# Orthodox Semikha for Homosexuals?

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At https://www.jta.org/2019/05/27/opinion/we-orthodox-jews-desperately-need-gay-rabbis, R. Daniel Landes explains his decision to ordain a sexually active gay Orthodox rabbi. He argues that Jewish law must be open to this change. Below I try to present R. Landes' argument fairly, and why in my view it cannot be accepted.

R. Landes has made an extraordinary effort to validate the Jewish *bona fides* of LGBTQ+ Jews who choose to identify with Orthodoxy, he invokes the principle of *nishtanah ha-tev'a*, that nature has changed and Jewish religious policy must change with it. This argument, that Nature has changed, is a Tosafist [Tosafot to b*'Avoda Zarah* 24b] construct explaining why the Tosafot, who usually regard Talmudic *aggadah/*narrative to be literally true, ignore Talmudic medical practices and prescriptions. This claim, that nature has changed, is empirically false. And Orthodox Judaism posits that God's omniscient will is memorialized at Leviticus 18:22, whose plain sense [=*peshat*] rendering unambiguously outlaws the male homosexual act.

1. R. Landes' decision to ordain a homosexual rabbi has evolved after many years of counseling young people with same sex attraction. He reviews and rejects the proposed suggestions currently given by Orthodox rabbis to

those with same sex attraction. Celibacy, "reparative" therapy, and remaining "in the closet" are ultimately unworkable solutions. R. Landes explains that his decision to explore the *Halakhic* literature on the topic is motivated by the fact that "gay Jews are asked to meet a virtually impossible standard of behavior." Consequently, R. Landes strives to reformulate the Biblical norm prohibiting the male homosexual act.

R. Landes is one of the very few modern Orthodox rabbis who has invested his energy, talent, and time to teach modern Orthodox rabbis how to confront *and to apply* the Jewish legal tradition to our post-modern reality. He accepts the Yeshiva Orthodox perspective that the Talmud is a unified literary trove whose laws are binding and whose descriptions must be taken to be true. When Talmudic "facts" conflict with the observed world, [a] we may not claim that the Rabbinic descriptions are flawed—because this ideological narrative invests, by dint of sanctity, its rabbinic elite, designated as *gedolim*, or "great ones," with implicit infallibility and virtual, sovereign immunity [see https://www.yeshiva.org.il/wiki/index.php?title=%D7%94%D7%A9%D7%AA%D7%A0%D ], [b] instead these great rabbis posit that is Nature that has changed, opening the door to reconsidering current *Halakhic* policy. What in fact has changed is what the human understanding of Nature actually is. R. Landes invokes this post-Talmudic concept, that Nature has changed, to reconsider the classical Orthodox Jewish approach to homosexuality. After all, it is easier for this iteration of Orthodoxy to claim that Nature changes because God's perfect law is neither changeable nor replaceable. What has changed is secular society's toleration, acceptance, and normalization of sexual license in general and homosexuality in particular. For fundamentalist secularists, one's failure to approve of an individual's right to choose, define, and act upon their chosen sexual identity renders that person a "homophobe," a morally deficient, judgmental bigot whose moral worldview is unworthy of consideration. For R. Landes, the modern, secular, Progressive perspective is part of the contemporary collective conscience and moral consciousness. Jewish Law must accept and accommodate this new reality. However, the fact is that Nature did not change; what *has* changed is the popular moral consensus. Maimonides explains [Introduction to the *Yad* compendium] that the Oral Torah norms, the *taqannot* ["to do" enactments that generate commandment blessings], *gezeirot* [do "not do" 'decrees'], and *hanhagot* [customary practices, edicts, and by-laws that, although legally obliging, do not generate commandment blessings] are Judaism's only mandatory Rabbinic norms. I have found no precedent in the *Halakhic* literature that authorizes male homosexual behavior. Rabbinic opinions, descriptions, or predilections [a] are not legislative acts and therefore [b] are *not* legally binding. In our observed experience, Nature has not changed and a sincere Orthodox commitment affirms that God's Torah does not change unless the Law itself authorizes particular changes in practice or usage. While we may not deny the Law, changing times may require alternative strategies or

