empathetic conceptions of halakhah that could allow LGBTs to live in accordance with halakhah, "the central vehicle of Jewish religious expression,"⁶ if they so choose. Additionally, it will argue

relevance of, and need for, a Sabbath in a society marked by relentless consumerism and incessant technological stimulation. Judith Shulevitz, *The Sabbath World: Glimpses of a Different Order of Time* (New York: Random House, 2010).

³ Halakhot concerning queers "assume a world in which" queers are non-normative. Judith Plaskow, *Standing Again at Sinai*, p. 63; queers are considered "unnatural" and "abominable." Ibid.

⁴ "Halakhah in its details discriminates against women because the world of law is male-defined and places men at the center." Ibid., p. 63. Queers and women were "objects of the law but neither its creators nor agents." Ibid. The "presupposition of women's Otherness" (p. 63) is applicable to queers as well: they are presumed to be not only Other, but unnatural. See also Blu Greenberg, *On Women in Judaism: A View From Tradition* (Philadelphia: Jewish Publication Society, 1998), p. 41, noting that "[t]he stratification of men and women in Judaism simply reflects the male-female hierarchical status in all previous societies in human history." The "Otherness" of women and LGBTs in halakhah is likewise reflective of the binary and heteronormative conception of sexuality that prevailed for much of human history.

⁵ Judith Plaskow, "Sexual Orientation and Human Rights: A Progressive Jewish Perspective," *The Coming of Lilith: Essays on Feminism, Judaism and Sexual Ethics, 1972-2003* (Beacon, Boston: 2005), p. 184.

⁶ Plaskow, *Standing Again at Sinai*, supra n. 1, p. 65. Though non-halakhic forms of Jewish expression assuredly exist, queers must be integrated into the halakhic system in order to be able to fully avail themselves of every avenue of Jewish expression.

for the application of a guiding meta-halakhic standard to the ethical and ritual questions implicated by queer issues.

According to Judith Plaskow, the dilemma of feminists and queers cannot be addressed until queers and women are allowed to become lawmakers. Otherwise, the very halakhic system that "disabled" women, "marginalized them, and passed over their concerns" will continue to exclude them from full participation in Jewish life. A place must be set for them at the Jewish legislative table so that their concerns will be reflected in halakhah.⁷ Just as halakhah should be able to accommodate the characteristics of the "feminist experience," such as "fluidity," "openness," and even its antinomian and "non-nomian" characteristics, so too should halakhah be able to accommodate the queer experience in ways that recognize the "spirituality of relation."⁸

A second approach for integrating LGBTs into halakhah can be crafted by applying Blu Greenberg's postulates for halakhic feminism into a similar equitable matrix that would allow for such an integration. "The Theoretical Basis of Women's Equality" should serve as a theoretical basis of LGBTs' equality in Judaism: 1) just as "women have the same innate potential, capability, *and* needs as men," so do LGBTs have the same innate potential, capability, and needs of men; 2) LGBTs "have a similar capacity for interpretation and concomitant decision making;" 3) LGBTs should be able to function in similar ways that others can, and 4) LGBTs "can and should have some control over their own destinies."⁹ If halakhah can grow to accept the

⁷ *Ibid.*, 65.

⁸ *Ibid.*, 67.

⁹ Blu Greenberg, "The Theoretical Basis of Women's Equality in Judaism," *On Women in Judaism*, *supra* n. 4, p. 39.

full personhood of LGBTs just as it has grown toward the acceptance of the full personhood of women, halakhah must acknowledge that gay men and women have the same desire for love and relationships as straight men and women. Furthermore, these postulates demand that LGBTs be offered a role in halakhic decision-making (which may be the only secure means within the halakhic system through which they can control their destinies).¹⁰

An application of a halakhic adjudicatory method that both accepts the full personhood of LGBTs and offers them legislative roles can be glimpsed in Rabbi Steve Greenberg's *Wrestling With God and Men*.¹¹ Steve Greenberg's thorough and sound halakhic reevaluation of the nature of homosexuality is possible only under a conception of halakhah that assumes it is a "fluid," "dynamic," "near-perfect"¹² legal system. These are the precise qualities that make halakhah amenable to addressing these imperfections.¹³

This fluidity and dynamism is evident in the variety of interpretive "techniques that enabled rabbinic Judaism to be continuous with the past": it reinterpreted verses like "eye for an eye" (Exodus 21:24) figuratively, used *gezerot* (decrees) to outlaw *yibbum* (levirate marriage), and crafted *takkanot* (enactments) to outlaw polygamy.¹⁴ Perhaps most strikingly, the rabbis created the legal fiction of *heter iskah* as an end-run-around the biblical prohibition of usury. The

¹⁰ Ibid. Additionally, it should be emphasized that just as "women as a class should not find themselves in discriminatory positions," *ibid.*, p. 40, neither should LGBTs.

