Torah versus Prejudice

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Torah versus Prejudice

To the sacred memory of those driven by societal prejudice to take their own lives.

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Rabbi Isaac Sassoon[1]

Potiphar was no muggins. The trust he places in Joseph bespeaks a man possessed of astute discrimination and sound instincts. If he sized up the newcomer Joseph, his wife he must have known like a book. It is therefore highly doubtful that Potiphar fell for her ladyship's concoction. To be sure, Genesis 39:19 reports Potiphar's anger; but significantly, Joseph is not said to have been its butt. "When his [Joseph's] master heard the words of his wife which she spoke to him saying such and such has your servant done to me he became angry". We are then told that his master 'took Joseph and put him' in prison. Not sentenced to death nor shoved into a pit (as he was by his brothers; Gen 37:22, 24), Joseph is taken and put like the Testimony. For the identical pair of verbs – taking and putting - describes the depositing of the *'edut* (Testimony) in the Ark (Exod 40:20). Commentators interpret the *'edut*'s taking and putting as deferential, kid-glove handling. The phrase's presence at Genesis 39:20 adds to the picture of a Potiphar skeptical of his wife's slander. But if Potiphar doubts Joseph's guilt, why jail? The answer is a single, tyrannical word: respectability. Potiphar dreads the obloquy that awaits a man seen to believe his servant above his wife. It could cost him his prestige; not a pretty prospect for anyone whose self-esteem hangs on the establishment's approval.

Today honor and respectability may have lost their former leverage, but public opinion still counts, and people are still blacklisted for failing to toe the line. This holds even in the arena of Torah. Thus, non-partisan Torah students, unwilling to play to the gallery, must be prepared for criticism all round. The charges may range from obscurantism and fuddy-duddyism, hurled by so-called progressives, all the way to heresy and schism thundered forth by the anachronistically grandiloquent. Speaking from personal experience, a well-intentioned friend tried hard to discourage the present essay. "It will come back to haunt you" he warned. "People with a reputation to sustain, do not touch this kind of taboo with a barge pole".

Taboo, of course, loomed large once upon a time. That was prior to the demythologizing process begun in the Bible and carried forward by *hazal*. But though taboo waned, its congener, bias, especially ingrained bias, persisted. Unconscionably, biases invaded Torah, infesting it like a maggot that, once inside, would turn Torah into its home and sanctuary. Most notorious, is the infestation that parasitized Genesis 9:22-27. As recently as 1861 a leading Orthodox Rabbi by the name of Morris Jacob Raphall, preached in defense of slavery quoting, among other scriptures, Genesis 9's *Curse of Ham.* Having cited the texts that allegedly sanctioned slavery, the rabbi went on "I find, and I am sorry to find, that I am delivering a pro-slavery discourse. I am no friend to slavery in the abstract, and still less friendly to the practical workings of slavery. But I stand here as a teacher in Israel, not to place before you my own feelings and opinions, but to propound to you the word of G-d, the Bible view of slavery ….". Rabbi Raphall was declaring his hands to be tied; his commitment to Torah, as he understood it, did not give him leave to condemn slavery outright.

Parallel to racism's appalling exploitation of Ham's story, homophobia found *to'ebah* at Leviticus 18:22 and hijacked it. While bigotry got away with profaning Torah, many of us sat idly by instead of toppling homophobia from its Torah perch. And make no mistake: in select circles it retains its dominion. Exodus 23:13 deters mentioning the names of idols. Yet one comes across people who treat homosexuality as if it were an idol, referring to it only by epithets such as perversion or *toeivah*. Their purpose, they claim, is to instill revulsion and horror for something unmentionable.[2] The connotation of *to'ebah* (or *to'abat hashem*) in its varied Torah contexts is clearly negative; but the very diversity of those contexts precludes a narrow definition. Let's see what light the sources can shed on *to'ebah*; we all probably agree that *hazal*'s ideas deserve more attention than the bigots'.

