

Aharei-Mot / Kedoshim, A D'var Torah by Sydney Nestel

Comparing Conservative and Reconstructionist Approaches in Dealing with Leviticus' Prohibition on Male-Male Sex

28 April 2007

This week's Torah reading – the double parshah Aharei Mot and Kedoshim – contains some of the most sublime and uplifting sections of the Hebrew Bible, as well as some of the most troubling and problematic.

On the sublime side, we have the verses beginning with Leviticus 19:9

9 When you reap the harvest of your land, you shall not wholly reap the corner of your field, neither shall you gather the gleaning of your harvest.

10 And you shall not glean your vineyard, neither shall you gather the fallen fruit of your vineyard; you shall leave them for the poor and for the stranger: I am the LORD your God.

11 You shall not steal; neither shall you deal falsely, nor lie one to another.

12 And you shall not swear by My name falsely, so that you profane the name of your God: I am the LORD.

13 You shall not oppress your neighbour, nor rob him; the wages of a hired servant shall not abide with you all night until the morning.

14 You shall not curse the deaf, nor put a stumbling-block before the blind, but you shall fear your God: I am the LORD.

15 You shall do no unrighteousness in judgment; you shall not respect the person of the poor, nor favour the person of the mighty; but in righteousness shall you judge your neighbour.

16 You shall not go up and down as a talebearer among your people; neither shall you stand idly by the blood of your neighbour: I am the LORD.

17 You shall not hate your brother in your heart; you shall surely rebuke your neighbour, and not bear sin because of him

18 You shall not take vengeance, nor bear any grudge against the children of your people, but **you shall love your neighbour as yourself: I am the LORD.**

For myself, and for many others, this is the heart and soul of the Jewish religion: the lens through which all other Jewish texts, laws, and traditions are interpreted, and the standard to which they are held.

But there are also some very troubling verses in this week's parsha. And it is on these troubling texts, and how modern Jews react to them that I wish to focus today.

I am referring to the verses that ban homosexual practices. In particular Leviticus 18:22-23

22 And with a male you shall not lie as one lies with a woman.

23 It is an abomination

And to Leviticus 20:13-14

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13 And a man who lies with a male as one lies with a woman. The two of them have done an abhorrent thing.

14 They are doomed to die. Their blood guilt is upon them.

Already in the mid 1980s the Reconstructionist movement decided that we do not accept this Biblical ban on homosexuality as incumbent on us. In 1983, the Reconstructionist Rabbinical College admitted openly gay and lesbian students to its ranks, and soon began graduating gay and lesbian Rabbis. Soon after, the Reconstructionist movement recognized gay and lesbian marriages, and encouraged gay and lesbians to get married in Jewish ceremonies. The Reconstructionist movement has publicly called for legalizing gay civil marriage in the U.S.

The reasoning behind these decisions (though not the decision making process) was quite simple. We felt that any thing else would be a denial of civil rights. Since gay and lesbian relations have no a priori negative consequences, and clearly bring pleasure to gays and lesbians, a ban on these relationships could not be supported. Moreover, denying gays and lesbians the right to sexual pleasure, love, married life and family was not consistent with our understanding of the underlying values of the Jewish religion: the values expressed so eloquently in the Leviticus 19 and elsewhere in our tradition.

Yes, the biblical text banning homosexual sex is quite clear, and furthermore we acknowledge that it is true that the majority of rabbinic opinion over the years has expanded this prohibition rather than relaxed it. But for Reconstructionists the past has a "vote not a veto", and this is a case where we – with our modern sensibilities – consciously chose to overrule the past. The Reconstructionist method is about extracting from past practice, narrative and discussion, core values that we find positive and life fulfilling, and then using these values as a sieve and a kiln through which and by which we re-evaluate and re-form traditional practice, by either keeping a traditional practice as is, reinterpreting its meaning, modifying the practice, or sometimes simply throwing it out. The Reconstructionist method is not afraid – when necessary – to say "Yes our ancestors believed so and so, but we do not. Our ancestors practiced such and such but we do not.

Not so Conservative Judaism. The Conservative movement has been racked these past several years with the question of how to treat gays and lesbians, and is threatening to split (once again I might add) over this question in light of three contradictory rulings issued, in December 2006, by its Committee on Law. Since then two of that movement's four Rabbinical Schools – including the flagship Jewish Theological Seminary – have moved to admit gays and lesbians, while two others have not.

