

## Sorting Sins: When the Law Stays the Same and Everything Else Changes

Steven Greenberg

It has long been the claim of the Orthodox community that Jewish law does not or should not change to accord itself with the times. Among certain Jews, since the early 19th century, all new things are considered a priori forbidden.

Despite this oft-repeated and historically questionable insistence on formal continuity, there are ways that prohibitions of sinful behavior can remain on the books unchanged in their form, and still be wholly transformed in their social effect. By shifting the over-arching category under which a prohibition falls, it can remain in force while being entirely changed in regard to its meaning and application.

Perhaps the most dramatic and commonplace example of this categorical shift is in regard to the observance of the Sabbath. Upon a handful of verses that prohibit creative work, the rabbis constructed an extensive, vast, and intricate array of rules for the observance of the Sabbath. For most of Jewish history, the violation of the Sabbath, especially in public, was an act that could remove a Jew from his or her community. Jews who were known to publicly violate the Sabbath were considered halakhically as gentiles. The communal response to violation was a form of excommunication.

As Jews were welcomed into the nation states of Europe as full citizens, and later, when questions about the use of electricity, the invention of the automobile, and finally the growth of suburban living made the link between traditional Sabbath observance and Jewish identity functionally untenable, the sta-

tus of Shabbat and its violation needed to be understood in a different light. Important orthodox *poskim* (halakhic decisors) insisted that Sabbath violators not be classified and treated as idolaters or gentiles whose touch disqualified wine or whose testimony or participation in a minyan no longer counted. While no Orthodox rabbi permitted driving a car on the Sabbath, many turned a blind eye to those members who lived beyond walking distance and who preferred to drive to shul rather than sit at home.

The laws of the Sabbath had not changed, but the social significance of their violation had. From a primary marker of corporate Jewish identity, a weekly acquiescence to the sovereignty of the Creator, it became a ritual expression of piety that only a certain minority of Jews observed. Profaning the Sabbath, once associated with idolatry and apostasy, became an unfortunate religious failing.

A similar sort of halakhic categorical shift can be seen in regard to homosexuality. Evidence for this can be found in both the Conservative and the Orthodox communities.

In December of 2006, the Law Committee of the Rabbinical Assembly, which determines matters of halakhah for Conservative Jews, voted to accept two contradictory legal arguments on the issue of homosexuality. Rabbi Joel Roth repeated his long held halakhic contention that there is no room for acceptance of gay relationships and no legitimacy to the notion of an openly gay rabbi. A lenient *teshuvah* (responsum) was offered by Rabbis Daniel Nevins, Elliot Dorff, and David Reisner that

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permits gay relationships and the celebration of commitment ceremonies, and supports the ordination of gay and lesbian rabbis. However, this ruling did hold on to a single prohibition in regard to sex between men. Men are not permitted to engage in anal intercourse according to this responsum. This seeming hair-splitting on sexual practice has its roots in the law. The rabbis of the Talmud did not consider any other sexual act between men to be a formal violation of the law. The biblical-level violation demanded specificity, so for a person to have violated any of the sexual crimes, penetrative intercourse was considered necessary.

In this intricate dance, the rabbis of the Conservative movement have essentially taken what was for centuries deemed a moral crime, a cardinal sin located in the same chapter as adultery, incest, and bestiality, and shaped it as a ritual infraction. Surely they would not countenance adulterous relationships or the marriage of siblings so long as they committed to avoid penetrative intercourse. But sex between men is now understood differently. The profound shifts in American society around the meaning and expression of same-sex desire has turned what was once considered an ugly and even disgusting moral depravity, into a matter of disposition.

In halakhic language, the recent ruling has simply removed homosexual relations between men (lesbian relations are not mentioned in the Torah) from the category of *arayot*, sexual crimes described biblically as *uncovering of nakedness*. The law has become detached from associations with incest, adultery, and bestiality and is tied instead to the laws of *niddah*, the ritual prohibition of sex during menstruation. Intercourse with a menstruating woman, which is included in the same chapter of Leviticus, is not punishable by a human court and has long been a matter of personal piety. Moving homosexual love from a cosmic threat and a moral scourge to a largely private matter of religiosity retains the prohibition, but shapes an entirely new set of social responses to same-sex couples.

A similar, categorical shift can be seen in the Orthodox community. While Orthodoxy has not overhauled its basic attitude toward homosexuality, over the past few years one can discern a growing movement in the community from castigation to compassion. A number of books and articles over the past five years have focused creative attention upon the

need to understand and empathize with the experience of lesbian and gay Orthodox Jews and their families.

Rabbi Tzvi Hirsch Weinrib, the former Executive Vice President of the Orthodox Union, spoke in New York recently at an event billed as "Orthodoxy responds to Homosexuality." Not surprisingly, it drew a relatively large crowd including a sizable showing from the city's small but growing pool of religious gay Jews.

Rabbi Weinrib demonstrated during the evening that he and much of the community he represents are aptly described as in-between categories.

While he insisted that the Torah's view on homosexuality is "clear, unambiguous, terse, and absolute," he called upon the Orthodox

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community to particularly empathize with the situation of the gay person attempting to remain faithful to the Torah. This is a dramatic move away from Rabbi Moshe Feinstein's rulings in the 1960s and 1970s that marked homosexuality as a demonic urge to rebel against God. While maintaining Orthodoxy's "eternal law," Rabbi Weinrib insisted upon compassion and understanding.

On the other hand, Rabbi Weinrib expressed strong support for the proposed constitutional amendment to protect traditional marriage. He and other Orthodox leaders have portrayed homosexual relations as sufficiently threatening to the sanctity of the family and the fabric of society that the government ought to deprive gay couples of the social and economic benefits that help to make marriage and family work. This political stance portrays homosexuality as a profound moral threat to be fought.

And yet, despite his position on civil marriage, Weinrib continued to insist that he did not consider gay people to be morally compromised by definition. In fact, he said that he would have no qualms about inviting a gay couple to his home on Shabbat and even giving them a room to share.

While the move toward compassion is welcome, it can be confusing for gay Jews when these conflicting conceptual frames of homo-

sexuality are expressed simultaneously. The call for empathy seems to reach toward a view of homosexuality as a fixed and unchosen aspect of the personality which, if expressed in particular sexual behaviors, is at worst, a religious failing. The public rejection of same-sex civil marriage portrays gay love as a grave moral danger to the fabric of society. When one's loving partnership is described as a threat to all that is good and wholesome, then no welcome mat is big enough and no empathy, however heartfelt, is truly credible.

Both the Conservative and Orthodox movements are struggling, one with two openly contradictory rulings and the other with patently contradictory sensibilities. And while I, a gay Orthodox rabbi and author, have chosen a completely different interpretive

path from either of these, I still find them both very important to consider.

Many liberal Jews understandably will prefer a cleaner and perhaps more honest rejection of halakhic norms when they conflict with their contemporary values. But this form of recategorization has the advantage of holding on to core norms while recalibrating their meaning and application to new social realities. It allows a slower, more patient process of consideration. It does not buy into the modern notion that all change, by definition, is progress, and yet it admits the need to respond to those same changing realities. Despite its unsettling and for some painful contradictions, category shift allows the community some negotiating room in the ongoing conversations between tradition and endlessly changing human circumstances. ●