> R. El'azar ben Azaryah taught: a person should not say Wearing *kil'ayim* [linsey-woolsey] is repugnant to me, eating swine's flesh is repugnant to me, the *'arayoth* [incest; illicit relationships in general] are repugnant to me. Rather should one say: These things are not distasteful to me, but I avoid them in obedience to the commandment that my Father in heaven has laid upon me ... .[3]

R. El'azar can be seen to replace disgust with submission to the divine will as the proper motivation for eschewing *kil'ayim*, swine's flesh and *'arayoth*. Whether these three precepts were picked by way of illustration or by virtue of some intrinsic peculiarity, in either case, their very linkage speaks volumes. *'Arayoth* are classified as *to'eboth* (Lev 18:26-30; Yeb. 21a, etc.) and non-kosher foods (of which swine's flesh is the standard exemplar) are generically labeled

to'ebah (Deut 14:3; Hul.114b, etc.). *Kil'ayim*, never characterized *to'ebah*, is the odd man out. Yet, for purposes of right motivation, rather than distinguish the two *to'ebah* categories from non-*to'ebah kil'ayim*, R. El'azar equates them. Thus we learn that whatever the Torah's objective in attaching *to'ebah* to certain prohibitions, it was not the enshrinement of primitive aversions. After R. El'azar, it comes as no surprise to find the Talmud endowing Leviticus 18:22's *to'ebah* with moral and reasoned purport, rather than treating it as code for 'go ahead and indulge your homophobia'.

"Bar Qappara asked Ribbi [Judah the Patriarch] 'What does *to'ebah* mean?' Every explanation that Ribbi offered he refuted. So Ribbi said to him, 'You explain it!'. He [Bar Qappara] replied... 'This is the meaning of the Torah. *To'ebah* means: You stray by this [*to'eh-attah-bah*]' …" . The commentary attributed to Rashi[4] elaborates: "such a man leaves his wife who is permitted and takes hold of that which is *zenuth* [harlotry, any illegitimate relationship]" (Ned.51a). Inserting a wife into the scenario, reminds us that the addressees of Leviticus 18 are men of, ostensibly, heterosexual proclivities - insofar as the *'arayoth* listed are mostly relations with women. Verse 22 is directed at that selfsame adult, male, heterosexual audience; not a few of whose members are likely to be married. Could one say, then, that for Bar Qappara the chief concern of Lev 18:22, is the wife's humiliation caused by her husband's 'straying'? Or did Bar Qappara perceive homosexuality as posing a threat to married life and, ultimately, to human reproduction; a top priority both instinctively and halakhically? [5] Some extrapolate from this ???? ????,[6] that since the risk to human survival from lower birthrates is no longer as dire as in bygone ages, homosexuality's threat-level might drop concomitantly. Moreover, gay-oriented people tend not to marry spouses of the opposite gender or to reproduce biological offspring; making their impact on population size inconsequential. However, one has to wonder whether such individuals were even within the purview of former generations. A theory has been floated that Jews of gay orientation were unknown, or at any rate unacknowledged, by halakhah. This theory might explain legislation such as the following: "A man who has passed the age of twenty and does not want to marry, the authorities force him to marry in order to fulfill the mitsvah of ???? ?????".[7] Had gay orientation been recognized, the suffering of a wife trapped in marriage to a man thus oriented, would surely have given pause before coercing all and every reluctant male.[8] Firmer evidence for the 'floated theory' would appear to transpire from the *teshuvah* of a foremost twentieth century halakhist:

> It is incomprehensible that this thing could involve desire. For in the creation of the human being [*or*: man] there was no desire in his nature to lust after *mishkav zakhur*.[9] That is why Bar Qappara said to Ribbi that it means *to'eh-attah-bah*… It is G-d's scriptural admonition to the wicked: For this transgression behold there is no lust whatsoever, as the lust I created in them was for women because without it human continuity would be impossible as taught at Yoma 69b and San. 64a… But for *mishkav zakhur* there is no lust whatsoever … Only because it is something prohibited does he do it as an act of defiance … In any event, lust for *mishkav zakhur* goes against the very nature of lust itself. Therefore any desire for this is only because it is forbidden and the evil inclination entices him to disobey G-d's will.[10]

Obviously, gay orientation does not exist for this responsum. If such a construct served as a working premise in halakhic deliberations, it opens the door to the application of a classic strategy, or legal fiction, called ?????? ??????. Recognizing changes in nature (and possibly in culture), that

strategy re-examines views that may have rested upon an earlier state of affairs before the change – whether real or fictive. In the case of homosexual orientation, it is contended, that since it formerly had no halakhic existence, Providence must have seen fit to intervene by granting many contemporary human beings an unprecedented kind of orientation. And if so, it may be time to revisit judgments based on a reality (or perceived reality) that predated the 'intervention'.