¹¹ Rabbi Steven Greenberg, "Admitting Difference," *Wrestling with God and Men: Homosexuality in the Jewish Tradition* (Madison: University of Wisconsin Press, 2004).

¹² Blu Greenberg, *On Women in Judaism*, *supra* n. 4, p. 43.

¹³ *Ibid.*

¹⁴ *Ibid.*, p. 44.

interpretive technique employed in the case of usury—radically reconstructing the prohibition without eliminating it wholesale—functions as highly persuasive precedent for a reinterpretation of Leviticus 18:22. If economic *force majeure* compelled the rabbis to interpret the literal prohibition of usury as obsolete (their reinterpretation rendered the prohibition binding only as to charitable and non-business loans¹⁵), "the question is obvious": can the rabbis effectuate a similar "dramatic legal reframing" of "homosexual relations" and thereby enable LGBTs to live in accordance with (rather than in opposition to) halakhah?¹⁶

¹⁵ See Rabbi Steven Greenberg, "Admitting Difference," *Wrestling with God and Men*, *supra* n. 11: "What was once a morally weighted prohibition....appearing three times in the Torah was effectively eliminated from business relations and relegated only to the sphere of friendly and charitable loans....had the sages refused to reframe the law, business between Jews would have come to a virtual standstill Under the convincing force of the new economic reality, the rabbis came to understand the law differently. It became clear to them that the original law was not applicable to the new economic forms that were emerging as the economy developed, new kinds of loans became necessary if the well-being of the community was to be assured....the sages invented a way to circumvent the law on the books in regard to business loans while leaving it otherwise intact." Pp. 232-33.

¹⁶ *Ibid.* It is important to note, as Blu Greenberg does, that such a far-reaching interpretation would still not reach beyond the belief of the divinity of the law; *On Women in Judaism*, *supra* n. 4, p. 44. Even the rabbis of the Talmud who reinterpreted the prohibition of usury still retained a steadfast belief in Sinaitic revelation. Reinterpreting Leviticus 18:22 would likewise not preclude abandoning a belief in Sinaitic revelation; it would, though, entail a theological recognition that occasional, careful human reinterpretation of divinely given law is constitutive of Sinaitic revelation.

Once LGBTs are granted full halakhic personhood,¹⁷ are allowed to become lawmakers, and are able to add their unique perspectives to the multivalent body of Jewish law, a central ethico-legal principle should be utilized to guide the adjudication of LGBT issues in halakha. As a Jewish religious humanist, I wholeheartedly agree with the principal that "[e]thical principles are at least as important as ritual ones"¹⁸—a principal that is rooted in the conception that *tzelem Elokim* (the teaching that every human being is created in the image of God)¹⁹ is the "Klal Gadol

¹⁷ While it is self-evident to any reasonable person that LGBTs are full people, this realization has yet to find its way into most Orthodox (and some Conservative) halakhic rulings. To the extent that halakhah does not permit LGBTs to marry or have sex, it is tacitly endorsing the proposition that LGBTs are not full people entitled to the same happiness that heterosexuals may enjoy; this odious notion must be overturned, just as the *nashim-avadim-k'tanim* category (a halakhic category whose application denied women full juridical personhood) has been revised by contemporary halakhic authorities (see, e.g., Saul Berman, "The Status of Women in Halakhic Judaism," 14:2 *Tradition* 1973), and just as American law eventually overturned the legal classification of black people as inferior juridical persons.

¹⁸ Blu Greenberg, *On Women in Judaism*, *supra* n. 4, p. 44.