Conservative Conservatives – mostly based in Canada are threatening to quit the movement, while progressive Conservatives – lead by Rabbi David Lazar of Tel-Aviv, who spoke at our synagogue, a few years ago – are insisting that all Conservative Rabbinic Schools must admit gay and lesbian candidates.

I want to explore for a few moments the process the Conservative movement used to

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come up with its decisions as well as the three responsa that were accepted as applicable halakhah. This in order to contrast it with the Reconstructionist approach described previously.

First, it is important to note that for Conservative Judaism – like Orthodoxy, and unlike Reform and Reconstructionism – this is a question of Halakha (Jewish Law) and as such must be based on precedent, formal logical argumentation, and proper process. The supreme legal body in the Conservative Movement and the only one allowed to create or modify Halakha is the Law Committee. This is composed of 25 Rabbis. At present only two of its members are women – a *shande* as far as I am concerned – and only two are Canadian – not such a *shande*. The two Canadians are Rabbi Frydman-Kohl of Beth Tzedek and Rabbi Scheim of Beth David (both in Toronto.) As you might guess – on the issue of gays and lesbians – the women consistently voted to liberalize, and the Canadians consistently voted for no change or even retrogression.

Traditional Jewish process, accepted by the Conservative Movement, allows two methods whereby Halakha can be changed. One is by means of a *Takanah* – rabbinic legislation which can ignore or even override precedents in order to achieve some higher good. Many *mishnaic* rulings are *Takanot*, including such fundamentals as using prayer as a substitute for sacrifices. One of the more famous post-*mishnaic* *takanot* is Rabenu Gershom's ruling, of the year 1004, banning polygamous marriages. *Takanot* are meant to be rare. But Conservative Judaism's Law Committee has used this mechanism in the past – for instance to allow driving a car on Shabbat in order to attend synagogue. By the rules of the Law Committee a *Takanah* needs 20 votes to pass (this was recently raised from a simple majority of 13, in itself a controversial procedural move, promoted by the conservative Conservatives). Since all sides in this debate knew they did not have 20 votes no one proposed a *Takanah*.

A second method of changing halakhah is by a *psak din* – a reasoned legal opinion based on precedent. *Piskei din* happen all the time in the halakhic world, in response to new circumstance or simply to new questions.

According to the rules of the Law Committee a *psak din* requires only 6 votes to be accepted as a viable option for Conservative Jews. In addition each vote is separate, and committee members can, and do, vote for multiple *piskei-din*. This allows for sometimes-contradictory acceptable rulings and practices. The role for women in ritual was subject to two such contradictory *piskai din*, which accounts for the variety of practice in this regard within the Conservative movement.

The issue of gays and lesbians resulted in three accepted *piskai din* and several rejected ones. Among those rejected was the most liberal ones which would have essentially taken the Reconstructionist position, and allowed full equality for gays and lesbians and full acceptance of gay and lesbian sex. Of the three that passed, two essentially argue for the status quo, but for different reasons, and the third allows for a limited acceptance of gays and lesbians and their sexual activities.

The Levy responsum is considered the most conservative. It argues against accepting gay

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and lesbians as rabbis, and against gay marriage or any sort of gay unions, and against any sort of gay or lesbians sex. Of course it is careful to point out that:

- only actions, and not thoughts or desires, are judged in Judaism
- we “hate the sin not the sinner”,
- that “a Jew, even though he sins, is still a Jew”,
- that gay Jews who act on their feelings can still come to shul, and should be encouraged to improve, just as a Jew who acts on his feelings of lust and has adulterous relations, or out of wedlock relations

The Levy responsum is based on a perfunctory review of the Biblical and rabbinical injunctions against homosexuality and on Levy's belief that gays and lesbians can change and should be encouraged to do so. For Levy, homosexuality is a manifestation of the *yetzer hara* (evil impulse) and as in all such cases, should be resisted by those who have it; and those in authority, or in a position to influence behavior, must educate and counsel against it. He recommends that gays and lesbians be given counselling and therapy, and in fact most of his 64 page paper is a series of appendices containing physiological studies purporting to show that gays and lesbians can be re-trained.

Rabbi Levy's responsum got 6 votes in favour, and therefore passed. Those voting in favour included Rabbi Frydman-Kohl of Beth Tzedek.

The Roth responsum is equally conservative in its ruling on practice. It too forbids ordination of gays and lesbians, gay marriages or unions or commitments ceremonies, and all forms of gay and lesbian sex. But Rabbi Roth uses a much more erudite, scholarly, and precedent-based approach than Rabbi Levi. And he takes no position on therapy or counselling. Indeed as he says:

I state with all of the clarity I can: The prohibitions against sexual behavior between members of the same sex stand and apply irrespective of the ability to “change” the people who are homosexuals or to modify their attractions or behaviors.