All the above theories, however cogent, are extraneous to the *beth midrash*, inside whose walls students seek guidance from the extant talmudic corpus. In that corpus Lev 18:22 is understood to prohibit categorically a specific act between two men. No rationales are formally offered in that literature other than incidental ones of which two have already been noticed – namely, R. Elazar's concept of blind obedience to a peremptory fiat and Bar Qappara's ???? ??? ??.

That said, we must not overlook the amply documented resource whereby the rabbis appealed to one scripture in order to override the literal sense of another scripture. Take, for instance, Leviticus 11:8. Referring to the four animals itemized in verses 4 through 7, verse 8 continues: "Their flesh you shall not eat and their carcasses you shall not touch they are unclean unto you." Logically, the two - eating and touching - demand parity; either both are absolutely proscribed or else neither is. But the Rabbis on confronting this text, whose literal meaning forbids touching the cadavers of the camel, cony, hare and pig, responded as follows. "Can lay Israelites really be prohibited to touch carrion? Scripture says [Lev 21:1] 'Speak unto the priests, the sons of Aaron, and say unto them, none shall defile himself for a dead person among his kin.' It is Aaron's sons that are prohibited, not the children of Israel. If a potent generator of defilement [i.e., a human corpse] had to be avoided by priests alone but not by lay Israelites, a fortiori a lesser generator of defilement [i.e., dead animals]. So what is the meaning [of 'their carcasses you shall not touch']? Its meaning is Do not touch the carcasses on the festival." (Rosh Hashanah 16b; cf. Sifra).

More famous is the fate of the *lex talionis*: An eye for an eye, a tooth for a tooth etc. (Exod 21:24-25 cf. Lev 24:19-20, Deut 19:21). At Numbers 35:31 the rabbis uncovered their cue for commuting these corporal penalties to monetary restitution. Numbers 35:31 ordains "You shall not take a ransom for the life of a murderer" - whence the Talmud deduced "For a murderer's life you may not take ransom but you may take ransom for limbs" (BQ 83b).

Where is the counter scripture with the potential to mitigate Lev 18:22? Actually we believe such a scripture to exist; but neither the text we have in mind nor, for that matter, any alternative is brought to bear by the Talmud. Therefore, unless - or until - the Talmud-faithful can be persuaded otherwise, received meanings stand. When it comes to Lev 18:22, the received meaning of that verse is unequivocal and precise. As noted, it names a very specific act which it outlaws; neither more nor less. Thus, there seems little leeway for the conscientious stalwart of traditional halakhah.

Those whose view of halakhah is less than sanguine, may feel that view reinforced by our last, unapologetic, paragraph. Yet, how can one apologize for reporting a straightforward reading of the relevant texts? By the same token, one is duty-bound to show the other side of the coin. Because the

Talmud, that proscribes a particular behavior, does not doom anyone to a life of enforced desolation. Quite the contrary: it leaves room, as we are about to see, for two individuals of the same gender to experience intimacy with one another without having to infringe Lev 18:22.

The crucial text occurs in Yerushalmi Sanhedrin. It deals with the question of why forbidding an integral act between men requires two scriptural sources - one each for the active and passive roles. The Talmud knows R. Ishmael and R. Aqiba to have deemed Lev 18:22's wording (as masoretically vocalized), inadequate to take care of both. To appreciate the anomaly of requiring twofold scriptural authority, one must remember how the rabbis approached the other *'arayoth* injunctions of Leviticus 18. Although those injunctions also address a single party, invariably the male, the rabbis read them as targeting both male and female partners. The clearest enunciation of this principle - that the *'arayoth* laws in general are intended for the absent woman no less than for the directly addressed man - occurs in Sifra.

Leviticus 18:6 launches its *'arayoth* laws as follows: "Man, man! ye shall not draw near to any *sh'er basar* (near of kin; literally, flesh of flesh) of his to uncover nakedness...". Sifra notes that the mention of man might suggest that women are not being charged to keep these laws. Such an inference, Sifra continues, would be erroneous "because plural 'ye' (in *lo tikrevu*, 'ye shall not draw near') indicates that both men and women are being addressed". This teaching of Sifra is axiomatic to all rabbinic discussions of *'arayoth*, and underlies the question of R. Bun bar Hiyya.