responses when confronting current challenges of religious non-compliance. We are not obliged to insult sinners. We do not protest dancing and clapping on Simhat Torah because we would rather Jews sin in ignorance than knowingly rebel against the Rabbinic law that forbids clapping and dancing on Jewish holy days [b*Betsa* 30a]. The Torah clearly and explicitly outlaws the male homosexual act [at Leviticus 18:22]. One is permitted to struggle, complain, and express frustration with existential, ethical, and religious challenges. According to *pBerachot* 7:3, Jeremiah defied the Great Rabbis' ruling requiring that God be praised as "awesome" because God's awe is only immediately experienced in the Temple, which at that time was in ruins, and Daniel refused to praise God as being "mighty" because Judah's population was placed in chains and led into exile and God failed to intervene. Job was not chastised by God for protesting his undeserved suffering [Job 42:7]. But the Torah's most essential directive is that faithful compliance with its norms is required. Genesis 1:3 reads "and God commanded, 'light, be!'" The Semitic root "*amr*" not only means "say." In Aramaic, Arabic, and as here, in BiblicalHebrew, as in Psalms 33:8. "command" is the more appropriate rendering. The response is *va-yehi or*, "Light is," literally "came into being." This is the Torah covenant's root metaphor, the *Narrative* that both informs and animates the *Nomos*, which are the prescriptive norms of the Torah's legal order, to borrow the idiom of the late Robert Cover. One must not misrepresent the Torah's "face" [b*Sanhedrin* 99a], the Torah's normative content as it stands, even and especially if we are uncomfortable with its prescriptions. Like every legal order, *Halakhah* possesses what H.L.A. Hart calls "rules of recognition," those secondary rules that determine whether a suggested legal norm is valid, or consistent with the *Halakhic* legal order. It is permitted to be frustrated with what *Halakhah* requires; what is essential is compliance. The Orthodox rabbi's task is to interpret the Law as it stands, not to reformulate or reconstruct the Law in order to accommodate alien ideologies, social constructions of reality, or political agendas. By approving homosexual behavior, one makes peace with a secular e*thos* of sexual permissiveness, allowing the Progressive ideology to supersede the orthodoxy encoded in the canonical Torah to library. While allowing for flexibility in emergencies, or *ad hoc hora'at sha'ah* rulings [Maimonides, *Mamrim* 2:4], there is neither precedent nor place for this leniency when dealing with murder, idolatry, or sexual violations.

1. If the Torah is taken seriously, one defers to the Torah's Law as it is manifest in the most reasonable, plain sense reading of its canonical documents [Maimonides, Introduction to the *Yad* compendium]. The male homosexual act is an *issur kareit* [m*Kereitot* 1:1]. The violations listed in this Mishnah are the most serious offenses in the *Halakhic* order. The male homosexual act is also an instance of '*arayyot,* a sexual violation for which there is little room for flexibility. [That the homosexual act is a violation of '*arayyot* is confirmed by p*Sanhedrin* 7 25:1. Thanks go to my learned son, R. Joshua Yuter, for this reference].

2. I do concur with R. Landes that LGBTQ+ Jews need not be banished from the Jewish community. They should be treated like any other inconsistently observant Jew. God alone is their Judge, nobody else is authorized to judge them until they stand in their place [m*Avot* 2:4], which cannot be done. We are obliged to love and embrace other Jews, without condition. Orthodox affiliating LGBTQ+ individuals should be able to attend synagogues, without insult, count in *minyan*, without question, and circumcise their sons, without hesitation.

3. R. Landes' reasons for normalizing the male homosexual act are that [a] people who are wired with same sex attraction were created by God with that wiring, [b] our understanding of nature has indeed changed, [c] modern people no longer stigmatize homosexual behavior or for that matter, non-marital, recreational sex, and [d] morally sensitive moderns are unable to believe in a perfect God Who creates people with urges that may not be satisfied with God's approval.