¹⁹ The principle that every human being is created in the image of God (Genesis 1:27) means that each human being is God-like: just as God's value is unquantifiable, so too are human beings infinitely valuable. The Talmud, (B.T. *Sanhedrin* 37a) explicates this principle with this teaching: "For this reason one individual was created to teach that anyone who destroys a single soul, Scripture considers him as though he has destroyed a whole world; and anyone who preserves a single soul, Scripture considers him as though he had preserved a whole world." *Tzelem Elokim* also teaches that just as God is unique, so too is each human being unique (see Joseph B. Soloveitchik, *The Lonely Man of Faith* [7:2 *Tradition* 1965], p. 27: Each human being's uniqueness is evident in the personal and philosophical realization that "no one exists like the 'I' and...the 'I' cannot be repeated, imitated, or experienced by others"). And if each human being is infinitely valuable and unique, every person is equal, for no

baTorah"²⁰: the predominant, all-encompassing ethical teaching of Judaism. The Talmud holds that the theological concept of *imago Dei*²¹ has ethical and ritual consequences: positing *tzelem Elokim* as the greatest principle of Torah means that every biblical law, be it an ethical or ritual law, can be derived from this principle. Living in accordance with each Torah law should naturally flow from seeing the image of God in each person, and seeing the image of God in each person should inspire a greater observance of the mitzvot.²² Understood in this fashion, *tzelem Elokim* means that every mitzvah must lead toward a greater appreciation of the uniqueness,

person can be "more infinitely valuable" or "more unique" than the next person. The equality of all persons is also postulated by the Mishnah (B.T., *Sanhedrin* 37a): "For this reason one individual human being was created....so that one human might not say to his fellow, 'my ancestor was greater than yours!'" (I am indebted to Rabbi Dr. Irving [Yitz] Greenberg for this interpretation of the *klal* [principle] of *tzelem Elokim* [*imago Dei*]; and I am eternally grateful for Rabbi Greenberg's teachings on *tzelem Elokim*, on the triumph of life in Judaism, and on the significance of redemption and freedom in Judaism.)

²⁰ Jerusalem Talmud, *Nedarim* 9:4, s.v. *l'rey'akha kamokha*, teaches that *imago Dei* is even more significant than the principle of "Love your neighbor as yourself."

²¹ On the relationship between the concept of *imago Dei* to the singular nature of man, see Rabbi Joseph B. Soloveitchik, *The Lonely Man of Faith*, *supra* n. 19, p. 17.

²² As Moshe Margolies in the *P'nei Moshe* (commentary upon J.T., *Nedarim*) explains, when one is cognizant of the divinity in each person, one will be careful in the honor of others; within this conceptual framework, wronging others and wronging God are coextensive. Consequently, cognizance of this principle will lead one to greater punctiliousness in the performance of God's commandments, for—when the implications of *tzelem Elokim* are fully grasped—even the commandments between persons and God emerge out of, and serve as ballasts for, the *klal gadol* that every human beings is infinitely valuable, equal, and unique. *P'nei Moshe*, J.T., *Nedarim* 9:4, s.v. *zeh sefer*.

equality, and infinite value of each person; to the extent that a mitzvah is not practiced or interpreted in a fashion that affirms the infinite value of each person, the position affirming *tzelem Elokim* as the greatest principle of Torah demands that the mitzvah be reinterpreted so that it does affirm each human being's infinite value.²³ Because of these factors, I believe that the standard of *tzelem Elokim*—that is, a *halakhic* interpretation of a biblical verse should only be binding insofar as it advances equality, human dignity, and human flourishing—should be the guiding ethico-legal adjudicatory principle in the context of the ritual law of Leviticus 18:22.

Antiquated views of sexuality conceived of homosexuals as inferior people: they were "unnatural," and the physical expression of their love was "abominable."²⁴ In eras in which sexuality was not properly understood, gay sex could very well have been considered degrading, and those who engaged in it may have been thought of as inferior people, irrespective of whether the sex was consensual or not. Applying the principle of *tzelem Elokim* as the primary "working principle of Torah"²⁵ would entail acknowledging that it is not gay sex that is repugnant, but it is

²³ This analysis is a distillation of Rabbi Dr. Greenberg's broader treatment of *tzelem Elokim* that was presented over the course of several classes at Yeshivat Chovevei Torah Rabbinical School (April—May 2013). Adopting the ethico-theological concept of *tzelem Elokim* as a guiding halakhic standard may be in accord with what Judith Plaskow would propose as a paradigm for an inclusive, empathetic halakhah: because Judaism believes that an individual—man or woman, gay or straight, bisexual or intersexual—is just as equal, infinitely valuable, and unique as any other individual, the halakhah must embrace the totality of the feminist and queer experiences, just as it has accommodated the male and heterosexual sensibilities.