> R. Bun bar Hiyya asked R. Zera "Why did R. Ishmael and R. Aqiba treat relations between two males and relations between a person and a beast differently from all other illicit relations [for in all other illicit relations both parties are made liable by a single scripture]?" He [R. Zera] said to him "In regard to all other illicit relations there is a general and inclusive reference to *sh'er basar* (Lev 18:6) while in the present cases there is no such reference to *sh'er basar*". An objection was raised: "Lo, there is the case of relations with a *niddah* which is not a *sh'er basar* relationship [and therefore not covered by Lev 18:6]. Yet, did they [Rabbis Ishmael and Aqiba] treat them [the man who has relations with a *niddah* and the *niddah*] as liable [without any additional verse]?" R. Jeremiah [said] in the name of R. Abhu: "Since it is written 'drawing near' [at Lev 18:6] and 'drawing near' [at Lev 18:19] it is as if all the rules pertaining to the one apply to the other".[11]

As so often, the Talmud astounds by the closeness of its reading. In this instance, R. Abhu notes that 'drawing near' in combination with 'to uncover nakedness' occurs but twice in Lev 18 - once in the preamble (v.6) and again in connection with *niddah* (v.19). Individually, neither 'drawing near' nor 'uncovering nakedness' is unattested.[12] But conjoined to form a single phrase ???+???? ???? appears nowhere else. R. Abhu further implies, that the phrase's distribution is not random. Its first occurrence governs the *sh'er basar 'arayoth*; its second is called for by *niddah*. The latter stands apart from *sh'er basar 'arayoth* inasmuch as it is not incestuous (i.e., not 'flesh of flesh'). Indeed, *niddah* applies to parties that are lawful husband and wife. That would appear to leave the rest of the pericope's prohibitions outside the 'drawing near' loop. In any event, as regards the prohibition of verse 22 the Yerushalmi is unambiguous: neither the first nor the second 'do not draw near' extends to

verse 22. Now the meaning of ‘drawing near’ in Lev 18 is disputed by *rishonim*. Maimonides defines it as any physical contact of an intimate kind that leads to carnal knowledge.[13] For Nahmanides, on the other hand, the phrase is a euphemism for actual cohabitation between man and woman.[14] But irrespective of its meaning, the Yerushalmi sets the parameters of ?? ?????, and 18:22 falls outside those parameters.[15]

As an Orthodox Rabbi, one would be remiss not to give prominence to a source as weighty as this Yerushalmi, especially when its conclusions are so demonstrably rooted in the Written Torah. Furthermore, it is a source that corroborates the Talmud’s assertion: “Everything that the Merciful One has forbidden us, He has permitted us its counterpart” (Hul. 109b). Being able to advise people of homosexual orientation about the counterpart that the Merciful One allows them, adds credence to halakhah’s interdiction. For what it interdicts is precisely and graphically demarcated by Rabbis Ishmael and Aqiba as an act whose performance involves an active and a passive partner. Delineating so exactly the prohibited conduct, *hazal* exclude by implication interaction short of penetration. To be sure, Rambam - as we have seen - derives from?? ????? a ban on lesser degrees of interaction. But this is where the Yerushalmi comes in: ????? ?? does not apply to Lev 18:22. So to reiterate, the Torah relegates no human being to a life of loveless solitude. This information may relieve the pressure from rabbis and religious counselors; they who agonize over “Vainly paining the heart of the righteous when I had not pained it…” (Ezek 13:22). If, as hypothesized above, halakhists of yore were oblivious of gay orientation, they could discourage, as they often did, all bonding between men without compunction about causing pain. Today we know: and that knowledge deprives us of the luxury to insouciantly condemn fellow Jews to a monastic life on the pretext of ‘being on the safe side’.[16]