Rabbi Roth, former chair of the Law Committee, presents a virtuoso display of his knowledge of halakhic precedents and Rabbinic literature. But it soon becomes clear from his paper that he enters the fray not with a detached objectivism, but with a predisposition to not liberalize. He picks and chooses his precedents – as all Rabbis do – with a clear goal. More telling though, and more damning in my opinion, is the way he dismissed the arguments of his more liberal colleagues. A few quotes might be sufficient to give you the flavour of his arguments.

Arguing against the liberals' claim that most homosexual activity is banned only by the Rabbis and not by the Torah itself (a position that if accepted makes these bans easier to overturn) Roth states:

One thing is absolutely clear: there is not one scintilla of ambiguity that the Rabbis knew that the Torah forbids, ... being either the active or the passive partner in a forbidden homosexual act. For us as halakhists and halakhic Jews that is, **as it must be, what counts most**. The universally

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acknowledged prohibition against being either the active or the passive partner in a forbidden homosexual relationship is uncontested, and it is *d'oraita* (from the written Torah).

Arguing against the liberals' claim that the phrase *biya she'lo k'darcha* (intercourse not in her usual manner) means anal intercourse – a principal supported by several Tamudic texts – and that if accepted would allow all other forms of gay sex, Roth states:

There is an implicit assumption by our [liberal] authors that *biya she'lo k'darcha* means only one type of sexual contact, and not multiple types. Nothing compels such a view. Surely, nobody denies that anal intercourse is *biya she'lo k'darcha*. What is at question is whether that **alone** is *biya she'lo k'darcha*?

Thus we see that when handed a Rabbinic text that could clearly be used to make life easier for gays and lesbians, by restricting the Biblical ban to only a single act, he chooses to reject it because it not crystal clear, and is open to a possible more limiting and strict interpretation. As if to prove this predisposition to small “c” conservatism, rabbi Roth quotes the general Rabbinic principal

safek d'oraita taal humra

Any thing that is in doubt as to its prohibition by the Torah, should be ruled strictly. In other words: When in doubt, ban it!

Arguing against having the Conservative Movement simply treating gays and lesbians the same as it treats heterosexual Jews who do not follow various prohibitions on heterosexual sex, Roth states:

Some will argue that we often “turn a blind eye” to other instances of the same type of behavior ... which are equally forbidden by the standards of the law. They will, in particular, refer to an unmarried man and an unmarried woman who are not ... [married] to each other, but where the woman is unlikely to have been to the *mikveh* since the end of her last menstrual cycle, so that any physical contact between them is forbidden ... or, to a married couple whose behavior during the woman's period does not meet the standards of the law, If we can “turn a blind eye” to these infractions, [the liberals argue] then we can “turn a blind eye” to the infractions that might be present in the relationship between two men, too, ...

[To this I answer] the Law Committee has not been asked to rule on those issues, and there is a very big difference between “turning a blind eye” and issuing a ruling. ... There is a very big difference between things that a [Rabbi] may say in the privacy of his office to one who seeks his halakhic advice... and making public statements about the same subjects.

To me this is one of the most shocking and revealing statements in Roth's responsum, and one that, in my opinion, reveals a hypocrisy deep at the core of much of Conservative Jewish thinking. “We can make rulings,” they seem to say, “that we know the public will not or cannot keep, but we will make them anyway.” Privately people can do what they

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want and privately Rabbis may even allow this. But the Public Law is supreme and aloof. It stands alone - unrelated to actual human activity, actual human consequences, and actual human needs.

Roth makes this explicit towards the end of his paper.

Every decisor of Jewish law seeks to find a way to render a decision which does not cause pain, hurt, or anguish to those for whom it is rendered. ...[and] I know very well that the view I have expressed ... [here] ... causes pain, hurt, and anguish to very many people. The fact that a decision causes pain does not mean that the decision is immoral. A moral law can have a negative consequence on the lives of people, but we make the judgment that the ... morality of the law outweighs the hurt done to the individual in such cases. That is the case here. I then ask... whether, [it is true that] a moral God could demand of homosexuals what I [have] affirmed [that] He does. My answer, [is] "yes." It is my perception that many of our circle have decided the question of the law's morality solely on the basis of its consequences. But that is not the best way to make this judgment, neither in this issue nor in any other."