4. R. Landes applies the doctrine of *ones,* or coercion*,* according to which a person is not considered culpable if she/he was compelled to commit an illegal act. A moral agent must make a decision to commit an offense. Since homosexuals are genetically wired and programmed to same sex attraction, they are compelled by their biology to behave as they do. Consequently, it is improper to condemn these individuals since they areprogrammed by their biology to behave in the way they do and it is likewise unjust to expel LGBTQ+'s from the Orthodox community. R. Landes also argues that a gay rabbi is uniquely qualified to experience the tension, empathize, and minister to LGBTQ+ Jews who regard Orthodoxy to be their preferred spiritual address. Nonetheless, R. Landes' argument remains problematic.

5. The Torah posits that the human being is able to overcome one's instincts, attitudes, and appetites and to *choose to* follow the Law. According to Jewish Tradition, the human person possesses both the *yester ha- tov* and *yester ha-r'a*, the impulse for doing good and the "evil" impulse of brute animal instinct for realizing immediate pleasure. The Torah holds humankind accountable for its choices because God has endowed humans free will. God reminds Cain that desire is no excuse for improper behavioral choices [Gen. 4:7]. The argument from *ones,* that the homosexual is compelled to act in a specific way is actually addressed in the Oral Torah canon. While negative, i.e. "do not do" commandments, are suspended

when a Jewish life is in danger, this dispensation *does not* apply to the prohibitions regarding murder, serving other gods in any way or the God of Israel in an unauthorized fashion [the *'avodah zarah* idiom is mistranslated as "idolatry," which is '*avodah zarah* but not its only manifestation], and sins of a sexual nature [b*Pesahim* 25a-b]. Here, R. Landes' argument from *ones*, the compulsive force of sexual desire, is rejected by the Oral Torah norm. Are we to also endorse license for heterosexual sex addiction? What is lacking is not the ability to resist improper behavior; what is lacking is the will.

6. R. Landes' proposed prescription, which while well intentioned, remains unacceptable. *First*, the entire Torah tradition forbids the male homosexual act, current apologetic casuistry notwithstanding. There is not even a rejected minority view on the subject in support of R. Landes' claim. To be authentically "Modern Orthodox," this community must be Orthodox first and "modern" second. When conflicts arise between the dogmas of the current popular, secular, moral consensus and an uncontested, unambiguous Torah law, the Orthodox Jew of every stripe is obliged to affirm the Torah Law as it stands. To do otherwise makes humans the *de facto* legislators of the Law. It is one matter to claim that the law is difficult to observe, and new strategies are needed to deal with contemporary challenges. For example, we are not really required to sit *shiv'a* [the seven day mourning period which begins after burial] for a child who intermarries because the Oral Law does not require that response and we ought to keep our doors open to the possibility of *teshuva*, a return to Jewish religious life. What we ought to do when dealing with Orthodox affiliating homosexuals is to be gentle, supportive, and avoid certain unresolvable, unhelpful, dead-end conversations. What Orthodox Jewry may *not* do is to overrule or nullify any uncontested Torah Law, to declare an act that the Torah forbids to be permitted. If Orthodoxy permits what the Torah forbids, it undermines its own *bona fides.* R. Landes' revered teacher, R. Joseph B. Soloveitchik, viewed the Binding of Isaac, the '*Aqeida*, as the archetypal test [See https://www.refuathanefesh.org/the-darker-side-of-the-akeida/]. Humans are often challenged to act heroically, like Abraham's heroic response to God's call to sacrifice his son, Isaac, on Mt. Moriah.