Acquaintance with the complementary rulings, and with where halakhah draws the line, could also empower the decision-making of homosexually inclined women and men who cherish halakhah. In turn, their peers will have to ask themselves: What right have we to be ???? ?????? or ??? ?????? ??????? For once R. Abhu’s Yerushalmi teaching is out there, the mere fact two gay individuals live together will not license an honest bystander to automatically assume that they are in breach of halakhah. Because as Jews familiar with this nuanced halakhah, they will have the presumption of faithfulness to its guidelines. The Talmud depicts a marriage, albeit a heterosexual one, in which the two parties lived together as a couple in all respects except cohabitation, on account of halakhic qualms (San.19b). Huge praise is heaped upon the couple for their heroic abstinence. But how did the rabbis know what went on in the couple’s bedchamber? Either the couple revealed it or, more likely, the rabbis relied on the assumption that observant Jews make every effort to adhere to halakhah.

Are these assumptions compromised when two men publicly proclaim their partnership a marriage? While prying is abhorrent, recent debates have brought the question into the limelight. Surely it depends whether or not????? ??? ??? ‘marriage’ is, by definition, a relationship that flouts halakhic boundaries. In other words, if society recognizes in a declaration of marriage the conscious intent of the parties to engage in the specific conduct disapproved by halakhah, then that declaration would tacitly seem to fall under the strictures of ‘writing a ketubah for males’ (see Hullin 92a-b). The ketubah, of course, includes the pledge ?????... ????? ?? ???? ; and if a comparable pledge were implicit in ‘marriage’ it would be tantamount to the writing of a ketubah. On the other hand, if ‘marriage’ is adopted to denote sincere commitment, then notwithstanding the public announcement,

the presumption (explained above) need not necessarily be undermined.[17] Mutatis mutandis, halakhically-educated heterosexual couples are assumed to observe niddah separation, even though the wife neither moves out of the house for the duration nor is she expected to wear distinctive niddah clothing as was customary among certain Jews in the distant past. Needless to say, we do not venture to advise any individual how to live her or his life. Our mandate is strictly academic; setting forth as best we can the germane texts.

"R. Qatina said When the pilgrims came [to the Temple] on the festivals, they [those in charge] would roll back the veil to let them see the *cherubim* intertwined with one another. They would say to them: 'Behold your endearment before G-d is like the endearment of a man and a woman'" (Yoma 54a). But were the *cherubim* male and female? Elsewhere the Talmud portrays them as having the faces of young lads (Suk. 5b; Hag. 13b; cf. *Torah Temimah* on Exod 25:18). So as it turns out, the divine love towards Israel was symbolized by two lads locked in a tight hug as if husband and wife. The image of this aggadah speaks for itself. Like the halakhic passage we saw in Yerushalmi Sanhedrin, it reminds us that love is not condemned, but only its expression in the one way interdicted by Torah. Is it naive to find a modicum of healing in such a message?

Some day, more reverential and prayerful study will perhaps yield unforeseen results. When Esther and Mordecai sought to institute the new feast of Purim, the Elders were greatly perturbed. "Moses said to us no other prophet is going to innovate anything henceforth. Yet Mordecai and Esther seek to innovate. They did not stop debating until the Holy One blessed be He lit up their eyes and they discovered it written in the Torah, in the Prophets and in the Writings".[18]

[1] This article benefitted immensely from the advice of Rabbi Yitzhak Ajzner. His contribution is herewith gratefully acknowledged. It has been further enhanced by the meticulous attention and valuable suggestions of Rabbi Noah Gradofsky.

[2] These revilers typically reserve their insinuations and slurs for the conduct dubbed *to'ebah*. Some, however, stretch their revulsion to encompass not merely the conduct, but also LGBT persons. Their self-righteousness evidently blinds them to the distinction between things or phenomena designated *to'ebah* (or *to'abath Hashem*) and exceptional wrongdoers that are thus designated. Examples of the former are furnished by Lev 18:22 and 20:13 that apply *to'ebah*, not to persons, but to an act. When Torah wants to brand persons *to'ebah*, it knows how to do so. Necromancers, soothsayers and their ilk

it brands at Deut 18:12, and cross-dressers at. 22:5. At 25:16 it is the turn of perverters of justice????? ??? ?? ??? ??? ?? ??? ??? .

[3] Sifra to Lev 20:26 (*Assemani 66* pp. 412-413) (text of Sifra on Sefaria here).