Suffice it to say that this is not an approach I can live with, nor, thank goodness, is it the approach of the Reconstructionist movement. Roth's *psak din* passed the Law Committee by a vote of 13 to 8 with 4 abstentions. Both Rabbi Frydman_Kohl and Rabbi Scheim of Beth David supported it.

Let me now briefly review the most liberal of the *piskei din* that was accepted. This is the paper presented by Rabbis Dorff, Nevins, and Reisner. This was passed by the Law Committee by a vote of 13 for and 12 against. Both women on the committee voted in favor, and both Toronto Rabbis voted against. Let me begin by quoting from its conclusions, to show that while it liberalizes acceptable Conservative practice, it is not really so liberal as it has been made out to be.

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

1. Gay men are instructed to refrain from anal sex. The explicit biblical ban on anal sex between men remains in effect.
2. Heterosexual marriage between two Jews remains the halakhic ideal. [However] 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. ... 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

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serve as rabbis, cantors and educators shall be welcomed to apply to our professional schools and associations.

4. We are not prepared at this juncture to rule upon the halakhic status of gay and lesbian relationships. ... This responsum does not allow for *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. ... The celebration of such a union is appropriate.

So, according to this opinion, gay and lesbian sexual relationships are never positive, and some gay sexual practices are still forbidden. But because gays and lesbians have no choice, we should have '*rachmonos*' (pity) and allow them to engage in "non-penetrative" sexual activities. Furthermore it would be an affront to their dignity to deny them admittance to Rabbinic schools. And since they are going to live together and have sex anyway, better it should be non-promiscuous. And since when they find long-term partners they may wish to publicly commit to each other, it is OK to celebrate these unions. However these couplings are neither marriages nor equivalent to marriages, and until we figure out what to do about them, they are to have no religious significance or religious ceremony: hardly, a welcoming and egalitarian policy.

To be fair, Rabbis Nevis et al, make a compelling and fascinating argument, quoting many Talmudic texts, showing that the halakhic principal of maintaining human dignity can be used to override other halakhic principals – even ones explicitly stated in the Torah. But then they don't have the **guts** (or maybe they feared they didn't have the **votes**) to apply this logic radically. It could have been used to over-rule Leviticus' ban on anal sex, and to extend *kiddushin* (marriage) to gays and lesbians. But they use it only to over-turn the rabbinic enactments against the "milder" forms of gay sex.

While this is far from a perfect ruling, maybe it is the thin edge of the wedge. The conservative Conservatives certainly think so, and they are not taking this lying down. Rabbis Roth and Levy, who authored the two conservative opinions accepted by the Law Committee quit the committee in protest over its equal acceptance of the Dorff-Nevis-Reisner opinion. In Toronto most conservative Rabbis strongly disapprove of Dorff-Nevis-Reisner, and are openly upset that it has gained acceptance as a valid approach for Conservative Jews. To quote (partially) from a recent article in *The Canadian Jewish News* written after the Jewish Theological Seminary chose to follow the liberal ruling and admit gay and lesbians students:

Canadian rabbis expressed sadness after last week's announcement by the Jewish Theological Seminary – the Conservative movement's flagship institution in New York – that it will accept openly gay and lesbian students to its rabbinical and cantorial schools.

"I feel that this is an abandonment of traditional Judaism, and as such I can

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have no part of it,” said Rabbi Wayne Allen, spiritual leader of Toronto’s Beth Tikvah Synagogue ...

The move “calls into question what it is that the Conservative movement really stands for and how it defines itself ...” said Rabbi Steven Saltzman, spiritual leader of Adath Israel Congregation.

Their views are in line with most of the Canadian rabbis and cantors who took part in a JTS survey released earlier this year. Eighty-two per cent of them were opposed to rabbinic ordination of gays and lesbians.

In contrast, in the United States, a majority of the American rabbis and cantors who took part in the survey – 69 per cent – were in favour of the idea.

“While some people in the movement might see that as evidence of a healthy, pluralistic, vital Conservative movement, I am not prepared to draw that conclusion,” said Rabbi Allen.

Rabbi Saltzman [of Adath Shalom] commented that “the JTS that ordained me in the 1970s was a totally different institution than it is today. It was very much committed to tradition and the conserving of the Jewish tradition, ...”

He added: “I think that one of the things we are going to have to do in Canada is that we are going to have to determine from an ideological point of view whether we are going to throw our lot in with the ideological decisions made in the United States for an American constituency, or whether we are going to define Conservative Judaism in a uniquely Canadian fashion in such a way that it reflects the traditional values of Canadian Jews.”