²⁴ Judith Plaskow, *Standing Again at Sinai*, *supra* n. 1, p. 63.

²⁵ *On Women in Judaism*, *supra* n. 4, p. 45.

predatory gay sex that is abominable because it violates the dignity and uniqueness of the Other.²⁶

Moreover, it is these older, otiose views of gay human beings and gay love that are themselves repugnant. It can be argued that new emotional, psychological, and physiological understandings of sexuality constitute a sociological *force majeure* necessitating a reinterpretation of Leviticus 18:22 that is just as compelling as the economic exigencies which mandated amending the prohibition of usury.²⁷ If God created all human beings in God's

²⁶ Thus, when interpreting a biblical verse in order to draw forth its legal-halakhic implication, applying the *tzelem Elokim* standard (wherein a legal interpretation is valid only insofar as it does not infringe upon the basic human dignities embedded in the concept of *tzelem Elokim*) of legal analysis to Leviticus 18:22 leads to the conclusion that the nature of the sexual activity prohibited by Leviticus 18:22 is predatory gay sex, because it infringes upon the dignities of a human being. Any sexual encounter in which one party is used as an object is degrading, unequal, and violates the other's dignity. Consensual, monogamous sex affirms the equality and infinite value of both partners, and would therefore not violate Lev. 18:22. Additionally, the *tzelem Elokim* standard would encourage such relationships to take place within the context of marriage, because Jewish tradition views marriage as the best guarantor of ensuring that both partners in a sexual relationship uphold each other's equality, uniqueness, and infinite value.

²⁷ The rabbinic principle of "*yesh ko'ach b'y'dei chachamim l'akor davar min haTorah b'shev v'al ta'aseh*" [abrogating biblical law is a rabbinic prerogative in positive commandments, not negative prohibitions] is often regarded as an absolute, irrevocable principle of Jewish law. However, the precedential case of usury and *heter iskah* demonstrably illustrates that the rabbis occasionally applied their interpretive powers in dramatic fashions to amend even negative prohibitions when the need was great; the Ashenazic abrogation of *yibbum* may also constitute a case in which the rabbis nullified aspects of a negative prohibition (insofar as a childless widow is technically "*zekukah l'yavam*," prohibited to marry any man other than her brother-in-law). As Rabbi Dr. Irving

Greenberg remarked to me, the principle of "*yesh ko'ach lachachamim*" is itself only a rabbinic hermeneutic, not a biblical mandate; unfortunately, though, it has too often been treated as a biblical mandate by those wishing to foreclose all possible avenues of covenantal, halakhic gay marriage. To paraphrase Blu Greenberg (*On Women in Judaism, supra* n. 4, p. 44), for halakhic authorities not to avail themselves of every halakhic way available for integrating gay Jews into halakhah merely bespeaks their lack of a rabbinic will to work towards a halakhic system that is more inclusive, empathetic, and responsive to genuine human needs.

On the rabbinic principle of "*yesh ko'ach lachachamim*," see B.T., *Sukkah* 43b, limiting the applicability of this principle to cases in which rabbinic authorities are legitimately concerned that the fulfillment of a positive (active, "thou shalt") mitzvah could lead to the violation of negative (passive, "thou shalt not") mitzvot (e.g., the rabbis forbid the blowing of the Shofar and the taking of the Four Species on the Sabbath, lest one come to violate the prohibition against carrying in a public domain on the Sabbath). But "obligating a person to actively transgress a mitzvah is beyond the scope of their power to act for the sake of Torah." Ibid.

This rabbinic principle, though, is a normative standard in halakhic adjudication (cases such as the *heter iskah* are responses to exigent circumstances [*she'at had'hak*] and likely non-representative of halakhic norms), and those who wish to continue applying it are not wholly misguided. Nevertheless, continuing to apply the "*yesh ko'ach lachachamim*" principle to Lev. 18:22 would conflict with the *tzelem Elokim* ethico-jurisprudential standard and would continue to perpetuate a grave ethical injustice. If maintaining a literal interpretation of Leviticus 18:22 could lead to the violation of other mitzvot—and continuing to forbid non-heterosexual individuals from ever fulfilling a basic biological impulse simply because one wishes to retain the literal integrity of the text may be the apotheosis of disdainful indifference, and is utterly at odds with the commandments of "love thy neighbor as thyself," Lev. 19:18, and Lev. 19:17: "do not hate your brother in your heart," and additionally violates the imperative of "you shall do what is right and good," Deut. 6:18—and if such an interpretation fundamentally contravenes the key Judaic teaching of Gen. 1:27 that we are Godly creatures of infinite value, it would follow that the rabbinic power to "uproot an item from the Torah" would extend to uprooting the literalist interpretation of Lev. 18:22 from the Torah. The *tzelem Elokim* ethico-legal adjudicatory standard would then condone replacing the