[4] The attribution is contested by scholars who consider so-called 'Rashi' on tractate Nedarim an early ashkenazic work from Rashi's circle but not by the master himself. This opinion goes back at least as far as the Beth Yosef (*Hoshen Mishpat* 186 quoting this comment attributed to Rashi on Nedarim 31b in the name of "the commentator" rather than "Rashi"; see *Shem ha-Gedolim* of the HIDA here and here (first full paragraph of each page) [Hayim Joseph David Azulai d. 1806]).

[5] Such a construal of the law's purpose approximates R. Judah the Pietist's (d.1217) as recorded by his son "???? ?"? ?? ????? ???? ???? ?? ??? ... ??? ????? ????? ???? ??????? ???? ?????"(????? ????? ??' ????? ????? Lange edition, Jerusalem 1975 pp.147-148).

[6] Extrapolations from ???? ???? abound in rabbinic literature (for examples see our *An Adventure in Torah*, KTAV 2022 pp.161-167). Rigorists maintain that the age of such extrapolating ended with the sealing of the Babylonian Talmud, notwithstanding the evidence of its later employment.

[7] Shulhan Arukh, E. H. 1:3.

[8] Yes, the rabbis gave a wife recourse against a husband who was ????; but that provision is narrowly circumscribed.

[9] Often translated *sodomy*; but historically, *sodomy*'s connotation was broader than *mishkav zakhur* 's.

[10] ????? ??? ???? ???? ??? ?' ???? ??"?, ??? ??? ???"? ???' ?"?-?"?, cf. Rashi at San.58a s.v. ???? ??? ????.

[11] Yer. San. 7:7 [25a]; adapted from Jacob Neusner's Translation, 1984 pp. 226-227.

[12] Indeed both figure in 18:14, but there each is enwrapped in its own grammatically discrete clause.

[13] *Yad*, Issure Bi'ah 21:1; *Sefer ha-Misvot*, negative command 353 et. al.

[14] Hasagot on *Sefer ha-Mitzvot*, negative command 353. Accordingly, ?? ????? ????? ???? would be rendered: do not have relations that are incestuous [or illegitimate].

[15] The tradition that R. Ishmael and R. Aqiba required dual scriptural authority in order to include both parties is widely attested (e.g., San. 54b; [cf. Ker.3a]; Sifra *Assemani 66*, p.379 (text of Sifra on Sefaria here), the latter source also attesting to the tradition distinguishing bestiality and same-sex cohabitation from the other behavior prohibited in Leviticus 20. Although R. Bun bar Hiyya and R.

Abhu (or their counterparts) are lacking in the Bavli and Sifra, there is no good reason to suppose that Bavli and Sifra would reject R. Abhu. Nor is R.Abhu opposed by the following Sifra passage:??? ??? ???? ?????? ?? ???? ????? ????? ??? ?? ??? ??? ???? ???? ??? ???? ?"? ?? ????. ??? ?? ??? ??? ?? ???? ?? ????. ???? ??? ?????? ?? ????? ??? ???? ?"? ?? ????? ?????. The phrase?? ?????? in the contex is surely shorthand for all *she'er basar* '*arayoth* which are, in fact, the only group of '*arayoth* besides *niddah* to be prefixed by ?? ?????.

[16] Some argue that the idea of 'playing safe' is prompted by ????? as in ?????? ?? ?????? (Lev 18:30). However, that exhortation the rabbis apply specifically to ????? (secondary incestuous relations; Yeb. 21a et al.). Moreover, even Rambam who forbids subsidiary forms of ????? intimacy, does not cite ????? or ????. Instead, Rambam cites scriptural ?? ????? - a phrase unique to *'arayoth* and not to be confused with vague ????. And, as we have learnt from the Yerushalmi, Lev 18:22 lies beyond the scope of ?? ?????.

[17] Along the same lines, LGBT individuals who seek giyyur, when being introduced to mitsvot, they will be apprized of the halakhic demarcation lines pertaining to Lev 18:22. The *beth din* could then assume that the prospective ger accepts the terms because they are not terms feasible only for ???? ?????.

[18]Yer. Meg. 1:4 [70d]; cf. Ruth Rab. 4:7 (in the Lerner edition, 4:5 in the Vilna edition, the text of which is available here on Sefaria).