7. LGBTQ+ Jews also encounter *Aqeidah*-like challenges. There is only One Judge who has the right to judge humankind as one judge [m*Avot* 4:8]. Sometimes we do not have satisfying answers to excruciatingly difficult questions. While valuing R. Landes' inclusivist instinct, I also fear that his approach unintentionally relativizes the Torah by permitting what it clearly

forbids. By ordaining an Orthodox rabbi, who teaches by example as well as word, who is not committed to living his life according to Orthodox *Halakhah*, R. Landes presents male homosexuality as *Halakhically* acceptable. Having seen the play *A Chorus Line* and having studied Plato's *Symposium*, I understood these two works to portray homosexuality to be morally and socially normative. This is *not* the Torah's perspective. The instant the Torah becomes subject to finite, human judgment and amendment, it is no longer the Torah that is "the word of the LORD" [Isaiah 2:3]. If we ordain a sexually active gay "Orthodox" rabbi, we create a theological oxymoron. An Orthodox rabbi cannot affirm the Torah while regularly and knowingly performing an act that Torah law forbids. When the Torah ethic conflicts with the popular, secular consensus, the astute Orthodox rabbi will distinguish between historical habit, which is subject to change at the discretion of the local rabbi, and the unambiguous Written and Oral Law statute, which is not subject to review.

8. Honest people can disagree without defaming the dissenter as "evil," "homophobe," or "pervert." The current conundrum is how to accommodate Orthodox affiliating and affirming LGBTQ+'s and remain honest to God and Torah compliance.

Progressive Orthodoxy's identity is being tested here. Is this Orthodoxy's ultimate benchmark Torah law or the Progressive egalitarian ideal? When Progressive ideology conflicts with Torah law, which world view will prevail? Oral Torah Orthodoxy is grounded in a shared communal commitment to the *heftsa* of a shared, normative library, and not the charismatic intuition of any *gavra*, or finite, mortal human.

1. I concur with R. Landes that LGBTQ+ Jews should be welcome in the Orthodox community. They are searching for authenticity, and are apparently prepared and willing to live with contradictions. The Reform and Conservative streams have accepted homosexual behavior to be Jewishly normative, and are suffering a demographic implosion because they are perceived to be standing *for* nothing more than enrolling billing units to pay their professionals' salaries. Without an authentic message to sell, there will not be very many buyers for the religious product marketed for sale. Torah law may never be presented to be morally inadequate, because to do so leaves ultimate truths in the possession of finite mortals with political power and powerful egos, which are hardly sources of divine truth. A formalist legal reading of *Halakhah* asks "what are the religious norms and

narratives embodied in the Torah canon," and will occasionally side with the Right [non-chauvinist patriotism is religiously healthy and owning private property is permitted] and sometimes will adopt positions that are identified with the Left [universal health care and education really *are Halakhic* entitlements]. There may be more than one legitimate *Halakhic* approach to many issues, but the Oral Torah values provide the normative benchmarks of Jewish propriety.

2. How should Orthodox Jews to respond to R. Landes' decision to ordain a sexually active homosexual male? One common Orthodox reflex is to view any error as heresy. After all, for this Orthodoxy, Jewish Law is guided by the divinely inspired intuition of Great Rabbis, whose presumed greatness precludes assessment on the part of rabbis who lack their charisma and greatness. However, Modern Orthodoxy's philological approach to Jewish Law discovered a category called "error" [*Hoshen Mishpat* 25 and 34]. When Rabbi Emanuel Rackman suggested that modern women prefer to be spinsters than to remain unhappily married, against the *hazaqah*, or presumptive descriptive reality proclaimed by Resh Laqish [b*Qeddushin* 41a], R. Joseph Soloveitchik suggested that R. Rackman was saying heretical words because he dared to suggest a *Halakhic* ruling, one that questioned the accuracy of the Sages' *observation*, that a *Hazaqah*, an empirical doubt so remote that the Law assigns to it the status of certainty, might be subject to change. R. Rackman was not held to be a great Oral Torah sage who would, to this view, have a right to an opinion regarding the legal status of *Hazaqah*. A more appropriate response to R. Rackman's claim would be "the course you propose appears to contradict these particular Oral Torah norms. Please clarify." And if the Tosafot may claim that nature changed, without demonstration, R. Rackman's claim that social conventions do change sounds reasonable. Jurisprudentially, R. Rackman's position is not without merit. Jewry must obey Talmudic legislation, which is *prescriptive*. The *Hazaqot* of the Sages refer to *their* reality as they saw it; these statements are descriptive observations, not legal norms, which are prescriptive "ought to do" statements. *Hazaqot* are findings regarding a discovered reality, or a narrative description of the reality to which the Law's prescriptions are to be applied. If Rabbinic narratives were legally binding, we would be obliged to apply Talmudic medicine today. In other words, one must demonstrate and not merely proclaim that *Hazaqot* are not subject to change. They are human observations, not legislated, legal norms. The rabbis are only able to see reality with the eyes that they have [b*Sanhedrin* 6b and elsewhere].