Rabbi Baruch Frydman-Kohl, spiritual leader of Beth Tzedec Congregation, said that talk of a possible sovereignty association for the Canadian Conservative movement, which Rabbi Saltzman proposed more than a year ago, is “still going on, ...”

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Rabbi Allen said he does not anticipate radical changes like a split within the movement, but he said there is “a disheartening of the spirit of those who are committed to tradition and remain committed to tradition.”

Rabbi Martin Berman of Shaar Shalom Synagogue described JTS' decision to ordain openly gay students as “a complete break from halachic tradition.”

In contrast, he said, he “could live with” the idea of women being ordained as rabbis, although he found it “problematic,” ...

While he would not hesitate to count a gay male in his minyan (although he would not count a woman), Rabbi Berman said he cannot honour JTS' decision.

He told The Canadian Jewish News he “can no longer in any way support the seminary” where he was ordained in 1977. That means he will not recommend it to prospective rabbinical students, nor will he involve himself in any fundraising for it.

So much for the conservative movements dealing with this issue.

I want to conclude by again contrasting the method displayed in most of the Law Committee arguments with the Reconstructionist method, which I described at the beginning of this dvar Torah. Surprisingly, I found in the paper of the very conservative Rabbi Roth a very good explanation of the fundamental difference in approach between the *capital-C* Conservative method and the Reconstructionist method. He provides this in his attack on the most liberal papers submitted to the Law Committee, basically – small “r” – reconstructionist arguments in favour of the long standing – capital “R” – Reconstructionist position – that is: total equality for gays and lesbians, for their relationships and for their sexual practices. Here are his words.

The approach of the third category [the most liberal and Reconstructionist] was very straightforward, and for that I give the authors much credit. The authors did not try to “permit the impermissible” through the classical methods of the halakhic system. For these papers, ... there is one crucial underlying premise, which alone allows for the argument to be made at all. That premise is that the Torah is ... not entirely Divine, and, as such, not legally infallible. Thus, the verses in Leviticus have no absolute legal claim or hold on us, **since it is clear to us that they cannot be expressing God's will, since the view they express is immoral**

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Again, to the credit of the authors of the papers in this category, they recognize that this claim has no source in the classical halakhic literature, and that it would be impossible to quote even one *posek* until our day who has offered such an argument and called it halakhic. ...

That, then, brings us to the following issue: Assuming that the type of [critical and scientific] biblical scholarship we have all been taught is correct, does that mean that the Torah is, in fact, not Divine and [not] legally infallible? I believe that it does not mean that.

The argument here is over the following issue: Is theology the dog which wags the tail called halakhah, or is halakhah the dog which wags the tail called theology? It cannot be both ways.

There can be no real doubt that, normatively speaking, the halakhic tradition is the given, and theology is required to fall into place behind it. Theology can, indeed should, provide the narrative which makes the halakhic tradition intellectually persuasive and emotionally acceptable and satisfying, and that narrative can change as needed, and it need not be the same narrative for everyone. Narratives, after all, are aggadic, and thus, neither normative nor binding. That claim, incidentally, in no way diminishes their importance. Whatever narrative works is fine, so long as the narrative does not reverse which is the dog and which is the tail. ... Our movement's thinkers and theologians are as competent to provide a modern and persuasive theology of halakhah as were the thinkers of the past. But, we, like they, cannot undo the foundational premise of the entire halakhic system – that the Torah is Divine and legally infallible.

This requires [that the Conservative Movement finds a] persuasive and convincing way to affirm the validity of critical scholarship without allowing that affirmation to undermine the foundational premise of the halakhic system [that Torah is legally infallible]. It may well necessitate [us] evolving a theology in which the divinity of the text is not dependent upon direct verbal revelation, but also not undermined by a claim that the text is merely **inspired** by the Divine; ...

What we cannot do if we are to be the writers of the next chapter in the book of halakhah, however, is to make theology become the dog which wags the tail called halakhah, for that cannot be the next chapter of the same book. That would be the first chapter of a new book!

Reconstructionism, as a post-halakhic movement, and one that views the Torah as Divinely inspired but not legally infallible, and which consciously does seek to adopt its practice to its core values - or as Roth puts it "to its theology" – is not afraid of writing a new book, when a new book and a new approach are what is needed.

So let us continue to read Aharei Mot-Kedoshim and celebrate and build our theology on verses like "love thy neighbour as thy self." And let us not be afraid to read verses, like those banning homosexual sex, and say: "This is indeed what our ancestors thought to be

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wrong, but they were mistaken, and this is no longer our view.”