image—"zakhar un'kevah," male and female alike²⁸—did not God also create males and females who are not only attracted to the opposite sex, but to members of the same sex?²⁹ When a

former literal interpretation with a qualified, empathetic meaning that is in consonance with the *k'lal gadol* that all human beings are created in the image of God.

²⁸ I am interpreting "zakhar" (male) and "n'kevah" (female) in Genesis 1:27 as non-exhaustive typologies; viz., "zakhar un'kevah" are representative of the entire range of possible genders and sexual orientations with which a person may be endowed. In the biblical era, the only recognized genders were male and female; by the advent of the rabbinic era, other genders, such as "androgynos" [androgynes] and "tumtum" [possibly intersexuals] came to be recognized (see, e.g., B.T. *Hagigah* 4b), and the only acknowledged sexual orientation was heterosexual (verses such as "a man shall leave his father and mother and cling to his wife," Gen. 2:24, strongly suggest that the only form of sexual expression considered to be socially acceptable was heterosexual). Given that the traditional gender binary has been shattered by the awareness of multiple genders and sexual orientations, "zakhar" and "n'kevah" should now be interpreted as all-encompassing typologies: the notion that every human being is Godly applies to every kind of individual, and not only to the heteronormative "zakhar" and "n'kevah."

See also Jon D. Levenson, *Creation and the Persistence of Evil: The Jewish Drama of Divine Omnipotence* (New York: Harper & Row, 1988), p. 111, interpreting "man" [*ha'adam*] in Gen. 1:27 as "species, not the gender: men and women alike are created in God's own image," referencing Phyllis A. Bird, "Male and Female He Created Them," *Harvard Theological Review* 74: 151 (1981), and acknowledging that the meaning of this verse has been subject to much speculation (citing Claus Westermann, *Genesis 1-11* [Minneapolis: Augsburg, 1984], 147-55).

²⁹ According to Religion scholars for whom gender and sexuality are foci, such as Judith Plaskow and Mara Benjamin, sexuality is a choice as much as it is a physiological predisposition. For Benjamin, "[b]eing gay was, for me, not an imperative but an option." Mara Benjamin, in "Learning to Be a Lesbian," *Keep Your Wives Away from Them: Orthodox Women, Unorthodox Desires*, Miryam Kabakov, ed. (Berkeley, CA: North Atlantic Books, 2010), p. 126. Moreover, it is now widely acknowledged that sexuality runs along a spectrum, and cannot be pigeonholed

literalist interpretation of Leviticus 18:22 is no longer a "way" to God but a "wall"³⁰ between a person and God—when it impedes an LGBT individual from living a fully dignified life—such a legal interpretation would no longer be valid under the ethico-legal standard of *tzelem Elokim*.

The only solution that permits the full and complete integration of the LGBT experience into halakhah, and that concomitantly preserves the halakhah as a livable legal system, is the adoption of *tzelem Elokim* as the controlling ethico-legal standard in addressing LGBT issues. If the *klal gadol* of *tzelem Elokim* becomes the ultimate standard of review in Jewish ethical and halakhic controversies, perhaps the “peripheral Jew” mark that has been ingrained upon LGBTs for far too long will at last be erased, and, like all Jews, LGBT Jews can assume their rightful places as equal, dignified, and unique members of K’nesset Yisrael.

into two categories alone. In accordance with interpreting “*zakhar*” and “*n’kevah*” as inclusive, all-encompassing typologies, it can be maintained that the same God who created human beings that are attracted to the opposite sex created human beings who are attracted to both sexes; for bisexuals, the ability to choose their sexuality is a *sine qua non* of their full personhood. Endowing bisexuals with a halakhic imprimatur to choose their sexuality would signify that halakhah recognizes bisexuals as dignified, unique, Godly persons who are every bit the equal of heterosexual and homosexual persons.

³⁰ Judith Plaskow, *Standing Again at Sinai*, *supra* n. 1, p. 70.