3. While R. Landes' reasoning is unconvincing, his argument merits conversation if only because he forces the conversation to take the pain, pathos, and passion of living people into account when dealing with this vexing issue. Mainstream Orthodoxy must explain why R. Landes' position is unacceptable; it may *not* argue that only its own Great Rabbis have the right to express a defensible, reasoned opinion because Talmudic Law locates normativity in the plain sense of the canonical Talmudic text, not in the charisma, intuition, office, or reputation of the canonical person. It is the plenum of the Sanhedrin, not the assumed greatness of its individual members, that is legally binding [b*Sanhedrin* 14b, *ha-maqom goreim*]. Those who agree with R. Landes' decision must argue their case on its merits, and not dismiss as bigots those who believe that acting on male to male sex attraction violates Jewish Law. Demeaning dissenters as "homophobes" is also out of order. *Hoshen* Mishpat 34 teaches that those who disagree have a right to be wrong, that their honestly held incorrect positions do not nullify their *Halakhic bona fides.* By focusing on a formalist reading of the Oral Torah canon, the Orthodox Right will come to recognize that Jewish Law only forbids what by statute is forbidden [*Beit Yosef*, *Yoreh De'ah* 1:1] and therefore innovation *per se* cannot be forbidden. Not seeing an act being performed may *not* be taken as evidence that the act may not be performed [m'*Eduyyot* 2:2]. And the Orthodox Left must discover and articulate where its own defining limits are located and unconditionally affirm Orthodoxy's defining red lines. Unlike Elish'a b. Abuyah, who "severed [his ties to the Torah tree of life's] roots [b*Hagigah* 14b] abandoning the *Halakhic* life, and by dint of his apostasy, was denied the rabbinic honorific, R. Hillel denied the future coming of the Messiah , arguing that Israel's messianic chit was spent during the time of Hezekiah [b. Sanhedrin 98b], and his opinion, but not he, was rejected. Elisha rejected the Torah system, and the community rejected him. Hillel made a mistake, but he remained faithful to the Torah system.

4. The test to which "Liberal" Orthodoxy will be put—and judged—will be determined by the tone of its of its argument. Will its discussions be brutal or collegial? Will it try to persuade or will it resort to name-calling, derision, and intimidation? Will the public Orthodox conversation increase contention or peace in the Jewish world? Jewish law requires that people be judged as generously as possible [m*Avot* 1:6 and *Avot* 6:6]. If Orthodoxy judges others ungenerously, the Righteous Judge will rightly judge Orthodoxy in the way it judged others [m*Sota* 1:7].

5. My suggestion is that each party should stake its claim, and neither side should try to destroy the other. At stake is the status of the *Talmid Hakham* , who by reflex advances peace and good will. If the LGBTQ+ community expects any accommodation from institutional Orthodoxy, it cannot demand that Orthodoxy deny its first principles, either. It is one thing to request that children of homosexuals be enrolled in an Orthodox day school and quite another to demand that a Torah norm be ignored or abolished. Questioning the moral probity of those who do not accept homosexual rabbis is an ironic if not coercive gambit for those who appeal to "pluralism." Tolerance is either a two way street or it is a dead end. By impugning the Jewish integrity of Orthodox rabbis who are bound by their honest to God reading of the Torah canon, the LGBTQ+'s who are drawn to Orthodoxy will alienate their target audience. Coercion is out of place whether it is done by Right or Left. Orthodoxy must learn to disagree with empathy and generosity; we should seek accommodation when possible rather than demand capitulation from dissidents. "The ways of Torah are pleasant, and all its paths are peaceful [Proverbs 3:17]." This too is Torah.